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LEROY KIRCHNER, APPELLANT, V. LARRY J. WILSON, APPELLEE.

634 N.W.2d 760

Filed September 28, 2001. No. S-00-254.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
3. **Expert Witnesses: Appeal and Error.** An appellate court's review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.
6. ____. A party cannot complain of an error which that party has invited the court to commit.
7. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine if there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
8. **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 Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

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

Michael F. Coyle, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This is an appeal from a personal injury trial limited to the issue of damages. Leroy Kirchner appeals from a jury verdict entered by the district court for Douglas County which found in favor of Larry J. Wilson and against Kirchner on Kirchner's claim for damages arising out of an automobile accident. Based on the jury's verdict, no damages were awarded and Kirchner's petition was dismissed. We affirm.

STATEMENT OF FACTS

This is the second appearance of this case in this court. See *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996). A detailed statement of facts is set forth in that case.

Briefly summarized, on November 25, 1990, a vehicle operated by Wilson collided with the rear of an automobile operated by Kirchner in the intersection of 66th and Maple Streets in Omaha, Nebraska. Kirchner sued Wilson for negligence, alleging, inter alia, that he had sustained personal injuries as a result of the automobile accident, including injuries to his neck and lumbar spine, which injuries necessitated cervical spine surgery as well as a laminectomy to correct a herniated lumbar disk.

Kirchner's lawsuit against Wilson initially went to trial in September 1994 (the first trial). In the first trial, the district court determined as a matter of law that Wilson was negligent, that his negligence was the proximate cause of the collision, and that Wilson was liable to Kirchner for any damages Kirchner sustained which were proximately caused by the collision.

During the first trial, the court received into evidence testimony that established that Kirchner had had four laminectomies prior to the November 1990 automobile accident. Wilson introduced into evidence the testimony of two expert witnesses, Dr. Bernard Kratochvil, an orthopedic surgeon, and Dr. Richard Howard, a physician and biomedical engineer. Kratochvil and Howard testified, inter alia, that the November 1990 automobile accident did not cause Kirchner's cervical and lumbar injuries.

After deliberating, the jury in the first trial returned a verdict in favor of Kirchner and awarded him $3,161.90 in damages. Dissatisfied with that award, Kirchner appealed, asserting that

the district court erred in, among other things, giving one of its instructions to the jury. In *Kirchner, supra*, we concluded that Kirchner's assignment of error regarding the jury instruction had merit, and we reversed, and remanded for a new trial limited to the issue of damages.

On May 18, 1998, following remand, Kirchner filed a motion to conduct a hearing to determine under the *Frye* standard the admissibility of expert scientific testimony from Howard, and "derivative or related opinions" from Kratochvil, regarding the mechanics of the November 1990 automobile accident and the injury, if any, to Kirchner as a result of such accident. In *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001), this court recently described the *Frye* standard, first set forth by the U.S. Court of Appeals for the District of Columbia in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *In Schafersman*, we observed that for expert scientific testimony to be admissible under the *Frye* test, "the proponent of the evidence must prove general acceptance [of the principles contained in the proposed testimony] by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists." *Ante* at 222, 631 N.W.2d at 870.

We note that in *Schafersman*, we held prospectively that for trials commencing on or after October 1, 2001, the admissibility of expert opinion testimony under the Nebraska Evidence Rules would no longer be based upon the *Frye* test, but instead would use the analysis set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The *Daubert* test requires, inter alia, proof of the scientific validity of the principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion. Because the instant case was tried prior to October 1, 2001, the *Frye* test governs.

Kirchner's motion came on for hearing on March 2, 1999. Sixteen exhibits were received into evidence, and both parties presented oral arguments. At the hearing, Kirchner argued, inter alia, that Howard's opinions based upon biomechanics and

injury causation analysis "are so farfetched that they don't even come close to the . . . standard required under Frye." In an order filed March 19, the district court rejected Kirchner's argument and found that the testimony offered by Howard with regard to injury causation analysis was generally accepted in the scientific community and that Howard was qualified under the *Frye* test to testify as an expert witness.

On February 14, 2000, Kirchner filed a motion in limine in which he renewed his *Frye* objection to Howard's testimony and also sought to prohibit Kratochvil from testifying at trial on the issue of causation. On February 16, the district court overruled Kirchner's motion in limine. Thereafter, commencing on February 16, and continuing through February 18, the second jury trial (the second trial) was held, limited solely to the issue of damages. See *Kirchner v. Wilson*, 251 Neb. 56, 554 N.W.2d 782 (1996). This appeal stems from the second trial.

Prior to the commencement of the second trial, the parties had stipulated that if Howard's testimony was deemed admissible, Howard's testimony from the first trial could be used in lieu of Howard's appearing live and testifying during the second trial. At some point after the parties made opening statements during the second trial, Wilson informed Kirchner that he would not be offering Howard's testimony.

As part of his case, Kirchner intended to present the videotaped testimony of his expert, Dr. Michael Freeman, a substantial portion of whose testimony consisted of a challenge to the credibility of Howard's opinions. Accordingly, in the second trial, after Wilson decided not to offer Howard's testimony, Kirchner called Howard as one of his witnesses in his case in chief and read portions of Howard's testimony from the first trial into the record. Wilson then in effect "cross-examined" Howard, without objection, by reading into the record of the second trial additional portions of Howard's testimony from the first trial. Thereafter, Kirchner played for the jury Freeman's videotaped deposition consisting, in part, of an attack on Howard's testimony.

During the second trial, a total of 7 witnesses testified and 29 exhibits were received into evidence. Among the witnesses called by Wilson was Kratochvil. Kratochvil, a physician specializing

in orthopedics with over 38 years of experience, testified, inter alia, that he had examined Kirchner and Kirchner's medical records and that Kirchner's neck injury was not caused by the November 1990 automobile accident.

At the close of all the evidence, the case was submitted to the jury. On February 22, 2000, after deliberation, the jury returned a verdict in which it stated that it found for the "defendant on plaintiff's petition." On May 16, the district court entered judgment on the jury's verdict, dismissing Kirchner's petition.

Kirchner appeals.

ASSIGNMENTS OF ERROR

On appeal, Kirchner has assigned two errors. Kirchner claims the district court erred (1) in concluding that Wilson met his burden under the *Frye* test with respect to his "proffered novel scientific testimony, which is not generally accepted in the relevant scientific community" and (2) in failing to exclude the causation opinions of Howard and Kratochvil which were "not probative, irrelevant, too generic, lacking in foundation, without sound or reasonable basis, ignored actual facts, and/or based on speculation and conjecture."

STANDARDS OF REVIEW

[1-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001); *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. See, *Genetti, supra*; *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000). Similarly, an appellate court's review of the trial court's admission or exclusion of expert testimony which is otherwise relevant will be for an abuse of discretion. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to

act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

ANALYSIS

Admission of Howard's Expert Testimony Under Frye *Test.*

[5] In his first assignment of error, Kirchner claims that the district court erred in admitting expert witness testimony which did not meet the *Frye* test. In the assignment of error, Kirchner does not identify the testimony he finds objectionable. We note, however, that Kirchner's brief regarding the first assignment of error is limited to a discussion of the admission of Howard's testimony. We have previously stated that a claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief. See, *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001); *Carroll v. Chase County*, 259 Neb. 780, 612 N.W.2d 231 (2000). Thus, we construe Kirchner's first assignment of error as challenging only the admissibility of Howard's testimony under the *Frye* test. So construed, we conclude there is no merit to Kirchner's first assignment of error.

[6] It is undisputed that Wilson decided during the second trial not to call Howard as an expert defense witness and that Howard's testimony was introduced into evidence by Kirchner during his case in chief. According to counsel for Kirchner, Kirchner elected to call Howard for the purpose of "attack[ing] Dr. Howard's credibility. Both by his own testimony and by the testimony of [Kirchner's] expert, Dr. Freeman." It is a well-established principle that a party cannot complain of an error which that party has invited the court to commit. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997); *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997). Because Kirchner introduced Howard's testimony into evidence at trial, on appeal, he cannot claim error from the trial court's admission of such testimony. See, also, *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991)

(concluding that litigant cannot introduce evidence and later complain that it was error to consider such evidence). By introducing Howard's testimony, Kirchner has waived any *Frye* objection he had to such testimony. Accordingly, we find no merit to Kirchner's first assignment of error.

Admission of Causation Opinions of Howard and Kratochvil.

In his second assignment of error, Kirchner claims that the district court erred in admitting the causation opinions of Howard and Kratochvil. Kirchner argues generally that the opinions of Howard and Kratochvil are flawed and not reasonable. We conclude that this assignment of error is without merit.

[7-8] It is within the trial court's discretion to determine if there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (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. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). 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. *Walkenhorst, supra.*

As to Kirchner's claim that the district court erred in admitting Howard's causation testimony, we have previously concluded that because Kirchner offered such testimony, he waived any objection to the same, and accordingly, we conclude that there is no merit to that portion of Kirchner's second assignment of error in which he claims that Howard's testimony should have been excluded. As to Kirchner's argument that the district court erred in admitting Kratochvil's causation testimony because such testimony was unreasonable and flawed, we conclude there is no merit to such assignment of error.

Wilson called Kratochvil as an expert witness. Kratochvil testified generally that Kirchner's condition was not caused by the November 1990 automobile accident. The record discloses that Kratochvil is a physician, specializing in orthopedic medicine. At the time of trial, he had specialized in orthopedics for 38 years. He is licensed to practice medicine in the states of Nebraska,

Iowa, Minnesota, and California. Kratochvil is on either the active or the consulting staffs of Bergan Mercy Medical Center, St. Joseph Hospital, Children's Hospital, Methodist Hospital, the University of Nebraska Medical Center, and Immanuel Medical Center, all in Omaha. He is a member of a number of professional medical societies, including the American Academy of Orthopedic Surgeons and the Clinical Orthopaedic Society.

With respect to Kirchner's complaints of injury allegedly sustained in the November 1990 automobile accident, Kratochvil examined Kirchner on March 4, 1992. Prior to his examination of Kirchner, Kratochvil reviewed certain of Kirchner's medical records. Kratochvil reviewed additional medical records concerning Kirchner after the March 4 examination. Based upon his education, training, experience, and examination of Kirchner and Kirchner's medical records, Kratochvil testified, inter alia, that Kirchner's neck injury was not caused by the November 1990 automobile accident.

As argued in his brief, Kirchner's assignment of error goes to the weight and credibility of Kratochvil's testimony rather than to its admissibility. We have recently stated that

> [w]hile recognizing the principle that an expert's opinion must have a sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture . . . an appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility.

Nebraska Nutrients v. Shepherd, 261 Neb. 723, 770, 626 N.W.2d 472, 510 (2001). Given the sound and reasonable basis behind Kratochvil's testimony and the certainty with which his opinion was expressed, we find no abuse of discretion in the district court's admission of Kratochvil's causation testimony.

Because Kirchner waived the objection he might have had to Howard's testimony and because there is ample basis in the record for the admission of Kratochvil's testimony which was expressed with sufficient certainty, we conclude there is no merit to Kirchner's second assignment of error.

CONCLUSION

For the reasons set forth above, we affirm the decision of the district court entering judgment in conformity with the jury verdict in favor of Wilson and against Kirchner and dismissing Kirchner's petition.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, V. ROBERT O. WHITLOCK AND PATRICIA WHITLOCK, HUSBAND AND WIFE, JOINT TENANTS, APPELLEES.

634 N.W.2d 480

Filed September 28, 2001. No. S-00-340.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **Rules of Evidence: Hearsay.** The admission of hearsay is controlled by the Nebraska Evidence Rules.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
4. **Evidence: Hearsay.** An expert's written appraisal report is hearsay and is not admissible unless it falls within a recognized exception.
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 the litigant complaining about evidence admitted or excluded.
6. **Trial: Evidence: Expert Witnesses: Appeal and Error.** The admission into evidence of an expert's appraisal report is prejudicial error.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded.

Don Stenberg, Attorney General, and Kenneth W. Payne for appellant.

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

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

CONNOLLY, J.

The State of Nebraska, Department of Roads, condemned 21.75 acres of Robert O. Whitlock and Patricia Whitlock's farmland property for the construction of a highway. The Whitlocks' property is located in three separate sections and is now severed by the new highway. A jury returned a verdict in the amount of $65,250. The State appeals, contending that the district court erred in various respects. We hold that the district court erred in admitting the Whitlocks' expert's written appraisal report and supplemental report into evidence because they were hearsay. We reverse, and remand.

BACKGROUND

At trial, the Whitlocks' appraiser, Larry Dean Radant, testified to his background and experience and to the generally accepted methodologies that he used to appraise the property. His written appraisal report contained two appraisals: one for the value of the property before the taking and one for the value of the property after the taking. The appraisal report contained details for the cost, income, and sales comparison approaches he had used and his final valuation for each method.

The appraisal report included descriptions of the 19 comparable sales he had relied upon for his sales comparison approach, as well as maps, photographs, and soil legends. He testified that he had visited the property and gave a general description of the farm. He also prepared a one-page supplemental report separating the value of the property taken based on the information contained in the appraisal report. Relying more heavily on the cost and sales comparison approaches, he opined that the value of the property before the taking was $245,000.

The State objected to the admission of the appraisal report, exhibit 9, and supplemental report, exhibit 10, on various grounds, including hearsay and foundational objections. The court overruled the objections, and the exhibits were received. Radant then opined that the value of the Whitlocks' property after the taking was $190,000, resulting in a total loss of $55,000. Of that total loss, he believed $9,264 was attributable to the value of the property taken. The balance, $45,736, was for damages to the value of the remainder because the property was

now divided by a highway. At the close of Radant's direct examination, the court overruled the State's motions to strike his testimony and exhibits 9 and 10, consisting of his appraisal report and supplemental report.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred by (1) striking the testimony of its expert witness, (2) admitting into evidence the appraisal report and supplemental report of Radant, (3) admitting the valuation testimony of Radant because there was insufficient foundation for his opinion of value and it was based on an improper measure of damages, and (4) failing to sustain the State's motion to strike the valuation testimony of Robert Whitlock.

STANDARD OF REVIEW

[1] A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *Mobeco Indus. v. City of Omaha*, 257 Neb. 365, 598 N.W.2d 445 (1999).

ANALYSIS

Because the evidentiary issue of the admission of Radant's appraisal report is dispositive, we do not decide the State's other assignments of error.

The State contends that the trial court erred by admitting exhibits 9 and 10 into evidence. The State argues that the appraisal report contained inadmissible hearsay not testified to by Radant. The State also contends the appraisal report and the supplemental report unduly emphasized Radant's conclusions. The Whitlocks contend that the court did not err in admitting the reports. They argue that evidence of comparable sales is admissible even if those comparisons are based upon hearsay or the appraiser lacks personal knowledge.

The Whitlocks argue two points: (1) Appraisal reports are admissible under our holding in *Anderson v. State*, 184 Neb. 467, 168 N.W.2d 522 (1969), and (2) Neb. Rev. Stat. § 25-12,115 (Reissue 1995) specifically allows the admission of composite reports prepared by an expert without calling as witnesses the persons furnishing the information.

[2] The admission of hearsay is controlled by the Nebraska Evidence Rules. *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995).

[3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Rev. Stat. § 27-801(3) (Reissue 1995). Hearsay "is not admissible except as provided by [the Nebraska Evidence Rules] or by other rules adopted by the statutes of the State of Nebraska." Neb. Rev. Stat. § 27-802 (Reissue 1995).

We have held that an expert's *testimony* on comparable sales is admissible over a hearsay objection. *Anderson v. State, supra.* We have also held that under Neb. Rev. Stat. § 27-703 (Reissue 1995), an expert may rely on hearsay facts or data reasonably relied upon by experts in that field. See, e.g., *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996). Finally, we have held that direct evidence of other recent and comparable sales of real estate is admissible as substantive proof of the value of the condemned property or as foundation and background for an expert's opinion of value. See *Clearwater Corp. v. City of Lincoln*, 207 Neb. 750, 301 N.W.2d 328 (1981). The Whitlocks confuse the admissibility of an expert's opinion testimony with the admissibility of the expert's report.

[4] An expert's written appraisal report is an out-of-court statement offered for the truth of the matter asserted. It is hearsay and is not admissible unless it falls within a recognized exception.

Kliment v. National Farms, Inc., 245 Neb. 596, 514 N.W.2d 315 (1994), affirmed the exclusion of an expert's technical report, which was commissioned by the defendant in a nuisance suit, on a hearsay objection when the expert did not testify. When an expert is employed for no other purpose other than to give technical advice, his or her employment does not include

making statements on behalf of the principal. Thus, such a report is hearsay and not subject to any exception.

Vacanti v. Master Electronics Corp., 245 Neb. 586, 514 N.W.2d 319 (1994), affirmed the trial court's refusal to admit a medical report into evidence. We held that the defendant had failed to show that the report fell within the "medical diagnosis" exception, and it was therefore inadmissible hearsay. *Id.* at 593, 514 N.W.2d at 324.

Howells Elevator v. Stanco Farm Supply Co., 235 Neb. 456, 455 N.W.2d 777 (1990), affirmed the exclusion of a written estimate of damages to personal property.

In *Vacanti*, the plaintiff's medical expert testified that he had read the report and relied upon it in forming his opinion. We stated:

> An expert medical witness may base an opinion on the medical records of another treating doctor . . . . The mere fact that an expert relied on medical records, however, does not transform those records from inadmissible hearsay into admissible evidence. . . . To allow such a transformation "would deprive opposing parties of an opportunity to cross-examine on the background, competency and completeness of the report and the qualifications of the doctor."

(Citations omitted.) 245 Neb. at 593, 514 N.W.2d at 324.

[5] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000).

Radant's testimony on 19 comparable sales was superficial at best. He stated that the details of the comparable sales he relied upon were in his appraisal report. In fact, a substantial portion of his testimony focused on explaining to the jury the contents of his appraisal report and where to find pertinent information in it. Furthermore, the appraisal report also defines "market value" in a different manner than this court has defined that term. See, e.g., *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 413, 576 N.W.2d 797, 803 (1998) ("[f]air market value is the price which property will bring when offered for sale upon the open

market as between a willing seller and buyer, neither being obligated to buy or sell"). Finally, the report contains a number of photographs and maps for which no foundation was laid. Moreover, in his closing argument, the Whitlocks' counsel repeatedly encouraged jurors to refer to Radant's appraisal report and to check the details, and he specifically instructed the jury to refer to Radant's supplemental report for Radant's estimate of the decrease in the value of the remainder.

Radant's written appraisal report and supplemental report essentially amounted to a continued and more thorough testimony of his opinion during jury deliberations, without the benefit of cross-examination or opposing opinion. This is the mischief this court sought to eliminate when we reversed the district court's decision in a condemnation action partially because of the court's admission into evidence of two one-page summaries of the appraiser's valuations. "[A]dmission of evidence of this type is prejudicially erroneous because during its deliberations, the jury might place more weight on written summaries than on its collective recollection of the actual testimony." *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 31, 547 N.W.2d 484, 499 (1996).

The Whitlocks, however, argue that a summary unfairly emphasizes parts of the expert's opinion testimony and that the admission of a complete appraisal report is distinguishable from the facts in *Westgate Rec. Assn.* Contrary to the Whitlocks' contention, the reasoning in *Westgate Rec. Assn.* applies even more to the admission of a complete appraisal report, not less. In addition, the first page of exhibit 9 and the sole content of exhibit 10 are summaries of Radant's conclusions, which type of information we specifically held is inadmissible in *Westgate Rec. Assn.*

[6] We conclude that Radant's appraisal report was hearsay and unfairly prejudiced the State's case.

The Whitlocks next argue that even if the appraisal report is hearsay, it is admissible under the Uniform Composite Reports as Evidence Act, § 25-12,115, and Neb. Rev. Stat. §§ 25-12,116 to 25-12,119 (Reissue 1995). Section 25-12,115 provides:

> A written report or finding of facts prepared by an expert . . . and containing the conclusions resulting wholly or partly from written information *furnished by*

> *the cooperation of several persons acting for a common purpose*, shall, insofar as the same may be relevant, be admissible when testified to by the person . . . making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based . . . .

(Emphasis supplied.)

This act preceded the Nebraska Evidence Rules by almost 25 years, and the language indicates that it was intended to operate much the same as § 27-703. In other words, it allows an expert to base an opinion on hearsay which is not itself admissible in evidence. Without deciding on the statute's continued application, we conclude that the Whitlocks have failed to satisfy the requisites of § 25-12,115. That section provides that the written information relied upon by an expert is to be furnished by the cooperation of several persons acting for a common purpose.

In this case, Radant was acting alone in the preparation of his report, and any persons who might have provided information to him cannot be said to have been acting for a common purpose. See, *Gateway Bank v. Department of Banking*, 192 Neb. 109, 219 N.W.2d 211 (1974) (affirming district court's admission of expert's feasibility report when facts and information contained in report were accumulated by persons acting under expert's direction); *Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861 (1965) (affirming admission of pathologist's report when expert relied upon information provided by technicians working under his direction). Thus, § 25-12,115 is inapplicable to these facts.

We conclude that the district court's admission into evidence of the Whitlocks' expert's appraisal report was reversible error which unfairly prejudiced a substantial right of the State.

REVERSED AND REMANDED.

JIM O. KEEF ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

634 N.W.2d 751

Filed September 28, 2001. No. S-00-343.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **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. **Actions: Words and Phrases.** A "claim for relief" within the meaning of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) is equivalent to a separate cause of action, as opposed to a separate theory of recovery.
6. **Actions: Parties: Final Orders.** Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action.
7. **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.
8. **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.
9. **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 causes of action could be maintained for separate relief.
10. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
11. ____: ____. When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
12. **Actions: Statutes.** A "special proceeding," within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995), entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.

13. **Actions: Final Orders.** A special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) must be one that is not an action and is not and cannot be legally a step in an action as part of it.
14. ____: ____. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
15. **Summary Judgment: Actions: Final Orders.** A partial summary judgment proceeding is not a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
16. **Class Actions.** The availability of a class action is encompassed within chapter 25 of the Nebraska Revised Statutes and is not in and of itself an action, but is a step or proceeding within the overall action; therefore, class certification is not a special proceeding.
17. **Limitations of Actions: Final Orders: Appeal and Error.** An order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order, and any error in the ruling made may be presented in an appeal taken after final disposition of the case.
18. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Appeal dismissed.

Don Stenberg, Attorney General, Jodi M. Fenner, and, on brief, Jason W. Hayes, for appellant.

David W. Rowe, of Kinsey, Ridenour, Becker & Kistler, and Robert J. Antonello and Robert G. Fegers, of Antonello, Fegers & Cea, and J. Davis Connor and Stephen R. Senn, of Peterson & Myers, P.A., for appellees.

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

GERRARD, J.

NATURE OF CASE

The State of Nebraska, Department of Motor Vehicles (State), appeals from a partial summary judgment entered by the district court, which enjoined the State from collecting fees for handicapped parking permits, but reserved the issue of monetary damages for later disposition. Because the district court's partial

summary judgment was not a final, appealable order, we dismiss the State's appeal.

PROCEDURAL BACKGROUND

Nebraska law provides for the issuance of parking permits for handicapped or disabled persons. See, generally, Neb. Rev. Stat. § 18-1736 et seq. (Reissue 1997 & Cum. Supp. 2000). A fee of $3 is charged for each permit. See § 18-1740(3).

The plaintiffs, on behalf of themselves and all others similarly situated, brought this action against the State, alleging that the permit fee violated title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (1994 & Supp. V 1999) (ADA). The enabling regulations for title II of the ADA provide:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA] or this part.

28 C.F.R. § 35.130(f) (2000).

The plaintiffs' petition sought (1) a declaratory judgment that the State cannot lawfully require payment for handicapped parking permits, (2) an injunction preventing the State from requiring payment from future applicants for such parking permits, (3) reimbursement for permit fees to members of the plaintiff class for amounts charged for permits since the effective date of the ADA, and (4) attorney fees and costs. The plaintiffs also sought class certification to represent the approximately 50,000 Nebraskans who use handicapped parking permits.

The parties filed cross-motions for summary judgment on several issues. After hearing, the district court first sustained the plaintiffs' motion for class certification. Reaching the merits of the parties' summary judgment motions, the district court first noted that the State had conceded that Nebraska's handicapped parking permit fee violates the ADA. The district court then determined that Congress, in abrogating state sovereign immunity under the ADA, had acted validly pursuant to U.S. Const. amend. XIV, § 5. The district court rejected the State's argument

that the plaintiffs' action was barred by a statute of limitations, concluding that a statute of limitations cannot limit claims where the defendant is guilty of an ongoing, persistent, and systemic violation of law. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). Finally, the district court concluded that injunctive relief was appropriate under the circumstances.

Based on those determinations, the district court entered a partial summary judgment, declaring that the permit fee violated the ADA and its regulations and enjoining the State from charging such a fee. The district court also stated:

> The Court further finds and orders pursuant to Neb. Rev. Stat. § 25-705(6) [Cum. Supp. 1998] that this order of partial summary judgment is a final order on fewer than all of the claims of the plaintiffs and that there is no just reason for delay of an appeal from the entry of this order. The issues of class certification, sovereign immunity, statute of limitations and appropriateness of injunctive relief are all issues that will need appellate review. It would be prudent to allow appellate review of these issues before the Court and counsel expend additional resources in litigating the remaining issues in this lawsuit. . . .
>
> . . . [P]laintiffs are directed to submit briefing to this court . . . to determine the issues of prejudgment interest, attorney fees, manner of reimbursement, and form of notice to the class concerning reimbursement. . . . In the event an appeal is taken from any portion of this order, the [time to respond] will commence at the resolution of that appeal, if such be consistent with the mandate (if any) of the appellate court.

The State appealed and, as restated, assigned that the district court erred in concluding that (1) the State's sovereign immunity had been appropriately abrogated by the ADA, (2) there was no statute of limitations that would limit the plaintiffs' cause of action, and (3) the plaintiffs should be certified as class representatives.

This court's preliminary review of this appeal raised a question regarding whether the district court's order of partial summary judgment was a final, appealable order. In addition, the

U.S. Supreme Court issued an opinion, after the parties' briefs in this case were filed, addressing whether the ADA was a valid abrogation of state sovereign immunity. See *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). In an order filed July 11, 2001, we directed the parties to file supplemental briefs on the questions whether (1) the district court's partial summary judgment of March 1, 2000, was a final, appealable order pursuant to either Neb. Rev. Stat. § 25-1902 (Reissue 1995) or Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) and (2) the district court's decision with respect to sovereign immunity was consistent with the U.S. Supreme Court's decision in *Board of Trustees of Univ. of Ala. v. Garrett, supra.*

The parties filed supplemental briefs, in which they agreed that the district court's partial summary judgment was not a final, appealable order and that this court lacked appellate jurisdiction. On August 28, 2001, the plaintiffs filed a motion to dismiss for lack of appellate jurisdiction, to which the State did not object. On September 4, this court took the plaintiffs' motion under advisement and ordered that the case be submitted without oral argument pursuant to Neb. Ct. R. of Prac. 11B(1) (rev. 2000).

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

[4] 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. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000). The district court's order of partial summary judgment reserved issues for later disposition, including the issues of monetary damages and attorney fees. The initial issue presented to this court is whether the district court's order was a final order from which an appeal could be taken.

§ 25-1315

Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998), now codified at § 25-1315(1), 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.

[5,6] The district court relied upon this statute in attempting to direct the entry of a final judgment. This court has determined, however, that a "claim for relief" within the meaning of § 25-1315(1) is equivalent to a separate cause of action, as opposed to a separate theory of recovery. See *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000). Thus, by its terms, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties

or causes of action. See, *Chief Indus. v. Great Northern Ins. Co., supra*; *Scottsdale Ins. Co. v. City of Lincoln, supra*. Those conditions are not satisfied in the instant case.

[7-9] It is initially evident that there is only one defendant—the State—and that the partial summary judgment entered by the trial court did not resolve all issues pertaining to the State. Neither does this case present multiple causes of action. 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. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000). 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 causes of action could be maintained for separate relief. *Id.*

In the instant case, it is clear that the plaintiffs' ADA claim presents one cause of action, in which they have requested declaratory and injunctive relief and compensatory damages. Since the plaintiffs' petition presents only one cause of action, § 25-1315(1) is not implicated.

We take this opportunity to remind trial courts and the practicing bar that § 25-1315 permits a judgment to become final only under the limited circumstances set forth in the statute. Prior to the enactment of § 25-1315, an order that effected a dismissal with respect to one of multiple parties was a final, appealable order, and the complete dismissal with prejudice of one of multiple causes of action was a final, appealable order, but an order dismissing one of multiple theories of recovery, all of which arose from the same set of operative facts, was not a final order for appellate purposes. See, generally, *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). Section 25-1315 was an evident attempt by the Legislature to simplify the issue and clarify many of the questions regarding

final orders when there are multiple parties and claims. See *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999).

Section 25-1315 does not, however, provide "magic words," the invocation of which transforms any order into a final judgment for purposes of appeal. As previously noted, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved and a final judgment is entered as to one of the parties or causes of action. Because those conditions were not present in this case, the district court's order of partial summary judgment could not be a final judgment pursuant to § 25-1315(1).

§ 25-1902

[10] Although the district court's invocation of § 25-1315 was ineffective, the question remains whether a final order is presented as defined in § 25-1902. That section provides that an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. See, *id.*; *Bargmann v. State, supra*. It is clear that this case presents neither the first nor the third category. See, generally, *Charles Vrana & Son Constr. v. State*, 255 Neb. 845, 587 N.W.2d 543 (1998). Thus, we are presented with the question whether the district court's partial summary judgment was an order affecting a substantial right made in a special proceeding.

[11] The most significant effect of the district court order was that it enjoined the State from the collection of permit fees. For purposes of this appeal, we assume, without deciding, that the district court order affected a substantial right of the State. When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000).

[12-15] The partial summary judgment issued in this case, however, was not a special proceeding. Generally, a "special proceeding" entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). In *O'Connor v.*

Kaufman, 255 Neb. 120, 582 N.W.2d 350 (1998), the defendants appealed from a district court order which, like the order in the instant case, established liability and a permanent injunction but reserved the issue of monetary damages for later disposition. In determining whether the partial summary judgment entered in that case was a special proceeding within the meaning of § 25-1902, we stated that

> " '[a] special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as part of it. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of the statute.' "

O'Connor v. Kaufman, 255 Neb. at 123, 582 N.W.2d at 353. We concluded that

> while a motion for partial summary judgment is not in and of itself an "action," such an order is merely a step or proceeding within the overall action. The grant of a motion for partial summary judgment merely resolves one or several of the issues involved in the entire action or the "main case." . . . A motion for partial summary judgment is not a special remedy or a special application to the court, as is a special proceeding, but, rather, is merely one particular tool that may be used to resolve certain issues in the case. Therefore, we find that the district court's order was not a final, appealable order under the second category because the motion for partial summary judgment did not involve a special proceeding.

Id. at 124, 582 N.W.2d at 353-54.

Our decision in *O'Connor v. Kaufman, supra*, is controlling in the instant case. Even though the basis for the plaintiffs' underlying cause of action is found in the U.S. Code, and thus well outside chapter 25 of the Nebraska Revised Statutes, the partial summary judgment rendered by the district court, like the order at issue in *O'Connor v. Kaufman*, was merely a step or proceeding within the overall action. Consequently, it was not a special proceeding within the meaning of § 25-1902.

[16,17] Neither are the aspects of the district court's order dealing with class certification or the statute of limitations final and appealable under § 25-1902. The district court's approval of class certification did not affect a substantial right. Compare *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982) (stating that denial of class action status did not affect substantial right because merits of claim were not determined). Furthermore, the availability of a class action is encompassed within chapter 25 of the Nebraska Revised Statutes and is not in and of itself an action, but is a step or proceeding within the overall action; therefore, class certification is not a special proceeding. See, Neb. Rev. Stat. § 25-319 (Reissue 1995); *O'Connor v. Kaufman, supra*. Similarly, we have held that an order entered denying relief on a plea of the statute of limitations is to be treated as an interlocutory order and that any error in the ruling made may be presented in an appeal taken after final disposition of the case. *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972). See, also, Neb. Rev. Stat. § 25-221 (Cum. Supp. 2000).

The district court's partial summary judgment was not a final order as defined by § 25-1902, as none of the issues determined by the partial summary judgment were resolved in the context of a special proceeding. As, under the circumstances presented in this case, neither § 25-1315 nor § 25-1902 confers appellate jurisdiction on this court, the State's appeal must be dismissed.

CONCLUSION

[18] We are aware that the U.S. Supreme Court held, during the pendency of this appeal, that suits in federal court by state employees by reason of the State's failure to comply with title I of the ADA are barred by U.S. Const. amend. XI. See *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001). However, in the absence of a judgment or final order disposing of a case, an appellate court is without jurisdiction to act and must dismiss the purported appeal. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). Because the district court's order of partial summary judgment was not a final, appealable order, we are without jurisdiction to address the substantive issue whether the

district court's determination in the instant case is consistent with *Board of Trustees of Univ. of Ala. v. Garrett, supra*, and we, therefore, dismiss the State's appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. HUGH I. ABRAHAMSON, RESPONDENT.

634 N.W.2d 462

Filed September 28, 2001. No. S-00-692.

1. **Disciplinary Proceedings: Proof: 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 when 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.** To sustain a complaint in a disciplinary proceeding against an attorney, a complaint must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
7. ____. In an attorney disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.
8. ____. An attorney's cooperation during the disciplinary proceedings is considered as a factor in mitigation.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for respondent.

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

PER CURIAM.

INTRODUCTION

On July 3, 2000, formal charges were filed by the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association, relator, against attorney Hugh I. Abrahamson, respondent. The formal charges alleged, inter alia, that Abrahamson violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (5), and Canon 9, DR 9-102(A)(2) and (B)(3).

DR 1-102(A)(1) and (5) provide: "(A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice." DR 9-102(A)(2) and (B)(3) provide:

> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> . . . .
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall:
>
> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them.

The formal charges also alleged Abrahamson violated his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

On August 29, 2000, Abrahamson filed an answer to the formal charges, admitting certain of the allegations, but denying that he had violated either the disciplinary rules or his oath as an attorney. On September 7, this court appointed a referee to hear

evidence and make a recommendation as to the appropriate sanction to be imposed. A referee hearing was held on November 21, at which hearing evidence was adduced and argument was made.

On January 18, 2001, the referee filed his report and found Abrahamson had violated DR 1-102(A)(1) and (5) and DR 9-102(A)(2) and (B)(3) of the Code of Professional Responsibility and his oath of office as an attorney, and recommended Abrahamson's suspension from the practice of law for 1 year. On January 26, Abrahamson filed his exceptions to the referee's report, challenging, inter alia, the referee's findings that he violated DR 9-102(A)(2).

FACTS

The referee's factual findings may be summarized as follows: Abrahamson, a solo practitioner, was admitted to practice law in the State of Nebraska on February 1, 1985, and at all times relevant hereto has practiced in Omaha, Nebraska. On June 30, 1994, Abrahamson was retained by Beverly A. Doyle to represent her in a legal separation from her husband, Wayne Oppenheim. As a result of his representation of Doyle, Abrahamson sent Doyle monthly statements for his attorney fees, which statements she did not pay. Pursuant to the terms of his engagement agreement with Doyle, Abrahamson was entitled to deduct his attorney fees from any moneys he received on behalf of Doyle.

At some point in time after June 30, 1994, the separation action changed to a divorce proceeding. As a result of the divorce proceeding, the marital house was sold. Net proceeds from the sale amounted to $46,337.81. Doyle and Oppenheim disputed entitlement to the sale proceeds. Doyle claimed the entirety of the net proceeds from the sale of the house, and Oppenheim claimed one half of the net proceeds. Accordingly, on March 8, 1996, the net sale proceeds of $46,337.81 were deposited into a trust account Abrahamson maintained, awaiting a court order directing distribution.

At the time he represented Doyle, Abrahamson maintained two trust accounts in separate banks: FirsTier trust account 322-0342 and First Bank trust account 424-8700 (8700). The two banks merged in February 1996, under the name of First

Bank, and Abrahamson's former FirsTier trust account number was changed to 3220-3424 (3424). First Bank gave Abrahamson new deposit slips to use for the 3424 account, but mistakenly encoded the account number for the 8700 account on the deposit slips.

After February 20, 1996, all deposits Abrahamson intended to make into the 3424 account were made into the 8700 account, including the deposit of the $46,337.81 net proceeds from the sale of the house. Checks written on the 3424 account, however, continued to be honored on that account. First Bank sent Abrahamson monthly statements for each account, which statements would have alerted Abrahamson to the depositing error. It is undisputed that Abrahamson did not open the statements and did not reconcile the trust account balances. Accordingly, Abrahamson did not note the mistake. Because of the confusion with respect to the 3424 and 8700 accounts, for purposes of our consideration of the allegations against Abrahamson, we will consider the accounts jointly as one account which we will refer to hereafter as "the trust account."

On August 31, 1996, the trial court entered its memorandum decision in the divorce proceeding. The decision awarded Doyle the entire net proceeds from the sale of the house. After allowing the applicable appeal period to run, Abrahamson issued a check to Doyle in the amount of $21,701.58, representing the net sale proceeds of the house minus Abrahamson's attorney fees and costs incurred in the divorce proceeding which amounted to $24,636.23.

Doyle was displeased that she did not receive the entirety of the sale proceeds and, after failing in her attempt to negotiate a final fee with Abrahamson, sent a letter to the Counsel for Discipline's office concerning Abrahamson's handling of the proceeds from the sale of the house.

The Counsel for Discipline notified Abrahamson of Doyle's grievance, and during the course of responding to the grievance, Abrahamson notified the Counsel for Discipline regarding his trust account balance. Although the balance had fluctuated for several days in July and August 1996, we note that the record shows that the amount in the trust account did not drop below $21,701.58, representing Doyle's interest in the proceeds from

the sale of the house, after deducting Abrahamson's attorney fees and costs.

It is undisputed that Abrahamson did not open the bank statements or reconcile his check registers, that he failed to maintain separate ledgers for his individual client accounts, and that he failed to reference client accounts on deposits and withdrawals from the trust account. Indeed, according to Abrahamson's own accountant, who testified at the referee's hearing, on a scale of 1 to 10, with 10 being good bookkeeping practices, Abrahamson's accounting practices merited a grade of 1. In the referee's report, he found that Abrahamson had since corrected his accounting practices and now maintains his trust account in accordance with required standards. The referee also found that Abrahamson cooperated fully with the Counsel for Discipline's investigation and was remorseful.

The referee found that within the bar and the community, Abrahamson had a reputation of competence, professionalism, integrity, honesty, hard work, and fitness to practice law and that this reputation was demonstrated through numerous affidavits and letters from judges, lawyers, and clients. The referee also found that Abrahamson had demonstrated a record of service to the bar and to the indigent community through the Nebraska State Bar Association's pro bono Volunteer Lawyers Project.

The referee noted that Abrahamson had been the subject of a prior disciplinary proceeding, involving allegations unrelated to Abrahamson's attorney trust account, for which Abrahamson had received a private reprimand.

In his report, the referee found by clear and convincing evidence that Abrahamson had violated DR 1-102(A)(1) and (5), DR 9-102(A)(2) and (B)(3), and his oath as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations and considering the aggravating and mitigating factors the referee found present in the case, the referee recommended that Abrahamson be suspended from the practice of law in the State of Nebraska for 1 year.

Abrahamson filed his exceptions to the referee's report. In Abrahamson's exceptions, he claimed that the referee erred (1) in finding that Abrahamson violated DR 9-102(A)(2), (2) in finding that he unethically "withdrew" and "misappropriated"

funds belonging to Doyle, (3) in failing to find that Abrahamson's written fee agreement with Doyle justified Abrahamson's use of Doyle's funds on deposit in the trust account, (4) in finding that Abrahamson violated DR 9-102(A) and (B) and his oath of office as an attorney, and (5) in recommending an excessive disciplinary sanction. In argument to the court, Abrahamson focused on the appropriate discipline.

ANALYSIS

Violation of Disciplinary Rules and Attorney's Oath.

[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 when 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. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000). To sustain a complaint in a disciplinary proceeding against an attorney, a complaint must be established by clear and convincing evidence. *Id.*

Based on our de novo review of the record, *id.*, we conclude that the above-related facts establish by clear and convincing evidence that Abrahamson has failed to maintain complete and accurate records of client funds coming into his possession and has failed to render appropriate accounts of client funds, in violation of DR 9-102(B)(3). We further conclude that Abrahamson has violated DR 1-102(A)(1) and (5) and the attorney's oath of office. We further conclude, however, under our standard in which a proceeding to discipline an attorney is a trial de novo on the record, see *Mefferd, supra*, that the record does not demonstrate by clear and convincing evidence that Abrahamson violated DR 9-102(A)(2).

Imposition of Attorney Discipline.

[3-5] We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. NSBA v. Brown*, 251 Neb. 815, 821, 560 N.W.2d 123, 128 (1997). Accord *State ex rel. NSBA v.*

Gridley, 249 Neb. 804, 545 N.W.2d 737 (1996). With respect to the imposition of attorney discipline in an individual case, we have stated that "[e]ach 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. Rothery*, 260 Neb. 762, 766, 619 N.W.2d 590, 593 (2000). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000). We have previously set out the factors which we consider in determining whether and to what extent discipline should be imposed:

> To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

State ex rel. NSBA v. Rothery, 260 Neb. at 766, 619 N.W.2d at 593. Accord, *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000); *State ex rel. NSBA v. Mefferd, supra.*

[6,7] We have noted that "[t]he determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors." *State ex rel. NSBA v. McArthur*, 257 Neb. 618, 631, 599 N.W.2d 592, 601 (1999). For example, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation. See *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996).

[8] The evidence in the present case establishes that Abrahamson failed to maintain complete and accurate records of client funds coming into his possession. As mitigating factors, we note Abrahamson's cooperation during the disciplinary proceedings, including the fact that he reported the condition of his trust account to the Counsel for Discipline. We also note Abrahamson's continuing commitment to the legal profession and the community. Furthermore, we note that the banking error

in mislabeling Abrahamson's deposit slips exacerbated Abrahamson's poor accounting practices. We are aware of the previous reprimand, but note that it did not involve allegations regarding Abrahamson's trust account.

CONCLUSION

We conclude that the appropriate judgment is to suspend Abrahamson from the practice of law in the State of Nebraska for 90 days, effective immediately. In addition, Abrahamson is ordered to retain, at his expense, an accountant to audit his trust account every 6 months, for a period of 3 years, and submit the results of these audits to the Counsel for Discipline. Pursuant to Neb. Ct. R. of Discipline 23 (rev. 2001), the costs of these proceedings are assessed against Abrahamson.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH TAYLOR, APPELLANT.

634 N.W.2d 744

Filed September 28, 2001. No. S-00-1139.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
3. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
4. ____: ____: ____. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater offense but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.
5. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned.
6. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

7. **Prior Convictions: Habitual Criminals: Sentences: Statutes.** A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute.
8. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
9. **Criminal Law: Statutes.** Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. Penal statutes are to be strictly construed.
10. **Criminal Law: Prior Convictions.** Under Neb. Rev. Stat. § 28-931 (Reissue 1995), the status of the victim is an element of the crime and is not a subsequent offense penalty enhancement.

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

James R. Mowbray and Kelly S. Breen, of the Nebraska Commission on Public Advocacy, for appellant.

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

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

HENDRY, C.J.

I. INTRODUCTION

On July 27, 2000, Joseph Taylor, an inmate at the Department of Correctional Services (DCS), was found guilty by a jury of third degree assault pursuant to Neb. Rev. Stat. § 28-931 (Reissue 1995) (assault upon "a peace officer or employee of the Department of Correctional Services"). On October 5, at a separate enhancement hearing pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995), Taylor was found by the court to be a habitual criminal. Taylor was sentenced to not more than nor less than 10 years in prison.

II. FACTUAL BACKGROUND

On December 23, 1998, Taylor was charged pursuant to Neb. Rev. Stat. § 28-930 (Reissue 1995) with one count of second degree assault upon Joseph Manley, an employee of DCS. Taylor was also charged with being a habitual criminal. On July

15, 1999, after initially pleading guilty, Taylor submitted a motion requesting leave from the court to withdraw his guilty plea and a motion to quash both counts of the indictment. The court granted both motions. At the hearing on the motion to quash, Taylor's counsel contended that charging Taylor as a habitual criminal constituted improper double enhancement of the assault charge. The court overruled the motion to quash.

At trial, Manley testified that on February 18, 1998, the date of the incident, he was employed at the Lincoln Correctional Center as a unit caseworker in the "Protective Custody Unit" or "A Unit." Manley explained that the A Unit is divided into two sections or sides, A-1 and A-2, with each unit housing approximately 60 prisoners. On February 18, Manley was assigned to section A-2 of the A Unit. His responsibilities included supervising the inmates during exercise time, getting the inmates in and out of their cells, and lining the inmates up to be escorted to the cafeteria. On the day of the incident, he was working a 6 a.m. to 2 p.m. shift.

At 8:20 a.m., Manley was sitting in the section A-2 office, working at his desk. Taylor came to the doorway and asked about some paperwork Taylor needed which was being prepared by Manley's supervisor. Taylor was holding a plastic tumbler of hot coffee in his hand. Manley told Taylor he knew nothing about the paperwork. Taylor became upset and told Manley that "he didn't like [his] attitude." Manley stood up and asked Taylor to leave. Taylor instead came inside the office and called Manley a "chicken shit."

Manley removed the radio microphone from his belt and called for assistance. As Manley was looking down to replace the microphone on his belt clip, Taylor threw his coffee in Manley's face. Taylor then began striking Manley with his fists and kicking him until another inmate pulled Taylor away from Manley. A response team responded to Manley's call for assistance and arrived shortly after Taylor had been pulled from Manley. Manley suffered first and second degree burns over the left side of his face and neck, and additional minor injuries to his head. He was treated at a Lincoln hospital.

Taylor testified in his own defense. In substance, Taylor testified that the coffee was accidentally spilled after Manley placed his hands on Taylor to remove him from the office.

At the conclusion of the evidence, the trial court instructed the jury, inter alia, on the elements of second degree and third degree assault of an officer pursuant to §§ 28-930 and 28-931. Taylor requested an additional instruction on general third degree assault pursuant to Neb. Rev. Stat. § 28-310 (Reissue 1995). Section 28-310 states:

> (1) A person commits the offense of assault in the third degree if he:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Threatens another in a menacing manner.
>
> (2) Assault in the third degree shall be a Class I misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it shall be a Class II misdemeanor.

A Class I misdemeanor is punishable by up to 1 year's imprisonment, a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1995). The court denied Taylor's request for an instruction on general third degree assault.

The jury found Taylor guilty of third degree assault pursuant to § 28-931, which at the time of Taylor's offense stated:

> (1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer or employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.
>
> (2) Assault on an officer in the third degree shall be a Class IV felony.

A Class IV felony is punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1995).

A separate habitual criminal enhancement hearing was held pursuant to § 29-2221(1), which states in relevant part:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal

> and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

At the enhancement hearing, the State offered undisputed evidence showing that Taylor had three previous convictions which satisfied the criteria set out in § 29-2221. The court found that Taylor was a habitual criminal and sentenced Taylor to not more than nor less than 10 years' imprisonment pursuant to § 29-2221. Taylor appeals.

III. ASSIGNMENTS OF ERROR

Taylor asserts, rephrased and renumbered, that the trial court erred in (1) failing to instruct the jury on third degree assault pursuant to § 28-310 and (2) failing to quash the indictment against Taylor as violating due process, equal protection, and this court's holding in *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). For the sake of completeness, we note that although Taylor mentions due process in his assignments of error, he fails to present any argument regarding due process in his brief. Accordingly, we will not address this issue. Generally, errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dunster, ante* p. 329, 631 N.W.2d 879 (2001).

IV. STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

[2] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. See *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998).

V. ANALYSIS

1. Jury Instructions

[3,4] Taylor contends the trial court committed prejudicial error in failing to instruct upon general third degree assault, pursuant to § 28-310, as a lesser-included offense of third degree assault under § 28-931. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an

instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Johnson, supra.* Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater offense but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction. *Id.*

In *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997), the defendant asserted that the trial court should have instructed the jury on third degree assault under § 28-310 as a lesser-included offense of third degree assault under § 28-931. In *Cebuhar*, 252 Neb. at 805, 567 N.W.2d at 135, we stated:

> Assuming that third degree assault may, under certain circumstances, be a lesser-included offense of third degree assault on a peace officer, we have held that it is not prejudicial error to not instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.

We then went on to conclude in *Cebuhar* that because there was no dispute in the evidence at trial that the victim was a peace officer engaged in his official duties at the time of the assault, the district court correctly refused to instruct the jury on assault under § 28-310.

The undisputed evidence at trial in this case establishes that Manley was an employee of DCS and that Manley was working as a DCS caseworker at the time of the assault. Nonetheless, Taylor argues that there was a question of fact as to whether Manley was engaged in his official duties when the incident occurred. Taylor asserts that during the incident, Manley attempted to remove Taylor by placing his hands upon Taylor. Taylor then argues that because Manley was not "trained nor authorized by his employer to lay his hands upon inmates to control or compel inmate compliance," brief for appellant at 13, Manley was not engaged in his official duties. Assuming for the purpose of argument that Manley did place his hands on Taylor, such a fact would raise only an issue as to the effectiveness of

Manley's response when Taylor did not leave the office. It does not constitute proof that Manley was engaged in something other than his official duties as a caseworker at the time of the incident. The evidence conclusively shows that Manley was performing his official duties when the incident occurred.

The district court correctly refused to instruct the jury on general third degree assault. This assignment of error is without merit.

2. Motion to Quash

(a) Equal Protection

Taylor also asserts that his motion to quash should have been granted because his right to equal protection under the Nebraska and U.S. Constitutions was violated by the application of both §§ 28-931 and 29-2221 to his crime.

[5] The record does not reflect that the issue of equal protection was ever raised by Taylor before the district court. In his motion to quash, Taylor cites to "U.S. Const. amend. V" and "Neb. Const. Art. I, sec. 12 and sec. 15," neither of which pertains to equal protection. Furthermore, there is no discussion of the Equal Protection Clause of either the Nebraska Constitution or the U.S. Constitution in the motion to quash. Finally, because no record was made of the hearing on the motion to quash, there is no indication as to what arguments were presented to the district court. It is incumbent upon the appellant to present a record which supports the errors assigned. *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

[6] In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995). See, also, *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999). Accordingly, finding no plain error, we decline to address Taylor's equal protection argument.

(b) *State v. Hittle*

Taylor also asserts that he should not have been found guilty under § 28-931 and sentenced as a habitual criminal under

§ 29-2221 because this results in improper double enhancement, which this court specifically disapproved of in *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). See, also, *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980). Both *Chapman* and *Hittle* involved repeat offenses under Nebraska's driving under the influence of alcoholic liquor statutes, and in both cases, the holdings were based on state statutory interpretation rather than "constitutional grounds." *Chapman*, 205 Neb. at 370, 287 N.W.2d at 699. Accord *State v. Hittle, supra.*

In *Hittle*, the defendant had been previously convicted of driving under the influence on at least two occasions under Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993). As a result, his driver's license was suspended. Afterward, the defendant was twice convicted of driving on a suspended license under § 60-6,196(6), which stated in part, " 'Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section shall be guilty of a Class IV felony.' " *Hittle*, 257 Neb. at 355, 598 N.W.2d at 29.

At the operative time in Hittle's case, driving on a suspended license was a misdemeanor offense unless § 60-6,196(6) applied, in which case the crime was a felony. Because of the enhancement provisions of § 60-6,196, both of Hittle's offenses for driving on a suspended license were felony crimes.

After the second conviction for driving on a suspended license under § 60-6,196(6), Hittle was sentenced under the habitual criminal statute. The trial court found that Hittle qualified as a habitual criminal based on his two enhanced convictions under § 60-6,196(6). On appeal, Hittle argued that it was improper to sentence him under the habitual criminal statute found at § 29-2221 because § 60-6,196(6) contained its own specific penalty enhancement mechanism.

[7] This court agreed, concluding that it was improper to sentence Hittle under the habitual criminal statute. The court reasoned that "[a] defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute." *Hittle*, 257 Neb. at 355, 598 N.W.2d at 29. See, also, *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000); *State v.*

Lobato, 259 Neb. 579, 582, 611 N.W.2d 101, 104 (2000) ("' "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" ' ").

Taylor bases his double enhancement argument on the assumption that § 28-931 is an enhanced penalty statute, similar to the driving under the influence statutes at issue in *State v. Hittle, supra*. Taylor points out that general third degree assault under § 28-310 is a misdemeanor offense, while third degree assault under § 28-931 is a felony offense. Taylor also asserts that the only difference between §§ 28-310 and 28-931 is the status of the victim. Therefore, Taylor reasons, § 28-931 constitutes an enhanced penalty for third degree assault based on the status or employment of the alleged victim.

[8,9] Taylor's argument presents a question of statutory interpretation as to whether the Legislature enacted § 28-931 as a "specific subsequent offense statute" for general third degree assault, or as a separate crime. See *State v. Hittle*, 257 Neb. 344, 355, 598 N.W.2d 20, 29 (1999). In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Hochstein and Anderson, ante* p. 311, 632 N.W.2d 273 (2001). Penal statutes are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *Id.* Also, penal statutes are to be strictly construed. See *id.*

[10] Nothing contained in the plain language of § 28-931 enhances the penalties for third degree assault upon a DCS employee based on subsequent offenses. A comparison of the plain language of §§ 28-310 and 28-931 indicates that the Legislature enacted these statutes to punish two separate and distinct crimes with separate and distinct elements. Under § 28-931, the status of the victim is an element of the crime and is not a subsequent offense penalty enhancement.

The reasoning of *Hittle* is inapplicable to the facts of this case because § 28-931 is not a specific subsequent offense statute. See *State v. Hittle, supra*. This assignment of error is without merit.

VI. CONCLUSION

Based on the foregoing, we conclude that Taylor's assignments of error are without merit. The conviction and sentence imposed by the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT E. HUNT, JR., APPELLANT.

634 N.W.2d 475

Filed September 28, 2001. No. S-00-1230.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Effectiveness of Counsel.** A prisoner cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding.
4. **Postconviction: Constitutional Law.** Neb. Rev. Stat. § 29-3001 (Reissue 1995) provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of the rights of the prisoner, rendering the judgment void or voidable under the Constitution of this state or the Constitution of the United States.
5. **Postconviction: Constitutional Law: Right to Counsel.** Any right to effective assistance of postconviction counsel provided by Neb. Rev. Stat. § 29-3004 (Reissue 1995) is statutory only and cannot render a prisoner's conviction void or voidable under the U.S. or Nebraska Constitution.
6. **Postconviction: Appeal and Error.** 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.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Mark D. Albin, of the Albin Law Office, for appellant.

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

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

CONNOLLY, J.

Robert E. Hunt, Jr., appeals the dismissal of his amended postconviction petition. Hunt alleges that he received ineffective assistance of counsel in a postconviction action. We have previously held that Nebraska does not recognize a claim for ineffective assistance of postconviction counsel. But Hunt argues that Neb. Rev. Stat. § 29-3004 (Reissue 1995) provides a claim for ineffective assistance of postconviction counsel. We affirm because a postconviction claim must be based on a deprivation of a federal or state constitutional right rendering the judgment void or voidable. Section 29-3004 is a statutory provision that does not render a judgment void or voidable.

BACKGROUND

In 1985, Hunt appealed his conviction for first degree murder and death sentence. On appeal, we affirmed the conviction, but vacated, and remanded for resentencing. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). On remand, Hunt was resentenced to life imprisonment.

In September 1996, Hunt filed a motion for postconviction relief which was later amended in 1997. The amended motion alleged, rephrased and summarized, that Hunt either was denied due process or received ineffective assistance of trial counsel because of the following:

(1) Counsel failed to pursue an insanity defense.

(2) Counsel threatened to withdraw from the case if Hunt insisted on entering a plea of not guilty by reason of insanity.

(3) Counsel referred to Hunt in a derogatory manner during closing arguments.

(4) Counsel admitted certain facts and elements of the crime during closing arguments.

(5) Without objection from Hunt's counsel, the prosecutor was allowed to ask questions about statements Hunt did not make to police and comment on the lack of evidence regarding those statements at closing.

(6) The original prosecutor, Richard W. Krepela, falsified a police report.

(7) Hunt's counsel failed to make a motion to disqualify Krepela, failed to report Krepela's actions to the Nebraska State Bar Association, failed to call Krepela as a witness, and failed to preserve and raise the issue on appeal.

(8) The prosecutor failed to properly disassociate himself with Krepela after Krepela withdrew from the case.

The amended motion did not raise various issues that Hunt had included in his first motion for postconviction relief.

Following a hearing in which both Hunt and his trial counsel testified, the district court found all of Hunt's arguments to be without merit and dismissed the petition. Hunt's appellate counsel filed an appeal assigning only the derogatory statements made by trial counsel. We affirmed. See *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998).

POSTCONVICTION COUNSEL

After the appeal was decided, Hunt filed the amended petition that is the subject of this appeal. The amended petition alleges that because of his court-appointed appellate counsel in his first postconviction action, he was denied due process, equal protection, a fair postconviction hearing, and effective assistance of counsel. The petition alleges, summarized and rephrased, that Hunt's postconviction counsel failed (1) to include claims when he amended Hunt's original petition for postconviction relief, (2) to seek recusal of the district court judge presiding over the action, (3) to assign issues as error on appeal and told Hunt that some issues were frivolous, (4) to explain the consequences of interviews Hunt had with psychiatrists, and (5) to object to certain statements made at trial. Hunt also alleges that trial counsel's involvement with the trial judge concerning a false police report was prejudicial.

The State filed a motion for summary judgment and a motion to dismiss. The district court sustained the State's motions and denied postconviction relief. Hunt appeals.

ASSIGNMENTS OF ERROR

Hunt assigns, rephrased, that the district court erred in sustaining the State's motions for summary judgment and to dismiss and in failing to grant an evidentiary hearing.

STANDARD OF REVIEW

[1] A criminal defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000).

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

ANALYSIS

Hunt alleges that he received ineffective assistance of postconviction counsel and concedes that we have previously held that Nebraska does not recognize such a claim in a postconviction action. See *State v. Gray, supra*. But Hunt argues that under a 1993 amendment to § 29-3004, counsel appointed in postconviction proceedings are required to provide effective counsel. Hunt contends that this amendment allows him to bring a postconviction action for ineffective assistance of postconviction counsel. A prisoner's right to postconviction relief as set out in Neb. Rev. Stat. § 29-3001 (Reissue 1995) which provides in part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

Section 29-3004 provides: "The district court may appoint not to exceed two attorneys to represent the prisoners in all proceedings under sections 29-3001 to 29-3004. . . . The attorney or attorneys shall be competent and shall provide effective counsel."

[3] Although we did not address § 29-3004, we have held that under the U.S. Constitution, a defendant in a criminal case has a right to effective assistance of counsel. But the assistance of counsel provision in the U.S. Constitution applies to direct appeals only. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524

(1993), citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). We then stated:

> As the *Finley* court stated, postconviction relief is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide a postconviction relief procedure, and when they do, the fundamental fairness mandated by the Due Process Clause of the U.S. Constitution does not require that the State supply a lawyer as well.

State v. Stewart, 242 Neb. at 719, 496 N.W.2d at 529. Thus, the U.S. Supreme Court has held that because there is no constitutional right to an attorney in state postconviction proceedings, a prisoner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *id.*, citing *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). We held in *Stewart* that the Nebraska Constitution's provision for assistance of counsel was no broader than its counterpart in the U.S. Constitution. Furthermore, a prisoner cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding. We reaffirmed our holding in *Stewart* in *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000).

[4,5] Relying on § 29-3004, Hunt contends that he has a right to bring a postconviction action for ineffective assistance of postconviction counsel. Hunt's argument fails. Section 29-3001 provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of the rights of the prisoner, rendering the judgment void or voidable under the Constitution of this state or the Constitution of the United States. Any right to effective assistance of postconviction counsel provided by § 29-3004 is statutory only and cannot render the prisoner's conviction void or voidable under the U.S. or Nebraska Constitution. Thus, our reasoning in *Stewart* and *Gray* continues to be valid. Hunt's arguments regarding ineffective postconviction counsel are without merit.

[6] Hunt has also raised issues regarding actions of his original trial counsel. These issues either were raised in Hunt's first

postconviction proceeding or could have been raised at that time. 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. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *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). We find Hunt's arguments regarding these issues to be without merit.

CONCLUSION

We determine that § 29-3004 does not provide a postconviction claim for ineffective assistance of postconviction counsel. Because all of the issues raised in Hunt's petition for postconviction relief were related to ineffective assistance of postconviction counsel or either were raised or could have been raised in earlier proceedings, we determine that the district court did not err in dismissing Hunt's petition. Accordingly, we affirm.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOSEPH LOPEZ WILSON, RESPONDENT.

634 N.W.2d 467

Filed September 28, 2001. No. S-01-122.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
4. ____. Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
5. ____. Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following

factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance 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.

7. **Courts: Attorney and Client.** Courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.
8. **Attorneys at Law.** Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability.
9. **Disciplinary Proceedings.** The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Joseph Lopez Wilson, pro se.

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

PER CURIAM.

NATURE OF CASE

This is an original proceeding seeking to discipline respondent, Joseph Lopez Wilson, for violating his oath of office as an attorney and Canon 1, DR 1-102(A)(1) and (6), of the Code of Professional Responsibility. Relator, the Counsel for Discipline of the Nebraska Supreme Court, initially filed charges with the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association (NSBA). A hearing panel of the Committee on Inquiry heard testimony on September 21, 2000, at which hearing both relator, through counsel, and respondent, pro se, were present. Testimony was given, and evidence was presented. The panel concluded there were reasonable grounds to believe respondent had engaged in conduct that violated the Code of Professional Responsibility.

Pursuant to Neb. Ct. R. of Discipline 27 (rev. 2001), all formal charges pending before the Disciplinary Review Board on January 1, 2001, were to be filed with the Clerk of the Supreme Court. The formal charges in this case were filed with the clerk on January 26, 2001, and a summons was issued and, together with the formal charges, served upon respondent.

Respondent filed an answer admitting the essential factual allegations of the formal charges, but denying that his conduct violated the Code of Professional Responsibility. The answer raised only issues of law. Therefore, under Neb. Ct. R. of Discipline 10(K) (rev. 2001), the Supreme Court did not appoint a referee, and by order of this court, the matter was to proceed to briefing. Oral argument was waived by respondent.

BACKGROUND

Respondent was admitted to the practice of law in the State of Nebraska on September 17, 1986. At all times relevant hereto, respondent engaged in the private practice of law in Douglas County, Nebraska. In 1995, respondent obtained an "H-1B1" professional visa for Carlos Moreno to work for U.S. Software, Inc. (USSI). Respondent was paid for his services. A few years later, the company that Moreno was working for subsequently underwent reorganization, and Moreno no longer worked for USSI.

In 1996, Moreno and his wife decided to obtain a divorce. Respondent represented Moreno in the divorce, and a decree was entered on June 13, 1997. Respondent was paid for his services. Over the years, respondent and Moreno became close friends, a friendship which, in the words of respondent, was "as close as brothers." During these years, respondent provided legal services to Moreno in a number of other matters. Respondent did not charge Moreno for these services because of their friendship.

During this time period, respondent and his wife separated, and unbeknownst to respondent, his ex-wife and Moreno began an intimate relationship. When respondent eventually learned of the relationship between his ex-wife and Moreno, he threatened to report information to the Immigration and Naturalization Service (INS) that Moreno's job status had changed.

Respondent further threatened to reopen the Moreno divorce case and report to the court that Moreno had misstated his assets and thus committed a fraud upon the court and Moreno's ex-wife. Respondent conditioned his not carrying through with the threats by insisting that Moreno pay respondent $5,000 for the professional services respondent had previously provided to Moreno at no charge. Respondent subsequently lowered his demand to $3,000. Later, at the Committee on Inquiry hearing,

respondent testified that he believed that certainly fraud was a ground to reopen the case.

In December 1999, Moreno eventually obtained a protection order against respondent. In the petition and affidavit to obtain the harassment protection order, Moreno wrote that respondent's

> [i]ntention [was] clear that [respondent] is trying to harrash [sic] me with the legal cases he have [sic] been representing me. This makes me think that he is trying to performe [sic] a personal vendeta [sic] against me because of a personal situation. [Respondent] has been trying to scare me with faxes, phone calls, and comming [sic] to my apartment.

In the petition and affidavit to obtain the harassment protection order, Moreno stated respondent came to his apartment on several occasions. Respondent came to Moreno's apartment on November 25, 1999, at approximately 10 p.m., at 10:30 p.m., and again at 11 p.m. Respondent was "kno[c]king [on] the door in a very hard way," but Moreno did not answer the door due to respondent's hostile behavior. Respondent also called Moreno at 10:45 p.m. on November 25. Respondent left a paper on Moreno's front door reading, "[Y]ou have been busted. You better seek a new attorney."

On November 26, 1999, at approximately 4:30 a.m., respondent went to Moreno's apartment and "knock[ed] strongly at the front door." Moreno opened the door, and respondent came in "acting in [a] way that made [Moreno think respondent] was out of control." Respondent wanted to know what was going on between Moreno and respondent's ex-wife. Respondent threatened to drop Moreno's INS case. Respondent also sent a fax to Moreno on November 26, which had attached to it a copy of a letter from respondent to the INS advising that he was withdrawing, effective immediately, as Moreno's attorney of record. The letter further stated:

> I respectfully request that you review Mr. Moreno's status in the US and revoke same because Mr. Moreno no longer is employed by USSI as it no longer exists. It is my understanding that Mr. Moreno now works for ACI worldwide at 330 South 108 in Omaha, NE. in a totally different capacity than approved under the original labor certification

through the Iowa department of labor. I submit to you that his H-1 is also through USSI and should be revoked as well.

Moreno testified at the Committee on Inquiry hearing that respondent was threatening him with several faxes asking for money. If the money was not received, respondent threatened to destroy Moreno's INS case or reopen Moreno's divorce case.

One of these faxes, dated November 25, 1999, contains respondent's request for $5,000. If the $5,000 was not paid on that day, respondent wrote he would advise the INS that Moreno no longer worked for USSI. Respondent also stated, "I will be looking to reopen your divorce case and ask the court to grant your ex[-wife] ½ of your assetts [sic] since you failed to fully disclose your assetts [sic] during your divorce proceeding."

Moreno testified that respondent "didn't have authorization to disclose any information from any of the clients, which are myself and my company." Moreno felt that respondent was trying to "blackmail" him and felt threatened, so Moreno decided he should file a complaint with the proper disciplinary entity in the NSBA.

Respondent admitted that it "looks bad to have a restraining order against your lawyer." Respondent testified that he did not show up for the show cause hearing because he felt it was ridiculous and did not merit a response and that he also had a conflict on the morning of the hearing. Respondent said that he denied about 90 percent of Moreno's allegations in the application for the protection order.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001); *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. NSBA v. Flores, supra.*

ANALYSIS

Relator argues that the foregoing acts of respondent constitute a violation of his oath of office as an attorney licensed to

practice law in the State of Nebraska, as provided by Neb. Rev. Stat. § 7-104 (Reissue 1997). Relator further argues that respondent's actions are in violation of DR 1-102(A)(1) and (6) of the Code of Professional Responsibility. DR 1-102 states in pertinent part: "Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law."

Respondent argues he was not notified of the Committee on Inquiry's decision within 30 days, in violation of the Nebraska Supreme Court Rules of Discipline. Respondent also argues he was denied due process allowed under rule 10 of those rules, wherein a referee could be appointed to review this matter. Respondent asserts that any violation was an isolated incident which will never happen again, but also maintains it would be "a gross imposition by the client to not pay for services rendered." Brief for respondent at 6.

Neb. Ct. R. of Discipline 9(H) (rev. 2001) states in pertinent part:

> Upon receipt of the Complaint and file from the Counsel for Discipline, the Chairperson of the Committee on Inquiry shall appoint an Inquiry Panel pursuant to Rule 7(F) which shall within thirty days review the Complaint and . . . :
>
> . . . .
>
> (4) Determine that there are reasonable grounds for discipline of the Respondent and that a public interest would be served by the filing of a Formal Charge. The Counsel for Discipline shall thereafter prepare and sign Formal Charges for filing with the Court.

The Nebraska Supreme Court Rules of Discipline do not require that respondent be notified of the Committee on Inquiry's decision within 30 days. Rule 9 requires the Committee on Inquiry only to determine within 30 days whether there are reasonable grounds for discipline. If the Committee on Inquiry does determine there are reasonable grounds for discipline, a formal charge would thereafter be filed against respondent, of which respondent would be notified. It is noted that the record reveals that respondent was personally served a copy of the formal charges on February 5, 2001, and that respondent filed his answer to the formal charges on February 7.

Respondent also argues he was denied due process because a referee was not appointed in this case. Rule 10(K) states, "Upon the filing of an answer raising an issue of law only, the Court may, in its discretion, refer the matter to a member as referee for such action in relation thereto as the Court may by its order of reference direct." Under rule 10(K), it is within this court's discretion to forgo the appointment of a referee when the answer raises an issue of law only.

Respondent received notice of the Committee on Inquiry hearing. Respondent personally appeared, representing himself, at the Committee on Inquiry hearing. Respondent had the right to examine and cross-examine witnesses with the right of subpoena and subpoena duces tecum. Respondent was permitted to file exhibits and other evidence at the Committee on Inquiry hearing. Therefore, due process through notice, an appearance, and the chance to question witnesses and present evidence was provided to respondent.

In addition, respondent's answer admitted to the essential factual allegations against him. However, respondent denied that his acts violated his oath as an attorney or the provisions of the Code of Professional Responsibility. Therefore, the only issues are issues of law. This court was within its authority under rule 10(K) to order the parties in this matter to proceed directly to briefing before this court. Our decision to bypass the appointment of a referee under rule 10(K), as the only issue remaining in this case, is a question of law and did not deny due process to respondent.

Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001). The record in this matter consists of the court's transcript containing, inter alia, the formal charges, respondent's answer, and the transcript from the September 21, 2000, hearing before the Committee on Inquiry. Based on this record, we find, in our de novo review, by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (6).

[3-5] 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. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Mefferd*, 258

Neb. 616, 604 N.W.2d 839 (2000). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997); *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996). Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995).

[6] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance 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. Flores, supra*; *State ex rel. NSBA v. Freese, supra.*

Canon 4, EC 4-5, of the Code of Professional Responsibility states in pertinent part, "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client . . . ." The nature of the offense in this case encompasses respondent's coercive threats to force Moreno to pay him money. Respondent threatened disclosure of confidential information if this money was not paid. Respondent argues he performed valuable services for Moreno and "[i]t would be a gross imposition by the client to not pay for services rendered." Brief for respondent at 6. Respondent further states that "[s]ometimes an attorney must take steps to collect the fee to prevent gross imposition by the client," citing Canon 2, EC 2-23, of the Code of Professional Responsibility. Brief for respondent at 6.

Ethical code 2-23 states, "A lawyer *should be zealous in his or her efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.* The lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." (Emphasis supplied.) Threatening telephone calls, faxes, and

visits to a client's home are not efforts which should be used to comply with the letter or the spirit of EC 2-23.

Disciplinary rule 4-101(C) of the Code of Professional Responsibility states in pertinent part, "A lawyer may reveal: . . . (4) Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." However, a disciplinary rule prohibiting disclosure of client confidences except in certain limited circumstances, including when an attorney reasonably believes disclosure is necessary for resolution of a fee dispute, does not permit an attorney to threaten a former client with disclosure of client confidences in order to resolve a fee dispute. See *Discipline of Boelter*, 139 Wash. 2d 81, 985 P.2d 328 (1999).

An attorney such as respondent is expected to use legal means to enforce his rights, not violent threats. See *In re Rosenblatt*, 253 A.D.2d 106, 687 N.Y.S.2d 23 (1999).

Respondent's conduct has a chilling effect on the public's perception of attorneys and the NSBA in general. The maintenance of the reputation of the NSBA as a whole depends in part on the client's ability to be able to fully confide in his or her attorney. If clients do not believe they can do this, then attorneys will no longer be able to fully and zealously represent their clients.

[7] With regard to the protection of the public, we have stated that " 'courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.' " *State v. Hawes*, 251 Neb. 305, 310, 556 N.W.2d 634, 638 (1996).

In addition, EC 4-1 states in pertinent part,

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him or her. A client must feel free to discuss whatever the client wishes with his or her lawyer . . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of

the client but also encourages laypersons to seek early legal assistance.

Respondent's threats in this case undermine the confidential and fiduciary nature of the attorney-client relationship and lessen the public's confidence in the legal profession.

[8] The next factor to be considered is the offender's present or future fitness to continue in the practice of law. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability. *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996). An attorney's conduct which includes progressively abusive language, demeanor, and threats violates disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on one's fitness to practice law. See *Disciplinary Counsel v. Levin*, 35 Ohio St. 3d 4, 517 N.E.2d 892 (1988).

Respondent's actions against Moreno were motivated by what he perceived to be a violation of an interpersonal relationship. The fact respondent was an attorney and used his position as an attorney to exact this vengeance on Moreno involves the disciplinary process. Respondent's conduct adversely reflects on his present fitness to engage in the practice of law.

The attitude of respondent generally, as projected from his brief and the record in this case, shows respondent felt that he was used by Moreno at the most vulnerable point in his life. Respondent believes that Moreno utilized their friendship to such an extent that Moreno was able to seduce respondent's ex-wife while she and respondent were trying to reconcile. Based on the record before us, we believe respondent's actions appear to be an isolated incident.

CONCLUSION

[9] The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment. *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997); *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997).

Based on the above, we find in our de novo review that respondent should be suspended from the practice of law for a period of 2 years from the date of this opinion.

The Clerk of the Supreme Court is directed to cause a copy of this opinion and judgment of suspension from the practice of law to be served upon respondent by certified U.S. mail.

JUDGMENT OF SUSPENSION.

BARBARA R. MONDELLI, APPELLANT AND CROSS-APPELLEE, V. KENDEL HOMES CORPORATION, A NEBRASKA CORPORATION, AND CITY OF PAPILLION, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES AND CROSS-APPELLANTS.
VITO B. MONDELLI, APPELLANT AND CROSS-APPELLEE, V. KENDEL HOMES CORPORATION, A NEBRASKA CORPORATION, AND CITY OF PAPILLION, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES AND CROSS-APPELLANTS.

641 N.W.2d 624

Filed October 5, 2001. Nos. S-00-296, S-00-297.

SUPPLEMENTAL OPINION

Appeals from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

W. Craig Howell and Nora M. Kane, of Domina Law, P.C., for appellants.

Richard C. Gordon and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee Kendel Homes Corp.

Thomas M. Locher and Thomas M. Braddy, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee City of Papillion.

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

PER CURIAM.

Cases Nos. S-00-296 and S-00-297 are before this court on the motion for rehearing of the appellee Kendel Homes

Corporation regarding our opinion reported at *Mondelli v. Kendel Homes Corp., ante* p. 263, 631 N.W.2d 846 (2001). We overrule the motion, but for purposes of clarification, modify the opinion as follows:

In that portion of the opinion designated "(c) Motion for Joinder," the last paragraph under that section, *id.* at 277, 631 N.W.2d at 858, is withdrawn, and the following paragraph is substituted in its place: "Joinder is discretionary. See Neb. Rev. Stat. § 25-705 (Cum. Supp. 1998). We conclude that based on the record, the district court did not abuse its discretion in refusing to join all of the claims into one action."

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL L. FRENCH, APPELLANT.

633 N.W.2d 908

Filed October 5, 2001. No. S-00-516.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial: Indictments and Informations: Complaints.** Although Nebraska's speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint.
4. **Speedy Trial: Complaints: Time.** In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.
5. **Speedy Trial: Indictments and Informations: Time.** The time chargeable against the State under Nebraska's speedy trial act commences with the filing of an initial information against a defendant.
6. ____: ____: ____. The time chargeable to the State under Nebraska's speedy trial act ceases, or is tolled, during the interval between the State's dismissal of an initial information and the refiling of an information charging a defendant with the same crime alleged in the previous, but dismissed, information.
7. ____: ____: ____. When the State dismisses an information and refiles another information charging a defendant with the same offense alleged in the previous information,

the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under Nebraska's speedy trial act. Certain periods of time must be excluded pursuant to Neb. Rev. Stat. § 29-1207(4) (Reissue 1995).

8. **Indictments and Informations: Complaints.** An amended complaint or information which charges a different crime, without charging the original crime(s), constitutes an abandonment of the first complaint or information and acts as a dismissal of the same.
9. **Speedy Trial: Time.** The time between the dismissal and refiling of the same or a similar charge is not includable in calculating the 6-month time period set forth in Neb. Rev. Stat. § 29-1207 (Reissue 1995).
10. **Speedy Trial: Proof.** The primary burden is on the State to see that an accused is brought to trial within the time prescribed by Nebraska's speedy trial act.
11. **Speedy Trial: Proof: Time.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and INBODY and CARLSON, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, ROBERT C. WESTER, Judge. Judgment of Court of Appeals affirmed.

Stuart J. Dornan, of Gallup & Schaefer, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Michael L. French appeals the decision of the Sarpy County District Court which affirmed the county court's denial of his motion to dismiss based upon a claim that he had not been brought to trial within 6 months, as required by Nebraska's speedy trial act, Neb. Rev. Stat. § 29-1207 et seq. (Reissue 1995). The Nebraska Court of Appeals affirmed, see *State v. French*, 9 Neb. App. 866, 621 N.W.2d 548 (2001), and we granted French's petition for further review.

SCOPE OF REVIEW

[1] Generally, 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).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

FACTS

On August 3, 1998, a criminal complaint was filed in Sarpy County Court under case No. CR98-3337 alleging that on or about August 1, French had committed the offenses of second-offense driving while under the influence of alcohol (DUI) and driving left of the centerline. French posted bond and was ordered to appear for arraignment on August 26. He did not appear and therefore forfeited his bond. A count of failure to appear was added to the complaint on September 10.

On June 22, 1999, French was arrested, and he posted bond. An amended criminal complaint was filed in case No. CR98-3337 on July 7 alleging that on or about August 1, 1998, French had committed the offense of possession of a controlled substance, a Class IV felony. No other charges were stated in the amended complaint.

At a preliminary hearing on July 22, 1999, the State moved for a continuance because its witness was unavailable. The county court denied the continuance, and the State moved to dismiss. The county court granted the motion to dismiss and ordered French's bond released.

The State refiled the possession of a controlled substance charge under a new case number, CR99-4121, on July 26, 1999. French was ordered to appear for arraignment on August 31, but he failed to appear. A probable cause hearing was held on September 15, and a warrant was issued.

French was arrested and posted bond on November 3, 1999. At the arraignment on November 18, with leave of court, the State amended the complaint to charge French with second-offense

DUI, driving left of the centerline, and failure to appear. These charges arose out of the incident of August 1, 1998. French entered a plea of not guilty, and trial was set for January 3, 2000.

On December 30, 1999, French moved to dismiss, alleging a speedy trial violation. French claimed that the DUI and driving left of the centerline charges were still pending after the complaint was amended on July 7, 1999, and that, therefore, he had not been brought to trial within 6 months as required by § 29-1207. The county court denied French's motion. On April 19, 2000, the district court determined that only 82 days had run and affirmed the decision of the county court. The Court of Appeals affirmed the decision of the district court. See *State v. French*, 9 Neb. App. 866, 621 N.W.2d 548 (2001). We granted further review.

ASSIGNMENT OF ERROR

French assigns as error that the Court of Appeals erred in affirming the decision of the district court.

ANALYSIS

[3,4] Section 29-1207(1) provides: "Every 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." Although the speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint. *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988). In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed. See *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

[5-7] The time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992). The time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and the refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information. *Id.* When the State dismisses an information and refiles another

information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense must be combined in determining the last day for commencement of trial under the speedy trial act. Certain periods of time must be excluded pursuant to § 29-1207(4). *State v. Trammell, supra.*

Generally, 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). The issue presented is whether in the criminal context the filing of an amended complaint or information acts as a dismissal of the original complaint or information. Resolution of this issue presents a question of law. To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

In summary, on July 7, 1999, when French appeared for trial, the State filed an amended complaint in case No. CR98-3337 charging him with one count of possession of a controlled substance, a Class IV felony. No new trial date was set for the misdemeanor charges previously filed. French argues that the filing of the amended complaint did not toll the time for bringing him to trial pursuant to § 29-1207. In contrast, the State argues that amending the complaint to a different charge had the effect of dismissing the prior charges. The State asserts that the amended complaint charging possession of a controlled substance superseded the original complaint and therefore tolled the time for bringing French to trial on the charges of DUI, driving left of the centerline, and failure to appear.

Relying upon our decisions in *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963), and *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996), and dicta contained in *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999), and *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997), the Court of Appeals concluded that when an amended complaint or information is filed, the amended complaint or information supersedes or supplants the original

complaint or information. Applying that rule to the case at bar, the Court of Appeals stated that once the amended complaint was filed, the misdemeanor charges were no longer pending and were in effect dismissed. Thus, the Court of Appeals concluded that the district court correctly affirmed the county court's denial of French's motion to dismiss.

In *Midwest Laundry Equipment Corp.*, we held that an amended pleading supersedes the original pleading and that thereafter, the original pleading ceases to perform any office as a pleading. In *In re Interest of Rondell B.*, we held that after the filing of an amended petition, preceding petitions cease to have any function.

In the criminal context, we have not previously determined whether an amended complaint or information supersedes the original for purposes of the speedy trial act. This issue is a matter of first impression. In *Meers*, we referred to an amended information as superseding the original information filed against a defendant. In *Huddleson*, the district court held that the amended complaint constituted a dismissal of the original DUI charge pursuant to Neb. Rev. Stat. § 60-6,206(4)(b) (Reissue 1993) and that the defendant was entitled to have his operating privileges reinstated. In *Huddleson*, there was no bill of exceptions, and we affirmed the decision of the district court on the basis that the pleadings were sufficient to support the order. Neither *Meers* nor *Huddleson* dealt with the issue presented in the case at bar.

Other jurisdictions have recognized that the filing of an amended complaint or information supersedes the original complaint or information for purposes of the speedy trial rule. In *Salazar v. State*, 85 N.M. 372, 512 P.2d 700 (N.M. App. 1973), the court held that an amended information vitiates the original information as fully as though it had been formally dismissed by court order and constitutes the filing of a new instrument which supersedes its predecessor. In *State v. Vigil*, 114 N.M. 431, 839 P.2d 641 (N.M. App. 1992), the court stated that absent an intent to circumvent the 6-month rule for bringing a defendant to trial, an amended complaint would supersede the original complaint for purposes of the 6-month rule. The court pointed out that the State had the burden of demonstrating a good faith use of the

procedures involved and that such procedures were not used to circumvent the operation of the 6-month rule.

In *State v. Kinard*, 21 Wash. App. 587, 589, 585 P.2d 836, 838 (1978), the court stated: "We hold, and it has been uniformly held, that the filing of . . . an amended information constitutes an abandonment of the first information." In *State v. Oestreich*, 83 Wash. App. 648, 922 P.2d 1369 (1996), the court noted that the general rule was that an amended information supersedes the original, citing *State v. Navone*, 180 Wash. 121, 39 P.2d 384 (1934). Accord *State v. Kinard, supra.*

It is important to determine whether the amendment charges the same crime or a totally different crime. A distinction is made between an *amendment to* a complaint or information and an *amended* complaint or information. If the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act. If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information. The original charges have been abandoned or dismissed.

[8,9] We hold that an amended complaint or information which charges a different crime, without charging the original crime(s), constitutes an abandonment of the first complaint or information and acts as a dismissal of the same. The time between the dismissal and refiling of the same or a similar charge is not includable in calculating the 6-month time period set forth in § 29-1207. See *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

French was arrested on June 22, 1999, and on July 7, the State amended the complaint to charge French with possession of a controlled substance. The amended complaint charged a separate and distinct crime and did not contain the misdemeanor charges of DUI, driving left of the centerline, or failure to appear. At the preliminary hearing on July 22, the State moved for a continuance because its witness was unavailable. The motion was denied, the State's motion to dismiss was granted, and French's bond was released. Therefore, as of July 22, no charges were pending against French. Time began to run again on November 18, when

the State filed an amended complaint in case No. CR99-4121 charging French with second-offense DUI, driving left of the centerline, and failure to appear. Thus, we conclude that the district court correctly determined that the county court properly denied French's speedy trial claim, and the Court of Appeals' affirmance of the district court's judgment was proper.

With regard to whether French's right to a speedy trial was violated, the district court determined that 82 days were counted against the State for purposes of the speedy trial act. The district court calculated the time as follows: (1) 22 days from August 3 to 26, 1998 (date original complaint was filed until date French failed to appear); (2) 13 days from June 22 to July 7, 1999 (date of French's arrest and date of dismissal of original charges); and (3) 47 days from November 18, 1999, to January 3, 2000 (date original charges were refiled until date French's motion to dismiss was heard).

The district court was correct in determining that 47 days elapsed between November 18, 1999, and January 3, 2000. However, the period between August 3 and 26, 1998, includes 23 days, not 22 days, and the period between June 22 and July 7, 1999, includes 16 days, not 13 days. Adding these three time periods together results in a total of 86 days that should be counted against the State, not 82 days as determined by the district court.

[10,11] The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the speedy trial act. *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988). To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial.

CONCLUSION

French's right to a speedy trial has not been violated. The charges in the original complaint were dismissed when the amended complaint was filed. However, we note that 86 days had elapsed, rather than 82. The judgment of the Court of Appeals affirming the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARLYN P. ILDEFONSO, APPELLANT.

634 N.W.2d 252

Filed October 5, 2001. No. S-00-1024.

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. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Search Warrants: Motions to Suppress: Judges: Affidavits.** Suppression is 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 that the executing officer cannot reasonably presume it to be valid. If none of the aforementioned circumstances exist, the evidence should not be suppressed.
4. **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.
5. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, the Nebraska Supreme Court has adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).
6. **Search Warrants: Affidavits: Probable Cause.** The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be

found in a particular place. The question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause.

7. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity and establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
8. ____: ____. The reliability of an informant may be established 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, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. **Criminal Law: Probable Cause.** A statement against penal interest, in and of itself, carries a sufficient indicia of reliability to support a finding of probable cause.
10. **Criminal Law: Search Warrants: Probable Cause.** Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That an informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.
11. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit to obtain a search warrant should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts.
12. **Motions to Suppress.** The duty rests on the defendant, after his or her motion to suppress has been denied, to object to the admission of the evidence at trial and to state the specific grounds of the objection if not apparent from the context in which the objection was made.
13. **Effectiveness of Counsel: Proof.** To state a claim of ineffectiveness of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and demonstrate that a conviction must be overturned, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
14. **Warrants: Affidavits: Probable Cause.** Under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), a challenger must attack the veracity of only the affiant and not of any other informant in order to be entitled to a hearing. The challenger must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. No hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause.
15. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
16. **Homicide: Sentences.** Upon being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time served in custodial detention pending

trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for time served against the consecutive sentence.

17. **Criminal Law: Sentences.** A sentencing judge must separately determine, state, and grant the amount of credit on a defendant's sentence to which the defendant is entitled.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed in part, and in part sentences vacated and cause remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Arlyn P. Ildefonso appeals from his convictions for first degree murder and use of a firearm to commit a felony. Ildefonso was charged with killing Carr Hume on September 13, 1999. After a jury convicted Ildefonso on both charges, he was sentenced to life in prison without parole for first degree murder and to a consecutive sentence of 40 to 45 years in prison for the use of a firearm. He asserts on appeal that his motion to suppress should have been granted and that he received ineffective assistance of counsel at trial.

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 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. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001), *cert. denied* 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754.

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

FACTS

At approximately 4 a.m. on September 13, 1999, Omaha police found the body of Hume, a retired minister, lying in the street and on the curb in front of 2527 South 42d Street. Hume had been shot in the right side of his face. His hands were still in the pockets of his sports coat, and his wallet contained $1,029. The blood evidence indicated that Hume had been shot at that location.

Based on the report of an informant, two suspects were identified and arrested. While preparing to interview one of the suspects, Officer Melvin McCowen of the Omaha Police Department received an anonymous call stating that the police had arrested the wrong persons. The caller, subsequently identified as Amy Taylor, said that Ildefonso was responsible for the shooting. Taylor called the police after she heard on the news that one of the suspects had been arrested for the Hume murder. Taylor told police that she was staying with Ildefonso at the Ben Franklin Motel and that Ildefonso had told her he shot Hume because Ildefonso was mad at his girl friend, Kristine Reh, and he "wanted the world to feel his pain." Taylor said she met Reh and a friend of Reh's, Christina Devore-Alexander, when they came to the motel to purchase drugs from Ildefonso. Devore-Alexander had also told Taylor that Ildefonso confessed to shooting Hume.

Taylor also told police that she had seen Ildefonso with several guns, including a .357-caliber revolver and a 9-mm handgun. At McCowen's request, Taylor obtained bullets from the guns in Ildefonso's backpack and left the bullets with a desk clerk at the Ben Franklin Motel. McCowen picked up the bullets, which included two expended shells, one live .357-caliber round, and one live 9-mm round. Because the .357-caliber bullet was simi-

lar to the bullet taken from Hume's body, McCowen requested a comparison by the crime laboratory.

Devore-Alexander testified at trial that she and Reh were high school friends and that on September 13, 1999, Reh had called her and asked for a ride because Reh and Ildefonso, Reh's boyfriend, were arguing. Ildefonso was upset because Reh had another boyfriend and the boyfriend was about to be released from a correctional center. Devore-Alexander picked up Reh and Ildefonso, and they drove around Omaha, with Ildefonso giving directions. Near 42d and Bancroft Streets, Ildefonso directed Devore-Alexander to stop the car. When Ildefonso got out, Devore-Alexander turned to talk to Reh, who was in the rear seat. Devore-Alexander said she heard a gunshot, turned around, and saw Ildefonso with his arm extended and a gun in his hand. Hume was lying on the ground.

Ildefonso returned to the car with the gun in his hand and told Devore-Alexander to drive. She drove to her grandmother's house on North 52d Street, where the group stayed for about 3 hours. Devore-Alexander stated that Ildefonso threatened to kill her and Reh if they said anything about the shooting and told them that his life was in their hands. At about 6 a.m., Devore-Alexander gave Ildefonso and Reh a ride to Reh's car. Devore-Alexander then returned to her grandmother's house. Devore-Alexander testified that prior to the shooting, Ildefonso told her "the only thing that would make him feel better is if he shot somebody."

Reh testified at trial that after Devore-Alexander stopped her car near 42d and Bancroft Streets, Reh heard a gunshot and saw a man lying on the sidewalk as they left the area. Reh also said that she, Devore-Alexander, and Ildefonso had taken drugs together and that Ildefonso was using methamphetamine the night of the shooting.

On October 1, 1999, police took steps to obtain a warrant to search Ildefonso, a blue 1991 Chevrolet Cavalier, and a room at the Ben Franklin Motel on Interstate 80. Officer Anthony Strong began surveillance of the motel at 8 a.m. At about 11:30 a.m., Strong saw Ildefonso and Taylor leave the motel room, load the car, and stop at the motel office. When they left the motel, Strong notified Sarpy County sheriff's officers that Ildefonso and Taylor

were northbound on Interstate 80. The Sarpy County officers pulled over the car at the Harrison Street overpass. The officers told Taylor, the driver, to turn off the car's engine and throw out the keys. Taylor and Ildefonso, who was sitting in the passenger's seat, were then removed from the vehicle. Strong saw a .357-caliber revolver under the passenger's seat of the car, and a 9-mm handgun was found in a backpack in the rear seat.

Daniel Bredow, senior crime laboratory technician and firearms toolmarks examiner with the Omaha Police Department, testified that the bullet from the .357-caliber revolver was consistent with the bullets left with the desk clerk at the motel and with the bullet removed from Hume's body.

The jury found Ildefonso guilty of first degree murder and use of a firearm to commit a felony. He was sentenced to life imprisonment without parole for the murder charge and to a consecutive term of 40 to 45 years' imprisonment for the use of a firearm charge.

ASSIGNMENTS OF ERROR

Ildefonso assigns four errors. First, he asserts that the district court erred when it failed to sustain his motion to suppress because the affidavit in support of the application for a search warrant failed to set forth sufficient probable cause to support issuance of the warrant. Second, if it is determined that trial counsel failed to properly preserve the suppression issue for appellate review, Ildefonso asserts that he was deprived of effective assistance of counsel by that failure. Third, he argues that trial counsel was ineffective in failing to challenge the search warrant's validity on the basis that "vitally important facts, shaking the reliability of the affidavit to its core, were omitted by the affiant officer." As his fourth assignment of error, Ildefonso asserts that trial counsel was ineffective in failing to object to hearsay statements by McCowen, who testified without objection as to statements given to the police by Devore-Alexander and Reh.

ANALYSIS

MOTION TO SUPPRESS

Ildefonso moved to suppress any and all items of personal property seized by law enforcement on October 1, 1999, from

his person, room No. 131 of the Ben Franklin Motel, or a 1991 Chevrolet Cavalier stopped at Interstate 80 and Harrison Street in Sarpy County. He argued that the evidence was seized without a warrant and was not obtained based on a valid stop and/or arrest. He asserted that the seizure based upon the warrant lacked probable cause, and he claimed that the stop was not based on exigent circumstances.

At the suppression hearing, Mark Trapp, a deputy with the Sarpy County sheriff's office, testified that he was assigned to a detail which planned to serve a warrant at the Ben Franklin Motel on October 1, 1999. Before the officers could serve the warrant, they were advised that the suspect was leaving the motel in a two-door blue Chevrolet, and the officers were told to stop the vehicle. Trapp located the vehicle and activated his cruiser's overhead lights on Interstate 80 between Harrison and 126th Streets. After an emergency response unit arrived, the individuals in the vehicle were placed in cruisers and the vehicle was searched.

The affidavit for the search warrant identified the following items as those being sought: (1) a .357-caliber revolver, "dark blue to black in color"; (2) a 9-mm semiautomatic handgun; (3) ammunition and accessories, including ammunition clips for the .357-caliber and 9-mm weapons; (4) any and all controlled substances, including but not limited to cocaine, methamphetamine, LSD, and their derivatives; (5) any and all homemade or manufactured equipment related to an illegal narcotics operation; (6) moneys and records pertaining to an illegal narcotics operation; and (7) venue items for Ildefonso.

Trapp observed a revolver under the passenger's seat of the vehicle and a backpack in the rear seat. The backpack contained a 9-mm handgun, a baggie of white powder, three baggies of "seed," and approximately $4,000 in cash.

As grounds for the warrant, the affidavit, which was sworn to by McCowen, stated:

> On Sunday, 26th September 1999, at 1220 hours ILDEFONSO, Arlyn P. entered the emergency room area of St. Joseph's Hospital in Omaha, Douglas County, Nebraska with a gunshot wound to his right upper arm. ILDEFONSO told staff members and responding officers of the Omaha Police Department that he was shot by the occupants of a

> "silver vehicle" while travelling eastbound on Interstate Highway 80 near 42nd Street. The incident was reported under Omaha Police RB# 09362S.
>
> TAYLOR Amy advised affiant officer during an interview on Tuesday, 28 September 1999 that she was a passenger in the vehicle at the time of the shooting and knew it was provoked when ILDEFONSO waved a .357 caliber handgun and flashed "gang signs" at the occupants of the second vehicle involved. ILDEFONSO, she said, always had in his possession two handguns, a .357 caliber revolver and a 9 mm semiautomatic. TAYLOR said she drove ILDEFONSO to the hospital after first depositing a green bookbag which contained two handguns and drugs described as "crank, acid, and cocaine" at 5145 N. 47th Street, her former residence. Following treatment at the hospital, TAYLOR said she reclaimed the bag and turned it over to ILDEFONSO.
>
> ILDEFONSO and TAYLOR went to Ben Franklin Motel and registered in Room #131. The weapons, she said, were in the room on Tuesday, 28 September 1999. On Wednesday, 29 September, 1999, she provided affiant officer with ammunition for the weapons which was taken from Room #131. The ammunition was booked into property after affiant officer picked it up at the Ben Franklin Motel.
>
> ILDEFONSO is a convicted felon. His record show [sic] a May 2nd 1995 conviction for "Theft 2nd Degree." And served five years in the Iowa Department of Corrections.
>
> Based on the investigation of the Omaha Police Department Homicide/Assault Unit and affiant officer it can be shown that ILDEFONSO, Arlyn P. is a convicted felon in possession [of] two firearms and illegal drugs and said property is kept or maintained in room #131 of the Ben Franklin Motel or the blue Chevrolet Cavalier which ILDEFONSO drives.

Based upon the information contained in the affidavit, a judge of the Douglas County District Court issued a search warrant for Ildefonso and room No. 131 of the Ben Franklin Motel, finding probable cause to believe that the items identified could be found on Ildefonso's person or in the motel room.

After hearing testimony at the suppression hearing, the district court found that there were exigent circumstances to merit the search of the vehicle and that the warrant was supported by probable cause. Taylor had told McCowen that Ildefonso was shot in the arm after he waved a .357-caliber revolver and flashed gang signs at the occupants of another vehicle. The court noted that although the officers did not know Ildefonso, they knew of the incident during which he was shot, and they knew that the man seen with Taylor had an injured arm. The court found that Taylor's veracity had not been attacked within the four corners of the affidavit and that the affidavit was proper and provided good and probable cause for issuance of the search warrant. The court overruled the motion to suppress, finding exigent circumstances in the evidence that Ildefonso and Taylor had packed up and left the motel.

[3] On appeal, Ildefonso argues that the affidavit failed to set forth sufficient facts that would establish probable cause to support issuance of the warrant. Therefore, we must examine the facts contained in the affidavit to determine whether the district court erred in finding probable cause. This court has held that suppression is 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 that the executing officer cannot reasonably presume it to be valid. If none of the aforementioned circumstances exist, the evidence should not be suppressed. *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). Ildefonso's argument centers on the third basis for suppression—that the affidavit lacks indicia of probable cause.

[4] 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. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

[5,6] In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, we have adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause. *Id.*

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

The affidavit in this case is based on two sources of information: (1) a police report of an earlier incident and (2) an interview with Taylor. The police report was filed after the incident in which Ildefonso waved a gun and flashed gang signs at another car and was shot. He was treated at a hospital for a gunshot wound after the hospital reported the incident. The affidavit is also based on information obtained during an interview with Taylor. She stated that Ildefonso always had two guns in his possession and that she was a passenger in the car when Ildefonso was shot. Taylor reported that she had dropped off a backpack containing illegal drugs at her former residence before taking Ildefonso to the hospital for treatment. She told officers that she and Ildefonso were registered in room No. 131 of the motel and

that she had seen Ildefonso's guns in the room on Tuesday, September 28, 1999.

[8] To rely upon the information provided by Taylor to support a finding of probable cause, the issuing magistrate must have found that Taylor's reliability as an informant had been demonstrated. The reliability of an informant may be established 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, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001), *cert. denied* 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754.

Reviewing the information within the four corners of the affidavit, there is no suggestion that Taylor had given reliable information to police officers in the past or that police officers independently investigated her reliability or the reliability of any information she had given, although police were aware of the earlier incident in which Ildefonso had been shot. Therefore, to establish Taylor's reliability, the affidavit must set forth that she made a statement against her penal interest or that she was a citizen informant.

We do not determine whether Taylor could be considered a citizen informant because her reliability was established by the fact that she made a statement against her penal interest. In providing information to the police about Ildefonso, Taylor told McCowen that she was with Ildefonso when he was shot and that before taking him to the hospital, she deposited "a green bookbag which contained two handguns and drugs described as 'crank, acid, and cocaine' at 5145 N. 47th Street, her former residence." Taylor said that after Ildefonso was treated at the hospital, "she reclaimed the bag and turned it over to ILDEFONSO." Taylor's statement was against her penal interest because it could have been used to charge her with possession of a controlled substance.

[9,10] "[A] statement against penal interest, in and of itself, carries a sufficient indicia of reliability to support a finding of

probable cause." *State v. Grimes*, 246 Neb. 473, 480, 519 N.W.2d 507, 514 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). See, also, *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). In *Harris*, the Court stated: "Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct." 403 U.S. at 583-84. We conclude that Taylor's statement against penal interest established her reliability and supported the finding of probable cause.

[11] After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). The affidavit provided sufficient information to find that there was probable cause to issue the search warrant. 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. Peters*, 261 Neb. 416, 622 N.W.2d 918 (2001), *cert. denied* 533 U.S. 952, 121 S. Ct. 2596, 150 L. Ed. 2d 754. The district court correctly overruled the motion to suppress. This assignment of error is without merit.

Ineffective Assistance of Counsel

Ildefonso asserts that he received ineffective assistance of counsel in three ways: (1) His trial counsel failed to preserve the issues raised in his motion to suppress; (2) his trial counsel failed to challenge the affidavit by filing a motion based on *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); and (3) his trial counsel failed to object to hearsay statements when McCowen testified as to the statements given to police by Devore-Alexander and Reh.

[12] The duty rests on the defendant, after his or her motion to suppress has been denied, to object to the admission of the evidence at trial and to state the specific grounds of the objection if not apparent from the context in which the objection was made. *State v. Bray*, 243 Neb. 886, 503 N.W.2d 221 (1993). The record shows that trial counsel adequately preserved all issues related to the motion to suppress by renewing his objection when the evidence was offered at trial. Therefore, the first claim of ineffective assistance of counsel is without merit.

Ildefonso next argues that trial counsel was ineffective when he failed to challenge the search warrant's validity under *Franks* because McCowen omitted important facts from the affidavit, including information concerning Taylor's relationship with an earlier suspect in the case. Also, McCowen did not include in the affidavit the fact that he picked up the ammunition from the motel desk clerk, rather than obtaining it directly from Taylor.

[13] To state a claim of ineffectiveness of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and demonstrate that a conviction must be overturned, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. See *State v. Dunster, ante* p. 329, 631 N.W.2d 879 (2001). The record shows that Ildefonso's counsel did not request a *Franks* hearing, but that does not necessarily demonstrate deficient performance by counsel.

In *Franks*, the Court held that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of

> the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56.

[14] In *State v. Williams*, 214 Neb. 923, 336 N.W.2d 605 (1983), this court noted that under *Franks*, a challenger must attack the veracity of only the affiant and not of any other informant in order to be entitled to a hearing. The challenger must also make a "'substantial preliminary showing,' including allegations of 'deliberate falsehood or of reckless disregard for the truth,' supported by an offer of proof." *Williams*, 214 Neb. at 926, 336 N.W.2d at 607. No hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. *Id.*

Ildefonso offers no evidence to suggest that any statement in the affidavit is a deliberate falsehood or shows reckless disregard for the truth. Although the affidavit did not contain any mention of an alleged relationship between Taylor and one of the individuals who had been arrested in connection with the murder, the finding of probable cause was not related to any evidence of such a relationship. The district court did not consider any false statement because none was made in the affidavit.

The second statement which Ildefonso alleges to be false concerns the method by which McCowen obtained the ammunition. This information was not deliberately false or made with reckless disregard for the truth, nor was it necessary to find probable cause.

Ildefonso has not demonstrated that trial counsel was ineffective by failing to request a *Franks* hearing. This assignment of error has no merit.

Ildefonso also argues that trial counsel was ineffective in failing to object to McCowen's hearsay testimony concerning statements made by Devore-Alexander and Reh. Ildefonso claims that McCowen's testimony rehabilitated weak testimony given by these witnesses concerning the events on the night of the murder. The State admits that the testimony was "conceptually hearsay," but it argues that the testimony was cumulative, that the testimony of Devore-Alexander and Reh was "consistent and

compelling," and that the failure to object did not prejudice Ildefonso. See brief for appellee at 23-24.

McCowen's testimony, in which he repeated statements made by Devore-Alexander and Reh, was hearsay. It consisted of statements made by one other than the declarant while testifying at trial, and the testimony was offered to prove the truth of the matter asserted. See Neb. Rev. Stat. § 27-801(3) (Reissue 1995). As hearsay, the testimony should have been objected to, and the objection would have been sustained if there were no exceptions to hearsay which applied. Neither party has suggested any exception to the hearsay rule which might apply in this case.

[15] However, McCowen's testimony reiterated statements made by Devore-Alexander and Reh, witnesses who heard the gunshot and saw the body of Hume in the street. There is no claim that McCowen testified to any facts which were in conflict with the testimony of the two witnesses, and his testimony was cumulative to their testimony. Even if Ildefonso's counsel should have objected to the testimony as hearsay, "erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact." See *State v. Quintana*, 261 Neb. 38, 63, 621 N.W.2d 121, 140 (2001). McCowen's testimony was cumulative.

Ildefonso also suggests that McCowen's testimony was harmful because it rehabilitated the testimony of Devore-Alexander and Reh, who were not credible. 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. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

Two witnesses testified that they heard a gunshot and that they saw Hume's body lying in the street. Devore-Alexander testified that Ildefonso returned to the car with a gun in his hand. Prior to the shooting, Ildefonso told Devore-Alexander that "the only thing that would make him feel better is if he shot somebody." No evidence was offered at trial to refute the State's evidence of

guilt. The hearsay testimony was cumulative. The evidence of guilt, including Ildefonso's confession to Taylor, was more than sufficient to support the convictions. This assignment of error has no merit.

SENTENCING

[16] Although neither party raises sentencing as an issue, we note that the district court sentenced Ildefonso to life imprisonment without parole on the first degree murder charge and to a consecutive sentence of 40 to 45 years' imprisonment on the use of a firearm charge. The sentencing order provided that Ildefonso would be given credit for time served (318 days) against the sentence imposed on the first degree murder charge. We find plain error in the sentencing.

> Upon being sentenced to life imprisonment for first degree murder, a defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for time served against the consecutive sentence.

State v. Mantich, 249 Neb. 311, 329, 543 N.W.2d 181, 194 (1996).

[17] A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled. *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993). Ildefonso is entitled to receive credit for time served, but the credit should be applied against the use of a firearm charge rather than against the first degree murder charge. Ildefonso's sentences are therefore vacated, and the cause is remanded to the district court with directions to resentence Ildefonso, giving him credit for time served against the conviction for use of a firearm to commit a felony.

CONCLUSION

The affidavit in support of the search warrant provided probable cause to issue the warrant, and the district court properly overruled the motion to suppress. Ildefonso did not receive ineffective assistance of trial counsel due to counsel's failure to request a hearing in accordance with *Franks v. Delaware*, 438

U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), because no false statements were made in the affidavit. As to whether trial counsel provided ineffective assistance by failing to object to hearsay testimony, we find that any error that occurred was harmless because the testimony was cumulative and the evidence of guilt was more than sufficient to sustain the convictions. Thus, Ildefonso's convictions are affirmed.

The sentencing order incorrectly granted Ildefonso credit for time served against the life sentence. We therefore find that Ildefonso's sentences should be vacated. The cause is remanded for resentencing, and the district court is directed to apply credit for time served to the conviction for use of a firearm to commit a felony.

AFFIRMED IN PART, AND IN PART SENTENCES VACATED AND CAUSE REMANDED FOR RESENTENCING.

LOUIS HUNT, APPELLEE, V.
LLOYD TRACKWELL, JR., APPELLANT.

635 N.W.2d 106

Filed October 19, 2001. No. S-00-172.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Appeal and Error.** When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
5. **Jurisdiction: Waiver.** While the lack of subject-matter jurisdiction cannot be waived nor the existence of subject-matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties.
6. **Jurisdiction: Service of Process: Parties.** For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process.
7. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.

8. **Motions for Continuance: Jurisdiction.** A motion for a continuance constitutes a general appearance that confers personal jurisdiction over the moving party.
9. **Jurisdiction: Pleadings: Parties.** A party that files an answer generally denying the allegations of a petition invokes the court's power on an issue other than personal jurisdiction and confers on the court personal jurisdiction.
10. **Jurisdiction: Words and Phrases.** Subject-matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
11. **Judgments: Jurisdiction.** A ruling made in the absence of subject-matter jurisdiction is a nullity.
12. **Courts: Jurisdiction.** Under Neb. Rev. Stat. § 24-517(4) (Supp. 1997), a county court has authority to certify the proceedings to district court when the amount in controversy exceeds its jurisdictional limit.
13. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
14. **Courts: Jurisdiction: Service of Process.** Service of process in a county court is effective in district court after the county court has certified the proceedings to district court under Neb. Rev. Stat. § 25-2706 (Reissue 1995) if the county court had previously obtained personal jurisdiction in the case.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Mary C. Wickenkamp for appellant.

James A. Cada and Edward F. Hoffman, of Cada & Associates, for appellee.

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

CONNOLLY, J.

Under Neb. Rev. Stat. § 25-2706 (Reissue 1995), a county court shall certify a proceeding to the district court when the pleadings or discovery indicates the amount in controversy may exceed $15,000. Although the petition of the appellee, Louis Hunt, claimed damages in the amount of $27,000, the county court failed to certify the case to the district court and entered judgment within its jurisdictional limit of $15,000. The appellant, Lloyd Trackwell, Jr., appealed to the district court. The district court determined that the county court erred in failing to certify the proceedings to the district court and reversed, and remanded for certification. After remand and certification by the

county court to the district court, a jury returned a verdict of $27,368. Trackwell appeals.

In deciding this appeal, we address the following issues:

(1) Whether Trackwell subjected himself to the personal jurisdiction of the county court by invoking the power of the court.

(2) Whether the county court had subject-matter jurisdiction to act in this case even though Hunt's petition indicated an amount in controversy over $15,000.

(3) Whether the district court had personal jurisdiction over Trackwell even though no service of summons was issued by that court.

We determine that Trackwell subjected himself to the personal jurisdiction of the county court, that the county court had jurisdiction to certify the proceedings to district court, and that the district court was not required to reissue service of summons after certification. We affirm.

BACKGROUND

Hunt initially filed this replevin action in county court on June 8, 1998, to recover tools that Hunt alleged Trackwell had converted to Trackwell's own use. The petition claimed that the value of the property sought was $27,368. The summons, issued by the county court on June 9, required service to be completed by June 22. The summons was not served until June 25.

At the hearing the next day, Trackwell, without counsel, claimed that Hunt's counsel had a conflict of interest in the case and should be disqualified. The court instructed Trackwell to file a proper motion and continued the temporary replevin order until a permanent hearing was held. The court noted that there was a jurisdictional question, but Trackwell responded only that he did not believe the value of the tools to be $27,000.

Before the permanent hearing in county court, Trackwell filed the following motions: (1) a motion for a continuance, (2) a motion for an order recusing the judge from presiding in the case because of past contact he allegedly had with her, and (3) a motion for an order requiring Hunt's counsel to withdraw. In addition, Trackwell filed an answer generally denying the allegations in Hunt's petition.

A hearing was held on Trackwell's various motions. After Hunt appeared with new counsel, the court sustained Trackwell's motion to disqualify counsel. Although the judge could not remember any past contact with Trackwell, she recused herself from the case. Accordingly, Trackwell's motion for a continuance was not disposed of at that time. Trackwell then filed another motion for continuance, which was denied after a new judge was assigned to the case. After filing an answer, Trackwell continued to proceed pro se. The county court found that Hunt had been damaged in the amount of $25,000 but entered a judgment against Trackwell for only $15,000, the limit of the court's jurisdiction. See Neb. Rev. Stat. § 24-517 (Supp. 1997).

Trackwell appealed to the district court, assigning, among other errors, that the county court lacked jurisdiction. Because the pleadings indicated that the amount in controversy exceeded $15,000, the district court held that the county court erred by failing to certify the proceedings to district court under § 25-2706. The district court reversed, and remanded the case to county court with instructions to certify the proceedings to district court. The county court filed the certificate of transcript with the district court on March 19, 1999.

After the transcript was filed, Trackwell filed a special appearance in district court, challenging the court's jurisdiction because a service of summons had not been effected. The court overruled the special appearance under § 25-2706. The case was tried to a jury, which returned a verdict in favor of Hunt in the amount of $27,368. Trackwell filed a motion for a new trial, which was overruled. Trackwell timely appeals.

ASSIGNMENTS OF ERROR

Trackwell assigns that the district court erred in finding that (1) it had personal jurisdiction over him because no service of process was effected in the district court after the case was certified to the district court and (2) it had personal jurisdiction over him because (a) the county court lacked subject-matter jurisdiction and (b) service of process was defective in that court.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000).

[2,3] Statutory interpretation presents a question of law. *Hatcher v. Bellevue Vol. Fire Dept., ante* p. 23, 628 N.W.2d 685 (2001). When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001).

ANALYSIS

Trackwell argues two jurisdictional points. First, he argues that all actions taken by the county court were void ab initio due to its lack of subject-matter jurisdiction, and therefore, the county court could not have acquired personal jurisdiction. He also contends that the county court could not have obtained personal jurisdiction because service of process was defective in that court. Second, he argues that because the county court did not have personal jurisdiction, it could not have conferred personal jurisdiction upon the district court. He argues that the district court was therefore required to issue a summons for service of process upon him after the certification before it could acquire personal jurisdiction.

PERSONAL JURISDICTION IN COUNTY COURT

[4,5] Trackwell first contends that because the county court did not have subject-matter jurisdiction over the amount in controversy, it could not have acquired personal jurisdiction over him. But the two are not synonymous. See *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997) (concluding that district court had personal jurisdiction but not subject-matter jurisdiction). Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Id.* While the lack of subject-matter jurisdiction cannot be waived nor the existence of subject-matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction

may be waived and such jurisdiction conferred by the conduct of the parties. *Id.*

There is no merit to Trackwell's contention that the county court could not have acquired personal jurisdiction over him if it lacked jurisdiction over the subject matter. But Trackwell also contends that the county court failed to obtain personal jurisdiction because service of process was defective in that court.

[6,7] For purposes of personal jurisdiction, the voluntary appearance of a party is equivalent to service of process. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Nebraska Methodist Health Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996).

[8,9] While Trackwell was proceeding pro se, he filed a motion for an order to recuse the county court judge and to require that Hunt's attorney withdraw over a conflict of interest. Moreover, he filed two motions for a continuance in the county court, and we have specifically held that a motion for a continuance constitutes a general appearance that confers jurisdiction over the moving party. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996). Most importantly, he filed an answer generally denying the allegations, invoking the court's power and making a general appearance. See *Concordia Teachers College v. Neb. Dept. of Labor, supra* (concluding that defendants' amended answer invoking court's power on issue other than personal jurisdiction conferred on court personal jurisdiction). Trackwell's answer and various requests for relief invoking the court's power subjected him to the personal jurisdiction of the county court.

Subject-Matter Jurisdiction in County Court

Trackwell also contends that all actions taken by the county court were void ab initio due to its lack of subject-matter jurisdiction because Hunt's petition indicated that the amount in controversy exceeded $15,000.

[10,11] Subject-matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the

general subject matter involved. *Falotico v. Grant Cty. Bd. of Equal., ante* p. 292, 631 N.W.2d 492 (2001). A ruling made in the absence of subject-matter jurisdiction is a nullity. *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998).

Although the statute has since been amended, at the time that this action was filed, § 24-517(4) gave county courts concurrent jurisdiction with district courts in all civil actions when "the amount in controversy does not exceed fifteen thousand dollars. When the pleadings or discovery proceedings in a civil action indicate an amount in controversy may exceed fifteen thousand dollars, the county court shall certify the proceedings to the district court as provided in section 25-2706."

Under this section, the county court lacked subject-matter jurisdiction to determine Trackwell's case because the petition indicated an amount in controversy of $27,368, and § 24-517(4) required the county court to certify the proceedings to district court. This conclusion is supported by the Legislature's 2001 amendments to § 24-517. See 2001 Neb. Laws, L.B. 269.

[12] Section 24-517(5)(a) now requires the county court, "*upon the request of any party*," to certify civil proceedings to district court when the pleadings or discovery indicates an amount in controversy over $45,000. (Emphasis supplied.) 2001 Neb. Laws, L.B. 269. The certification of a civil proceeding, in which the amount in controversy exceeds the statutory limit, is now mandatory only upon the request of a party. By implication, at the time of this action, the certification was mandatory even without a party's request. But § 24-517(4) authorized the county court to certify the proceedings to district court when the amount in controversy exceeded its jurisdictional limit. Further, a county court may be required to certify the proceedings even after the parties have had discovery in a case. Consequently, while the county court was without authority to determine the case, it was not without authority to act. Therefore, on appeal, the district court correctly reversed the judgment and remanded the case with instructions to certify the case to district court.

Trackwell, however, argues that the action did not effectively begin until it was filed in the district court because only that court had jurisdiction to hear and determine the case. He

contends, therefore, that the district court was required to issue a new summons for service of process before the court could acquire personal jurisdiction over him. We analyze that argument in the context of § 25-2706.

PERSONAL JURISDICTION IN DISTRICT COURT

[13] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001).

At the time this action was filed, the applicable version of § 25-2706 provided:

> The county court shall certify proceedings to the district court of the county in which an action is pending . . . when . . . there is an amount in controversy in excess of fifteen thousand dollars . . . . *The action shall then be tried and determined by the district court as if the proceedings were originally brought in such district court* . . . .

(Emphasis supplied.)

[14] By its plain terms, § 25-2706 required no additional action by the parties or the district court to confer personal jurisdiction on the district court once the county court had certified the proceedings. We conclude that service of process or a defendant's voluntary appearance in a county court is effective in district court after the county court has certified the proceedings under this section. While service of process might be required in district court if the county court had never obtained personal jurisdiction, that is not the case here.

CONCLUSION

The district court did not err in overruling Trackwell's special appearance and in finding that it had personal jurisdiction over him because § 25-2706 does not require a district court to issue a new summons for service of process when an action has been certified to it from the county court under this section.

AFFIRMED.

HENDRY, C.J., not participating.

LYLE WILCOX AND JEAN WILCOX, APPELLANTS, V. CITY OF MCCOOK, NEBRASKA, A MUNICIPAL CORPORATION, AND SOUTHWEST NEBRASKA YOUTH SERVICES, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEES.

634 N.W.2d 486

Filed October 19, 2001. No. S-00-481.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
3. **Pleadings.** The issues in a given case will be limited to those which are pled.
4. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
5. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Order vacated, and appeal dismissed.

J. Bryant Brooks, of Brooks Law Offices, P.C., for appellants.

G. Peter Burger, of Burger & Bennett, P.C., for appellee City of McCook.

John A. Gale, of McCarthy, Gale, Moore, Bacon & Hall, for appellee Southwest Nebraska Youth Services, Inc.

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

HENDRY, C.J.

INTRODUCTION

Lyle Wilcox and Jean Wilcox appeal from the district court's decision dismissing their petition in error. In their petition, the Wilcoxes requested that the district court reverse the McCook

City Council's decision of May 17, 1999, approving a special exception application.

FACTUAL BACKGROUND

In 1999, Southwest Nebraska Youth Services, Inc. (Southwest), submitted an application for a special use exception. This application concerned a building located in McCook, Nebraska, within an area zoned residential medium density. Southwest intended to use the building as a multiple-family dwelling, medical-health facility, and school for state wards and other youths. The McCook zoning ordinances list multiple-family dwellings, medical-health facilities, and schools as special exceptions in residential medium density zones.

Previously, in 1998, the McCook City Council denied a separate special use exception application by Southwest concerning the same building. The 1998 application proposed to use the building as an "intermediate school . . . multiple family dwelling" and provide "governmental services" for state wards and other youths, including services for domestic and sexual abuse victims. The city council denied the 1998 application by a vote of two in favor, two against, and one abstaining.

Southwest's second application was submitted to the city council in 1999. The city sent out notices to all adjoining landowners concerning Southwest's 1999 special exception application. Some of the landowners initiated a petition drive against Southwest's application. The record indicates they collected approximately 108 signatures against Southwest's proposal. On May 17, 1999, after public notice and public hearings, the city council met and considered Southwest's second application. The council voted three in favor, one against, and one abstaining. Immediately after the vote, a question was raised as to whether a simple majority was sufficient to pass the application pursuant to Neb. Rev. Stat. § 19-905 (Reissue 1997). Notwithstanding this concern, the mayor announced the application had passed.

On June 3, 1999, the city council published notice in the McCook Daily Gazette newspaper that the next council meeting would be held on June 7, 1999. Listed on the agenda for the meeting was a motion by a council member to reconsider "the special

exception request for Southwest Nebraska Youth Services, Inc." This council member had voted "no" on Southwest's application at the May 17 meeting. Also included on the agenda for the June 7 meeting was a proposal that the city council consider "additional restrictions" on Southwest's use of the property.

At the June 7, 1999, meeting, the city council reconsidered Southwest's application. After including some additional restrictions concerning hours of operation and other related matters, the city council approved the application with four votes in favor of the proposal and one against.

On June 10, 1999, 3 days after the special exception request had been reconsidered and approved, the Wilcoxes filed a petition in error under Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2000). The Wilcoxes are adjoining landowners to the proposed youth center.

In their petition, the Wilcoxes asked the district court to reverse the city council's May 17, 1999, decision. The petition alleged four grounds in support of the requested relief. First, the Wilcoxes asserted that the 1999 application was barred by the previous 1998 application under a theory of res judicata. Second, they contended that Southwest's proposed use did not comply with the permitted special exception uses listed in the McCook zoning ordinances. Third, they argued that the application failed to receive a three-fourths majority vote at the May 17 meeting as required by § 19-905. Finally, the Wilcoxes argued that they were not provided due process by the city council. The petition did not ask for any relief from the city council's decision of June 7.

The appellees, Southwest and the City of McCook, filed answers in which the city asserted the issues raised by the Wilcoxes were "rendered moot by the vote in favor of the application by three-fourths (3/4ths) of the City Council on June 7, 1999." No amendments to the Wilcoxes' petition were requested or made.

The court rendered its decision on the Wilcoxes' petition in error on April 3, 2000. The court made various findings of fact, determined the matter in the appellees' favor, and dismissed the petition.

The Wilcoxes appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court

and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The Wilcoxes assert the district court erred in (1) failing to find that Southwest's 1999 application for a special exception was barred by res judicata, (2) failing to find that the Wilcoxes' right to due process was violated, and (3) failing to address whether the intended use of the property by Southwest was a permitted special exception.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000).

ANALYSIS

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. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

[2] The appellees argue that the Wilcoxes' appeal from the city council's decision on May 17, 1999, is moot. "A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive." *Hron*, 259 Neb. at 263, 609 N.W.2d at 383. See, also, *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001).

[3] The appellees contend that because of the subsequent actions taken by the city council on June 7, 1999, the issues presented by the May 17 decision are no longer alive. See *Hron, supra*. The record shows that the Wilcoxes' petition in error only challenges the May 17 decision by the city council. "[T]he

issues in a given case will be limited to those which are pled." *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 73, 615 N.W.2d 460, 468 (2000). Accord *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000). The record further shows that on June 7, the May 17 decision by the city council was reconsidered and the city council approved Southwest's application, with some additional restrictions.

[4] Accordingly, any determination regarding the May 17, 1999, decision would be purely advisory. "In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory." *US Ecology v. State*, 258 Neb. 10, 18, 601 N.W.2d 775, 780 (1999) (citing *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999)). We therefore determine that the Wilcoxes' appeal is moot.

[5] We recognize that the court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *Hron v. Donlan, supra*. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000).

While the questions presented in this case are of a public nature, we find that application of the public interest exception would not be appropriate. The issues presented in this appeal do not inherently evade appellate review. See *Putnam*, 256 Neb. at 274, 589 N.W.2d at 844 ("[i]t is generally inappropriate for an appellate court to review a moot case that does not evade review as a result of a transitory setting"). Thus, we decline to apply the public interest exception to reach the merits of this case.

CONCLUSION

The Wilcoxes' petition in error did not raise any issue involving an actual case or controversy necessary for the district court

to exercise judicial power. Accordingly, the decision of the district court is vacated, and the appeal is dismissed as moot.

ORDER VACATED, AND APPEAL DISMISSED.

HOME PRIDE FOODS, INC., A NEBRASKA CORPORATION, APPELLEE, v. CHRISTOPHER S. JOHNSON ET AL., APPELLANTS.

634 N.W.2d 774

Filed October 19, 2001. No. S-00-514.

1. **Trade Secrets: Words and Phrases.** The definition of a trade secret is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
3. **Trade Secrets: Actions: Damages.** In an action for damages, whether information sought to be protected rises to the level of a trade secret under the Trade Secrets Act is a question of fact.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
5. **Motions to Dismiss: Waiver: Appeal and Error.** A defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal.
6. **Trade Secrets: Words and Phrases.** A customer list can be included in the definition of a trade secret under Neb. Rev. Stat. § 87-502 (Reissue 1999).
7. **Trade Secrets: Restrictive Covenants.** Where time and effort have been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market.
8. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
9. ____: ____. A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.
10. **Damages: Evidence.** Where a plaintiff presents evidence of only gross profits and fails to provide evidence of expenses and overhead costs from which net profits can be calculated, the plaintiff has failed to present sufficient evidence of lost profits.
11. **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.
12. **Damages: Injunction.** It is impermissible double recovery for a court to award damages for future use and, at the same time, issue a permanent injunction barring such use.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellants.

Clay M. Rogers and Patrick E. Griffin, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, for appellee.

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

CONNOLLY, J.

The appellee, Home Pride Foods, Inc. (Home Pride), sued the appellants, Christopher S. Johnson, Jason J. Johnson, and Consumer's Choice Foods, Inc. (Consumer's Choice), for a permanent injunction and damages under Nebraska's Trade Secrets Act, Neb. Rev. Stat. § 87-501 et seq. (Reissue 1999). After a bench trial, the district court determined that the appellants had used a customer list misappropriated from Home Pride. The court determined the list was a trade secret, issued a permanent injunction, and awarded damages.

This appeal presents the questions, Is a customer list a trade secret, and if so, was the list used by the appellants? Because we decide these issues in Home Pride's favor, we inquire whether Home Pride proved damages. We determine that the district court erred in calculating damages by awarding an amount based on a 25-percent net profit when there is no evidence in the record to support that finding. We also conclude that the court erred in awarding damages for future use of the list when a permanent injunction was also entered. We reverse the district court's award of damages and remand the cause for further proceedings.

BACKGROUND

FACTS

Home Pride and Consumer's Choice are competing home food service companies. The companies sell and deliver food products and appliances to their customers.

The parties stipulated that the appellants inappropriately came into possession of the customer list owned by Home Pride.

The appellants stipulated that they paid $800 for the list and knew the list was stolen when they purchased it. The parties further stipulated that under a search warrant for the Consumer's Choice premises related to the purchase of stolen goods, police found copies of the list at the Consumer's Choice premises. The list contains information about the customers such as their names, addresses, telephone numbers, amount of food ordered, and number of reorders of food.

Bryce Johnson, no relation to Christopher Johnson and Jason Johnson, is the president of Home Pride. Before starting Home Pride, he and Christopher Johnson and Jason Johnson were employed by Nebraska Prime Meats (Nebraska Prime). In 1996, Bryce Johnson purchased the customer database of Nebraska Prime and its service contracts.

After the list was purchased, an employee of Nebraska Prime loaded the list into Home Pride's computers. Bryce Johnson testified that there were three different passwords on each computer and that the paper files were also protected. Bryce Johnson, his secretary, and his sales manager were the only people who had access to the customer list. In addition, Home Pride's sales representatives were subject to covenants not to compete and not to divulge trade secrets, including customer lists.

The customer list is a valuable asset of a food service company. Bryce Johnson described the list as "priceless" and testified that if a customer list got into the hands of a competitor, the results could result in significant losses.

Testifying about damages, Bryce Johnson stated the average customer at Home Pride reorders food 4½ times and that the national average is four to eight reorders. According to Bryce Johnson, Home Pride's gross margin of profit was 60 percent and between 30 and 50 percent on reorders. He stated the average value of reorders is between $1,200 and $1,500. After discovery proceedings, he compared customer files at Consumer's Choice against Home Pride's customer list and found that many of the names matched up. By cross-referencing the list, he determined the receipts from Consumer's Choice of the names that matched was $33,605. He assumed the average number of reorders from these customers would be four reorders each.

Using a gross profit margin of 60 percent, he calculated that Home Pride had lost approximately $80,000 in profits because of the theft of the customer list.

Kenneth E. McLaughlin, the previous owner of Nebraska Prime, corroborated Bryce Johnson's testimony. He testified that the customer list contained names of both active and inactive customers. McLaughlin explained that a food service business could be harmed if others knew the customers and the prices, because the company could then be undercut. According to McLaughlin, without the customer list, no business can exist.

McLaughlin testified that when he owned Nebraska Prime, it made every attempt to keep its customer list secret. Nebraska Prime kept the list password protected, and the list was never sold to anyone other than Home Pride. He testified that employees were given lists of people to call but that these employees did not have the master list. He also stated that the Nebraska Prime employee who loaded the list did not have the authority to have the list other than to install it in Home Pride's computers.

McLaughlin testified that between 50 percent and 60 percent of customers would reorder food. According to McLaughlin, most customers would stay with the service for 3 years because they had a service agreement or had bought a freezer through Nebraska Prime which entitled them to a discount on food. He stated that this would lead to between five and six reorders because a customer would have to place that many reorders in order to benefit from the discounts during the period that the appliance was financed.

Home Pride also called two expert witnesses whose testimony generally agreed with Bryce Johnson's testimony about Home Pride's gross profits and the value of the list. Both testified that Home Pride lost $80,000 in gross profits.

Shannon Tews, an acquaintance of Christopher Johnson, corroborated that the appellants misappropriated the use of the list. Tews testified that Christopher Johnson told her he had bought disks copied from Nebraska Prime. She also stated that Christopher Johnson told her that he and his fiance, Kimberly Stigge, the sales manager of Consumer's Choice, were going to contact people within 1 to 2 months so as not to raise eyebrows.

The appellants called Michael Schmidt, an employee of Consumer's Choice. Schmidt was previously employed by Nebraska Prime, where he was in charge of operations. He testified that Nebraska Prime had between 300 and 400 active customers and that there were between 2,000 and 3,000 names on the list. He stated that the list at Nebraska Prime was printed and not password protected. According to him, 40 to 50 percent of Nebraska Prime's business was derived from day-care providers, contrary to Bryce Johnson's claim that Home Pride did not solicit day-care centers. He stated that the average reorder rate is one or two and that the net profit on reorders at Consumer's Choice is 10 percent.

On cross-examination, Schmidt admitted that in April 1999, Consumer's Choice had purchased a home food service business owned by him and had retained him as a consultant. As part of that transaction, he receives between 10 and 20 percent of the sales price from people that he hires and trains for Consumer's Choice. He also conceded that the customer list is an asset of the business.

Stigge testified that the customer list had not been installed on the Consumer's Choice computers and was not used by the appellants. According to Stigge, Christopher Johnson and Jason Johnson did not make sales calls for Consumer's Choice.

Stigge testified there were 40 matches, but 15 of those were acquired by Consumer's Choice before the list was stolen in September 1996. She could not find a file for 1 of the remaining 25 matches. She stated that the rest of the matches were acquired through normal marketing, including day-care provider lists.

Stigge, who had previously been employed by Nebraska Prime as a telemarketer, stated that day-care lists were used at Nebraska Prime, along with other marketing lists. According to her, day-care lists generated the most appointments.

TRIAL COURT'S FINDINGS

After the conclusion of Home Pride's case, the appellants moved for a directed verdict, which was overruled. The court entered a detailed order finding in favor of Home Pride. The court did not specifically state that it found the customer list to be a trade secret. The court did, however, note McLaughlin's

testimony about the value of the customer list. The court also noted the conflicting testimony about whether the list was used and the value placed on the list.

The court then found that Home Pride had established the presence of 40 names from the stolen list on the Consumer's Choice customer database. The court stated that "[a]t this point, it would seem that the business from those 40 names should, in the absence of other evidence, be attributed to the stolen list." The court then found that Home Pride suffered no damage from those customers of Consumer's Choice acquired before the list was stolen. The court separately addressed the remaining names on the list and found that each customer had been acquired through the use of the stolen list with the exception of three names.

Concerning damages, the court noted that the renewal rate from Nebraska Prime's list was "quite low." The court also noted that most of the customers who were acquired by Consumer's Choice had already purchased a freezer. The court found that this limited the loss to Home Pride since most of the profit lost from those customers would be through reorders or purchases of items other than freezers. The court determined that lost revenues were not the proper measure of damages and that gross profit margins were not reflective of actual damages. The court then determined that there were customers who demonstrated that they were active customers and found those customers represented lost profits, valued at the time of theft at $13,000, or $1,000 per contract. The court calculated the $13,000 based on "25% net profit."

In addition, the court found that the customer list had value because it represented future sales opportunities and provided "real leads in this area." The court found the value of those leads to be $10,000 and stated that "[t]o the extent that this value may represent neither an enrichment to Defendants' or a dollar loss to Plaintiff, it shall be considered a royalty under §87-504." The court awarded Home Pride $23,000 and entered a permanent injunction prohibiting the appellants from continuing to misappropriate the customer list.

ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred in (1) finding that the customer list was a trade secret, (2) finding

that the customer list was used by the appellants, (3) allowing Home Pride a double recovery by entering an order that included damages for both actual damages and unjust enrichment, (4) entering an order for damages without competent evidence to support the award, (5) awarding $10,000 as a reasonable royalty, (6) failing to sustain their motion for a directed verdict, (7) failing to issue specific findings of fact and conclusions of law, and (8) failing to grant their motion for a new trial.

STANDARD OF REVIEW

We first address the appropriate standard of review. Before the enactment of the Uniform Trade Secrets Act in 1988, this court indicated that an action for damages because of the unlawful use of a trade secret was an action at law, subject to a clearly erroneous standard of review. *Henkle & Joyce Hardware Co. v. Maco, Inc.*, 195 Neb. 565, 239 N.W.2d 772 (1976). In a later case, we held that an action for both an injunction and damages for misappropriation of a trade secret was in equity and subject to a de novo standard of review. *Garner Tool & Die v. Laux*, 204 Neb. 717, 285 N.W.2d 219 (1979). See, also, *Selection Research, Inc. v. Murman*, 230 Neb. 786, 433 N.W.2d 526 (1989) (stating that trade secret action seeking injunction and filed before Trade Secrets Act went into effect was action in equity).

We have not addressed what the appropriate standard of review is in an action brought under Nebraska's Trade Secrets Act for money damages. Courts in other jurisdictions that have adopted the Uniform Trade Secrets Act have treated an action for damages under the act as an action at law. See, e.g., *Elm City Cheese Co. v. Federico*, 251 Conn. 59, 752 A.2d 1037 (1999) (citing cases applying clearly erroneous standard of review); *Basic American, Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999); *Weins v. Sporleder*, 569 N.W.2d 16 (S.D. 1997). Thus, courts have held that the definition of a trade secret is a matter of law under the act. But, the question of whether information sought to be protected by the act rises to the level of a trade secret is one of fact for the trial court that is subject to a clearly erroneous standard of review. *Id.*; *Bernier v. Merrill Air Engineers*, 770 A.2d 97 (Me. 2001).

[1-4] We hold that the definition of a trade secret is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *In re Guardianship & Conservatorship of Donley, ante* p. 282, 631 N.W.2d 839 (2001). Whether information sought to be protected rises to the level of a trade secret under the act is a question of fact. In a bench trial of a law action, a trial court's findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000); *Blue Creek Farm v. Aurora Co-op Elev. Co.*, 259 Neb. 1032, 614 N.W.2d 310 (2000).

ANALYSIS

Motion to Dismiss

[5] The appellants contend that the district court erred in failing to grant their motion for a directed verdict. The appellants made a motion for a directed verdict at the end of Home Pride's case, which was overruled. We interpret this motion to be the same as a motion to dismiss. After the motion was overruled, the appellants presented evidence and did not renew their motion at the end of their case. A defendant who, after the overruling of a motion for dismissal made at the close of the plaintiff's evidence, adduces evidence on its own behalf waives any error on the motion for dismissal. *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995), *overruled in part on other grounds, Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). We determine that the appellants' argument on this issue has been waived.

Determination That Customer List Was Trade Secret

The appellants argue that the court erred in determining that the customer list was a trade secret. Section 87-502(4), of the Trade Secrets Act, defines a trade secret as

> information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:
>
> (a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable

by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[6] This court has never addressed the question whether a customer list can be included in the definition of a trade secret. Other jurisdictions hold that a customer list can constitute protected information under the Uniform Trade Secrets Act. See, e.g, *Brown v. Ruallam Enterprises, Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001); *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wash. 2d 427, 971 P.2d 936 (1999) (en banc); *Fred's Stores of Miss. v. M & H Drugs*, 725 So. 2d 902 (Miss. 1998); *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 66 Cal. Rptr. 2d 731 (1997). We agree and hold that a customer list can be included in the definition of a trade secret under § 87-502. The question is whether the customer list rises to the level of a trade secret in this case.

[7] The appellants argue that the customer list could be ascertained by proper means through the use of day-care lists and other marketing lists and that therefore, the customer list was not a trade secret. Courts are reluctant to protect customer lists to the extent that they embody information that is readily ascertainable through public sources. *Morlife, Inc. v. Perry, supra.* But where time and effort have been expended to identify particular customers with particular needs or characteristics, courts will prohibit others from using this information to capture a share of the market. See *id.* Such lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers. *Id.*

The record contains evidence that the customer list contained information not available from publicly available lists. For example, Bryce Johnson testified that the list provided information on customers who had previously placed orders with Home Pride or Nebraska Prime, and the amounts of those orders. With such information, a competitor could undercut Home Pride's pricing. Moreover, if the information was readily available, why did the appellants pay $800 for a stolen list? We determine that the court was not clearly wrong in finding that the list could not be ascertained through proper means.

The appellants also argue that the list was not password protected or kept secret. The record, however, contains evidence that the customer list had independent economic value and was kept secret. Finally, the appellants do not deny that the list was misappropriated. There was evidence in the record to support the court's finding of fact that the customer list was a trade secret. Thus, the finding of the court was not clearly erroneous.

Determination That Customer List Was Used by Appellants

The appellants next argue that the court erred in finding that the customer list was used by them. The appellants argue that Home Pride failed to present any evidence that the list was actually used.

The record contains evidence that previous customers of Home Pride or Nebraska Prime were contacted by Consumer's Choice and that some of these people received discounts on their orders. The record also contains evidence that some of these previous customers did not initiate the contact with Consumer's Choice. Finally, Home Pride's evidence refuted the contention by Consumer's Choice that many of the customers' names were obtained from day-care providers. Thus, there was circumstantial evidence that Consumer's Choice used the customer list, and it was reasonable for the court to infer from this evidence that the list had been used. See, generally, *Morlife, Inc. v. Perry, supra.* We determine that the court was not clearly wrong in finding that the customer list was used by Consumer's Choice.

Damages for Lost Profits and Unjust Enrichment

The appellants first argue that the court awarded damages for both lost profits and unjust enrichment. The appellants argue that such an award allows a double recovery for the same damages.

Section 87-504 provides:

> [A] complainant shall be entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation

may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Courts are divided on whether a plaintiff may recover damages for both his or her lost profits and damages for unjust enrichment based on the defendant's gain. See Annot., 11 A.L.R. 4th 12 (1982 & Supp. 2001). A majority of courts hold that damages are to be calculated by either the plaintiff's lost profits or the defendant's gain, whichever is greater, but not a combination of the two. See, *id.*; *Saforo & Associates, Inc. v. Porocel*, 337 Ark. 553, 991 S.W.2d 117 (1999). Other courts allow for a combination of lost profits and unjust enrichment damages under certain circumstances that are not present in this case. See Annot., 11 A.L.R. 4th, *supra*.

We do not decide whether a plaintiff may recover both his or her lost profits and the defendant's gained profits because the court awarded damages based only on lost profits. The court did not base an award on the profit gained by the appellants. The court awarded $10,000 representing the value of leads for future sales opportunities gained by Consumer's Choice because of their misappropriation of the list. This figure did not represent the appellants' unjust enrichment and was characterized by the court as a reasonable royalty. Thus, the court did not award a double recovery for both the lost profits of Home Pride and the gain in profits of Consumer's Choice.

Evidence of Lost Profits

The appellants next argue that Home Pride failed to provide sufficient proof of lost profits. In particular, the appellants argue that Home Pride failed to present evidence to support its claim for lost profits and that the evidence of lost profits was based only on gross profit without taking expenses into consideration.

[8,9] While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). We have held that a claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness. *World Radio Labs. v. Coopers & Lybrand*,

251 Neb. 261, 557 N.W.2d 1 (1996). In *World Radio Labs.*, a witness provided an opinion regarding lost profits, but no reliable financial data was provided to support the claim. We held under those circumstances that it was error for the district court to submit the claim for lost profits to the jury.

[10] Further, courts in other jurisdictions hold that the proper method of calculating damages for lost profits is on the basis of lost net profits and not gross profits. See, *Brown v. Ruallam Enterprises, Inc.*, 73 Ark. App. 296, 44 S.W.3d 740 (2001); *Fred's Stores of Miss. v. M & H Drugs*, 725 So. 2d 902 (Miss. 1998). Thus, where a plaintiff presents evidence of only gross profits and fails to provide evidence of expenses and overhead costs from which net profits can be calculated, the plaintiff has failed to present sufficient evidence of lost profits. See *Fred's Stores of Miss. v. M & H Drugs, supra* (reversing damage award based on gross profits).

[11] 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. *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

Home Pride presented evidence of only lost gross profits or losses based on Home Pride's gross profit margin. No evidence was provided regarding Home Pride's expenses or overhead costs. There is no evidence in the record to support a damage award for lost profits. The court, however, based its award on an assumption of a 25-percent net profit. Because no evidence was provided that would allow a calculation of net profit to be made, we determine that the court's award of lost profits was clearly erroneous and must be reversed.

Although we determine that there was insufficient evidence for the court's award of damages for Home Pride's lost profits, we note that evidence was presented regarding the net profit of Consumer's Choice. The net profit realized by Consumer's Choice is recoverable as unjust enrichment as a result of the misappropriation. The record contains testimony from Schmidt

that Consumer's Choice earned a 10-percent net profit on reorders of food. Accordingly, we remand for a determination of damages based on the unjust enrichment to Consumer's Choice.

Award of Royalty

The appellants argue that the court's award of $10,000 as a reasonable royalty is not allowed under the Trade Secrets Act. The court awarded an additional $10,000 for the value of future sales generated by the misappropriation of the list. The court also permanently enjoined the appellants from further use of the list.

[12] Courts in other jurisdictions have held that it is impermissible double recovery for a court to award damages for future use and, at the same time, issue a permanent injunction barring such use. See, *Sonoco Products Co. v. Johnson*, 23 P.3d 1287 (Colo. App. 2001) (citing cases); *Robert L. Cloud & Associates v. Mikesell*, 69 Cal. App. 4th 1141, 82 Cal. Rptr. 2d 143 (1999).

The court's award for the value of future sales is inconsistent with the issuance of a permanent injunction. Home Pride requested, and was given, a permanent injunction. The court's award of $10,000 for future sales was an impermissible double recovery and is reversed.

Remaining Assignments of Error

The appellants also assign that the court erred in failing to issue specific findings of fact and conclusions of law and in failing to sustain a motion for a new trial. We have reviewed these assignments of error and determine they are without merit.

CONCLUSION

We determine that a customer list can be a trade secret under the Trade Secrets Act. We further determine that the court was not clearly wrong in determining that the customer list was a trade secret under the facts of the case and that it was used by the appellants. We determine, however, that the court erred in awarding damages for lost profits when no evidence of Home Pride's net profits was provided. We further determine that the court erred in awarding $10,000 in damages for future use of the customer list when a permanent injunction had also been issued.

We reverse the award of damages. Because there is evidence of the net profit earned by Consumer's Choice, we remand for a recalculation of damages.

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

V.C., APPELLANT, V. THOMAS K. CASADY, CHIEF OF POLICE, CITY OF LINCOLN, NEBRASKA, POLICE DEPARTMENT, AND DON LEUENBERGER, DIRECTOR, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

634 N.W.2d 798

Filed October 26, 2001. No. S-99-1435.

1. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
3. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
4. **Trial: Evidence: Appeal and Error.** An erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence.
5. **Equity: Statutes.** Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity.
6. **Equity: Jurisdiction.** Jurisdiction of a court of equity refers to two distinct concepts: (1) the power of a court to render a valid decree and (2) the propriety of granting the relief sought.
7. **Courts: Arrests: Records.** Courts which recognize an inherent power to expunge arrest records have tempered this power by requiring that it be exercised sparingly and only in extraordinary circumstances.
8. **Appeal and Error.** An issue not presented to the trial court may not be raised on appeal.
9. **Constitutional Law: Due Process.** An injury to reputation alone is not enough to create a liberty interest, protected by the Due Process Clause of the U.S. Constitution, apart from some more tangible interests such as employment.
10. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled.

11. **Equity: Records: Appeal and Error.** The reservation of possible judicial review of police records in cases of overriding equitable considerations, based on the violation of established legal rights, is to provide a remedy in the rare case where extraordinary circumstances so warrant.
12. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
13. **Rules of Evidence: Words and Phrases.** 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.
14. **Rules of Evidence: Proof.** For evidence to be relevant under Neb. Rev. Stat. § 27-401 (Reissue 1995), all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.

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

John E. Beltzer, of DeCamp Legal Services, P.C., for appellant.

Dana W. Roper, Lincoln City Attorney, and Connor L. Reuter for appellee Thomas K. Casady.

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

GERRARD, J.

NATURE OF CASE

V.C., the appellant, sued Thomas K. Casady, chief of the Lincoln Police Department (LPD), and Don Leuenberger, director of the Nebraska Department of Health and Human Services (DHHS), seeking an order directing Casady and Leuenberger to expunge any record of an LPD investigation into an allegation that the appellant had sexually molested a child, C.C., who was then 9 years old. The district court determined that it had jurisdiction to issue such an order, but that the appellant was not entitled to relief. The appellant filed this appeal.

FACTUAL BACKGROUND

POLICE INVESTIGATION

On May 23, 1996, a police officer with the LPD generated an incident report based on information provided to him by C.C.'s mother and by a Lincoln attorney. The police officer was first called by the attorney, who was representing the mother in a

custody dispute with C.C.'s father. The attorney reported that the mother thought that C.C. might have been sexually abused by the appellant, a friend of the father's. The police officer later received a telephone call from the mother and proceeded to investigate.

As part of his investigation, the police officer interviewed C.C. at C.C.'s school. The police officer also spoke to the counselor at C.C.'s school and reviewed a deposition of the father that had been in the possession of the mother's attorney. The police officer then dictated a supplemental investigation report. The police officer concluded that there was no evidence of a sexual assault. Since there was no evidence of a crime, no charges were filed.

Briefly summarized, the police officer's supplementary investigation report states that while there was no evidence that the appellant had abused C.C., the police officer did find the appellant's relationship with the child to be peculiar and inappropriate and expressed these concerns to C.C. and the father. The report recounts the mother's explanation of the situation to the police officer as follows: The mother had been employed in the appellant's office, and the appellant became acquainted with C.C. when the mother brought C.C. to work. The appellant became C.C.'s godfather and became extremely involved in C.C.'s life. The mother became concerned and began restricting the appellant's contact with C.C. The mother then left the appellant's employment. According to the police officer's recitation of the mother's statements, the appellant then befriended the father and provided the father with substantial financial support in exchange for being permitted to spend time with C.C.

LPD Recordkeeping Procedures

Casady testified regarding the LPD's retention and use of police reports. Generally, Casady drew a distinction between incident reports and investigation reports.

Incident reports are maintained as both a hard copy of a written report and as an electronic record containing some of the information on the officer's written report. Incident reports contain the name of the victim, but not the name of any suspects. The incident report in this case, contained in exhibit 3, identifies only C.C. as the victim and the LPD officer who prepared the report.

The electronic incident report records are accessible to the LPD's police officers and civilian employees who have been determined to need access to those records in the course of their duties. Police incident reports are public records, available to the general public upon request. In addition, the FBI is provided with and maintains records of code numbers, the nature of the event, and the date of each incident report for the purpose of compiling national crime statistics, but the FBI does not have access to the report and is not given any identifying information.

A supplementary investigation report is a narrative report about any case or information that an officer cares to prepare. Such a report names all the persons involved in the case, including suspects. These reports are electronic records and are not regularly kept as hard copies. They may be accessed by the LPD's police officers and civilian employees who need to access them. Case investigation reports and additional case investigation reports are maintained as hard copies, and not as electronic records. They include names and details of the investigation.

Investigation reports are not available to the general public, including victims, without a subpoena or a court order. Governmental officials or agencies charged with criminal investigatory responsibilities may be provided with copies of such reports upon request. Such officials or agencies include federal law enforcement agencies, courts, probation officers, probation departments in Nebraska, and DHHS in child abuse and neglect investigations. Military agencies charged by law with criminal investigative responsibility, such as the Naval Investigative Service, might also access investigation reports. Federal civil service personnel, however, would not be able to get copies of investigation reports.

The LPD has extensive rules and regulations about the distribution of information that are rigorously enforced. Reports are kept in a secure area and, when discarded, are securely recycled and destroyed.

Casady also testified at length regarding the utility of such records to the LPD. Casady stated that the reports document the LPD's investigation in the event that questions arise about whether an investigation has been handled properly; for instance, Casady noted that police investigations sometimes result in litigation.

Casady also stated that the reports preserve a record of the investigation in case allegations are made in the future, either by C.C. or against the appellant. Casady also testified that the reports would provide documentation if C.C. was ever convicted of a crime and his childhood history was a relevant issue in sentencing.

Casady stated that if anyone ever wanted testimony from the investigating police officer or anyone else at the LPD regarding the investigation, the police reports would provide the only record. Casady also testified that the reports help him to provide oversight to ensure competent investigations, noting that there is occasionally a need to investigate the death of a child regarding whom there have been previous reports or referrals. Casady testified that in his opinion, there is a valid place in police reports for clearly noted opinions.

Casady admitted that if there was some way of guaranteeing that nothing would ever come up in the future that would involve this case, then the police reports would have no continuing utility.

PROCEDURAL BACKGROUND

The appellant filed an "Amended Petition in Equity" against Casady, alleging that the LPD reports on file were untrue and injurious to his reputation. The appellant sought to require Casady to deliver to him all of the LPD documents and records in the case. The appellant also asked the district court to order Casady to purge the LPD records and to identify all the persons who had been informed of the records. The appellant's petition also named Leuenberger and the Lancaster County Attorney as parties and sought to compel those parties to purge their records as well.

The district court subsequently sustained a demurrer by the Lancaster County Attorney and dismissed him from the case. The district court overruled demurrers filed by Casady and Leuenberger, concluding that the district court had the power to act in equity even in the absence of legislative authority. The court ruled, however, that trial was to be limited to the records themselves, concluding that since the relevant issue was the harm that could be done by the records, any attempt to attack the veracity of the records was irrelevant.

At trial, the appellant made several offers of proof regarding evidence that was intended to undermine the credibility of the

facts and conclusions stated in the police reports. A lawyer, who defended the appellant with respect to charges made by the mother in a separate civil proceeding, would have testified that the mother's attorney told this lawyer that if the appellant stopped helping the father in his custody proceeding, another civil action brought by the mother against the appellant would "go away." This testimony was excluded as irrelevant.

A licensed clinical psychologist would have testified that he had met with and assessed the appellant to determine if there was evidence of pedophilic tendencies. The psychologist would have testified that he reviewed the police report and concluded that there was no evidence that the appellant had pedophilic tendencies. Casady's relevance objection was sustained.

C.C.'s father would have testified about his contact with the LPD investigating officer and the events of the investigation. The appellant would have testified about his relationship with C.C. and why the appellant took the interest in C.C. that he did. Relevance objections were sustained to this proffered testimony. Attempts to attack the accuracy of statements in the reports were also made during the investigating officer's testimony, but Casady's objection was sustained, and the testimony was stricken. In addition, the district court excluded the deposition of an employee of the appellant and the deposition of the mother, which the appellant offered to further attack the substance of the police reports.

The appellant was permitted to testify at trial regarding the potential harm to him of the continued existence of the reports. The appellant recalled that he was required, on application to another state's bar, to have police records sent to the other state's bar association. The appellant also testified that he has on several occasions obtained security clearances: twice when working as an electrical engineer in the missile industry, again as a civilian employee of the Navy, and also when performing a foreign patent application for the Army. The appellant testified that police records were obtained by the FBI in making those checks. The appellant also testified that he had recently obtained an application to the Big Brother program that required him to sign a release authorizing the program to obtain police records. The appellant testified, "I'm always afraid that that matter will

be resurrected and used against me, although I think that it wasn't meritorious at all."

During trial, at the close of the plaintiff's evidence, the district court entered what it referred to as a directed verdict in favor of Casady and Leuenberger and dismissed the case. The district court found that the evidence failed to establish that the continued existence of the reports carried a potential harm to the appellant. The undisputed evidence, according to the district court, was that the reports were released only through legal process and that the appellant had proved only the legitimate need to maintain such records. V.C. appeals.

ASSIGNMENTS OF ERROR

The appellant assigns that it was error for the trial court to (1) find that the LPD and DHHS have a legitimate need to retain the reports sought to be expunged; (2) fail to find harm or potential harm to the appellant's basic legal interests; and (3) exclude evidence relevant and material to a determination of the competence, reliability, and accuracy of the investigation that provides the basis for the generation of the records.

Casady has also filed a "Suggestion of Mootness" with this court. See *ProData Computer Servs. v. Ponec*, 256 Neb. 228, 590 N.W.2d 176 (1999). Casady argues that because of this proceeding and others, and due in part to the appellant's own actions, the content of the police reports has already been made a part of the public record. We have considered Casady's argument that this fact renders the instant appeal moot, and we find the argument to be without merit.

STANDARD OF REVIEW

[1] On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Klundt v. Karr*, 261 Neb. 577, 624 N.W.2d 30 (2001); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska

Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001); *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *Genetti, supra.* An erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence. *Nickell, supra.*

ANALYSIS

We first address that portion of the district court's judgment that dismissed the appellant's claim against Leuenberger. While the appellant alleged that copies of the police reports at issue had been provided to DHHS and were maintained in DHHS' records, there was no evidence at trial to substantiate the allegation that DHHS had maintained copies of any of the reports that the appellant sought to have expunged.

[5] Moreover, to the extent that the appellant's petition addresses information maintained in the Abused or Neglected Child Registry, there is a statutory remedy available that allows for the expunction of such information, but there is no indication in the record that the appellant followed the statutory procedure. See, generally, *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before one may resort to equity. See *Genetti, supra.*

Given the failure of the record to establish that the appellant pursued an available statutory remedy, or to establish even that DHHS maintained copies of the reports that the appellant sought to have expunged, we conclude that the district court did not err in dismissing the appellant's claims against Leuenberger. However, the statutes providing for expunction of criminal history record information, as maintained by the LPD, do not include investigative information such as the reports at issue in this case. See Neb. Rev. Stat. §§ 29-3506 (Reissue 1995) and 29-3523 (Cum. Supp. 2000). There is, therefore, no statutory procedure

that applies to the police reports that the record reflects are maintained by the LPD, and we proceed to consider the appellant's assignments of error as they relate to his claims against Casady.

DENIAL OF RELIEF

We turn first to the issue whether the district court erred when it dismissed the appellant's cause of action and denied the relief he requested. The appellant's first two assignments of error are essentially addressed to the appellant's claim that he proved his entitlement to the relief requested. Underlying the issue, however, are the more fundamental questions whether, and under what circumstances, the equitable remedy of expunction is within the jurisdiction of the district court.

[6] Juridically, jurisdiction of a court of equity refers to two distinct concepts: (1) the power of a court to render a valid decree and (2) the propriety of granting the relief sought. *Doe v. Comdr., Wheaton Police Dep't*, 273 Md. 262, 329 A.2d 35 (1974). Assuming, arguendo, that expunction is available as an equitable remedy, the first question is under what circumstances the power of a court to expunge may be invoked.

Most of the reported cases that address the propriety of expunction as an equitable remedy have done so in the context of arrest records, rather than police reports. In cases upholding the theory of " 'inherent equitable power to expunge,' " the expunction of such records is a process of weighing the interests of society and of the individuals involved. *In re Interest of P.L.F.*, 218 Neb. 68, 71, 352 N.W.2d 183, 185 (1984).

[7] Courts which recognize an inherent power to expunge arrest records have tempered this power by requiring that it be exercised sparingly and only in extraordinary circumstances. *Toth v. Albuquerque Police Dept.*, 123 N.M. 637, 944 P.2d 285 (N.M. App. 1997). See, e.g., *Camfield v. City of Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001); *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977); *In Interest of E.C.*, 130 Wis. 2d 376, 387 N.W.2d 72 (1986); *Bradford v. Mahan*, 219 Kan. 450, 548 P.2d 1223 (1976); *Journey v. State*, 850 P.2d 663 (Alaska App. 1993), *aff'd* 895 P.2d 955 (Alaska 1995); *State ex rel. Peach v. Tillman*, 615 S.W.2d 514 (Mo. App. 1981); *People v. Michael L.*, 80 Misc. 2d 292, 362 N.Y.S.2d 989 (1975). Notably, no court has

questioned the legitimacy or importance of the government's interest in obtaining and retaining records dealing with individuals who pass through our criminal justice system, none has viewed inherent judicial authority to expunge as a power to be used routinely, and none has suggested that the government's interest in maintaining accurate criminal histories can be outweighed in any but exceptional circumstances. See *Journey, supra.*

The logic upon which this requirement is based is that while expunction may be available as an equitable remedy, that remedy may only be properly invoked where the court is afforded with authority to act, by the need to remedy the invasion of legally protected rights. See, *In Interest of E.C., supra*; *Bradford, supra.* While the judicial remedy of expunction may be inherent, and not dependent upon express statutory provision, it exists to vindicate substantial rights provided by statute as well as by organic law. See *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

Where constitutional questions are involved, the litigant has the right to raise them in a court of equity and such court has the right to consider them. *Doe, supra.* In cases to which a statutory scheme does not extend, however, the court's inherent power is limited to instances where the petitioner's constitutional rights may be seriously infringed by retention of his or her records. *In re R. L. F.*, 256 N.W.2d 803 (Minn. 1977).

For instance, a number of courts have ordered expunction of local police records as an appropriate remedy in the wake of police action in violation of constitutional rights. *Police Comm'r of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640, 374 N.E.2d 272 (1978). Federal courts have ordered expunction of arrest records where the arrests were made in violation of the constitutional rights of the individuals arrested. See, e.g., *Menard, supra* (individual arrested and held without probable cause); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973) (mass arrests, without probable cause, of thousands of individuals protesting American military involvement in Southeast Asia); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) (arrests used to intimidate minority voters in violation of Voting Rights Act).

Assuming, then, that expunction is an available remedy for a court of equity, the issue facing this court is whether the appellant's evidence, taken as true as required by our standard of

appellate review, establishes the extraordinary circumstances necessary for expunction to be ordered. Because the appellant's evidence, taken as true, fails to establish the invasion of a legally protected right, we conclude that the appellant did not prove the extraordinary circumstances that would be necessary to support an order expunging the police investigative reports at issue.

[8] The appellant's brief argues that the retention by the LPD of the police reports presents violations of (1) his right to liberty as protected by the Due Process Clause and (2) his right to privacy. We first note that these claims were not clearly articulated by the appellant in his pleadings or at trial. Generally, an issue not presented to the trial court may not be raised on appeal. *Menkens v. Finley*, 251 Neb. 84, 555 N.W.2d 47 (1996). However, it appears that the district court, evidently being of a generous disposition, nonetheless evaluated the appellant's pleadings and evidence to determine if the appellant's rights to privacy or due process had been violated. Therefore, we consider each argument in turn.

[9,10] The appellant argues that the LPD's retention of the police reports deprives him of liberty without due process of law, in violation of the Due Process Clause of the U.S. Constitution. However, the only injury identified in the appellant's petition is harm to his reputation. It is well established that an injury to reputation alone is not enough to create a liberty interest, protected by the Due Process Clause, apart from some more tangible interests such as employment. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001). See, *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). Although the appellant expands upon his due process argument on appeal, the appellant's operative petition clearly does not allege a violation of a liberty interest protected by the Due Process Clause. The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled. *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000). Given the appellant's failure to plead, and the failure of the evidence presented at trial to substantiate, the deprivation of any protected liberty interest, we find the appellant's alleged due process claims to be without merit.

The appellant did not specifically plead a violation of his right to privacy either, but the district court, in overruling Casady's and Leuenberger's demurrers, concluded that the appellant's petition alleged facts that would support a finding that the appellant's right to privacy had been violated. The evidence presented at trial, however, failed to show such a violation.

The appellant's argument is premised on the possibility that the police investigative reports will be disseminated and cause him harm. In the first place, we note that the uncontradicted evidence presented at trial indicates that the police reports are not public records and are disseminated only to other law enforcement agencies or when subject to legal process.

Moreover, in *Paul, supra*, the U.S. Supreme Court rejected a claim that a plaintiff's right to privacy had been violated by the dissemination of the fact that he had been arrested for shoplifting. The Court recognized that " 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power." 424 U.S. at 712-13. However, the Court concluded that the plaintiff's claim

> [was] based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

424 U.S. at 713. See, also, *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202 (3d Cir. 1991) (information contained in police report not protected by constitutional right of privacy); *J. P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981) (interest asserted in nondisclosure of juvenile court records not protected by constitutional right to privacy); *Roth v. Reagen*, 422 N.W.2d 464 (Iowa 1988) (entry in child abuse registry not violation of constitutionally protected privacy interest); *Loder v. Municipal Court*, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976) (limited retention and dissemination of arrest records does not violate right of privacy).

In the instant case, the evidence does not indicate, and the appellant does not argue, that the police investigative reports at issue were generated in violation of the appellant's constitutional rights. While the appellant sought to impeach the information in

the reports, he does not claim, and the evidence would not support concluding, that the investigation was undertaken in bad faith or that the reports were the result of actionable police misconduct. Compare, *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977); *United States v. Linn*, 513 F.2d 925 (10th Cir. 1975); *Toth v. Albuquerque Police Dept.*, 123 N.M. 637, 944 P.2d 285 (N.M. App. 1997); *State ex rel. Peach v. Tillman*, 615 S.W.2d 514 (Mo. App. 1981) (cases holding expunction of arrest record not appropriate where arrest was lawful).

While the appellant claims that the information contained in the police investigative reports is embarrassing to him, those reports do not contain confidential information and explicitly exonerate the appellant of any illegal conduct. The appellant's argument essentially appears to be that he is entitled to have the reports expunged because some of the conclusions are wrong and because the appellant believes the investigating officer did not conduct a complete investigation. This claim, however, does not support a finding that a legal right of the appellant has been invaded. Accepting the appellant's argument would require the judiciary to become the arbiter of what is and is not good police work, and to edit police reports to remove conclusions over which there is disagreement. This is simply not an appropriate judicial function.

Police reports summarize the facts surrounding an event and constitute a necessary log of police activity. See *State v. L.K.*, 359 N.W.2d 305 (Minn. App. 1984). The hallmark of our system of government calls for the preservation of accurate official records rather than suppression of information. *Spock v. District of Columbia*, 283 A.2d 14 (D.C. App. 1971). If a record of involvement with criminal process is expunged, the traces literally vanish and no indication is left behind that information has been removed. *Com. v. Roberts*, 39 Mass. App. 355, 656 N.E.2d 1260 (1995). Therefore, it is possible that the judicial editing of history could produce a greater harm than that sought to be corrected by the expunction of certain information from a police report. See *Camfield v. City of Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001).

[11] Given the uncontradicted testimony of Casady regarding the utility of these police reports to the LPD, the commands of a

government of laws require that this court confine its acts within the scope of judicial power recognizing the coequal powers of the other branches of government. See *Mulkey v. Purdy*, 234 So. 2d 108 (Fla. 1970). The reservation of possible judicial review of police records in cases of overriding equitable considerations, based on the violation of established legal rights, is to provide a remedy in the rare case where extraordinary circumstances so warrant. See *id.* Because the appellant's evidence in this case, taken as true, failed to establish such circumstances, we conclude that the district court did not err in dismissing the appellant's cause of action. The appellant's first two assignments of error are without merit.

EVIDENTIARY ISSUE

[12] The appellant also argues that the district court abused its discretion in excluding the evidence the appellant proffered that he claims would have attacked the conclusions in the police reports. We first note that the appellant's brief appears to argue that the exclusion of this evidence violated his right to due process of law. However, the record does not indicate that this due process argument was presented to the trial court; therefore, we do not consider it. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). We do consider the appellant's argument that this evidence was erroneously excluded on the basis of relevance.

[13,14] 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. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). For evidence to be relevant under § 27-401, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence. *Snyder, supra.*

We conclude that the trial court erred in excluding the appellant's proffered evidence to the extent that it was relevant to the truth of the conclusions set forth in the police reports. As noted

above, expunction of police records is a process of weighing the interests of society and of the individual involved. Whether the facts set forth in a police report are true or false will directly bear on the interests of the individual involved, as the harm done to the individual's legally protected interest may vary depending upon the veracity of the information that is disseminated. See *Bound v. Biscotti*, 76 Ohio Misc. 2d 6, 663 N.E.2d 1376 (1995). Furthermore, the utility of a police record to law enforcement may depend on the reliability of the information contained in the report. See *Police Comm'r of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640, 374 N.E.2d 272 (1978). Thus, while we cannot countenance the use of the courts as a forum for questioning the competence of an investigation, evidence bearing on the reliability of a police report is certainly relevant to the analysis necessary to determine if expunction is appropriate.

However, we conclude that this error does not require reversal, as it does not affect the issue that the district court and this court have determined to be dispositive. The investigative reports conclude that the appellant did not commit any crime, and even if the other opinions expressed by the investigating officer are incorrect or subject to dispute, there is no evidence that maintaining the reports in police records would invade the appellant's rights to privacy or due process of law. Even if the appellant's evidence had been accepted by the district court and had successfully undermined the conclusions set forth in the police reports, the appellant's petition would still fail to plead, and his evidence would still fail to establish, the invasion of a legally protected right. Absent such proof, the appellant is not entitled to the remedy of expunction.

CONCLUSION

Assuming, without deciding, that expunction of police records is an available remedy under extraordinary circumstances when an individual's legally protected rights have been invaded, the appellant's evidence, taken as true, failed to establish such circumstances. The district court did not err in dismissing the appellant's petition at the close of his evidence, and we therefore affirm the judgment of the district court.

AFFIRMED.

DIDIER PRESLE, APPELLANT, V. LYNNE ANN PRESLE, APPELLEE, AND STATE OF NEBRASKA, INTERVENOR-APPELLEE.

634 N.W.2d 785

Filed October 26, 2001. No. S-00-502.

1. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
2. **Records.** Once a praecipe for bill of exceptions has been filed, preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to prepare the original bill of exceptions.
3. **Rules of the Supreme Court: Records.** If a court reporter is unable to prepare and certify a bill of exceptions, or if a bill of exceptions cannot be prepared and certified under provisions contained elsewhere in court rules, the bill of exceptions shall be prepared under the direction and supervision of the trial judge and shall be certified by the judge and delivered to the clerk of the district court.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Order vacated, and cause remanded with directions.

Daniel W. Ryberg for appellant.

Anthony R. Medina for intervenor-appellee.

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

WRIGHT, J.

NATURE OF CASE

This is an appeal from an order of the Douglas County District Court which found that, as a matter of public policy, it could not vacate or set aside any provision of a 1982 decree of dissolution, including a finding of paternity. The district court granted summary judgment to the State as intervenor.

FACTS

Didier Presle and Lynne Ann Presle were married on May 15, 1980. One child was born during the marriage on January 27, 1982. On May 26, Didier filed a petition for dissolution of marriage in Douglas County District Court. In the petition, Didier disclaimed paternity of and responsibility for the child.

In the decree of dissolution, entered on December 14, 1982, the trial court found that although the petition alleged Didier was not the father of the child and Didier had disclaimed paternity, there was no competent and sufficient evidence before the court to support these allegations. The trial court found that the child was the issue of the marriage and that Didier should be required to contribute to her support. Lynne was awarded custody, and Didier was ordered to pay $200 per month in support until the child's emancipation. During subsequent years, Lynne assigned her child support rights to the State on several occasions and received State benefits for the child.

In an application to modify signed on December 12, 1998, 16 years after the decree of dissolution was entered, Didier requested a modification of the child support order, asserting that a material change of circumstances had occurred. He alleged that he was not aware he had been ordered to pay child support because he did not reside in Nebraska at the time the decree was entered. Didier further alleged that genetic testing conducted in 1998 had determined that he could not be the natural father of the child.

The State filed a petition seeking leave to intervene on April 6, 1999, alleging that it had been assigned the child support payments and that Didier owed the State $39,200 as of March 29. The State was subsequently granted leave to intervene.

On May 7, 1999, Didier filed a "Petition to Vacate and Set Aside or Alternatively Amended Application to Modify" asserting that the provisions of Neb. Rev. Stat. § 42-368 (Reissue 1998) which preclude modification of amounts "accrued prior to [the] date of service" of a motion to modify are arbitrary and capricious; are in violation of the separation of powers clause of the state Constitution; deny him access to the courts for an adequate remedy, in violation of article I, § 13, of the state Constitution; and deny him due process under the state Constitution and the U.S. Constitution. Didier argued that the adverse parties were estopped from asserting any obligations upon him, and he invoked laches. In the alternative, he sought to amend his application to modify by asking that child support be abated as of the date of the decree, the date of the application to modify, or "such other retroactive date that the law allows."

In its response, the State affirmatively alleged that since entry of the decree of dissolution in 1982, Lynne had received aid to dependent children benefits, and that she had assigned her rights to child support to the State. The State also asserted that any effort to revisit the issue of paternity was precluded by res judicata.

After Didier and the State each filed motions for summary judgment, the district court entered an order overruling Didier's motion and sustaining the State's motion. The district court held that it would be contrary to public policy for the court to find that the child was not the issue of the marriage and that Didier remained the child's legal father and had a continuing obligation of support. The district court ordered that all aspects of the original decree of dissolution remain in full force and effect. Didier filed this appeal.

ASSIGNMENTS OF ERROR

Didier set forth five assignments of error: (1) The district court erred in determining that public policy prevented it from vacating and setting aside the original provisions of the December 1982 decree of dissolution; (2) the court erred in failing to consider the issues of estoppel and laches; (3) the court erred in determining that the State, as assignee, had not waived or was not estopped from asserting any rights it may have had; (4) the court erred in granting standing to the State and in sustaining its motion for summary judgment; and (5) the court erred in failing to address the constitutionality of Neb. Rev. Stat. § 42-377 (Reissue 1998).

ANALYSIS

We must first address the appellate record in this case. The transcript, which has been supplemented twice, contains the original petition seeking dissolution of the marriage and the decree of dissolution as well as the application to modify, the petition to vacate, the motions for summary judgment, and the district court's order from which Didier appeals. The bill of exceptions contains seven exhibits, but no testimony nor any indication that the exhibits were offered or received into evidence at the summary judgment hearing. In a motion for an order nunc pro tunc, which was filed after Didier filed his notice of appeal, Didier asserted that no court reporter was available for the summary judgment hearing but that the exhibits were preserved for the record.

[1] Pursuant to Neb. Ct. R. of Prac. 5A(1) (rev. 2000), "[t]he official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived." See, also, Neb. Ct. R. of Official Ct. Rptrs. 3 (rev. 2000).

[2,3] The record in the case at bar includes a praecipe for bill of exceptions. This court has stated that "[o]nce a praecipe for bill of exceptions has been filed, preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to prepare the original bill of exceptions." *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 979, 581 N.W.2d 405, 407 (1998). Court rule 5B(3)c provides that

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

The record here does not establish that the trial judge took any steps to ensure that a bill of exceptions was prepared and certified.

At oral argument before this court, the State suggested that the summary judgment hearing was held in chambers and that no court reporter was present. This court will not permit such conduct. Whether a trial court judgment is appealed or not, a record is necessary, and the trial judge in the case at bar should have ensured that a court reporter was available for the hearing.

On June 12, 2000, Didier filed a motion for an order nunc pro tunc requesting an order from the district court reflecting which exhibits were received and showing that no objection was made to the exhibits offered by Didier. For purposes of this opinion, we treat the motion as a notice and request that the trial judge direct and supervise the preparation of a bill of exceptions to be certified by the judge and delivered to the clerk of the district court. The trial docket reflects that the district court overruled this motion. Under these circumstances, we conclude that the orderly administration of justice is best served by vacating the order of the district

court and remanding the cause for a new evidentiary hearing. See *Sindelar v. Hanel Oil, Inc., supra* (Caporale, J., concurring).

CONCLUSION

The order granting summary judgment to the State is vacated, and the cause is remanded for a new evidentiary hearing.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

ARMEDA MALONE, APPELLANT, V. AMERICAN BUSINESS INFORMATION, A CORPORATION, APPELLEE.

634 N.W.2d 788

Filed October 26, 2001. No. S-00-571.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. ___: ___. In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
5. **Termination of Employment: Public Policy.** The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated.

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

Michael P. Dowd, of Dowd & Dowd, for appellant.

Patrick M. Flood and Andrew J. Wilson, of Hotz, Weaver, Flood & Breitkreutz, for appellee.

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

STEPHAN, J.

This is an appeal from an order of the district court for Douglas County dismissing an action for wrongful discharge filed by Armeda Malone against American Business Information (ABI), her former employer. The sole issue presented is whether Malone stated a cause of action by alleging that her employment was terminated after she asserted a claim cognizable under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998). The district court resolved this issue against Malone. We find no error and therefore affirm.

BACKGROUND

In her petition, Malone alleged she was employed by ABI as a national account manager under an employment agreement which included a sales/wage commission plan. Malone further alleged she was entitled to commissions in the amount of $94,877.81 under the plan which ABI failed and refused to pay within 30 days from the date due. Malone alleged she made both verbal and written claims to ABI for her unpaid wages and that due to the assertion of such claims, her employment was terminated. Malone specifically alleged that her demand for payment of wages to which she was lawfully entitled under the Nebraska Wage Payment and Collection Act resulted in the termination of her employment in violation of public policy. She prayed for damages in the form of mental pain and suffering and present and future lost wages.

ABI filed a general demurrer asserting that the petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, reasoning that Malone was an at-will employee and that the facts she alleged did not fall within a public policy exception to the at-will employment doctrine. Although given an opportunity to amend, Malone elected to stand on her petition, and the district court entered an order of dismissal. Malone then perfected this timely appeal which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

Malone assigns, restated and summarized, that the district court erred in failing to find that her petition stated a cause of

action for wrongful termination pursuant to the public policy exception to the at-will employment doctrine.

STANDARD OF REVIEW

[1] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001); *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

[2,3] In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000); *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

ANALYSIS

[4] Although Malone alleged that she was employed by ABI pursuant to an "employment agreement" which included a sales/wage commission plan, there is no allegation that the agreement contemplated employment for a specific duration. Malone concedes in her brief that she was an at-will employee. The clear and oft-cited rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000). Malone contends that she has nevertheless stated a cause of action because she alleged facts falling within the public policy exception to the at-will employment rule.

We first recognized, without adopting, the public policy exception to the at-will employment doctrine in *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), *disapproved*

on other grounds, Johnston v. Panhandle Co-op Assn., 225 Neb. 732, 408 N.W.2d 261 (1987). In *Mau*, we noted that other jurisdictions had adopted a rule that allows an at-will employee to claim damages for wrongful discharge "when the motivation for the firing contravenes public policy." 207 Neb. at 316, 299 N.W.2d at 151.

[5] We first applied the public policy exception in *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). The issue presented in that case was whether an at-will employee had stated a cause of action for wrongful discharge by alleging that his employment was terminated because he refused to submit to a polygraph examination. Although we recognized the general rule that in the absence of contractual or statutory restrictions, an employer could discharge an at-will employee for any reason without incurring liability, we determined that an exception to the rule was created by Neb. Rev. Stat. § 81-1932 (Reissue 1999), which provides in part that " '[n]o employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination . . . .' " *Ambroz*, 226 Neb. at 900-01, 416 N.W.2d at 512. The statute further provides that any person who violates its provisions is guilty of a Class II misdemeanor. We held that these statutory provisions constituted a "pronouncement of public policy on the issue of wrongful discharge" in language which clearly and unambiguously prohibited the employer's use of a polygraph to deny employment. *Id.* at 903, 416 N.W.2d at 513. We concluded by defining the circumstances in which the public policy exception would be recognized, stating:

> This is a case involving a discharge in violation of a clear, statutorily mandated public policy. We believe that it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated. This case falls within that rule.

Id. at 905, 416 N.W.2d at 515.

We next considered the public policy exception in *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988), wherein

an employee claimed that he was wrongfully discharged for reporting his suspicions that his employer was violating state odometer fraud laws. In addressing the employee's claim, we cited our recognition of the public policy exception in *Mau* and our holding in *Ambroz*. We distinguished the case from *Ambroz* in that there was no statute which prohibited an employer from discharging an employee who reported suspected criminal activity. We further noted that the case was distinguishable from those in other jurisdictions where an employee was discharged for refusing to directly engage in criminal conduct. Notwithstanding those distinctions, however, we recognized that the Legislature had made it unlawful to engage in odometer fraud and had made such conduct a Class IV felony under Neb. Rev. Stat. § 60-2301 et seq. (Reissue 1984 & Cum. Supp. 1986) (now found at Neb. Rev. Stat. § 60-132 et seq. (Reissue 1998)). In view of this legislative action, we noted that we were not being asked to declare new public policy, but, rather, were presented with the issue of

> whether, by virtue of the enactment of §§ 60-2301 et seq., there exists such a clear declaration by the Legislature of important public policy as to warrant a judicial determination that the policy is to be enforced by recognizing a cause of action for wrongful discharge under appropriate facts.

Schriner, 228 Neb. at 91, 421 N.W.2d at 759. In addressing this issue, we reasoned that there is no public policy more basic than the enforcement of a state's criminal code and concluded that the enactment of the criminal statute was a clear declaration of public policy against odometer fraud. Finding, however, that an action for wrongful discharge could lie only when the employee acts in good faith in reporting a violation of the criminal code, we declined to apply the exception and affirmed summary judgment for the employer because there was no evidence that the employee had reasonable cause to believe that the employer had acted unlawfully or that he had acted in good faith in so reporting.

The most recent Nebraska case to address the public policy exception is *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb. App. 263, 558 N.W.2d 825 (1997). In that case, an at-will employee alleged that he was wrongfully discharged for refusing an order to drive a truck that had defective brakes. Based upon *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510

(1987), and *Schriner, supra*, the Court of Appeals concluded that "the law in Nebraska is that an at-will employee has a cause of action for wrongful discharge against his or her former employer if the employee was discharged in violation of a contractual right or a statutory restriction or when the motivation for the discharge contravenes public policy." *Simonsen*, 5 Neb. App. at 269, 558 N.W.2d 829. The Court of Appeals determined that by making the operation of a motor vehicle with defective brakes a misdemeanor under Nebraska law, the Legislature had declared that such conduct was contrary to public policy. The Court of Appeals concluded that discharging an employee for refusal to commit a criminal act would contravene public policy and give rise to a wrongful discharge action under the public policy exception.

The Nebraska Wage Payment and Collection Act, codified at §§ 48-1228 to 48-1232, obligates an employer to "pay all wages due its employees on regular days designated by the employer or agreed upon by the employer and employee." § 48-1230. The act places certain restrictions upon the employer's right to deduct, withhold, or divert a portion of an employee's wages, and specifies when unpaid wages are due following an employee's separation from the payroll. *Id.* The act also permits an employee to bring suit on a claim for wages which are not paid in a timely fashion and, if successful in prosecuting such a claim, to recover attorney fees. § 48-1231. In such an action, an amount equal to the unpaid wages, or an amount equal to two times the unpaid wages in the event of willful nonpayment, may be recovered and placed in a fund distributed to the common schools of this state. § 48-1232.

Unlike the Licensing of Truth and Deception Examiner's Act which formed the basis of our decision in *Ambroz*, the Wage Payment and Collection Act does not contain a specific provision restricting an employer's right to discharge an at-will employee. Nor does the act impose any criminal sanctions, thus distinguishing it from the basis for the public policy exception recognized in *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988), and *Simonsen, supra*. Thus, none of these cases provide direct support for Malone's contention that the Wage Payment and Collection Act forms the basis for recognition of a public policy exception to the doctrine of employment at will under the facts alleged.

Due to variations in statutory language, cases from other jurisdictions provide little guidance. In *Tullis v. Merrill*, 584 N.W.2d 236 (Iowa 1998), the Iowa Supreme Court held that an at-will employee who was terminated after seeking reimbursement of amounts withheld from his paycheck could bring an action for wrongful discharge based upon a provision of Iowa's wage payment collection act which prohibited an employer from discharging an employee because of the employee's assertion of a claim under the act. As noted, the Nebraska act contains no such provision. In *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29 (1998), the court held that an employee who had been discharged during a dispute with his employer regarding payroll deductions could state a claim for retaliatory discharge, reasoning that the State of California had a fundamental public policy favoring prompt payment of wages based in part upon a statute which made an employer's willful nonpayment of wages a misdemeanor offense. Nebraska's act contains no such provision. Although the Illinois Wage Payment and Collection Act does contain a similar provision, see 820 Ill. Comp. Stat. Ann. 115/14(c) (Lexis 1999), the court in *McGrath v. CCC Information Services, Inc.*, 314 Ill. App. 3d 431, 731 N.E.2d 384, 246 Ill. Dec. 856 (2000), reached the opposite result. Reasoning that "[to] constitute a clearly mandated public policy exception that would justify application of the tort of retaliatory discharge, the matter at issue must strike at the heart of a citizen's social rights, duties, and responsibilities," the court concluded that "the effect of plaintiff's dispute and subsequent termination on the citizenry collectively is incidental at best" and that "[m]erely citing a constitutional or statutory provision in a complaint will not give rise to a retaliatory discharge cause of action." *Id.* at 440, 731 N.E.2d at 391, 246 Ill. Dec. at 863.

As did the district court, we conclude as a matter of law that the Nebraska Wage Payment and Collection Act does not represent a "very clear mandate of public policy" which would warrant recognition of an exception to the employment-at-will doctrine based on the facts alleged by Malone. See *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). The act is primarily remedial in nature, providing specific procedures for the enforcement of substantive rights to compensation for work

performed which arise not from the statute but from the employment relationship itself. The act specifically contemplates payment of wages which become due both during the employment relationship and after it has been terminated. See § 48-1230. As noted above, the act contains no criminal penalties nor any specific provision restricting the employer's common-law right to discharge an at-will employee. Thus, while the act provides Malone with a remedy to collect any compensation which ABI may owe her, it does not "declare . . . an important public policy with such clarity as to provide a basis for a civil action for wrongful discharge." See *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 89, 421 N.W.2d 755, 757 (1988).

CONCLUSION

For the reasons discussed, we conclude that Malone's petition does not allege facts sufficient to constitute a cause of action. The district court therefore did not err in sustaining ABI's demurrer or in ultimately dismissing the action.

AFFIRMED.

ROGER THORNTON, APPELLANT, V. GRAND ISLAND CONTRACT CARRIERS AND AETNA CASUALTY AND SURETY COMPANY, APPELLEES.

634 N.W.2d 794

Filed October 26, 2001. No. S-00-887.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. **Statutes.** Interpretation of a statute presents a question of law.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Stipulations.** The general rule is that parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael P. Dowd, of Dowd & Dowd, for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Roger Thornton, filed a petition alleging that appellees, Grand Island Contract Carriers and Aetna Casualty and Surety Company, refused to pay medical expenses and attorney fees arising from work-related injuries. Aetna Casualty is now known as The Travelers Property and Casualty and will be referred to herein as "Travelers." The issue in the Nebraska Workers' Compensation Court was whether a medical bill incurred by Thornton was required to be paid by appellees. A single judge of the compensation court ordered a dismissal. This order was reviewed and affirmed by a three-judge review panel. We granted Thornton's petition to bypass under our power to regulate the caseloads of this court and the Nebraska Court of Appeals.

BACKGROUND

On August 24, 1988, Thornton sustained personal injuries as a result of an accident arising out of the course of his employment with Grand Island Contract Carriers. Thornton filed a petition on September 20, 1991, to present a claim for workers' compensation benefits. In this petition, Thornton alleged that "the Statute of Limitations is tolled as a result of [appellees'] paying compensation benefits and medical expenses as a result of this accident and injuries to date of filing this Petition." Appellees generally denied Thornton's petition. In its award, the single judge for the compensation court noted that "[appellees] have paid all medical bills incurred to date arising from said accident" and that appellees had already been paying Thornton temporary total and permanent partial disability benefits for which appellees were entitled to credit. The original award was totally silent as to future medical expenses.

The present appeal arises out of a petition filed on June 4, 1999, by Thornton alleging that appellees refused to pay medical

expenses and attorney fees arising from work-related injuries of the original August 24, 1988, accident. Appellees filed a motion for summary judgment, attaching a stipulation of the parties to indicate there was no genuine issue of material fact. The stipulation states that Thornton was awarded various benefits including future medical benefits in a 1992 award which was affirmed on June 21, 1993; that Travelers last made a disability payment to Thornton on September 1, 1994, and a medical payment to Thornton or on Thornton's behalf on June 19, 1995; and that Thornton now makes a claim for medical services arising more than 2 years following the date of Travelers' last payment of indemnity and/or medical payments.

Neb. Rev. Stat. § 48-137 (Reissue 1998) states in pertinent part:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

The single judge granted appellees' motion for summary judgment and ordered a dismissal, citing *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997), as controlling the matter. In *Snipes*, we held that claims for medical expenses filed more than 2 years after the last payment of compensation were barred by § 48-137 in the absence of evidence of a material increase in the claimant's disability, which would permit the claimant to seek an increase in benefits pursuant to Neb. Rev. Stat. § 48-141 (Reissue 1993) or where the injury is latent and progressive and is not discovered within 2 years of the accident. See *Snipes v. Sperry Vickers, supra.*

The three-judge panel affirmed, citing *Snipes* as controlling, and one judge wrote a concurrence and attached a three-judge opinion in a case which has since become *Foote v. O'Neill Packing, ante* p. 467, 632 N.W.2d 313 (2001), as deciding the exact same issues as those presented in this case.

Thornton's petition to bypass the Court of Appeals was granted.

ASSIGNMENTS OF ERROR

Thornton assigns that the trial court erred (1) in determining that Thornton's claim for payment of medical benefits was barred by §§ 48-137 and 48-141 (Reissue 1988); (2) in determining that the general statute of limitations, § 48-137, applied in this case in which a petition had previously been filed and adjudicated and an award had previously been entered by the compensation court; (3) in determining that requiring the employer to pay for medical care amounted to a modification of the previous award directing payment for such care and was therefore subject to the provisions of § 48-141; and (4) as a matter of fact and law in applying the case *Snipes v. Sperry Vickers, supra*, as controlling on this matter.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a compensation court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (2001).

[2,3] Interpretation of a statute presents a question of law. *Fontenelle Equip. v. Pattlen Enters., ante* p. 129, 629 N.W.2d 534 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001).

ANALYSIS

In the recent case of *Foote v. O'Neill Packing, supra*, we were called upon to resolve two questions: (1) whether the compensation court has the authority to order payment of future medical expenses incurred more than 2 years after the date of the last payment unless there was a change in condition of the employee sufficient to satisfy the requirements of § 48-141 and (2) whether

§ 48-137 bars a claim made more than 2 years after the accident or last payment of compensation in a situation where compensation was paid pursuant to an award of the compensation court. As to the compensation court's authority, we concluded in *Foote* that Neb. Rev. Stat. § 48-120 (Reissue 1998) clearly manifests the legislative intent to make medical benefits available to a disabled worker without regard to any time limitation measured from the last date of payment when an award is entered as long as further medical treatment is reasonably necessary to relieve the worker from the effects of the work-related injury or occupational disease.

As to § 48-137, we stated:

> We determine that Foote's claim for payment of medical expenses is not barred by § 48-137 and that the 1996 compensation court award authorized the payment of reasonable and necessary medical expenses resulting from said injuries, even where those expenses were incurred after the award was entered and more than 2 years from the time of the making of the last payment.

Foote, ante at 480, 632 N.W.2d at 324.

In both *Foote v. O'Neill Packing, ante* p. 467, 632 N.W.2d 313 (2001), and in Thornton's case, the injured worker was attempting to obtain payment of medical expenses more than 2 years after the last compensation payment was made.

However, as in *Foote*, the compensation payments made in this case were made pursuant to an award entered by the compensation court after a petition had been filed. In *Foote*, we held that the 2-year limitation of § 48-137 is contingent upon the failure of one of the parties to file a petition. Instead, once a party has filed a petition and an award of compensation has been entered, that award is final and not subject to readjustment, unless there is an increase or decrease in incapacity or the condition of a dependant has changed. See *Foote v. O'Neill Packing, supra*, citing Neb. Rev. Stat. §§ 48-140 and 48-141 (Reissue 1998). In other words, an injured worker may be entitled to future medical expenses under § 48-120, but the injured worker must prove such entitlement and obtain an award with respect to the future medical expenses. The employer can then, if warranted, appeal that final award. If, on the other hand, future medical expenses are not part

of the final award, that judgment is final and any future claims for medical expenses relating to the same accident are absolutely barred unless the requirements of § 48-141 are met. *Foote v. O'Neill Packing, supra.*

In *Foote*, we determined that the plaintiff's claim was not barred by § 48-140. In *Foote*, however, our decision was based on the fact that the Workers' Compensation Court's original award had provided that future medical benefits would be paid and that § 48-120 authorized such an award. In the instant case, no such award was made; the order stated only that "[appellees] have paid all medical bills incurred to date arising from said accident." Thus, unlike in *Foote*, the award in the instant case is essentially silent on the issue of future medical expenses.

Thornton's claim in the instant case is admittedly based on the same accident that was the subject of the 1992 award, and the parties agree that the requirements of § 48-141 (Reissue 1988) have not been satisfied. Consequently, the compensation court erred in applying the 2-year limitation of § 48-137 in the instant case because absent satisfaction of § 48-141, a claim for additional benefits relating to the same accident is barred regardless of whether or not it is brought within 2 years of the making of the last compensation payment. As the 1992 award contains no language that can be reasonably construed to provide future medical benefits, Thornton's current claim is an attempt to secure additional benefits relating to the same accident, and is barred by § 48-140 (Reissue 1988).

[4] One additional matter we address is the fact that although the award of December 22, 1992, did not award future medical expenses, the stipulation entered into between the parties after the judgment states that Thornton was awarded various benefits, including future medical benefits. The stipulation is of no effect, as the general rule is that the parties have no right to stipulate as to matters of law, and such a stipulation, if made, will be disregarded. See *Struve Enter. v. Travelers Ins. Co.*, 243 Neb. 516, 500 N.W.2d 580 (1993).

Therefore, we conclude that since the December 22, 1992, award did not provide for future medical benefits, Thornton cannot recover for medical expenses relating to the same accident that is the subject of the 1992 award.

CONCLUSION

The compensation court erred in concluding that § 48-137 applied to the instant case; instead, Thornton's petition was properly dismissed because his claim was barred by § 48-140. However, a proper result will not be reversed merely because it was reached for the wrong reasons. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000). Since the compensation court reached the right result, albeit for the wrong reasons, the order of the review panel affirming the judgment of the compensation court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

THE CINCINNATI INSURANCE COMPANY, APPELLEE, V. BECKER WAREHOUSE, INC., AND BECKER TRANSPORTATION, INC., APPELLANTS.

635 N.W.2d 112

Filed November 2, 2001. No. S-00-767.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Actions: Jurisdiction.** The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
3. **Declaratory Judgments.** A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain.
4. **Insurance: Contracts.** Whether the language in an insurance policy is ambiguous presents a question of law.
5. ____: ____. A court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
6. **Insurance: Contracts: Intent: Appeal and Error.** Appellate review of an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made. Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning.
7. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
8. **Contracts.** When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

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

Eugene P. Welch and Francie C. Riedmann, of Gross & Welch, P.C., for appellants.

Robert T. Grimit and Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

GERRARD, J.

NATURE OF CASE

Becker Warehouse, Inc., and Becker Transportation, Inc. (collectively Becker), own a warehouse where food products owned by various entities are stored. While constructing an addition to Becker's warehouse, Stoetzel & Son, Inc., applied a sealant called Kure-N-Seal to the concrete floor. The owners of the food products filed lawsuits against Becker alleging that xylene fumes from the Kure-N-Seal contaminated their food products. Becker sought indemnity and defense from its insurer, the appellee, The Cincinnati Insurance Company (Cincinnati). Cincinnati filed a petition for declaratory judgment in the district court, seeking a declaration that Becker's insurance policy does not provide coverage for the alleged contamination and that Cincinnati has no obligation to defend Becker. Both parties filed motions for summary judgment; the district court sustained Cincinnati's motion and overruled Becker's. Because Cincinnati's insurance policy is not ambiguous and excludes coverage for Becker's claim, we affirm the district court's judgment in favor of Cincinnati.

FACTUAL BACKGROUND

In 1997, Becker and Stoetzel & Son entered into a contract under which Stoetzel & Son was to build an addition to Becker's warehouse in Hastings, Nebraska. Becker used the warehouse to store food products and ingredients owned by various entities, including Swift-Eckrich, Inc., doing business as Armour Swift Eckrich (Armour); Newly Weds Foods, Inc.; and J.M. Swank Company, a division of ConAgra, Inc. (Swank). While constructing the warehouse addition, Stoetzel & Son applied a concrete sealant called Kure-N-Seal.

Kure-N-Seal's material safety data sheet indicates that it contains xylene, poses an immediate and chronic health hazard, and

should be used with proper respiratory protection when applied in poorly ventilated areas. The federal Clean Air Act, 42 U.S.C. § 7412(b) (1994), lists xylene as a hazardous air pollutant. The Kure-N-Seal label and advertisement state that "[i]f Kure-N-Seal is applied in or near areas containing foodstuffs, they should be removed before application and until Kure-N-Seal has fully dried and all solvent vapors have dissipated." The label and advertisement also state:

> Heating Ventilation Air Conditioning (HVAC) units may draw [Kure-N-Seal] solvent vapors into occupied building interiors. Solvent vapors can be irritating to people unaccustomed to the odor; do not apply Kure-N-Seal in or around buildings occupied by nonconstruction personnel without consulting building management. Use only with adequate ventilation and with a minimum of 6 air changes per hour.

According to Becker, Stoetzel & Son failed to properly ventilate the warehouse while applying the Kure-N-Seal. Scott Stoetzel, an employee who applied the Kure-N-Seal, testified in a deposition that he wore a respirator during application of the Kure-N-Seal because he applied it in an enclosed building that needed ventilation.

Scott Stoetzel testified that Kure-N-Seal might have been safely applied without a mask, but he "wouldn't want to try it." Scott Stoetzel and another Stoetzel & Son employee opened doors, installed fans, and hung plastic sheeting to ventilate the area treated with Kure-N-Seal and to prevent the fumes from spreading. Several days after the Kure-N-Seal application, both Scott Stoetzel and Brian Becker, the warehouse company's owner and chief executive officer, noticed an odor of the Kure-N-Seal in the warehouse area where food products were stored. Subsequently, Scott Stoetzel and Brian Becker attempted to better ventilate the warehouse until the odor dissipated.

Armour and Swank filed lawsuits against Becker, alleging that xylene fumes from the Kure-N-Seal damaged their food products stored in Becker's warehouse at the time of the Kure-N-Seal application. Subsequently, Becker filed insurance claims with Cincinnati, seeking indemnity and defense against Armour and Swank's allegations. Cincinnati denied Becker's claims and refused to defend Becker in the pending lawsuits.

Cincinnati filed a petition for declaratory judgment in district court, seeking a declaration that its policy does not cover matters arising out of Stoetzel & Son's use of Kure-N-Seal in the Becker warehouse and that it has no obligation to defend actions filed by others against Becker. Becker filed a counter/cross-claim, alleging that Cincinnati has a duty to indemnify Becker's damages from the use of Kure-N-Seal and to provide a defense to the pending litigation against Becker. Becker also alleged that Kure-N-Seal is not a pollutant within the meaning of the insurance policy issued by Cincinnati.

The commercial general liability (CGL) insurance policy issued to Becker by Cincinnati excludes from coverage, in pertinent part:

> **f. Pollutant**
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.
>
> . . . .
>
> (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
>
> (i) If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor . . . .
>
> . . . .
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. Pollutants include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment.
>
> . . . .
>
> **j. Damage to Property**
>
> "Property damage" to:

. . . .

(4) Personal property in the care, custody or control of an insured.

The building and personal property coverage form of the commercial property coverage part of the insurance policy issued to Becker by Cincinnati states, in pertinent part:

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property, as used in this Coverage Part, means the following types of property for which a Limit of Insurance is shown in the Declarations:

. . . .

b. Your Business Personal Property and Personal Property of Others in your care, custody and control located in or on the building described in the Declarations

. . . .

The causes of loss—special form as shown in the declarations and referred to above provides the following relevant exclusion for the commercial property coverage part:

B. EXCLUSIONS

. . . .

2. We will not pay for loss or damage caused by or resulting from any of the following:

. . . .

1. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss." But if loss or damage by the "specified causes of loss" results, we will pay for the resulting damage caused by the "specified causes of loss."

The policy defines "Specified Causes of Loss" as "Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire

extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage."

Becker and Cincinnati both moved for summary judgment in the district court. The district court found that the insurance policy in question contained an absolute pollution exclusion which, as a matter of law, was not ambiguous and should be construed under its plain meaning. The district court also found that the xylene fumes emitted in Becker's warehouse constituted a pollutant within the meaning of the policy, creating damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants. Further, the court determined that damage to Swank's and Armour's property in the care, custody, and control of Becker was excluded from coverage by the pollution exclusion in the policy. Therefore, the district court concluded that Becker's damages were excluded from coverage under the insurance policy and that Cincinnati had no duty to defend. The district court sustained Cincinnati's motion for summary judgment and denied Becker's motion for summary judgment. Becker appealed, and we moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts.

ASSIGNMENTS OF ERROR

Becker assigns, restated, that the district court erred in (1) finding that the pollution exclusion contained in the insurance policy issued by Cincinnati is not ambiguous; (2) finding that the pollution exclusion applied to the claims filed against Becker and not just to environmental claims; (3) finding that xylene was a pollutant within the language of the policy; (4) finding that the chemicals contained in the floor sealant were "discharged, dispersed, migrated or released"; (5) finding that the conflicting provisions regarding the "care, custody and control" provision in the policy were not ambiguous; (6) finding that the claims against Becker are excluded by the "care, custody and control" provision contained in the policy; and (7) sustaining Cincinnati's motion for summary judgment and overruling Becker's motion for summary judgment. Additionally, Becker argues that the district court did not have

subject matter jurisdiction over Cincinnati's petition for declaratory judgment.

STANDARD OF REVIEW

[1] The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000).

ANALYSIS

SUBJECT MATTER JURISDICTION

[2,3] First, we must determine if the district court had subject matter jurisdiction over Cincinnati's declaratory judgment action. The absence of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). Becker argues that because Swank's and Armour's lawsuits against Becker have not yet established that their products were contaminated by the xylene used in Becker's warehouse, the district court did not have jurisdiction over the declaratory judgment action filed by Cincinnati. A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain. *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998).

Becker, citing *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981), asserts that an insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. In *Novak*, the insured sought defense from his insurance company for assault and battery allegations brought against him. The insurance policy in *Novak* excluded coverage for bodily injury that the insured either expected or intended, such as intentional torts like assault and battery. Bodily injury, however, was clearly covered by the policy in *Novak*, and the pending case against the insured would have determined whether or not the injury was intentional. Thus, this court found that until the facts were resolved, we could not determine the insurance company's obligation to pay and could not, therefore, grant a declaratory judgment on that question. *Id.*

[4] Here, however, the duty to defend is bound up in whether or not Cincinnati's policy covers Becker's potential damages. In *Novak, supra*, the insured's damages were covered if his acts were not intentional. But here, Becker is arguing only that Cincinnati's policy is ambiguous. Whether the language in an insurance policy is ambiguous presents a question of law. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). *Novak, supra*, turned on facts; this case turns on law. If Cincinnati's policy does not provide coverage for Becker's damages in the Kure-N-Seal incident, there is no duty for Cincinnati to provide a defense for Becker in the pending lawsuits. Therefore, the district court had subject matter jurisdiction over the declaratory judgment, and we proceed to consider the substantive issues in this appeal.

POLLUTION EXCLUSION

Becker alleges that the pollution exclusion contained in Cincinnati's policy is ambiguous. In support of this claim, Becker argues that (1) the pollution exclusion applies to only traditional environmental pollution claims and (2) applying the pollution exclusion to the claims against Becker violates Becker's reasonable expectations as an insured. The question of the ambiguity of this type of pollution exclusion is an issue of first impression in Nebraska. State and federal courts are split on whether an insurance policy's absolute pollution exclusion bars coverage for all injuries caused by pollutants or whether it applies only to injuries caused by traditional environmental pollution. A majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for all claims alleging damage caused by pollutants. See, *Nat'l Elect. Mfrs. v. Gulf Underwriters Ins.*, 162 F.3d 821 (4th Cir. 1998) (applying D.C. law); *Technical Coating v. U.S. Fidelity & Guaranty*, 157 F.3d 843 (11th Cir. 1998) (applying Florida law); *Certain Underwriters at Lloyd's v. C.A. Turner Const.*, 112 F.3d 184 (5th Cir. 1997) (applying Texas law); *American States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) (applying Mississippi law); *Brown v. American Motorists Ins. Co.*, 930 F. Supp. 207 (E.D. Pa. 1996); *City of Salina, Kan. v. Maryland Cas. Co.*, 856 F.

Supp. 1467 (D. Kan. 1994); *Madison Const. v. Harleysville Mut. Ins.*, 557 Pa. 595, 735 A.2d 100 (1999); *Deni Associates v. State Farm Ins.*, 711 So. 2d 1135 (Fla. 1998); *Truitt Oil &c. v. Ranger Ins. Co.*, 231 Ga. App. 89, 498 S.E.2d 572 (1998); *City of Bremerton v. Harbor Ins. Co.*, 92 Wash. App. 17, 963 P.2d 194 (1998); *Terramatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997).

Becker, however, argues that the pollution exclusion is ambiguous and should be applied to only environmental pollution claims. In support of his argument, Becker refers us to authority in a number of other jurisdictions. Representative of the cases upon which Becker relies is *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997), wherein the Illinois Supreme Court found that a similar pollution exclusion excluded coverage for only traditional environmental damages. The *Koloms* court based its reasoning on the evolution and purpose of the pollution exclusion rather than on a plain reading of the exclusion. The court in *Koloms* acknowledged that

> [a] close examination of this [pollution exclusion] language reveals that the exclusion (i) identifies the types of injury-producing materials which constitute a pollutant . . . (ii) sets forth the physical or elemental states in which the materials may be said to exist . . . and (iii) specifies the various means by which the materials can be disseminated . . . . To that extent, therefore, the exclusion is indeed "quite specific," and those courts wishing to focus exclusively on the bare language of the exclusion will have no difficulty in concluding that it is also unambiguous.

177 Ill. 2d at 487, 687 N.E.2d at 79, 227 Ill. Dec. at 156. Despite the plain meaning of the policy language, the court held:

> Our review of the history of the pollution exclusion amply demonstrates that the predominate motivation in drafting an exclusion for pollution-related injuries was the avoidance of the "enormous expense and exposure resulting from the 'explosion' of *environmental* litigation." . . . We would be remiss, therefore, if we were to simply look at the bare words of the exclusion, ignore its *raison d'être*, and apply it to situations which do not remotely resemble traditional environmental contamination. The pollution

> exclusion has been, and should continue to be, the appropriate means of avoiding " 'the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment.*' " . . . We think it improper to extend the exclusion beyond that arena.

(Emphasis in original.) *Id.* at 492-93, 687 N.E.2d at 81, 227 Ill. Dec. at 158.

[5,6] We, however, find it unnecessary and inappropriate to look beyond the "bare words of the exclusion" as the court in *Koloms* did. The pollution exclusion in Cincinnati's CGL policy reads, in pertinent part:

> **f. Pollutant**
>
> **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> **(a)** At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.
>
> . . . .
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. Pollutants include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment.

Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). Appellate review of an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made. Where the terms of an insurance contract are clear, they are to be accorded their plain and ordinary meaning. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001).

[7] We conclude that as a matter of law, Cincinnati's pollution exclusion, though quite broad, is unambiguous. The language of the policy does not specifically limit excluded claims to

traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage. The definition of "pollutant" in Cincinnati's CGL policy includes substances that are "harmful or toxic to persons, property or the environment." By including "the environment" as a separate entity that could suffer harm from a pollutant, the pollution exclusion does not limit its scope of application to environmental pollution. An occurrence such as the release of xylene fumes in Becker's warehouse clearly falls under Cincinnati's broad exclusion—to find otherwise would read meaning into the policy that is not plainly there. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Austin v. State Farm Mut. Auto. Ins. Co., supra*; *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999).

Other courts, as cited above, have found pollution exclusions to be unambiguous as a matter of law. The 11th Circuit, applying Florida law, held that "absolute pollution exclusions contained in the policies issued by [the insurer] unambiguously excluded coverage for bodily injuries sustained by breathing vapors emitted from [the insured's] roofing products, regardless of whether [the insured] used the products properly or negligently." *Technical Coating v. U.S. Fidelity & Guaranty*, 157 F.3d 843, 846 (11th Cir. 1998). The court in *Brown v. American Motorists Ins. Co.*, 930 F. Supp. 207, 209 (E.D. Pa. 1996), stated:

> The best manifestation of the intent of the parties is the clear and unambiguous language of the policy. . . . Plaintiffs have not identified any ambiguity in the language . . . and none is apparent to the Court. . . . Accordingly, the Court declines to look to, or speculate on, the intent of the parties in an attempt to avoid the plain meaning of policy language.

(Citations omitted.) In *Brown, supra*, as in the instant case, there were no specific instances of ambiguous language identified by the insurance claimant, but instead a mere allegation of ambiguity, which is not enough to sustain a conclusion of ambiguity under Nebraska's insurance policy interpretation laws. The broad nature of the pollution exclusion may cause a commercial client to question the value of portions of its commercial general

liability policy, but, as an appellate court reviewing terms of an insurance contract, we cannot say that the language of the pollution exclusion is ambiguous in any way. The language in the instant pollution exclusion is clear and susceptible of only one possible interpretation.

[8] Becker argues that the absolute pollution exclusion violates its reasonable expectations as an insured. Under Nebraska law, however, the reasonable expectations of an insured are not assessed unless the language of the insurance policy is found to be ambiguous. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). As stated above, the terms of Cincinnati's insurance policy are clear; therefore, the policy is not subject to further interpretation or construction beyond its plain and ordinary meaning. Becker's reasonable expectations are not taken into consideration in light of an unambiguous policy to which it has agreed. Cincinnati's pollution exclusion, though quite broad, is not ambiguous.

Xylene as Pollutant

The district court found that xylene qualified as a pollutant within the definition of the Cincinnati insurance policy issued to Becker. Becker argues that based on an identical definition of "pollutant" used by an insurance policy in *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), *overruled on other grounds, Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000), the xylene in Kure-N-Seal does not constitute a "pollutant" under the Cincinnati policy. In that case, Tufco Flooring East, a floor resurfacing company, sought indemnification and defense from West American Insurance for its alleged contamination of chicken products of Perdue Farms, Inc., with styrene, a resurfacing chemical. The court found that under West American's insurance policy, styrene was not a "pollutant" under the pollution exclusion clause, because

> Tufco did not bring the *vapors* or *fumes* which invaded the chicken to the Perdue plant. Rather, Tufco brought an

> unadulterated, pure raw material, styrene monomer resin . . . . When this raw material was brought onto the site, it was neither an "irritant or contaminant." It was a raw material used by Tufco in its normal business activity of resurfacing floors. Yet, to be a "pollutant" under the exclusion, a substance brought onto the site must be precisely that, an "irritant or contaminant."

(Emphasis in original.) *Id.* at 322, 409 S.E.2d at 698.

Becker claims that because Stoetzel & Son brought xylene into the warehouse as pure, unadulterated material to be used in the business activity of resurfacing floors, xylene is not a "pollutant" within the definition of the Cincinnati policy or the holding in *Tufco Flooring East, supra.* Becker also points out that while the food products stored in its warehouse may have been damaged, they were not "polluted," i.e., made toxic from the xylene fumes. Brief for appellant at 31.

We conclude, however, that xylene is indeed a pollutant under the meaning of the Cincinnati insurance policy. The policy defines a pollutant as "any solid, liquid, gaseous or thermal irritant or contaminant," including but not limited to "substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment." The federal Clean Air Act, § 7412(b), lists xylene as a hazardous air pollutant. Merely because the substance is in a different form in the instant case—fumes instead of liquid—does not render xylene a nonpollutant. See, e.g., *American States Ins. Co. v. Technical Surfacing*, 50 F. Supp. 2d 888 (D. Minn. 1999).

Cincinnati urges that in addition to being defined as a pollutant under the federal Clean Air Act, xylene qualifies as a pollutant under the insurance policy because it contaminated the food products in the warehouse. As noted earlier, the Kure-N-Seal label clearly warns that food products should be removed from the area where the sealant is applied until the vapors dissipate. The label also states that the solvent vapors can be "irritating" to those not accustomed to them, which places xylene squarely within the insurance policy's definition of "pollutant" as a "contaminant or irritant." We, therefore, conclude as a matter of law that xylene is a pollutant within the definition of Cincinnati's policy.

DISCHARGE, DISPERSAL, MIGRATION, OR RELEASE

The district court found that the Kure-N-Seal fumes were "discharged, dispersed, migrated or released" in Becker's warehouse, therefore excluding from Cincinnati's insurance policy coverage the alleged damage they caused. Becker argues that within the broader argument regarding the pollution exclusion's ambiguity, the "discharged, dispersed, migrated or released" language further indicates that the pollution exclusion applies to only environmental pollution. *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997), and *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), both found that language similar to the language in Cincinnati's policy indicates that a discharge into the environment is necessary for the pollution exclusion to be applicable.

> The operative policy terms of the pollution exclusion clause imply that there must be a discharge into the environment before coverage can be properly denied. . . . While they are not defined in the policy, the terms "discharge" and "release" are terms of art in environmental law and include "escape" by definition and "dispersal" by concept.

Tufco Flooring East, 104 N.C. App. at 324, 409 S.E.2d at 699. Becker also cites the Sixth Circuit's holding that "the total pollution exclusion clause at bar does not shield the insurer from liability for injuries caused by toxic substances that are still confined within the general area of their intended use." *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1184 (6th Cir. 1999).

Cincinnati also cites the above quotation from *Kellman, supra*, emphasizing the words "confined within the general area of their intended use" to distinguish the issue in the instant case from *Kellman*. Cincinnati argues that, unlike *Kellman*, 197 F.3d at 1185, "where the injured third party was in the immediate vicinity of the harmful product" and was "harmed . . . within a few feet of the area of [the product's] intended use," the Kure-N-Seal fumes in Becker's warehouse were not confined within the general area of their intended use and, allegedly, harmed products outside the immediate vicinity of use. As noted earlier, Stoetzel & Son applied Kure-N-Seal to the floor of the addition

to Becker's warehouse, not to the immediate area or vicinity where the food products were stored. The treated area was separated from the food storage area with layers of heavy plastic sheeting. Cincinnati claims, and we agree, that the only logical explanation for the alleged damage is that the Kure-N-Seal fumes "discharged, dispersed, released or escaped" from the warehouse addition into the original part of the warehouse where food products were stored.

Care, Custody, and Control

Finally, Becker assigns that the district court erred in finding (1) that the "care, custody and control" exclusion in Cincinnati's policy is unambiguous and (2) that claims against Becker are excluded by the "care, custody and control" exclusion.

Cincinnati's policy contains two coverage segments, the CGL coverage form and the commercial property coverage part. While the CGL coverage form excludes property in the "care, custody and control" of the insured from coverage, the commercial property coverage part, with its building and personal property coverage form, covers property in the "care, custody and control" of the insured. This is not ambiguous, but instead applies to separate aspects of Becker's insurance coverage—the CGL covers liability, and the commercial property coverage refers to Becker's buildings and personal property.

The "care, custody and control" exclusion in the CGL coverage form clearly excludes Becker's damages from coverage. The "care, custody, and control" provision in the commercial property coverage part provides coverage, but subject to the causes of loss—special form. The causes of loss form specifically excludes coverage for "discharge, dispersal, seepage, migration, release or escape of 'pollutants' unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the 'specified causes of loss.' " None of the specified causes of loss, which refer primarily to weather- or nature-related damage, apply to Becker's situation.

Because we have determined that the alleged xylene contamination constitutes pollution, the pollution exclusion in the commercial property coverage part precludes coverage under the "care, custody and control" provision.

CONCLUSION

Having considered each of Becker's assignments of error, and finding them to be without merit, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLANT, V.
CRAIG J. HAMIK, APPELLEE.

635 N.W.2d 123

Filed November 2, 2001. No. S-00-787.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Sentences: Probation and Parole: Appeal and Error.** When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.
3. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
4. **Statutes: Intent: Appeal and Error.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute.
5. **Statutes.** 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.
6. **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.
7. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
8. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
9. **Sentences.** The sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Sentence vacated, and cause remanded for resentencing.

Andrew J. McMullen, Buffalo County Attorney, Melodie Turner Bellamy, and Melanie Young for appellant.

Clarence E. Mock and Michael J. Tasset, of Johnson and Mock, for appellee.

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

STEPHAN, J.

Following a jury trial in the district court for Buffalo County, Craig J. Hamik was convicted of first degree sexual assault, a Class II felony, and sentenced to 5 years' probation to be served consecutively to a sentence of incarceration imposed in another case. Pursuant to Neb. Rev. Stat. § 29-2320 (Reissue 1995), the State has appealed on grounds that the sentence is excessively lenient, both factually and as a matter of law. We moved the case to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). The issues presented for our review are whether the district court was prohibited by Neb. Rev. Stat. § 28-105(4) (Reissue 1995) from placing Hamik on probation and, if not, whether the sentence imposed was excessively lenient.

BACKGROUND

Hamik was charged with first degree sexual assault in violation of Neb. Rev. Stat. § 28-319(1) (Reissue 1995). At trial, a female under the age of 16 testified that Hamik, who had been her neighbor, touched and digitally penetrated her on multiple occasions while she was present in his home for the purpose of playing with his children. Hamik testified in his own defense and denied that he ever touched the girl. The jury returned a verdict of guilty, upon which the district court entered a judgment of conviction on May 9, 2000.

In June 1999, prior to the trial of this case, Hamik was charged with two counts of sexual assault of a child in violation

of Neb. Rev. Stat. § 28-320.01 (Reissue 1995), a Class IV felony. He initially entered pleas of not guilty to both counts. At a hearing on July 17, 2000, Hamik entered a guilty plea to one of these counts as part of a plea agreement. In return for the plea, the State agreed to dismiss the other pending count and to recommend that any sentence imposed for the Class IV felony be concurrent with the sentence to be imposed in this case. The district court accepted the plea and entered a judgment of conviction on the Class IV felony. With the agreement of the parties, the district court then conducted a sentencing hearing and imposed sentences in both cases. Because it is central to the issues presented in this appeal, we quote verbatim the reasoning of the district judge from the record of the sentencing hearing:

> Mr. Hamik, the duty of the Court at this time is to impose a sentence as to each of these particular matters. And frankly the status of this particular case does create a great deal of problems for the Court as well as it has for the State, yourself, and the victims. There is nothing that this Court can do that is going to make everything perfect for everybody in this case. There's certainly no way no matter how much we wish we could that we can bring closure of this incident, that we can bring peace of mind, that we can return the victims and their families to normalcy. That is not possible. The effect of what has occurred will bother those persons and those families for a great number of years to come the same as it will be a destructive influence and bothersome to your own family and the people within it.
>
> Mr. Mock has pointed out that the Legislature envisioned offenses that had a great latitude in punishment because the nature and the type of the offenses that are involved have a great latitude in the degree of violence and the degree of harm that is occasioned. Whenever the Legislature basically says that the Court has a period of 1 to 50 years to play with in sentencing an individual, the suggestion is that some cases are right for one-year sentence and some cases are for 50 and many cases are for in between. And it's the discretion of the Court to try to find the right place to put each individual case.

One of the things that we do not do in sentencing in this country is to sentence an individual on a peremptory basis. That is, a sentence that is going to stop you from committing a crime in the future. That is certainly antagonistic to our system of justice that thinks that people ought to commit the crimes before they're punished for them.

Mr. Mock also pointed out that there was quite a bit of information contained in the presentence report that he hoped that the Court would not pay attention to. It's sad because I pay attention to that information, especially the information that relates to activities by other people in your family which seem to be at best harassing and irritating toward the victim and her family. I pay attention to it not because it in any way affects you because you're not doing those things. It doesn't — I don't pay attention to it because you should receive [a] more harsher penalty because of what has occurred. I pay attention to it because I think better of the people in this community than they may have in this particular way.

I also note, Mr. Hamik, that there is a difference in your case than some of the other cases that we see. First of all, I'm not so sure that these are necessarily better moments, but they are different.

My opinion from the evidence that we've heard and what we've seen in this case is that you are a predator and you prey upon the trust of young girls, and that this is something that has happened in the past and you've either put them in a position of tolerating the advances because they're having fun driving the car or you put them in a position where they have a great deal of trust and affection and you take advantage of their inability to know how to properly express themselves. None of that is forgiven because you are the adult, they are the children. Our laws in this state are designed to protect the children and to put an affirmative obligation on each and every one of us to protect the children of the community. And when we violate that obligation, we violate that trust, this is where we end up.

You are not out actively soliciting and trying to ensnare these people. You sort of wait until they're almost prover-

bally [sic] dropped in your lap. As I said, it may not make it better but there is a difference in the type of person that is actively soliciting and trying to find the victims. Yours is the type of situation that should well be put in check. If there's any validity whatsoever to our Sex Offender Registration Act because the community will know — anyone who doesn't know you will know that they may not wish to trust you with the well being of their children.

Ms. Young has suggested that the Court sentence you to what would be effectively a period of ten years of incarceration. I will tell you that if I sentenced [you] to ten years of incarceration, you would be out free from your commitments within five years. You will have spent that five years accomplishing little if anything through the auspices of the State of Nebraska Department of Corrections. Partially because their program is difficult to get into, it's questionably effective. More importantly as you stand at this point, I don't see an attitude on your part that suggests that you think it's necessary to make changes in yourself in your life. I will suggest to you from what I have seen in the court I have sat through the trial and what I have read, that you do need to reevaluate yourself, you do need to reevaluate your personality, you do need to reevaluate your relationship to other people and you do need to bring your life under control. And no matter how many people love you in your family, the fact that they will not say that to you does not mean that it doesn't need to be done.

Mr. Hamik, the offenses that occurred on the scale of sexual assault offenses and I say this with a great deal of reluctance because it doesn't sound real good is not as great as other people who are in this court. The pain, the hurt, the long-term psychological damage, that has been occasioned may well be just as great to the victims and their families as any forcible rape could ever be.

My read of this particular situation is absent the opportunity, the likelihood of your reoffending is not great.

The best way for the Court to control your opportunity is two-fold.

One, there has to be some serious period of incarceration that tells you and other persons that this type of behavior is not acceptable.

Second of all, we need to be able to maintain control over your behaviors and try to get you to reevaluate your position in yourself in the future. The best way I can do that is by not complying with the request for concurrent sentence.

Mr. Hamik, in case CR 99-76 which is the conviction for the Class IV felony, the Court in this matter is going to assess the costs of the prosecution against you, and I'm going to sentence you to a period of incarceration and commitment to the State of Nebraska Department of Corrections for not less than 20 months nor more than 5 years.

Mr. Hamik, that is the maximum sentence that I can impose on that particular offense. I will advise you that you will be parole eligible in approximately ten months. That does not mean that you will receive parole. It means that if you earn the good time and the other time credits that are available, that you will be considered for parole if the Department of Parole believes that you are an appropriate person to be released back on to the streets at that time.

In case CR 99-7[5] which is the conviction for the Class II felony, Mr. Hamik, this is obviously the most serious of the events. It's going to be strange because I'm going to give you the lesser of the sentences in this particular case. The lesser as it affects us today. The greater the potential of sentence for tomorrow. I'm going to place you on a concurrent probation — I'm sorry, a consecutive sentence of probation consecutive to the prior order that has been entered by the Court. This sentence of probationary status will commence upon your release on parole or upon institutional discharge from the State of Nebraska Department of Corrections. I'm going to place you under probationary supervision for a period of five years which is the maximum possible time that I can place you on a probationary supervision as allowed by statutes.

I will require that you comply with the standard and traditional terms and conditions of probation that will be

placed on your probation order. Those will include such things as reporting to the probation officer when required, maintaining suitable employment or career situation, doing the — abiding by all of the terms and conditions of probation including not being involved in any and I stress the word "any law violations in the future." A violation of the probation will lead to you being brought back to be resentenced under the 1-to-50 year program.

As additional conditions of that probation, I am going to require that you have no direct or indirect contact with the alleged victim in this particular case. That means you are to neither see, talk to, or have other persons communicate with that victim or her immediate family.

I will also require that you pay the court costs that are involved in this.

I'm going to require that you participate in and complete an appropriate psychological evaluation, and I'm also going to require that as a result of that evaluation that you participate in any counseling that it is determined necessary and appropriate by the probation officer after conferring with counsel. Pursuant to any term or condition of future counseling, you may petition the Court for review and clarification.

Mr. Hamik, the purpose of this is to motivate you and convince you you've got to change and understand that the penitentiary is where you're headed in the future for long periods of time unless your attitude and your behaviors change. It is also designed to give you an opportunity to make those changes and afford the maximum amount of protection that we can to the victim. I hope you use this as an opportunity and not as an escape, an — an opportunity — there's a future for yourself, there's a future for your family, and I hope and pray there's a future for the victim and her family.

ASSIGNMENTS OF ERROR

The State argues, restated, (1) that Hamik was ineligible for probation under § 28-105(4) and (2) that in any event, a sentence of probation was excessively lenient in this case.

STANDARD OF REVIEW

[1,2] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

ANALYSIS

Eligibility for Probation

All crimes in Nebraska are statutory in nature. *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). Sentences imposed upon persons convicted of a crime are also statutory. *Id.* Thus, in order to resolve the question of whether Hamik was eligible to be sentenced to probation on his Class II felony conviction, it is necessary to examine those Nebraska statutes pertaining to criminal penalties and eligibility for probation. The starting point for our analysis is § 28-105, which provides in pertinent part:

> (1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into eight classes which are distinguished from one another by the following penalties which are authorized upon conviction:
>
> Class I felony . . . Death
> Class IA felony . . . Life imprisonment
> Class IB felony . . . Maximum-life imprisonment
> Minimum-twenty years imprisonment
> Class IC felony . . . Maximum-fifty years imprisonment
> Mandatory minimum-five years imprisonment
> Class ID felony . . . Maximum-fifty years imprisonment
> Mandatory minimum-three years imprisonment
> Class II felony . . . Maximum-fifty years imprisonment
> Minimum-one year imprisonment

Class III felony . . . Maximum-twenty years imprisonment, or twenty-five thousand dollars fine, or both
Minimum-one year imprisonment
Class IV felony . . . Maximum-five years imprisonment, or ten thousand dollars fine, or both
Minimum-none

. . . .

(4) A person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation.

Also pertinent to our analysis is Neb. Rev. Stat. § 29-2260(2) (Reissue 1995), which provides in part:

> Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility[.]

[3-5] The State contends that § 28-105(1) imposes a mandatory minimum term of incarceration for persons convicted of a Class II felony and that Hamik is therefore ineligible for probation under § 28-105(4). This presents an issue of statutory interpretation, which we must resolve in accordance with long-established principles. A fundamental principle of statutory construction requires that penal statutes be strictly construed. *State v. Hochstein and Anderson, ante* p. 311, 632 N.W.2d 273 (2001); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the

province of the court to read anything plain, direct, and unambiguous out of the statute. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). Likewise, 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, 587 N.W.2d 122 (1998).

[6] 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. *State v. Hochstein and Anderson, supra*; *State v. Seberger*, 257 Neb. 747, 601 N.W.2d 229 (1999).

As is readily apparent from the plain language of § 28-105(1), the Legislature utilized different language in specifying the lower limit of a term of incarceration for specific felony classifications. For Class IC and Class ID felonies, the statute prescribes a "[m]andatory minimum" term. For other classifications, including Class IB, Class II, and Class III felonies, the statute prescribes a "[m]inimum" term of incarceration. Section 28-105(4) provides that a person convicted of a felony for which a "mandatory minimum" sentence is prescribed shall not be eligible for probation. However, neither this nor any other statute states that a person such as Hamik who is convicted of a felony for which a "minimum" sentence is prescribed is ineligible for parole. Equating a "minimum" sentence with a "mandatory minimum" sentence, as the State urges, would require that we regard the Legislature's use of the word "mandatory" to be superfluous, contrary to our established principles of statutory construction.

The State argues that the statutory structure for classifying penalties for felonies is incongruous if we do not read the term "minimum" as "mandatory minimum," because then, persons convicted of relatively less serious offenses would require a mandatory minimum sentence without the option of probation, while those convicted of more serious offenses could be sentenced to probation without any incarceration. If any such incongruity exists, it is wholly within the province of the Legislature

to resolve as a matter of policy. Accordingly, we conclude that the State's first assignment of error is without merit.

CLAIM OF EXCESSIVE LENIENCY

[7,8] Alternatively, the State argues that even if a sentence of probation could lawfully be imposed for a Class II felony, its imposition on the facts of this case resulted in an excessively lenient sentence. Pursuant to § 29-2320, the State may appeal a sentence imposed following a finding or plea of guilty "if such [county] attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient." Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison, supra*.

Having concluded that probation was a legally permissible sentence in this case, we turn to the question of whether the sentence was excessively lenient under the facts reflected in the record. Neb. Rev. Stat. § 29-2322 (Reissue 1995) provides that where the State challenges a sentence as excessively lenient, the appellate court should consider:

(1) The nature and circumstances of the offense;

(2) The history and characteristics of the defendant;

(3) The need for the sentence imposed:

(a) To afford adequate deterrence to criminal conduct;

(b) To protect the public from further crimes of the defendant;

(c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the appellate court deems pertinent.

In *State v. Harrison, supra*, we recognized that where the sentence alleged to be excessively lenient is one of probation, it is also necessary for the trial court and the reviewing appellate court to consider the provisions of § 29-2260, which states in relevant part:

> [T]he court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;
>
> (d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;
>
> (e) The victim of the crime induced or facilitated commission of the crime;
>
> (f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;
>
> (g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

In *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), a case concerning the prosecution for motor vehicle homicide involving a driver impaired by alcohol, we determined that there was competent evidence received at the sentencing hearing which supported the sentence of probation. This evidence included a statement by the defendant expressing deep remorse for her conduct and a promise to maintain sobriety in the future; letters from members of the community attesting to the defendant's sincere attempts to rehabilitate herself; and, of particular importance to the sentencing judge, a letter from relatives of the two victims expressing their opinion that the defendant's remorse and efforts at rehabilitation were genuine. We noted that this evidence established that the defendant was unlikely to commit another crime, that she was likely to respond affirmatively to probationary treatment, and that imprisonment would entail excessive hardship to her children.

In this case, the district court reasoned that consecutive sentences of 20 months' to 5 years' imprisonment on the Class IV felony and 5 years' probation on the Class II felony would result in Hamik's being subject to the State's supervision for a longer period than under the concurrent sentences of incarceration proposed by the State, thus providing Hamik with a better opportunity to alter his attitude and behaviors. While this rationale seems reasonable on its face, it does not square with the record. Hamik did not offer evidence or personally address the court at the sentencing hearing. Unlike the defendant in *Harrison*, he did not acknowledge his criminal conduct or express any remorse. Indeed, during the sentencing hearing, the district court specifically noted that it could not discern in Hamik's attitude any appreciation of a need to make changes in his life. Although the court characterized Hamik as a "predator" who "prey[s] upon

the trust of young girls," it concluded that "absent the opportunity, the likelihood of your reoffending is not great." This conclusion is not supported by the presentence investigation report (PSI) which describes several instances of aggressive and violent conduct on the part of Hamik. For example, the PSI indicates that in October 1999, Hamik instituted an altercation with another individual while both were in a post office, and then said to the individual, "You better watch your kids, I'm going to get them, they're mine."

In reviewing the record, we find none of the grounds favoring probation which are enumerated in § 29-2260(3). Regarding § 29-2260(3)(a) and (b), the crime clearly caused serious psychological harm to the victim. The victim's counselor diagnosed her as suffering from significant trauma from the abuse and stated that she would be "at high risk for needing additional psychological services periodically throughout her lifetime." There is no claim or evidence to suggest that Hamik did not contemplate that his conduct would cause such harm. With respect to § 29-2260(c) through (f), there is no evidence that Hamik acted "under strong provocation" or under circumstances tending to excuse or justify his conduct; or that the victim, who because of her age was incapable of consent, "induced or facilitated commission of the crime." With respect to § 29-2260(f), the PSI reflects that the victim's parents incurred unreimbursed expenses for her counseling and medical services. The PSI reflects that Hamik was convicted of third degree assault in 1986, as well as the conviction on one count of first degree sexual assault on a child for which he was sentenced contemporaneously with the sentence here under review. As noted above, the record does not support a conclusion that the "crime was the result of circumstances unlikely to recur"; that Hamik's "character and attitudes" make him unlikely to reoffend; or that he is likely to "respond affirmatively to probationary treatment." See § 29-2260(h), (i), and (j). Finally, the record does not support a finding that imprisonment would constitute "excessive hardship" to Hamik's dependents within the meaning of § 29-2260(k).

[9] As we stated in *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), the sentencing court is not limited in its discretion to any mathematically applied set of factors. The

appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*; *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993). However, there must be some reasonable factual basis for imposing a particular sentence. Here, while we believe that the trial court was attempting in good faith to fashion a sentence which would both punish Hamik and afford him an opportunity to rehabilitate himself, the record simply does not reflect statutory or other grounds for the imposition of probation. Accordingly, we determine that the sentence constituted an abuse of discretion.

CONCLUSION

For the reasons stated, we conclude that a sentence of probation in this case was legally permissible but excessively lenient. Accordingly, pursuant to Neb. Rev. Stat. § 29-2323(1)(a) (Reissue 1995), we vacate the sentence of probation and remand the cause to the district court with directions to impose a greater sentence.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

IN RE ADOPTION OF BABY GIRL H.
K.D.G. AND T.S.G., APPELLEES, V. LUKE ARMOUR, APPELLANT.

635 N.W.2d 256

Filed November 2, 2001. No. S-00-1104.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court.
2. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
3. **Constitutional Law: Parent and Child.** State intervention in a parent-child relationship is subject to constitutional oversight.
4. **Constitutional Law: Parent and Child: Due Process.** An established familial relationship is a liberty interest entitled to substantial due process protection, but the mere existence of a biological link does not merit equivalent constitutional protection.

5. **Constitutional Law: Parent and Child: Adoption: Notice.** When a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and opportunity to be heard before a child may be adopted.
6. **Due Process.** Substantive due process concerns the content of the statute specifying when a right can be lost or impaired.
7. **Constitutional Law: Due Process.** The 14th Amendment forbids the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.
8. **Statutes: Due Process.** The 30-day filing requirement of Neb. Rev. Stat. § 43-104.05 (Reissue 1998) does not facially violate substantive due process.
9. **Equal Protection.** Under principles of equal protection, the government may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest.
10. **Equal Protection: Adoption: Statutes.** The adoption statutes do not facially violate equal protection.
11. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
12. **Constitutional Law: Parent and Child: Notice: Statutes.** Neb. Rev. Stat. § 43-104.13 (Reissue 1998) is facially constitutional.
13. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties.

Appeal from the County Court for Gosper County: CARLTON E. CLARK, Judge. Affirmed.

Michael J. Synek for appellant.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellees.

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

CONNOLLY, J.

Neb. Rev. Stat. § 43-104.05 (Reissue 1998) requires a putative father to file a petition for adjudication of paternity in county court within 30 days of filing a notice of intent to claim paternity in order to preserve his rights to notice of adoption proceedings. See *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000). Appellant, Luke Armour, the putative father of Baby Girl H., filed a petition for adjudication of paternity in the

district court, which was the wrong court. The district court dismissed the petition for lack of jurisdiction. In the present adoption proceedings, the county court determined that because Armour filed in the wrong court, he had not complied with the provisions of § 43-104.05. As a result, the court determined Armour was not entitled to further notice in adoption proceedings involving the child.

On appeal, Armour argues that the application of the adoption statutes to his case violate his rights to due process and equal protection and that the statutes are facially unconstitutional. We determine that the statutes at issue are constitutional and did not deprive Armour of his constitutional rights as applied. We affirm.

BACKGROUND

On August 3, 1998, Armour received a letter by registered mail from a counselor at Lutheran Family Services. The letter stated that L.H., a person with whom Armour had been sexually active, had given birth to a child on July 22, 1998, and was planning to relinquish the child for adoption. The letter advised that Armour had been identified as a possible biological father and informed Armour that he could: "a. Deny paternity; b. Waive any paternal rights [Armour] may have; c. Join in the relinquishment and consent to adoption; or d. File a notice of intent to claim paternity and obtain custody of the child." The letter advised Armour that if he wished to establish his rights as the biological father, he must file a notice with the biological father registry maintained at the Nebraska Department of Health and Human Services within 5 days of receipt of the letter. The letter further advised Armour that if he wished to pursue custody of the child, he should seek counsel from an attorney immediately. At the time Armour received the letter, he was an unemancipated minor and was living with his parents.

Armour filled out a form entitled "Notice of Intent to Claim Paternity and Obtain Custody," in which he stated his intention to obtain custody of the child. He further acknowledged his liability for contribution to support the child and pay for pregnancy-related expenses of the mother. The form was faxed to the appropriate department on August 4, 1998. A portion of the notice stated:

> I understand that if a petition is not filed in the county court in the county of residence of said child for an adjudication of my claim of paternity and right to custody within thirty (30) days after the filing of this notice, my consent to the adoption of said child shall not be required and any alleged parental rights of mine shall not be recognized thereafter in any court.

Armour hired legal counsel, and on August 21, 1998, a petition for determination of paternity and custody was filed in district court. The petition named L.H. as a party and stated that it was filed according to § 43-104.05. K.D.G. and T.S.G. sought to intervene as the prospective adoptive parents. On September 22, L.H. filed a demurrer on the basis that the district court lacked subject-matter jurisdiction, and Armour later filed a motion for visitation pending final hearing.

Without ruling on the petition in intervention or motion for visitation, the district court entered an order dismissing the petition for lack of jurisdiction. We dismissed Armour's appeal, holding that the procedure for adjudicating paternity under § 43-104.05 falls within the exclusive jurisdiction of the county court, or in certain circumstances, the separate juvenile court. *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000). On June 23, 2000, the district court dismissed the petition pursuant to the mandate.

On July 17, 2000, K.D.G. and T.S.G. filed a petition for adoption in the county court. The petition asserted that Armour had been given proper notice of his rights and that he had failed to file a petition for an adjudication of paternity within 30 days of filing notice of intent to claim paternity with the Department of Health and Human Services as required by § 43-104.05. The record shows that Armour was served with a copy of the petition.

K.D.G. and T.S.G. also filed a motion seeking a determination that Armour's consent to the adoption was not required and that he was not entitled to further notice in the proceedings. Armour appeared without counsel and requested a continuance because the attorney he had planned to hire had a conflict of interest. The county court ruled in favor of K.D.G. and T.S.G., but later granted Armour's motion for a rehearing.

At the hearing, Armour testified that L.H. informed him of her pregnancy when she called him in June or July 1998, shortly

before she gave birth. Armour contended that because he was a minor, he received insufficient notice of his rights from Lutheran Family Services. Armour also argued that any action to preclude him from receiving notice of, and participating in, the adoption proceedings would deprive him of procedural and substantive due process under the U.S. and Nebraska Constitutions. Armour then argued that the statutory scheme at issue was unconstitutional.

On September 19, 2000, the county court determined that Armour did not properly file a petition for adjudication of paternity in accordance with § 43-104.05 and was not entitled to any further notice in the adoption proceedings. On September 21, K.D.G. and T.S.G. adopted the child. Armour appeals.

ASSIGNMENTS OF ERROR

Armour assigns, rephrased, that the county court erred in (1) determining that he was not entitled to further notice in the adoption proceedings; (2) determining that he did not have any rights that were required to be recognized in the adoption proceedings; (3) depriving him of his constitutional rights, particularly substantive and procedural due process under the U.S. and Nebraska Constitutions; (4) rendering an adoption decree contrary to statutory provisions; and (5) failing to dismiss the adoption petition for failure of proof and lack of jurisdiction. Armour further assigns that Neb. Rev. Stat. §§ 43-101 to 43-116 (Reissue 1998), especially §§ 43-104.05, 43-104.13, and 43-104.22, violate the U.S. and Nebraska Constitutions on their faces.

STANDARD OF REVIEW

[1] In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000).

[2] Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below. *Parnell v. Good Samaritan Health Sys.*, 260 Neb. 877, 620 N.W.2d 354 (2000); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

ANALYSIS

CONSTITUTIONALITY OF ADOPTION STATUTES AS APPLIED

Armour contends that the application of the adoption statutes to his case denied him due process. Armour argues that because he filed a notice of intent to claim paternity within 5 days under § 43-104.02, applying § 43-104.05 deprives him of his constitutionally protected interest of parenting his child.

At the time Armour filed his petition for adjudication of paternity in district court, § 43-104.05 provided in part:

> If a notice of intent to claim paternity and obtain custody is timely filed with the biological father registry pursuant to section 43-104.02, either the claimant-father, the mother, or her agent specifically designated in writing shall, within thirty days after filing the notice, file a petition in the court in the county where such child is a resident for an adjudication of the claim of paternity and right to custody. If such a petition is not filed within thirty days after filing the notice, the claimant-father's consent to adoption of the child shall not be required and any alleged parental rights of the claimant-father shall not be recognized thereafter in any court.

Section 43-104.22 provided:

> The court shall determine that the biological father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:
>
> . . . .
>
> (7) The father failed to timely file a petition to adjudicate his claim of paternity and right to custody as contemplated in section 43-104.05[.]

[3-5] This court has not addressed whether § 43-104.22 can violate due process as applied. The U.S. Supreme Court has long recognized that state intervention in a parent-child relationship is subject to constitutional oversight. See, e.g, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 2d 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 2d 1042 (1923). The Court has held that an established familial relationship is a liberty interest entitled to substantial due process protection. *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). But the Court has made clear

that "the mere existence of a biological link does not merit equivalent constitutional protection." 463 U.S. at 261. The Court explained that the protection given to the familial relationship stems from the emotional attachments that derive from the intimacy of daily association. Thus, when a biological father has not taken the opportunity to form a relationship with his child, the constitution does not afford him an absolute right to notice and opportunity to be heard before a child may be adopted. As the Court explained:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

463 U.S. at 262.

In *Lehr*, the putative father of a child born out of wedlock never supported the child and failed to enter his name in his state's "putative father registry," 463 U.S. at 251, which would have entitled him to notice of any adoption proceedings. When the child was over 2 years old, the biological mother and her husband filed a petition for adoption and an order of adoption was entered. The biological father sought to vacate the adoption, arguing that the requirement that he file notice with the putative father registry in order to be given notice of the adoption violated his constitutional rights. The U.S. Supreme Court held that the putative father failed to grasp any opportunity interest he had in raising his child. In reaching this conclusion, the Court stated that it was concerned only with whether the state had adequately protected the putative father's opportunity to form a relationship with his child. The Court held that the putative father registry protected that right and further stated that the possibility that the father failed to use the registry because of his ignorance of the law could not be a sufficient reason for criticizing the law itself.

In Nebraska, a putative father is required under § 43-104.02 to file a notice of intent to claim paternity within 5 days of either the child's birth or receiving notice from an agency or attorney of the birth. Under § 43-104.04, if the putative father fails to file such a notice, his consent or relinquishment are not required. Citing to *Lehr*, we held in *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996), that §§ 43-104.02 and 43-104.04 did not violate due process as applied.

In *Friehe*, the putative father, after learning of the child's birth, infrequently visited the child at the hospital. The father agreed to place the child in temporary foster care and did not file a notice of intent to claim paternity within the 5-day time period required by § 43-104.05. The putative father argued that §§ 43-104.02 and 43-104.04 unconstitutionally violated his rights to due process and equal protection. We noted that the liberty interest at stake did not involve the termination of established custodial rights. Instead, the interest involved was a putative father's opportunity to potentially form a familial bond with his child. We then specifically noted the reasoning of the U.S. Supreme Court in *Lehr* as follows: " 'The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.' " 249 Neb. at 836, 545 N.W.2d at 748, quoting *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). We held that the putative father had it within his own power to assert his rights and obtain an opportunity to be heard by filing a notice of intent to claim paternity. Because it was his own failure to act upon the notice given to him of the child's birth, we determined that his due process claim was without merit.

Armour did not have an established familial relationship with the child guaranteeing him due process protection. Armour never saw the child and did not assist in paying for the child's birth or in supporting the child. Armour did, however, timely file a notice of intent to claim paternity pursuant to § 43-104.02, in which he acknowledged his obligation to pay support. Armour later failed to timely file a petition for adjudication of paternity under § 43-104.05 because his attorney filed the first petition in the wrong court. A motion for visitation was also filed in the wrong court. The question is whether Armour has sufficiently

grasped his opportunity interest in a relationship with his child requiring further notice of adoption proceedings and an opportunity to be heard under the Due Process Clauses of the U.S. and Nebraska Constitutions.

In accordance with *Lehr*, when Armour failed to file a petition for adjudication of paternity under § 43-104.05, Armour and his attorney were presumed to know the law. Indeed, Armour's notice of intent to claim paternity, filed under § 43-104.02, stated that he understood that he must file a petition for adjudication of paternity in the county court within 30 days. That the error of filing in the wrong court was made by Armour's attorney does not change the analysis. As *Lehr* makes clear, the issue is whether the state has adequately protected the putative father's opportunity interest. The failure to properly follow § 43-104.05 because of ignorance of the law can not be a sufficient reason for criticizing the law itself. As we indicated in *Friehe*, Armour is presumptively capable of asserting and protecting his own rights. Further, after our decision in *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000), Armour failed to make any further attempts to comply with § 43-104.05. As a result, Armour failed to ever file a petition for adjudication of paternity in county court. We determine that it was not impossible for Armour to properly comply with § 43-104.05 and that he was not denied any reasonable opportunity to do so. The statutes at issue adequately protected Armour's opportunity to form a relationship with his child. We determine that Armour did not sufficiently grasp his opportunity interest and that the application of §§ 43-104.05 and 43-104.22 to Armour's case did not deprive him of due process.

Facial Constitutionality of § 43-104.05

Armour next contends that the adoption statutes facially violate the U.S. and Nebraska Constitutions. Armour argues that the 30-day filing requirement of § 43-104.05 arbitrarily acts to terminate parental rights in violation of his right to substantive due process.

[6,7] Substantive due process relates to the content of the statute specifying when a right can be lost or impaired. See *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199 (Utah 1984). The U.S. Supreme Court has stated that the 14th Amendment

forbids the government from infringing upon a fundamental liberty interest, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. See *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

Applying the reasoning of *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), the Utah Supreme Court has held that an adoption statute that required a notice of paternity to be filed in order to preserve parental rights did not facially violate substantive due process. *Wells, supra*. The court in *Wells* reasoned that parental rights are not absolute and that the state has a compelling interest in speedily identifying those persons who will assume a parental role over illegitimate newborn children. The court further noted that for the statute to serve its purpose for the welfare of the child, a determination that a child can be adopted must be final and immediate. *Id.*

[8] We hold that the 30-day filing requirement of § 43-104.05 does not facially violate substantive due process. The 30-day requirement does not arbitrarily act to terminate a putative father's parental rights. Rather, the requirement provides the father with a period of time in which to assert his rights. If the father fails to do so, the statute then serves the compelling state interest of immediately placing the child with people who will assume a parental role for the child.

[9] Armour next contends that the adoption statutes—in particular § 43-104.05—facially violate equal protection because the statutes treat biological mothers and fathers differently. Under principles of equal protection, the government may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state interest. *Lehr, supra*.

We have stated that the 5-day filing requirement of § 43-104.02, although treating mothers and fathers differently, enables a speedy determination of the rights of the father so as to make it possible for the state to achieve a legitimate end, which is the placement of children as soon after birth as possible. *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). See, also, *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d

740 (1996) (interpreting *In re Application of S.R.S. and M.B.S.* as upholding the facial constitutionality of adoption statutes).

[10] The immediate secure adoption of children is an important state interest. We determine that the adoption statutes serve an important state interest and that any disparity of treatment in those statutes are substantially related to that interest. Accordingly, we determine that the adoption statutes do not facially violate equal protection.

NOTICE

Armour next contends that § 43-104.13 is facially unconstitutional because it fails to require that notice be given to a putative father that he must file a petition for adjudication of paternity within 30 days. Armour claims that this failure violates principles of procedural due process.

Section 43-104.08 provides:

> Whenever a child is claimed to be born out of wedlock and the biological mother contacts an adoption agency or attorney to relinquish her rights to the child . . . the agency or attorney contacted shall attempt to establish the identity of the biological father and further attempt to inform the biological father of his right to execute a relinquishment and consent to adoption, or a denial of paternity and waiver of rights . . . .

Section 43-104.12 requires that an agency or attorney shall notify by registered mail, return receipt requested, any person who has been identified as the biological father or possible biological father by the child's mother. Section 43-104.13 provides a list of information and rights of which a possible biological father must be notified.

[11] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001).

[12] Although § 43-104.13 does not require that a putative father be given notice that he must file a petition for adjudication within 30 days of filing his notice of intent to claim paternity,

§ 43-104.13 does advise the father to seek legal counsel immediately if he desires to seek custody of his child. Further, § 43-104.05 provides notice that a petition for adjudication must be filed within 30 days of the date the notice of intent to claim paternity was filed. If § 43-104.05 is followed, the father is afforded full notice of the adoption proceedings and an opportunity to be heard. It was not the content of the adoption statutes that deprived Armour of notice in the adoption proceedings. Instead, Armour's own failure to properly follow statutory procedure deprived him of notice in the adoption proceedings. We determine that § 43-104.13 is facially constitutional.

Armour next contends that the requirements of the notice statute, § 43-104.13, were not met. The letter Armour received from Lutheran Family Services was sent by registered mail with a return receipt requested. The letter informed Armour of his rights as set forth in § 43-104.13. Having reviewed the letter, we determine that it was sent in compliance with the notice statutes.

Armour next contends that the notice requirements of § 43-104.13 deprived him of due process and equal protection because Armour was a minor when he received notice of the child's birth. The stated purpose of § 43-104.13 is to provide notice to allow compliance with § 43-104.02. That section requires a putative father to file a notice of intent to claim paternity in order to preserve his rights. Armour received notice of the birth and acted on that notice by filing a notice of intent to claim paternity pursuant to § 43-104.02. Therefore, Armour was not deprived of any benefit intended by the statute. Nothing in the notice statutes requires notice to be served on the parents of a minor. Armour does not cite to any precedent for his argument that § 43-104.02 as applied to him violated his rights to due process or equal protection, nor can we find any precedent to support his argument. We conclude that this assignment of error is without merit.

Remaining Assignments of Error

Armour assigns that the county court erred in entering a decree of adoption based on what he contends were errors made by the court in the final adoption hearing and decree. K.D.G. and T.S.G. argue that Armour lacks standing to raise these issues.

[13] In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000); *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999). The issues regarding the final adoption hearing and decree arose out of proceedings that Armour was not a party to and was not required to be given notice of. Armour is attempting to assert the legal interests of third parties. Because Armour lacks standing, we do not address his remaining assignments of error.

CONCLUSION

We determine that the adoption statutes at issue are not unconstitutional, either facially or as applied to Armour. We further conclude that the county court did not err in determining that Armour was not entitled to further notice in the adoption proceedings for Baby Girl H. We do not address Armour's remaining assignments of error due to Armour's lack of standing to assert the errors. Accordingly, we affirm.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
EDWIN KULA, ALSO KNOWN AS ED KULA, APPELLANT.
635 N.W.2d 252

Filed November 2, 2001. No. S-01-044.

1. **Trial: Costs: Appeal and Error.** In determining what costs are actually, apparently, or probably necessary, the trial court is given discretion in determining those costs, and such determination will be reversed or modified only for an abuse of discretion.
2. **Sentences: Appeal and Error.** An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences.
3. **Costs.** Generally, the only costs which can be taxed are those authorized by statute.
4. **Costs: Parties.** A trial court may award or tax costs and apportion the same between parties on the same or adverse sides as in its discretion it may deem right and equitable.
5. **Convictions: Appeal and Error.** A conviction reversed on appeal is nullified, and the slate is wiped clean.

6. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
7. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
8. ___. In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Merrick County: MICHAEL OWENS, Judge. Affirmed in part, and in part reversed and remanded with directions.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, and Adam Sipple for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

On October 26, 2000, Edwin Kula pled no contest to a charge of manslaughter, a Class III felony, in the district court for Merrick County. His plea arose out of the April 15, 1994, death of Jerry Carlson. This is the fourth time Kula has appeared before this court regarding this incident. He was originally convicted of first degree murder and use of a weapon to commit a felony, which this court overturned in *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997) (*Kula I*). Kula was then convicted of second degree murder and use of a weapon to commit a felony. This conviction was overturned by this court in *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000) (*Kula II*). On December 5, 2000, Kula pled no contest to the charge of manslaughter, was sentenced by the trial court to a minimum and a maximum term of 20 years in prison, and was ordered to

pay court costs of $4,592.39. Kula appeals his sentence and the order assessing the costs of prosecution to him.

BACKGROUND

The facts of this case are set out in detail in *Kula I.*

On October 26, 2000, pursuant to a plea agreement, Kula appeared in the district court for Merrick County, entering a plea of no contest to the reduced charge of manslaughter and giving a statement which served as the factual basis for the plea. The charge of use of a weapon to commit a felony was dismissed. On December 5, Kula was sentenced to a minimum and maximum sentence of 20 years in prison. He was also ordered to pay costs of $4,592.39. The trial court granted Kula credit for the time he had served since his arrest.

ASSIGNMENTS OF ERROR

Kula, in the appeal of his sentence, assigns that (1) the trial court erred in assessing court costs to him and (2) the trial court erred and abused its discretion in sentencing him to a minimum and maximum sentence of 20 years in the Nebraska Penal and Correctional Complex.

STANDARD OF REVIEW

[1] In determining what costs are actually, apparently, or probably necessary, the trial court is given discretion in determining those costs, and such determination will be reversed or modified only for an abuse of discretion. See *Biester v. State*, 65 Neb. 276, 91 N.W. 416 (1902).

[2] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

ANALYSIS

As to the first assignment of error, Kula argues that there is no rational basis for an assessment of costs of $4,592.39. He argues that no costs should be assessed to him for the first conviction because it was reversed due to prosecutorial misconduct. He also argues that he should not be assessed the costs of the second trial because "[h]e was not convicted as a result of the

second trial and the matter was reversed." Brief for appellant at 5. Kula believes that no costs should be associated with the present proceeding, wherein he entered a no contest plea to a conviction of manslaughter. At the very least, according to Kula, the matter should be remanded to the trial court for a hearing to determine the accurate amount of costs, if any, that should be assessed to him.

[3,4] Costs are purely compensatory and are not punitive. 24 C.J.S. *Criminal Law* § 1738 (1989). Generally, the only costs which can be taxed are those authorized by statute. *State v. Konvalin*, 181 Neb. 554, 149 N.W.2d 755 (1967), *cert. denied* 389 U.S. 872, 88 S. Ct. 157, 19 L. Ed. 2d 152. A trial court may award or tax costs and apportion the same between parties on the same or adverse sides as in its discretion it may deem right and equitable. *State v. Canizales*, 240 Neb. 811, 484 N.W.2d 446 (1992). Determining what costs are actually, apparently, or probably necessary is a matter of discretion. However, the court's decision is subject to review and will be reversed or modified whenever it appears that there has been an abuse of discretionary power. *Biester v. State, supra.*

The *only* evidence in the record as to costs is the statement by the clerk of the district court as follows:

STATE OF NEBRASKA VS. EDWIN KULA a/k/a/ ED KULA
Case No. 1072-E-220,CR95-9
Appellate Court Case No. S-01-0044

	1ST TRIAL
FEES	$1546.32
DEPOSITIONS	288.38
FILING, ETC.	60.00
	2ND TRIAL
FEES	$1334.76
SUPREME COURT FILING, ETC.	177.00
DEPOSITIONS	5979.55
SUPREME COURT BILL OF EXCEPTIONS	371.25
WITNESS AFFIDAVIT FOR 1ST TRIAL	$3631.00

Therefore, the issue is whether the trial court abused its discretion in taxing costs to Kula from the previous trials, the convictions for which were reversed.

At oral argument, neither the attorney for Kula nor the attorney for the State could reconcile the figures in the clerk's statement with the costs assessed by the court, of $4,592.39. Other than the clerk's statement, there is absolutely nothing in the record as to how the court arrived at this figure.

The State relies on Neb. Rev. Stat. § 29-2207 (Reissue 1995), which provides: "In every case of conviction of any person for any felony or misdemeanor, it shall be the duty of the court or magistrate to render judgment for the costs of the prosecution against the person convicted." The State argues that the first two trials did indeed establish Kula's guilt, despite the fact that his convictions were overturned on appeal. According to the State, court costs are part of the burden the loser must pay. Since Kula lost at trial, the State contends he is liable for the associated costs. See *State ex rel. Douglas v. Gradwohl*, 194 Neb. 745, 235 N.W.2d 854 (1975).

[5] In *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995), we held that generally a conviction reversed on appeal is nullified, and the slate is wiped clean. In *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986), the U.S. Supreme Court held, similar to *State v. Rust, supra*, that when a defendant obtains a reversal of his or her conviction on appeal, the original conviction is nullified, and the slate is wiped clean.

Kula's convictions in the two trials, *Kula I* and *Kula II*, were reversed on appeal, and the costs of those two proceedings cannot be assessed against Kula. We remand this matter to the trial court to determine what, if any, costs are associated with only the instant proceeding (plea of no contest to manslaughter) and to assess such unpaid costs of prosecution found against Kula.

EXCESSIVE SENTENCE

In his second assignment of error, Kula argues that the trial court abused its discretion in sentencing him to prison for the statutory maximum, which is a minimum and maximum of 20 years. He cites several Nebraska cases where defendants were convicted of manslaughter and received lesser sentences and argues that those cases form the basis for an abuse of discretion

argument. Kula notes that this court may reduce a sentence imposed on a defendant when in its opinion the sentence is excessive, and it is the duty of this court to render such a sentence as in its opinion may be warranted by the evidence. See *State v. Sturm*, 189 Neb. 299, 202 N.W.2d 381 (1972).

[6-8] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). Additionally:

> In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

State v. Urbano, 256 Neb. 194, 216, 589 N.W.2d 144, 159 (1999). In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995).

We conclude, after reviewing the record, that the trial court did not abuse its discretion in the sentence imposed, and therefore, this assignment of error is without merit.

CONCLUSION

As to the assigned error in the assessment of court costs, we cannot determine on this record how the trial court arrived at the costs. We reverse and vacate the judgment of the trial court as to costs, and remand the cause on this issue with directions that Kula cannot be assessed any costs in *Kula I* or *Kula II*.

On the assigned error of excessive sentence, we determine that this assignment is without merit for the reason that the trial

court did not abuse its discretion in sentencing Kula to a minimum and a maximum term of 20 years in prison on the charge of manslaughter.

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

SAMMIE JONES, DOING BUSINESS AS JONES DRYWALL, APPELLEE, V. SUMMIT LIMITED PARTNERSHIP FIVE, A SOUTH DAKOTA LIMITED PARTNERSHIP, AND THE SUMMIT GROUP, INC., A SOUTH DAKOTA CORPORATION, APPELLANTS.

635 N.W.2d 267

Filed November 9, 2001. No. S-00-630.

1. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
2. ____: ____. Under Neb. Rev. Stat. § 25-2614(a)(1) (Reissue 1995) of the Uniform Arbitration Act, an evident miscalculation of figures occurs when there is a mathematical error in the arbitration award that is both obvious and unambiguous.
3. **Arbitration and Award: Proof.** The burden of alleging and proving an arbitration award's invalidity rests upon the party seeking to set aside the decision.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Timothy R. Engler and Karen A. Haase, of Harding, Schultz & Downs, for appellants.

Stuart Tiede, of Woods, Fuller, Schultz & Smith, P.C., and Jane F. Langan and Britt J. Ehlers, of Rembolt, Ludtke & Berger, L.L.P., for appellee.

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

HENDRY, C.J.

INTRODUCTION

This case arises from a contract dispute between Sammie Jones (Jones) and The Summit Group, Inc., a general contractor

affiliated with Summit Limited Partnership Five (collectively The Summit Group). After the dispute was submitted to arbitration, The Summit Group requested that the district court modify or correct the arbitrator's award pursuant to Neb. Rev. Stat. § 25-2614(a)(1) (Reissue 1995). The district court denied the request and confirmed the award. The Summit Group appealed.

FACTUAL BACKGROUND

Jones, an individual doing business as Jones Drywall, contracted to do painting and drywalling on a hotel owned by The Summit Group in Lincoln, Nebraska. The Summit Group was displeased with Jones' work and his staffing of the job, and eventually terminated its contractual relationship with Jones.

On July 30, 1998, Jones filed a construction lien against the hotel and a construction lien foreclosure petition and praecipe in Lancaster County District Court. The parties thereafter filed a joint stipulation to arbitrate the dispute and agreed to stay the district court proceedings pending the outcome of the arbitration. The district court ordered the stay.

The parties arbitrated their dispute. The record before this court regarding the proceedings before the arbitrator includes only the two-page arbitration award and the one-page order of the arbitrator denying modification. The arbitrator entered his award on February 25, 1999. In the award, the arbitrator awarded Jones $40,195.47, itemized as follows:

Drywall Contract Damages Total	$31,031.59
Painting Contract Damages Total	9,163.88
Total	$40,195.47

The arbitrator also awarded The Summit Group $10,019.40, itemized as follows:

Custom Drywall Systems	$11,453.00
E&K Drywall	21,112.00
Performance Coatings	18,800.00
Payment to Tim Rogers	600.00
Extra staff to clean paint and texture from Fixtures, tubs, etc.	1,092.00
Sub-total	$53,057.00
Less Contract Amounts Not Paid to Jones	<43,037.60>
Total	$10,019.40

In sum, the arbitrator found $40,195.47 in damages to Jones and $10,019.40 in damages to The Summit Group, resulting in an award of $30,176.07 to Jones.

On March 17, 1999, Jones applied to the district court for confirmation of the arbitration award. That same day, The Summit Group filed an application for modification of the award with the arbitrator in accordance with Neb. Rev. Stat. § 25-2610 (Reissue 1995). The arbitrator refused to modify the prior award and denied the application.

The Summit Group then filed a motion in the district court, requesting modification or correction of the arbitrator's award pursuant to § 25-2614(a)(1). The Summit Group asserted that the arbitrator granted Jones a double recovery by awarding Jones $40,195.47 for "Drywall Contract Damages" and "Painting Contract Damages," while deducting $43,037.60 for "Contract Amounts Not Paid to Jones" from The Summit Group's award. The district court denied The Summit Group's motion and confirmed the arbitrator's $30,176.07 award to Jones. The court found there was not an "evident miscalculation of figures" under § 25-2614(a)(1).

The Summit Group appealed to the Nebraska Court of Appeals, which, in *Jones v. Summit Group, Inc.*, 8 Neb. App. lxvii (case No. A-99-1090, Jan. 18, 2000), dismissed the appeal without opinion and remanded to the district court for reasons unrelated to this appeal. Jones thereafter moved for summary judgment in the district court requesting that court to enter a final judgment in the amount of the arbitration award. The district court entered judgment for Jones. The Summit Group appealed.

ASSIGNMENTS OF ERROR

The Summit Group assigns that the district court erred as a matter of fact and law in refusing to alter or amend the arbitrator's award.

STANDARD OF REVIEW

[1] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, this court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside

on appeal unless clearly erroneous. See *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993).

ANALYSIS

QUESTION OF LAW

The Summit Group asserts that the arbitrator's award contains an "evident miscalculation of figures" under § 25-2614(a)(1), justifying a modification or correction of the arbitrator's award. Under Nebraska's Uniform Arbitration Act, a district court may modify or correct an arbitration award when one of the limited grounds listed in § 25-2614 exists. The Summit Group relies on § 25-2614(a)(1), which states, "[T]he court shall modify or correct the award when: (1) There was an evident miscalculation of figures."

This court has not previously addressed what constitutes an "evident miscalculation of figures" under § 25-2614(a)(1). However, § 25-2614(a)(1) is similar to 9 U.S.C. § 11(a) (1994) of the federal Arbitration Act ("evident material miscalculation of figures") and identical to the Unif. Arbitration Act § 13(a)(1), 7 U.L.A. 409 (1997) ("evident miscalculation of figures"), which has been adopted in other states. Accordingly, we look to federal and state decisions interpreting similar portions of the Uniform Arbitration Act and the federal Arbitration Act for guidance in construing § 25-2614(a)(1). See, e.g., *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999) (in interpreting state statute, court may look to federal court decisions construing similar federal statute); *FirstTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993) (stating that other jurisdictions' opinions were persuasive in case of first impression in Nebraska under Uniform Commercial Code).

Various courts have defined what constitutes an evident miscalculation in the context of reviewing an arbitrator's decision. In the federal courts, the Eighth Circuit has defined an "evident material miscalculation of figures" under 9 U.S.C. § 11(a) of the federal Arbitration Act as a "mathematical mistake." *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 749 (8th Cir. 1986). The Fifth and Sixth Circuits have found that an evident material miscalculation occurs only " ' "[w]here the record that was before the arbitrator demonstrates an unambiguous

and undisputed mistake of fact . . . by the arbitrator in making his award . . . .'" " *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 821 (5th Cir. 1993), quoting *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210 (5th Cir. 1993). Accord *National Post Office v. U.S. Postal Service*, 751 F.2d 834 (6th Cir. 1985). The Fourth Circuit has defined "evident material miscalculation" as a " 'mathematical error appear[ing] on the face of the award.' " *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998). See, also, *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1284 (5th Cir. 1994) ("clerical error which may be corrected without disturbing the merits of the arbitrators' decision").

State courts similarly define an "evident miscalculation of figures" under the Uniform Arbitration Act in very narrow terms. See, e.g., *Foust v. Aetna Cas. & Ins. Co.*, 786 P.2d 450 (Colo. App. 1989) (only mathematical errors that do not alter award on merits); *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 413, 255 S.E.2d 414, 419 (1979) ("mathematical errors committed by arbitrators which would be patently clear to a reviewing court"). As perhaps best stated in *Severtson v. Williams Const. Co.*, 173 Cal. App. 3d 86, 93, 220 Cal. Rptr. 400, 404 (1985), an evident miscalculation is " 'something which is apparent by an examination of the [document], needing no evidence to make it more clear.' "

The Summit Group relies principally upon *Laurin Tankers America v. Stolt Tankers*, 36 F. Supp. 2d 645 (S.D.N.Y. 1999), in support of its contention that the definition of evident miscalculation of figures should include miscalculations which are not clearly apparent on the face of the award. In *Laurin Tankers America*, the district court modified an arbitrator's award under the federal Arbitration Act. The district court found that the arbitrator, in calculating damages, mistakenly used a sea vessel's total estimated fuel consumption for an entire voyage as the daily estimated rate of fuel consumption, resulting in a much larger deduction to the amount of the petitioner's recoverable damages. The court stated that the error "should have been 'evident' to anyone familiar with the industry," *id.* at 651, and that "in proper circumstances, a reviewing court may look beyond 'the face of the award.' " *Id.* at 652.

The decision in *Laurin Tankers America*, however, differs from this case. In *Laurin Tankers America*, the arbitrators acknowledged their erroneous calculation. Furthermore, the court in *Laurin Tankers America* found that the parties had agreed "on the vessel's rates of fuel consumption to be used in calculating [the petitioner's] damages." 36 F. Supp. 2d at 651. Such agreement among the parties and the arbitrator does not exist in this case. For these reasons, we decline to follow *Laurin Tankers America*.

[2] As noted by the Fourth Circuit in *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998), "[r]eview of an arbitrator's award is severely circumscribed." Appellate review of an arbitrator's award is necessarily limited because "to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." *Id.* "[S]trong deference [is] due an arbitrative tribunal." *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993). Furthermore, " '[w]hen . . . parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process.' " *Id.* at 821, quoting *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410 (11th Cir. 1990). Based on the foregoing rationale, a carefully circumscribed definition of evident miscalculation of figures is appropriate. Accordingly, we determine that under § 25-2614(a)(1) of the Uniform Arbitration Act, an "evident miscalculation of figures" occurs when there is a mathematical error in the arbitration award that is both obvious and unambiguous.

Question of Fact

The Summit Group contends that the arbitrator's award contains an error on the face of the award that is "obvious, indisputable and clear." Brief for appellants at 24. While a plausible argument can be made that there is some inconsistency in the arbitrator's award, we cannot say that the district court was clearly erroneous in finding that there was no evident miscalculation of figures. In the arbitrator's itemization of damages, it is not clear whether the distinctly labeled "Drywall Contract Damages" and "Painting Contract Damages" are equivalent to "Less Contract Amounts Not Paid to Jones," particularly when

the dollar amount is not identical. As the trial court observed in its order:

> The various elements of damage in [the] arbitrator's award are not at all clear. . . . It is noted that the amount of the deduction ($43,037.60) is not identical to the amount of the damages awarded to [Jones]. While this may be confusing and even suspicious that there may be duplication, that is not sufficient under the law. The duplication must be clear, conclusive, or undisputable, in other words, evident. It is not.

We further note that Jones has disputed any modification of the award from the start. Compare *Cole v. Hiller*, 715 So. 2d 451 (La. App. 1998) (granting modification in case where parties jointly asked arbitrator to review arbitration award).

[3] "[T]he burden of alleging and proving [an arbitration award's] invalidity rests upon the party seeking to set aside the decision." *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 833, 448 N.W.2d 168, 172 (1989). To find an evident miscalculation in the arbitrator's award would require the district court to delve into a legal interpretation of the categories of the arbitrator's award and make assumptions not present on the face of the award. Furthermore, because the record does not contain the evidence presented to the arbitrator, any attempt to modify the figures as determined by the arbitrator would be pure speculation on the part of the district court. This type of analysis is not permissible in reviewing an arbitration award for an evident miscalculation of figures. "[W]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication." *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986). The district court was not clearly erroneous in finding that The Summit Group failed to show an "evident miscalculation of figures" under § 25-2614(a)(1).

CONCLUSION

The district court's confirmation of the award is affirmed.

AFFIRMED.

JOSE MAURICIO RODRIGUEZ, APPELLANT, V. MONFORT, INC., APPELLEE.

635 N.W.2d 439

Filed November 9, 2001. No. S-00-717.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the trial court which conducted the original hearing; the findings of fact of the trial court will not be disturbed on appeal unless clearly wrong.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
6. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
8. **Workers' Compensation: Presumptions.** The plain language of Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2000) requires both the submission of a plan by the vocational rehabilitation counselor and approval of that plan by a Workers' Compensation Court vocational rehabilitation specialist in order for the plan to benefit from the rebuttable presumption of correctness set forth in § 48-162.01(3).
9. ____: ____. Having declined to evaluate an injured worker's loss of earning capacity, a vocational rehabilitation counselor has not provided a loss of earning capacity opinion from which to afford a rebuttable presumption of correctness.

Petition for further review from the Nebraska Court of Appeals, HANNON, CARLSON, and MOORE, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Todd Bennett, of Rehm & Bennett, for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Jose Mauricio Rodriguez, appellant, filed a petition with the Nebraska Workers' Compensation Court seeking workers' compensation benefits for injuries allegedly arising out of and in the course of his employment with Monfort, Inc. Following trial, the workers' compensation trial court entered an award in favor of Rodriguez, granting him, inter alia, vocational rehabilitation benefits as a result of his injuries. Monfort appealed the award to the review panel of the Nebraska Workers' Compensation Court. Monfort claimed that the court-appointed vocational rehabilitation counselor had opined that Rodriguez did not need vocational rehabilitation benefits and that the trial court had failed to afford the "opinions" of the court-appointed vocational rehabilitation counselor a rebuttable presumption of correctness. The review panel, with one judge dissenting, ordered the trial court to consider the applicability of the rebuttable presumption with regard to the vocational rehabilitation counselor's opinion. Rodriguez appealed the review panel's decision to the Nebraska Court of Appeals, which affirmed the review panel's decision. *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 623 N.W.2d 714 (2001). This court granted Rodriguez' petition for further review.

For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to remand the cause to the review panel with directions to affirm the trial court's award.

STATEMENT OF FACTS

The relevant facts are not in dispute. On May 8, 1997, Rodriguez began working for Monfort as a box thrower, stacking 75- to 100-pound boxes of meat. On May 21, while performing his duties as a box thrower, Rodriguez began to experience pain in his left elbow. Rodriguez received medical treatment for this injury. Later, Rodriguez began to complain of pain in both of his shoulders. He received treatment for these injuries.

Because of his injuries, Rodriguez was reassigned to the position of "clod opener," in which position he used a knife to cut incisions in carcasses of meat which were moving on a chain in front of him. A physical therapist, Mike Kalvoda, conducted a jobsite analysis and stated in his report that the position was essentially within Rodriguez' physical restrictions. Rodriguez' treating physician, Dr. Frank Lesiak, concurred with this analysis.

On June 17, 1999, while Rodriguez was being treated for his work-related injuries, the Nebraska Workers' Compensation Court appointed a vocational rehabilitation counselor, Michelle Holtz, to provide Rodriguez with vocational rehabilitation services. In a letter dated June 30, 1999, Holtz informed Rodriguez' and Monfort's attorneys that "vocational rehabilitation services are not appropriate at this time due to the fact that Mr. Rodriguez is currently employed with Monfort in an alternate position that pays an hourly wage comparable to his pre-injury wage rate ($7.30 per hour)." In a letter dated August 13, 1999, Holtz stated that it appeared vocational rehabilitation services were unnecessary for Rodriguez because Kalvoda's jobsite analysis indicated Rodriguez' position as a clod opener was within his restrictions. In a report dated August 24, 1999, Holtz concluded that "vocational rehabilitation services are not warranted at this time due to the fact that Mr. Rodriguez is currently working at Monfort in the alternate position of [clod opener] which was approved by both Dr. Lesiak and Mr. Mike Kalvoda." Holtz further stated that no loss of earning capacity evaluation was appropriate for Rodriguez, because, as distinguished from an injury to the body as a whole for which loss of earning benefits are paid, Rodriguez had sustained an injury solely to a scheduled member. See Neb. Rev. Stat. § 48-121(2) and (3) (Reissue 1998).

On March 2, 1999, Rodriguez filed for workers' compensation benefits against Monfort. On November 10, Rodriguez' claim came on for hearing. During the trial, Rodriguez testified that performing the duties of the position of clod opener caused him shoulder pain and that he did not believe he could continue to perform the job.

In an award filed December 16, 1999, the workers' compensation trial court found that Rodriguez had suffered injuries arising out of and in the course of his employment with Monfort and

that as a result of his injuries, Rodriguez had sustained an 8-percent permanent impairment to his right upper extremity and a 10-percent permanent impairment to his left upper extremity. The court ordered Monfort to pay to Rodriguez medical and indemnity benefits.

With regard to vocational rehabilitation, the court, upon its review of the evidence, found that Rodriguez suffered pain while performing the job of clod opener. In the award, the trial court stated:

> I realize Mr. Kalvoda believes [Rodriguez] can perform the position but it is [Rodriguez] who is performing the position and due to the constant repetitive nature of the duties to make two cuts every 15 seconds, there is a basis for [Rodriguez] to have pain which I believe he has. I find that [Rodriguez] is entitled to rehabilitation services.

In awarding Rodriguez vocational rehabilitation services, the court did not reference or discuss Holtz' findings in her letters or report (hereafter reports).

Monfort applied for review by a Workers' Compensation Court review panel, claiming that the trial court erred in awarding vocational rehabilitation benefits and in not affording a rebuttable presumption to Holtz' "opinions" that vocational rehabilitation services were not warranted. Monfort did not challenge the trial court's findings with regard to Rodriguez' injuries, ratings, and medical and indemnity benefits, and these findings are not at issue in the present appeal.

In its order filed June 2, 2000, the review panel, with one judge dissenting, concluded that pursuant to Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2000) of the Nebraska workers' compensation statutes, the trial court must, at a minimum, state in the award the rationale for rejecting a vocational rehabilitation counselor's "opinion" with regard to vocational rehabilitation services. Section 48-162.01(3) provides, in pertinent part, as follows:

> If entitlement to vocational rehabilitation services is claimed by the employee, the employee and the employer or his or her insurer shall attempt to agree on the choice of a vocational rehabilitation counselor . . . . If they are unable to agree on a vocational rehabilitation counselor, the employee or employer or his or her insurer shall notify

> the compensation court, and the compensation court shall select a counselor from the directory of vocational rehabilitation counselors . . . . The vocational rehabilitation counselor so chosen or selected shall evaluate the employee and, if necessary, develop and implement a vocational rehabilitation plan. *It is a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation.* . . . Any loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a counselor from the directory established pursuant to subsection (2) of this section and chosen or selected according to the procedures described in this subsection. *It is a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.*

(Emphasis supplied.) We note that since the trial in this case, § 48-162.01(3) has been amended, but such amendments have not affected the relevant portions of the statute for the purpose of this appeal. Based upon the language of § 48-162.01(3), the review panel ordered the trial court to consider the applicability of the rebuttable presumption to be accorded the vocational rehabilitation counselor's "opinion."

Rodriguez appealed the review panel's decision to the Court of Appeals, assigning as errors the review panel's decision (1) "in holding that the vocational rehabilitation counselor's opinion was entitled to a rebuttable presumption of correctness" and (2) "in failing to affirm the trial judge's determination that [Rodriguez] is entitled to vocational rehabilitation."

The Court of Appeals affirmed the review panel's decision, stating: "We conclude that the presumption under the statute applies to her opinions in this case." *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 8, 623 N.W.2d 714, 718 (2001). In affirming the review panel's decision, the Court of Appeals concluded that (1) the vocational rehabilitation counselor's "opinions" were entitled to a rebuttable presumption of correctness pursuant to § 48-162.01(3) and (2) the trial court failed to comply with Workers' Comp. Ct. R. of Proc. 11 (2000) when it rejected the

counselor's "opinions" without an explanation which dealt with the statutory presumption in § 48-162.01(3). Rule 11 provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

The Court of Appeals affirmed the review panel's decision ordering the trial court to reconsider in accordance with the statute and for a decision which complied with rule 11.

Rodriguez petitioned for further review of the Court of Appeals' decision. We granted the petition.

ASSIGNMENTS OF ERROR

On further review, Rodriguez asserts, restated, that the Court of Appeals erred (1) in determining that Holtz' vocational rehabilitation reports were entitled to a rebuttable presumption of correctness and (2) in failing to determine whether there was sufficient competent evidence to support the trial court's award. Because we reverse the Court of Appeals' decision on the basis of the first assigned error, we need not discuss the second assigned error.

STANDARDS OF REVIEW

[1-4] Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001); *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of

fact of the trial court which conducted the original hearing; the findings of fact of the trial court will not be disturbed on appeal unless clearly wrong. *Id.* Statutory interpretation presents a question of law. *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Fay v. Dowding, Dowding, supra*; *Logsdon v. ISCO Co., supra.*

ANALYSIS

[5-7] This appeal presents a question of statutory construction. It is well settled that when construing a statute, we 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. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *City of Lincoln v. Liquor Control Comm., supra.* A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

We have previously recognized that § 48-162.01 "provides a means of determining a vocational rehabilitation plan for an injured worker, as well as his or her loss of earning power," in order to promote one of the primary purposes of the Nebraska Workers' Compensation Act, that is to restore the injured worker to gainful employment. *Variano v. Dial Corp.*, 256 Neb. 318, 322, 589 N.W.2d 845, 849 (1999). With regard to the procedure for securing vocational rehabilitation services, the statute provides that if an injured employee seeks such services, the employee and the employer or its insurer must try to agree on the appointment of a vocational rehabilitation counselor. § 48-162.01. If they are unable to agree, the Workers' Compensation Court will appoint a vocational rehabilitation counselor. *Id.*

As a means of furthering the goal of returning the injured employee to gainful employment, § 48-162.01 creates two rebuttable presumptions. "A 'rebuttable presumption' is generally defined as '[a] presumption that can be overturned upon the showing of sufficient proof.' " *Variano v. Dial Corp.*, 256 Neb. at 326, 589 N.W.2d at 851 (quoting Black's Law Dictionary 1186 (6th ed. 1990)).

With respect to rebuttable presumptions, § 48-162.01(3) first provides that "[i]t is a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation" (vocational rehabilitation plan presumption of correctness). Second, § 48-162.01(3) states that with regard to a loss of earning capacity evaluation performed by the vocational rehabilitation counselor, "[i]t is a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct," *id.* (loss of earning capacity opinion presumption of correctness). The issue presented in the instant appeal is whether any reports issued by Holtz, as Rodriguez' vocational rehabilitation counselor, are entitled to either of the rebuttable presumptions of correctness contained in § 48-162.01(3).

Vocational Rehabilitation Plan Presumption of Correctness.

We first consider whether Holtz developed a vocational rehabilitation "plan" that under § 48-162.01(3) is entitled to a rebuttable presumption of correctness. Pursuant to the plain language of the statute, in order for the vocational rehabilitation plan presumption of correctness to attach, two conjunctive requirements must be met. First, the vocational rehabilitation counselor must develop a vocational rehabilitation "plan," and second, that plan must be submitted and approved by a vocational rehabilitation specialist of the Workers' Compensation Court.

In the instant case, Holtz did not develop a vocational rehabilitation "plan," and hence, there was no "plan" approved by a vocational rehabilitation specialist to which a rebuttable presumption of correctness under § 48-162.01(3) could attach. In her written reports, Holtz states that because Rodriguez had returned to work for Monfort in the new position of a clod

opener, vocational rehabilitation services were not necessary. Notwithstanding the content of Holtz' reports, Monfort argues that Holtz' reports to the effect that no rehabilitation services were necessary are, nevertheless, a "plan" entitled to a rebuttable presumption of correctness under § 48-162.01(3). In effect, Monfort argues that any analysis Holtz made with regard to vocational rehabilitation services is a "plan" entitled to a rebuttable presumption of correctness under the statute.

We decline to accept Monfort's interpretation of § 48-162.01(3). Under the rules of statutory construction, this court is obligated to give a statute its plain and ordinary meaning and must attempt to give effect to all parts of a statute. See, *City of Lincoln v. Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001); *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001). The plain meaning of "plan" includes "a detailed and systematic formulation of a . . . program of action." Webster's Third New International Dictionary, Unabridged 1729 (1993). It is undisputed that Holtz declined to formulate a program of action for Rodriguez. Holtz did not develop a plan.

[8] Monfort's interpretation of § 48-162.01(3) would compel this court to ignore the plain meaning of "plan" and the language of the statute. The plain language of the statute requires both the submission of a plan by the vocational rehabilitation counselor and the approval of that plan by a Workers' Compensation Court vocational rehabilitation specialist in order for the plan to benefit from the rebuttable presumption of correctness set forth in § 48-162.01(3). Because Holtz did not develop a plan, Holtz' reports to the effect that Rodriguez did not require vocational rehabilitation services are not entitled to a rebuttable presumption of correctness under § 48-162.01(3). To the extent the Court of Appeals concluded that Holtz' reports stating that Rodriguez did not require vocational rehabilitation were a "plan" entitled to a rebuttable presumption of correctness under § 48-162.01(3), such a conclusion is error as a matter of law.

Loss of Earning Capacity Opinion Presumption of Correctness.

In its opinion affirming the review panel's order, the Court of Appeals relied upon the second rebuttable presumption of

correctness found in § 48-162.01(3), i.e., the loss of earning capacity opinion presumption of correctness. The Court of Appeals misconstrued the loss of earning capacity opinion presumption of correctness and incorrectly attached that presumption to Holtz' vocational rehabilitation report.

In reaching its decision to affirm the review panel's order, the Court of Appeals stated that its decision was mandated by our opinion in *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

Referring to *Variano*, according to the Court of Appeals, "[i]t seems clear [under § 48-162.01(3)] that if the [loss of earning capacity evaluation] process results in a conclusion that there is no loss of earning power, the opinions in connection with that conclusion are entitled to the statutory presumption." *Rodriguez v. Monfort, Inc.*, 10 Neb. App. 1, 7-8, 623 N.W.2d 714, 718 (2001).

The Court of Appeals misapplied our opinion in *Variano* and, as a matter of law, erred in its construction of § 48-162.01(3). In *Variano*, we were dealing with a succession of apparently inconsistent loss of earning capacity opinions expressed by the same court-appointed vocational rehabilitation counselor. We concluded that the series of letters written by the vocational rehabilitation counselor reflected the process during which the vocational rehabilitation counselor evaluated Variano's loss of earning capacity. In *Variano*, we concluded it was the final letter in the process that reflected the vocational rehabilitation counselor's final opinion concerning Variano's loss of earning capacity. Accordingly, the vocational rehabilitation counselor's final letter in which he opined that Variano was totally disabled was an opinion entitled to the § 48-162.01(3) presumption of correctness regarding loss of earning capacity opinions.

[9] On the facts of the case in *Variano,* we concluded that the vocational rehabilitation counselor's final letter was an opinion regarding Variano's loss of earning capacity and was entitled to a rebuttable presumption of correctness. In contrast, in the instant case, Holtz did not evaluate Rodriguez and never expressed an opinion concerning Rodriguez' loss of earning capacity. Indeed, in her August 24, 1999, report, she stated that a loss of earning capacity assessment was "not warranted." Having declined to evaluate Rodriguez' loss of earning capacity, Holtz has not

provided a loss of earning capacity opinion in the instant case from which to afford a rebuttable presumption of correctness. The Court of Appeals' decision to the contrary is in error.

Although not referenced by the parties in their briefs, we observe that the injuries Rodriguez sustained, which injuries are not in dispute, are injuries to his left and right upper extremities, i.e., scheduled member injuries. There is no claim in this case that Rodriguez sustained an injury to the body as a whole. The partial disabilities in this case are limited to scheduled members and are not subject to loss of earning capacity opinions. See, § 48-121(2) and (3); *Fenster v. Clark Bros. Sanitation*, 235 Neb. 336, 455 N.W.2d 169 (1990). Holtz properly declined to express an opinion concerning Rodriguez' loss of earning capacity.

Section 48-121 of the workers' compensation statutes sets forth the compensation schedule for workers' compensation injuries and provides, inter alia, as follows:

> (2) For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . .
>
> (3) For disability resulting from permanent injury of the following classes, the compensation shall be . . . [f]or the loss of an arm, sixty-six and two-thirds percent of daily wages during two hundred twenty-five weeks.

Subsection (2) of § 48-121 provides for compensation based upon an injured worker's loss of earning capacity as a result of disability to the body as a whole. Subsection (2) specifically exempts disabilities listed in subsection (3) from such a loss of earning capacity analysis. Disabilities listed under subsection (3), referred to as scheduled member disabilities, are generally compensated according to the amounts provided by statute. See, *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991); *Fenster v. Clark Bros. Sanitation, supra.*

The trial court found that Rodriguez had sustained permanent partial injuries to his right and left upper extremities, or arms. There is sufficient evidence in the record to support this finding. Under Nebraska's workers' compensation statutes, an injury to the upper extremity constitutes a scheduled member injury. See

§ 48-121(3). See, also, *Fenster v. Clark Bros. Sanitation, supra* (injury to right arm constitutes scheduled injury rather than injury to body as whole); *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983) (same). Thus, in this case, any loss of earning capacity Rodriguez may have sustained as a result of the permanent partial disabilities to his arms is irrelevant for purposes of compensating his workers' compensation injuries, and Holtz properly declined to express an opinion regarding Rodriguez' loss of earning capacity. There was no loss of earning capacity opinion to which to afford a rebuttable presumption of correctness under § 48-162.01(3), and the conclusions of the review panel and the Court of Appeals to the contrary were in error.

CONCLUSION

No vocational rehabilitation plan was prepared by Holtz and approved by a vocational rehabilitation specialist of the Workers' Compensation Court, and thus, there was no vocational rehabilitation plan to which the trial court should have afforded a rebuttable presumption of correctness. Holtz properly declined to evaluate Rodriguez' loss of earning capacity, and thus, there was no loss of earning capacity opinion expressed by the court-appointed vocational rehabilitation counselor to which the trial court should have assigned a rebuttable presumption of correctness. The review panel erred when it ordered the trial court to consider the rebuttable presumptions of correctness provided under § 48-162.01(3), and the Court of Appeals erred in affirming the review panel's decision.

For the reasons set forth herein, we reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to remand the cause to the review panel with directions to affirm the award of the workers' compensation trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS A. KINNEY, APPELLANT.

635 N.W.2d 449

Filed November 9, 2001. No. S-00-750.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Pretrial Procedure: Prosecuting Attorneys.** In Nebraska, the prosecution has not been granted a right of discovery except as permitted by the court, with limitations clearly defined by statute.
3. **Criminal Law: Pretrial Procedure.** Discovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Reversed and remanded with directions to dismiss.

Gregory C. Scaglione, of Koley Jessen, P.C., L.L.O., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

After a jury trial, Douglas A. Kinney was convicted of two counts of theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1995). The district court for Douglas County sentenced Kinney to 2 years' probation and ordered restitution and community service. Kinney appeals.

SCOPE OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Sanchez-Lahora*, 261 Neb. 192, 622 N.W.2d 612 (2001).

FACTS

Wolfe Automotive Group (WAG) manages 15 automobile dealerships in Missouri, Kansas, Illinois, and Nebraska. Its headquarters is in Kansas City, Missouri. Jeffrey Wolfe and his sister Cynthia Tucci each own 45 percent of WAG, and Dave Gatchell, WAG's chief operating officer, owns 10 percent. Wolfe and Tucci are also the majority owners in the 15 dealerships, which are organized as independent entities. At all but four of the dealerships, the general manager owns a minority interest in the dealership and is considered the managing partner.

Kinney was hired by WAG in 1994 as an internal auditor. He had a good working relationship with Wolfe and was rapidly promoted to chief controller and eventually to chief financial officer. During this time, Kinney was instrumental in establishing how the dealerships' accounting information would be interpreted, how this information would be reported on WAG's statements, and the standards to which WAG held its employees. Kinney was also involved in formulating and implementing WAG's policies.

In the spring of 1997, WAG was approached by a broker about the possibility of purchasing H.P. Smith Ford (H.P. Smith), an automobile dealership in Omaha, Nebraska. After several months of negotiations, in which Wolfe, Tucci, Gatchell, and Kinney all participated, an agreement was reached for the purchase of the dealership.

During the negotiations prior to the purchase of H.P. Smith, Kinney asked to be considered for the general manager position. Kinney was given the position based on his knowledge of the business. As general manager, Kinney was permitted to purchase a 10-percent equity interest in the dealership for $10,000, which entitled him to a yearend bonus of 10 percent of the dealership's profits. The annual profit of H.P. Smith was projected to be $2 million. Wolfe and Kinney discussed Kinney's compensation and agreed on a salary of $6,000 per month and a monthly draw of $4,000 as an advance on his yearend bonus, for total compensation of $10,000 per month.

While Kinney was general manager, he had full management authority and was the owner with responsibility for the day-to-day operations of H.P. Smith. Kinney worked with the dealership's

controller to improve its accounting system, including streamlining the accounts payable and payroll departments.

As general manager of H.P. Smith, Kinney had a company credit card in his name. Some of the charges made on the credit card while Kinney was general manager were for personal expenses. In addition, during 1997 and 1998, a number of checks were issued by H.P. Smith to Kinney. Some were expensed to different accounts within H.P. Smith, while others were debited to Kinney's accounts receivable employee account. In August and September 1998, Kinney and his wife ordered furniture from a furniture store to be delivered to their residence. The invoices, which were sent to and paid by H.P. Smith, were debited to Kinney's accounts receivable employee account.

On January 20, 1999, Wolfe and Tucci terminated Kinney for perceived irregularities in the accounting of the sale of H.P. Motor Sports, which had been a drag-racing division of H.P. Smith. WAG subsequently hired a forensic audit team to investigate the financial transactions involving Kinney while he was the general manager of H.P. Smith. After WAG complained of Kinney's conduct to the Omaha Police Department, he was arrested at his residence on April 23.

Kinney was originally charged by information on May 12, 1999, with one count of theft by deception, to which he pled not guilty. The trial court overruled a plea in abatement on August 12. Kinney subsequently filed a motion for a bill of particulars. At a pretrial conference on November 8, the trial court ordered counsel to exchange out-of-state witness lists on or before December 1. Prior to December 10, counsel were ordered to use good faith efforts to reach agreement on exhibits and objections to such exhibits. On December 10, over Kinney's objection, counsel were ordered to confer regarding exhibits.

At a hearing on December 22, 1999, the State requested leave to produce an amended information, copies of which were provided to the trial court and Kinney at that time. The amended information divided the case into four counts of theft by unlawful taking, with specific timeframes listed for each count. The State then read each new count and described the evidence it intended to produce on each count. The trial court granted the State's motion for leave to file the amended information, which

it filed on December 23, and Kinney moved for a bill of particulars as to the amended information. The trial court overruled the motion for a bill of particulars on December 28. On the record, but outside the presence of the trial court, defense counsel again objected to the court's order for compulsory production of trial exhibits.

Trial to a jury occurred on January 4 through 7 and 11, 2000. After the State presented its case, Kinney moved to dismiss all four counts with prejudice, which motion the trial court denied. Kinney then presented his case. Closing arguments were delivered, and the case was submitted to the jury on January 12. On January 14, the jury returned verdicts of not guilty on counts II and III. On count I, the jury found Kinney guilty and determined that the value of the property taken was $6,620. On count IV, the jury found Kinney guilty, and the value of the property taken was determined to be $1,665. On January 24, Kinney moved to set aside the verdict or, in the alternative, for a new trial. Both motions were overruled.

On June 20, 2000, the trial court ordered Kinney to complete 2 years' probation, to pay restitution in the amount of $8,285, and to complete 100 hours of community service. Kinney appealed, and we moved the case to our docket pursuant to our statutory authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Kinney assigns as error that the trial court erred in (1) ordering him to produce his trial exhibits and to disclose his potential out-of-state witnesses to the State before trial; (2) receiving evidence of uncharged misconduct; (3) overruling the motion for a protective order and motion to quash regarding a subpoena duces tecum issued to Norwest Bank; (4) overruling Kinney's motion for a bill of particulars; (5) finding sufficient evidence to support Kinney's convictions on counts I and IV; (6) admitting evidence over Kinney's objections; (7) excluding evidence Kinney offered; (8) sustaining the State's motion in limine; (9) sustaining an objection to statements made during Kinney's voir dire; (10) failing to adequately instruct the jury regarding criminal intent; and (11) overruling Kinney's motions to dismiss, for

directed verdict, and to set aside the verdict or, alternatively, for a new trial.

ANALYSIS

Kinney first argues that the trial court erred by ordering him to produce his trial exhibits and to disclose his potential out-of-state witnesses to the State before trial. This same argument was made in support of Kinney's motions to dismiss, his motion for a directed verdict, and his motion to set aside the verdict or, in the alternative, for a new trial, the dispositions of which are the subject of Kinney's 11th assignment of error.

At a pretrial conference on November 8, 1999, the trial court ordered counsel to exchange out-of-state witness lists by December 1 and to use good faith efforts to reach agreement on exhibits and objections on exhibits. At a second pretrial conference on December 10, the trial court again ordered counsel to exchange out-of-state witness lists by the close of business that day and, over the objection of the defense, to confer regarding exhibits on December 17. At a hearing on December 28, the trial court clarified that its order would encompass a document about which testimony would be adduced at trial. The trial court's stated purpose for the order was to ensure that the trial ran smoothly and efficiently. Pursuant to the trial court's orders, Kinney filed a limited witness disclosure on December 2 and original and supplemental out-of-state defense witness disclosures on December 10 and 13, respectively.

[2] In *State v. Woods*, 255 Neb. 755, 764, 587 N.W.2d 122, 128 (1998), we stated:

> The common law recognized no right of discovery in a criminal case by either the prosecution or the defendant. . . . In Nebraska, the prosecution has not been granted a right of discovery except as permitted by the court, with limitations clearly defined by statute. . . . Additionally, in the absence of a statute, Nebraska has not required defendants to plead defenses in advance.

(Citations omitted.)

[3] " '[D]iscovery in a criminal case is generally, and in the absence of a constitutional requirement, controlled by either a statute or court rule.' " *State v. Lotter*, 255 Neb. 456, 490, 586 N.W.2d 591, 618 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673

(1999) (quoting *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991)). This court has not established any court rules that would provide the State with a right of discovery in criminal cases. Neb. Rev. Stat. §§ 29-1912 to 29-1927 (Reissue 1995 & Cum. Supp. 2000) are the statutory provisions governing discovery in criminal cases, and §§ 29-1916 and 29-1917 are the only sections that authorize discovery by the State. Section 29-1917 permits a court to order the taking of depositions of certain witnesses, and therefore, it is inapplicable to Kinney's assignment of error. Section 29-1916(1) provides in part that whenever the court grants a request by the defendant for discovery pursuant to § 29-1912,

> the court may condition its order by requiring the defendant to grant the prosecution like access to comparable items or information included within the defendant's request which:
>
> (a) Are in the possession, custody, or control of the defendant;
>
> (b) The defendant intends to produce at the trial; and
>
> (c) Are material to the preparation of the prosecution's case.

Kinney argues, and we agree, that § 29-1916 did not provide a basis for the trial court to order him to produce his exhibits, since he never requested a discovery order pursuant to § 29-1912. The trial court ordered the production of the exhibits and exchange of witness lists in order to ensure the "smooth running of th[e] trial" and an "efficient presentation of th[e] case." We conclude that the trial court exceeded its authority and erred as a result.

Kinney was required to produce his trial exhibits without restriction and to disclose to the State every document which might have been used for any purpose. In *State v. Woods, supra*, we held that the trial court's order to disclose the identities of potential alibi witnesses was reversible error.

Here, Kinney was required to disclose not only the identities of certain witnesses but the substance of potential rebuttal and impeachment testimony as well. As a result, the State was provided with advance notice of Kinney's potential rebuttal and impeachment evidence. Thus, the witnesses called by the State were apprised of impeachment evidence that would be used in Kinney's defense.

Kinney was required to essentially provide the prosecutor with his entire case, including key impeachment evidence, before the trial began. If a remand were to be allowed, the prosecution would have the advantage of knowing the entire strategy of Kinney's case. The prosecution could then use that knowledge in ways that cannot be cured on remand. For example, the knowledge might allow the prosecutor to (1) craft the opening statement anticipating Kinney's defenses and minimizing his case, including deflating the impeachment evidence; (2) anticipate the cross-examination of the State's witnesses and prepare the witnesses for that cross-examination; (3) orchestrate the order of witnesses; (4) forgo calling certain witnesses because of the knowledge that impeachment evidence exists, perhaps forcing the defense to call those people as witnesses, which would then allow the State to lead these witnesses in questioning; (5) use the knowledge and extra time to obtain new witnesses whose testimony is not as likely to be impeached or to gather evidence to rebut the impeachment evidence; (6) anticipate, formulate, and advance the argument against a motion to dismiss; and (7) prepare the closing arguments well in advance of trial.

Because of the unusual circumstances, no remedy fashioned will return the parties to pretrial status quo. Unlike the situation in *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998), the error committed cannot be cured by remanding for a new trial and ordering discovery restrictions. Therefore, we reverse the judgment of the trial court and remand the cause with directions to dismiss with prejudice.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court is reversed and the cause is remanded with directions to dismiss the amended information with prejudice.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. SHAUN O. PARKER, RESPONDENT.

635 N.W.2d 454

Filed November 9, 2001. No. S-01-1219.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, for relator.

Richard M. Jones, of Lee & Bucchino Law Firm, for respondent.

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

PER CURIAM.

On January 30, 2001, the Office of the Counsel for Discipline filed a disciplinary grievance against respondent, Shaun O. Parker, D.D.S. The grievance alleges respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (3), which provide as follows: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (3) Engage in illegal conduct involving moral turpitude."

On September 7, 2001, respondent filed with this court an amended conditional admission of the disciplinary grievance pending against him. In accordance with the amended conditional admission, respondent admitted the following: Respondent was duly admitted to the practice of law in the State of Nebraska on September 22, 1994, and is subject to the Committee on Inquiry of the Second Disciplinary District. Respondent is not actively engaged in the practice of law in Nebraska and has been an inactive member of the Nebraska State Bar Association since his admission to the practice of law in Nebraska. Prior to January 23, 2001, respondent was authorized to practice dentistry in the State of Nebraska.

On January 16, 2001, a "Petition for Disciplinary Action" was filed against respondent with the Department of Health and

Human Services Regulation and Licensure of the State of Nebraska (DHHS) concerning respondent's license to practice dentistry. That same day, respondent filed an "Agreed Settlement" with DHHS and admitted the allegations in the petition for disciplinary action. On January 23, an "Order on Agreed Settlement" was entered by DHHS' chief medical officer, which order adopted the sanctions set forth in the agreed settlement.

In the agreed settlement, respondent admitted that from May through November 1999, he obtained quantities of the drug Vicoprofen for his personal use, by requesting drug samples from a drug wholesaler. The drug samples were delivered to the office where respondent practiced dentistry. Respondent removed the drug samples from the dental office and ingested them over time.

From September 1998 through March 2000, respondent obtained prescription drugs dispensed by Omaha area pharmacies pursuant to fraudulent prescriptions. Respondent had several methods for obtaining the drugs. One method consisted of enlisting employees at respondent's office to obtain drugs for him. Respondent would prescribe drugs in the names of employees, and the employees would pick up the drugs from pharmacies with the employees' claiming that they were patients, then deliver the drugs to respondent for his personal use. Another method involved respondent's having employees call pharmacies with prescriptions purportedly prescribed by other dentists, to be dispensed to respondent. The dentists listed as prescribers on pharmacy records, other than respondent, did not actually authorize the prescriptions.

In February 2000, respondent's employer confronted respondent regarding his drug use and gave him the option of either seeking chemical dependency treatment through DHHS' Licensee Assistance Program or being reported to DHHS for misconduct. Respondent chose to seek treatment through the Licensee Assistance Program.

In February 2000, respondent was evaluated for chemical dependency by the Licensee Assistance Program and was referred to an outpatient chemical dependency treatment program. In March, respondent began treatment through the outpatient program.

While in treatment with the outpatient program, respondent periodically went to the dental offices of his employer, outside of regular business hours, and used nitrous oxide. On July 29, 2000, the business manager at respondent's office found respondent in a dental chair self-medicating with nitrous oxide. That same day, respondent reported to an Omaha hospital and was admitted to the hospital's chemical dependency treatment center. Respondent subsequently sought chemical dependency treatment at the Talbott Recovery Campus in Atlanta, Georgia, which program included approximately 3 months of inpatient treatment.

Pursuant to the agreed settlement, respondent's dental license was placed on probation for a period of 5 years, on probationary conditions which we summarize as follows:

1. During the initial 3 months of probation, respondent was suspended from the practice of dentistry and was required to deliver his dental license to DHHS.

2. At the conclusion of the license suspension period, DHHS would issue to respondent a probationary license.

3. Respondent must abstain from personal use of controlled substances, prescription drugs, nitrous oxide, and all mood-altering substances, unless prescribed for or administered to respondent by a licensed physician or authorized licensed practioner for a diagnosed medical condition.

4. Respondent must abstain from the consumption of alcohol.

5. Respondent must agree to random body fluid or chemical testing at respondent's own expense, at such time and place as DHHS may direct. Respondent shall follow DHHS' instructions and directives for body fluid or chemical testing.

6. Respondent must report the use of any controlled substances, prescription drugs, or inhalants to DHHS on such frequency as is directed by DHHS.

7. Respondent must comply with all aftercare treatment recommendations made by his chemical dependency treatment provider, including any recommendations for counseling and attendance at support group meetings.

8. Respondent must attend a minimum of one Narcotics Anonymous or Alcoholics Anonymous or other chemical dependency support group meeting per week. If respondent's chemical

dependency treatment provider recommends additional attendance at support group meetings, respondent must follow such recommendations.

9. Respondent must advise all personal treating physicians and other treating practitioners, prior to treatment, of his prior history of chemical abuse and dependency and of all medications respondent may be taking at the time of treatment. Respondent authorizes all treating physicians and other treating practitioners to inform DHHS of all conditions for which respondent is being treated, including any drugs or medications, prescribed or over-the-counter, used in any treatment.

10. Respondent must not order controlled substances or nitrous oxide from drug wholesalers.

11. Controlled substances and nitrous oxide shall not be maintained on the premises at any location where respondent practices dentistry.

12. Respondent must maintain a separate log of controlled substance prescriptions sufficient to identify each prescription written or authorized by him during the probationary period by date, drug, patient, and prescription purpose. The prescription log shall be provided to DHHS upon request.

13. Respondent must provide notification of his license discipline to all dental practice partners, dental practice associates, any dental employer, and the licensing authority in any states where respondent may possess, apply for, or obtain an active dental license. Notification shall include providing copies of the petition for disciplinary action, the agreed settlement, and the order by the chief medical officer approving the agreed settlement.

14. If respondent is not self-employed, he must be employed as a dentist only by an employer who provides employer quarterly reports to DHHS. Employer quarterly reports shall be submitted to DHHS by respondent's employer, and shall include a description of respondent's work habits and continued abstinence from drugs, inhalants, and alcohol.

15. Any period during which respondent does not have an active Nebraska dental license, excluding the 3-month license suspension period, shall not reduce the probationary period or satisfy the terms and conditions of probation.

16. Respondent must submit written notification to DHHS within 15 days of any change in employment, employment status, residence, or telephone number.

17. Respondent must permit DHHS or representatives of the Board of Dentistry to conduct inspections of the premises where respondent practices dentistry.

18. Respondent must obey all state and federal laws and rules and regulations regarding the practice of dentistry.

19. Respondent must pay any costs associated with ensuring compliance with the agreed settlement, including, but not limited to, the costs of the random body fluid or chemical testing.

In his conditional admission entered into with the Office of the Counsel for Discipline, respondent admits that the above actions with regard to his drug use constitute violations of DR 1-102(A)(1) and (3) of the Code of Professional Responsibility and of his oath of office as an attorney.

Based on the conditional admission of respondent and the recommendation of the Office of the Counsel for Discipline, this court finds by clear and convincing evidence that respondent has violated his oath of office as an attorney and DR 1-102(A)(1) and (3). Accordingly, we hereby suspend respondent from the practice of law in the State of Nebraska for a period of 1 year, effective immediately, followed by a 2-year period of probation. During the periods of suspension and probation, respondent shall abide by and fully comply with all of the terms of the agreed settlement between respondent and DHHS, which terms are summarized above and are hereby incorporated by reference.

Additionally, during the periods of suspension and probation from the practice of law, respondent shall:

1. Attend a minimum of three meetings per week of Narcotics Anonymous, Alcoholics Anonymous, or Cocaine Anonymous.

2. Agree to work with and furnish the name and telephone number of a Narcotics Anonymous, Alcoholics Anonymous, or Cocaine Anonymous sponsor who is willing to disclose and confirm to the Nebraska Lawyers Assistance Program (NLAP), upon request, that he or she serves as respondent's sponsor.

3. Provide written verification on a monthly basis to NLAP of respondent's attendance at Narcotics Anonymous, Alcoholics Anonymous, or Cocaine Anonymous meetings.

4. Execute a release of information form authorizing DHHS and respondent's treatment provider to immediately report any violation of the agreed settlement to NLAP.

Costs and expenses are taxed to respondent. See Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF SUSPENSION.

RAYMOND RUZICKA ET AL., APPELLEES, V. HAROLD RUZICKA, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. RUZICKA, DECEASED, APPELLEE, AND BARBARA SUKSTORF ET AL., APPELLANTS.

635 N.W.2d 528

Filed November 16, 2001. No. S-00-608.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
5. **Interventions.** The right to intervene is granted by statute.
6. ____. The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 1995) is a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.
7. **Interventions: Statutes.** Intervention was unknown both at common law and in equity, and is a creature of statute.
8. ____: ____. The intervention statutes are to be liberally construed.
9. **Interventions.** The right to intervene pursuant to the statute is absolute.
10. **Interventions: Pleadings.** A person seeking to intervene in an action must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.
11. ____: ____. For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the petition are true.

12. **Decedents' Estates: Real Estate: Title.** Under Nebraska law, title to real property passes immediately upon death to devisees or heirs, subject to administration.
13. **Parties: Jurisdiction: Waiver: Appeal and Error.** As a general rule, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. However, the presence of necessary parties is jurisdictional and cannot be waived by the parties. If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.
14. **Parties: Words and Phrases.** An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

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

Jeff C. Miller and Malcolm D. Young, of Young & White, for appellants.

Steven J. Riekes, Leanne A. Gifford, and David P. Wilson, of Marks, Clare & Richards, for appellees Raymond Ruzicka, Phyllis Ruzicka, and 3R Farms, Inc.

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

STEPHAN, J.

Raymond Ruzicka, Phyllis Ruzicka, and 3R Farms, Inc. (collectively appellees), brought this action in the district court for Saunders County against Harold Ruzicka, as personal representative of the estate of Robert L. Ruzicka, to determine title to real property in Saunders County which brothers Raymond and Robert owned in fee simple as tenants in common at the time of Robert's death. Appellees claimed that Raymond and Robert had intended to transfer title to 3R Farms, but by "mistake and inadvertence," this had not occurred prior to Robert's death. They petitioned for equitable relief and prayed that title be quieted in 3R Farms. Barbara Sukstorf, John Ruzicka, and Debra Gorley (appellants), who are residuary devisees named in Robert's will, filed a motion for leave to intervene in the action. They appeal from the denial of that motion by the district court.

BACKGROUND

In their operative amended petition, appellees allege that prior to 1983, the land in question was owned by Raymond and Robert in fee simple as tenants in common and utilized by them in a joint farming operation. They further allege that in 1983, the brothers formed 3R Farms, a Nebraska corporation, for the purpose of owning and operating their family farm. Twenty-five thousand shares of capital stock were issued to Robert, and twenty-five thousand shares of capital stock were issued to Raymond. Appellees allege that Raymond and Robert orally agreed that the real estate, along with other assets, would be transferred to 3R Farms in exchange for the stock. They further allege that Raymond and Robert hired an attorney to transfer the real estate to 3R Farms but that the attorney failed to do so. Appellees allege that from and after 1983, all parties treated the real estate as an asset of 3R Farms.

Appellees further allege that in 1996, Robert, Raymond, and Phyllis, then the sole shareholders of 3R Farms, entered into a stockholders' "Buy-Sell Agreement" wherein the parties agreed that in the event of the death of any of the stockholders, 3R Farms was entitled to purchase all outstanding shares of the deceased stockholder at a price computed pursuant to the buy-sell agreement. A copy of the buy-sell agreement was attached to the petition and incorporated therein. Appellees asserted "causes of action" for resulting trust, specific performance, constructive trust, and quiet title. They sought the conveyance of the real estate to 3R Farms and the enforcement of the buy-sell agreement.

Robert died testate in Saunders County on November 22, 1998. At the time of his death, record title to the real estate in question was still held by Raymond and Robert in fee simple as tenants in common and had not been conveyed to 3R Farms. Robert's will did not specifically devise the real estate, but included a residuary clause devising the residuary of his real and personal property to nine nieces and nephews. Three of those nine are appellants in this case and proposed intervenors below.

In their motion for leave to intervene, appellants alleged that they had a valid interest in the real estate that was the subject of the petition by virtue of their standing as residual and remainder

"legatees" under Robert's will. In their proposed petition in intervention submitted to the district court, appellants alleged that Robert's will was duly admitted to probate and that upon information and belief, all debts and claims against the estate and taxes had been paid. They further alleged that there are sufficient liquid assets in the estate to pay all specific bequests and that the remainder of the estate is the real property at issue. The proposed petition in intervention sought a partition of the real estate or, in the alternative, a sale of the property and a division of the proceeds of the sale. In addition, the proposed petition sought an order requiring appellees to produce financial records for an accounting.

On May 17, 2000, the personal representative filed an answer and cross-petition denying the allegation that Raymond and Robert agreed to transfer the real estate to 3R Farms. The cross-petition requested that title to the real estate be quieted and that it be partitioned and divided among its owners.

The district court entered its order denying the motion for leave to intervene on May 30, 2000. The court found that the petition in intervention improperly attempted to present issues not in the original petition and improperly expanded the scope of the proceedings. The court also found that the interests of appellants were already represented by the personal representative and that there was no allegation of a conflict of interest. Furthermore, the court held that appellants did not have a direct interest in the real estate because they were entitled to a distribution of only the residue of the estate in cash after all of the debts and specific bequests had been paid.

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

ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred (1) in denying the motion for leave to intervene and (2) in failing to find, sua sponte, that all of the residual devisees were necessary and indispensable parties to the litigation.

STANDARD OF REVIEW

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

[3,4] The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which would be affected by the judgment. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997); *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997). When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

ANALYSIS

RIGHT TO INTERVENE

Appellants argue that the essential issue for our review is whether they have a direct legal interest in the proceedings that entitles them to intervene pursuant to Neb. Rev. Stat. § 25-328 (Reissue 1995). Appellees contend that the case turns on whether the personal representative or an heir is the proper party to defend a quiet title action involving real property to which title was held by Robert at the time of his death. The issues presented require us to examine the interplay between our intervention statutes and the Nebraska Probate Code, codified at Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 1995 & Cum. Supp. 1998).

[5-9] The right to intervene is granted by statute in Nebraska. Section 25-328 provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming

> what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

The interest required as a prerequisite to intervention under § 25-328 is a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action. *In re Interest of Kayle C. & Kylee C., supra.* Intervention was unknown both at common law and in equity, and is a creature of statute. *Wightman v. City of Wayne*, 146 Neb. 944, 22 N.W.2d 294 (1946). The intervention statutes are to be liberally construed. *Id.* The right to intervene pursuant to the statute is absolute. *Id.*

[10,11] The procedure for intervening is also set forth in our statutes. Neb. Rev. Stat. § 25-330 (Reissue 1995) provides:

> The intervention shall be by petition, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same rules as obtain in regard to other pleadings provided for by this code. If such petition is filed during term, the court shall direct the time in which answers thereto shall be filed.

We have recently recognized the statutory requirement that intervention be by petition. *In re Interest of Kiana T., ante* p. 60, 628 N.W.2d 242 (2001). A person seeking to intervene in an action must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998). For purposes of ruling on a motion for leave to intervene, a court must assume that the intervenor's factual allegations set forth in the petition are true. *Id.*

[12] Appellants contend that they have a direct and legal interest in the controversy because distributive shares of Robert's title to the disputed real property passed to them immediately upon his death. Under Nebraska law, title to real property passes immediately upon death to devisees or heirs, subject to administration. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997); *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986). The probate code also clearly recognizes this principle:

> The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. *Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them . . . or, in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them*[,] . . . subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

(Emphasis supplied.) § 30-2401. According to the allegations in the petition for intervention, which we must accept as true, all of the debts of the estate have been paid, there are sufficient assets to pay specific bequests made by Robert in his will, and the real estate at issue constitutes the remainder. Under these circumstances, each appellant as a residual devisee is the vested titleholder of an interest in the real property presently included in the residue of the estate. If appellees are successful in removing the real property from the estate, appellants' interest in the residuary remainder will be substantially diminished.

The district court stated three reasons in support of its finding that appellants were not entitled to intervene in the proceedings. First, the court found that they lacked a direct interest in the real estate because, as "residuary legatees," appellants were entitled to only a distribution of the residue in cash. We disagree with this reasoning. Initially, we note that appellants are not "legatees" either as that term is used at common law or under the probate code. Under the common law, a legatee is one who takes personal property under a will. Black's Law Dictionary 908 (7th ed. 1999). The appellants in this situation are the takers of real property under the will, or common-law devisees. *Id.* at 463. Furthermore, the probate code uses the generic term "devisee" to refer to parties who take either real or personal property under a will, and "legatee" is not used in the code. § 30-2209(7) and (8).

More importantly, the record does not support the district court's conclusion that appellants' interests are in a cash distribution after the settlement of debts and specific bequests, rather than

in the real estate in the residuary. The petition in intervention makes factual allegations, which we must accept as true for purposes of our review, that all debts of the estate have been paid. The petition also alleges that there are sufficient assets to pay specific bequests and that the real estate at issue constitutes the remainder of the estate. The petition requests that the real estate be partitioned and, only as an alternative, requests that it be sold and the proceeds divided. Unless there is a contrary intention indicated by the will, the assets of an estate are to be distributed in kind to the extent possible. § 30-24,104. Section 30-24,104(4) specifically provides that "[t]he residuary estate shall be distributed in kind if there is no objection . . . and it is practicable to distribute undivided interests." On the record before us, there is no objection to an in-kind distribution of the real estate that constitutes the residuary and no showing that such a distribution would be impractical. Moreover, we note that even if the real estate is sold and the proceeds distributed, the interest of appellants remains in the real estate, regardless of how the interest is satisfied.

The district court also found that appellants' interests in this matter "are already represented by the Personal Representative who has the duty to defend this lawsuit in the best interests of those persons who take under decedent's will." It reasoned that because appellants made no showing that the personal representative would act contrary to their interests, they were not entitled by law to be represented twice in the same action. This rationale requires us to examine other relevant provisions of the probate code.

As noted, the probate code clearly provides that title to real estate passes immediately upon death to heirs or devisees. § 30-2401. Appellees argue, however, that §§ 30-2462 to 30-2482, which set forth the duties and powers of the personal representative, illustrate that the personal representative nevertheless adequately represents appellants. Section 30-2464 provides:

> (a) A personal representative is a fiduciary who shall . . . comply with the Nebraska Uniform Prudent Investor Act. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and

> as expeditiously and efficiently as is consistent with the best interests of the estate. He or she shall use the authority conferred upon him or her by this code, the terms of the will, if any, and any order in proceedings to which he or she is party for the best interests of successors to the estate.
>
> . . . .
>
> (c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his or her death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his or her decedent had immediately prior to death.

Section 30-2470 governs the duty of a personal representative with respect to possession of an estate, providing:

> Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. *He may maintain an action to recover possession of property or to determine the title thereto.*

(Emphasis supplied.) Appellees argue that the above statutes, particularly the italicized portion of § 30-2470, are dispositive of the appeal, as they clearly authorize the personal representative to represent the estate in a quiet title action. They argue that although title still passes at death, the other provisions of the probate code make the concept of title "relatively unimportant" in matters of probate except in the absence of administration. Brief

for appellee at 8. This argument is also based upon § 30-2472, which provides:

> Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. Unless otherwise specifically ordered by the court, this power may be exercised without notice, hearing, or order of court.

Since the enactment of the probate code, we have addressed issues relating to the power of a personal representative over real estate of a decedent. In *In re Estate of Kesting*, 220 Neb. 524, 371 N.W.2d 107 (1985), the will of a testator devised the north half of a quarter section of land to his daughter and the south half to his son. Prior to his death, however, the testator by warranty deed conveyed the entire quarter section to his son. The son was subsequently appointed as personal representative of the estate. The daughter filed a petition alleging that the warranty deed was procured by undue influence and requesting that a special administrator be appointed for the purpose of taking action on behalf of the estate to set aside the warranty deed. In resolving the issue, we noted that "[g]enerally, and in a proper situation, an heir, devisee, or interested person in his or her own right may challenge a deed executed by the decedent defeating descent to the challenger." *Id.* at 526, 371 N.W.2d at 109. Citing § 30-2470, we reasoned that there was no allegation that the real estate at issue was necessary for the purposes of administering the estate, and that in the absence of a request from the personal representative for possession of the real estate, there was " 'conclusive evidence' " that the real estate was not necessary for administration of the estate. *Id.* at 527, 371 N.W.2d at 109. We then concluded that when real property is not needed for purposes of administration, the probate code could not be construed so as to authorize a special administrator to bring an action, thereby permitting one heir or devisee to finance a lawsuit against another out of the funds of the estate.

In *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997), we interpreted § 30-2470 in a similar manner. In that case, the trial court awarded certain heirs a partial interest in real property.

We held that this was error, noting that the personal representative had made a demand for surrender of the property and that pursuant to § 30-2470, such demand was conclusive proof that the property was necessary for administration. In *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986), we addressed who is the proper party in a revivor action involving real property of a decedent. In examining the issue presented, we interpreted our revivor statutes to require that

> "the revivor should be against the representatives of the deceased person whose property rights would be affected by the revivor. If the revivor would affect only the personal property in the hands of the administrator, then it may be revived as against him, but, if it is intended to affect real property which passed, on the death of the judgment debtor, to his heirs, then it should be revived against such heirs at law . . . ."

Willis, 223 Neb. at 53-54, 388 N.W.2d at 105, quoting *Dougherty v. White*, 112 Neb. 675, 200 N.W. 884 (1924). We then stated:

> The reason for the rule is simple. A suit must be brought by or against a person or persons who have an interest in the property which will be affected by the order of the court. If the property to be affected is personal property, the proper party is the personal representative, who, until the estate is closed, has lawful title to the property. . . . On the other hand, if the property is realty, the proper party or parties are the heirs or devisees, because title to real estate immediately vests in the heirs or devisees upon the death of the party having an interest in the property just prior to death.

(Citations omitted.) *Willis*, 223 Neb. at 55, 388 N.W.2d at 105-06.

In *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982), the appellant contended that he should have been awarded the decedent's business under the terms of an oral promise that the decedent would leave the property to the appellant in his will. At issue was whether this was a request for specific performance of an oral contract or whether it was a claim against an estate. We noted that we had previously addressed the issue in *Peterson v. Estate of Bauer*, 76 Neb. 652, 107 N.W. 993 (1906), and found it was an equitable action for specific performance. In support of our holding, we quoted from *Peterson*:

> "The suit is one to bind specifically the estate, real and personal, of the deceased with a contract alleged to have been made by him in his lifetime . . . . To such a suit the persons claiming title to the lands of the decedent as heirs or devisees, and asserting rights as distributees of the personalty by will or by statute, are indispensable parties without whose presence a final determination of the controversy cannot be made. It follows that such a claim is not litigable in the ordinary course of probate administration, but must be prosecuted, if at all, in a court of original and general equitable jurisdiction and powers, the executor or administrator being a proper but not in all instances a necessary party."

In re Estate of Layton, 212 Neb. at 521-22, 323 N.W.2d at 819-20.

These cases demonstrate that a personal representative may maintain an action with respect to real estate only to the extent the personal representative has possession of the real estate for purposes of administration. In the instant case, the allegations in the petition for intervention indicate that the real property at issue is no longer necessary for purposes of administration. The personal representative therefore does not have a possessory interest in the real estate and cannot already be adequately representing the interests of appellants.

Moreover, even if the personal representative does in some manner already represent appellants, the district court nevertheless erred in denying the petition to intervene on this ground. Appellees rely upon two cases from other jurisdictions in support of their argument that because the probate code gives authority to the personal representative to represent all interested parties of the estate, allowing those parties to intervene will unnecessarily complicate the litigation. Both of these cases are inapplicable, however, because they involve intervention rules substantially different from ours.

In *In re Est. of Scott*, 40 Colo. App. 343, 577 P.2d 311 (1978), and *State ex rel. Palmer v. District Ct., Etc.*, 190 Mont. 185, 619 P.2d 1201 (1980), the courts interpreted intervention rules providing that a party could intervene as a matter of right if the party

> "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that

> the disposition of the action may as a practical matter, impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties*."

(Emphasis supplied.) *In re Est. of Scott*, 40 Colo. App. at 345, 577 P.2d at 312, quoting Colo. R. Civ. P. 24(a)(2). Accord *State ex rel. Palmer, supra*, quoting Mont. R. Civ. P. 24(a)(2). These intervention rules make an exception for a party already adequately represented by an existing party. There is no such qualification in § 25-328.

Section 25-328 requires only that an intervenor have a direct and legal interest in the matter in litigation. The language of the intervention statute is clear, and the right to intervene under it is "absolute." *Wightman v. City of Wayne*, 146 Neb. 944, 946, 22 N.W.2d 294, 296 (1946). The district court erred in denying the petition in intervention for the reason that appellants were already adequately represented by the personal representative.

The district court also found that the petition in intervention impermissibly attempted to expand the scope of the proceedings by seeking an accounting. An intervenor who is not an indispensable party cannot change the nature and form of the action or the issues presented therein. *Arnold v. Arnold*, 214 Neb. 39, 332 N.W.2d 672 (1983). Because we conclude based on the analysis below that appellants are necessary parties, we do not address this finding.

Pursuant to Nebraska law, title to the real property immediately vested in appellants at the time of Robert's death. They therefore have a sufficient direct and legal interest in the matter in litigation to entitle them to intervene pursuant to § 25-328, and the district court erred in denying their petition in intervention.

Necessary Parties

[13] Appellants also argue that the district court erred in not sua sponte requiring that all nine residual devisees be made parties to the proceeding. We note that the necessary party argument was not made before the district court. As a general rule, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001). However, the presence of

necessary parties is jurisdictional and cannot be waived by the parties. *Langemeier v. Urwiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000). If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy. *Id.* We therefore address the merits of this argument.

[14] An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). See, also, Neb. Rev. Stat. § 25-323 (Reissue 1995). All nine residual devisees were immediately vested with title to the residuary real estate upon Robert's death. See, § 30-2401; *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997); *Willis v. Rose*, 223 Neb. 49, 388 N.W.2d 101 (1986). A determination of this controversy in favor of appellees would necessarily prejudice the rights of all the residual devisees, and therefore, the controversy cannot be properly resolved without their participation in the suit.

We conclude that the district court erred in not sua sponte requiring that all nine residual devisees be made parties to the instant case. We remand with directions that all residual devisees be made defendants to the instant proceedings.

CONCLUSION

As vested titleholders to the real property in the residuary estate, appellants have a direct and legal interest entitling them to intervene pursuant to § 25-328. Because a determination of the controversy in favor of appellees would prejudice the rights of all nine residual devisees, all of them are also necessary parties to this case. We reverse, and remand with directions to grant appellants leave to intervene and to order that all of the residual devisees be made parties defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

LYNDA F. PAULK, PERSONAL REPRESENTATIVE OF THE ESTATE OF GREG W. ANDERSON, DECEASED, APPELLANT AND CROSS-APPELLEE, V. CENTRAL LABORATORY ASSOCIATES, P.C., ET AL., APPELLEES AND CROSS-APPELLANTS.

636 N.W.2d 170

Filed November 30, 2001. No. S-00-109.

1. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
3. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
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. **Pretrial Procedure.** The primary purpose of the discovery process is to explore all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. The discovery process also provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination. Moreover, pretrial discovery enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case.
6. **Rules of the Supreme Court: Pretrial Procedure.** Failure to seasonably supplement discovery responses may be grounds for sanctions imposed under Neb. Ct. R. of Discovery 37(d) (rev. 2000).
7. ____: ____. An appropriate sanction under Neb. Ct. R. of Discovery 37 (rev. 2000) is determined in the factual context of a particular case and is initially left to the discretion of the trial court.
8. **Motions for Mistrial.** A motion for mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
9. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
10. **Actions: Decedents' Estates: Wrongful Death.** The right to maintain an action for wrongful death did not exist under the common law and exists in Nebraska, as in other states, solely by statute.
11. **Wrongful Death: Words and Phrases.** The phrase "next of kin" as used in Nev. Rev. Stat. § 30-809 (Reissue 1995) means persons nearest in degree of blood surviving, or,

in other words, those persons who take the personal estate of the deceased under the statutes of distribution.

12. **Constitutional Law: Courts.** Article I, § 13, of the Nebraska Constitution does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy, but where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none.
13. **Statutes: Judicial Construction: Legislature: Intent: Presumptions.** Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Denzel Rex Busick for appellant.

Mark E. Novotny and Kyle Wallor, of Lamson, Dugan & Murray, L.L.P., for appellees.

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

STEPHAN, J.

This is a professional liability action in which Lynda F. Paulk, as the personal representative of the estate of Greg W. Anderson, seeks damages for personal injury and wrongful death. Defendants named in the action include G.L. Morris, M.D.; A.F. Kielhorn, M.D.; and Central Laboratory Associates, P.C. (CLA), a professional corporation with which Morris and Kielhorn were affiliated at all pertinent times (collectively the defendants). Following a trial in the district court for Buffalo County, the jury returned a verdict in favor of the defendants and the district court entered judgment thereon. Paulk appeals from an order overruling her motion for new trial.

BACKGROUND

On April 17, 1991, Anderson had a mole surgically removed from his back. The surgeon submitted a specimen of the excised tissue to a pathology laboratory operated by CLA, where it was first examined by Morris, a board-certified pathologist. Morris diagnosed the specimen as an "[i]rritated junctional nevus," a type of benign lesion. Kielhorn, who is also a board-certified

pathologist, then independently examined the specimen and concurred with Morris' diagnosis. On April 18, CLA reported the diagnosis reached by Morris and Kielhorn to the surgeon, who, in reliance thereon, notified Anderson that the surgically removed tissue was benign.

On June 17, 1995, Anderson was admitted to St. Francis Medical Center in Grand Island, Nebraska, with complaints of severe back pain, dizziness, vomiting, slurred speech, and headaches. He was thereafter diagnosed as suffering from a metastatic cancerous lesion in his brain, caused by metastatic malignant melanoma. On June 23, in an attempt to determine the primary source of the malignancy, pathologists at St. Francis Medical Center reexamined the specimen slide from the 1991 surgery. They concluded that the specimen was not a benign lesion, as Morris and Kielhorn had concluded, but, rather, a primary nodular malignant melanoma. Anderson's health deteriorated rapidly, and he died as a result of the malignancy on September 11, 1995.

In her operative petition, Paulk alleged that Morris and Kielhorn were negligent in failing to correctly diagnose and report the malignancy in 1991 and that such negligence was attributable to CLA under the doctrine of respondeat superior. She further alleged that

> [a]s a direct and proximate result of the negligence of the Defendants, [Anderson] died on September 11, 1995, and his surviving next of kin have been deprived of his care, comfort, companionship, services, earnings, contributions, and consortium, and all other pleasures and rights, having a pecuniary value, which attend inter-family relationships.

In their answer, the defendants admitted that the 1991 diagnosis was incorrect, but specifically denied that they were negligent in any manner and further alleged that "there was no causal relationship between any action or inaction on the part of these defendants in the death of [Anderson], the same being an unavoidable medical sequela of his pathological condition as it there and then existed . . . ."

Prior to trial, the defendants responded to written interrogatories propounded by Paulk. One of the interrogatories directed to each defendant stated:

> Identify each person whom defendant expects to call as an expert witness, stating the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each such opinion.

Each defendant identified David Bouda, M.D.; Jerry Jones, M.D.; and David Howe, M.D., as experts whom they had consulted, and responded to the aforementioned interrogatory as follows: "Dr. David Bouda and Dr. David Howe will testify as to causation. Dr. Jones will testify as to causation and standard of care." In supplemental responses, each defendant identified George Bascom, M.D., as an additional defense expert who would testify as to "causation."

After the first of these responses was served, Paulk made a written request by letter for a curriculum vitae for each expert identified and further requested by letter the "facts and opinions upon which each expert is expected to testify." In response, defense counsel wrote:

> [E]ach of the . . . expert witnesses . . . will testify, based on a review of the materials in the case . . . that the actions of the defendants were not the proximate cause of [Anderson]'s death. The experts will testify as to the nature of this type of cancer, its curability rate, and the treatments available at the time the decedent suffered from the disease. The experts will further opine regarding the pathology of metastatic melanoma, the disease process itself, and the manner and shape in which the disease manifests itself. Dr. Jones will specifically testify regarding the standard of care regarding the defendants and the difficulty in diagnosing metastatic melanoma. Dr. Jones will testify in detail regarding the process of examining and diagnosing this disease versus other processes of skin samples.

Paulk deposed Jones prior to trial. Jones, a pathologist who practices in Omaha, testified that he reviewed the specimen slide containing tissue from Anderson's 1991 surgery and concluded that it reflected a malignant melanoma. Jones also identified a series of seven photomicrographic slides which he had prepared from the specimen slide, depicting the tissue excised in 1991. When asked why he prepared these slides, Jones stated: "Well, I

may — I would like to offer a caveat that I may have additional things to say about these slides." Paulk's counsel then stated, "I would like to know everything you are going to say about those slides, Doctor[.]" Jones was then questioned and commented upon what was depicted in each of the seven photomicrographic slides. He did not disclose that any of the slides depicted melanoma cells in the blood. After expressing his opinions regarding the applicable standard of care, Jones stated his opinion that the melanoma had already metastasized at the time of Anderson's 1991 surgery. Paulk's counsel then stated, "Tell me all the reasons why you are of that view[.]" Jones discussed "several reasons" but did not mention any detection of melanoma cells in the blood in the 1991 tissue specimen.

At trial, Kris Mleczko, M.D., a board-certified pathologist, was called as an expert witness on behalf of Paulk. Mleczko testified he reviewed a specimen from a scalp lesion biopsy performed during Anderson's 1995 hospitalization and reached a diagnosis of metastatic malignant melanoma, indicating that the malignancy had spread from a distant primary site. In an effort to ascertain the primary site, Mleczko reviewed the tissue specimen from Anderson's 1991 surgery and concluded that it reflected a primary lesion from which the metastatic tumor had originated. He opined that the failure of Morris and Kielhorn to diagnose and report the malignancy in 1991 fell below the applicable standard of care.

Donald Bell, M.D., a board-certified surgeon, also testified as an expert witness on behalf of Paulk. Bell stated that if the malignant melanoma had been diagnosed in 1991, the appropriate treatment would have been a "wide local excision" to surgically remove tissue around and below the scar left by the excision of the mole, as well as postoperative followup care. Bell opined that with such treatment and care, Anderson would have had a greater than 50-percent chance of survival. Bell admitted on cross-examination, however, that patients with *metastatic* melanoma have virtually no chance of survival.

Paulk also offered the deposition testimony of Adour R. Adrouny, M.D., a board-certified oncologist. Based upon a review of medical records, Adrouny testified that if the malignant melanoma had been correctly diagnosed and properly

treated in 1991, Anderson would more likely than not have been alive and free of the disease 5 years later.

In their case in chief, the defendants called, among other persons, Bouda, Jones, Howe, and Bascom, the defense experts previously identified. Bascom and Howe, both board-certified oncologists, testified that in their opinion, the 1991 misdiagnosis was not causally related to Anderson's death because, by that time, the melanoma had already metastasized beyond the skin where it had originated and no treatment could have prolonged Anderson's life. Bouda, another board-certified oncologist, expressed similar opinions. After a hearing outside the presence of the jury, the district court sustained Paulk's motion in limine and excluded Bouda's testimony regarding calculation of tumor growth rates based upon "doubling times" on the ground that this methodology lacked an adequate scientific basis.

On direct examination, Jones gave an opinion that the 1991 diagnosis, while incorrect, did not constitute a deviation from the appropriate standard of care because 100 percent accuracy in pathologic diagnosis is not achievable. He further testified that the lesion had been completely excised in 1991. He was then asked a series of questions concerning images projected from the photomicrographic slides that he prepared from the 1991 specimen slide. When asked what could be seen on one of the images, Jones responded that a melanoma cell could be seen within a blood vessel. He characterized this as "very important" and something he had searched for "very carefully and diligently to try to find." When asked the significance of this finding, Jones stated:

> Well, it [sic] obviously at this stage — at this time when this was excised we have melanoma cells in blood vessels already. We can demonstrate these melanoma cells in blood vessels. What does that mean? That's how melanoma spreads. Melanoma is not like other cancers. It spreads by way of the lymph vessels, and it spreads by the way of the blood vessels. And once it gets in the blood vessels, it goes everywhere. . . . The fact that it's in the blood vessel, it indicates it has already spread systemically to other areas of the body.

Jones further stated his conclusion that "these melanoma cells having been demonstrated in blood vessels have already spread from this site to multiple other areas of the body."

Paulk moved for a mistrial on the ground that the presence of melanoma cells in Anderson's blood as a basis for Jones' opinion regarding the onset of metastasis had not been disclosed in response to pretrial discovery. The district court took the motion under advisement and permitted the trial to proceed. At the conclusion of Jones' testimony, the court questioned him outside the presence of the jury and confirmed that Jones had formed his opinions regarding the presence of melanoma cells in Anderson's blood prior to the taking of Jones' deposition.

Following a brief recess, the trial resumed. On the following day, the defendants rested and Paulk re-called Mleczko to the stand as a rebuttal witness. Mleczko testified that he had obtained the 1991 tissue specimen slide from Jones on the previous evening and had reviewed it again. He also reviewed the photomicrographic slides and Jones' trial testimony in reference to them. Mleczko testified that the photomicrographic slides did not conclusively establish the presence of melanoma cells in the blood and that even if such cells were present, one could not conclude with reasonable medical certainty that the melanoma had metastasized beyond the primary site.

At the conclusion of the evidence, the trial court conducted an instruction conference. The court proposed instruction No. 14, which stated: "A proximate cause is a substantial factor that produces a result in a natural and continuous sequence, *and without which the result would not have occurred.*" (Emphasis supplied.) Paulk objected to the italicized portion of the instruction and requested an instruction on concurring cause. Paulk also objected to instruction No. 8 insofar as it defined Anderson's "next of kin" as his surviving spouse and children. The court overruled the objections and declined to give the requested instruction.

The jury returned its verdict for the defendants on November 12, 1999. On November 15, the district judge filed a journal entry overruling Paulk's motion for mistrial, stating:

> The Court is in agreement that the testimony of Dr. Jones constituted surprise and the type of opinion expressed by Dr. Jones should have been but was not previously disclosed by

> the defendants to the plaintiff. The Court finds further, however, that the provision of opportunity to the plaintiff to offer additional evidence contrary to the evidence offered by Dr. Jones was sufficient to remedy the difficulties raised by the plaintiff's motion.

In the same journal entry, the district court accepted and entered judgment upon the verdict.

Paulk filed a timely motion for new trial on multiple grounds, including the overruling of her objections to jury instructions, the refusal of the court to give certain requested jury instructions, and the refusal to grant the motion for mistrial based upon unfair and prejudicial surprise arising from Jones' testimony. Following an evidentiary hearing on this motion, it was overruled. Paulk then perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Paulk contends, restated and summarized, that the district court erred in (1) declining to grant her motions for mistrial and new trial based upon unfair surprise; (2) overruling her objection to jury instructions Nos. 8 and 14; and (3) refusing to give a concurring cause instruction.

The defendants have cross-appealed, asserting that the district court abused its discretion in sustaining the motion in limine and precluding the testimony of Bouda with respect to "doubling times."

STANDARD OF REVIEW

[1] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

[2,3] To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Nebraska Nutrients v. Shepherd*, 261 Neb.

723, 626 N.W.2d 472 (2001); *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). Whether a jury instruction given by a trial court is correct is a question of law. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001).

[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. *Maxwell, supra.*

ANALYSIS

Unfair Surprise

It is undisputed that Morris and Kielhorn missed the diagnosis of malignant melanoma when reviewing the tissue specimen submitted after the 1991 surgery. At trial, the two critical issues of fact pertaining to liability were (1) whether the missed diagnosis constituted a deviation from the applicable standard of care and (2) if so, whether the missed diagnosis was the proximate cause of Anderson's injuries and death. The causation issue turned on whether the cancer had already metastasized, i.e., spread to other parts of the body, by the time the mole was excised in 1991. There was sharply conflicting evidence on this point.

Whether a causal relationship existed between the misdiagnosis and the metastasis of the primary tumor is a complex medical issue requiring expert testimony. See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). Accordingly, an important aspect of each party's trial preparation was discovery of the opinions that the opposing party's expert witnesses would state at trial and the facts upon which such opinions were based.

[5] The primary purpose of the discovery process is to explore all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997); *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). The discovery process also provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination. *Id.* Moreover, pretrial discovery enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case. *Id.*

Neb. Ct. R. of Discovery 26(b)(4)(A)(i) (rev. 2000) provides:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Rule 26(b)(4)(A)(ii) provides that upon motion, the trial court "may order further discovery by other means." Here, it appears that the parties informally agreed to identify each expert witness and the general nature of his or her testimony through answers to interrogatories, and then to voluntarily tender the expert for a discovery deposition to be taken by opposing counsel. We therefore view the interrogatory response regarding Jones' testimony and his subsequent discovery deposition testimony as components of the defendants' initial response to expert witness discovery.

Jones' opinion that malignant melanoma cells were visible within the blood vessels in the 1991 tissue specimen, thereby establishing that metastasis had already occurred, was clearly within the scope of the expert witness interrogatory propounded by Paulk. In addition, the information should have been disclosed by Jones in his deposition when he was asked to disclose all of his anticipated testimony concerning the photomicrographic slides, and again when he was asked to give all the reasons for his opinion that metastasis had occurred prior to the 1991 surgery. Jones' own testimony at trial underscores that the presence of melanoma cells in the bloodstream would be a "very important" factor in determining when metastasis occurred.

The record is unclear as to exactly when the defendants or their counsel became aware of this evidence, but that fact is immaterial to our analysis. It is ultimately a party's responsibility to ensure that the party's experts have fairly and adequately responded to an opposing party's deposition questions. Rule 26(e)(1) provides:

> A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to
>
> . . . .
>
> (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or

> she is expected to testify, and the substance of his or her testimony.

The record clearly indicates that the defendants failed to supplement prior discovery responses regarding Jones' testimony that in his opinion, melanoma cells could be detected in Anderson's bloodstream. Pursuant to rule 26(e)(1)(B), such critical evidence should have been disclosed prior to trial, and consequently, we agree with the district court that its disclosure for the first time at trial constituted surprise.

[6,7] Failure to seasonably supplement discovery responses may be grounds for sanctions imposed under Neb. Ct. R. of Discovery 37(d) (rev. 2000). *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). An appropriate sanction under rule 37 is determined in the factual context of a particular case and is initially left to the discretion of the trial court. *Norquay, supra.*

[8] In *Norquay*, we held that a party claiming unfair surprise due to the admission of evidence at trial which was not disclosed in response to discovery requests must make a timely request for an appropriate remedial measure, such as a motion to strike, a motion for a continuance, or a motion for a mistrial. Here, Paulk made a timely motion for mistrial when suddenly confronted with Jones' previously undisclosed opinion that malignant cells were visible in the bloodstream on the 1991 tissue specimen. A motion for mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986), *overruled in part on other grounds, State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

Based upon our review of the record, we conclude that the district court abused its discretion in denying Paulk's motion for mistrial. We reach this conclusion for three reasons. First, Jones' testimony concerning the presence of melanoma cells in the bloodstream was perhaps the most critical evidence offered by the defense. If believed by the jury, the testimony provided objective, tangible proof that the malignancy had already spread at the time of the 1991 surgery. This fact would convincingly refute Paulk's liability theory that the misdiagnosis prevented prompt treatment which would have averted metastasis and death. The critical

importance of the evidence intensified the unfairness occasioned by the failure to disclose it during discovery.

Second, the surprise introduction of this testimony, coupled with the district court's reservation of a ruling on the timely motion for mistrial, placed Paulk in the unenviable position of cross-examining Jones with respect to damaging medical evidence which was disclosed for the first time during trial. This thwarted one of the essential purposes of discovery, which is to provide a basis for an informed cross-examination. See *Norquay, supra.*

Third, the fact that Paulk was permitted to present rebuttal testimony did not eliminate or ameliorate the prejudice occasioned by the unfair surprise. Paulk would have been entitled to present rebuttal evidence even if Jones' opinion had been disclosed during discovery, as it should have been. Timely pretrial disclosure, however, would have permitted Paulk a reasonable period of time in which to develop such rebuttal evidence. Instead, Paulk had approximately 24 hours to arrange for the 1991 tissue specimen to be transported from Jones' office in Omaha to Mleczko's office in Grand Island, so that Mleczko could review it again in light of Jones' trial testimony. Counsel had only a limited time to confer with Mleczko prior to his rebuttal testimony. In an affidavit submitted in support of Paulk's motion for new trial, Mleczko stated that he had inadequate time to examine the specimen slide prior to his rebuttal testimony and therefore had to qualify his opinions. The belated disclosure also denied Paulk the opportunity to have her expert in the courtroom during Jones' testimony in order to visualize the areas on the projected photomicrographic slide which Jones identified as melanoma cells within the blood.

For these reasons, we conclude that Jones' trial testimony regarding his previously undisclosed opinion that melanoma cells were present in Anderson's blood in 1991 resulted in unfair and prejudicial surprise. The district court abused its discretion in denying Paulk's motions for mistrial and new trial.

JURY INSTRUCTIONS

[9] Because we are remanding this cause for a new trial for the reasons stated above, we need not reach the assigned errors

pertaining to jury instructions. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001); *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001). We do not address the assigned errors pertaining to the proximate cause instruction that was given, or the requested concurring cause instruction, because the question of whether such instructions should be given will depend upon the evidence adduced at the retrial. Nevertheless, Paulk's contention that the phrase "next of kin" was incorrectly defined in instruction No. 8 presents a question of law that is likely to recur on retrial, so we address it here.

Jury instruction No. 8 stated:

> The plaintiff Lynda F. Paulk is suing in this case as the personal representative of the Estate of Greg W. Anderson and *for the benefit of the decedent's next of kin who are his surviving spouse, Connie E. Anderson, and his children Jaden Anderson and Latisha Trump.* It is the decedent's next of kin who are the persons who will receive the benefits of any recovery you may find.

(Emphasis supplied.) Paulk asserts on appeal that the italicized portion of the instruction is too restrictive in that "next of kin" should also include the sibling and parents of Anderson.

[10] The right to maintain an action for wrongful death did not exist under the common law and exists in Nebraska, as in other states, solely by statute. *Smith v. Columbus Community Hosp.*, 222 Neb. 776, 387 N.W.2d 490 (1986). The cause of action is authorized by Neb. Rev. Stat. § 30-809 (Reissue 1995). The damages that may be recovered and the disposition of the avails of any judgment obtained are defined by Neb. Rev. Stat. § 30-810 (Reissue 1995). Section 30-810 provides that a wrongful death action shall be brought by the personal representative "for the exclusive benefit of the widow or widower and next of kin" and that the avails of a judgment in a wrongful death action "shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons."

[11] In *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959), we construed the phrase "next of kin" as used in § 30-809 to mean persons nearest in degree of blood surviving, or, in other words, those persons who take the personal estate of the deceased under the statutes of distribution. See, also, *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998). In *Mabe*, we held that where the deceased was survived by a daughter and his parents, the daughter was the next of kin under the wrongful death statute but the parents were not. Applying this rule, the next of kin in the present case would include the surviving spouse and children of Anderson, but not his parents or his sibling.

[12,13] While acknowledging the controlling authority of *Mabe*, Paulk suggests that we reexamine that case for several reasons. First, she argues that our interpretation of the phrase "next of kin" in *Mabe* runs afoul of Neb. Const. art. I, § 13, which provides, "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay . . . ." This argument misconstrues the scope of this constitutional provision. In *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 288, 70 N.W.2d 86, 91 (1955), *overruled on other grounds, Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966), we stated that

> [article I, § 13,] of the [Nebraska] Constitution does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but where no right of action is given or remedy exists, under either the common law or some statute, this constitutional provision creates none.

The cause of action created by § 30-809 is purely a statutory remedy which may be enlarged, reduced, or completely eliminated at the pleasure of the Legislature. Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Parnell v. Good Samaritan Health Sys.*, 260 Neb. 877, 620 N.W.2d 354 (2000). Thus, there is no

constitutional basis for expanding the wrongful death remedy to persons who do not fall within the statutory classification of "next of kin," as that phrase has been construed by this court.

Paulk also argues that the statutes of descent and distribution in effect at the time of *Mabe, supra*, were repealed and recodified in 1974. See 1974 Neb. Laws, L.B. 354 (operative January 1, 1977). While that is true, it does not compel a departure from the rule announced in *Mabe* because there has been no substantive change in the applicable law. In *Mabe*, we noted that it is only when there is no child of the deceased or descendants of a deceased child that property descends to the parents of the deceased. The same is true under present law. See Neb. Rev. Stat. §§ 30-2301 through 30-2303 (Reissue 1995).

Paulk invites us to abandon the holding in *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959), for the "modern and enlightened" approach, brief for appellant at 34, taken by the Michigan Supreme Court in *Crystal v Hubbard*, 414 Mich. 297, 324 N.W.2d 869 (1982), which interpreted the phrase "next of kin" in a wrongful death statute to encompass any potential heir of the deceased who could prove a pecuniary loss. We decline to do so because we conclude that any expansion of the class of persons entitled to recover under the wrongful death statutes falls within the province of the Legislature. We therefore conclude that instruction No. 8 was a correct statement of the law.

CROSS-APPEAL

The defendants' cross-appeal presents the single issue of whether the district court erred in excluding portions of Bouda's testimony regarding cancer growth rates as calculated through doubling times on the ground that the testimony lacked a scientific basis. At the time of trial, Nebraska followed the "general acceptance" test for the admissibility of expert testimony concerning scientific evidence, set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring). We have subsequently held that for trials commencing on or after October 1, 2001, the admissibility of such testimony should be determined under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct.

2786, 125 L. Ed. 2d 469 (1993). *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). We therefore do not reach the issue presented in the cross-appeal because the admissibility of any scientific evidence offered on retrial of this case will be governed by the *Daubert* standards adopted in *Schafersman*.

CONCLUSION

For the reasons above, we conclude that the trial court did not err in defining "next of kin" in instruction No. 8. However, we conclude that the court did err in not granting Paulk's motions for mistrial and for new trial on the ground that Jones' trial testimony with respect to matters requested but not disclosed in discovery resulted in unfair and prejudicial surprise that deprived Paulk of a fair trial. Because of this error, we reverse, remand for a new trial, and do not reach the remaining assignments of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

KEVIN D. RUSSELL, APPELLANT, V. BRANT STRICKER AND LEE SWIRES, APPELLEES.

635 N.W.2d 734

Filed November 30, 2001. No. S-00-264.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
3. **Negligence: Jury Instructions: Appeal and Error.** It is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).
4. **Negligence: Jury Instructions: Statutes: Words and Phrases.** The Nebraska Supreme Court has consistently understood the plain meaning of the word "instructed" in Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995) to require formal jury instructions.
5. **Legislature: Negligence: Jury Instructions.** The Nebraska Legislature has chosen to require that the jury be fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence.
6. **Jury Instructions: Verdicts.** The verdict form is not a substitute for a proper instruction.

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.
8. **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.
9. **Jury Instructions: Appeal and Error.** Trial judges are under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed and remanded for a new trial.

James L. Zimmerman, of Sorensen & Zimmerman, P.C., for appellant.

John F. Simmons, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee Stricker.

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee Swires.

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

HENDRY, C.J.

INTRODUCTION

Kevin D. Russell brought a negligence action against Brant Stricker and Lee Swires (collectively defendants) for injuries Russell sustained as a passenger in Stricker's truck when Stricker engaged in a speed contest with Swires. The jury found Russell 36 percent negligent, Stricker 47 percent negligent, and Swires 17 percent negligent. Russell was awarded $17,330, which was 64 percent of the $27,077 total award. The court granted Stricker's motion for a credit against the judgment and reduced Russell's judgment by $5,000. Russell appealed. We moved this case to our docket pursuant to our power to regulate

the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

On March 3, 1995, Stricker engaged in a speed contest with Swires in Scottsbluff, Nebraska, which resulted in an accident when Stricker lost control of the truck he was operating and struck a light pole. Russell, a passenger in Stricker's truck at the time of the accident, brought this negligence action against defendants, seeking damages for his injuries. Defendants contended that Russell was contributorily negligent.

At the jury instruction conference at the close of evidence, defendants did not object to the court's proposed instructions and Russell objected only to the extent that the instructions referred to Russell's assumption of the risk or contributory negligence. The court gave the jury five instructions and three verdict forms. Jury instruction No. 2, under "C. Effect of Findings," informed the jury how to utilize the verdict forms. The instruction stated:

> 1. If the Plaintiff failed to meet his burden of proof against the Defendants then your verdict must be for the Defendants and you will complete only Verdict Form Number 1. However, if the Plaintiff has met his burden of proof, then you must consider the defendant's defenses.
>
> 2. If the Defendants have met their burden of proof that the Plaintiff assumed the risk, then your verdict must be for the Defendants, and this is true even if you find that one or both of the Defendants were negligent and this negligence was also a proximate cause of Plaintiff's injury. You will complete only Verdict Form Number 1. If the Defendants have not met their burden of proof, you must disregard the defense of "assumption of risk".
>
> 3. If the Plaintiff has met his burden of proof against Defendant Stricker or Defendant Swires or both, AND the Defendants HAVE NOT met their burden of proof that the Plaintiff was also negligent, then your verdict must be for the Plaintiff in the amount of damages you find, and you will complete only Verdict Form Number 2.
>
> 4. If the Plaintiff has met his burden of proof against Defendant Stricker or Defendant Swires or both, AND the

> Defendants HAVE met their burden of proof that the Plaintiff was also negligent then you must complete only Verdict Form Number 3.

(Emphasis in original.)

After receiving these instructions, the jury deliberated and returned verdict form No. 3. Using verdict form No. 3, the jury allocated percentages of negligence to each of the parties as follows: Russell, 36 percent; Stricker, 47 percent; and Swires, 17 percent. The jury then found that Russell had incurred total damages of $27,077. The jury, finding that the sum of both defendants' negligence totaled 64 percent, multiplied that percentage by $27,077 to determine that Russell was entitled to recover $17,330 in damages. The district court entered judgment against defendants for that amount on January 25, 2000.

Russell filed a motion for new trial on January 31, 2000. A hearing was held on February 9 regarding the motion for new trial and Stricker's motions for credit against the judgment. The court overruled Russell's motion for new trial and granted Stricker's motion for credit against the judgment, reducing Stricker's judgment by $5,000 to $12,330. Russell appealed.

ASSIGNMENTS OF ERROR

Russell asserts as error that (1) the court failed to properly instruct the jury with respect to the effects of its allocation of negligence as required by Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995) and (2) the court erred in sustaining Stricker's motion for credit against the judgment in the sum of $5,000 pursuant to the medical payments coverage provision in Stricker's automobile insurance policy and Neb. Rev. Stat. § 25-1222.01 (Reissue 1995).

STANDARD OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001); *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

ANALYSIS

JURY INSTRUCTIONS AND VERDICT FORMS

[3] Russell contends the district court did not properly instruct the jury regarding the effects of its allocation of negligence as required by § 25-21,185.09. This is a question of statutory interpretation. Section 25-21,185.09 states:

> Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury *shall be instructed* on the effects of the allocation of negligence.

(Emphasis supplied.) We have concluded previously that "it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with § 25-21,185.09." *Wheeler v. Bagley*, 254 Neb. 232, 239, 575 N.W.2d 616, 620 (1998). In *Wheeler*, the trial court did not instruct the jury or provide a verdict form that sufficiently conveyed the effects of the allocation of negligence. The result was a jury verdict form that found 49 percent negligence on the plaintiff's part, 51 percent negligence on the defendant's part, and the plaintiff's damages in the amount of $40,000.

In *Wheeler*, the plaintiff argued that the verdict form indicated she should receive $40,000. The defendant, however, asserted that the verdict form indicated the plaintiff's total damages were $40,000 and should be reduced by the plaintiff's percentage of negligence, which would result in a $20,400 award for the plaintiff. The trial court granted a new trial because it concluded that the jury instruction given did not comply with the requirements of § 25-21,185.09. In *Wheeler*, we affirmed the decision of the trial court and provided a jury instruction and a verdict form as guidelines to be used in single-defendant negligence cases and "adjusted as the circumstances of a particular case merit." 254 Neb. at 239, 575 N.W.2d at 621.

The district court's jury instructions in this case are not consistent with the instructions we provided in *Wheeler*. The district

court's instruction No. 2, part C, speaks only in terms of whether plaintiff and defendants have met their burden of proof, but it never addresses what the result will be if " 'the negligence of the plaintiff was equal to or greater than the negligence of the defendant' " or how " '[i]f the plaintiff is allowed to recover, you will then reduce the total damages by the percentage of the plaintiff's negligence,' " as *Wheeler* requires. 254 Neb. at 240, 575 N.W.2d at 620-21. Therefore, the district court did not give the jury instruction required by § 25-21,185.09. Defendants assert that even in the absence of a formal jury instruction, the jury was adequately instructed in this case pursuant to § 25-21,185.09 by the verdict form the district court provided. This raises the issue of whether a verdict form may serve as a substitute for the instruction required by § 25-21,185.09.

[4] Section 25-21,185.09 states, "The jury shall be *instructed* on the effects of the allocation of negligence." (Emphasis supplied.) This court has consistently understood the plain meaning of the word "instructed" in § 25-21,185.09 to require formal jury instructions. See, e.g., *Wheeler, supra.*

Allowing a verdict form to substitute for a proper jury instruction is inconsistent with the historical underpinnings of § 25-21,185.09. As we discussed in *Wheeler*, courts and legislatures across the nation have adopted various rules regarding informing juries of the effects of their allocation of negligence. Some courts enforce the so-called blindfold rule, which requires that jurors deliberate with no knowledge of the effect of the allocation of negligence between plaintiffs and defendants. In these jurisdictions, it is reversible error to inform the jury of the effects of its allocation of negligence. See, e.g., *McGowan v. Story*, 70 Wis. 2d 189, 234 N.W.2d 325 (1975). The blindfold rule is based on the concern that jurors might "attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable." *Id.* at 198, 234 N.W.2d at 329.

As we noted in *Wheeler*, there has been a "strong, if not overwhelming, recent trend away from the blindfold rule in comparative negligence states." *Wheeler v. Bagley*, 254 Neb. 232, 237, 575 N.W.2d 616, 619 (1998). See, also, *Sollin v. Wangler*, 627 N.W.2d 159 (N.D. 2001) (citing jurisdictions with statutes, court rules, and judicial decisions that allow juries to be informed of

consequences of allocation of negligence). These jurisdictions have determined that failing to instruct the jury on the effects of the allocation of negligence only "propagates error" and "propels the jury to arrive at verdicts that may have legal effects different from those the jury believed were warranted." Price Ainsworth & Mike C. Miller, *Removing the Blindfold: General Verdicts and Letting the Jury Know the Effects of Its Answers*, 29 S. Tex. L. Rev. 233, 234 (1987). See, also, Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 Duke L.J. 824, 842 (noting concern of some courts that "uninformed jurors, anticipating the legal effect of the numerical findings, will speculate incorrectly and render a verdict that does not reflect the jury's true intent"). The legislatures and courts in these states have decided that a "'"jury is not to be set loose in a maze of factual questions, to be answered without intelligent awareness of the consequences."'" *Seppi v. Betty*, 99 Idaho 186, 192, 579 P.2d 683, 689 (1978) (quoting *Porche v. Gulf Mississippi Marine Corporation*, 390 F. Supp. 624 (E.D. La. 1975)).

[5] In enacting § 25-21,185.09, the Nebraska Legislature has required that juries be instructed on the effects of the allocation of negligence. "The Nebraska Legislature has chosen to require that the jury be fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence." *Wheeler*, 254 Neb. at 238, 575 N.W.2d at 619. In Nebraska, the trial court must inform the jury that the ultimate outcome of a 50-50 allocation of negligence between a plaintiff and a defendant will be a verdict in favor of the defendant; the plaintiff will recover nothing. A jury cannot be "fully and openly informed before making its determination" when it does not receive this proper ultimate outcome charge. *Id.* Defendants would have this court rely on an inference that the jury will understand the effects of its responses by walking through a maze of verdict forms without proper instruction. This is in conflict with the plain language of § 25-21,185.09, which mandates removal of the blindfold. The unguided maze of verdict forms does not fulfill the Legislature's mandate.

[6] Allowing a verdict form to substitute for a proper jury instruction would not be consistent with this court's prior rulings

interpreting § 25-21,185.09. In *Wheeler*, we stated, "[T]he verdict form is not a substitute for a proper instruction, and, in any event, the verdict form did not adequately convey the effects of the allocation of negligence in the present case." 254 Neb. at 238, 575 N.W.2d at 620.

Defendants argue that *Wheeler* is distinguishable because the district court in this case used a verdict form consistent with the verdict form provided by this court in *Wheeler*. It is true that the verdict form in this case is consistent with *Wheeler*, but the verdict form is not a substitute for a proper instruction. We specifically stated in *Wheeler* that an ultimate outcome charge is required and may not be circumvented. The verdict form in *Wheeler* was never designed to stand alone, but, rather, it was to be used "*in conjunction with* the instruction regarding the effects of the allocation of negligence in cases where a jury finds some contributory negligence on the part of the plaintiff." (Emphasis supplied.) *Wheeler v. Bagley*, 254 Neb. 232, 240, 575 N.W.2d 616, 621 (1998).

The argument that a verdict form can cure a defective jury instruction under § 25-21,185.09 was implicitly rejected in *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). In *Pleiss*, the trial court denied the plaintiff's request for the *Wheeler* jury instruction and the plaintiff appealed. The defendant argued on appeal that the plaintiff was not prejudiced because the jury's completion of the verdict form in favor of the defendant revealed that the jury never reached the issue of contributory negligence. We found this argument to be without merit and restated our findings in *Wheeler* that "a verdict form is not a substitute for a proper instruction and that the verdict form utilized in *Wheeler* did not adequately convey the effects of the allocation of negligence in any event." *Pleiss*, 260 Neb. at 774, 619 N.W.2d at 828.

Based on our prior rulings and the plain meaning and purpose of § 25-21,185.09, we hold that a jury verdict form cannot serve as a substitute for the proper jury instruction as to the allocation of negligence. The district court erred in not properly instructing the jury as to the effects of the allocation of negligence as required by § 25-21,185.09.

PLAIN ERROR

[7,8] Nevertheless, defendants argue that even if the district court's failure to give the proper instruction is error, it is not plain error. At trial, none of the parties objected to the district court's proposed jury instructions on the basis of failing to instruct the jury as to the allocation of negligence. 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. *Maxwell v. Montey, ante* p. 160, 631 N.W.2d 455 (2001). 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. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

We addressed the issue of plain error in the context of § 25-21,185.09 in *Fiscel v. Beach*, 254 Neb. 678, 578 N.W.2d 52 (1998). In *Fiscel*, the jury returned verdict forms finding that the plaintiff was 40 percent negligent and the defendant was 60 percent negligent. The jury further determined that the plaintiff's damages were $63,500, but did not indicate whether the plaintiff should recover 100 percent or 60 percent of the $63,500. The trial judge held an off-the-record conversation with the jury to clarify the ambiguity. The district court thereafter awarded a judgment of $63,500 to the plaintiff on the basis of the conversation with the jury. The defendant appealed. While the issue was not raised by either party, this court found that "an overriding issue lies in the district court's failure to provide a proper verdict form and a written jury instruction regarding the effect of the allocation of negligence." *Id.* at 684, 578 N.W.2d at 56. We noted that the jury did not receive a proper verdict form, written jury instruction, or oral instruction regarding the effect of its allocation of negligence and affirmed the holding in *Wheeler* that § 25-21,185.09 mandated a jury instruction regarding the effect of the allocation of negligence. *Fiscel, supra*. This court further found it was plain error to fail to give such an instruction. *Id.*

Defendants seek to distinguish our holdings in *Fiscel, supra*, and *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998), on the basis that in those cases, the plaintiff experienced actual prejudice because it was impossible to ascertain what the jury intended through the verdict forms. In this case, defendants argue that the jury understood and intended the effect of allocating negligence because of the clear step-by-step process of completing the verdict form. They contend that the jury's damage award would have been the same whether or not the jury had received the proper instruction. This we do not know—that is the problem.

In *Wheeler*, we stated as part of the required instruction, " 'If the plaintiff is allowed to recover, you will *first* determine the plaintiff's total damages *without regard to his or her percentage or degree of negligence*.' " (Emphasis supplied.) 254 Neb. at 240, 575 N.W.2d at 620. The jury never received this charge through either the jury instructions or the verdict form. Instructing the jury of its need to first determine a plaintiff's damages without considering the plaintiff's negligence reduces the potential that the jury will inappropriately discount the plaintiff's damages. See Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases*, 6 Psychol. Pub. Policy & L. 712 (2000).

The jury in this case reached its verdict without this preventative instruction. Were Russell's damages inappropriately reduced, or did the jury reach the same result it would have if properly instructed? We do not know the answers to these questions. Therein lies the prejudice to Russell. As we stated in *Wheeler*, " 'It seems to us that a jury's deliberations should not be attended by such surmises but rather they should be openly informed as to the legal principles involved in our comparative negligence doctrine so that they may make a rational decision.' " *Wheeler*, 254 Neb. at 239, 575 N.W.2d at 620 (quoting *Adkins v. Whitten*, 171 W. Va. 106, 297 S.E.2d 881 (1982)). In this case, we cannot determine that the jury's verdict was free of the "surmises" that concerned this court in *Wheeler*, and which the Legislature sought to eliminate in enacting § 25-21,185.09.

The Nebraska Legislature's enactment of § 25-21,185.09 created an obligation for courts to instruct juries on the effects of the allocation of negligence in every case where contributory negligence is a defense. See *Wheeler, supra*. We recognize that some

states allow a trial judge to exercise discretion in giving the instruction. See, e.g., Minn. R. Civ. P. 49.01(b) (West 1996) ("the court shall inform the jury of the effect of its answers to the comparative fault question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law or complex issues of law or fact are involved which may render such instruction or comment erroneous, misleading, or confusing to the jury"); *Seppi v. Betty*, 99 Idaho 186, 195, 579 P.2d 683, 692 (1978) ("the trial courts should be given discretion not to so inform the jury in those cases where the issues are so complex or the legal issues so uncertain that such instructions would confuse or mislead the jury"). Other states require the parties to request the instruction. See, e.g., *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982) (if requested, trial court must inform jury of effect of apportioning negligence). However, the Nebraska Legislature has made this instruction mandatory. Nebraska trial judges have no discretion regarding this type of instruction. As we have stated, "The Nebraska Legislature has made the . . . judgment that a jury should be fully and openly informed with respect to the effects of the allocation of negligence in every case." *Wheeler v. Bagley*, 254 Neb. 232, 239, 575 N.W.2d 616, 620 (1998).

[9] The Legislature has obligated courts to give this instruction. Trial judges are "under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made." *Haag v. Bongers*, 256 Neb. 170, 188, 589 N.W.2d 318, 331 (1999).

"[T]he courts of this state may not circumvent the ultimate outcome charge requirement, either purposely or inadvertently." *Wheeler*, 254 Neb. at 238, 575 N.W.2d at 619-20. The obligation to instruct the jury on the allocation of negligence cannot be waived, even if a party contends that a jury found the proper "instruction" in the midst of the verdict forms. To do otherwise would "result in damage to the integrity, reputation, and fairness of the judicial process" by ignoring the Legislature's clear mandate set out in § 25-21,185.09. See *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 761, 619 N.W.2d 579, 583 (2000).

Given the clear mandate of the Legislature and this court, it is the duty of a trial court to instruct the jury on the effects of the allocation of negligence under § 25-21,185.09, and failure to do so constitutes plain error. See *Fiscel v. Beach*, 254 Neb. 678, 578 N.W.2d 52 (1998). Courts of this state have the responsibility to give the proper instruction and to ensure that compliance with § 25-21,185.09 is not made an occasion for gamesmanship. It was plain error for the district court to fail to give the proper jury instruction under § 25-21,185.09.

Remaining Assignment of Error

[10] Since we hold that the district court's failure to instruct the jury on the allocation of negligence requires reversal, it is unnecessary to address Russell's remaining assignment of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. See *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001).

CONCLUSION

For the foregoing reasons, we reverse the decision and remand the cause to the district court for a new trial.

Reversed and remanded for a new trial.

Wright, J., dissenting.

The majority has reversed the judgment of the district court and remanded the cause for a new trial, finding plain error in the court's failure to give the proper jury instruction under Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). I respectfully dissent.

Kevin D. Russell sustained injuries while a passenger in Brant Stricker's truck when Stricker and Lee Swires engaged in a speed contest. The jury found in favor of Russell and against Stricker and Swires. The jury apportioned the negligence among Russell (36 percent), Stricker (47 percent), and Swires (17 percent). Russell was awarded $17,330, which represented 64 percent of the total award of $27,077.

Although Russell did not object to the jury instructions as given, he now asserts that the district court failed to properly instruct the jury with respect to the effect of its allocation of negligence as required by § 25-21,185.09.

We have previously held that it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with § 25-21,185.09. See *Wheeler v. Bagley*, 254 Neb. 232, 575 N.W.2d 616 (1998). In *Wheeler*, the jury found the plaintiff 49 percent negligent and the defendant 51 percent negligent and valued the plaintiff's damages at $40,000. Because we were unable to determine whether the jury had apportioned this amount between the plaintiff and the defendant, we reversed the judgment and remanded the cause for a new trial.

In *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000), the trial court denied the plaintiff's request for a *Wheeler*-type jury instruction. On appeal, the defendant argued that the plaintiff was not prejudiced because the jury did not reach the issue of contributory negligence, since it found in favor of the defendant. As in *Wheeler*, it was not apparent to this court that the jury had ever considered the possibility of apportioning the negligence between the parties. Thus, we reversed the judgment and remanded the cause for a new trial.

Here, the result would not have been any different had the jury been instructed in the language of § 25-21,185.09. The jury determined the total amount of the award to be $27,077. The jury then apportioned contributory negligence to Russell and awarded him $17,330.

The majority concludes that the district court's error 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. In my opinion, since the jury did what it would have been instructed to do had the district court given an instruction on the allocation of negligence, there is no plain error. The jury's verdict shows that the jury allocated the negligence among the parties.

Although the district court erred in not giving an instruction on the allocation of negligence, there is no prejudice to Russell. I would affirm.

CONNOLLY and STEPHAN, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. EDDIE L. ARELLANO, APPELLANT.

636 N.W.2d 616

Filed November 30, 2001. No. S-00-1305.

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. **Arson: Damages.** Under Neb. Rev. Stat. § 28-504 (Reissue 1995), the amount of damages involved in the crime of third degree arson affects the severity of the punishment.
3. **Arson: Damages: Proof.** Although the amount of damages is not an element of arson, the State must prove by evidence beyond a reasonable doubt the amount of damages to the property that was damaged by arson in order to prove that the arson was a Class IV felony.
4. **Value of Goods: Criminal Law.** Rules for establishing value in civil actions apply in a criminal case to determine the grade of the crime prosecuted.
5. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
6. **Value of Goods: Criminal Law: Proof.** In examining proof of value in a criminal case, when a criminal statute requires proof of a particular amount of value in order to raise the grade of a crime, proof of "*some* value" is insufficient to do so.
7. **Juries: Value of Goods.** A jury cannot be allowed to speculate as to value merely from the appearance of the property.
8. **Sentences.** A crucial fact that distinguishes a crime punishable by 1 year's imprisonment from a crime punishable by 5 years' imprisonment cannot rest on guesswork or speculation.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed, sentence vacated, and cause remanded for resentencing.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

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

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

CONNOLLY, J.

The appellant, Eddie L. Arellano, was convicted by a jury of third degree arson, a Class IV felony. Under Neb. Rev. Stat.

§ 28-504(1) (Reissue 1995), the intentional burning of the property of another without his or her consent is third degree arson if the burning causes damage to the property. Under § 28-504(2) and (3), third degree arson is a Class IV felony if the damages amount to $100 or more, but is a Class I misdemeanor if the damages are less than $100. On appeal, Arellano contends that there was insufficient evidence to prove that damages were $100 or more, and thus, his sentence was excessive. Because there was no proof that damages were $100 or more, we reverse the verdict, vacate the sentence, and remand the cause for resentencing.

BACKGROUND

Sometime between 4:30 and 4:45 a.m. on August 1, 2000, Matthew Ault's 1987 Chevrolet Beretta caught fire. Deputy State Fire Marshal Charles Hoffman determined that the fire was started by the use of an ignitable liquid that was poured on the vehicle. A book of matches and three burnt matches were later found at the scene. The book of matches advertised a Conoco cafe and motel. Also, a red gas can was found near the scene.

Two police officers testified that at around 4:40 a.m. on August 1, 2000, they observed Arellano outside a Conoco gas station and convenience store located a few blocks from the scene of the fire. The officers observed that Arellano had a red object or container near him. The clerk who was working at the Conoco store on the morning of August 1 testified that Arellano came into the store and that she gave him two books of matches that advertised the Conoco cafe and motel.

At approximately 7 a.m. the same day, two other officers encountered Arellano and observed that hair on Arellano's fingers was either cut short or burned. The officers also observed that Arellano's socks were wet and smelled of gasoline or petroleum. Arellano was then arrested.

Arellano was charged with third degree arson. The information listed the charge as a Class IV felony and stated that the fire caused damages over $100.

At trial, Ault testified that he had just purchased the vehicle and that he was still making payments on it. He stated that he thought he paid $2,250 for the vehicle. He testified that when he observed the fire, the front and back bumpers of the vehicle

were burning the most, and that a tire blew out on the vehicle. When asked to describe the damages to the vehicle, he stated that "[t]he front bumper, all up under the engine, wiring burnt, front bumper burnt, back bumper burnt . . . all the wiring throughout . . . the car." Ault testified that he did not have insurance and that at the time of trial, the vehicle was inoperable.

Hoffman testified that the fire damage patterns were on the exterior of the vehicle and that there was no damage on the interior of the passenger compartment. There was no direct testimony that the amount of damages to the vehicle was $100 or more.

Arellano made a motion for a directed verdict at the end of the State's evidence. Arellano renewed the motion at the end of all the evidence on the basis that the State had failed to prove the amount of damages to the vehicle. The district court overruled the motions based on Ault's testimony that he had just purchased the vehicle for $2,500; the vehicle sustained damages to its bumpers, tire, and electrical system; and the vehicle was inoperable. The jury found Arellano guilty. The district court sentenced Arellano to 20 to 60 months' imprisonment. Arellano appeals.

ASSIGNMENTS OF ERROR

Arellano assigns that the district court erred in (1) finding the evidence sufficient to convict him of third degree arson, a Class IV felony, and (2) imposing an excessive sentence.

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. Ildefonso, ante* p. 672, 634 N.W.2d 252 (2001).

ANALYSIS

Arellano contends that there was insufficient evidence to convict him of a Class IV felony because the prosecution failed to prove that Ault's vehicle sustained $100 or more in damages. In his brief, Arellano concedes that the evidence was sufficient to

convict him of a Class I misdemeanor—damages less than $100. Thus, Arellano contends that his sentence was excessive because he was sentenced to a maximum penalty greater than allowed for third degree arson as a Class I misdemeanor.

Section 28-504 provides:

> (1) A person commits arson in the third degree if he intentionally sets fire to, burns, causes to be burned, or by the use of any explosive, damages or destroys, or causes to be damaged or destroyed, any property of another without his consent, other than a building or occupied structure.
>
> (2) Arson in the third degree is a Class IV felony if the damages amount to one hundred dollars or more.
>
> (3) Arson in the third degree is a Class I misdemeanor if the damages are less than one hundred dollars.

A Class IV felony carries a maximum penalty of 5 years' imprisonment, while a Class I misdemeanor carries a maximum penalty of not more than 1 year's imprisonment. See Neb. Rev. Stat. §§ 28-105 and 28-106 (Cum. Supp. 2000).

[2,3] Under § 28-504, the amount of damages involved in the crime affects the severity of the punishment. Although the amount of damages is not an element of arson, the State must prove by evidence beyond a reasonable doubt the amount of damages to the property that was damaged by arson in order to prove that the arson was a Class IV felony. See, generally, *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992).

[4,5] We have held that rules for establishing value in civil actions apply in a criminal case to determine the grade of the crime prosecuted. *State v. Garza, supra*. We determine that the same principle applies to issues involving proof of damages. In civil actions, we have often stated that while damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000); *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292, 616 N.W.2d 796 (2000).

[6,7] In examining proof of value in a criminal case, when a criminal statute requires proof of a particular amount of value in order to raise the grade of a crime, proof of "*some* value" is insufficient to do so. See *State v. Watkins*, 804 S.W.2d 859, 861

(Mo. App. 1991). The jury cannot be allowed to speculate as to value merely from the appearance of the property. *United States v. Wilson*, 284 F.2d 407 (4th Cir. 1960) (reversal of conviction for theft of property over $100 when 72 rifles were stolen but no evidence presented of their value). See, also, *United States v. Thweatt*, 433 F.2d 1226 (D.C. Cir. 1970).

[8] In this case, evidence showed that specific parts of Ault's vehicle were burned, that the vehicle was currently inoperable, and that Ault paid $2,250 for the vehicle. Although the evidence makes it appear likely that the damages to the vehicle were over $100, no evidence was given regarding the dollar amount of damages to the vehicle. The State failed to provide evidence such as the cost to repair the vehicle or the diminution in value of the vehicle due to the fire. A crucial fact that distinguishes a crime punishable by 1 year's imprisonment from a crime punishable by 5 years' imprisonment cannot rest on guesswork or speculation. See *United States v. Wilson, supra*. Absent additional evidence, the amount paid for the vehicle is irrelevant to a determination of damages the vehicle sustained. Without evidence of the monetary amount of damages, any estimate was based on speculation. The State failed to present sufficient evidence to prove beyond a reasonable doubt that the damages to the vehicle were $100 or more. Accordingly, we determine that the evidence was insufficient to convict Arellano of third degree arson as a Class IV felony and that Arellano's sentence was excessive.

CONCLUSION

We hold that the evidence was insufficient to convict Arellano of third degree arson as a Class IV felony. Arellano admits that he may be sentenced to third degree arson as a Class I misdemeanor. Accordingly, we reverse the verdict, vacate Arellano's sentence, and remand the cause for resentencing.

REVERSED, SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

McCORMACK, J., participating on briefs.

IN RE INTEREST OF SABRINA K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JACK K. AND MARY K., GUARDIANS, APPELLEES, AND CHARLES H., APPELLANT.

635 N.W.2d 727

Filed November 30, 2001. No. S-01-012.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
5. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
6. ____. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. **Juvenile Courts: Jurisdiction: Minors: Guardians and Conservators.** Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) clearly anticipates a juvenile court's obtaining exclusive jurisdiction of a minor ward in a previously established guardianship.
8. **Statutes.** To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
9. **Juvenile Courts: Jurisdiction: Guardians and Conservators.** Unlike a guardianship proceeding under chapter 30 of the Nebraska Revised Statutes, an adjudication under the Nebraska Juvenile Code brings all the parties under the juvenile court's exclusive jurisdiction.
10. **Juvenile Courts: Jurisdiction: Minors: Guardians and Conservators.** A county court's jurisdiction over a previously established guardianship must yield to the juvenile court's exclusive jurisdiction over a minor and his or her guardian if the juvenile court determines that there is a sufficient factual basis for an adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1998).
11. **Parental Rights.** The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase.
12. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 1998).
13. **Juvenile Courts: Parental Rights: Child Custody.** Whether a noncustodial parent is fit or unfit to have custody does not arise and should not arise until the dispositional phase of a juvenile proceeding.

14. **Juvenile Courts: Parental Rights: Child Custody: Guardians and Conservators.** A guardian's admission of allegations of abuse in a juvenile petition is a sufficient factual basis for an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) when evidence shows that a parent has previously lost custody of his or her natural child and plays no role in the child's living conditions at the time the child is taken into custody.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Pamela Lynn Hopkins for appellant.

Joe Stecher, Dodge County Attorney, and Cynthia Schuele for appellee State of Nebraska.

Adam J. Sipple, of Johnson & Mock, for appellees Jack K. and Mary K.

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

CONNOLLY, J.

The main issue presented is whether the juvenile court can acquire jurisdiction over a juvenile under Neb. Rev. Stat. § 43-247(3) (Reissue 1998) when the county court has previously appointed a guardian for the juvenile, under Neb. Rev. Stat. § 30-2608 (Reissue 1995).

The county court, sitting as a juvenile court, determined that Sabrina K., the natural child of the appellant, Charles H., was an abused or neglected minor as defined by § 43-247(3)(a). Charles objected to the juvenile court's jurisdiction. He claimed that the county court had previously appointed permanent guardians for Sabrina under § 30-2608 before the juvenile petition was filed and, thus, the county court, not the juvenile court, had jurisdiction. The juvenile court overruled the objection, found that there was a sufficient factual basis for the adjudication, and continued temporary custody with the Nebraska Department of Health and Human Services (DHHS) until further hearing. Charles appeals.

We hold that § 43-247(3) permits a juvenile court to acquire exclusive jurisdiction over a minor whose guardians were previously appointed by the county court and that the juvenile court correctly found a sufficient factual basis for the adjudication. We affirm.

BACKGROUND

In July 1996, the county court appointed Jack K. and Mary K., Sabrina's maternal grandparents, as her permanent guardians. In October 2000, the State filed a juvenile petition in the county court, sitting as a juvenile court, alleging that Sabrina was a minor as defined in § 43-247(3)(a). The petition alleged that Jack had whipped Sabrina with a car antenna, causing her to have red welts on her buttocks. The court ordered emergency temporary custody of Sabrina with DHHS, and an adjudication hearing was set for November 1.

After the juvenile petition was filed, Charles filed a motion in county court to terminate Jack and Mary's guardianship. Charles also filed a motion for an emergency ex parte order to terminate the guardianship and an amended motion in county court for an order finding that (1) Jack and Mary's guardianship of Sabrina should be terminated, (2) the county court had jurisdiction, and (3) Sabrina should be returned to Charles' custody. The county court did not rule on either motion.

At the adjudication hearing, Charles filed an objection to the juvenile court's subject-matter jurisdiction of Sabrina. The court noted Charles' jurisdictional objection and his motion to terminate the guardianship in county court. The court, however, declined to consider the jurisdictional question until an evidentiary hearing could be held on the issue and continued the adjudication hearing. The court ordered that emergency custody remain with DHHS until that time.

At the adjudication hearing, Charles asked the juvenile court to take judicial notice of the county court's guardianship file. Without objection, the court took judicial notice. The guardianship file showed the following facts leading to the 1996 guardianship appointment.

Sabrina was born in 1988 to Tammy K. and Charles, who were living together but were not married. Both parents allegedly suffered from alcoholism. Before Sabrina was born, Charles was arrested for felonious assault and received treatment for alcoholism at the Hastings Regional Center. When Sabrina was 6 months old, Charles violated his probation and served 15 months of an 18-month to 3-year sentence.

In 1996, Charles filed a petition requesting that he be appointed Sabrina's temporary guardian. He alleged that Tammy was an alcoholic who was constantly involved in abusive relationships, creating an emergency situation for Sabrina. Charles was appointed temporary guardian, but Tammy filed an objection to his appointment and nominated her parents, Jack and Mary, as guardians. After a hearing, the county court removed Charles and appointed Jack and Mary as temporary guardians for Sabrina. Charles then nominated himself as permanent guardian, and Jack and Mary nominated themselves. The county court appointed Jack and Mary as Sabrina's permanent guardians and gave Charles and Tammy visitation rights.

After taking judicial notice of the guardianship file, the court overruled Charles' objection to subject-matter jurisdiction. The court ruled that it acquired jurisdiction when the State filed a juvenile petition on behalf of a child even though a preexisting guardianship was in place. During the hearing, Jack admitted the allegations in the juvenile petition and the guardian ad litem admitted the allegations on behalf of Sabrina. Based upon these admissions, the court found that it had jurisdiction and that Sabrina was a juvenile as described by § 43-247(3)(a). The court ordered a home study for four potential placements, which included Charles.

ASSIGNMENTS OF ERROR

Charles assigns that the county court, sitting as juvenile court, erred in (1) failing to find that the county court had exclusive original jurisdiction in all matters relating to the care, custody, and control of Sabrina and overruling his objections to juvenile court jurisdiction and (2) finding that the facts presented were a sufficient factual basis for adjudication under § 43-247(3)(a).

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Kiana T., ante* p. 60, 628 N.W.2d 242 (2001).

[2,3] A jurisdictional question which does not involve a factual dispute is a matter of law. *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997). Statutory interpretation presents a question of law. *Hunt v. Trackwell, ante* p. 688, 635 N.W.2d 106 (2001).

ANALYSIS

JUVENILE COURT'S JURISDICTION

Charles contends that the juvenile court did not acquire jurisdiction over Sabrina. He argues that under Neb. Rev. Stat. § 24-517(2) (Cum. Supp. 2000), the county court retains exclusive original jurisdiction over a guardianship appointment if the appointment is made before the State files a juvenile petition under § 43-247. The State contends that the county court's jurisdiction must yield to the juvenile court's exclusive jurisdiction once a juvenile petition is filed and an adjudication takes place.

[4] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Home Pride Foods v. Johnson, ante* p. 701, 634 N.W.2d 774 (2001).

Section 24-517(2) provides that a county court shall have "[e]xclusive original jurisdiction in all matters relating to the guardianship of a person, except if a separate juvenile court already has jurisdiction over a child in need of a guardian, concurrent original jurisdiction with the separate juvenile court in such guardianship[.]"

Section 43-247(3)(a), however, gives a juvenile court exclusive, original jurisdiction over "[a]ny juvenile . . . who lacks proper parental care by reason of the fault or habits of his or her parent, *guardian*, or custodian . . . ." That jurisdiction continues "until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." § 43-247. Further, when a juvenile court adjudicates a minor under § 43-247(3), it also obtains exclusive jurisdiction over the "parent, guardian, or custodian who has custody of any juvenile described in this section." § 43-247(5).

Although there is an apparent conflict between these jurisdictional provisions, we have recently held that a county court may

not acquire jurisdiction for a guardianship appointment under the probate code when the court, sitting as a juvenile court, has previously adjudicated a minor under § 43-247(3). See *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). Applying established principles of statutory construction, we conclude that this rule also applies to cases where the juvenile court finds a sufficient factual basis for the adjudication of a minor in a previously established guardianship under chapter 30 of the Nebraska Revised Statutes.

[5,6] In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Keller v. Tavarone, ante* p. 2, 628 N.W.2d 222 (2001). If we were to hold that the juvenile court could not exercise jurisdiction when a guardianship is already in place under chapter 30, it would be contrary to the plain language of § 43-247. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Hatcher v. Bellevue Vol. Fire Dept., ante* p. 23, 628 N.W.2d 685 (2001).

[7] Subsection 43-247(3)(a) sets out the circumstances of neglect or abuse under which a juvenile court shall have exclusive jurisdiction of any minor under the age of 16. There is no distinction made between a parent and guardian in this paragraph. Any circumstance which would permit a juvenile court to take jurisdiction over a juvenile in his or her parent's custody would also permit the court to take jurisdiction when the juvenile has a guardian. In total, the Legislature refers to a "parent, guardian, or custodian" five separate times in subsection (3)(a). Thus, we agree with the juvenile court that the statute clearly anticipates a juvenile court's obtaining exclusive jurisdiction of a minor ward in a previously established guardianship.

[8] Furthermore, we have held that "[t]o the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute." *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 860, 620 N.W.2d 339, 350 (2000). In this case, the exclusive, original jurisdiction conferred upon a

juvenile court under § 43-247(3)(a) is specific to circumstances where the State alleges a child in a guardianship has been abused or neglected, whereas the county court has jurisdiction over guardianships generally.

But Charles relies on two Nebraska Court of Appeals opinions to argue that a guardian cannot be subject to the simultaneous jurisdiction of the county court and juvenile court: *In re Guardianship of Alice D. et al.*, 4 Neb. App. 726, 732, 548 N.W.2d 18, 22 (1996) (holding that "when a minor has been adjudicated a juvenile as defined under § 42-247(3) and the juvenile court retains jurisdiction, a probate court cannot appoint a guardian of that juvenile without the consent of the juvenile court"), and *In re Interest of Justin C. et al.*, 7 Neb. App. 251, 581 N.W.2d 437 (1998) (extended holding in *In re Guardianship of Alice D. et al., supra*, to cases where county court judge presided over both juvenile adjudication and subsequent appointment of guardians under probate code). See, also, *In re Guardianship of Rebecca B. et al., supra*. The concern in those cases about simultaneous jurisdiction over a guardian in two separate courts, however, is not present when an adjudication takes place after a guardianship appointment.

[9] Unlike a guardianship proceeding under chapter 30, an adjudication under the Nebraska Juvenile Code brings all the parties under the juvenile court's exclusive jurisdiction. See § 43-247(3) and (5). In addition, § 43-247(3) requires the juvenile court to maintain exclusive and continuing jurisdiction over a minor until the child reaches the age of majority or the court discharges the individual. This continuing jurisdiction creates a conflict if the county court attempts to obtain jurisdiction for a guardianship after an adjudication in juvenile court. But chapter 30 does not contain a counter statutory mandate that requires it to maintain exclusive jurisdiction. There is no merit to Charles' argument.

[10] We determine that a county court's jurisdiction over a previously established guardianship must yield to the juvenile court's exclusive jurisdiction over a minor and his or her guardian if the juvenile court determines that there is a sufficient factual basis for an adjudication under § 43-247.

JUVENILE COURT'S ADJUDICATION UNDER § 43-247(3)(a)

Charles also contends that the juvenile court lacked a sufficient basis for an adjudication under § 43-247(3)(a) because the allegations in the juvenile petition were directed against Jack and that there was no showing that Charles was unfit or unable to exercise appropriate parental control.

[11-13] The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999). To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Kantril P. & Chenelle P., supra.* " '[W]hether the [noncustodial] father was fit or unfit to have custody did not arise and should not have arisen until the dispositional phase.' " *Id.* at 458, 598 N.W.2d at 736.

[14] Charles asked the juvenile court to take judicial notice of the county court's guardianship appointment, and the court complied. Thus, the evidence showed that Charles had previously lost custody of Sabrina and that he played no role in Sabrina's living conditions at the time she was taken into custody. The only question before the court was whether Sabrina—in her present living situation with Jack and Mary—lacked proper parental care by reason of the fault or habits of her guardians. See, *id.*; § 43-247(3)(a). The allegations in the petition were admitted by both Jack and Mary and Sabrina's guardian ad litem. Based upon these admissions, the court found that Sabrina was a juvenile as described in § 43-247(3)(a). We conclude under our de novo review that the juvenile court was correct in finding a sufficient factual basis for the adjudication. See *In re Interest of Amber G.*, 250 Neb. 973, 554 N.W.2d 142 (1996) (concluding that juvenile court properly took jurisdiction where mother admitted to allegations in petition).

CONCLUSION

The county court, sitting as a juvenile court, correctly determined that Sabrina was a minor within its jurisdiction because § 43-247(3)(a) allows a juvenile court to obtain exclusive

jurisdiction over a minor and his or her guardian when the county court has previously appointed a guardian under the probate code. Also, the court correctly found a sufficient factual basis for the adjudication.

AFFIRMED.

McCORMACK, J., participating on briefs.

LUANN NICHOLSON, APPELLANT, V. GENERAL CASUALTY COMPANY OF WISCONSIN, APPELLEE.
DENNIS GALE NICHOLSON, APPELLANT, V. GENERAL CASUALTY COMPANY OF WISCONSIN, APPELLEE.

636 N.W.2d 372

Filed December 7, 2001. Nos. S-00-230, S-00-231.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below.
4. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute.
5. **Statutes: Appeal and Error.** An appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result.
6. **Statutes.** In order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject.

Appeals from the District Court for Douglas County: MICHAEL McGILL, Judge. Affirmed.

David B. Latenser and Daniel L. Johnson, of Latenser & Johnson, P.C., for appellants.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellee.

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

GERRARD, J.

BACKGROUND

Dennis Gale Nicholson was injured on August 2, 1991, when the vehicle he was driving was struck by an underinsured motorist (UIM). The UIM was insured under an automobile liability policy issued by Union Insurance Company, which settled Dennis' claim on that policy for the policy limit of $50,000.

At the time of the accident, Dennis was driving a vehicle owned by Dennis' employer. The vehicle was covered under a policy of automobile insurance issued by Royal Insurance Company of America (Royal Insurance), which included UIM coverage up to a limit of $500,000. Dennis and his wife, LuAnn Nicholson, also had their own automobile insurance policy issued by General Casualty Company of Wisconsin (General Casualty), which provided UIM coverage up to a limit of $300,000. Pursuant to Neb. Rev. Stat. § 60-580(2) (Reissue 1988), in effect at the time of the accident, coverage under the policy issued by Royal Insurance had priority over coverage under the General Casualty policy.

Dennis and LuAnn each made a separate claim against the General Casualty UIM coverage, both of which were denied by General Casualty. Dennis and LuAnn sued General Casualty to recover under their policy. General Casualty filed a motion for summary judgment, which was granted by the district court, on the basis that given the limitation on recovery set forth in § 60-580, there were no circumstances under which General Casualty's coverage could be implicated. See *Nicholson v. General Cas. Co. of Wis.*, 255 Neb. 937, 587 N.W.2d 867 (1999). On appeal, this court disagreed and reversed the decision and remanded the cause for further proceedings. See *id.*

During the pendency of the prior appeal, Dennis and LuAnn settled their claims against Royal Insurance for $215,221.29. Dennis and LuAnn are now pursuing their claims under the General Casualty policy for damages they allege are uncompensated by the payments from Union Insurance and Royal Insurance.

After the cause was remanded, based on the settlement with Royal Insurance, General Casualty filed another motion for summary judgment, which was granted by the district court. The

district court stated that Dennis and LuAnn "had to be aware that any settlement with Royal [Insurance] could be construed as a full and final settlement of their claims." The district court found that Dennis and LuAnn, "having jointly accepted a settlement of less than one-half of the $500,000.00 coverage, are precluded from proceeding under underinsured motorist policy against [General Casualty]." Dennis and LuAnn appeal.

ASSIGNMENTS OF ERROR

Dennis and LuAnn assign, consolidated and restated, that the district court erred in (1) concluding that Dennis and LuAnn were precluded from seeking recovery from General Casualty for their uncompensated damages resulting from the accident; (2) construing § 60-580 to contain an exhaustion clause; (3) failing to conclude that General Casualty is entitled to a credit in the amount of the $500,000 limit of the Royal Insurance policy, regardless of the amount of the settlement with Royal Insurance; (4) excluding from evidence exhibits 9 through 12, which provided evidence of the extent of LuAnn's loss of consortium claim, and that General Casualty was not prejudiced by Dennis and LuAnn's settlement with Royal Insurance; and (5) accepting into evidence the legislative history of 1994 Neb. Laws, L.B. 1074, operative January 1, 1995, which amended § 60-580 after Dennis' accident.

[1] The appellants' brief, however, contains no argument supporting their third assignment of error. Therefore, we do not consider it. Errors that are assigned but not argued will not be addressed by an appellate court. *Holmes v. Crossroads Joint Venture, ante* p. 98, 629 N.W.2d 511 (2001).

STANDARD OF REVIEW

[2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Skinner v. Ogallala Pub. Sch. Dist. No. 1, ante* p. 387, 631 N.W.2d 510 (2001).

[3] The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below. *Jacob v. Schlichtman*, 261 Neb. 169, 622 N.W.2d 852 (2001).

ANALYSIS

The primary issue presented in this appeal is whether the district court erred in concluding that Dennis and LuAnn were required to exhaust the UIM limits of the Royal Insurance policy as a prerequisite to their UIM claim under the General Casualty policy. At the time of the accident, on August 2, 1991, § 60-580 provided:

> (1) In the event an insured is entitled to underinsured motorist coverage under more than one policy of motor vehicle liability insurance, the maximum amount an insured may recover shall not exceed the highest limit of any one such policy.
>
> (2) When multiple policies apply, payment shall be made in the following order of priority, subject to the limit of liability for each applicable policy:
>
> (a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;
>
> (b) A policy covering a motor vehicle which came into contact with the insured while a pedestrian; and
>
> (c) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured.

The General Casualty policy also provided, in accord with the language of § 60-580:

> If there is other applicable similar insurance available under more than one policy or provision of coverage:
>
> 1. Any recovery for damages for "bodily injury" sustained by an "insured" may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.
>
> 2. The following priorities of recovery apply:
>
> FIRST The Underinsured Motorist Coverage applicable to the vehicle the "insured" was occupying at the time of the accident.
>
> SECOND Any other policy affording Underinsured Motorist Coverage to the "insured" as a named insured or family member.

General Casualty contends that the language of § 60-580, and the corresponding language of the policy, required exhaustion of

the primary UIM policy before seeking payment under another, excess UIM policy. This reading of the statute is consistent with the general rule that when multiple policies apply, primary uninsured motorist or UIM coverage must be exhausted before excess uninsured motorist or UIM coverage is triggered. See, e.g., *Nationwide General Ins. Co. v. Perry*, 2 F. Supp. 2d 857 (S.D. Miss. 1997); *Illinois Nat. Ins. Co. v. Kelley*, 764 So. 2d 1283 (Ala. App. 2000); *Iodice v. Jones*, 133 N.C. App. 76, 514 S.E.2d 291 (1999); *Donovan v. State Farm Auto. Ins. Co.*, 105 Ohio App. 3d 282, 663 N.E.2d 1022 (1995). See, generally, 3 Alan I. Widiss, Uninsured and Underinsured Motorist Insurance § 40.5 (rev. 2d ed. 2001). An insurer providing excess uninsured motorist or UIM coverage is usually entitled to enforce a provision that no liability exists until the primary UIM coverage is exhausted. See *id.*

[4,5] We conclude that the language of § 60-580 required Dennis and LuAnn to exhaust their primary UIM coverage with Royal Insurance prior to pursuing a claim under their excess UIM coverage with General Casualty. The statute provided that payment under successive UIM coverages was to be made in the specified "order of priority, subject to the limit of liability for each applicable policy." It would make little sense for the Legislature to utilize the phrase "order of priority" and to establish a succession of primary and excess coverage unless exhaustion was a prerequisite to proceeding against the excess carrier. When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). An appellate court will, if possible, try to avoid a statutory construction which would lead to an absurd result. See, *In re Estate of Eickmeyer, ante* p. 17, 628 N.W.2d 246 (2001); *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000).

We note that the language of the General Casualty UIM policy mirrored that of § 60-580. It is quite clear from the language in General Casualty's policy that the insurer of the vehicle that Dennis was "occupying at the time of the accident" (i.e., Royal Insurance) provided primary coverage and that General Casualty provided excess coverage. Thus, while nothing in the then Underinsured Motorist Insurance Coverage Act precluded

General Casualty from offering or providing coverage to Dennis and LuAnn on more favorable terms than required by the act, see Neb. Rev. Stat. § 60-582(4) (Reissue 1988), now codified at Neb. Rev. Stat. § 44-6413(4) (Reissue 1998), there is no indication in the General Casualty policy that such was intended. The consistency of the language in § 60-580 and the General Casualty policy leads to the conclusion that the General Casualty policy required primary UIM coverage to be exhausted before excess UIM coverage attached.

We conclude, therefore, that § 60-580 is consistent with, and was intended to effectuate, the general rule that primary UIM coverage must be exhausted before excess UIM coverage is triggered. The district court did not err in determining that Dennis and LuAnn's failure to exhaust the limits of the primary UIM coverage available to them under the Royal Insurance policy precluded their claims against the excess UIM coverage provided by General Casualty. Dennis and LuAnn's first two assignments of error are thus without merit.

Dennis and LuAnn argue, under their fourth assignment of error, that the district court erred in excluding evidence that they claim would have shown the extent of LuAnn's damages and that their settlement with the UIM did not prejudice General Casualty. In view of our determination regarding Dennis and LuAnn's failure to exhaust the limits of their primary UIM coverage, we need not consider this assignment of error, since the issues of LuAnn's damages and prejudice to General Casualty from settlement with the UIM do not affect our disposition of the case. Error regarding the exclusion of this evidence, if any, is not prejudicial and provides no basis for reversal. See *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

Dennis and LuAnn also claim, in their final assignment of error in this case of last impression, that the district court erred in accepting into evidence the legislative history of L.B. 1074, which amended § 60-580 after Dennis' accident. In 1994, § 60-580 was amended and recodified as Neb. Rev. Stat. § 44-6411 (Reissue 1998), and now specifically provides that in the event of bodily injury, sickness, disease, or death of an insured while occupying a motor vehicle not owned by the

insured, the UIM coverage on the occupied motor vehicle is primary, and if such primary coverage is exhausted, other UIM coverage available to the insured is excess. See L.B. 1074. Dennis and LuAnn argue, as we understand it, that this legislative history was irrelevant.

[6] However, in order to ascertain the proper meaning of a statute, reference may be had to later as well as earlier legislation upon the same subject. *Gage Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 260 Neb. 750, 619 N.W.2d 451 (2000); *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). While the district court might have erred had it relied on the legislative history, we are hard pressed to find reversible error solely in the district court's acceptance and examination of the legislative history. There is no indication in the record or the district court's reasoning, as expressed in its order, that the district court actually relied on the legislative history in reaching its conclusion.

In any event, we have independently determined, without reference to the legislative history of L.B. 1074, that § 60-580 bars Dennis and LuAnn's recovery under the General Casualty UIM coverage. Any error in the district court's acceptance into evidence of the legislative history is, therefore, harmless and provides no basis for reversal. See *John Markel Ford v. Auto-Owners Ins. Co., supra.*

CONCLUSION

Section 60-580 and the consistent language of the General Casualty UIM policy required Dennis and LuAnn to exhaust their primary UIM coverage before proceeding against their excess UIM coverage carrier, General Casualty. The district court did not err in determining that Dennis and LuAnn's claims against General Casualty were barred after their failure to exhaust the policy limits of the Royal Insurance UIM coverage, nor did the district court commit reversible error in its evidentiary rulings. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. MATTHEW R. RHEA, APPELLEE.

636 N.W.2d 364

Filed December 7, 2001. No. S-01-145.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Plea in Abatement: Probable Cause: Evidence: Verdicts.** In order to resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it. The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt.
3. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry.
4. ____. If it can be avoided, no word, clause, or sentence of a statute should be rejected as superfluous or meaningless.
5. **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.
6. **Fraud: Words and Phrases.** The final sentence of Neb. Rev. Stat. § 28-618(7) (Reissue 1995) requires that for purposes of Neb. Rev. Stat. §§ 28-618 to 28-630 (Reissue 1995 & Cum. Supp. 2000), a "financial transaction device" must be something which is capable of being used to execute a transaction in a financial account.
7. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and of article I, § 12, of the Nebraska Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
8. **Double Jeopardy: Juries.** Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. In a case tried to a jury, jeopardy attaches when the jury is empaneled and sworn.

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

L. Kenneth Polikov, Sarpy County Attorney, and John E. Higgins for appellant.

Michael N. Schirber, of Schirber Law Offices, P.C., for appellee.

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

STEPHAN, J.

This is an error proceeding brought pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). The State, through the Sarpy County Attorney, takes exception to an order of the district court for Sarpy County sustaining a plea in abatement filed on behalf of Matthew R. Rhea and dismissing all criminal charges against him. We removed the matter to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). Rhea waived his right to file a brief and has not participated in the appellate proceedings. We conclude that the district court erred, and because jeopardy has not attached, we remand for further proceedings.

BACKGROUND

The evidence offered with respect to Rhea's plea in abatement discloses the following facts: Rhea, Andrew J. Hawkins, and Alvaro Castillo III met in an advanced computer class at the high school they attended in Papillion, Nebraska. In late summer 1999, they devised a plan whereby Rhea, who worked as a mail sorter at First Data Resources (FDR) in Omaha, would take credit card billing statements from FDR and sell them to Hawkins and Castillo. Hawkins and Castillo would then use these billing statements, which contained the names, addresses, and credit card account numbers of numerous individuals, to order merchandise using the Internet.

In early August 1999, Rhea took 40 to 50 billing statements from FDR and sold them to Castillo for $100 cash. Castillo then gave the billing statements to Hawkins, who entered the information into his personal computer and then destroyed the statements. Hawkins then sent encrypted e-mails containing the same information back to Castillo.

Over the next several months, Castillo used the credit card account numbers to make approximately 50 purchases using the Internet. Hawkins used the same information to make 10 to 15 purchases. As part of the process, Castillo and Hawkins had the merchandise shipped to various vacant houses located in Papillion and LaVista, Nebraska. If delivery of the package did not require a signature, the package was simply left on the

doorstep of the vacant house, where Castillo or Hawkins would later pick it up.

In the course of retrieving these packages, Castillo and Hawkins aroused the suspicion of the neighbors living near the vacant houses which Castillo and Hawkins used as "drops." These persons reported the suspicious activity to the Papillion Police Department, who assigned the case to Investigator Jim Murcek.

On December 2, 1999, Murcek observed a young man park a vehicle in front of one of the vacant houses and retrieve a package from the doorstep. Murcek then followed the vehicle to a Papillion residence, where he made contact with the driver, who was subsequently identified as Castillo. After being advised of his rights, Castillo made a voluntary statement confessing to his participation in the plan and implicating both Rhea and Hawkins. Castillo and his parents then consented to a search of their home which yielded numerous electronic devices that Castillo had ordered utilizing the credit account numbers supplied by Rhea.

Murcek accompanied Castillo to Hawkins' home and then to Rhea's home. After being advised of their rights, both Rhea and Hawkins confessed to their participation in the plan. A search of Hawkins' bedroom uncovered numerous electronic devices which he had purchased using the account numbers on the statements which Rhea took from FDR. A search of Rhea's home produced nothing, but Murcek found 174 additional billing statements under the rear passenger-side floorboard of Rhea's vehicle.

The record reflects that Castillo and Hawkins used the account numbers supplied by Rhea to place electronic orders for merchandise totaling $121,000 in value, of which $3,865 remains unreturned or unrecovered. Rhea denied using the account numbers to order merchandise but admitted that on four or five occasions, he attempted to pick up packages which had been ordered by Hawkins or Castillo and delivered to vacant houses.

On September 8, 2000, Rhea was charged with criminal possession of a financial transaction device, unlawful circulation of a financial transaction device, and conspiracy to commit theft in violation of Neb. Rev. Stat. §§ 28-621, 28-622, and 28-202(1) (Reissue 1995), respectively. On October 26, Rhea filed an amended plea in abatement requesting dismissal of all charges filed against him. The district court dismissed the conspiracy

charge for reasons unrelated to this error proceeding. After conducting an evidentiary hearing, the district court sustained Rhea's plea in abatement and dismissed all remaining charges against him.

The district court explained the reasons for its ruling in a written opinion and order. First, the court held that the billing statements Rhea obtained did not constitute "financial transaction devices" within the definition of that term provided in Neb. Rev. Stat. § 28-618(7) (Reissue 1995). Specifically, the district court reasoned that the terms "instrument" and "device" in § 28-618(7) referred to "tangible bank or credit card[s]" and not account numbers on a billing statement. Second, the district court held that in any event, Rhea and Hawkins could not be convicted under §§ 28-621 and 28-622 because § 28-618(7) "requires the device to 'affect' an account," which the district court interpreted as making the possession and circulation unlawful "only when the device is actually used." Finally, noting that §§ 28-621 and 28-622 require a financial transaction device to be, inter alia, "stolen" to constitute a crime, the district court held that although Rhea may have taken the billing statements in violation of FDR's policies, "the information was not actually 'stolen' or in any way taken from the cardholders [because] they still own[ed] and possess[ed] their own credit cards and the ability to utilize them."

STANDARD OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

ASSIGNMENTS OF ERROR

The State assigns as error, rephrased, (1) the district court's conclusion that credit card numbers on a billing statement do not constitute a "financial transaction device" under § 28-618(7), (2) the district court's conclusion that the word "affect" in § 28-618(7) requires a financial transaction device to be used before an individual can be charged with criminal possession or unlawful circulation of such devices under §§ 28-621 and 28-622, and (3) the district court's determination that the billing

statements were not "stolen" within the meaning of §§ 28-621 and 28-622.

ANALYSIS

Applicable Statutes

We are asked in this error proceeding to review the district court's interpretation of the penal statutes under which Rhea was charged, as well as other related statutes. In count I of the information, Rhea was charged with criminal possession of a financial transaction device in violation of § 28-621, which provides:

> (1) A person commits the offense of criminal possession of a financial transaction device if, with the intent to defraud, such person has in his or her possession or under his or her control any financial transaction device issued to a different account holder or which he or she knows or reasonably should know to be lost, stolen, forged, altered, or counterfeited.
>
> (2) Any person committing the offense of criminal possession of one financial transaction device shall be guilty of a Class III misdemeanor.
>
> (3) Any person committing the offense of criminal possession of two or three financial transaction devices, each issued to different account holders, shall be guilty of a Class IV felony.
>
> (4) Any person committing the offense of criminal possession of four or more financial transaction devices, each issued to different account holders, shall be guilty of a Class III felony.

Rhea was specifically charged with a violation of § 28-621(4). In count II, Rhea was charged with unlawful circulation of a financial transaction device in violation of § 28-622, which provides:

> (1) A person commits the offense of unlawful circulation of a financial transaction device in the first degree if such person sells or has in his or her possession or under his or her control with the intent to deliver, circulate, or sell two or more financial transaction devices which he or she knows or reasonably should know to be lost, stolen, forged, altered, counterfeited, or delivered under a mistake as to the identity or address of the account holder.

> (2) Any person committing the offense of unlawful circulation of a financial transaction device in the first degree shall be guilty of a Class III felony.

The term "financial transaction device" as used in these statutes is defined by § 28-618(7) as

> any instrument or device whether known as a credit card, credit plate, bank service card, banking card, check guarantee card, debit card, electronic funds transfer card, *or account number representing a financial account.* Such device shall affect the financial interest, standing, or obligation of the financial account for services or financial payments for money, credit, property, or services.

(Emphasis supplied.)

FINANCIAL TRANSACTION DEVICE

[2] In order to resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it. The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

[3] The State's first assignment of error requires us to determine whether credit card account numbers included on the billing statements taken from the premises of FDR constitute a "financial transaction device" as defined by § 28-618(7). In making this determination, we consider the language of the statute in conjunction with the familiar principle that if the language of a statute is clear, the words of such statute are the end of any judicial inquiry. *In re Guardianship & Conservatorship of Garcia, ante* p. 205, 631 N.W.2d 464 (2001); *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

[4] We respectfully disagree with the reasoning of the district court that the terms "instrument" and "device" in § 28-618(7) refer exclusively to such items as "tangible bank or credit card[s]" and not to account numbers on billing statements. This construction ignores the plain language of the statute which includes an "account number representing a financial account" within the definition of a "financial transaction device." § 28-618(7). If it can be avoided, no word, clause, or sentence of a statute should be

rejected as superfluous or meaningless. *Hatcher v. Bellevue Vol. Fire Dept., ante* p. 23, 628 N.W.2d 685 (2001); *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001). Here, it is clear that the Legislature intended to include both tangible items such as credit cards *and* the account numbers reflected on such cards within the definition of a financial transaction device.

We note that even under statutes less explicit than ours, other state courts have held that the wrongful use of a credit card *number* is the equivalent of wrongfully using the credit card itself. See, *State v. Morgan*, 985 P.2d 1022 (Alaska App. 1999); *State v. Shea*, 221 Wis. 2d 418, 585 N.W.2d 662 (Wis. App. 1998); *Patterson v. State*, 326 Ark. 1004, 935 S.W.2d 266 (1996); *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976). The reasoning of the Alaska Court of Appeals in *State v. Morgan*, 985 P.2d at 1023, is typical and instructive:

> Policy considerations and case law support the conclusion that a credit card number is included in the definition of "credit card." As the Arkansas Supreme Court recognized in *Patterson v. State*, "[i]t is the use of the account numbers on a credit card which gives the plastic card any credit value." Most people are aware that once they memorize the number on their plastic credit card, they no longer need the plastic card to make long-distance telephone calls *or to purchase other goods or services over the telephone or across the Internet*. In these transactions, merchants and buyers do not meet face-to-face, and merchants do not demand proof that the buyer is holding a plastic card. Rather, the buyer's knowledge of the credit card number is what allows the buyer to make these purchases on credit. Physical possession of the plastic card is unnecessary, for the value of the card resides in the number.

(Emphasis supplied.) We conclude that the district court erred in holding that the credit card account numbers on the statements Rhea took from FDR did not constitute financial transaction devices as defined by § 28-618(7).

MEANING OF "AFFECT"

In its second assignment of error, the State contends that the district court erred in its interpretation of the word "affect" in

the second sentence of § 28-618(7). In its order, the district court held that "since the definition [of financial transaction device] requires the device to 'affect' an account, the plain meaning of the wording may make the possession or circulation unlawful only when the device is actually used." In other words, the district court interpreted the word "affect" in § 28-618(7) to mean "use" and then concluded that Rhea could not have criminally possessed or circulated financial transaction devices, since the possession and circulation of such devices does not involve their use.

[5,6] 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 Eickmeyer, ante* p. 17, 628 N.W.2d 246 (2001); *In re Estate of Sutherlin*, 261 Neb. 297, 622 N.W.2d 657 (2001). The unauthorized *use* of a financial transaction device is proscribed by Neb. Rev. Stat. § 28-620 (Reissue 1995). Criminal *possession* of a financial transaction device is proscribed by § 28-621, and the unlawful *circulation* of a financial transaction device is proscribed by § 28-622. The phrase "shall affect the financial interest, standing, or obligation of [a] financial account" in § 28-618(7) is part of the definition of "financial transaction device," and that definition applies to all of the aforementioned penal statutes. The construction given to § 28-618(7) by the district court, which requires actual use in order to meet the definition of a "financial transaction device," would render the unlawful-use proscription of § 28-620 redundant and would be inconsistent with §§ 28-621(1) and 28-622(1), which criminalize possession and circulation of lost, stolen, forged, altered, or counterfeited financial transaction devices under certain circumstances without requiring their actual use. Based upon our independent review, we conclude that the final sentence of § 28-618(7) requires that for purposes of Neb. Rev. Stat. §§ 28-618 to 28-630 (Reissue 1995 & Cum. Supp. 2000), a "financial transaction device" must be something which is capable of being used to execute a transaction in a financial account. In the instant case, there is evidence that the account numbers reflected on the statements which Rhea removed from the

premises of FDR could be and in fact were used to purchase merchandise which was billed to such accounts.

MEANING OF "STOLEN"

In its third assignment of error, the State contends that the district court erroneously interpreted the word "stolen" in §§ 28-621 and 28-622 when it stated:

> It would not appear that the statements in question come under the umbrella of 'lost, stolen, forged, altered, counterfeited, or delivered under a mistake,' considering the fact that the information was obtained through the course of Defendant's employment at First Data Resources, albeit in violation of FDR's policies and without their permission. The strongest argument would be that the 'device' was 'stolen,' but the information was not actually 'stolen' or in any way taken from the cardholders, whereas they still own and possess their own credit cards and the ability to utilize them. They were not deprived of property as the term 'stolen' typically connotes.

The term "steal" means "[t]o take (personal property) illegally with the intent to keep it unlawfully" or "[t]o take (something) by larceny, embezzlement, or false pretenses." Black's Law Dictionary 1425 (7th ed. 1999). Acting without authorization and with the knowledge that they would be used unlawfully, Rhea physically removed the statements containing the credit account numbers from his employer's premises. As noted, the account numbers reflected on the statements constituted financial transaction devices as defined by § 28-618(7), and on these facts, we have no difficulty in concluding from the record that there was competent evidence upon which a trier of fact could conclude that they were stolen.

DOUBLE JEOPARDY

For the reasons above, we find merit in the State's exceptions to the district court's ruling on Rhea's amended plea in abatement. Disposition of the case is therefore governed by Neb. Rev. Stat. § 29-2316 (Reissue 1995), which provides:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been

> placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the county attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

[7,8] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and of article I, § 12, of the Nebraska Constitution protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt or innocence of the defendant. *State v. Bottolfson, supra*; *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999). In a case tried to a jury, jeopardy attaches when the jury is empaneled and sworn. *State v. Bottolfson, supra*; *State v. Bostwick, supra*.

The record in this case reflects that no jury was empaneled and that no evidence was heard by the district court pertaining to Rhea's guilt or innocence on the charges on which he stood accused. The focus of the district court's inquiry with respect to the amended plea in abatement was whether the charged offenses had been committed and whether there was probable cause to believe that Rhea committed them. See *State v. Bottolfson, supra*. Accordingly, we conclude that jeopardy has not attached.

CONCLUSION

Based upon our independent review of the pertinent penal statutes and the record in this case, we conclude that the district court erred in sustaining Rhea's plea in abatement and in dismissing the charges which were the subject thereof. Accordingly, the State's exception is sustained, and because

jeopardy did not attach, the cause is remanded to the district court for further proceedings pursuant to § 29-2316.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. RICHARD NELSON, APPELLANT.

636 N.W.2d 620

Filed December 7, 2001. No. S-01-160.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
3. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
4. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
5. **Sentences: Prior Convictions: Waiver: Proof: Appeal and Error.** In the absence of proof on the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right, it is plain error for a court to use a defendant's prior convictions to enhance the defendant's sentence.
6. **Appeal and Error.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
7. **Habitual Criminals: Sentences: Double Jeopardy.** Double jeopardy principles do not apply to habitual criminal enhancement proceedings under Neb. Rev. Stat. § 29-2221 (Reissue 1995).
8. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Sentence vacated, and cause remanded for resentencing.

Scott A. Calkins, of Byam & Hoarty, for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Richard Nelson was convicted in the district court for Douglas County of unlawful possession with intent to deliver a controlled substance. Nelson was found to be a habitual criminal and was sentenced to imprisonment for a term of 10 to 15 years. Nelson appeals his conviction and his sentencing as a habitual criminal. We affirm the conviction but vacate the sentence and remand the cause for resentencing.

STATEMENT OF FACTS

Following a bench trial held November 18, 1997, Nelson was found guilty of possession with intent to deliver a controlled substance, cocaine. At trial, Omaha police officer David Turco testified that he was on patrol in a cruiser on January 9, 1997, with his partner, Officer Shawn LeClair, in the vicinity of 33d and Parker Streets in Omaha. Turco had turned the cruiser onto Parker Street heading eastbound when he observed a blue Buick Electra in the eastbound lane of Parker Street parked facing westbound. The Buick pulled away from the curb heading westbound which required Turco to stop the cruiser in order to avoid a collision. After stopping the cruiser, Turco maneuvered around the Buick, which then proceeded westward and turned south on 33d Street. Turco made a U-turn, proceeded south on 33d Street, and saw that the Buick had pulled over to the curb. Nelson got out of the Buick and began to walk eastward. Turco asked Nelson to return to the Buick, and Nelson complied.

Because LeClair recognized Nelson, the officers ran a check of Nelson's record which revealed an outstanding warrant issued

by the sheriff's department. The officers approached the Buick and advised Nelson of the warrant and that he was under arrest. Turco directed Nelson to exit the Buick and handcuffed Nelson after he had exited the vehicle. Turco patted Nelson down to check for weapons. During the pat down, Turco found some candy in Nelson's jacket pocket. Turco then brought Nelson to the cruiser, put him in the back seat, and closed the door. Turco returned to the Buick to assist LeClair with a passenger who was inside the vehicle.

The officers took Nelson to the police station. When they arrived, LeClair escorted Nelson out of the cruiser, and Turco immediately checked the back seat of the cruiser. Turco found a plastic bag containing what was later identified as 9.1 grams of crack cocaine. Nelson was then arrested on a charge of possession with intent to deliver a controlled substance. At the time of the arrest, a pager and $166 in cash, including seven $20 bills, were found in Nelson's possession.

Turco and LeClair testified that they had started their shift approximately 1 hour before the incident with Nelson. They also testified that prior to starting the shift, LeClair had searched the back seat area, and that such searches were routinely made at the start of a shift and after an arrest. LeClair testified that he specifically remembered searching the back seat that day. LeClair typically straps his duty bag into the back seat, and on that day, the seatbelts were buried underneath the back seat cushion, so he had to pull the seat cushion out to retrieve the seatbelts. LeClair testified that the search of the back seat had occurred in daylight at approximately 4 p.m. and that because of the thoroughness of his search, he did not think it possible that he had missed seeing anything in the back seat area. Turco testified that no other passenger had been in the back seat prior to Nelson's arrest and that immediately following Nelson's removal from the cruiser, Turco observed the plastic bag upon inspection of the back seat.

Turco testified that based on his experience, the amount of crack cocaine found in the bag would be characterized as "dealer amounts" rather than "user amounts" because the bag contained approximately 90 hits valued at almost $2,000. Turco further testified that the presence of several $20 bills and a pager on Nelson's person at the time of arrest was significant because

pagers were typically used in narcotics transactions and $20 bills were often used in the trade of crack cocaine, which was commonly sold at $20 per hit.

At the time of Nelson's arrest, swabs were taken of his hands. The swabs were tested by a forensic chemist and tested negative for controlled substances. However, the forensic chemist testified at trial that if an individual had handled a bag containing crack cocaine, residue might be on that individual's hands if residue was on the outside of the bag, but there would not likely be residue on that individual's hands if residue was on only the inside of the bag and none on the outside.

At defense counsel's request, on July 3, 1997, fingerprint tests were performed on the bag found in the cruiser. No identifiable fingerprints were found. The crime laboratory technician who performed the test testified at trial that plastic bags are generally not hard enough to receive fingerprint impressions and noted that it had been almost 6 months between the time the bag had been found in the cruiser and the time it was tested.

Nelson was convicted following a bench trial. On December 9, 1997, an enhancement proceeding was held at which Nelson was found to be a habitual criminal. On June 16, 1998, Nelson was sentenced as a habitual criminal to a term of imprisonment of 10 to 15 years.

On November 22, 1999, Nelson filed a motion for postconviction relief asserting, inter alia, that his counsel had provided ineffective assistance of counsel by failing to perfect a direct appeal of his conviction and sentence. A postconviction evidentiary hearing was held on January 3 and 10, 2001. Thereafter, the district court entered an order finding that Nelson had been provided ineffective assistance of direct appeal counsel and concluding that, pursuant to *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), and *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), the appropriate relief was to grant Nelson a new direct appeal. The present direct appeal followed.

ASSIGNMENTS OF ERROR

In his new direct appeal, Nelson asserts that (1) the district court erred in finding the evidence sufficient to prove he was a habitual criminal; (2) he was rendered ineffective assistance of

counsel at the enhancement hearing because trial counsel failed to object to the introduction of his prior plea-based convictions and failed to object regarding the sufficiency of the evidence in support of the habitual criminal finding; and (3) the evidence at trial was insufficient to convict him of the charge of possession with intent to deliver a controlled substance, and the district court therefore erred in failing to direct a verdict in his favor.

STANDARDS OF REVIEW

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

[3] Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997); *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997); *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993).

ANALYSIS

Sufficiency of Evidence—Possession With Intent to Deliver.

We first consider Nelson's assignment of error with respect to the sufficiency of evidence in the underlying conviction because if such conviction was not valid, the assignments of error regarding sentence enhancement would become moot. Nelson argues that the evidence on the possession charge was almost solely circumstantial. He claims that there was no direct evidence that he was the individual responsible for placing the plastic bag containing crack cocaine in the back seat of the cruiser and that there was evidence which cast substantial doubt on the assertion that he was so responsible.

In reviewing the sufficiency of the evidence following a conviction, we must view the evidence in the light most favorable to the State to determine whether it supports a conviction for possession with intent to deliver a controlled substance. *Castor, supra.* In reviewing the evidence, we must remember that circumstantial evidence is equally probative as direct evidence. *Id.* Therefore, Nelson's complaint that the evidence against him is almost solely circumstantial is not meritorious if such evidence, even though circumstantial, is sufficient to support the conviction.

Turco testified that after he and LeClair had removed Nelson from the back seat, he noticed the bag of crack cocaine under the seat where Nelson had been sitting. LeClair testified that he had searched this area prior to their patrol shift and had not seen a bag at that location at that time. Turco further testified that during the shift, no one had been in the back seat prior to Nelson. Such testimony, if believed by the trier of fact, could reasonably lead to the finding that the bag of crack cocaine had been in Nelson's possession and deposited by him in the back seat of the cruiser.

Turco also testified that the amount of crack cocaine in the bag was a "dealer amount" and that the pager and the $20 bills found on Nelson at the time of his arrest were indications of involvement in narcotics trade. Such testimony supports a finding that Nelson's possession of the crack cocaine was with the intent to deliver it.

Nelson points to evidence in his favor, including the results of tests which failed to detect residue on his hands and which failed to detect his fingerprints on the bag. However, there was also testimony which indicated that residue would not necessarily have been on his hands if he had handled the bag but not the contents and if there had been no residue on the outside of the bag. There was also testimony to the effect that plastic bags do not easily receive fingerprint impressions. The evidence asserted by Nelson therefore does not preclude a finding that he had possessed the bag containing crack cocaine.

Viewing the evidence in the light most favorable to the State, we conclude that, if believed by the trier of fact, there was evidence beyond a reasonable doubt which supports a conviction for possession with intent to deliver a controlled substance.

Nelson's assignment of error regarding sufficiency of the evidence to support his conviction is therefore without merit.

Habitual Criminal Enhancement.

The State sought enhancement of Nelson's sentence pursuant to the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995), based on two prior felony convictions.

Nelson asserts that the district court erred in finding him to be a habitual criminal because the State did not present evidence proving that his prior plea-based convictions were obtained when he either was represented by counsel or had knowingly, intelligently, and voluntarily waived his right to counsel.

[4] We have held that in a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).

[5] The State in this case concedes that the evidence of Nelson's two prior felony convictions presented at the enhancement hearing did not affirmatively establish that Nelson was represented by counsel at the time of his pleas or that he voluntarily, intelligently, and knowingly waived counsel. The State nevertheless argues that such evidence was subject to challenge by Nelson and that Nelson waived the error regarding the sufficiency of the enhancement evidence by failing to object at the enhancement hearing and instead raising the challenge for the first time on appeal. Given the constitutional dimension of the right to counsel, we have held, however, that in the absence of proof on the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right, it is plain error for a court to use a defendant's prior convictions to enhance the defendant's sentence. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986).

The State recognizes such authority in its brief, but asserts that such holdings were in error and urges this court to overrule such cases. The State further refers to *State v. McGhee*, 184 Neb.

352, 359, 167 N.W.2d 765, 770 (1969), in which this court held that "the failure of the defendant to initiate inquiry into the constitutional basis of his prior conviction at or prior to its offer into evidence forecloses him from challenging its validity on an appeal to this court." See, similarly, *State v. Cole*, 207 Neb. 318, 298 N.W.2d 776 (1980) (stating in postconviction case that validity of prior conviction offered to enhance punishment under habitual criminal statute must be challenged at habitual criminal hearing and that failure to challenge prior conviction at trial level waives issue, and prior conviction not subject to collateral attack in postconviction proceeding). See, also, *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978).

[6] We have stated that plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). We conclude that based on these standards and our prior cases, *Ristau, supra*, and *Huffman, supra*, the use of a defendant's prior convictions to enhance the defendant's sentence absent proof on the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right is plain error.

We observe that the holdings in *Ristau* and *Huffman*, decided in 1994 and 1986, respectively, created an exception to the proposition stated earlier in *McGhee*, decided in 1969. Although *McGhee* foreclosed a challenge to the "validity" of a prior conviction on direct appeal when such challenge was not raised at the trial level, we have held in *Ristau* and *Huffman* that in the circumstance in which the challenge to the validity of the prior conviction was limited to the absence of proof on the record in an enhancement hearing—that the prior conviction was obtained at a time when the defendant was represented by counsel or had knowingly waived such right—such error was plain error, meaning that it could be considered on appeal even though it had not been raised at the trial level. *Ristau* and *Huffman* therefore overruled *McGhee* to the extent that under *Ristau* and *Huffman*, such counsel-based challenges will be

permitted on direct appeal, notwithstanding a failure by trial counsel to raise such challenges.

In the present case, the district court committed plain error in sentencing Nelson as a habitual criminal where the State failed at the enhancement hearing to affirmatively establish that Nelson was represented by counsel at the time of the pleas in his two prior felony convictions. See, *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996); *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986). We therefore vacate Nelson's enhanced sentence and remand the cause to the district court for resentencing. Because of the disposition of this assignment of error, we need not consider Nelson's assignment of error claiming ineffective assistance of counsel at the enhancement hearing.

Double Jeopardy in Enhancement Proceeding.

Nelson asserts that in the event of a remand for resentencing, the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions, U.S. Const. Amend. V and Neb. Const. art. I, § 12, prohibit the State from attempting to resentence him as a habitual criminal. Nelson bases his argument on the holding of the Nebraska Court of Appeals in *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000). In *Gray*, the Court of Appeals held that double jeopardy principles apply to habitual criminal proceedings under § 29-2221 and that the State is prohibited from attempting to resentence a defendant as a habitual criminal where the enhanced sentence has been vacated because of insufficient evidence.

The State questions the Court of Appeals' holding in *Gray*. In so arguing, the State cites to this court's holding in *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000), and the U.S. Supreme Court's holding in *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998). In *Neiss*, we held that double jeopardy principles do not apply to Nebraska's driving under the influence enhancement proceedings. In deciding *Neiss*, we relied in part on the U.S. Supreme Court's decision in *Monge*. In *Monge*, the Court held that in noncapital sentencing proceedings, the Double Jeopardy Clause of the U.S. Constitution does not preclude resentencing enhancement proceedings even where the

enhancement sentencing proceeding has certain hallmarks of a trial. The Court noted that double jeopardy protections are generally inapplicable to sentencing proceedings because the determinations at issue in sentencings do not place a defendant in jeopardy for an "offense." The Court in *Monge* noted, however, that double jeopardy protections do apply to capital sentencing proceedings. We have similarly concluded in *State v. Hochstein and Anderson, ante* p. 311, 632 N.W.2d 273 (2001).

At issue in *Monge* was California's "three-strikes" law, which provides that a defendant convicted of a felony who has two qualifying prior convictions for "serious felonies" shall be sentenced to a minimum prison sentence of 25 years to life, and a defendant convicted of a felony who has one prior serious felony shall be sentenced to a double term of imprisonment. The Court concluded that the Double Jeopardy Clause did not preclude a resentencing hearing, the subject of which would be the merits of allegations regarding the existence of prior serious felony convictions under California's "three-strikes" law.

[7] We conclude that the rationale of *Monge* applies to habitual criminal enhancement proceedings under § 29-2221. Habitual criminal proceedings under the Nebraska statutes are similar to proceedings under the California "three-strikes" law at issue in *Monge* in that the determinations made in habitual criminal proceedings are sentencing determinations involving establishing the existence of prior convictions. Such determinations are not trials regarding an element of an offense. *Monge, supra.* We hold that double jeopardy principles do not apply to habitual criminal enhancement proceedings under § 29-2221, and we therefore overrule *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), to the extent it held that double jeopardy principles applied to habitual criminal enhancement proceedings.

[8] Nelson urges us to conclude that even if the U.S. Constitution's Double Jeopardy Clause does not apply to habitual criminal enhancement proceedings, the Nebraska Constitution's double jeopardy clause prohibits the State from attempting to sentence him as a habitual criminal on remand. However, we have held that the protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001); *Neiss,*

supra; *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999). We, therefore, reject Nelson's argument that the Nebraska Constitution provides greater protection, and we conclude that on remand, neither the U.S. nor the Nebraska Constitution's double jeopardy provisions preclude resentencing Nelson as a habitual criminal.

CONCLUSION

Following conviction, and viewing the evidence in the light most favorable to the State, we determine the evidence was sufficient to convict Nelson of possession with intent to distribute a controlled substance. We, therefore, affirm Nelson's conviction. However, at the habitual criminal enhancement proceeding, the State did not establish that Nelson's pleas in his two prior felony convictions were counseled or that Nelson had waived counsel. Based on such evidence, we conclude that it was plain error for the district court to find Nelson to be a habitual criminal for sentencing purposes, and the sentence should be vacated. We further conclude that double jeopardy principles do not preclude a subsequent habitual criminal sentencing proceeding upon remand. We, therefore, vacate Nelson's sentence and remand the cause to the district court for resentencing consistent with this opinion.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLANT, V. ANDREW J. HAWKINS, APPELLEE.

636 N.W.2d 378

Filed December 7, 2001. No. S-01-381.

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

L. Kenneth Polikov, Sarpy County Attorney, and John E. Higgins for appellant.

James E. Blinn, of Blinn & Rees, P.C., for appellee.

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

STEPHAN, J.

This is an error proceeding brought pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). The State, through the Sarpy County Attorney, takes exception to a portion of an order of the district court for Sarpy County sustaining a plea in abatement filed on behalf of Andrew J. Hawkins with respect to one of three counts in the information filed against him, and dismissing that count.

We removed the matter to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). Hawkins waived his right to file an appellate brief and has not participated in the appellate proceedings.

This case arises from the same underlying facts set forth in *State v. Rhea, ante* p. 886, 636 N.W.2d 364 (2001). Hawkins was charged by information with conspiracy to commit theft by unlawful taking in violation of Neb. Rev. Stat. § 28-202(1) (Reissue 1995) (count I); criminal possession of financial transaction devices, in violation of Neb. Rev. Stat. § 28-621(4) (Reissue 1995) (count II); and receiving stolen property having a value of more than $500 and less than $1,500, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1995) (count III). Hawkins filed a plea in abatement directed to all three counts. Following an evidentiary hearing, the district court for Sarpy County overruled the plea in abatement with respect to counts I and III. The record reflects that Hawkins was subsequently arraigned on those charges and entered pleas of not guilty.

With respect to count II, the district court sustained Hawkins' plea in abatement and dismissed the charge, referring to the reasoning set forth in its opinion and order in State v. Rhea, Sarpy County District Court, docket CR 00, page 502. The Sarpy County Attorney initiated these error proceedings, taking exception to the district court's ruling with respect to count II.

The issues of statutory interpretation presented for our review in this case are the same as those addressed in *State v. Rhea, supra.* Our reasoning in that case has equal application to this

case, and no purpose would be served in reiterating it here. Accordingly, for the reasons detailed in *Rhea*, we conclude that the district court erred in sustaining Hawkins' plea in abatement with respect to count II of the information and in dismissing the charge of criminal possession of financial transaction devices. Accordingly, the State's exception is sustained, and because jeopardy has not attached, the cause is remanded to the district court for further proceedings pursuant to Neb. Rev. Stat. § 29-2316 (Reissue 1995).

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

SUBURBAN AIR FREIGHT, INC., APPELLEE, V. GERALD J. AUST, APPELLANT.

636 N.W.2d 629

Filed December 14, 2001. No. S-00-221.

1. **Courts: Appeal and Error.** The district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
2. ____: ____. On appeal from the district court, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision 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.
5. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
6. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
7. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
8. ____. The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence.

9. **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.
10. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
11. **Motions for New Trial: Courts.** A motion for new trial may appropriately be filed only in a trial court.
12. **Motions for New Trial: Courts: Appeal and Error.** It is improper to move for a new trial in a court which reviewed the decision of a lower court and thus functioned not as a trial court but as an intermediate court of appeals.

Appeal from the District Court for Douglas County, ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Judgment of District Court affirmed.

Frederick R. Strasheim, of Blackwell, Sanders, Peper & Martin, and Jerrold L. Strasheim, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellant.

Robert E. O'Connor, Jr., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Suburban Air Freight, Inc. (Suburban Air), sued Gerald J. Aust for breach of an agreement for reimbursement of training costs after Aust left his employment and refused to pay for pilot training provided by Suburban Air. A jury in the county court for Douglas County entered a verdict in favor of Suburban Air in the amount of $2,916. On appeal, the district court affirmed, and Aust timely appealed.

SCOPE OF REVIEW

[1] The district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990).

[2] On appeal from the district court, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher

appellate court. See *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

FACTS

In its amended petition, Suburban Air claimed that it suffered $3,000 in damages when Aust left his employment with Suburban Air and did not reimburse the company for pilot training as required by the training agreement. Aust asserted in a counterclaim that Suburban Air wrongfully withheld wages from him although he continued to work for a short time after informing Suburban Air that he planned to leave its employment. Aust claimed he was damaged in the amount of $83 or $84 in bank charges.

Suburban Air provides air transportation for freight, and in 1996, it hired Aust as a pilot to be based in North Platte. In May, Aust signed the first of two agreements in which Suburban Air agreed to provide general indoctrination training and Aero Commander 500/680 ground and flight training so that Aust would be certified to fly the Aero Commander 680FL aircraft. A pilot must pass oral and written examinations and an inflight competency check for each type of aircraft flown by the pilot. The parties agreed that the fair value of the training was $5,000. This agreement provided that if Aust voluntarily terminated his employment with Suburban Air at any time prior to or 1 calendar year from the date of the agreement or if Aust's employment was terminated for cause, Aust would reimburse Suburban Air for the training on a prorated schedule.

In November 1996, Aust requested a transfer to Omaha, and he and his family moved to Omaha in February 1997 at Aust's expense. Aust continued to fly the Aero Commander 680FL and began training on the Cessna 402.

On June 3, 1997, the parties entered into a second training agreement which is the basis of this appeal. In the agreement, Suburban Air agreed to provide training for Aust on a Cessna 402 in return for his agreement to stay in Suburban Air's employ for 1 year. The fair value of the training was set at $3,000. The specifics of the second agreement varied from the original agreement as to the deadlines and amounts of reimbursement. Under the second agreement, if the termination occurred within

210 days of the agreement, Aust agreed to repay the entire training cost of $3,000. If the termination occurred after 210 days or before 240 days following the signing of the agreement, Aust agreed to repay five-sixths of the training cost. The amount that would be reimbursed upon early termination decreased by one-sixth of the training cost for every additional 30 days during which termination did not occur. If the termination occurred more than 330 days and on or before 365 days following the signing of the agreement, Aust agreed to pay one-sixth of the training cost. Aust was not required to repay any part of the training cost if the termination occurred more than 365 days from the date of the agreement.

Initially, Aust refused to sign the second training agreement, but he eventually signed it in the presence of Louis Kuhn, Jr., senior line pilot and director of training for Suburban Air. In October 1997, Aust quit his job with Suburban Air and took a position with Silver Hawk Aviation in Lincoln, where he was employed at the time of trial. Suburban Air sued Aust for breach of the second agreement, seeking reimbursement of the training costs.

On February 12, 1999, a county court jury found in favor of Suburban Air and awarded damages in the amount of $2,916. In addressing Aust's motion for directed verdict or, in the alternative, a new trial, the county court found that the evidence supported the amount of damages and a finding of proximate cause and substantial performance by Suburban Air. The county court found that the purpose of the training agreement was not to effect an assignment of wages but, instead, was to ensure that Suburban Air would be reimbursed for its investment in Aust's training. The county court concluded that the provision of the agreement alleged to be a wage assignment was severable from the rest of the agreement and that the agreement should be enforced even if it contained a wage assignment provision which would not be enforced. The county court denied Aust's motion for directed verdict and/or a new trial.

Aust timely appealed to the district court, which found no error appearing on the record and affirmed the judgment of the county court. Aust timely appealed to the Nebraska Court of Appeals, and the case was moved to this court's docket pursuant

to our authority to regulate the caseloads of this court and the Court of Appeals.

ASSIGNMENTS OF ERROR

Aust assigns as error that the county court erred (1) in refusing to grant judgment as a matter of law in favor of Aust because the training agreement contained an unlawful wage assignment provision; (2) in submitting the issue of damages to the jury because the evidence was not sufficient to support the verdict and in refusing to grant judgment as a matter of law in favor of Aust because there was no evidence of substantial performance of Suburban Air's obligations under the agreement; (3) in refusing to invalidate the agreement because it contained a liquidated damages provision; and (4) in failing to grant Aust's motion for a directed verdict or, in the alternative, a new trial. Aust also assigns error in the district court's affirmance of the county court's judgment and the district court's denial of his motion for directed verdict and/or a new trial.

ANALYSIS

This action was originally brought in county court and subsequently appealed to the district court. The district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). On appeal from the district court, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. See *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

Aust asserts that the county court should have granted judgment in his favor as a matter of law because paragraph 5 of the training agreement is an unlawful wage assignment which makes the agreement void and that the county court erred in finding the provision to be severable from the remainder of the agreement. Paragraph 5 provided:

> Withholding from wages: All amounts due in reimbursement shall be paid in full by employee to Suburban Air Freight, Inc., within fourteen (14) days from any date of termination. In executing this agreement, Employee specifically authorizes Suburban Air Freight, Inc., to withhold

> from any wages or other sums of money due to him/her, any balance due under this agreement . . . .

Aust suggests that this provision voids the training agreement because it violates state law, which requires that wage assignments be signed by both a husband and a wife, and Aust's wife did not sign the agreement. Neb. Rev. Stat. § 36-213 (Reissue 1998) states: "[E]very assignment of the wages or earnings of the head of a family and every contract or agreement intending or purporting to have the effect of such assignment shall be void unless such contract, agreement, assignment, or transfer is executed and acknowledged by both husband and wife . . . ." The county court granted partial summary judgment in favor of Aust, finding that paragraph 5 of the agreement was null and void and unenforceable. However, the county court found that paragraph 5 was severable and that the agreement had a legitimate purpose independent of the assignment of wages.

[3] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000). We conclude that paragraph 5 was severable from the remainder of the training agreement and that the county court did not err in severing this provision from the agreement.

Aust also argues that the county court erred in submitting the issue of damages to the jury without sufficient evidence to support a verdict and in refusing to grant judgment as a matter of law in favor of Aust. Aust claims that Suburban Air failed to prove the existence or amount of damages by sufficient evidence or with reasonable certainty and that Aust's alleged breach of the training agreement was the actual or proximate cause of any damages suffered by Suburban Air.

[4] In this case, the jury acted as the fact finder. The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision 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. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995).

[5] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996), *cert. denied* 519 U.S. 1058, 117 S. Ct. 688, 136 L. Ed. 2d 612 (1997). The evidence at trial included two training agreements signed by Aust. He fulfilled the first agreement by working for Suburban Air for more than 1 year. This case arises from Aust's alleged breach of the second agreement, which he signed on June 3, 1997. There is no dispute as to whether Aust signed the agreements. The 1997 agreement was received into evidence without objection.

At trial, Geoffrey Gallup, treasurer of Suburban Air, was asked to identify the factors used by the company to determine the value of the training provided to its pilots. He stated that the figure includes the cost of airplane parts, fuel, maintenance, insurance, and inspection, as well as administrative costs for staff who maintain records on each plane. For example, the Federal Aviation Administration requires that each plane be inspected after every 150 hours of flight, and these inspections cost between $5,000 and $25,000. Gallup also stated that Suburban Air must meet federal aviation regulations for its pilots, who fly solo, and must ensure that each pilot is skilled for the particular aircraft he or she flies.

The jury determined that the $3,000 figure set forth in the second training agreement was reasonable and was supported by the evidence. The $2,916 verdict reflects that the jury subtracted the amount of Aust's counterclaim from the $3,000 value stated in the agreement. Viewing the evidence most favorably to Suburban Air, the evidence was sufficient to sustain the verdict, and we find no prejudicial error which requires that the verdict be overturned.

Aust complains that the county court erred in refusing to invalidate the purported liquidated damages provision in the training agreement as an unlawful penalty clause and in instructing the jury that the "agreed upon value" of the training was $3,000.

Jury instruction No. 2 states in part:

> The agreement provided that the parties agreed that the value of the training was $3,000.00. Further, the parties

agreed that if Gerald Aust left his employment prior to the expiration of one year, he would be responsible for repaying on a pro rata basis the cost of his training. Gerald Aust subsequently left his employment before the year was up and Suburban Air Freight now sues to collect the agreed upon value of the training, $3,000.00.

The Plaintiff claims that the Defendant breached the contract after he left employment, he failed, neglected and refused to repay the $3,000.00 called for in the agreement for reimbursement of training costs.

The Plaintiff also claims that it was damaged as a result of this breach of contract, and it seeks a judgment against the Defendant for these damages, in the amount of **$3,000.00**.

[6] During the jury instruction conference, Aust made no objection to instruction No. 2, which stated that the amount of damages in dispute was $3,000. In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Aust cannot now complain about instruction No. 2 when he failed to object during the instruction conference.

Aust claims the county court erred in refusing to grant judgment in his favor because no evidence was offered regarding substantial performance of Suburban Air's obligations under the training agreement. He asserts that Suburban Air did not show that it had provided the company indoctrination training specified in the agreement. The county court denied Aust's motion for directed verdict on this issue.

[7,8] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). The party against whom the motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence. See *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

Kuhn, director of training for Suburban Air, testified that he provided Aust with general indoctrination training, which included a review of the company manual, an explanation of

company procedures, and a review of company operation specifications. We conclude that the evidence was sufficient to establish that Suburban Air substantially performed its obligations under the training agreement, and the county court was correct in denying Aust's motion for a directed verdict on this issue.

[9,10] Aust's final assignment of error argues that the county court erred in failing to grant his motion for a directed verdict or, in the alternative, for a new trial. 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. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Id.* The record contains no evidence that the county court abused its discretion in denying the motion or that any error prejudiced Aust.

[11,12] Aust also filed a motion for a directed verdict or a new trial in the district court, which was sitting as an appellate court.

> [A] motion for new trial may appropriately be filed only in a trial court. See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). It is improper to move for a new trial in a court which reviewed the decision of a lower court . . . and thus functioned not as a trial court but as an intermediate court of appeals.

Booker v. Nebraska State Patrol, 239 Neb. 687, 688, 477 N.W.2d 805, 806 (1991). Thus, the district court could not properly consider Aust's motion.

We find no error on the record in the county court that would have required the district court to reverse the jury verdict. The decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *In re Estate of Mecello, ante* p. 493, 633 N.W.2d 892 (2001).

CONCLUSION

The district court did not err in affirming the county court's judgment. Thus, the judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLANT, V. ERIC M. KNUDTSON, APPELLEE.

636 N.W.2d 379

Filed December 14, 2001. No. S-00-1307.

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. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.
3. ____. The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge.
4. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.
5. ____: ____. To obtain absolute discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1995), a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within the 6 months in accordance with Neb. Rev. Stat. § 29-1207(2) (Reissue 1995).

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

James S. Jansen, Douglas County Attorney, and Donald W. Kleine for appellant.

Emil M. Fabian, of Fabian & Thielen, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court granted Eric M. Knudtson's motion for absolute discharge based on a denial of the right to a speedy trial. The Nebraska Court of Appeals granted the State's application to docket an error proceeding, and we moved the case to our docket pursuant to our power to regulate the caseloads of this court and the Court of Appeals. See Neb. Rev. Stat. §§ 24-1106(3) and 29-2315.01 (Reissue 1995).

SCOPE OF REVIEW

[1] 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. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001).

FACTS

On August 11, 1999, Knudtson was charged by information with first degree assault. He was arraigned on August 19, and he pleaded not guilty.

Knudtson was not present at a January 25, 2000, hearing, after which the district court granted defense counsel's motion for a continuance of 120 days. A second hearing was held on January 31, at which time Knudtson appeared personally. The district court then informed Knudtson that an entry had been made on January 25 continuing the case for 120 days and that the running of the 6-month speedy trial period had been abated as of that date. When asked if he was seeking a continuance of 120 days, Knudtson responded, "Yes, sir." Defense counsel stated that he had advised Knudtson of his constitutional and statutory rights to a speedy trial and that Knudtson understood those rights. The following colloquy took place:

> THE COURT: And during this 120-day continuance, will the six months, in fact, run?
>
> [Defense counsel]: Yes, sir.
>
> THE COURT: Okay. So you are, in effect, waiving your right to a speedy trial by asking for and receiving this continuance. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. You're working on this now, [defense counsel]? You just got into it?
>
> [Defense counsel]: Yes, sir, I did.
>
> THE COURT: All right. Then the 120-day continuance again will be granted, and the running of the six months is abated — I guess it would be as of this date?
>
> [Deputy county attorney]: As of today.

On October 3, 2000, Knudtson filed a motion for absolute discharge pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1995); article I, § 11, of the Nebraska Constitution; and the 6th and

14th Amendments to the U.S. Constitution. Knudtson asserted that the matter had been pending for 419 days and that even if the 120-day abatement based on his continuance was subtracted, there remained 299 days attributable to the State. He claimed that originally, the last date for commencement of the trial was February 11 and that after adding the 120 days allowed by the district court, the last date for commencement of trial should have been June 10. Knudtson asserted that as of the date of the motion, the statutory speedy trial deadline had been exceeded by a total of 115 days.

A transcript of the January 31, 2000, hearing was offered and received at a hearing on the motion for absolute discharge. The district court noted that while its "musings . . . might have caused some confusion," the court's comments were intended to be "more informative than anything else to remind Mr. Knudtson that during this 120-day continuance, if granted, your speedy trial date would come and go. It didn't mean and it didn't state that that would affect you at all because during the 120 days, it was your continuance."

The motion for absolute discharge was granted. In its order, the district court stated that at the time of the request for a continuance, 173 days had run on the 6-month speedy trial period and that following the continuance granted by the court, 7 days remained in the 6-month period. The district court noted that the State had made no request for any type of continuance or delay in the trial, and the order stated: "The 120 day continuance period would have expired on May 30, 2000. This matter would have had to been brought to trial at least by June 7, 2000, in order to comply with the six month rule." The district court found that Knudtson had not been brought to trial within the 6-month speedy trial period, that the State had offered no valid reason for the motion for absolute discharge to be overruled, and that the State had submitted no authority to assist the court in deciding the matter. The district court did not find that Knudtson had waived his right to a speedy trial within the meaning of § 29-1207. Rather, the district court found that Knudtson had requested and was granted a 120-day continuance, after which the time for bringing him to trial began again. The county attorney sought review of this order.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in granting an absolute discharge because Knudtson offered no evidence to prove that his waiver of the right to a speedy trial was not made knowingly, intelligently, or voluntarily and in granting Knudtson an absolute discharge because § 29-1207 does not allow for a limited waiver of the right to a speedy trial.

ANALYSIS

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. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001). The State argues that Knudtson waived his right to a speedy trial when he requested a 120-day continuance. Knudtson claims that he did not waive his right but merely requested a continuance of 120 days to allow his new counsel time to prepare for trial.

[2-4] Section 29-1207 provides that every person indicted or informed against for any offense shall be brought to trial within 6 months. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge. *State v. Blackson*, 256 Neb. 104, 588 N.W.2d 827 (1999). To avoid a defendant's absolute discharge from an offense charged, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial. *State v. Steele, supra*. See, also, Neb. Rev. Stat. § 29-1208 (Reissue 1995).

In this case, the State asserts that it does not bear the burden to prove any excludable period under § 29-1207(4) because Knudtson unconditionally waived his right to a speedy trial. Although Knudtson and the district court both stated at the hearing on the motion for absolute discharge that they understood that Knudtson had waived his right to a speedy trial for only 120 days, the State argues that this was not its understanding of the

events that took place at the January 31, 2000, hearing and that the result was unfairly prejudicial to the State. It asserts that § 29-1207 does not provide for a conditional waiver and that a defendant cannot waive his right to a speedy trial for a limited period of time. The State provides no authority to support this argument, but it suggests that *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999), is analogous.

In *Herngren*, the defendant was charged by information on January 29, 1996. On July 23, the trial court made a finding that the defendant had freely, knowingly, intelligently, and voluntarily waived his right to a speedy trial. At the end of the hearing, the trial court stated:

> "If there are any hearings that will be held, they will be as a result of your attorneys filing the motions, which means that that may put it off past September. But at this point I'm allowing you to waive your six month speedy trial right, and at this point the matter is scheduled for September 10."

Id. at 209, 590 N.W.2d at 873. The docket entry indicated that the defendant had made a knowing and intelligent waiver of his speedy trial right until the September 1996 jury panel. The defendant's counsel then filed a motion to suppress, and the case was continued until resolution of the suppression issues. The motion to suppress was overruled on November 21.

On April 23, 1997, the defendant appeared in person to waive his right to a jury trial. He filed a motion to dismiss on speedy trial grounds on March 27, 1998. The prosecution offered no evidence to support its contention that the defendant had waived his right to a speedy trial. The motion to dismiss was overruled. On appeal, the defendant argued that his knowing and voluntary waiver was limited to the specific time period from July 23 to the September 1996 jury term. He conceded that the time during which the motion to suppress was pending was excludable.

The Court of Appeals found that the journal entry and the bill of exceptions presented a conflict because the journal entry stated that the waiver was until the September 1996 jury panel, while the verbatim transcript showed that the defendant had made a full and unconditional waiver of his right. Noting that the verbatim record of the proceedings in open court prevails when there is a conflict with the record of a judgment, the Court

of Appeals held that the trial court's finding that the waiver was full and unconditional was not clearly erroneous. In addition, the prosecutor had stated that the defendant was entering an actual waiver of speedy trial and that he was not just requesting a continuance. The defendant's counsel verbally acquiesced to that statement. The Court of Appeals found that the State had proved by a preponderance of the evidence that the defendant unconditionally waived his right to a speedy trial.

The case at bar is different in several respects. In *Herngren*, the trial court that originally accepted the waiver found again at the discharge hearing that the waiver was full and unconditional and that the clearly erroneous standard was not satisfied. In the case at bar, the district court which granted the continuance also found at the discharge hearing that the court's comments at the hearing on the continuance were intended to inform Knudtson that the 6-month period would abate during the 120-day continuance. The district court made no finding that Knudtson had unconditionally waived his right to a speedy trial.

In addition, the bill of exceptions and the journal entry both reflect that Knudtson had requested a continuance of 120 days, that a continuance of 120 days was granted, and that the running of the 6-month speedy trial time period was "abated" during the continuance. There is no conflict between the verbatim record of the proceedings in open court and the journal entry, as there was in *Herngren*.

The State also relies on *State v. Lundquist*, 134 Idaho 831, 11 P.3d 27 (2000), for support. In *Lundquist*, the defendant was arraigned on January 4, 1996, and trial was set for July 9. The defendant filed a motion to separate on April 18, which was granted on May 31. On June 14, the defendant filed a motion to substitute a new attorney. The court agreed on the condition that the defendant agree to a continuance and waive his right to a speedy trial. The defendant agreed, and trial was set for September 5. The State requested and was granted a continuance and moved to consolidate the trial with the trial of two other defendants. Trial began on January 29, 1997, 1 year 25 days after the defendant's arraignment.

On appeal, the defendant did not challenge the continuance granted on his motion after substitution of counsel. Rather, he

objected to the State's continuance from September to January, arguing that his waiver of speedy trial was limited to the first continuance. The Idaho Supreme Court found that the state's speedy trial statute did not allow for a limited waiver and that once the trial had been postponed, the 6-month statutory period no longer applied.

The facts in the case at bar are distinguishable from those in *Lundquist*. Here, no trial date was ever set and trial was not postponed, as was the case in *Lundquist*. Knudtson did not waive his right to a speedy trial for an indefinite period. His waiver was for the 120-day continuance only. The district court informed Knudtson that the 6-month period would expire during the 120-day continuance, and Knudtson indicated that he was aware of that fact. The district court also advised Knudtson that the "running of the six months" was abated. However, the district court made no finding that Knudtson had knowingly, intelligently, and voluntarily waived his right to a speedy trial.

The State argues that Knudtson's waiver was absolute and cannot be limited in time. Section 29-1207 does not mention a waiver or suggest that a waiver cannot be limited in time. In addition, the statute provides that the 6-month period shall exclude "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." § 29-1207(4)(b). The statute does not provide that requesting a continuance results in a complete waiver of the right to a speedy trial; rather, it provides that the delay caused by a continuance granted for the defendant is excluded from the 6-month period and counted against the defendant.

In this case, the information was filed on August 11, 1999. The continuance was initially granted on January 25, 2000, and then again on January 31, when Knudtson was present at the hearing with counsel. The motion for absolute discharge was filed on October 3. No trial had been scheduled or commenced prior to the filing of the motion. Between January and October, the State made no request for a continuance, and the record does not show that the State was actively proceeding toward trial.

[5] To obtain absolute discharge under § 29-1208, a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within the 6 months in accordance

with § 29-1207(2). *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000). 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. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001). The State did not try Knudtson within the 6-month speedy trial period, and the district court's determination to grant the motion for absolute discharge was not clearly erroneous.

CONCLUSION

We conclude that the State did not bring Knudtson to trial within the required time. The district court's determination that the charge against Knudtson should be dismissed is not clearly erroneous, and the State's exception is overruled.

EXCEPTION OVERRULED.

McCORMACK, J., participating on briefs.

JOAN L. WAGNER, NOW KNOWN AS JOAN L. ROSENBERG, APPELLEE, V. LEWIS T. WAGNER, APPELLANT.

636 N.W.2d 879

Filed December 21, 2001. No. S-00-770.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred after the entry of the original decree or a previous modification, and which was not contemplated when the prior order was entered.
4. **Rules of the Supreme Court: Child Support: Modification of Decree.** Amendment of the child support guidelines after the entry of a decree constitutes a material change in circumstances to justify a modification of a parent's child support obligation.
5. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.

6. ____: ____. Under the Nebraska Child Support Guidelines, paragraph D, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
7. **Child Support.** Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in the amount of that parent's support obligation would seriously impair the needs of the children.
8. **Divorce: Child Support.** A divorce decree does not require a parent to remain in the same employment, and child support may be calculated based on actual income when a career change is made in good faith.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded for further proceedings.

Jane F. Langan, of Rembolt, Ludtke & Berger, L.L.P., for appellant.

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

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

PER CURIAM.

The appellant, Lewis T. Wagner, was previously married to the appellee, Joan L. Wagner, now known as Joan L. Rosenberg, and pays child support for a child of that marriage. Lewis voluntarily left his employment at Central States Indemnity Company of Omaha (Central States) to accept an appointment as Nebraska's Director of Insurance, resulting in a reduction in Lewis' annual income. Joan filed an application to modify the decree, and the district court calculated Lewis' child support obligation based on his income at Central States. Lewis appeals. We reverse because the record shows that Lewis changed employment in good faith and nothing in the record indicates that the child's needs will be impaired.

BACKGROUND

The Wagners were divorced in 1994. Under the original decree, Lewis was required to pay $587 per month in child support based on an income of $88,000. The decree was later modified, and his child support obligation was raised to $669 per month. He was also responsible for providing health insurance

for the child and was required to make available to the child a coinsurance fund for noncovered medical expenses up to $5,000. He was awarded the dependency exemption for the child, contingent upon his being current on his obligation to pay child support and daycare expenses at the end of each calendar year.

In October 1999, Joan filed an application to modify the decree. The record shows Joan is employed by the Lincoln Public School District as a teacher and earns $3,333 per month. In the application, she alleged that Lewis had voluntarily left his employment for another position, no longer had a coinsurance fund, and had refused to pay his share of uncovered medical expenses. She requested a review of the amount of the child support award and insurance provisions and requested attorney fees.

Lewis filed an answer and cross-application for modification. In the cross-application, he requested that should the court determine that a material change in circumstances had occurred, he be awarded the dependency exemption. Joan filed a reply denying that Lewis was entitled to the dependency exemption.

The record shows that before January 7, 1999—Lewis' starting date as Director of Insurance—he was employed by Central States as vice president of government relations. In 1997, he earned $92,170 and received a bonus of $27,651, resulting in total compensation of $119,821. In 1998, he earned $92,170, received a bonus of $65,151, and received other compensation of $16,000, resulting in total compensation of $173,321. The record shows that he earned dividends of $3,046 in 1999. Lewis left Central States and accepted an appointment as the Director of Insurance. He earns approximately $70,000 in that position.

Lewis testified that he voluntarily left his employment at Central States because he believed the profitability and the ability of Central States to survive was short lived. The company specialized in a single area of insurance that could be affected by the passage of a federal act. He also was concerned that he did not receive a salary increase in 1998. A former Director of Insurance testified that in his opinion, the passage of the federal act would have a dramatic adverse effect on insurance companies like Central States that write insurance for credit disability. On cross-examination, the former director conceded that serving as Director of Insurance had enhanced his career.

The parties stipulated that Lewis did not make the career change in bad faith. During trial, the court questioned Lewis about former Directors of Insurance who had found more lucrative positions after they served in that position. The court asked Lewis what part that knowledge played in his decision to accept the appointment. He admitted that usually the position serves as a "jumping stone to other places." He stated that because he was 56 years old and was hoping to serve as Director of Insurance for 8 years, he felt he might be able to act as a consultant after his tenure as Director of Insurance instead of simply retiring.

The district court entered a detailed order finding that Lewis earned $92,170 in 1998 and that his current income was approximately $75,000 per year. The court determined child support based on Lewis' earning capacity, excluding bonuses, and determined that that capacity was $92,170 per year. As a result, the court found that child support should be increased to $854 per month, and the award was made retroactive to January 1, 2000. The court ordered that the decree would remain in effect on all other issues.

ASSIGNMENTS OF ERROR

Lewis assigns that the district court erred in (1) refusing to use his present income when calculating child support, (2) concluding that his earning capacity was equal to his base rate of pay with Central States, (3) retroactively increasing child support, and (4) failing to grant him the dependency exemption for the child.

STANDARD OF REVIEW

[1] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Workman v. Workman, ante* p. 373, 632 N.W.2d 286 (2001).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Kirchner v. Wilson, ante* p. 607, 634 N.W.2d 760 (2001).

ANALYSIS

Lewis contends that the district court abused its discretion by calculating his child support obligation based on his salary at Central States. He argues that because he left his job at Central States in good faith and because of a probable decline in income, child support should have been calculated based on his present income.

[3,4] A party seeking to modify a child support order must show a material change of circumstances which occurred after 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). We have held that amendment of the child support guidelines after the entry of a decree constitutes a material change in circumstances to justify a modification of a parent's child support obligation. See *id.* In this case, the child support guidelines were amended after the entry of the decree. There is no dispute that a material change in circumstances warranting modification of child support is present. Therefore, the issue is whether the court abused its discretion when it calculated Lewis' child support obligation based on the income he earned at Central States.

[5,6] In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). The Nebraska Child Support Guidelines, paragraph D, provide that "if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities."

[7,8] We have held that child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in the amount of that parent's support obligation would seriously impair the needs of the children. See, generally, *Sabatka v. Sabatka, supra.* Under those circumstances, whether the decision to leave employment was made in good faith was only a factor to be considered and an award of child support could be based on a parent's earning capacity even when the parent acted in good faith. *Id.* But we have also stated

that a divorce decree does not require a parent to remain in the same employment and that child support may be calculated based on actual income when a career change is made in good faith. *Fogel v. Fogel*, 184 Neb. 425, 168 N.W.2d 275 (1969).

In *Fogel*, a parent was employed as a salesman, earning $20,000 annually. He left his employment after his work was curtailed by managerial duties and he could not work out a satisfactory salary arrangement with his employer. He then took another sales position on the promise that it would lead to an executive position. When it became apparent that the promise would not be fulfilled, he decided to enter the real estate field. He estimated that his annual earnings for the next year would be $10,000 and would increase substantially when he later became eligible to sell commercial property. The district court reduced his child support obligation. On appeal, this court affirmed on the basis that the career change was made in good faith. We stated:

> A divorce decree does not freeze a father in his employment. One may in good faith make an occupational change even though that change may reduce his ability to meet his financial obligation to his children. . . . Ordinarily, a man makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together the standard of living of the children rises or falls with the changes in the father's fortunes. Should this readjustment be any different because divorce has separated them physically? We think not, unless the move is made to avoid responsibility or made in bad faith.

Id. at 428, 168 N.W.2d at 277.

Lewis left his position at Central States because he was concerned that the company would not remain profitable. Furthermore, the parties stipulated that he changed employment in good faith. Joan did not dispute that Central States might not remain profitable. Because of his age, he will likely be of retirement age when his term as Director of Insurance ends. At that time, he testified that he hopes to do some consulting work. Unlike *Sabatka*, Lewis did not initiate proceedings to reduce his child support and nothing in the record indicates that the amount he was obligated to pay impaired the needs of the child.

Under these circumstances, when the needs of the child are not seriously impaired and the career move was made in good faith, the court abused its discretion when it calculated Lewis' child support obligation based on his income at Central States. Accordingly, we reverse, and remand for a recalculation of child support. Because we reverse for a recalculation of support, we do not address Lewis' remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

THE OHIO CASUALTY INSURANCE COMPANY, APPELLEE, V. CARMAN CARTAGE COMPANY, INC., DOING BUSINESS AS CARMAN CARTAGE CO., APPELLANT.

636 N.W.2d 862

Filed December 21, 2001. No. S-00-915.

1. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
3. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Insurance: Contracts.** The nature of the duty to defend is defined by the insurance policy as a contract.
6. **Insurance: Contracts: Intent: Appeal and Error.** An insurance policy is a contract. In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
7. **Insurance: Contracts.** An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law.
8. ____: ____. Because the contract terms of an insurance policy govern the duty to defend, the policy may relieve the insurer of any duty to defend, or give the insurer the right, but not the duty, to defend.

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

James Allen Davis and Travis Thorne Bennington, of Davis & Associates, for appellant.

Kevin J. Dostal and Thomas M. Locher, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

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

STEPHAN, J.

In this declaratory judgment action, the district court for Douglas County determined as a matter of law that under a commercial inland marine insurance policy, the insurer had no duty to defend a property damage claim against its insured and was therefore entitled to summary judgment in its favor. We reach the same conclusion and therefore affirm.

BACKGROUND

Carman Cartage Company, Inc. (Carman Cartage), is a common carrier engaged in the interstate truck transport of cargo within the United States. The Ohio Casualty Insurance Company (Ohio Casualty) issued a commercial inland marine insurance policy insuring Carman Cartage for the period January 1, 1997, to January 1, 1998. The policy included a "Trucker's Motortruck Cargo Coverage Form" which obligated Ohio Casualty to pay for loss to property for which the insured was "liable by law as a common carrier . . . under tariff, bill of lading or shipping receipt" when the loss was caused by one of several occurrences, including fire, explosion, accidental collision, and other perils. This form further provided that "[t]he most we will pay for 'loss' is the applicable Limits of Insurance shown in the Declarations," which state a limit of $100,000 per unit.

On February 6, 1997, Carman Cartage was transporting a cargo of beef under contract with American President Lines (APL) when an accident occurred, resulting in damage to the cargo. APL asserted a cargo loss claim against Carman Cartage in the approximate amount of $140,000. Carman Cartage notified Ohio Casualty of the claim and stated its position that the

loss had a maximum value of $86,999.66. After investigating the loss and attempting unsuccessfully to settle the claim within the policy limit of $100,000, Ohio Casualty paid that amount to APL on behalf of Carman Cartage. Ohio Casualty obtained a receipt for this payment but did not secure a release of claims on behalf of Carman Cartage. Subsequently, APL filed suit against Carman Cartage seeking approximately $40,000 over and above the payment made by Ohio Casualty. Carman Cartage tendered defense of this claim to Ohio Casualty, which rejected the tender based upon a denial that it had a duty to defend under the terms of the policy.

Ohio Casualty then brought this action for a declaratory judgment determining its rights and obligations under the policy. Carman Cartage counterclaimed, alleging negligent failure to secure a waiver of claims, breach of fiduciary duty, and breach of contract. Ohio Casualty moved for summary judgment, which the district court granted based upon its determination that Ohio Casualty had merely a right and not a duty to defend under the plain language of the policy. Carman Cartage perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Carman Cartage assigns that the trial court erred (1) in ruling that Ohio Casualty did not owe Carman Cartage a duty to defend it from the third-party suit, (2) in failing to recognize the common-law principle that an insurer owes its insured a fiduciary duty to secure a release of claims on behalf of its insured when it pays a third-party claim in full, and (3) in granting summary judgment when genuine issues of material fact exist regarding whether Ohio Casualty knowingly overpaid the third-party claim and whether the cargo was a total loss.

STANDARD OF REVIEW

[1,2] The interpretation of an insurance policy is a question of law. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation

to reach its conclusion independently of the conclusion reached by the trial court. *Continental Western Ins. Co. v. Conn, ante* p. 147, 629 N.W.2d 494 (2001).

[3,4] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001); *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Skinner v. Ogallala Pub. Sch. Dist. No. 1, ante* p. 387, 631 N.W.2d 510 (2001).

ANALYSIS

The term "inland marine coverage" encompasses a variety of specialized insurance coverages, including coverage for loss or damage to goods while in transit. 11 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 154:3 at 154-11 (rev. ed. 1998). Inland marine insurance "function[s] basically as a form of property insurance, even though the policy may explicitly contemplate that the value of the property will be payable to the owner rather than the insured." 11 Russ & Segalla, *supra*, § 154:5 at 154-14. In this case, it is undisputed that the loss in question was of a type covered under the policy and that the policy limit was $100,000. The issues presented are whether the insurer had either a duty to defend under the policy or a common-law duty to obtain a release of the insured as part of any settlement with the claimant.

DUTY TO DEFEND

[5] In construing liability insurance policies, we have held that an insurer's duty to defend is broader than its duty to indemnify. *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). The nature of the duty to defend is defined by the insurance policy as a contract. *Union Ins. Co.*

v. Land and Sky, Inc., 247 Neb. 696, 529 N.W.2d 773 (1995). In this case, however, we are not considering a liability insurance policy, but, rather, an inland marine policy providing trucker's motortruck cargo coverage. The threshold question is not the nature or scope of a duty to defend, but, rather, whether any such duty exists under the policy.

[6,7] An insurance policy is a contract. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001); *Callahan v. Washington Nat. Ins. Co., supra.* An insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law. 14 Russ & Segalla, *supra*, § 200:5. Thus, we look to the insurance policy itself to determine whether Ohio Casualty undertook a duty to defend Carman Cartage under its commercial inland marine insurance policy.

Carman Cartage asserts that such a duty arises from a portion of the policy conditions entitled "Privilege to Adjust With Owner," which provides:

> In the event of "loss" involving property of others in your care, custody or control, we have the right to:
>
> 1. Settle the "loss" with the owners of the property. A receipt for payment from the owners of that property will satisfy any claim of yours.
>
> 2. Provide a defense for legal proceedings brought against you. If provided, the expense of this defense will be at our cost and will not reduce the applicable Limit of Insurance Under this insurance.

Ohio Casualty argues that this language creates a *right* but not a *duty* to defend.

Although we have not had occasion to determine whether this precise policy language creates a duty to defend, we considered similar language in *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986). That case posed the question of whether an excess liability insurer undertook a duty to defend based upon the following policy language:

> "The Insured shall be responsible for the investigation, settlement or defense of any claim made or suit brought or proceeding instituted against the insured *which no underlying insurer is obligated to defend*. . . .
>
> "The company shall have the right and shall be given the opportunity to associate with the insured or its underlying insurers, or both, in the defense and control of any claim, suit or proceeding which involves or appears reasonably likely to involve the company and in which event the insured, such insurers and the company shall cooperate in all things in defense of such claim, suit or proceeding."

(Emphasis in original.) *Id.* at 626-27, 392 N.W.2d at 371-72. We held that "[t]he trial court correctly found that the language . . . 'expressly give[s] Equitable the *right* to defend [but] do[es] not provide an express duty to defend.' " (Emphasis in original.) *Id.* at 627, 392 N.W.2d at 372.

Case law from other jurisdictions is also instructive on the issue. In *B & D Appraisals v. Gaudette Machinery Movers*, 752 F. Supp. 554 (D.R.I. 1990), a machine being shipped by a common carrier was damaged in transit. When the owner brought suit to recover its loss, the carrier notified its insurance company, which refused to participate in its defense. The applicable portion of the policy provided:

> "The Insured shall not voluntarily admit any liability nor settle any claims nor incur any expenses . . . without the specific authority of this Company, nor shall the Insured interfere with any negotiations for settlements carried on between this Company and the owners of the property. *In event of legal action being brought against the Insured in respect to alleged loss or damage which might constitute a claim under this policy, the Insured shall give immediate notice to this Company, and this Company reserves the right at its sole option to defend such action in the name and on behalf of the Insured and will pay all legal expenses incurred by this Company in connection with any action it undertakes to defend . . . .*"

(Emphasis in original.) *Id.* at 556. The court concluded that the unambiguous language of the policy gave the insurer only the

right to exclusive control over potential litigation, and not the duty to defend. *Id.*

Similarly, in *City of Peoria v. Underwriter's at Lloyd's London, Uninc.*, 290 F. Supp. 890, 892 (S.D. Ill. 1968), the court interpreted a policy which provided that the insurer "may, 'if they so desire,' 'take over the conduct . . . of the defense of any claim' covered by the policy provisions." The court concluded that this language was clear and created only the right, and not the obligation, to assume the conduct of defense. See, also, *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730 (7th Cir. 1976) (holding that right to assume control of defense carries with it no duty to participate in defense).

[8] These cases are illustrative of the general rule that "[s]ince the contract terms govern the duty, an insurance policy may relieve the insurer of any duty to defend, or give the insurer the right, but not the duty, to defend." 14 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 200:5 at 200-18 to 200-21 (rev. ed. 1999). We conclude that the applicable language in the policy under consideration clearly and unambiguously gives Ohio Casualty a right to defend claims against its insured and a right to settle such claims, but does not impose a duty upon it to do either.

Contrary to the assertions of Carman Cartage, the policy does create an obligation on the part of the insurer to pay for loss to covered property which results from a covered cause of loss up to the limits of insurance as stated on the policy declarations. It is this obligation to pay which provides the mutuality of obligation upon which the insurance contract is based. By paying the policy limit of $100,000 to APL, Ohio Casualty satisfied that contractual obligation.

Fiduciary Duty to Secure Release

Alternatively, Carman Cartage argues that "[a]n insurer owes its insured a fiduciary duty to secure a release of claims when it pays a claim, in full, on behalf of their [sic] insured." Brief for appellant at 9. It contends that the district court erred in granting summary judgment because there is a genuine issue of material fact regarding whether Ohio Casualty breached this fiduciary duty when it failed to secure a release from APL. Generally, Carman Cartage argues that by failing to fulfill this fiduciary

duty, Ohio Casualty became obligated to defend Carman in the suit brought by APL.

In support of this argument, Carman Cartage relies extensively upon *Aetna Cas. & Sur. Co. v. Sullivan*, 33 Mass. App. 154, 597 N.E.2d 62 (1992). In that case, a liability insurance carrier tendered the full amount of its coverage to a party asserting a personal injury claim against its insured but did not obtain a release. The carrier then sought a declaratory judgment determining that by virtue of such tender, it was discharged from its duty to defend its insured in a suit brought by the third party. In addressing the issue, the court specifically reasoned that "[s]ince the source of the duty to defend is the contractual agreement, . . . we consider, first, the applicable provision of the insurance policy in effect at the time of the accident." (Citation omitted.) *Id.* at 155, 597 N.E.2d at 63. The language of the paragraph of the policy entitled " 'Our Duty to Defend You and Our Right to Settle' " provided that the insurer had " 'the right and duty to defend any lawsuit' " and that the " 'duty to settle or defend ends when we have paid the maximum limits of coverage under this policy.' " *Id.* The court held that the policy thus made it "absolutely clear" that the insurer had a duty to defend, noting that the right of an insured motorist to have his insurer provide a defense is a great benefit to the insured. *Id.* at 157, 597 N.E.2d at 64. The court reasoned that a fair reading of the language was that the insurer was discharged from its contractual duty to defend only "if it should make a payment equal to the maximum policy limits either to settle a claim against the insured or in total or partial satisfaction of a judgment against the insured upon conclusion of the litigation." *Id.* It then proceeded to the analysis upon which Carman Cartage relies in this case:

> The situation is different, however, when an insurer seeks to pay the full amount of coverage without a judgment and without obtaining a release of the insured from at least one personal injury claimant. Were we to interpret the policy language in that situation as Aetna does, an insurer would be free, regardless of the merits of a personal injury claim, to tender the coverage limits to the claimant and decline to defend further whenever the insurer anticipates that the cost of providing a defense would exceed the amount of

> coverage. The duty to defend generally relied upon by insured motorists would, thus, be significantly nullified in a large number of cases.

Id. at 158, 597 N.E.2d at 65. Employing a similar rationale, the court in *Emcasco Ins. Co. v. Davis*, 753 F. Supp. 1458 (W.D. Ark. 1990), held that a liability insurer could not relieve itself of an express contractual duty to defend by interpleading its policy limits. See, also, *Stanley v. Cobb*, 624 F. Supp. 536 (E.D. Tenn. 1986); *Samply v. Integrity Ins. Co.*, 476 So. 2d 79 (Ala. 1985).

Contrary to the contention of Carman Cartage, none of these cases recognize a common-law fiduciary duty on the part of an insurance carrier to obtain a release of the insured in conjunction with a settlement of claims. In each case, the payment of policy limits without obtaining a release or otherwise effecting a settlement with the claimant was held insufficient to extinguish the insurer's *contractual* duty to defend its insured. Here, for the reasons we have stated, the policy at issue created no such contractual duty. Accordingly, the reasoning of these cases is inapposite to the issues before us.

Carman Cartage also argues that a duty on the part of an insurer to secure a release of claims against its insured as a part of a settlement can be implied from our holdings in *Hadenfeldt v. State Farm Mut. Auto. Ins. Co.*, 195 Neb. 578, 239 N.W.2d 499 (1976), and *Olson v. Union Fire Ins. Co.*, 174 Neb. 375, 118 N.W.2d 318 (1962). Both of these cases involved causes of action for a bad faith failure of an insurance company to settle a claim within policy limits. We stated in *Olson*:

> The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit. The weight of authority is to the effect that when the insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no obligation to do so. In the event the insurer elects to resist a claim of liability, or to effect a settlement thereof of such terms as it can get, there arises an implied agreement that it will exercise due care and good faith where the rights of an insured are concerned.

174 Neb. at 379, 118 N.W.2d at 320-21. Based upon this language, Carman Cartage argues that an insurer has a fiduciary duty to use good faith when it "settles" claims and that "settle" by definition includes securing a release when a claim is paid.

This argument ignores the undisputed fact that Ohio Casualty did not "settle" APL's cargo loss claim. It attempted to do so, but was unsuccessful in that effort. Ohio Casualty then paid the full amount of its insurance limit to APL, thus satisfying its contractual obligation under the policy to pay covered losses. Also, as we have noted, Ohio Casualty had no duty to defend Carman Cartage with respect to the APL claim and therefore could not have an "exclusive right" to settle in the same sense as a liability insurer under the reasoning of *Hadenfeldt* and *Olson*. We conclude that these cases furnish no logical support for the argument that Ohio Casualty had a duty to obtain a release of Carman Cartage when it paid its policy limits to APL.

Alleged Overpayment of Claim

Carman Cartage contends there was a genuine issue of material fact as to whether Ohio Casualty overpaid the APL claim. We fail to see how this issue could be material to the primary question of whether Ohio Casualty owed any duty to Carman Cartage after paying its policy limit. If an overpayment was made, it would inure to the benefit of Carman Cartage which is being sued by APL for the difference between the claimed value of the cargo and the amount paid by Ohio Casualty. If no overpayment was made, Ohio Casualty nevertheless satisfied its contractual obligation by paying out its policy limit. In either circumstance, Ohio Casualty had no contractual or common-law duty to defend APL's claim against Carman Cartage for amounts exceeding its liability limit.

CONCLUSION

For these reasons, we agree with the determination of the district court that under the unambiguous language of the commercial inland marine insurance policy, which it issued to Carman Cartage, Ohio Casualty had a right but not a duty to defend its insured against covered cargo loss claims. It did have a duty, however, to pay such claims up to the stated policy limit of $100,000. Having paid that amount to APL, Ohio Casualty satisfied its

obligation to Carman Cartage under the policy. It had neither a contractual nor a common-law duty to defend Carman Cartage against claims by APL that its cargo loss exceeded the amount paid by Ohio Casualty. Finding no error in the entry of summary judgment in favor of Ohio Casualty, we affirm.

AFFIRMED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM D. TUCKER, APPELLANT.
636 N.W.2d 853

Filed December 21, 2001. No. S-00-1122.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld 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. **Search and Seizure.** Voluntariness of consent to search are questions of fact to be determined from all the circumstances.
3. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment to the U.S. Constitution is that of objective reasonableness: What would the typical reasonable person have understood by the exchange between the officer and the suspect?
4. **Search and Seizure.** Whether there were any limitations placed on the consent given and whether the search conformed to those limitations is a question of fact to be determined by the totality of the circumstances.
5. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits unless the district court abused its discretion in establishing the sentences.
6. **Constitutional Law: Search and Seizure.** It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions—one being a search undertaken with consent.
7. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
8. **Search and Seizure.** Mere submission to authority is insufficient to establish consent to a search.

9. **Search and Seizure: Police Officers and Sheriffs: Warrants.** In situations where the searching officer has stated that he could obtain or was in the process of getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.
10. ____: ____: ____. A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion.
11. **Search and Seizure.** A search of a home that is made pursuant to consent may not exceed the scope of consent.
12. **Search and Seizure: Police Officers and Sheriffs.** Recitation of magic words is unnecessary to give consent to a search. The key inquiry focuses on what the typical reasonable person would have understood by the exchange between the officer and the suspect.
13. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
14. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
15. ____. In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

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

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Don Stenberg, Attorney General, and Thomas J. Olsen for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The charges in this case arise from a 1997 warrantless search of William D. Tucker's home, wherein certain illegal items were recovered. A hearing was held on Tucker's motion to suppress the items recovered in the search, and the motion was overruled.

After a stipulated trial, Tucker was found guilty of two counts of possession of a controlled substance, both Class IV felonies. Tucker was sentenced to two consecutive prison terms of 15 to 30 months each. Tucker now appeals the findings of the trial court and the sentences imposed by the trial court. We affirm.

BACKGROUND

In November 1997, Lincoln police officer Thomas Ward received a dispatch call around midnight. He was informed that the occupant of an apartment located at 134 South 17th Street in Lincoln was complaining about the odor of marijuana coming from the apartment below. Ward was met by Officers Charles Marti and Michael Bassett, who also responded to the call. Ward was the lead investigator in the case. The uniformed officers determined that the odor was coming from apartment No. 5, which was below the complainant's apartment, and made contact with Tucker, who lived in apartment No. 5.

Ward explained to Tucker that the officers had come to his residence because of a complaint of a marijuana odor. Tucker initially denied that the odor was coming from his apartment, but after Ward repeated why the officers were there, he admitted that he and some others had "smoked a joint." Tucker then pulled a roach clip from his pocket and handed it to Ward. The exchange between Ward and Tucker lasted about a minute and a half. Ward then asked Tucker if the officers could enter his apartment and look for more items. He also told Tucker that if he had any more illegal items, now would be a good time to get rid of them. Tucker told Ward it was not necessary for the officers to enter his apartment because he had no more items. Ward testified that he thought he used the term "search" but could not remember the exact terminology.

Ward continued to tell Tucker that he believed it was necessary for the officers to come in and look for illegal items. Tucker then went into the bedroom of his apartment, grabbed a newspaper, and placed it on a chair. He dumped the contents of a tray into the newspaper, wadded it up, and gave it to the officers. Ward opened up the newspaper and found several leftover joints, ashes, and stems of marijuana. Ward could see into the bedroom from where he was standing in the doorway leading into the

apartment from the hallway. According to Ward, this exchange lasted approximately 2 minutes.

Ward again asked Tucker if the officers could enter the apartment. Tucker refused, stating that the officers would "mess up" his apartment. Ward stated that the officers would leave the apartment the way they had found it. Bassett told Tucker that he would accompany Tucker inside the apartment, staying at his elbow. Marti testified that he believed Tucker may have wanted the officers only to come in and look around to see that there was nothing there, as evidenced by Tucker's gesturing to different areas of the room, claiming there was nothing in the room.

After Tucker was told that an officer would stay by his side, he was asked if the officers had permission to come in. Tucker stepped back and gestured with his arms raised and his hands upward and outward. When asked by Ward if that meant the officers could come in, he said yes. Ward testified that the officers may have also discussed the possibility of obtaining a search warrant during their contact with Tucker. Bassett did not recall any discussion about obtaining a search warrant. Ward testified that had Tucker refused to consent to the search, he would have been cited for drug paraphernalia and would not have been arrested, yet Ward also stated that he considered Tucker to be under arrest and not free to leave.

After Tucker gave the officers permission to enter his apartment, the officers came in and began to search. Ward went into the bedroom and found a silver hand-held scale and a Ziploc bag with screens on it on top of one dresser, and a brass marijuana pipe on top of another dresser. According to all three officers, Tucker at no point requested that they stop searching, nor did he tell the officers that he did not consent to the search of the drawers in his bedroom. Tucker was cooperative and even helped the officers locate a "bong" by opening a kitchen drawer. The officers found 2.67 grams of cocaine and 2.99 grams of amphetamine within the dresser drawers in the bedroom. Tucker was then arrested.

Tucker claims that he was repeatedly harassed by the officers' requests to enter his apartment. He testified that he asked the officers whether the term "search" meant simply to look around and that the officers said yes. The trial court found that Tucker

did not limit his consent to search in spite of his claims that he gave consent to only a limited "visual search." Tucker also testified that the officers agreed that visually looking around the apartment does not mean "opening and closing drawers and such." When the officers began to search through drawers, Tucker claims to have verbally objected to their actions. According to Tucker, the officers did not respond and kept looking through the drawers.

Tucker was charged with count I, possession of a controlled substance with intent to deliver (marijuana), a Class III felony in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995), and counts II and III, possession of a controlled substance (cocaine and amphetamine), Class IV felonies in violation of § 28-416(3). Tucker filed a motion to suppress the evidence seized in the warrantless search of his apartment, and a hearing on the matter was held on May 12, 1998. The trial court overruled Tucker's motion, finding that his consent was freely and voluntarily given and was not the product of coercion, intimidation, or anything promised or threatened in exchange for consent. Tucker also moved to dismiss on speedy trial grounds, but that motion was overruled by the trial court. Tucker appealed that decision, and this court affirmed the denial of the motion. See *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

Tucker waived his right to a jury trial in exchange for dismissal of count I. Tucker then appeared for a stipulated trial on the two remaining counts. The State offered testimony from the suppression hearing. In order to preserve the suppression issue for appeal, Tucker objected to the portions of the testimony which the State elicited regarding the search. Based upon the evidence presented at the stipulated trial, Tucker was found guilty on both counts of possession of a controlled substance.

Tucker was sentenced to prison for 15 to 30 months on both counts, to run consecutively. He was given 17 days' credit for time served.

ASSIGNMENTS OF ERROR

Tucker claims, rephrased, that the trial court erred in (1) overruling his motion to suppress and admitting the results of

the search into evidence at his trial and (2) imposing excessive sentences.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld 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. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

[2] Voluntariness of consent to search is a question of fact to be determined from all the circumstances. *State v. Chitty*, 253 Neb. 753, 571 N.W.2d 794 (1998), *cert. denied* 525 U.S. 857, 119 S. Ct. 139, 142 L. Ed. 2d 112.

[3] The standard for measuring the scope of a suspect's consent under the Fourth Amendment to the U.S. Constitution is that of objective reasonableness: What would the typical reasonable person have understood by the exchange between the officer and the suspect? *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

[4] Whether there were any limitations placed on the consent given and whether the search conformed to those limitations are questions of fact to be determined by the totality of the circumstances. *U.S. v. Blake*, 888 F.2d 795 (11th Cir. 1989).

[5] An appellate court will not disturb sentences that are within statutory limits unless the district court abused its discretion in establishing the sentences. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

ANALYSIS

Tucker's first assignment of error involves two issues: (1) whether Tucker's voluntary and free consent to the search is evident under the totality of the circumstances and (2) whether it was objectively reasonable for the officers to consider the scope

of Tucker's consent to search his apartment to include areas where additional contraband may be hidden.

CONSENT TO SEARCH

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, will be upheld 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. Strohl, supra*; *State v. Konfrst, supra.*

[6] It is well settled under the Fourth Amendment that warrantless searches and seizures are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). One of those specifically established exceptions is a search undertaken with consent. *Id.* See, also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

[7] To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *State v. Chitty, supra.* The determination of whether consent to a search is voluntarily given is a question of fact to be determined from the totality of the circumstances surrounding the giving of consent. *State v. Graham*, 241 Neb. 995, 492 N.W.2d 845 (1992). See, also, *State v. Chitty, supra.*

The question is therefore whether, under the totality of the circumstances, the trial court committed clear error in finding that Tucker voluntarily gave consent to the officers to search his home.

According to Tucker, the record establishes that he did not voluntarily consent to a search. He argues that (1) the presence of three uniformed and armed officers at Tucker's door late in the evening, (2) repeated requests by the officers for consent to search his apartment, and (3) statements by the officers that they could obtain a search warrant if consent was not given are factors that demonstrate involuntariness.

[8] While it is true that mere submission to authority is insufficient to establish consent to a search, see *State v. Walmsley*, 216 Neb. 336, 344 N.W.2d 450 (1984), Tucker's actions that evening amounted to more than mere submission. According to *State v. Juhl*, 234 Neb. 33, 42, 449 N.W.2d 202, 209 (1989), a defendant's right to be free from unreasonable search and seizure was not violated when, in response to a question from a police officer as to what he had in his jacket, the defendant raised his right arm and said, " '[C]heck.' " This court noted that those actions by the defendant, in light of the fact that there was no evidence of any physical force used against the defendant, constituted an unequivocal invitation for the police to search the jacket. *Id.*

In the instant case, after a request to search his home, Tucker responded by stepping back and gesturing with his arms raised and his hands outward and upward. He also answered "yes" to the question of whether that meant the officers could search his home. There is no evidence that the officers used force or even threatened force.

The repeated requests by the officers to search Tucker's home prompted Tucker to produce various items of contraband. Tucker denied he possessed drugs, but then produced drugs and drug paraphernalia of his own volition. The consent Tucker gave to enter the apartment was likewise voluntary and was not a product of a will overborne.

[9] Tucker also argues that his consent was not voluntary because the officers threatened to get a search warrant. In *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976), a police officer asked the defendant to open the trunk of his car so the officer could search it. The defendant declined the request, and the officer responded by saying, " 'Okay, I'll get a warrant.' " *Id.* at 489-90, 239 N.W.2d at 256. The defendant then voluntarily assented to the search. The defendant argued that the officer's statement amounted to coercion, but this court did not agree, stating:

> There is no doubt that false assertions that one already *has* a warrant will vitiate a consent to search. . . . However under the facts of the instant case, all the officer said was that he would *get* a warrant. In situations where the searching officer has stated that he could obtain or was in the process of

> getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.

(Emphasis in original.) *Id.* at 490, 239 N.W.2d at 256.

[10] Tucker twice voluntarily supplied the officers with illegal items from his apartment before the search commenced. Based upon this series of events, the officers could have obtained a warrant. A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion. *State v. Rathburn, supra.*

The trial court's finding that consent was freely and voluntarily given and was not the product of coercion, intimidation, or anything promised or threatened in exchange for consent is not clearly erroneous.

Scope of Search

[11] Tucker claims that even if the consent to search was given, the search conducted exceeded the scope of the consent. A search of a home that is made pursuant to consent may not exceed the scope of consent. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

[12] The question thus becomes whether the officers were reasonable in believing that the scope of Tucker's consent included areas in the home where additional contraband may be hidden. Tucker argues that he clearly never consented to a thorough search of his apartment, rather, he consented only to letting the officers come inside and visually look around. However, recitation of magic words is unnecessary to give consent to a search. *U.S. v. Stewart*, 93 F.3d 189 (5th Cir. 1996), citing *U.S. v. Rich*, 992 F.2d 502 (5th Cir. 1993), *cert. denied* 510 U.S. 933, 114 S. Ct. 348, 126 L. Ed. 2d 312. The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, that is, what the typical reasonable person would have understood by the exchange between the officer and the suspect. *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991); *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999). See, also, *U.S. v. Stewart, supra.* The key inquiry focuses on what the typical reasonable person would

have understood by the exchange between the officer and the suspect. Whether any limitations were placed on the consent given and whether the search conformed to those limitations are questions of fact to be determined by the totality of the circumstances. See *U.S. v. Blake*, 888 F.2d 795 (11th Cir. 1989).

In *U.S. v. Stewart, supra*, because the defendant knew the object of the search was drugs, the court held that the police officer's looking in a prescription bottle after being given permission to look at the bottle was objectively reasonable.

In *U.S. v. Coffman*, 148 F.3d 952, 953 (8th Cir. 1998), where the defendant said, " ' "[G]o ahead and look around. You won't find a thing," ' " the court held that a " 'typical reasonable person' " would not have understood the defendant to be permitting only a limited search of his residence.

In the instant case, the officers searching Tucker's apartment had reasonable suspicion that Tucker possessed illegal drugs therein, because they were called to his apartment based on a complaint of marijuana odor and smelled the odor themselves. They specifically indicated to Tucker why they were at his door, so Tucker would reasonably have known that the purpose of any requested search would be to look for illegal drugs, which could be hidden in closed drawers or cabinets. Tucker should, therefore, reasonably have known that any request to search would be a request to have a closer look for illegal drugs and drug paraphernalia rather than a simple visual scan around the apartment. These events would lead a reasonable person to believe that the search of Tucker's apartment was within the scope of consent he gave, despite the fact that Tucker testified that he clearly did not give consent.

Tucker's actions in regard to the scope of the search were not consistent with what he testified he told the officers. He clearly aided the officers by producing contraband from his kitchen, and he did so of his own volition. This is directly at odds with his statement that he gave consent for only a visual search and that he did not consent to the officers' going through his drawers. Additionally, all three officers testified that Tucker did not object or try to stop the officers from continuing the search despite his stated belief that, by the officer's agreeing to stay at his elbow, it meant that the officers would conduct only a visual search.

Thus, under the circumstances present in this case, we conclude that it was objectively reasonable for the officers to determine that the scope of consent given by Tucker covered the drawers, cabinets, and other places where contraband could be hidden. See *U.S. v. Rich*, 992 F.2d 502 (5th Cir. 1993).

Excessive Sentence

[13-15] In his second assignment of error, Tucker argues that the trial court erred by imposing an excessive sentence. According to *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001), an appellate court will not disturb sentences within statutory limits unless the district court abused its discretion in establishing the sentences. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). Additionally:

> In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

State v. Urbano, 256 Neb. 194, 216, 589 N.W.2d 144, 159 (1999), citing *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997). In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995).

Tucker is 42 years old; has been using marijuana since he was 15 years old, together with other drugs; has had five driving under the influence convictions; and has been in prison three times on five different drug charges. Tucker has been arrested approximately 30 times in his adult life.

We thus conclude that through an assessment of the factors discussed in *State v. Urbano, supra*, the trial court did not abuse

its discretion when it sentenced Tucker to two consecutive prison terms of 15 to 30 months each.

CONCLUSION

Based on the above, we determine that the trial court's decision to overrule Tucker's motion to suppress was correct. We further conclude that the trial court did not abuse its discretion in sentencing Tucker. We thus affirm the ruling of the trial court on the motion to suppress and the sentences imposed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CONNIE ROEDER, APPELLANT.

636 N.W.2d 870

Filed December 21, 2001. No. S-01-292.

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. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Attorney and Client: Waiver.** Fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the lawyer-client privilege.
5. ____: ____. The party asserting a lawyer-client privilege has impliedly waived it through his or her own affirmative conduct where (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his or her defense.
6. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
7. **Pleas: Proof.** The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.

8. **Judges: Sentences: Appeal and Error.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.
9. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

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

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Connie Roeder pled guilty and was convicted in the district court for Buffalo County of one count of possession of a controlled substance with intent to deliver and one count of attempted possession of a controlled substance. The district court denied Roeder's subsequent motion to withdraw her pleas. Roeder was sentenced to a term of 6 to 12 years' imprisonment on the possession conviction and a term of 1 year's imprisonment on the attempted possession conviction, to be served concurrently. Roeder appeals the denial of her motion to withdraw pleas and claims that her sentences were excessive. We affirm.

STATEMENT OF FACTS

Background.

On July 25, 2000, Roeder was charged by information in the district court with two counts of possession of a controlled substance with intent to deliver. At the arraignment on August 25, Roeder pled not guilty. Jury trial was set for November 6. As set

forth below, although a jury was summoned on November 6, Roeder initially failed to appear and following her tardy appearance, she entered pleas pursuant to a plea agreement. Roeder subsequently sought to withdraw her pleas. The motion was denied, and Roeder was sentenced.

Entry of Pleas.

On November 6, 2000, pursuant to a plea agreement, the State amended its information to allege one charge of possession of a controlled substance with intent to deliver and one charge of attempted possession of a controlled substance. The State also dismissed five charges which were pending against Roeder in county court. Pursuant to the plea agreement, Roeder pled guilty to both charges in the amended information. The district court determined that Roeder had knowingly, voluntarily, and intelligently entered her pleas. During the allocution, the district court asked Roeder, inter alia, whether anyone had made any promise to her or threats against her which had either coerced or induced her to enter the pleas against her will. Roeder replied, "No." The district court found an adequate factual basis for the pleas, and the district court therefore accepted Roeder's pleas and found her guilty on both counts.

The district court noted on the record that earlier in the day, the case had been scheduled to proceed with a jury trial but that at approximately 10:30 a.m., Roeder had notified the court that she had been detained due to mechanical problems with her car. Although a jury panel had been summoned, the court dismissed the jury panel approximately 20 minutes after Roeder's call. Counsel were excused. The court issued a bench warrant for Roeder due to her failure to appear. Roeder subsequently appeared and entered her pleas as outlined above. Following the entry and acceptance of her pleas, the court required an increase in Roeder's bond before she could be released from custody pending sentencing.

Motion to Withdraw Pleas.

On December 15, 2000, prior to sentencing, Roeder filed a motion to withdraw her pleas. In the motion, Roeder claimed that she "felt she was left with no other alternative but to accept the plea [agreement]" and that "she was coerced into accepting

the plea [agreement] and subjected to duress because of the same." A hearing on the motion was set for December 18. However, the hearing was continued due to Roeder's concerns regarding her counsel and her desire to retain new counsel to argue for withdrawal of her pleas. On January 11, 2001, a hearing on the motion to withdraw pleas was held with Roeder represented by new counsel.

Roeder testified at the hearing regarding the pleas. She testified that on the day set for trial, she was delayed due to automobile problems. She called the court to report that she had been delayed. When she arrived at the courthouse, she was arrested but was allowed to wait at the courthouse for her counsel to return. Roeder testified that counsel told her that if she did not accept the plea agreement offered by the State, she would be held in jail with no bond until trial because of her failure to timely appear. Roeder testified that she entered the pleas of guilty in order to stay out of jail, not because she was guilty.

The State presented evidence including the testimony of a deputy county attorney regarding possible prejudice to the State in the event Roeder were allowed to withdraw her pleas. The State also called the original counsel who had represented Roeder at the time of her pleas as a witness. Counsel testified regarding the events of November 6, 2000. Counsel testified that she had appeared at the time set for trial but was excused by the court after Roeder failed to appear. Counsel returned to her office. Counsel returned to the courthouse after being advised that Roeder had appeared.

When counsel began to testify regarding her interactions with Roeder after Roeder had presented herself at the courthouse, Roeder's new counsel objected on the basis of attorney-client privilege. The district court overruled the objection and treated it as a continuing objection. Counsel testified that she understood that due to Roeder's failure to appear, Roeder was to be arrested and taken to jail. Roeder asked counsel to speak with the court regarding whether bond would be set or revoked. Counsel attempted to do so, but the court referred counsel to the county attorney. Roeder was arrested.

Counsel met with the county attorney. The State offered a plea agreement which counsel conveyed to Roeder. Counsel told

Roeder that the State had agreed that if Roeder would enter pleas pursuant to the plea agreement that day, then the State would not oppose the court's setting a higher bond instead of revoking her bond. Counsel also testified that the court had indicated to her that were the underlying matter to go to trial, it would not release Roeder on bond until after the trial. After counsel and Roeder discussed the features of the plea agreement and potential sentences for convictions pursuant to such pleas, Roeder indicated to counsel that she wanted to accept the plea agreement.

Counsel testified regarding Roeder's demeanor during these conversations and indicated that Roeder initially appeared upset about having been arrested but that she appeared to be asking appropriate questions in order to understand the plea agreement and the effects of entering the pleas. Counsel testified that she and Roeder met again later in the day. In the afternoon, Roeder did not indicate to counsel that she had changed her mind regarding the plea agreement. Counsel testified that Roeder appeared to have calmed down and that Roeder indicated that she understood the plea agreement and still wanted to accept it. During the allocution in connection with entry of the pleas, Roeder appeared to counsel to understand the questions and to know what she was doing.

On January 24, 2001, the district court entered an order denying Roeder's motion to withdraw her pleas. The district court found that "[t]he fact that [Roeder] was required to make hard choices in her own best interest and later may regret her decision is not evidence of coercion and nor [sic] is it evidence that her pleas at the time entered were not intelligently, voluntarily and knowingly made."

Sentences.

On February 16, 2001, Roeder was sentenced to imprisonment for 6 to 12 years on the possession with intent to deliver conviction and 1 year on the attempted possession charge, to be served concurrently. Roeder appeals.

ASSIGNMENTS OF ERROR

Roeder asserts that the district court (1) erred in allowing her attorney to testify at the hearing on her motion to withdraw her

pleas, (2) erred in denying her motion to withdraw her pleas, and (3) abused its discretion by imposing excessive sentences.

STANDARDS 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. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Castor, ante* p. 423, 632 N.W.2d 298 (2001).

[2] Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Heitman, ante* p. 185, 629 N.W.2d 542 (2001).

ANALYSIS

Testimony of Counsel.

Roeder asserts that the testimony of her counsel should not have been allowed at the hearing on her motion to withdraw her pleas because such testimony breached the lawyer-client privilege embodied in Neb. Rev. Stat. § 27-503 (Reissue 1995). Roeder recognizes that § 27-503(4)(c) excepts from the lawyer-client privilege "a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer," but argues that she did not allege a breach of duty by counsel and therefore any communications between her and her lawyer were within the scope of the lawyer-client privilege.

In response, the State argues, inter alia, that although Roeder did not per se allege a breach of duty by counsel, she waived lawyer-client privilege by putting into issue communications she had had with her counsel. We agree with the State.

In her motion to withdraw pleas, Roeder asserted that withdrawal would be fair and just because at the time she entered her

pleas, she "felt she was left with no alternative but to accept the plea" and that therefore "she was coerced into accepting the plea and subjected to duress because of the same." At the hearing on the motion to withdraw pleas, Roeder testified that counsel told her that if she did not accept the plea agreement offered by the State, she would be held in jail with no bond until trial because of her failure to timely appear. Roeder's testimony at the hearing made clear that the allegations of coercion and duress she asserted to justify withdrawal of her pleas were in material part the result of communications by counsel. By alleging such basis for withdrawal, Roeder made such communications an issue in the hearings, thus impliedly waiving the lawyer-client privilege as to these communications.

In *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985), we found no error by the trial court in admitting into evidence certain communications between the plaintiff and his attorney. *League* involved a suit by a minority shareholder against a corporate president alleging that the president had breached a duty to the plaintiff with respect to various corporate transactions. To avoid the bar of the statute of limitations, the plaintiff alleged, inter alia, that the president had concealed certain facts, thus putting the plaintiff's knowledge of such facts in issue. Over objection, the plaintiff's attorney was permitted to testify regarding conversations he had had with the plaintiff regarding the allegedly concealed facts. We stated in *League* that a party "is not permitted to thrust his lack of knowledge into the litigation as a foundation or condition necessary to sustain his claim . . . while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim." 221 Neb. at 45, 374 N.W.2d at 856.

[4,5] In *League*, this court addressed the issue whether a party had waived the lawyer-client privilege by placing communications between lawyer and client into issue and noted, "Fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the lawyer-client privilege." 221 Neb. at 44, 374 N.W.2d at 856. We further noted that in cases where an exception to the privilege existed,

> " 'in each instance, the party asserting the privilege placed information protected by it in issue through some

> affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.' "

Id. (quoting *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420 (S.D.N.Y. 1976), citing and quoting *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)).

Similarly, in the present case, Roeder impliedly waived the lawyer-client privilege as to relevant communications when she affirmatively made such communications a crucial issue to the resolution of her motion. Analyzing the present case in light of the three factors outlined in *League, supra*, we note that (1) Roeder's assertion of the privilege was the result of her affirmative act of filing the motion to withdraw her pleas; (2) by filing the motion to withdraw her pleas, Roeder put at issue communications between herself and counsel which were relevant to the basis she alleged to support her motion to withdraw the pleas; and (3) the application of the lawyer-client privilege would have denied the State access to information vital to its opposition to Roeder's motion to withdraw pleas.

As is evident from the record on the motion to withdraw the pleas, Roeder claimed that she should be allowed to withdraw her pleas because at the time she entered the pleas, she felt coercion and duress as a result of what counsel had told her regarding what would happen if she did not accept the plea agreement. Roeder put the communications with counsel regarding the plea agreement and their impact upon her at issue, and the State would have been denied access to information vital to that issue if it had not been allowed to question counsel as to such communications and counsel's perceptions of Roeder's reactions.

Roeder therefore impliedly waived the lawyer-client privilege as to the communications relative to entry of her guilty pleas.

Our review of the record of the hearing indicates that the substance of the testimony of counsel which the district court allowed into evidence did not go beyond that which was relevant to the issues raised by Roeder. We therefore conclude that the district court did not err in allowing Roeder's counsel to testify at the hearing on the motion to withdraw the pleas, and we reject Roeder's first assignment of error.

Withdrawal of Pleas.

Roeder next asserts that the district court erred in denying her motion to withdraw her pleas. Roeder argues that because she was coerced and subjected to duress at the time she made her pleas, such pleas were not made freely, voluntarily, and intelligently. She further argues that at the hearing on her motion to withdraw pleas, the State failed to prove that substantial prejudice would result if she were allowed to withdraw her pleas.

[6,7] After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000). The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *Id.*

The district court in the present case concluded that Roeder had not presented clear and convincing evidence that she had been coerced or was under duress or that her pleas were not intelligently, voluntarily, and knowingly made. The district court noted that the State had offered evidence as to the prejudice it might face if Roeder were allowed to withdraw her pleas, but the district court noted that such evidence related only to "possible prejudice" and that the State had not presented evidence as to "actual prejudice which would occur." The district court, however, found it unnecessary to consider whether the State had shown substantial prejudice because it ultimately concluded that Roeder had failed to show any fair and just reason to withdraw her pleas.

Upon our review of the record, we conclude that the district court did not abuse its discretion in determining that Roeder had failed to present clear and convincing evidence of a fair and just reason to withdraw her pleas. Because Roeder failed to establish a reason for withdrawal, the State's asserted failure to establish substantial prejudice was of no consequence. We therefore reject Roeder's second assignment of error.

Excessive Sentences.

Roeder claims that the district court abused its discretion by imposing excessive sentences. We do not agree.

[8,9] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Heitman, ante* p. 185, 629 N.W.2d 542 (2001). In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

Roeder was convicted of one count of possession of a controlled substance with intent to deliver, a Class III felony pursuant to Neb. Rev. Stat. § 28-416(1)(a) and (2)(b) (Cum. Supp. 2000), and one count of attempted possession, a Class I misdemeanor pursuant to Neb. Rev. Stat. §§ 28-201(1) and (4)(e) (Cum. Supp. 2000) and 28-416(3). The penalty for a Class III felony is a minimum 1 year's imprisonment, a maximum 20 years' imprisonment, or a $25,000 fine, or both imprisonment and a fine. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). The penalty for a Class I misdemeanor is a maximum 1 year's imprisonment, a $1,000 fine,

or both, with no minimum. Neb. Rev. Stat. § 28-106 (Cum. Supp. 2000). Roeder was sentenced to a term of 6 to 12 years' imprisonment on the possession with intent to deliver conviction and a term of 1 year's imprisonment on the attempted possession conviction, to be served concurrently. Roeder's sentences were therefore within statutory limits.

Roeder argues the sentences were an abuse of discretion because she had a drug addiction problem, she had no prior drug convictions, and alternative or lesser sentences could have better satisfied rehabilitative and punitive goals. The presentence investigation report shows, however, that Roeder had numerous convictions for nondrug charges. The State argues in response that Roeder had engaged in behavior to avoid dealing with her drug problem and that imprisonment would give her an opportunity to obtain treatment, whereas an alternative or lesser sentence would have been futile in addressing the problem. In sentencing Roeder, it is evident that the district court took the factors noted in *Decker* into account, and upon review, we find no abuse of discretion. We reject Roeder's final assignment of error.

CONCLUSION

We conclude that the district court did not err in allowing counsel to testify at the hearing on Roeder's motion to withdraw her pleas nor did it err in denying the motion. We further conclude that the district court did not abuse its discretion in sentencing Roeder. We therefore affirm Roeder's convictions and sentences.

AFFIRMED.

SUSAN CARUSO, FORMERLY KNOWN AS SUSAN SEVENKER, APPELLEE, V. JAMES D. PARKOS, APPELLANT, AND VIRGINIA M. PARKOS, APPELLEE.

637 N.W.2d 351

Filed January 4, 2002. No. S-00-498.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Summary Judgment: Appeal and Error.** The denial of a motion for summary judgment is neither appealable nor reviewable.

3. ____: ____. After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.
4. **Equity: Quiet Title.** A quiet title action sounds in equity.
5. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, 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.
6. **Deeds: Proof.** It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.
7. **Deeds: Intent.** To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently.
8. **Deeds.** The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee.
9. **Deeds: Intent.** No particular acts or words are necessary to constitute delivery of a deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.
10. ____: ____. Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case.
11. ____: ____. Where a grantor has conveyed his or her property, he or she cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed.
12. ____: ____. The vital inquiry is whether the grantor intended a complete transfer—whether the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and making it presently operative as a conveyance of title to the land.
13. **Deeds: Escrow.** The delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery.
14. **Deeds: Undue Influence: Proof.** The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence.
15. **Contracts: Undue Influence: Proof.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence.
16. **Undue Influence.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; instead, there must be a solid foundation of established facts on which to rest the inference of its existence.

17. **Deeds: Conveyances: Undue Influence.** The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with whether it was the voluntary act of the grantor.
18. **Conveyances: Undue Influence.** It is not mere influence that makes a conveyance unlawful, but undue influence as established in the law.
19. **Real Estate: Vendor and Vendee: Consideration: Notice: Words and Phrases.** A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry.
20. **Real Estate: Vendor and Vendee: Consideration: Notice: Proof.** The burden of proof is upon a litigant who alleges that he or she is a good faith purchaser to prove that he or she purchased the property for value and without notice; this burden includes proving that the litigant was without notice, actual or constructive, of another's rights or interest in the land.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed.

Gregory G. Jensen, of the Jensen Law Office, for appellant.

Bradley D. Holtorf, of Sidner, Svodboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellee Susan Caruso.

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

GERRARD, J.

FACTUAL BACKGROUND

This is a quiet title action relating to certain real property in Valley County, Nebraska. Prior to June 20, 1997, the property was owned by Virginia M. Parkos and two of her children, Susan Caruso and Carol Nattress. Virginia held an undivided five-sevenths interest in the property, while Carol and Susan each held a one-seventh interest in the property.

In April 1997, Carol approached Virginia about receiving an early inheritance to pay for Carol's medical expenses. The proposal was that Virginia would convey her five-sevenths interest in the property to Carol and Susan and that Susan would then obtain a loan to pay Carol $50,000 for Carol's share of the property, thus providing Carol with the money to pay for needed medical care. Carol and Susan contacted Curtis Sikyta, Virginia's attorney, regarding preparation of a deed. A warranty deed was prepared and signed by Virginia on June 20, and the

deed was provided to Sikyta for recording. Another deed, conveying Carol's interest in the property to Susan, was executed on June 26 and returned to Sikyta for recording. The deeds, however, were not promptly recorded by Sikyta's office.

On October 27, 1997, Virginia executed and delivered a warranty deed to her son James D. Parkos, purporting to convey the same property that was the subject of the June 20 and 26 deeds. The October 27 deed was recorded with the Valley County register of deeds on October 29. Thereafter, Susan contacted the register of deeds regarding her loan application process and was informed that the only deed on file with respect to the subject property was the deed conveying the property from Virginia to James. Susan contacted Sikyta, who, on November 14, recorded the June 20 and 26 deeds.

PROCEDURAL HISTORY

Susan filed a quiet title action in the district court against Virginia and James, alleging that both Virginia and James had been aware of the June 20, 1997, conveyance at the time that the October 27 deed was executed and that there was no consideration given at the execution of the October 27 deed. James denied the allegations and further alleged that the June 20 deed was never delivered, that the June 20 deed was given without consideration and was not intended to be a gift, and that Susan made misrepresentations to Virginia that induced Virginia to sign the June 20 deed.

James filed a motion for summary judgment which was overruled, and the case proceeded to trial. The primary witnesses to testify at trial were Sikyta, Carol, Susan, and James; Virginia neither appeared as a party nor testified. After trial, the district court determined that Virginia was competent when she executed the June 20, 1997, deed, that there was consideration given for the conveyance, and that the deed had been delivered to Sikyta, who was acting as an escrow agent. The district court further determined that James had knowledge of the June 20 deed prior to his receipt and recording of the October 27 deed. Consequently, the district court quieted title to the subject property in Susan. James appeals.

ASSIGNMENTS OF ERROR

James assigns, as consolidated, restated, and reordered, that the district court erred in (1) finding that there was delivery of the June 20, 1997, deed prior to October 29; (2) finding that Sikyta was acting as an escrow agent, as opposed to acting as Virginia's attorney, on June 20 and while he retained the June 20 deed; (3) finding that there was no undue influence exerted on Virginia to sign the June 20 deed; and (4) finding that James had knowledge of the June 20 deed prior to his receipt of the October 27 deed.

[1] James also assigns that the district court erred in finding that there was consideration for the June 20, 1997, deed. This assignment of error, however, was not argued in James' brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Holmes v. Crossroads Joint Venture, ante* p. 98, 629 N.W.2d 511 (2001).

[2,3] James also attempts to assign error to the district court's overruling of James' pretrial motion for summary judgment. The denial of a motion for summary judgment, however, is neither appealable nor reviewable. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999). After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment. *Id.* Therefore, we do not consider this assignment of error.

STANDARD OF REVIEW

[4,5] A quiet title action sounds in equity. *Mueller v. Bohannon*, 256 Neb. 286, 589 N.W.2d 852 (1999). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, 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. *Jeffrey Lake Dev. v. Central Neb. Pub. Power, ante* p. 515, 633 N.W.2d 102 (2001).

ANALYSIS

DELIVERY OF JUNE 20 DEED

[6] James first assigns that the district court erred in determining that there had been delivery of the June 20, 1997, deed. It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

[7-10] To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently. *Id.* The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee. *Id.* No particular acts or words are necessary to constitute delivery of a deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *Id.* Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. *Id.*

The essential question, then, is whether Virginia, at the June 20, 1997, meeting with Carol, Susan, and Sikyta, intended her execution of the deed and presentation of the deed to Sikyta for recording to presently transfer title of the property. The evidence presented at trial supports the district court's conclusion that Virginia did intend to transfer title on June 20.

Sikyta testified that he discussed the transaction at length with Virginia and that Virginia indicated that she intended to transfer the property so that Carol could obtain needed surgery. Sikyta further testified that the deed was given to him without restrictions and that everyone at the meeting, including Virginia, told him to take the deed and record it. Sikyta testified that he was not instructed to retain the deed for any reason. Carol and Susan's testimony corroborated Sikyta's account of the June 20, 1997, meeting.

[11] Furthermore, Sikyta testified regarding a telephone call on December 3, 1997, in which he spoke to Virginia. Sikyta testified that Virginia told Sikyta that she had wanted to convey the

property on June 20, but that she had since changed her mind and wanted James to have it. Sikyta testified that in a conversation with Virginia in February 1998, Virginia again stated that she had intended to convey the property on June 20, 1997, but later had reservations. However, where a grantor has conveyed his or her property, he or she cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed. See *In re Estate of Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980).

This court addressed a similar situation in *In re Estate of Saathoff, supra*. In that case, the grantor, upset over the death of one of her sons, decided to transfer part of her interest in the decedent's estate to her other son. The grantor directed the decedent's attorney to prepare an assignment of the grantor's interest in the decedent's estate. The assignment was prepared and signed, and the grantor gave the assignment to the attorney's secretary. Later, after the grantor spoke with her daughter, the grantor changed her mind. This court determined, however, that when the grantor executed the assignment, it was delivered to the attorney's secretary with the intent that it be delivered to the grantee and with the further intent that the grantor have nothing more to do with the assignment; thus, this court determined that the delivery was valid and affirmed the trial court's ruling to that effect. *Id.*

[12] Similarly, in the instant case, the delivery of the deed to Sikyta rather than to Carol or Susan does not defeat the delivery, as the evidence indicated that the deed was presented to Sikyta for the specific purpose of having the deed recorded. The vital inquiry is whether the grantor intended a complete transfer—whether the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and making it presently operative as a conveyance of title to the land. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). Given the undisputed testimony that Sikyta was instructed, at the June 20, 1997, meeting, to take the deed and have it recorded, we conclude, on our de novo review, that Susan met her burden of proving by a preponderance of the evidence that the June 20 deed was validly delivered. See *id.*

[13] James contends that the delivery was not effective because it was conditional on the payment, by Carol and Susan,

of Sikyta's legal fees for the transaction. The delivery by the grantor of a deed to a third person to hold until the happening of a contingency does not operate as a delivery. *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 215 N.W.2d 629 (1974). The evidence does indicate that Virginia insisted that Carol and Susan were to pay the legal and filing fees, and a letter from Sikyta to Carol regarding the fees may have implied that both deeds were being held pending payment of those fees.

However, Sikyta testified at the trial that the implication of that letter was a mistake and that retention of the deeds until the fees were paid was not part of the agreement with Virginia, Carol, and Susan. Sikyta testified that the sole reason for the delay in filing the deeds was a clerical error in his office and that he was not instructed to hold the deeds for any reason. Furthermore, the intent of the grantor is the controlling factor, and there is no indication in the record that Virginia intended for the conveyance of the land to be conditional or that Virginia, on June 20, 1997, intended anything other than that the conveyance be immediately effective. James' first assignment of error is without merit.

James' second assignment of error also relates to the delivery of the June 20, 1997, deed. James contends that the delivery was ineffective because Sikyta was Virginia's attorney and thus Virginia's agent, not an "escrow agent" as found by the district court. James argues that Sikyta was incapable of acting as an escrow agent because he was counsel to one of the parties and, thus, could not act as a third party. See *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

However, Sikyta testified that he considered himself to be acting as an agent of Carol and Susan for the limited purpose of filing the deed and thus an "escrow agent" for filing purposes. There is support in our law for an attorney of one party to a transaction being able to act as an escrow agent for that transaction. See *Pike v. Triska*, 165 Neb. 104, 84 N.W.2d 311 (1957). In any event, the issue here is not propriety, but the intent of the grantor. There is no indication in the record that the deed was given to Sikyta in order to permit Virginia to retain control over the deed, and in fact substantial evidence exists to the contrary. As such, we find James' argument, and his second assignment of error, to be without merit.

UNDUE INFLUENCE

[14,15] James argues that the June 20, 1997, deed should be set aside as the result of undue influence on the part of Carol and Susan. The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence. *Bishop v. Hotovy*, 222 Neb. 623, 385 N.W.2d 901 (1986). See, also, *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996); *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994). The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are (1) that the person who executed the instrument was subject to undue influence, (2) that there was opportunity to exercise undue influence, (3) that there was a disposition to exercise undue influence for an improper purpose, and (4) that the result was clearly the effect of such undue influence. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Bishop, supra*; *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983).

In this regard, the testimony of Sikyta regarding the June 20, 1997, meeting is particularly illuminating and representative of the entire record:

> [O]ne of the first responses I had was I had asked [Virginia] if she understood, in transferring this land, that she would be giving up the full use of it and she responded yes. I asked her if she understood that when this land went out of her possession that meant she would no longer have the income off of it. She stated yes. I asked her if she was sure she wanted to transfer it to the girls. Her first response was I think so or something to that effect. And so I persisted about what do you mean by you think so. Well, yes, I do. And, you know, there was several exchanges of that nature. I told her that I think so was not good enough. That I needed to know if she really intended to transfer and she said yes. I asked her if anyone was putting her under any pressure to do that. She said no. I asked her if there was a reason why she wanted to transfer it and she said, yes, it was the only way that Carol could have her surgery, so she wanted to do it for Carol's benefit. There was several other questions of that nature, but generally that's the line it took.

[16] James' argument is that Carol and Susan misled Virginia regarding their motives for proposing the conveyances. However, James presented no evidence that directly supports this argument. Moreover, the record simply would not support a finding that Virginia was mentally incapacitated or otherwise susceptible to undue influence at the time she executed the June 20, 1997, deed. Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; instead, there must be a solid foundation of established facts on which to rest the inference of its existence. See, *Westwood, supra*; *Craig, supra.* Our de novo review of the record reveals no such foundation.

[17,18] The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with whether it was the voluntary act of the grantor. *Westwood, supra*; *Bishop, supra*; *Craig, supra.* While the record is clear that Carol and Susan proposed the conveyance and persuaded Virginia to agree to the conveyance, it is not mere influence that makes a conveyance unlawful, but undue influence as established in the law. See, *Westwood, supra*; *Craig, supra.* Although there is evidence that Virginia wavered on her decision months after the transaction, there is simply no clear and convincing evidence that Virginia was subject to undue influence on or around June 20, 1997, the date of the conveyance of the deed. James' third assignment of error is without merit.

Notice to James of June 20 Deed

James' final assignment of error is that the district court erred in determining that James had notice of the June 20, 1997, deed prior to his receipt and recording of the October 27 deed. James argues that he is a subsequent purchaser in good faith without notice entitled to the protection of Neb. Rev. Stat. § 76-238 (Reissue 1996), which provides:

> All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without

> notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; *Provided*, that such deeds, mortgages and other instruments shall be valid between the parties.

(Emphasis in original.)

[19,20] A good faith purchaser of land is one who purchases for valuable consideration without notice of any suspicious circumstances which would put a prudent person on inquiry. *How v. Baker*, 223 Neb. 100, 388 N.W.2d 462 (1986); *Mader v. Kallos*, 219 Neb. 579, 365 N.W.2d 408 (1985). See, also, *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995). The burden of proof is upon a litigant who alleges that he or she is a good faith purchaser to prove that he or she purchased the property for value and without notice. *How, supra*; *Mader, supra*. This burden includes proving that the litigant was without notice, actual or constructive, of another's rights or interest in the land. *Mader, supra*.

James testified that he prepared the October 27, 1997, deed and related documents himself, without counsel. James claimed that the October 27 deed was part of a transaction in which he was given title to several of Virginia's real properties in exchange for taking care of Virginia on a daily basis. Leaving aside the question whether James' care was "valuable consideration" for the conveyances, see *id.*, the record is replete with evidence that James had actual notice of the June 20 deed prior to receiving and recording the October 27 deed.

Carol, Susan, and James all testified regarding a "family meeting" that was held in May 1997, which included Virginia and her children Carol, Susan, James, and Tammy Parkos, as well as Tammy's husband. Carol, Susan, and James all agreed that the subject of the meeting was the proposed conveyance that is the subject of this dispute and that Carol and Susan were in favor of the transaction, while James and Tammy opposed it. James' account differs from that of Carol and Susan with respect to Virginia's participation in the meeting. Carol and Susan each testified that at the family meeting, Virginia decided that she wanted to convey the property to Carol and Susan. James

claimed that at the family meeting, Virginia opposed the conveyance to Carol and Susan, but James acknowledged that he had not mentioned this fact in his prior deposition. Nonetheless, James' own testimony regarding this meeting could be held to reveal a notice of suspicious circumstances which would put a prudent person on inquiry regarding the subsequent transaction. See, *Winberg, supra*; *How, supra*; *Mader, supra*.

Beyond that, however, several witnesses testified to conversations with James after June 20, 1997, in which James indicated his awareness of the June 20 conveyance. Sikyta testified regarding a telephone conversation on December 3 in which James admitted that James had known about the June 20 deed prior to recording the October 27 deed. Sikyta testified that in a later meeting, in February 1998, James changed his story and claimed that while he had known in October 1997 of the plan to convey the property to Carol and Susan, he did not know that it had actually been accomplished. Even if the latter conversation reflected James' actual knowledge, however, that would still constitute sufficient notice to place him on inquiry regarding the June 20 transaction. See *id.*

Moreover, Carol testified to a conversation with James in August 1997 in which James allegedly told Carol to "give back" the subject property. Susan testified that she had spoken to James on July 7 and that James had congratulated her on obtaining the property and asked if he could borrow money off the remaining credit for the property. Susan also testified regarding another conversation with James in mid-August, in which James said that Virginia could not afford nursing home care because "you girls have her income, her farm." Susan further testified that James again acknowledged his awareness of the conveyance in a conversation on August 28.

In James' testimony, he asserted simply that he did not know about the June 20, 1997, deed when he received and recorded the October 27 deed. James did not deny the conversations testified to by Sikyta, Carol, and Susan; instead, James merely denied any recollection of any of those conversations.

The overwhelming weight of the evidence supports the district court's conclusion that James was aware of the June 20, 1997, deed prior to the October 27 conveyance. The district

court, which had the opportunity to hear and observe the witnesses, did not accept James' version of the facts, and we consider and give weight to this in our de novo review. See *Jeffrey Lake Dev. v. Central Neb. Pub. Power, ante* p. 515, 633 N.W.2d 102 (2001). After reviewing the record, we conclude, as did the district court, that James did not sustain his burden of proving he was a subsequent purchaser in good faith without notice with respect to the October 27 conveyance. James' final assignment of error is without merit.

CONCLUSION

Susan met her burden of showing a valid delivery of the June 20, 1997, deed, and James did not meet his burden of showing that the June 20 deed was the result of undue influence or that he was a subsequent purchaser in good faith without notice. Thus, title to the subject property passed from Virginia on June 20, and the October 27 deed purporting to convey the same property is a nullity. James' assignments of error having no merit, we affirm the judgment of the district court quieting title to the subject property in Susan.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PHILIP D. FURLONG, RESPONDENT.

637 N.W.2d 361

Filed January 4, 2002. No. S-01-516.

Original action. Judgment of disbarment.

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

PER CURIAM.

Philip D. Furlong, respondent, was admitted to the practice of law in the State of Nebraska on February 14, 1983. He is also admitted to practice law in the State of Iowa. On April 25, 2001, he was indefinitely suspended from the practice of law in Iowa by the Iowa Supreme Court, with no possibility of reinstatement

for 18 months as a result of his actions which violated provisions of the Iowa Code of Professional Responsibility for Lawyers, which actions included engaging in sexual relations with one client, sexually harassing another client, engaging in conduct that adversely reflected on his fitness to practice law, and attempting to dissuade a complaining witness from following through on her complaint with disciplinary authorities.

On May 2, 2001, the Office of the Counsel for Discipline filed a motion for reciprocal discipline against respondent, seeking an order of appropriate discipline, which discipline could include disbarment. On May 9, this court entered an order directing the respondent to show cause why this court should not enter an order of identical discipline, or greater or lesser discipline, including possible disbarment, pursuant to Neb. Ct. R. of Discipline 21 (rev. 2001).

On November 29, 2001, respondent filed with this court a voluntary surrender of his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that he did not challenge or contest the allegations set forth in the motion for reciprocal discipline or the allegations, findings, and order of the Iowa Supreme Court. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

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

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.
>
> (2) A voluntary surrender of license shall not terminate such Grievance, Complaint, or Formal Charge unless an appropriate order is entered by the Court.

Pursuant to rule 15, this court finds that respondent has voluntarily surrendered his license to practice law, admitted in writing that he engaged in conduct in violation of the Code of

Professional Responsibility, consented to the entry of an order of disbarment, and waived all proceedings against him.

Upon due consideration of the pleadings in this matter, the court finds that respondent's admission and waiver are knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
JAMES D. CURTRIGHT, APPELLANT.

637 N.W.2d 599

Filed January 4, 2002. No. S-01-521.

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: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Effectiveness of Counsel: Appeal and Error.** Where a defendant has instructed trial counsel not to appeal, such a defendant plainly cannot later complain that, by following his or her instructions, counsel performed deficiently.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own.
5. **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.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Peter K. Blakeslee for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

James D. Curtright appeals the order of the district court for Lancaster County denying his motion for postconviction relief. After an evidentiary hearing, the district court concluded that trial counsel was not ineffective when he did not file a direct appeal because Curtright had instructed trial counsel not to file such appeal. The district court further determined that the remaining issues raised by Curtright in the postconviction motion were waived because they could have been raised on a direct appeal. We affirm the denial of Curtright's motion for postconviction relief.

STATEMENT OF FACTS

Following a jury trial, Curtright was convicted on May 7, 1986, of two counts of murder in the first degree and two counts of use of a weapon to commit a felony. The victims were Curtright's mother and sister. On July 3, Curtright was sentenced to life imprisonment on each murder conviction and 10 years' imprisonment on each weapon conviction. At trial, Curtright was represented by two deputy public defenders, one of whom served as lead trial counsel (trial counsel). No direct appeal was taken from Curtright's convictions and sentences.

On April 9, 1999, Curtright filed a pro se motion for postconviction relief. In the motion, Curtright asserted five claims for which he sought postconviction relief. Curtright asserted that (1) he was provided ineffective assistance of counsel because no direct appeal was filed on his behalf despite several appealable issues which arose at trial, (2) he was provided ineffective assistance of counsel at trial because he is deaf and no interpreter was present during some of his pretrial meetings with counsel, (3) he was provided ineffective assistance of counsel at trial because he was not provided a competent interpreter during trial, (4) certain self-incriminating statements were admitted

into evidence against Curtright in violation of his *Miranda* rights, and (5) testimony of a psychologist who was not licensed to practice in Nebraska was admitted into evidence against Curtright in violation of his right to due process of law and a fair trial. For relief, Curtright sought, inter alia, that his convictions and sentences be set aside and vacated, that he be appointed counsel, and that he be provided such other and further relief as the district court deemed just.

Postconviction counsel was appointed for Curtright, and on July 20, 2000, Curtright filed a motion requesting that the district court direct the preparation of a bill of exceptions of the trial and sentencing proceedings. On July 31, the district court denied the motion, stating that

> [t]he errors alleged by the defendant with respect to pretrial and trial matters are waived if they could have been raised on direct appeal and, therefore, the record is of no assistance unless it is found that the defendant was denied effective assistance of counsel with respect to the decision not to appeal.

The district court stated that the pretrial and trial issues were not relevant "[u]ntil the defendant shows that the failure to appeal was due to ineffective assistance of counsel . . . ."

An evidentiary hearing was held March 21 and April 11, 2001. At the hearing, Curtright waived the attorney-client privilege and trial counsel testified regarding communications he had had with Curtright. Trial counsel testified that during the pretrial stages and trial, he communicated with Curtright through a sign language interpreter as well as through the use of a telecommunications device for the deaf (TDD) designed to assist deaf persons to communicate by telephone, which allowed Curtright to type words and have his words displayed on a screen. Trial counsel also stated that he attempted to learn some sign language, but generally used an interpreter, the TDD, or note writing to discuss trial strategy with Curtright. Trial counsel noted that Curtright knew American Sign Language (ASL) and explained that because ASL was a different language from English, when Curtright wrote or used the TDD to communicate in English, his sentence structure would not always follow standard English form and might appear ungrammatical. Trial coun-

sel testified, however, that he found Curtright to be intelligent and able to understand abstract concepts very well.

Certain of Curtright's writings quoted below were received in evidence at the postconviction hearing. We note that because of Curtright's translation of ASL into English, certain of his writings which are quoted below appear ungrammatical. Because indicating each error in grammar or word use would be distracting and correcting all of the errors poses the risk of altering the meaning of the communications, we have quoted Curtright's written materials in their original form. See *State v. Heitman, ante* p. 185, 629 N.W.2d 542 (2001). See, also, *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000).

Letters dated May 7, 1986, written by Curtright to the trial judge and the trial prosecutors were entered into evidence. Letters to trial counsel were also entered into evidence. In summary, in letters to the trial judge, Curtright initially indicated, inter alia, that he wished to receive the death penalty or otherwise he would appeal, but in subsequent letters and communications with trial counsel, Curtright ultimately indicated he did not want to appeal.

In the May 7, 1986, letter to the prosecutors, Curtright wrote, inter alia, "I want to give you my congratulation for your real great job on my case. I know you really deserve to hear that verdict, however; I do deserved, too." Curtright further wrote, "I hope you will work hard to get a judge put me on death penalty because I believe I deserve to have one, won't you?"

In a letter to the trial judge, Curtright wrote that he wished to receive the death penalty and expressed concern that his attorneys strongly opposed the death penalty. Curtright wrote to the trial judge, "You have the two choices: grant my wish on a death penalty or you will get my appeal . . . . Please think of 2 women was stabbed to die, therefore; you should put me to death." However, in a letter dated May 18, 1986, from Curtright to the trial judge, Curtright apologized for the earlier letter, saying that he understood the sentencing decision was the trial judge's to make and that he would abide by the trial judge's decision. Curtright further indicated that he had told his attorneys they could fight for a life sentence and that he would not press the trial judge to give a death sentence. In a letter written by

Curtright to trial counsel dated May 15, 1986, Curtright wrote, inter alia, "My decision is going to appeal my trial because I am intensely disagreeing the verdict . . . ."

Trial counsel testified that between the conviction on May 7, 1986, and the sentencing on July 3, as well as after sentencing, he had encouraged Curtright to appeal because trial counsel thought there were nonfrivolous appellate issues and that an appeal would be in Curtright's best interests. Trial counsel specifically recalled a conversation he had had with Curtright regarding the filing of an appeal, which conversation was in person using an interpreter on or near July 3, the day of sentencing. Trial counsel testified that he informed Curtright of procedures that would need to be followed to file an appeal, including deadlines and the preparation of an affidavit of poverty. Trial counsel testified that Curtright's responses made it clear that Curtright no longer wanted to appeal, and trial counsel paraphrased Curtright as saying, "I am not willing to appeal. I am guilty. I was wrong. I refuse to allow you to appeal the case. I will not sign an affidavit of poverty or in any other way to do this."

In a letter from Curtright to trial counsel dated July 20, 1986, which date followed sentencing but preceded the running of the time for filing an appeal, Curtright wrote, inter alia, "I have already decided not to file an appeal before the sentence, even though, no matter what I would get a death penalty or life sentence." The letter indicated that Curtright believed trial counsel would disagree with the decision not to appeal, stating, "This will be more harder for you to accept the fact what I'm telling this in response to your wishes of having an appeal." Curtright further stated, "Don't think of me being a nothing person who don't know what to do with the legal matter. I know what I'm doing because I understand what it's going on." Curtright concluded the letter, "Sorry, there won't have an appeal for my rest of life. I'll not be sorry what I decided. I trust God's will more than myself."

Trial counsel also testified regarding a conversation he had had with Curtright using the TDD, which conversation he recalled as taking place near the end of the time to file an appeal. A transcript of the conversation was entered into evidence. In the conversation, Curtright asked what trial counsel planned to

do in response to his letter indicating he did not want to appeal. Trial counsel responded that he would be disappointed but would stop working on the issues. Later in the conversation, trial counsel said, "I think we could debate the issue of the appeal, but when all the arguments are given, I must accept your decision. So I will, although, as you know I very much do not want to." Trial counsel testified that he then presented his reasons why he thought Curtright should appeal. Curtright responded to each of the reasons and concluded that he and trial counsel had different views of the issue. Curtright said, "Please, please, please accept my decision. But please don't think that I don't know what I am doing. I know what I do and talk about. . . . I am very delightful to see my case is in the garbage right now, and my mind is clearing out." Trial counsel responded,

> I want to tell you that I do really believe that you know what you are doing and I accept your decision. Probably I should tell you that under Nebraska law if you do not appeal, you may not be able to change your mind later, which means that you probably cannot bring a motion for post conviction relief and probably that means that you will not be eligible to bring a federal application or a writ of habeas corpus, but I think you understand that your decision is yours to make.

Curtright also testified at the evidentiary hearing. Curtright testified, inter alia, that he did not always understand what trial counsel was telling him about the legal proceedings, that trial counsel was unable to explain the appeal process in terms Curtright could understand, and that Curtright simply indicated that he understood even though he did not. Curtright also testified that prior to trial, he had discussed with trial counsel getting a more experienced lawyer but that nothing was done in that regard. Curtright further testified that after trial, he went back and forth as to whether he wanted to file an appeal and had discussed with trial counsel getting a new lawyer for the appeal because he was dissatisfied with trial counsel's performance. Curtright conceded, however, that he told trial counsel he did not want to file an appeal.

On April 17, 2001, the district court entered an order denying and dismissing Curtright's motion for postconviction relief.

Upon its review of the evidence, the district court found that Curtright directed trial counsel not to appeal. The district court also found that the evidence showed that Curtright was aware of his rights of appeal and that he knowingly directed trial counsel not to appeal. With respect to the absence of an appeal, the district court concluded that Curtright had not received ineffective assistance of counsel because Curtright had instructed trial counsel not to file an appeal. The district court further disposed of all other claims in Curtright's postconviction motion by concluding that because the other claims raised by Curtright in his motion for postconviction relief could have been raised on a direct appeal, such issues were waived and could not be raised in a postconviction action since no appeal had been taken at Curtright's direction. Curtright appeals the district court's denial of his motion for postconviction relief.

ASSIGNMENTS OF ERROR

Curtright asserts, restated, that the district court erred in these postconviction proceedings by (1) determining that trial counsel was not ineffective when he did not file a direct appeal on Curtright's behalf, (2) failing to rule in Curtright's favor on his remaining trial-related claims and by determining that such claims were waived because they were not raised in a direct appeal, and (3) denying Curtright's motion requesting preparation of a bill of exceptions of the trial.

STANDARDS 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. Thomas, ante* p. 138, 629 N.W.2d 503 (2001).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Hunt, ante* p. 648, 634 N.W.2d 475 (2001).

ANALYSIS

After the postconviction evidentiary hearing, the district court found that Curtright had directed trial counsel not to file an

appeal and that as a consequence, Curtright had not received ineffective assistance of counsel when trial counsel did not in fact file a direct appeal. Based on the foregoing, the district court concluded that Curtright's remaining trial-related claims were waived because they could have been raised in a direct appeal. The district court also determined that there was no need to order the preparation of a bill of exceptions from the trial and sentencing because such bill of exceptions would relate to trial issues, the appeal of which had been waived, and it would not aid in the determination of any issue properly before the district court.

We first consider Curtright's assignment of error with respect to the district court's determination that trial counsel was not ineffective when he did not file a direct appeal. In arguing that his trial counsel was ineffective by failing to file an appeal, Curtright relies extensively on the U.S. Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Curtright asserts that in order to resolve whether counsel was deficient "for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other," "courts must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' " 528 U.S. at 477. Based on these statements in *Flores-Ortega*, Curtright claims that the district court erred by failing to address the reasonableness of trial counsel's conduct with respect to taking an appeal. Because we determine that the district court's finding that Curtright told his attorney not to appeal is not clearly erroneous, the district court was not required to engage in the reasonableness analysis urged by Curtright.

With respect to cases where no appeal was taken, the Court noted in *Flores-Ortega* two extremes where effectiveness of counsel is not at issue. The Court first noted that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* The Court then stated, "At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Id.* The Court noted that the question it faced in *Flores-Ortega* concerned

those cases somewhere in the spectrum between these two extremes and stated:

> In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal.

528 U.S. at 478.

[3] Because Curtright expressly directed counsel not to file an appeal, the present case is not one of those circumstances addressed in the discussion in *Flores-Ortega* regarding a defendant who has not clearly conveyed his wishes one way or another but instead is a case at one end of the spectrum where a defendant explicitly tells his attorney not to file an appeal. Where a defendant has instructed trial counsel not to appeal, such a defendant "plainly cannot later complain that, by following his instructions, his counsel performed deficiently." *Roe v. Flores-Ortega,* 528 U.S. at 477.

In the present case, the record shows that counsel and Curtright meaningfully consulted about nonfrivolous grounds for an appeal and the district court found that Curtright explicitly informed counsel that he did not want an appeal. Based on the evidence presented at the evidentiary hearing, such finding by the district court was not clearly erroneous and therefore we do not disturb such finding on appeal. See *State v. Thomas, ante* p. 138, 629 N.W.2d 503 (2001).

[4] We have stated that in order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). In the present case, the absence of an appeal was not due to negligence or incompetence of counsel, but instead was due to the express instructions of Curtright directing counsel not to file an appeal. See *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

We therefore conclude that the district court did not err in its conclusion that Curtright's counsel was not ineffective when he did not file an appeal.

[5] In his second assignment of error, Curtright raises claims involving trial issues which could have been raised on direct appeal had Curtright not instructed counsel to forbear filing a direct appeal. 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. Brunzo, ante* p. 598, 634 N.W.2d 767 (2001).

Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Hunt, ante* p. 648, 634 N.W.2d 475 (2001). As a matter of law, we conclude that the district court did not err when it determined that consideration of the remaining claims was waived when Curtright instructed trial counsel not to appeal and such claims were thus procedurally barred. See *id.* The assignment of error encompassing purported errors at trial is without merit.

As his final assignment of error, Curtright claims that the district court erred in the postconviction proceedings by refusing to direct preparation of the bill of exceptions. Because the bill of exceptions from the trial would have been useful only to assess claimed trial errors, the evaluation of which were procedurally barred, the district court did not err in these postconviction proceedings in denying Curtright's motion to order the preparation of a bill of exceptions of the trial. This assignment of error is without merit.

CONCLUSION

The district court was not clearly wrong when it found that Curtright had instructed trial counsel not to file an appeal. Thus, we conclude that the district court did not err in its conclusion that Curtright's trial counsel was not ineffective when he did not in fact file an appeal. The issues raised by Curtright in his motion for postconviction relief relating to purported trial errors were waived because they could have been raised in a direct appeal which Curtright directed trial counsel not to file. The dis-

trict court did not err when it concluded consideration of these issues was procedurally barred. The district court did not err in denying Curtright's motion for an order directing the preparation of a bill of exceptions of the trial because such bill of exceptions would have been useful only in the present proceeding to evaluate issues which Curtright waived by not appealing. Having considered and rejected each of Curtright's assigned errors, we conclude that the district court's decision denying postconviction relief was correct and is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
L.T. THOMAS, APPELLANT.

637 N.W.2d 632

Filed January 11, 2002. No. S-00-1070.

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: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
3. **Records: Appeal and Error.** When considering the merits of a new direct appeal, an appellate court is precluded from considering any portion of the record that would not have been included in the record on the original direct appeal.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, errors assigned by a defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment.
5. **Jury Misconduct: New Trial.** In order for jury misconduct to become the basis for a new trial, it must be prejudicial.
6. **Criminal Law: Jury Misconduct: Proof.** Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.
7. **Rules of Evidence: Jurors: Testimony.** Under Neb. Rev. Stat. § 27-606(2) (Reissue 1995), a juror is prohibited from testifying about any matter or statement which occurred during the jury's deliberation, with two exceptions: whether extraneous prejudicial information was brought to the jury's attention and whether any outside influence was brought to bear upon any member of the jury.

8. **Rules of Evidence: Jurors: Affidavits.** Neb. Rev. Stat. § 27-606(2) (Reissue 1995) does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations.
9. **Criminal Law: Jury Misconduct: Proof.** In a criminal case, jury misconduct must be demonstrated by clear and convincing evidence.
10. **Juries: Notice.** A directive from the court to a deadlocked jury to keep deliberating which is given orally without notice to the parties or their counsel violates Neb. Rev. Stat. §§ 25-1115 and 25-1116 (Reissue 1995) and is improper.
11. **Jury Misconduct: Proof.** The State has the burden to prove that a defendant was not prejudiced by any improper communication between the judge and the jury.
12. **Constitutional Law: Juries: Discrimination: Proof.** In order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.
13. **Trial: Juries: Discrimination: Appeal and Error.** A trial court's finding that there was no discrimination in the selection of a jury is not to be reversed on appeal unless clearly erroneous.
14. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
15. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
16. **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.
17. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
18. **Criminal Law: Proximate Cause.** An efficient intervening cause is a new and independent cause, itself a proximate cause of a death, which breaks the causal connection between the original illegal act and the death.
19. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
20. **Homicide.** A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.
21. ____. A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.

22. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** Remarks made by a prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
23. **Prosecuting Attorneys: Appeal and Error.** Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case.
24. **Trial: Juries: Appeal and Error.** The trial court is in a better position to measure the impact a comment has on a jury, and the court's decision will not be overturned unless clearly erroneous.
25. **Rules of Evidence.** 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.
26. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
27. **Trial: Evidence: Waiver: Appeal and Error.** A party waives the right to assert on appeal prejudicial error concerning the admission of evidence received without objection.
28. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions.
29. ____: ____. The State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence of imprisonment in the first instance.
30. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** Under *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), *overruled on other grounds, Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994), when using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel.
31. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
32. **Prior Convictions: Right to Counsel: Waiver: Records: Proof.** A transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction.
33. ____: ____: ____: ____: ____. The use of a defendant's prior convictions to enhance the defendant's sentence absent proof in the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right is plain error.
34. **Sentences: Prior Convictions: Double Jeopardy.** Double jeopardy does not attach to habitual criminal enhancement proceedings under Neb. Rev. Stat. § 29-2221 (Cum. Supp. 1994).
35. **Effectiveness of Counsel: Appeal and Error.** Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, such claims do not require dismissal ipso facto.

36. **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.
37. **Effectiveness of Counsel: Proof.** To prove ineffective assistance of counsel, a defendant must establish that his attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and must demonstrate how he was prejudiced in the defense of the case as a result of the attorney's actions or inactions.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part, and in part sentences vacated and cause remanded with directions.

James Walter Crampton for appellant.

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

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

WRIGHT, J.

I. NATURE OF CASE

L.T. Thomas was convicted of second degree murder, first degree assault, and two counts of use of a firearm to commit a felony. Following his conviction, Thomas filed a motion for new trial and two supplemental motions for new trial, all of which were overruled. Thomas was sentenced as a habitual criminal.

Thomas' direct appeal was dismissed because the poverty affidavit was signed by trial counsel rather than by Thomas. In response to a motion for postconviction relief, Thomas was granted a new direct appeal because trial counsel had provided ineffective assistance in filing the original direct appeal. Thomas' appeal from the postconviction proceedings was dismissed by this court upon the State's motion for summary dismissal. The matter is presently before this court on Thomas' new direct appeal.

II. SCOPE 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. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

[2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

III. FACTS

On June 17, 1994, Thomas shot two men who were in a car near the Stage II lounge in Omaha, Nebraska. Phillip White, the driver, was shot in the left leg, and Rafael Petitphait, a passenger, was shot in the back, head, and left leg.

Following the shooting, White drove away at a high rate of speed. Shortly thereafter, the car ran over a curb and into a brick building at 24th Street and Patrick Avenue. White died of head injuries sustained in the automobile accident.

Prior to the shooting, Thomas met Demitrius Simpson and Russell Wills at the Stage II lounge. The group left the lounge and were standing near Thomas' car when a fight broke out between two women. Simpson attempted to stop the fight because he knew one of the women. White and Petitphait were among the crowd that gathered in the parking lot outside the lounge. As Petitphait also attempted to stop the fight, he was struck by a man who was later identified as Simpson. Petitphait stopped White from going after Simpson because White had a .22-caliber gun, which he always carried with him. The gun was not operational, Petitphait said.

After the fight, some of the bystanders teased Petitphait about not fighting back. Petitphait approached Simpson, and the two began to fight. Simpson said he was attacked by several of Petitphait's friends. Petitphait testified that he kept hitting Simpson until someone pulled him off. At some point in time, shots were fired into the air, and the crowd began to disperse.

Thomas testified that he was grabbed during the fight between Petitphait and Simpson and that someone pointed a gun at his head. As Thomas ran away, he heard shots fired. Thomas moved

his car out of the parking lot, took his gun out of the trunk, and walked back to the scene of the fight. A car approached, and Thomas heard Petitphait say, "Blood, smoke that nigger." Thomas claimed that the driver waved a gun. Thomas testified that he ducked and then stood up and started shooting in self-defense.

Petitphait testified that as he and White were stopped at the traffic light at 30th and Bedford Streets, they heard gunshots coming from the rear of the car. When White realized Petitphait had been shot, he said he was going to drive to a hospital. As they drove away, White said he had also been shot. Shortly before the crash, White said he could not make it to the hospital. The car hit a curb and then crashed into a building. A gun was found on the floor of the driver's side of White's car. Testimony was presented to establish that White was speeding and that he was intoxicated.

Thomas was charged with first degree murder, first degree assault, and two counts of use of a firearm to commit a felony in the commission of the above felonies. An amended information was filed alleging that Thomas is a habitual criminal.

During jury selection, the State asked the panel if any prospective juror's family had ever been a victim of a violent crime or a crime in general, or if any prospective juror knew anyone (friend, family, or acquaintance) who had been a victim of a homicide. Some of the panel members responded affirmatively and were further interrogated by the State.

Thomas was subsequently convicted of second degree murder, first degree assault, and two counts of use of a firearm to commit a felony. After an enhancement hearing, Thomas was found to be a habitual criminal. He was sentenced to prison terms of 20 years to life for second degree murder, 12 to 14 years for use of a firearm to commit second degree murder, 12 to 14 years for first degree assault, and 10 to 12 years for use of a firearm to commit first degree assault. The sentences were ordered to be served consecutively.

Thomas timely filed a motion for new trial. He subsequently filed two supplemental motions for new trial and requested an evidentiary hearing before a neutral judge. The trial judge overruled the first two motions, and a different judge overruled the third motion.

A review of the three motions for new trial is necessary. In the first motion for new trial, Thomas alleged, inter alia, that the proceedings were irregular because no African-Americans were included in the panel from which his jury was selected. He also claimed that the prosecutor made improper remarks in closing arguments when he commented to the jury: "We all should be sick and tired of the shooting, the random shooting that goes on and the violence that's going on. Now you have a chance to do something about it."

Thomas' first supplemental motion for new trial alleged that Thomas had learned from Vincent Evans, a previously unidentified witness, that testimony about the shooting given by William King, Jr., one of the State's witnesses, was not true. Thomas alleged that King's testimony was crucial to the State's case and that King had refused to identify any other witnesses who were present with him. Thomas alleged that Evans' testimony about the shooting would have contradicted King's testimony.

Thomas' second supplemental motion for new trial and request for an evidentiary hearing before a neutral judge alleged that during the second day of deliberations, the jury foreman sent a note to the trial judge stating that the jury was deadlocked. Outside the presence of and without notice to the parties or their counsel, the trial judge told the jury to continue deliberating because it was too soon to abandon the effort to reach a verdict.

At a hearing to consider the first two motions for new trial, Thomas clarified that the supplemental motions were not intended as new motions for new trial but were intended to be considered part of the original motion. The trial judge recused himself on the claim of improper communication with the jury, and the parties proceeded to argue the remaining issues. Thomas asked the trial court to take judicial notice that there were no African-American jurors and that no African-Americans were included in the jury panel. Thomas also alleged juror misconduct based on a letter from one of the jurors, who stated that she wanted to change her vote, and another juror's statement that the jury did not follow the instructions given by the trial court. Thomas offered into evidence sworn statements from these jurors.

In exhibit 105, a jury member (Juror A) stated that while the jury was discussing whether the crime was first or second

degree murder, another jury member (Juror X) was adamant that the crime was first degree murder. Juror X said that he knew in his heart that a person would not return to the area of the shooting unless he was looking to kill someone. Eventually, the jury learned that Juror X had an uncle who had been shot by a relative and that Juror X believed that the relative should have been convicted of first degree murder, rather than second degree murder. When the foreman asked Juror X why he did not disclose this information during jury selection, Juror X stated that he did not believe it was important enough to mention.

Exhibit 106 is a sworn statement from another jury member (Juror B) claiming that the jury did not follow its instructions with regard to reasonable doubt. Exhibit 108 is a letter from Juror B to the trial court stating that the juror wanted to change her vote. The State objected to the exhibits, and the trial court took the matter under advisement. The closing argument at trial was also offered and received into evidence. Thomas offered exhibit 107, which is a sworn statement by Evans, the previously unidentified witness. The State objected to admission of Evans' statement. The record does not indicate whether Evans' statement was received.

The trial court overruled the first two motions for new trial. In its written order, the trial court found that Thomas raised three issues in the motions—newly discovered evidence, recantation of the verdict by two jurors, and improper statements by the prosecutor in closing argument. The trial court noted that the basis of Thomas' claim of newly discovered evidence was an affidavit by Evans, who was with King at the time of the shooting. When King testified during the trial as to his observations of events related to the shooting, King acknowledged that he had a companion at the time but he declined to name the companion, and neither party asked the trial court to require King to identify the companion.

Although Evans' account differed from King's testimony as to the pair's activities prior to and after the shooting, the trial court found that Evans' testimony could have been produced at trial with reasonable diligence and did not provide a basis for new trial.

In addressing the alleged juror misconduct, the trial court reviewed the statement of Juror B, who alleged she wanted to change her vote. The trial court found that the letter concerned

matters occurring during the course of the jury's deliberations, matters influencing the juror to assent to the verdict, and the juror's mental process in connection with the deliberations. The trial court refused to receive Juror B's sworn statement, and its contents were not considered by the court in its rulings on Thomas' motion for new trial and the first supplemental motion.

The trial court noted that a sworn statement from Juror A also alleged factors that influenced the juror to assent to the verdict. The court refused to admit exhibit 105, which recapitulated statements occurring during the jury's deliberations.

The trial court found that Thomas had timely objected to the prosecutor's remark about random shootings and asked for a cautionary instruction or, in the alternative, a mistrial, which the court refused. The trial court had instructed the jury that it should be governed solely by the evidence and should not be influenced by statements of counsel not supported by the evidence. The court paraphrased a witness at trial who had testified that he was sick and tired of the guns and the shooting and that someone had to do something about it. The trial court stated: "In the light of the cautionary instructions given and the testimony at trial, I do not think that the prosecutor's language reached a degree of prejudice which could not be avoided by the usual admonitions to the jury." The trial court overruled Thomas' motion for new trial and the first supplemental motion.

The trial judge then recused himself, and a hearing was held before a different judge to consider whether the trial judge gave the jury an improper *Allen* charge. See *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). Thomas offered the sworn statement of Juror A to demonstrate that communications occurred between the trial court and the jury. The second judge received into evidence part of Juror A's statement, but the judge found no prejudice to Thomas by the conduct alleged in the statement. The second judge found that the trial judge had merely told the jurors to continue deliberating. Thomas' second supplemental motion for a new trial was overruled.

IV. ASSIGNMENTS OF ERROR

Thomas assigns 20 errors, which we have restated. Concerning jury issues, Thomas alleges that he was denied a fair trial by the

misconduct of Juror X, who failed to indicate during voir dire that his uncle had been a victim of a violent crime, and that the jury considered this information during deliberations; by the jury's consideration of facts not in evidence related to Juror X's misconduct; by the jury's failure to follow the instructions as to burden of proof and the order of consideration; and because the jury panel was not reflective of the racial diversity of the community. Thomas also asserts that the trial court erred when it failed to protect his right to a fair trial after the court learned of Juror X's misconduct; when the court instructed the jury to continue deliberations; when the court failed to make a record concerning receipt of a note from the jury; and when the court failed to properly instruct the jury that it could not change its decision after a verdict and failed to properly instruct on proximate cause, manslaughter, and self-defense. The second judge abused his discretion when he improperly overruled Thomas' second supplemental motion for new trial on the ground of jury misconduct.

Thomas alleges several errors related to prosecutorial misconduct. He asserts that he was denied a fair trial when the prosecutor made an agreement with a witness in exchange for testimony helpful to the State and failed to disclose the agreement to the jury, used improper rebuttal to bolster a witness' credibility, made improper statements during closing argument, struck from the jury the only minority member of the jury panel, and presented improper rebuttal evidence on identity when identity was not an element of the defense.

As to evidentiary issues, Thomas asserts that the trial court erred in refusing to allow cross-examination of a witness as to his address after the State asserted that the witness feared retaliation even though no evidence of the alleged fear of retaliation was adduced, in allowing improper rebuttal evidence on identity when identity was not an element of the defense, in admitting expert opinion testimony on "crush measurements" and impact calculations, and in finding Thomas to be a habitual criminal.

Thomas asserts that he received ineffective assistance of counsel when trial counsel failed to call a witness who would have impeached the credibility of other prosecution witnesses, failed to object to expert opinion testimony on crush measurements and impact calculations, failed to file a motion in limine

to exclude testimony related to an injury to White's leg, failed to identify and compel to testify a witness who was with one of the State's witnesses, failed to object to the causation instruction and to prepare an alternate proximate cause instruction, failed to offer a manslaughter instruction, failed to elicit the testimony of the trial judge and bailiff at the hearing on the second supplemental motion for new trial, failed to object to exhibits related to the habitual criminal allegations and to preserve the issue on appeal, and failed to move to strike testimony of witnesses who refused to answer material questions on cross-examination.

The last errors asserted relate to postconviction issues. Thomas alleges that the district court erred in failing to follow appropriate postconviction procedures, in failing to grant an evidentiary hearing, and in failing to find that the convictions were void or voidable.

V. ANALYSIS

1. Issues Before This Court

We must first address the State's assertion that some of the issues raised by Thomas and some portions of the record are not properly before the court in this new direct appeal. The State questions whether exhibits 105 and 106, sworn statements from Jurors A and B, can be considered on direct appeal because the exhibits were not offered at trial, but, rather, were offered during the hearing on Thomas' motion for new trial and the first supplemental motion. The trial court did not receive the exhibits into evidence and overruled those motions. The State seems to argue that the overruling of the motion for new trial and the first supplemental motion was a separate appealable order and that because Thomas did not file an appeal from that order within 30 days as required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994), this court cannot consider the exhibits as a part of the record.

In support of its argument, the State relies on *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995) (*McCracken I*), in which we stated that a party who timely files a motion for new trial may appeal from the overruling of that motion provided that the party complies with the 30-day filing requirement of § 25-1912(1). We stated that the denial of a motion for new trial

is a separate proceeding from an order entering a judgment. "A party may be able to preserve for appellate review issues which are presented to the district court in a timely filed motion for new trial although he failed to file a timely notice of appeal from the judgment entering the verdict and sentence." *McCracken I*, 248 Neb. at 580, 537 N.W.2d at 505, citing *State v. Nash*, 246 Neb. 1030, 524 N.W.2d 351 (1994), and *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994). Both *McCracken I* and *McCormick and Hall* dealt with motions for new trial based on claims of newly discovered evidence. In *McCormick and Hall*, the motions for new trial were decided more than 2 months after sentencing. In *McCracken I*, the motion for new trial was based upon errors in sentencing, although McCracken had not yet been sentenced. Thomas' first motion for new trial made no claim concerning newly discovered evidence, but the supplemental motions raised such claims.

[3] We have also held that when considering the merits of a new direct appeal, an appellate court is precluded from considering any portion of the record that would not have been included in the record on the original direct appeal. See *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000) (*McCracken II*).

The State's reliance upon *McCracken I* and *McCracken II* (and the cases from which they were derived, *McCormick and Hall* and *Nash*) is misplaced. In certain circumstances, a motion for new trial based on newly discovered evidence can be separately appealed from the judgment of conviction and sentence because a motion for new trial based on newly discovered evidence need not be filed and ruled upon within 30 days of the sentence. Newly discovered evidence can be the basis of a motion for new trial if it is discovered within 3 years after the verdict. Thus, the ruling on such a motion would necessarily be appealed separately from the conviction and sentence. See Neb. Rev. Stat. § 29-2103 (Reissue 1995).

Section 29-2103, as it relates to newly discovered evidence, is not applicable here. Thomas' original motion for new trial was filed within 10 days of the verdict. The additional motions for new trial supplemented the timely filed original motion for new trial. We therefore conclude that the record made by Thomas at

the hearings on his motions for new trial may be considered by this court on the new direct appeal.

[4] In a criminal case, errors assigned by the defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment. To the extent that *McCracken I*, *McCracken II*, *McCormick and Hall*, and *Nash* could be interpreted to the contrary, such interpretation is expressly disavowed. It would be a waste of judicial resources to require a defendant who has timely filed a motion for new trial within 10 days of the verdict to file two appeals: one from the order overruling the motion for new trial and a second from the judgment which occurs when the sentence is pronounced. In order to provide for one appeal, the trial court should rule on all outstanding motions prior to sentencing. Other than the exceptions stated in § 29-2103, alleged errors in overruling a timely filed motion for new trial should be assigned and considered on direct appeal.

2. Jury Issues

Thomas alleges a number of errors related to the jury, including juror misconduct. Thomas asserts that he was denied a fair trial by the misconduct of Juror X, who failed to disclose during voir dire that his uncle had been the victim of a violent crime, and Thomas alleges that the jury considered facts not in evidence related to Juror X's misconduct.

The State claims Thomas has failed to prove juror misconduct because the sworn statements of two jurors should not be before this court. The issue of juror misconduct was presented to the trial court in the second supplemental motion for new trial. As noted above, that record is properly before us.

[5,6] In order for jury misconduct to become the basis for a new trial, it must be prejudicial. *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987). Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

> "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. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.
>
> "The matter of whether the misconduct occurred is largely a question of fact and the jurors may be questioned as to what happened during their deliberations. The determination as to whether the misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case."

Id. at 95, 430 N.W.2d at 289.

This court has previously considered the parameters under which a juror may testify concerning extraneous information which was improperly brought to the jury's attention during deliberations. No evidence may be received concerning the effect of any statement upon a juror's mind, its influence upon the juror, or the mental processes of a juror. See, *State v. McDonald, supra*; *State v. Roberts*, 227 Neb. 489, 418 N.W.2d 246 (1988); *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). The evidentiary hearing may be conducted as part of a hearing on a motion for new trial. *State v. McDonald, supra.*

The issue of juror misconduct was presented to the trial court in Thomas' second supplemental motion for new trial and was raised at the hearing on the motion. Evidence of the alleged misconduct was offered through the jurors' sworn statements. The trial court declined to consider those exhibits and subsequently overruled Thomas' second supplemental motion for new trial.

In excluding the jurors' statements, the trial court relied upon Neb. Rev. Stat. § 27-606(2) (Reissue 1995), which 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 process 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.

To resolve this issue, we must interpret § 27-606(2). Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Guardianship & Conservatorship of Garcia, ante* p. 205, 631 N.W.2d 464 (2001).

[7] Under § 27-606(2), a juror is prohibited from testifying about any matter or statement which occurred during the jury's deliberation, with two exceptions: whether extraneous prejudicial information was brought to the jury's attention and whether any outside influence was brought to bear upon any member of the jury. Section 27-606(2) restricts the evidence that a court can consider in determining whether juror misconduct occurred. The key phrase in the statute is "extraneous prejudicial information," and within that phrase, the crucial word is "extraneous," which means " 'existing or originating outside or beyond: external in origin: coming from the outside . . . brought in, introduced, or added from an external source or point of origin.' " See *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 455, 412 N.W.2d 56, 77 (1987), and Webster's Third New International Dictionary, Unabridged 807 (1993).

No evidence was presented in this case which established that any extraneous information was brought to the jury's attention. One of the statements indicated that Juror X had informed the jury that he had an uncle who had been murdered and that the perpetrator had been found guilty of second degree murder. This information was provided by a member of the jury, not by an external source. The second juror statement asserted that the jury did not follow instructions during its deliberations. Again, no outside information was introduced. In *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992), we allowed juror

affidavits only to show that presubmission discussions took place among certain jurors over 5 days of the 7-day trial. Other comments in the affidavits were found to be useless.

[8,9] We conclude that the trial court properly excluded the jurors' statements based upon the court's interpretation of § 27-606(2). None of the jurors brought extraneous information to the jury or obtained extra information about the facts of the case. The allegations in Juror A's sworn statement concerned Juror X's personal feelings about the murder of his uncle and claimed that Juror X was insisting on a verdict of first degree murder. This evidence was not admissible. Section 27-606(2) does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations. *Rahmig v. Mosley Machinery Co., supra.* Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *State v. McDonald,* 230 Neb. 85, 430 N.W.2d 282 (1988). In a criminal case, the misconduct must be demonstrated by clear and convincing evidence. See *Hunt v. Methodist Hosp., supra.* Thomas has not sustained his burden of proof that juror misconduct occurred or that the jury considered facts not in evidence related to juror misconduct. This assignment of error is without merit.

Thomas also claims that the jury failed to follow the trial court's instructions as to burden of proof and the order of consideration in deliberations. He relies on the jurors' sworn statements for support. Because we have found that the statements were properly excluded, we find no merit to this assigned error.

Thomas next asserts that the trial court erred and failed to protect Thomas' right to a fair trial when the court instructed the jury to continue deliberations after the court was made aware of Juror X's deception and when it failed to make a record concerning receipt of a note from the jury. Thomas asserted that the directive from the trial court to a deadlocked jury amounted to an improper *Allen* charge (directive from court to deadlocked jury to keep deliberating). See *State v. Owen,* 1 Neb. App. 1060, 510 N.W.2d 503 (1993).

[10,11] An *Allen* charge to the jury given orally without notice to the parties or their counsel violates Neb. Rev. Stat.

§§ 25-1115 and 25-1116 (Reissue 1995) and is improper. See *State v. Owen, supra*. The State has the burden to prove that the defendant was not prejudiced by any improper communication between the judge and the jury. *Id.*

At the evidentiary hearing, a different judge received into evidence the juror's statement which described the trial judge's communication directing the jury to continue its deliberations. Thomas argued that if he had known of the jury's note, he would have asked the trial judge to allow the jury to return a hung verdict rather than ordering the jury to proceed. The second judge overruled the second supplemental motion for new trial, finding no prejudice to Thomas and holding that the trial judge had merely directed the jury to continue deliberating.

If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows communication had no tendency to influence the verdict. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

The record shows that the communication between the trial court and the jury merely directed the jury to continue its deliberations. This direction did not have a tendency to influence the verdict. This assignment of error is without merit.

Thomas' next assertion related to the jury is that he was denied a fair trial because the jury panel was not reflective of the racial diversity of the community. At trial, Thomas' attorney asked for an evidentiary hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), because the sole panel member who was a member of a minority group, a Native American, had been stricken from the panel by the State. The State advised the trial court that it had prosecuted a case the previous summer which involved persons believed to be related to the Native American juror and that it was therefore prudent to strike the juror in this case.

After Thomas moved to disqualify the all-white jury panel, the trial court held an evidentiary hearing. Although Thomas said he was not abandoning his *Batson* challenge, he did not offer any evidence. The clerk of the district court testified that the selection of jury panels is a random process and is not

related to the minority status of the defendant. The trial court overruled the motion to disqualify the panel.

A defendant must satisfy certain criteria in order to establish a prima facie case of discrimination in jury selection. If the defendant establishes such a prima facie case of discrimination, then the burden shifts to the State to articulate a neutral explanation for striking any juror.

[12] In examining whether an entire jury should be stricken due to racial composition, we stated in *State v. Garza*, 241 Neb. 934, 952-53, 492 N.W.2d 32, 45-46 (1992):

> In *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the U.S. Supreme Court observed that in order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
>
> . . . .
>
> We have consistently held that a defendant has no right to a petit jury composed in whole or in part of members of his or her race, *State v. Pratt*, 234 Neb. 596, 452 N.W.2d 54 (1990); *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989); *State v. Kitt*, 231 Neb. 52, 434 N.W.2d 543 (1989), and that the absence of members of the defendant's race in the jury, standing alone, does not support a claim of improper racial composition, *State v. Falkner*, 224 Neb. 490, 398 N.W.2d 708 (1987). A defendant cannot, under either a Sixth Amendment or an equal protection challenge, simply allege that no minorities are on the jury, but has the burden of establishing systematic exclusion and purposeful discrimination.

The State established here through cross-examination of the clerk of the district court that permissible racially neutral selection criteria and procedures were used which produced the monochromatic result in Thomas' case. The evidence showed

that at least 6 African-Americans were included in the 144 persons called for jury duty. From that group, the venire panel of 50 to 60 members was selected on a random basis without reference to race or the race of the defendant being tried. Nothing in the record established that the six African-Americans called for jury duty were purposely excluded from the panel from which Thomas' jury was selected.

Thomas claims *Garza* is distinguishable because "the odds . . . are astronomical" that an entire panel will not include any African-Americans. See brief for appellant at 27. In support of his motion to disqualify the jury panel, Thomas offered as evidence an exhibit showing that African-Americans make up 10.94 percent of the Douglas County population and an affidavit stating that he is of African-American descent but that no members of the jury panel were African-American. The clerk of the district court testified about the jury panel selection process and explained that it is random. Prospective jurors' cards are separated into piles for each courtroom holding a jury trial. Although other African-Americans were called for jury service, none were randomly selected for the jury panel which heard Thomas' case. Thomas' evidence did not establish any error in the process by which the panel was selected, and he has not shown that any underrepresentation was due to systematic exclusion.

[13] The trial court's findings that there was no discrimination in the selection of the jury are not to be reversed on appeal unless clearly erroneous. *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989). Thomas has failed to meet his burden of proving that he was denied a fair trial because the jury panel was not reflective of the racial diversity of the community. We find no error by the trial court.

Thomas next claims that the trial court erred in its instructions to the jury. He alleges that the trial court failed to give an appropriate proximate cause or manslaughter instruction or to give a correct self-defense instruction. Thomas also alleges that the trial court should have instructed the members of the jury that they could not change their minds after the verdict was entered.

[14,15] In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected

a substantial right of the appellant. *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999). It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

[16,17] 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. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999). A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

The trial court gave the proximate cause instruction requested by Thomas. The instruction stated: "The defendant killed Phillip White if the death of Phillip White occurred in a natural and continuous sequence and without the defendant's act, the death of Phillip White would not have occurred." This instruction is similar to the definition of proximate cause stated in NJI2d Crim. 4.1.

[18] Thomas argues that since the evidence shows that the injury sustained by White in the shooting was not life threatening and the cause of death was head trauma sustained during the car accident, the trial court should have given an instruction defining "efficient intervening cause." Brief for appellant at 30. An efficient intervening cause is a new and independent cause, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death. *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

The State argues that this case is similar to *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990), in which the defendant was refused an instruction regarding efficient intervening cause. Ruyle claimed that the victim caused his own death by voluntarily reentering a building that had been set on fire by Ruyle. We found no issue of intervening cause and held that the jury was properly instructed. We concluded that a victim's contributory

negligence will not relieve a defendant from criminal responsibility for homicide unless it was the supervening and thus sole cause of death.

[19] Whether jury instructions given by a trial court are correct is a question of law. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). In the present case, the evidence did not warrant an instruction on efficient intervening cause. The fact that White drove away at a high rate of speed was not a new and independent cause which broke the causal connection between the shooting and the death. Any contributory negligence on White's part, if it existed, did not relieve Thomas of criminal responsibility for the homicide unless White's actions were the sole cause of his death. See *State v. Ruyle, supra.*

The evidence established that White was shot by Thomas and that White then drove away at a high rate of speed, heading for a hospital. White said he could not make it to the hospital shortly before the car crashed into a building. White's actions were not the sole cause of his death, and they did not support an efficient intervening cause instruction. The trial court did not err in failing to give that instruction, and the jury was properly instructed on the issue of proximate cause.

[20] Next, Thomas argues that the jury was not given an appropriate manslaughter instruction. Because the record does not suggest that Thomas requested a manslaughter instruction, the question is whether there was any evidence from which a jury could conclude that he committed manslaughter. "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Neb. Rev. Stat. § 28-305(1) (Reissue 1995).

[21] Thomas claims that a jury could have found that he killed White upon a sudden quarrel because both Thomas and another witness testified that words were exchanged between Thomas and the occupants of White's vehicle. A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994). The evidence does not support an inference that Thomas shot at White's car as the result of a sudden quarrel.

Thomas also claims that a jury could have found that he unintentionally killed White while in the commission of an assault on Petitphait. The record includes no evidence from which a jury could infer that Thomas intended to shoot at Petitphait but not at White. The assignment of error regarding the manslaughter instruction has no merit.

Thomas claims that he acted in self-defense and that the trial court erred in its self-defense instructions. The trial court gave two separate self-defense instructions. Thomas argues that a single " 'in concert' " instruction should have been given because the jury could have found that White and Petitphait were acting in concert to threaten Thomas. Brief for appellant at 34. He claims that if the jury believed, for example, that White threatened or attempted to cause Thomas' death and that Thomas had provoked Petitphait or vice versa, the instructions would not permit a finding of self-defense. Thomas testified that he shot at both White and Petitphait because he thought they were trying to kill him and he did not want to die; however, Thomas claimed that he did not want to be the cause of any death.

The jury instructions stated:

> The defendant acted in self-defense as to Phillip White if: One, Phillip White threatened or attempted death or serious bodily harm towards [sic] the defendant. And, two, the defendant did not provoke any such use of force against him with the intent of using deadly force and response. And, three, under the circumstances as they existed at the time, the defendant reasonably believed that his use of deadly force was immediately necessary to protect him against death or serious bodily injury — against death or serious bodily harm. And, four, before using deadly force, the defendant either tried to get away or did not try because he reasonably did not believe he could do so in complete safety.
>
> The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed, and he acted reasonably in response to that belief.
>
> Deadly force means force used with the intent to cause death or serious bodily harm or force used with the knowl-

> edge that its use would create a substantial risk of death or serious bodily harm.

The same instruction was given as to Petitphait.

Thomas claims that he was not trying to hit either White or Petitphait but that he was shooting in their direction because one or two of the car's occupants had a gun. In *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999), the defendant fired shots into a vehicle and one of the occupants was killed. The defendant claimed he was entitled to a self-defense instruction regarding all of the occupants of the vehicle as a group. We stated that the language of Neb. Rev. Stat. § 28-1409(1) (Reissue 1995) makes it clear that the excuse of self-defense applies to the threatening behavior of another person, and not to a generalized group of actors. The self-defense instructions given in this case follow the language of NJI2d Crim. 7.2 and accurately state the law. Thomas' assignment of error as to the self-defense instructions is without merit.

Thomas also argues that he was entitled to an instruction on transferred intent like the one given in *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). In *Duis*, the defendant intended to shoot one person but actually killed another and was charged under a theory of transferred intent. Thomas was not charged under a theory of transferred intent, and therefore, he was not entitled to an instruction on transferred intent.

Thomas further claims that the jury should have been instructed that it could not change its decision. The jury was instructed that its "decision on these facts is final." When the jurors were individually polled following the verdict, each responded that he or she agreed with the verdict. We find no merit to this assignment of error.

3. Prosecutorial Misconduct

Thomas claims that he was denied a fair trial by several acts of prosecutorial misconduct. First, Thomas argues that the prosecutor promised leniency to Aybar Crawford in exchange for his testimony. On cross-examination, Thomas asked Crawford if he had received anything in return for his testimony, and Crawford denied that any promises had been made to him. During a break, the State informed Thomas that Crawford had a felony conviction

for which he had not been sentenced. On recross, Thomas questioned Crawford about leniency and Crawford said he could not benefit because he would be returned to California for probation violation. The State then asked if anyone had made any promises to Crawford, and he again denied that any promises had been made. Thomas argues that prosecutorial misconduct occurred when the prosecutor did not correct Crawford's denial of a deal in exchange for his testimony.

In support of his motion for postconviction relief, Thomas obtained a copy of a transcript that included hearings on Crawford's plea, sentence, and violation of probation. However, those documents are not part of the record before us on direct appeal and will not be considered. See *McCracken II* (appellate court is precluded from considering any portion of record that would not have been included in record on original direct appeal when considering merits of new direct appeal). This assignment of error has no merit.

Thomas also claims he was denied a fair trial because the prosecutor used improper rebuttal to bolster the credibility of Petitphait and the trial court admitted the evidence. Thomas made no timely motion for mistrial on this basis. Therefore, he has waived the right to assert on appeal that the trial court erred in failing to declare a mistrial due to prosecutorial misconduct. See *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993). This assignment of error has no merit.

Thomas next claims that he was denied a fair trial when the prosecutor made an improper argument in closing, when he said: "And now it's in your hands, ladies and gentlemen. We all should be sick and tired of the shooting, the random shooting that goes on and the violence that's going on. Now you have a chance to do something about it. Thank you very much." Thomas objected to the statement that the jury had "a chance to do something about it," and he asked for a cautionary instruction and a mistrial. On appeal, Thomas complains that the argument appealed to the jury to convict him as an expression of the conscience of the community rather than based on his actions.

[22,23] The general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.

State v. Fraser, 230 Neb. 157, 430 N.W.2d 512 (1988). Whether or not inflammatory remarks by a prosecutor are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977). The trial court's refusal to give an admonishing instruction supports the inference that the court did not consider the prosecutor's argument to be of such a nature that it would have a damaging effect. This error has no merit.

[24] The trial court also considered this issue in Thomas' motion for new trial and the first supplemental motion, when it concluded that in light of the cautionary instructions given at trial, the prosecutor's statement did not reach a degree of prejudice that would require a mistrial. The trial court is in a better position to measure the impact a comment has on a jury, and the court's decision will not be overturned unless clearly erroneous. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), *disapproved on other grounds, State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998). We find no error in the trial court's determination, and we find no merit to this argument.

Thomas next alleges that it was prosecutorial misconduct to strike the only minority member of the jury panel. As outlined earlier, Thomas did not meet his burden of proving that he was denied a fair trial based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The State's actions in striking a Native American panel member do not rise to the level of prosecutorial misconduct. The prosecutor provided a legitimate reason for striking the panel member. We conclude there is no evidence to sustain Thomas' assignment of error.

Thomas also claims prosecutorial misconduct because the State called Det. Bill Jadlowski as a rebuttal witness and asked him about an out-of-court identification of Thomas made by Roger Tucker, a witness for the State. Thomas objected because he had already testified that he was the shooter. Thomas claims this question violated Canon 7, DR 7-106(C)(2), of the Code of Professional Responsibility, which states that a lawyer shall not "[a]sk any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." There is no showing that the questions asked of Tucker were intended to degrade a witness or other

person. The trial court did not err in allowing this testimony on rebuttal because the testimony was cumulative to Thomas' own testimony and he was not prejudiced by it. Thomas has failed to establish any intentional wrongdoing or any prejudice in the State's questions concerning out-of-court identifications. We find no merit to this assignment of error.

4. Evidence Issues

Concerning the admission of evidence, Thomas first argues that the trial court erred in refusing to allow him to cross-examine a witness as to the witness' address. Outside the presence of the jury, the State explained that the witness was reluctant to provide his address for fear of retaliation. Thomas stated that he did not need a specific address, but he wanted to know in which block the witness lived. The witness then testified that he lived in the area of 24th and Spencer Streets. Thomas apparently wished to establish that the witness lived near White and was associated with a gang. However, Thomas did not allege at trial and has not asserted on appeal any prejudice that resulted from the failure to obtain a specific address from the witness. Nor has Thomas suggested a specific rule of evidence which was violated by the trial court's refusal to require the witness to provide an address.

[25] 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, 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. *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999). We find no abuse of discretion by the trial court as to this evidentiary issue.

[26] Next, Thomas asserts that the court erred in admitting expert testimony on crush measurements and impact calculations regarding the damage to White's car. The standard for reviewing the admissibility of expert testimony is abuse of discretion. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[27] The expert witness, David Carlson, an officer with the Omaha Police Department, testified that he has investigated serious personal injury and fatality accidents for 6 to 7 years. He testified that White's car left 24th Street just south of Patrick Avenue, hit a post, traveled through a cinder vacant lot, crashed through the concrete and brick wall of a building, and entered the building, stopping at a point 24 to 27 feet inside the building. Carlson stated that he can determine the speed of a vehicle from the skid marks and scuff marks on the roadway, or lack of such marks, and the "crush," or area on a vehicle that is pushed in from impact. Carlson estimated that the front end of White's automobile was crushed 24 to 30 inches, which equated to an impact speed of 40 to 50 m.p.h. At that time, Thomas did not object or move to strike Carlson's testimony. The State then asked Carlson his opinion of the speed of White's vehicle at the time of impact, and the trial court sustained Thomas' foundational objection. However, Carlson had already expressed his opinion about the speed of White's vehicle with no objection. A party waives the right to assert on appeal prejudicial error concerning the admission of evidence received without objection. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). This assignment of error has no merit.

5. Habitual Criminal

Thomas asserts that the trial court erred in finding him to be a habitual criminal. He alleges that exhibits concerning convictions in 1984 and 1989 offered by the State do not support the sentence enhancement because the journal entries do not contain the judges' signatures. The State also offered certified copies of records showing (1) that Thomas was committed to the Department of Correctional Services on November 28, 1984, on two counts of second degree assault and was discharged on April 27, 1987, and (2) that Thomas was committed to the department on August 9, 1989, for attempted possession with intent to deliver a controlled substance (cocaine) and was released on May 27, 1993, to be discharged from parole effective June 27, 1994. The copies were certified by the records custodian of the department's central records office.

[28-32] In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior

convictions. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994). The State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence of imprisonment in the first instance. *Id.*, citing *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), *overruled on other grounds, Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). Under *Baldasar*, when using a prior conviction to enhance a sentence, the State need show only that at the time of the prior conviction, the defendant had, or waived, counsel. *State v. Ristau, supra.* In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Nelson, ante* p. 896, 636 N.W.2d 620 (2001); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). In most cases, the State will prove a defendant's prior convictions by introducing certified copies of the prior convictions or transcripts of the prior judgments. *State v. Ristau, supra.* A transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction. *Id.* Thomas makes no claim that his pleas and convictions were uncounseled, nor does he assign the admission of the prior convictions as error.

[33] The use of a defendant's prior convictions to enhance the defendant's sentence absent proof in the record that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right is plain error. See *id.*

The record does not show that the trial court ascertained whether Thomas was represented by counsel or waived his right to counsel at the time of the earlier convictions. The journal entries simply show that Thomas was present with counsel at the time of sentencing, but they do not demonstrate whether he was represented by counsel prior to that time. The evidence offered by the State at the enhancement hearing did not establish that Thomas was represented by counsel or had waived the right to

counsel at the time of the prior convictions. We conclude that the evidence was insufficient to prove Thomas' earlier convictions for purposes of sentence enhancement.

[34] Double jeopardy does not attach to habitual criminal enhancement proceedings under Neb. Rev. Stat. § 29-2221 (Cum. Supp. 1994). *State v. Nelson, supra.* Because the evidence presented at the enhancement hearing did not establish that Thomas' prior felony convictions were counseled or that he properly waived his right to counsel, it was error for the trial court to find Thomas to be a habitual criminal. We therefore vacate Thomas' sentences and remand the cause to the trial court with directions for a new enhancement hearing and for resentencing following that hearing.

6. Ineffective Assistance of Counsel

[35-37] Although an appellate court will not address an ineffective assistance of counsel claim on direct appeal when the matter necessitates an evidentiary hearing, such claims do not require dismissal ipso facto. *State v. Dunster, ante* p. 329, 631 N.W.2d 879 (2001). 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. *McCracken II.* To prove ineffective assistance of counsel, the defendant must establish that his attorney failed to perform at least as well as a lawyer with ordinary training and experience in criminal law and must demonstrate how he was prejudiced in the defense of the case as a result of the attorney's actions or inactions. *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995).

Thomas claims a number of instances in which counsel allegedly failed to provide effective assistance.

(a) Failure to Call Officer Warnock

Thomas claims the testimony of an Officer Warnock would have impeached the credibility of other witnesses for the State and that Thomas' counsel was ineffective in failing to call

Warnock. No reference to Warnock is contained in the trial record, but, rather, it is found in the record of the postconviction hearing. As noted earlier, the only record properly before us is the trial record. Because the record needed to support this assignment of error is not properly before the court, we cannot consider this assignment of error.

(b) Failure to Object to Expert Testimony on Crush Measurements

The accident investigator, Carlson, testified that the crush measurements on White's vehicle translated into an estimated impact speed of 40 to 50 m.p.h. Petitphait testified that he thought White was traveling between 65 and 70 m.p.h. Although the speedometer was stuck at 70 m.p.h., Carlson testified that the speed at which the speedometer stopped is not an accurate indication of the speed at the time of the collision.

This assignment of error is without merit because Thomas has not established any prejudice based on the admission of Carlson's testimony. The exact speed of the vehicle was not a critical fact in Thomas' conviction. Evidence was undisputed that the car jumped a curb and crashed through a brick wall and that White died as a result of head injuries sustained in the crash. The speed at which White was traveling is not a vital element of the case.

(c) Failure to File Motion in Limine to Exclude Testimony of Dr. Bowen Regarding Effect of Injury

The State called Dr. Robert Bowen, who performed an autopsy on White. While Bowen was unable to testify as to the extent of damage to the femoral artery caused by the gunshot, Bowen testified that there would have been significant bleeding if the femoral artery had been damaged. If significant bleeding occurs, the victim can lose consciousness. Thomas claims his counsel should have filed a motion in limine to exclude this testimony. We find this assignment of error to be without merit because Thomas has failed to show that he suffered any prejudice as a result of the testimony.

(d) Failure to Identify Witnesses

Thomas alleges ineffective assistance of counsel because counsel did not ask the trial court to compel King to provide the

name of a companion who was with King when they followed the car in which the shooter left the scene. King had refused to identify his companion. Thomas offered Evans' sworn statement in support of Thomas' first supplemental motion for new trial. In the order denying that motion, the trial court determined that Evans' account differed from King's testimony concerning their activities earlier in the evening, regarding King's position at the time he made his observations of the shooting, and as to events after the shooting.

Evans stated that he and King were drinking beer in the filling station parking lot and were not paying attention to White's car until they heard four or five shots. King testified that he was driving down the street and saw a man run up to a car. Evans testified that King refused to change his statement when Evans challenged him. Evans stated that he and King had consumed between a 6-pack and a 12-pack of beer and possibly a half pint of brandy. Evans also admitted to smoking marijuana but did not recall whether King was smoking marijuana.

We conclude that Thomas has failed to show he was prejudiced by counsel's failure to obtain and offer Evans' testimony at trial. We cannot say that Thomas has demonstrated with a reasonable probability that the result of the proceeding would have been different if counsel had called Evans as a witness. Even if Evans' testimony had been offered at trial, Thomas admitted he was present at the time of the shooting and that he fired into the car four or five times. This error has no merit.

(e) Failure to Object to Causation Instruction and Request Appropriate Intervening Proximate Cause Instruction and Failure to Present Manslaughter Instruction

We have addressed these issues previously and found that the correct instructions were given. Therefore, Thomas has not shown that his counsel was ineffective for failing to object to the instructions given or to request different instructions.

(f) Failure to Elicit Testimony at New Trial Hearing

Thomas complains of his counsel's failure to elicit the testimony of the trial judge and the bailiff at the hearing on the second supplemental motion for new trial. We have found no error in the overruling of this motion for new trial and find no prejudice to

Thomas in his counsel's failure to elicit certain testimony at the hearing on that motion. This assignment of error has no merit.

(g) Failure to Object at Enhancement Hearing

We have concluded that the evidence was insufficient to support a finding that Thomas is a habitual criminal and therefore have vacated the sentences and remanded the cause with directions for a new enhancement hearing and for resentencing. We decline to further consider this assignment of error.

(h) Failure to Move to Strike Testimony of King and Crawford for Refusing to Answer Material Questions on Cross-Examination

We have addressed the issue of King's testimony and will not consider it further as it relates to ineffective assistance of counsel. As to Crawford's testimony, Thomas has not set forth any prejudice as a result of the testimony or any material questions Crawford refused to answer on cross-examination. Crawford repeatedly testified that he could not remember the names of the people who were with him. We conclude that Thomas has failed to prove that he suffered any prejudice from the performance of his attorney in failing to move to strike Crawford's testimony.

7. Postconviction Issues

Thomas asserts three errors by the trial court related to the motion for postconviction relief. On May 9, 2001, this court sustained the State's motion for summary dismissal of Thomas' appeal from the postconviction proceeding, and those issues relating to postconviction are not properly before this court. Thus, they will not be considered.

VI. CONCLUSION

Having found no merit to Thomas' assignments of error except with regard to the sufficiency of the evidence to support a finding that Thomas is a habitual criminal, we affirm the judgment of conviction. However, Thomas' sentences are vacated, and the cause is remanded with directions for a new enhancement hearing and for resentencing.

Affirmed in part, and in part sentences vacated and cause remanded with directions.

McCormack, J., participating on briefs.

CYNTHIA S. PETER, APPELLANT AND CROSS-APPELLEE, V. JAMES B. PETER, APPELLEE AND CROSS-APPELLANT.

637 N.W.2d 865

Filed January 11, 2002. No. S-00-1193.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
4. **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 which was not contemplated when the prior order was entered.
5. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
6. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
7. **Child Support.** As a general matter, the parties' current earnings are to be used in calculating child support.
8. **Modification of Decree: Child Support: Appeal and Error.** Normally, the initial determination regarding the retroactive application of a modification order is entrusted to the discretion of the trial court.
9. **Modification of Decree: Child Support: Time.** The rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
10. **Child Support.** The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.
11. **Divorce: Modification of Decree: Property Settlement Agreements: Pensions.** Where a party to a divorce action voluntarily executes a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of real and personal property, division of pension benefits, and division of stock will not thereafter be vacated or modified in the absence of fraud or gross inequity.

12. **Fraud.** What constitutes fraud is a matter of fact in each case.
13. ____. Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive.
14. **Divorce: Final Orders: Actions.** A decree of dissolution which does not contain a complete adjudication of property rights of the parties does not operate as an absolute bar to the maintenance of an independent action by either of the parties involving such rights.
15. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 1995), connotes an improper motive or legal position so wholly without merit as to be ridiculous.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John W. Ballew, Jr., of Ballew, Schneider & Covalt, for appellant.

James E. Gordon, of DeMars, Gordon, Olson, Shively & Zalewski, for appellee.

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

HENDRY, C.J.

I. INTRODUCTION

Cynthia S. Peter and James B. Peter were divorced in June 1998. In October 1999, Cynthia brought an action in Lancaster County District Court to modify the decree of dissolution, requesting an increase in James' child support obligation. In January 2000, James filed his own petition to modify, alleging that Cynthia had fraudulently failed to disclose certain assets at the time their marital estate was divided. The district court denied Cynthia's petition for modification and granted James' petition in part. Cynthia appealed, and James cross-appealed.

While the case was on appeal, James filed with the district court a motion to amend the bill of exceptions. The district court denied the motion. James also appeals the district court's refusal to grant his motion to amend the bill of exceptions.

II. FACTUAL BACKGROUND

Cynthia and James were married in 1974 in Lincoln, Nebraska. The marriage was dissolved on June 10, 1998, when

the Lancaster County District Court entered a decree of dissolution, which incorporated the parties' property settlement, custody, and support agreement. In the decree, the district court granted legal and physical custody of the Peters' two children to Cynthia and ordered James to pay a total of $731 per month in child support.

On October 25, 1999, Cynthia filed a petition for modification of the decree of dissolution in Lancaster County District Court. She requested that the district court increase James' child support obligation and apply it retroactively.

On January 6, 2000, James filed his own petition to modify the decree of dissolution, alleging in part that Cynthia fraudulently failed to disclose a transition account she possessed at the time the parties entered into the property settlement agreement. James claimed the account, which was maintained through Cynthia's employer, Bryan Memorial Hospital, was unknown to him at the time the decree of dissolution was entered. James requested that the district court modify the decree to award him one-half the gross value of the account as of June 10, 1998.

On January 25, 2000, Cynthia filed an answer and cross-petition to James' petition to modify. In her cross-petition, Cynthia asked the district court to strike James' petition and award her attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) on the basis that James filed his petition frivolously in order to harass her.

Since the entry of the decree, the parties have also had an ongoing disagreement over the sharing and exchanging of family photographs. The property settlement agreement specifically provided:

> The parties will cooperate in making photographs available for Husband to duplicate at his expense. To the extent there are some duplicates of these photographs, Husband may have them. Husband is also entitled to utilize photographic proofs for purposes of copying and shall return them to Wife after he has made copies.

On January 4, 2000, James filed a motion requesting the district court to order Cynthia to produce all photographs and negatives in her possession and to award James attorney fees. On January 27, the district court granted James' motion to produce

the photographs and negatives, but withheld any ruling on attorney fees pending the trial on the petitions to modify.

Trial was held on August 8, 2000. At trial, James presented evidence of what he alleged to be a mathematical error in the decree of dissolution and the property settlement agreement. James argued that a "transposition error" had occurred when the district court derived the money judgment designed to equalize the division of the Peters' marital estate from numbers found in appendix 2 of the property settlement agreement and then "carried over" a different, incorrect number into paragraph 11 of the property settlement agreement and paragraph 6 of the decree of dissolution. This error allegedly resulted in an overpayment to Cynthia of $2,256.

James also asserted in support of his petition to modify that he spent a sufficient amount of time with his children to create a joint physical custody arrangement, thereby justifying a reduction in his child support obligation from $731 per month to $120.42 per month.

The district court entered its order on November 13, 2000. With respect to Cynthia's petition to modify, the court found that due to the fluctuations in James' annual income, income averaging was an appropriate method under the Nebraska Child Support Guidelines for determining whether there was a material change in circumstances that would require a modification in child support. Utilizing income averaging, the court found that James' monthly child support obligation would increase from $731 per month to $760.27 per month. Since the variation was less than the "10 percent or more" standard at which a material change of circumstances is presumed under paragraph Q of the guidelines, the court denied Cynthia's petition to modify, finding there was not a material change of circumstances.

Concerning James' petition to modify, the district court found that Cynthia had failed to disclose the transition account maintained by her employer at the time of the division of the marital estate. The court determined that the "Gross Vested Transition Account Amount" at the time of the decree of dissolution was $7,640.94. The court ordered Cynthia to pay James $3,820.47, one-half of the gross amount of $7,640.94, with interest from June 21, 1998.

The district court also agreed with James that there was a mathematical error in the decree of dissolution. The court determined that Cynthia had received an overpayment of $2,256 as a result of the error and therefore ordered Cynthia to pay James that amount with interest from June 21, 1998.

The district court, however, found against James on his remaining claims. The court found that a joint custody arrangement did not exist and determined that both parties would be responsible for their respective attorney fees. Cynthia appealed the district court's order on November 16, 2000, and James cross-appealed.

On April 23, 2001, James filed with the district court a motion to amend the bill of exceptions. In his motion, James asked for leave to add a page to exhibit 7, a document describing Bryan Memorial Hospital's policies regarding transition accounts. Exhibit 7, as offered into evidence at trial, contained only the first and third pages of the document.

On May 11, 2001, the district court held a hearing on whether to amend the bill of exceptions. In its order, the court found that the second page was not part of the exhibit as offered at trial and determined it did not have jurisdiction to expand the trial record. James also appeals this determination.

III. ASSIGNMENTS OF ERROR

Cynthia assigns, rephrased and renumbered, that the district court erred in (1) utilizing income averaging in determining whether a material change in circumstances had occurred, (2) determining that there was not a material change in circumstances and refusing to increase and retroactively apply James' child support obligation, (3) modifying the final decree of dissolution to correct a mathematical error, (4) entering a money judgment against Cynthia based on the finding that her transition account through Bryan Memorial Hospital was an asset that was not disclosed at the time the decree of dissolution was entered, and (5) failing to find under § 25-824 that James' petition for modification was frivolous and brought in bad faith.

In his cross-appeal, James assigns, rephrased and renumbered, that the district court erred in (1) failing to award attorney fees resulting from James' motion to require Cynthia to

produce family photographs, (2) finding that a joint custody arrangement did not exist, and (3) denying James' motion to amend the bill of exceptions.

Finally, James argues in his brief that this court should award him attorney fees on appeal resulting from his motion to amend the bill of exceptions.

IV. STANDARD OF REVIEW

[1] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Wagner v. Wagner, ante* p. 924, 636 N.W.2d 879 (2001).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

[3] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

V. ANALYSIS

1. Modification of Child Support

(a) Income Averaging

In her petition to modify, Cynthia claimed that a material change of circumstances had occurred with respect to James' income which required an increase in James' child support obligation. Prior to the divorce, James worked as an administrator at the Nebraska Heart Institute, where he received a salary in excess of $90,000 in 1995, and over $100,000 in 1996. In 1997, he began working on commission as a stockbroker. According to James' evidence, his gross annual earnings from commissions were $36,492 in 1997, $30,814.31 in 1998, $62,098.64 in 1999, and $43,470.38 as of July 15, 2000. James' and Cynthia's 1997 earnings were used to calculate James' child support obligation in the decree of dissolution entered June 10, 1998.

At the trial in August 2000, Cynthia contended that the district court should calculate child support based on the current earnings of the parties—either the 1999 actual earnings or the 2000 annualized earnings—in determining whether a modification of child support was warranted and, if so, the amount of any increase. Utilizing these income figures, Cynthia claimed James' child support obligation would increase from $731 per month to either $1,027.09 (1999 earnings) or $1,101.48 per month (2000 annualized earnings). Either calculation would exceed the "10 percent or more" standard at which a material change of circumstances is presumed under paragraph Q of the Nebraska Child Support Guidelines.

James, however, argued that due to fluctuations in his annual and monthly income, income averaging should be used to calculate any modification in child support. He proposed averaging his annual income from 1997, 1998, and 1999 to determine his average annual salary. Under James' calculations, his child support obligation would increase from $731 per month to $760.27 per month. The district court adopted James' calculations.

Paragraph Q of the Nebraska Child Support Guidelines states:

> Modification. 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.

Neither party disputes that the district court's use of income averaging led to the court's finding that a variation by 10 percent or more did not exist, and ultimately to the determination that there was not a material change of circumstances. Therefore, in order to determine whether the district court abused its discretion in this finding, it is necessary to determine whether income averaging was appropriate given the facts of this case.

The Nebraska Child Support Guidelines specifically allow for income averaging in certain circumstances. Worksheet 1, the fifth footnote listed (footnote 5), states, "In the event of substantial fluctuations of annual earnings of either party during

the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet."

This case presents the first opportunity for this court to apply the specific language of footnote 5. Under our de novo review, the question is whether James experienced "substantial fluctuations of annual earnings . . . during the immediate past 3 years."

[4] We first note that "[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 which was not contemplated when the prior order was entered." (Emphasis supplied.) *Noonan v. Noonan*, 261 Neb. 552, 559, 624 N.W.2d 314, 321 (2001). Accord, *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001); *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000). Footnote 5 does not alter this longstanding principle.

The Peters' decree of dissolution was entered in 1998. In determining whether a material change of circumstances occurred subsequent to the decree, the district court considered James' 1997 earnings which had previously been used to calculate child support in the 1998 decree. Since James' 1997 earnings were not subsequent to the entry of the decree, we find the district court abused its discretion in using those earnings to determine whether a material change of circumstances had occurred.

[5] Our determination that the district court abused its discretion in considering James' 1997 earnings requires reversal, so it is not essential that we reach the merits of Cynthia's argument that income averaging was inappropriate on the facts of this case. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Schafersman v. Agland Coop, ante* p. 215, 631 N.W.2d 862 (2001). Because the issue of income averaging is likely to recur upon remand, we proceed to address the issue.

According to the evidence provided by James, his income from 1998 to 2000 reveals this pattern: $30,814.31 in 1998; $62,098.64 in 1999; and approximately $80,000 in 2000 (projected estimate based on income as of July 15, 2000). There was

no evidence in the record that suggested James' current rate of earnings would decrease in the remaining months of 2000 or thereafter. In fact, James testified that his current employer had told him that after 5 or 6 years, he might achieve his previous level of compensation at the Nebraska Heart Institute. We find that James' annual earnings show a clear pattern of consistently increasing income.

[6] Other courts have found that the use of income averaging is inappropriate when the obligor's income is consistently increasing. See, e.g., *Schaeffer v. Schaeffer*, 717 N.E.2d 915 (Ind. App. 1999); *Mahoney v. Mahoney*, 538 N.W.2d 189 (N.D. 1995). In *Schaeffer*, the court found that income averaging in such a situation gives the spouse, in this case James, a "windfall that deprives [his children] of 'the same standard of living [they] would have enjoyed had the family remained intact.' " See *id.* at 918 (quoting *Perri v. Perri*, 682 N.E.2d 579 (Ind. App. 1997)). We agree, and determine that it is not in the best interests of the children to allow income averaging when James' income is consistently increasing. "The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child." *Noonan v. Noonan*, 261 Neb. 552, 567, 624 N.W.2d 314, 327 (2001). Accord *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). Accordingly, we find that in this case it would be an abuse of discretion for a district court to use income averaging upon remand.

[7] In calculating child support, we have stated that "as a general matter, the parties' current earnings are to be used." *Shiers v. Shiers*, 240 Neb. 856, 860, 485 N.W.2d 574, 577 (1992). We find no reason to deviate from this principle under our de novo review of this record and determine that on remand, the district court should use the parties' current earnings as found in this record in calculating James' child support obligation.

(b) Retroactive Modification

[8] Cynthia also argues that any increase in James' child support obligation should be retroactively applied. Normally, the initial determination regarding the retroactive application of a modification order is entrusted to the discretion of the trial court.

Sears v. Larson, 259 Neb. 760, 612 N.W.2d 474 (2000). However, the district court did not modify the child support obligation in its modification order, so "the determination regarding retroactivity is left to this court based on our de novo review of the record." *Noonan*, 261 Neb. at 567, 624 N.W.2d at 326.

[9] "[T]he rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification." *Id.* at 567, 624 N.W.2d at 326-27. James asserts that the equities of his current situation should prevent application of this rule. Specifically, James contends that retroactive modification would be unfair since he is not delinquent on his child support payments and is not trying to avoid his support obligations. James argues that an order to pay retroactive child support payments in addition to his current obligations would substantially burden his finances.

[10] We view James' current circumstances in light of the best interests of the children.

> The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the children. [Citations omitted.] The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.

Pursley v. Pursley, 261 Neb. 478, 482-83, 623 N.W.2d 651, 654 (2001). In *Riggs v. Riggs*, 261 Neb. 344, 356, 622 N.W.2d 861, 870 (2001), we recognized that "[t]here are circumstances, for example, when a noncustodial parent may not have the ability to pay retroactive support and meet current obligations."

James has been steadily employed since the time of the divorce. His earnings in 1999 exceeded $60,000, and his annualized 2000 earnings are approximately $80,000. Additionally, James testified that his current net worth is "approximately a half a million dollars." Based on our de novo review of the record, we determine that the equities of James' current situation do not warrant a deviation from the general rule enunciated by this court in *Riggs v. Riggs, supra*, and *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). We find that any increase in

James' child support obligation ordered by the district court should be retroactively applied to November 1, 1999, which is the first day of the month following the October 25, 1999, filing date of the application for modification.

2. MODIFICATION OF DECREE FOR "MATHEMATICAL ERROR"

[11] Cynthia argues in her next assignment of error that the district court erred in modifying the decree of dissolution to correct a mathematical error in the original money judgment designed to equalize the division of the Peters' marital estate. The district court entered the decree of dissolution in 1998, and neither James nor Cynthia appealed.

> [W]here a party to a divorce action voluntarily executes a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of real and personal property, division of pension benefits, and division of stock will not thereafter be vacated or modified in the absence of fraud or gross inequity.

Reinsch v. Reinsch, 259 Neb. 564, 568-69, 611 N.W.2d 86, 90 (2000).

[12,13] James contends the mathematical error was "due to neglect on the part of the parties, counsel, and the court," and constituted fraud or gross inequity. Brief for appellee at 22. This court has previously determined that " 'what constitutes fraud is a matter of fact in each case.' " *Peters v. Woodmen Accident & Life Co.*, 170 Neb. 861, 870, 104 N.W.2d 490, 497 (1960). We have also stated that " '[f]raud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive.' " *Pasko v. Trela*, 153 Neb. 759, 762, 46 N.W.2d 139, 143 (1951).

A mathematical error occurring as a result of "neglect on the part of the parties, counsel, and the court" does not, under our de novo review of this record, constitute fraud. James had the opportunity to review the property settlement agreement and divorce decree, and he was represented by counsel throughout. Any alleged error was present in the decree from the outset. Furthermore, assuming the existence of the mathematical error, an error of $2,256 under this record does not constitute gross

inequity when viewed in light of the Peters' combined marital assets that totaled more than $600,000 at the time of the decree. In our de novo review of the record, we determine that James has failed to establish fraud or gross inequity. Having so determined, we find the district court abused its discretion in modifying the decree of dissolution to correct the mathematical error.

3. Transition Account

Cynthia also argues that the district court erred in its findings regarding the transition account maintained by her employer at the time of the Peters' divorce. She asserts that the transition account was disclosed to James at the time of the divorce.

As discussed previously, a property settlement agreement which has become final generally cannot be vacated or modified "in the absence of fraud or gross inequity." *Reinsch*, 259 Neb. at 569, 611 N.W.2d at 90. James contends that the district court was correct in modifying the decree of dissolution and awarding him one-half of the transition account because Cynthia's failure to disclose the account "constitute[d] fraud on her part." Brief for appellee at 21.

Our review of the record, however, shows that the existence of the transition account was not withheld from James. James received copies of Cynthia's pay stubs during pretrial discovery in the original divorce proceedings, and furthermore, Cynthia's pretrial memorandum identified "Current wage stubs" as an exhibit. These pay stubs listed the transition account and its current balance. In our de novo review, we find nothing supporting James' claim that Cynthia purposely tried to hide the existence of the account.

[14] James alternatively argues that even if the transition account was disclosed, it was not a part of the original property settlement that was incorporated into the decree of dissolution. He cites *Buhrmann v. Buhrmann*, 231 Neb. 831, 835, 438 N.W.2d 481, 484 (1989), for the proposition that "a decree of dissolution which does not contain a complete adjudication of property rights of the parties does not operate as an absolute bar to the maintenance of an independent action by either of the parties involving such rights." *Buhrmann* does not apply here. James and Cynthia signed the property settlement agreement

which stated that "wife and husband completely waive all right, claim or interest in property of the other and in the estate of each other . . . and that said waiver was made with full knowledge and fair disclosure of the nature and extent of the respective property in the estate of each party." In our de novo review of the record, we determine the transition account was disclosed to James and covered by the property settlement agreement. Accordingly, we find that the district court abused its discretion in modifying the decree of dissolution to award James $3,820.47 based on the alleged value of the account.

4. Attorney Fees

In her fifth assignment of error, Cynthia contends the trial court erred in failing to award her attorney fees pursuant to § 25-824. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001); *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001).

[15] Specifically, Cynthia argues that the district court erred in failing to find that James' petition to modify was frivolous under § 25-824(2). The term "frivolous," as used in § 25-824(2), connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Daily v. Board of Ed. of Morrill Cty.*, 256 Neb. 73, 588 N.W.2d 813 (1999). The fact that the district court found merit in some of James' contentions supports our finding that James' petition was not so wholly without merit as to be ridiculous. See *id.* at 94, 588 N.W.2d at 826 ("Daily's petition in error in the district court was certainly not frivolous. The fact that Daily prevailed in the district court is ample evidence of that fact"). The district court did not abuse its discretion in denying Cynthia's request for attorney fees.

5. James' Cross-Appeal

James argues in his cross-appeal that the district court erred in not awarding attorney fees for expenses he incurred in obtaining the order regarding the production of family photographs. While James prevailed in his motion to produce the photographs, "we note in our de novo review of the record that the road to the . . .

hearing was not entirely smooth on the part of either party." *Riggs*, 261 Neb. at 358, 622 N.W.2d at 870. The record shows that both parties were dissatisfied with the manner in which the photographs were being exchanged. Furthermore, the district court heard and observed the parties at the hearing on James' motion, and we cannot say, based on this record, that the district court abused its discretion in not awarding attorney fees to James. See *id.*

We have also reviewed James' remaining assignments of error regarding the district court's failure to find the existence of a joint custody arrangement and its denial of his motion to amend the bill of exceptions. Upon our de novo review of the record, we determine that these assignments of error are without merit.

Additionally, James requests attorney fees on appeal resulting from his motion to amend the bill of exceptions. Having determined that James' assignment of error regarding the bill of exceptions is without merit, we likewise find that James is not entitled to attorney fees.

VI. CONCLUSION

For the foregoing reasons, the order of the district court modifying the decree of dissolution is affirmed in part, and in part reversed, and remanded for further proceedings consistent with this opinion. In addition, Cynthia filed a motion for attorney fees incurred in this appeal pursuant to Neb. Ct. R. of Prac. 9F (rev. 2001). We grant this motion and award Cynthia attorney fees in the amount of $3,000 together with costs in the sum of $463.

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

McCORMACK, J., participating on briefs.

KIMBERLY VOGEL, APPELLANT AND CROSS-APPELLEE, V. BRADLEY VOGEL, APPELLEE AND CROSS-APPELLANT.

637 N.W.2d 611

Filed January 11, 2002. No. S-01-234.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial

court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.

2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
3. **Divorce: Child Custody: Courts.** Pursuant to Neb. Rev. Stat. § 42-364 (Reissue 1998), a district court may in certain circumstances obtain and retain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child.
4. **Child Custody: Courts.** A trial court may properly take temporary custody of a child when it is unsure either parent is fit.
5. **Judgments: Final Orders.** If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
6. **Parent and Child: Visitation.** A reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent.
7. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
8. **Modification of Decree: Child Custody.** Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. Nevertheless, such a move when considered in conjunction with other evidence may result in a change of circumstances that would warrant a modification of the decree.
9. **Child Custody.** In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child.
10. ____. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
11. ____. A move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal.
12. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements.
13. **Child Custody: Appeal and Error.** In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, an appellate court should consider several pertinent factors, including: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational

advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties.

14. **Child Custody.** While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration.
15. **Divorce: Witnesses.** Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to hear their testimony depends upon the circumstances of the case.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, reversed and remanded in part, and in part vacated.

Michael W. Heavey, of Colombo & Heavey, P.C., for appellant.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Kimberly Vogel appeals, and Bradley Vogel cross-appeals, from the order of the district court for Sarpy County which modified the parties' decree of dissolution. Kimberly, the custodial parent, was granted permission to permanently remove the parties' children from Nebraska to Virginia so that she could accompany her new husband, who was transferred from Offutt Air Force Base in Nebraska to Washington, D.C. The district court denied Bradley's cross-petition for change of custody. In its order, the district court also took legal custody of the parties' children; provided for annual transfer of physical custody of the children between the parties in the event Kimberly's husband, who is in the U.S. Air Force, is transferred overseas; awarded visitation rights to Bradley; required Kimberly to pay all travel expenses for such visitations; and provided for an alternate visitation schedule to take effect in the event Kimberly and Bradley establish residences within 50 miles of one another at any time in the future. We affirm in part, in part reverse and remand, and in part vacate certain portions of the decision of the district court.

II. STATEMENT OF FACTS

Bradley and Kimberly were married in 1988 and were divorced pursuant to a decree of dissolution entered July 25, 1997. Two children were born during the marriage, Brandon, born April 30, 1989, and Chelsea, born September 28, 1991. Prior to the modification proceedings which give rise to this appeal, legal custody and physical possession of the two children were given to Kimberly, subject to reasonable and liberal visitation by Bradley.

Subsequent to the dissolution of the parties' marriage, Kimberly began a relationship with Kent Butler, a master sergeant in the U.S. Air Force. When they began their relationship, Butler was stationed at Offutt Air Force Base. Fourteen months into the relationship, Butler was transferred to Washington, D.C., a transfer which Butler unsuccessfully resisted. Despite Butler's transfer, the relationship continued, and he and Kimberly were married on April 21, 2000.

On March 22, 2000, Kimberly filed an application to modify the decree of dissolution, requesting permission to permanently remove the children from Nebraska so that she and the children could move to Virginia to reside with Butler. On May 2, Bradley answered, denying that removal was in the best interests of the children. Bradley cross-petitioned for a change of custody to him and an order directing Kimberly to pay child support. The district court appointed a guardian ad litem on behalf of the children on May 16.

Trial was held August 23, 2000. At trial, both Kimberly and Bradley presented evidence which they assert supported their respective positions on removal and custody. Kimberly testified that the children got along well with her and were happy living with her. She testified to facts which illustrated her caregiving. She testified that she and Butler could provide a good home and, by combining their incomes, could provide a good standard of living for the children in Virginia. Kimberly also testified that in addition to court-ordered visitation, she and Butler expected to return to Nebraska periodically to visit extended family and that she anticipated that the children would see Bradley on these occasions. Bradley testified that he had exercised frequent visitation with the children since the divorce and that he was actively

involved with them during such visitation. Bradley testified that his extended family, including his two brothers, their children, and his parents lived in the Omaha area and that the children had close relationships with such extended family. Bradley testified to certain incidents which he asserts illustrated Kimberly's improper caregiving. Kimberly disputed this testimony.

The report of the guardian ad litem was also entered into evidence. The guardian ad litem concluded in her report that Kimberly appeared to have a legitimate reason for requesting removal and that "[t]here does not appear to be any strong evidence to suggest why the children should be removed from their mother's care and placed into their father's care at this time." The guardian ad litem also noted in her report that while Kimberly had not voiced complaints to her regarding Bradley, Bradley had multiple complaints with regard to the quality of Kimberly's caregiving. The guardian ad litem testified at trial, and in response to a question regarding such complaints, the guardian ad litem acknowledged that Bradley's objections might have been motivated by hostility and that "[h]e struck me as angry."

The district court entered its order October 2, 2000. The district court denied and dismissed Bradley's application for change of custody and sustained Kimberly's application for leave to remove the children from Nebraska subject to certain conditions, including the following, as listed under paragraph 2 of the court's order:

A. The district court retained continuing jurisdiction over and assumed legal custody of the children, while ordering that Kimberly retain primary possession subject to Bradley's right of reasonable visitation.

B. Kimberly was granted leave to remove the children to Virginia, but could not permanently remove the children to a state other than Virginia or Nebraska or to a location outside the United States without further order of the district court.

C. In the event Butler is ever transferred to a location outside the United States and Kimberly elects to join him at such location, the district court ordered that the following would then apply:

> (1) Kimberly would be required to remain in the United States and keep the children enrolled in their then current schools until they were released from school;

(2) possession of the children would then be transferred to Bradley for a period of 1 year;

(3) possession of the children would then be transferred to Kimberly for a period of 1 year;

(4) possession of the children would then be transferred to Bradley for a period of 1 year;

(5) possession of the children would then be returned to Kimberly.

D. While the children were residing in Virginia, a visitation schedule for Bradley was set which included, inter alia, "[t]he summer school break, except for the first and last five days thereof, each year," and Kimberly was required to pay the children's travel expenses associated with visitation.

E. In the event Kimberly and Bradley establish residences within 50 miles of one another at any time in the future, then the visitation schedule set forth in the October 2, 2000, order would become ineffective and the visitation schedule set forth in the district court's prior order of November 23, 1998, would again become effective.

On October 11, 2000, Kimberly moved for a new trial challenging (1) the district court's assumption of legal custody of the children, (2) the provision of the order which becomes effective on the condition that Butler is transferred overseas and she elects to join him, (3) the portion of the visitation schedule which gives Bradley visitation for almost the entire summer school break, and (4) the provision requiring Kimberly to pay all visitation-related travel expenses. In the alternative, Kimberly moved to enter a judgment notwithstanding the verdict (1) deleting the provision under which the district court assumes legal custody of the children, (2) deleting the provision which becomes effective only if Butler is transferred overseas and she elects to join him, (3) modifying the visitation schedule such that Bradley would have visitation during the first half of the summer school break in even-numbered years and during the second half of the summer school break in odd-numbered years, and (4) modifying the provision relating to visitation travel expenses to provide that Bradley be responsible for travel expenses from Virginia to Nebraska and that Kimberly be responsible for travel expenses from Nebraska to Virginia. The

district court overruled Kimberly's motion. Kimberly appealed the order, and Bradley cross-appealed.

III. ASSIGNMENTS OF ERROR

Kimberly asserts in her appeal that the district court erred in (1) taking legal custody of the children from her and placing legal custody of the children in the district court when neither she nor Bradley had been shown to be unfit, (2) providing for an annual transfer of possession which would take effect in the event that Butler is transferred overseas and Kimberly elects to join him, (3) awarding Bradley visitation for almost the entire summer school break, (4) requiring Kimberly to pay all travel expenses associated with visitation, and (5) establishing an alternate visitation schedule in the event Kimberly and Bradley establish residences within 50 miles of one another at any time in the future.

In his cross-appeal, Bradley asserts that the district court erred in (1) failing to change custody from Kimberly to him, (2) permitting Kimberly to remove the children from Nebraska to Virginia, (3) failing to compute reasonable child support to be paid by Kimberly to him, and (4) denying Bradley the right to call the children to the witness stand to testify regarding their preferences.

IV. STANDARD OF REVIEW

[1,2] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

V. ANALYSIS

1. Appeal

(a) District Court Assuming Legal Custody of Children

Kimberly claims that the district court abused its discretion by taking legal custody of the children without a showing that

she or Bradley was unfit. Prior to these modification proceedings, the district court had awarded legal custody to Kimberly.

In its October 2, 2000, order, the district court did not explain its reasons for assuming legal custody of the children. A review of the bill of exceptions shows that at trial, the district court commented that it was going to take legal custody of the children so that "the Uniform Child Custody [Jurisdiction] Act [Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1998)] will not apply" and that "all further proceedings involving these children will take place in this court."

[3] In *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988), this court found that pursuant to Neb. Rev. Stat. § 42-364 (Reissue 1998), a district court may in certain circumstances obtain and retain legal custody of a minor child, in proceedings to dissolve a marriage, and grant a parent physical custody of the child. We stated in *Ensrud* that

> "[w]hen the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court . . . .
>
> "It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing."

230 Neb. at 725, 433 N.W.2d at 196 (quoting *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975)).

[4] In *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled in part on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999), this court concluded that the trial court was not required to determine that both parents were unfit before taking custody of a child. Instead, this court concluded in *State ex. rel. Reitz* that "[t]he trial court

properly took temporary custody of the child when it was unsure either parent was fit." 244 Neb. at 983, 510 N.W.2d at 300.

In the present case, the district court neither found both parents to be unfit nor indicated that it was unsure whether either parent was fit. At trial, the district court stated that "it's clear that both of these parents are good parents to some extent, and to some extent they leave a little bit to be desired about the way they're interacting with each other." We do not read this comment to be a finding of unfitness or questionable fitness as required under *State ex rel. Reitz*. The district court further stated at trial that it had some concerns regarding the effect of removal on the children, "plus the fact that the new spouse may be transferred or have an assignment somewhere else where we're going to [be] back in here again."

We conclude that the district court abused its discretion by assuming legal custody of the children in the present case. Our de novo review of the record does not reveal that either parent is unfit or of questionable fitness. Instead, the record shows that the district court assumed legal custody of the children because it was concerned about the effect of removal or the possibility of further moves which may be required by Butler's employment. The record indicates that the district court was concerned that if any further modifications were required, such modifications should be made by it rather than by a court in another jurisdiction. Such concerns about potential issues do not justify the district court's present assumption of legal custody of the children. See *State ex rel. Reitz v. Ringer, supra*. We therefore reverse that portion of the district court's order in which it assumed legal custody of the children and, for the reasons explained *infra*, remand with directions to return legal custody of the children to Kimberly.

(b) Conditional Orders Regarding Physical Possession and Visitation

Kimberly claims that the district court abused its discretion by entering orders which would become effective upon the occurrence of certain conditions. Specifically, the district court (1) ordered a new schedule for physical possession of the children in the event Butler is transferred overseas and Kimberly elects to join him and (2) ordered a new visitation schedule in

the event Kimberly and Bradley establish residences within 50 miles of one another.

[5] We have stated that if a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001). A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000); *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995).

The provision contained in paragraph 2C of the district court's October 2, 2000, order concerns custody matters in the event Butler is transferred overseas and Kimberly elects to join him, and the provision contained in paragraph 2E concerns visitation matters in the event Kimberly and Bradley establish residences within 50 miles of one another. We conclude that such orders are conditional in that they do not "perform in praesenti" and become effective only upon the happening of certain future events which may or may not occur. Whether such orders will ever become effective is speculative. The impact of such potential events on the children's best interests and the proper judicial response to the potential events identified in the orders complained of are better assessed at the time of their occurrence.

The provisions complained of in paragraphs 2C and 2E of the district court's order of October 2, 2000, are void and severable from the valid portion of the order. See *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). We therefore order such portions of the district court's order vacated.

(c) Visitation Schedule and Travel Expenses

Finally, Kimberly claims that the district court abused its discretion in entering certain orders regarding visitation. Specifically, she objects to those portions of the October 2, 2000, order giving Bradley visitation for almost the entire summer school break and requiring her to pay all costs of travel associated with visitation.

In her arguments regarding summer visitation, Kimberly cites to *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), a removal case in which this court found to be reasonable

a visitation schedule which gave the noncustodial parent a 6 weeks' summer visitation. Kimberly asserts that "[a]nything more constitutes an abuse of discretion." Brief for appellant at 11. However, in *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998), we affirmed a visitation schedule which gave the noncustodial parent a summer visitation commencing 1 week after the beginning of the summer break and terminating 1 week before the conclusion of the summer break. In neither *Farnsworth* nor *Bondi* did we state that only a certain mathematical amount of visitation could be considered reasonable, and we decline to do so now. Instead, the determination of reasonableness is to be made on a case-by-case basis.

[6] We have said that generally, a reasonable visitation schedule is one that provides a satisfactory basis for preserving and fostering a child's relationship with the noncustodial parent. *Farnsworth v. Farnsworth, supra.* Given the facts of this case, we conclude that the visitation schedule is reasonable and that the district court did not abuse its discretion in setting the summer visitation schedule. We therefore affirm that portion of the district court's order.

Regarding the challenged provisions of the October 2, 2000, order requiring Kimberly to pay all travel expenses associated with visitation, Kimberly again cites to *Farnsworth* in which the parties were ordered to split travel expenses for certain visitations and the noncustodial parent was required to pay the remaining expenses associated with visitations. Kimberly argues that in a removal situation, given the reduced visitation with the noncustodial parent, the custodial parent typically bears a greater economic burden in supporting the children and that it is unfair to further impose the entire economic burden of visitation on the custodial parent. Kimberly claims that the order imposing travel expenses on her was meant to "punish the custodial parent for being the one 'who has chosen to move these children'" and that the district court abused its discretion in making such order. Brief for appellant at 13.

As with other visitation determinations, the matter of travel expenses associated with visitation is initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be

affirmed absent an abuse of discretion. As with the summer visitation schedule, neither *Farnsworth* nor any other case sets an immutable standard for the allocation of travel expenses, and instead the determination of reasonableness is made on a case-by-case basis.

We have reviewed the record and note that there was evidence regarding the respective incomes of the parties, and the district court could reasonably have concluded that Kimberly could more readily bear the expenses of travel occasioned by her removal of the children. Such a determination is not a punishment but an arrangement which is within the district court's discretion based on the facts of the case. We conclude that the district court did not abuse its discretion in ordering Kimberly to pay all travel expenses associated with visitation.

2. Cross-Appeal

(a) Modification of Custody, Removal, and Child Support

Bradley cross-appeals and assigns error to the portions of the district court's October 2, 2000, order granting Kimberly permission to remove the children from Nebraska to Virginia, denying his motion to modify custody, and failing to order Kimberly to pay child support to him. Because these three issues are related, they will be discussed together.

[7] Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). The party seeking modification of child custody bears the burden of showing such a change in circumstances. *Id.*

[8,9] We have stated that removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. *Id.* Nevertheless, such a move when considered in conjunction with other evidence may result in a change of circumstances that would warrant a modification of the decree. *Id.* In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000).

In his motion to modify custody of the children, Bradley does not assert that such modification is required because Kimberly is unfit, but, rather, that the modification is required because Kimberly has indicated her intention to move to Virginia, proximate to Washington, D.C. Essentially, Bradley contends that it would be in the best interests of the children to remain in Nebraska. The resolution of both Kimberly's motion to remove the children and Bradley's motion for a change of custody depends on a consideration of whether the best interests of the children are served by allowing them to remain in Kimberly's custody and move with her to Virginia or by transferring their custody to Bradley and allowing them to stay in Nebraska.

[10] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Although the district court in its order did not explicitly discuss legitimate reasons or the best interests of the children in deciding these motions, the district court did grant Kimberly permission to remove the children and therefore implicitly found that she had a legitimate reason and that removal was in the best interests of the children.

[11] Kimberly's asserted reason for leaving the state was to reside with Butler who serves in the Air Force and was restationed to Washington, D.C. We have previously held that a move to reside with a custodial parent's new spouse who is employed and resides in another state may constitute a legitimate reason for removal. See, *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986). We have further stated:

> " 'If there is a legitimate reason for the custodial parent's decision to leave the jurisdiction, the minor child will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the child to continue to live with that parent. . . . Custody is not to be interpreted as a sentence to immobility.' "

Harder, 246 Neb. at 949, 524 N.W.2d at 328 (quoting *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989)). Following our de novo review, we conclude that the district court did not abuse its discretion in determining that Kimberly had satisfied the threshold issue of showing a legitimate reason for leaving the state.

[12,13] In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth, supra*. In determining the potential that the removal to another jurisdiction holds with respect to the second consideration regarding enhancing the quality of life of the parent seeking removal and of the children, we have previously evaluated several pertinent factors, including: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the custodial parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). We have stated the list of factors should not be misconstrued as setting out a hierarchy, and depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

With respect to the first consideration involving the motive of each parent in seeking or opposing the move, from our de novo review, we see no conclusive evidence that either party was seeking to frustrate the custodial rights of the other party or was otherwise acting in bad faith.

With respect to the second consideration regarding the quality of life for the children and the custodial parent, Kimberly presented evidence generally to the effect that the move to the Washington, D.C., area where she could reside with Butler would result in a good quality of life for the children by providing educational, cultural, and recreational activities. The prime motive asserted for removal was to enable Kimberly, the custodial parent, to reside with Butler. Kimberly did not claim that the quality of life factors were the driving force behind her desire for removal, nor was she required to prove that the quality of life elsewhere was superior to that in Nebraska. Bradley presented evidence which focused on the children's ties to their community, their extended family in Nebraska, and the fact that the children had expressed concerns about moving.

The consideration before the district court was whether it would be in the children's best interests to move with Kimberly, who is their custodial parent, or to modify custody in order to allow the children to stay in Nebraska. From the record in this case, we conclude that although there were legitimate reasons for the children to remain in Nebraska, they were not compelling, and the district court could reasonably have found that the move with the custodial parent was in the children's best interests.

The third factor to be considered is the impact such removal will have on contact between the children and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. In the present case, it is clear that the distance between Virginia and Nebraska will diminish the amount of contact available between the children and their noncustodial parent. The district court awarded Bradley liberal visitation and almost the entire summer school break. The visitations are to be facilitated by requiring Kimberly to pay all travel expenses associated with visitation. It appears that the district court attempted to minimize the negative impact removal would have on contact between Bradley and the children.

In sum, our de novo review of the record indicates that the district court did not abuse its discretion in granting Kimberly, the custodial parent, permission to move the children from Nebraska and in denying Bradley's motion to modify custody.

Because we affirm the district court's order denying Bradley's motion to modify custody, we do not consider Bradley's assignment of error which claimed that the district court erred when it failed to order Kimberly to pay child support to Bradley.

(b) Testimony of Children

In his cross-appeal, Bradley assigns error to the district court's refusal to allow him to call the children as witnesses to testify as to their preferences in regard to custody and removal. Bradley subpoenaed both children to appear and testify on his behalf at trial. Kimberly moved to quash the subpoenas on the basis that it was not in the children's best interests to be required to appear and testify in a case involving their own custody and for the further reason that the children were not identified by Bradley as potential witnesses during discovery.

At trial, the district court determined that it would not allow Bradley to call the children as witnesses, but allowed Bradley to make an offer of proof. Bradley sought to stipulate that the children would testify that they would want to continue living in Nebraska with him rather than moving to Virginia with Kimberly, but Kimberly declined to so stipulate. Ultimately, the parties did stipulate that if called to testify, the children would testify that they would prefer to continue living in Nebraska. Bradley objected to the district court's decision not to allow the children's testimony, and the district court overruled his objection. Bradley made an offer of proof.

[14] In the present case, the children's preferences were relevant because "the children's opinion or preference as to where to live" is one of the factors to be considered in determining whether to allow removal. See *Brown v. Brown*, 260 Neb. 954, 967, 621 N.W.2d 70, 81 (2000). Furthermore, § 42-364(2)(b) provides that in determining custody arrangements, one of the factors the court shall consider is "[t]he desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning." We have held that while the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration. *Miles v. Miles*,

231 Neb. 782, 438 N.W.2d 139 (1989). See, also, *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986); *Boroff v. Boroff*, 197 Neb. 641, 250 N.W.2d 613 (1977). We observe that in those cases where the child's preference was given significant consideration, the child was typically over 10 years old. At the time of the trial in the present case, Brandon was 11 years old and Chelsea was 8 years old.

[15] Children of the parties to a marriage dissolution proceeding are not by that fact alone rendered incompetent as witnesses, but whether it is reversible error to hear their testimony depends upon the circumstances of the case. *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990); *Murdoch v. Murdoch*, 200 Neb. 429, 264 N.W.2d 183 (1978). This court has previously considered a district court's ruling on a parent's request to present children's testimony in a custody proceeding. In *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984), the trial court denied the father's request for the court to interview the children, ages 4 and 6, in chambers. We affirmed the trial court's decision for a number of reasons, including the questionable value of such interview unless an adequate record were made and the young and impressionable age of the children entitling their expressions of preference to little if any weight. Moreover, any error in regard to the trial court's denial was waived because the father in *Krohn* made no offer of proof as to what the children were expected to testify.

In *Murdoch v. Murdoch, supra*, the wife called two natural daughters of the husband, ages 13 and 11, as her final witnesses and the trial court declined to hear their testimony. We concluded such refusal was not reversible error because the court had already questioned the two children in the presence of counsel for both parties and such unsworn testimony was in the record. We concluded that additional testimony of the children would not have affected the court's determinations and instead could have had a traumatic and disrupting emotional effect on the children and could have harmed the ultimate custodial arrangement and therefore the best interests of the children.

In *Beran v. Beran, supra*, the mother called the parties' 15-year-old daughter as a witness and the trial court did not allow her to testify. We concluded in *Beran* that the trial court had

erred in its ruling. The mother had made an offer of proof as to the daughter's testimony, and the daughter was not being called to testify regarding her custodial preference but to corroborate her mother's testimony that the mother took care of the family and household duties as best she could when she was home. Such testimony was intended to counteract testimony of various witnesses presented by the father to the effect that the mother was no longer taking care of the family or that her family was no longer a priority to her. In *Beran*, we noted that although courts are rightly wary of placing minor children of a divorce proceeding in the traumatic position of testifying, the trial court should have allowed the daughter's testimony in that case. In *Beran*, the daughter was 15 years old at the time of trial and appeared to have a clear understanding of the proceedings. Her testimony had potential probative value in light of the testimony presented by the father. Although the guardian ad litem had expressed the opinion that the daughter should not testify, we found that such opinion was a broad recommendation and that there was no specific statement as to how the daughter might be detrimentally affected by testifying. We therefore concluded the trial court had committed reversible error in not allowing the daughter to testify for the limited purposes stated.

As a general matter, it has been observed that

> [a] child who is a competent witness under the general rules relating to children as witnesses is a competent witness in an action for divorce. . . .
>
> Although calling children to testify against one of their parents in a divorce case is distasteful and should be discouraged, a court may not prohibit a witness from testifying in a divorce case solely because the proposed witness is [a] child of the parties. Strictly speaking, however, if a child of the parties to a divorce action is called as a witness, the court is not warranted in excluding its testimony for reasons other than those warranting its exclusion generally. The rule applies with particular force where the need for calling the child to testify is imperative; public policy and private views of propriety do not justify a refusal to listen to competent testimony of young children where there is a need for such testimony. A divorce court's

> unwarranted refusal to permit the parties' minor children to testify may constitute reversible error.

24 Am. Jur. 2d *Divorce and Separation* § 379 at 538 (1998).

In the present case, the district court decided it would not permit the children's testimony because it found that such testimony would be cumulative and that it was not in the children's best interests to be required to testify. The parties had stipulated to the children's preferences, and the children's guardian ad litem had testified.

With respect to the move, the guardian ad litem testified that the children "had indicated that if they moved they would miss their father a great deal as well as — they're age appropriately nervous about the idea of going to a new school and leaving friends." She further testified that Brandon was "worried" about the prospect of moving and that "he's indicated that he doesn't want to lose his friends, his family contacts. He'd miss his dad." The guardian ad litem's report states that "[b]oth children indicated that, if they moved to D.C., they would miss their father greatly. They also expressed some concerns regarding leaving friends and starting new schools." In her testimony, the guardian ad litem concluded, nevertheless, that "the children appear to be pretty well-adjusted and could handle a move." With respect to the children's testifying, the guardian ad litem recommended in her report that "[d]ue to these children's young ages and their loyalty bonds to both parents, [she] would strongly object to any effort to have these children testify in court."

We conclude that the district court's decision not to permit the children to testify in the present case was not reversible error. The testimony would have been cumulative because, inter alia, the parties stipulated that the children would prefer to stay in Nebraska. Accordingly, the district court was able to consider the factor of the children's preferences in determining whether removal should be permitted, and thus we cannot say that the district court failed to consider their preferences. In light of the record and the valid concerns connected with requiring these young children to testify regarding their custody in a dispute between the parents, the district court did not commit reversible error in disallowing their testimony.

VI. CONCLUSION

We conclude that the district court abused its discretion when it assumed legal custody of the children and when it entered conditional orders. We conclude that Kimberly's remaining assignments of error and Bradley's assignments of error on cross-appeal are without merit.

The district court's order in which it assumed legal custody of the children is reversed, and we remand the cause to the district court with directions to enter an order returning legal custody of the children to Kimberly. Paragraphs 2C and 2E of the district court's October 2, 2000, order, in which it made conditional orders, are void, and we vacate those portions of the order. We affirm the district court's order in all other respects.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART, AND IN PART VACATED.

McCORMACK, J., participating on briefs.

CONNOLLY, J., dissenting.

The majority opinion concludes that the district court implicitly found that removal was in the best interests of the children because it granted Kimberly Vogel permission to remove the children from the state. This is a generous interpretation. Rather than determining that the relocation was in the children's best interests, the trial court found that removal was an insufficient ground for a change in custody and denied Bradley Vogel's application for a modification of the decree. It then summarily granted Kimberly's request for removal. Neither in its order nor in comments from the bench did the court make any findings regarding the children's best interests.

Trial and appellate courts, in parental relocation cases, deal with the tension created by a mobile society and the problems associated with uprooting children from stable environments. As we stated in *Farnsworth v. Farnsworth*, 257 Neb. 242, 248, 597 N.W.2d 592, 597 (1999), these cases are "among the most complicated and troubling" disputes that courts are asked to resolve. The purpose of multifactor tests is to help courts that must struggle with these difficult issues by pointing out the relevant considerations. Because of the nature of the problem, no test can be perfect. But unless a trial court undertakes to analyze these considerations, its judgment is rendered in a vacuum.

Because the trial court failed to follow the applicable law as set out in *Farnsworth*, I conclude that it was an abuse of discretion to allow Kimberly to relocate the children to Virginia.

Whether a custodial parent should be allowed to remove his or her child from the state is a separate question from whether a change in custody is warranted. There is no presumption favoring or disfavoring relocation. See Neb. Rev. Stat. §§ 42-364(1) and (2) and 43-2902 (Reissue 1998). Rather, when a custodial parent has a legitimate reason to move, the issue must be decided on the children's best interests. *Id.* The trial court's order, apparently premised upon whether a change in custody was justified, failed to properly analyze whether the relocation was in the children's best interests. Reviewing the record de novo, I conclude that it was not. Accordingly, I dissent.

I. RELOCATION ANALYSIS

There are three broad considerations for determining whether removal to another jurisdiction is in a child's best interests: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000).

1. Parents' Motives

I agree that Kimberly has not sought to frustrate Bradley's custodial rights or otherwise acted in bad faith or frivolously. But her desire to reside in Virginia with her husband, Kent Butler, is equally balanced by Bradley's legitimate concerns about the effects a relocation of over 1,000 miles will have on his relationship with his children. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). It is the second and third considerations in the best interests analysis which weigh against relocation.

2. Quality of Life Factors

In *Farnsworth*, we set out a number of factors to "assist trial courts in assessing the second consideration regarding the potential for enhancing the quality of life for the child and the custodial parent." 257 Neb. at 250, 597 N.W.2d at 598. We further

stated that courts were not required to give one factor more weight than any other factor in a given case. *Id.* But that statement should not be construed as authorizing courts to disregard any factor.

In determining the quality of life potential for the relocating parent and children, the following factors are pertinent: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *Brown, supra.*

The majority states that Kimberly presented evidence that the move to the Washington, D.C., area would result in a good quality of life for the children by providing educational, cultural, and recreational activities. The majority opinion further states that Kimberly was not required to prove that the quality of life elsewhere was superior to that in Nebraska. I disagree. The factors we set out in *Farnsworth v. Farnsworth*, 257 Neb. 242, 250, 597 N.W.2d 592, 598 (1999), were specifically intended to "assist trial courts in assessing . . . the potential for *enhancing* the quality of life." (Emphasis supplied.) To "enhance" is to "raise to a higher degree; [or] intensify." Webster's Encyclopedic Unabridged Dictionary of the English Language 474 (1989). Therefore, in order to have the quality of life consideration weighed in her favor, Kimberly had to show that the relocation would improve the quality of life for the children and herself when all eight factors are considered as a whole. Although educational, cultural, and recreational activities are not the only factors that a court may consider, Kimberly has failed to demonstrate that their quality of life would be enhanced by the move.

(a) Existence of Educational Advantages

Kimberly stated that she and Butler wished to find a home in Fairfax, Virginia, because she believed that the city has a good

school system. She stated that she had seen the curricula for the schools, but she did not present any evidence to show that the Fairfax schools were superior to the children's current school. In *Farnsworth*, we stated that generalized research is not compelling in determining whether one school system is superior to a Nebraska school system. This factor weighs neither for nor against the relocation. See *id.* See, also, *Brown, supra.*

(b) Improvement of Housing or Living Conditions

(i) Living Conditions

Kimberly testified that she and the children had enjoyed many recreational activities together while in Papillion. The children were also involved in organized sports, dance, and other activities. She stated that, if allowed to move, the children would be close to the ocean, historical sites, and museums. But she did not claim that these opportunities were superior to those available in Nebraska. Rather, the statements were made to support her contention that the recreational and cultural opportunities were not inferior to those available in Nebraska.

We have specifically stated that "the dispositive question is not where the children will have more fun, but where the living conditions will further their best interests. Simply put, the considerations one includes when choosing a vacation destination are not necessarily the same as those included when deciding where to raise a child." *Brown v. Brown*, 260 Neb. 954, 969-70, 621 N.W.2d 70, 82 (2000). Based on the record, cultural and entertainment opportunities do not show that the Washington, D.C., area is a preferable place to live. See *id.*

Furthermore, because Kimberly had not obtained employment or housing at the time of the hearing, she was unable to say what the children's schedule or childcare needs would be before or after school. She stated that Butler would be able to pick the children up from school on the days that he worked until 2 p.m., but she admitted that he sometimes worked until 6 p.m. and that she was uncertain what the commute time would be for either herself or Butler. In contrast, the children's neighborhood school in Papillion provided before-and-after-school daycare, and Kimberly was able to rely on Bradley's parents to care for the children when they were sick.

(ii) Housing

Kimberly testified that comparable housing was available but would cost approximately $500 to $600 per month more than in Nebraska. Under similar facts, we have held that the fourth factor did not weigh for or against relocation and did not factor into our de novo review. See *id.*

(c) Strength of Children's Ties to Present Community and Extended Family

The majority opinion states that Bradley presented evidence which focused on the children's ties to their community, their extended family in Nebraska, and the fact that the children had expressed concerns about moving. The majority concludes that while there were legitimate reasons for the children to remain in Nebraska, they were not compelling. I disagree.

Bradley testified that the children are very close to his parents and extended family. He usually stopped to visit his parents with the children when he had custody, and the children were with his extended family every holiday. Bradley's mother testified that she saw the children once or twice a week and on every holiday and special occasion and that the children called her at least once a week. Two other witnesses also testified to the children's close relationship with Bradley's parents. Brandon's cousin was also his best friend. Finally, Chelsea and Brandon, who were in the fourth and sixth grades, respectively, at the time of this hearing, had attended the same school in Papillion all of their lives.

In contrast, the children do not have extended family in Virginia or the stability that comes from the long-established social relationships in their school and community. Given the strength of the family and community ties in Nebraska, this factor weighs against relocation.

(d) Children's Opinions or Preferences as to Where to Live

The parties stipulated that if the children were allowed to testify, they would say that they preferred to continue living in Papillion. Although a child's wishes are not controlling, they are relevant and weigh against removal in this case. See *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984) (affirming district court's denial of motion for removal to Colorado in which court strongly considered children's statements made during in camera

interview; children, ages 11, 10, and 9, wished to remain with family and friends in Nebraska).

A child's preference should be given consideration by the court in acting upon a motion for modification of custody when (1) the issue is whether the child will be moved from the community where the child has lived for most of his or her life; (2) an excellent parent who remains in that community wishes to have the child reside with him or her, and (3) the child, for valid reasons, has expressed a preference to remain in the community. *In re Marriage of Rosson*, 178 Cal. App. 3d 1094, 224 Cal. Rptr. 250 (1986), *disapproved on other grounds, In re Marriage of Burgess*, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 2d 444 (1996).

The children's desires to remain close to the family and friends they had known all their lives were valid reasons for preferring to remain in Nebraska with Bradley. See *Marez, supra.* Further, the children had extensive interactions with both parents and had lived with the custody arrangement for 3 years at the time of this modification hearing. Their preferences should have been given consideration by the court.

I find the support of this extended family and the strength of the children's desires to remain near this family compelling reasons for the children to remain in Nebraska. Moreover, I cannot conclude that the remaining factors weigh in favor of relocation.

(e) Emotional, Physical, and Developmental Needs of Children

The guardian ad litem's interviews indicated that the children were very loyal to both parents, and she believed it would be in their best interests to have "good contact with both parents on an immediate and frequent basis." Given that Kimberly intended to move, however, she believed that it would be in the children's best interests to remain with Kimberly and Butler.

A court should consider that a custodial parent's remarriage can sometimes strengthen and stabilize a postdivorce family unit. See *Tropea v. Tropea*, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996). The guardian ad litem, however, admitted that she had never met Butler, and Kimberly presented no evidence concerning the children's relationship with him. In addition, Kimberly testified that Butler's assignment at the Pentagon

would last only a little over a year and that he had no control over where he would be assigned after that period.

There was also a question as to the emotional effect the move would have on Brandon. Bradley testified that Brandon had told his cousin he would kill himself if he were forced to move. The guardian ad litem did not believe Brandon would act in a harmful manner if he moved, based on Brandon's counselor's reports. She admitted, however, that she had not followed up on Bradley's concerns about Brandon and that she had only briefly interviewed Brandon. She also testified that Brandon's counselor had reported that Brandon was mildly depressed. She believed that the move—especially to a location over 1,000 miles away—could exacerbate Brandon's depression whether he moved with Kimberly or stayed with Bradley because the move would make close contact with both parents impossible.

At best, the guardian ad litem was able to say that the children were well-adjusted enough to "handle" a move. But given the guardian ad litem's concerns that the children should have close contact with both parents and that the move could heighten Brandon's depression and the possibility of future transfers for Butler, the evidence failed to show that the relocation would enhance the children's emotional, physical, and developmental needs.

(f) Enhancement of Custodial Parent's Income or Employment

Kimberly testified that she had received no replies to her job applications to manage apartment rental property. Although she believed her income would be approximately $8,000 more annually than what she earned in Nebraska, she admitted that her estimate might not be accurate. She stated that she believed the standard of living for herself and her children would be improved by combining her household with Butler's household, but the record does not show Butler's income. Further, the evidence showed that any assumed increase in her income would be at least partially offset by increases in housing costs of approximately $500 to $600 per month. On this record, Kimberly did not show that her income or employment would be enhanced. Compare *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000) (Stephan, J., concurring in result).

(g) Quality of Relationship Between Children and Each Parent

The record shows that both Bradley and Kimberly have a close, nurturing relationship with their children. The guardian ad litem's report and testimony indicated that the children are bonded to both parents and experience positive interactions with each. Kimberly admitted that Bradley had custody of the children more than the time ordered in the decree of dissolution. Although Kimberly testified that Bradley had not taken full advantage of his extended summer visitation, she also stated that she had asked him to pick the children up from daycare when she had scheduling conflicts or needed him to babysit for her.

Bradley submitted a calendar on which he had kept track of the dates he had custody for evenings or overnight visitations. Some of the evenings he had custody were only from 5 p.m., after daycare, until between 8 and 9 p.m., but the evidence showed that he had overnight visitation with his children an average of seven nights per month and had some type of visitation with his children an average of 3½ days out of every week. He also frequently called his children on the days he did not have visitation. In addition, the children attended regular, extended family gatherings at his parents' home. While the children's move to Virginia sustains Kimberly's relationship with the children, its effect on their relationship with Bradley is devastating because the distance involved will make frequent contact impossible.

(h) Summary—Quality of Life

"Under Nebraska law, the burden has been placed on the custodial parent to satisfy the court that he or she has a legitimate reason for leaving the state and to demonstrate that it is in the child's best interests to continue living with him or her." *Brown v. Brown*, 260 Neb. 954, 965, 621 N.W.2d 70, 80 (2000). In affirming this relocation, the majority opinion has relied on Kimberly's evidence that the move to the Washington, D.C., area would enhance the quality of life for the children by providing educational, cultural, and recreational activities. But, in other cases, we have found that similar evidence failed to demonstrate that a relocation would enhance the child's quality

of life. See, *id.*; *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

Conversely, the majority has ignored the children's desires to remain in Nebraska where they have a close relationship with Bradley and strong ties to their extended family and community. As to the remaining factors, the evidence was inconclusive at best and required this court to speculate that the children's quality of life would be enhanced. Preserving the custodial relationship should not always come at the cost of a child's bond with a dedicated noncustodial parent. Because Kimberly has failed to carry her burden of proof that the relocation will enhance the quality of life for the children and herself, the issue should turn on the impact of the move on the contact between Bradley and the children. See *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

3. Impact of Move on Contact Between Bradley and Children

The final consideration is the impact of the relocation on Bradley's ability to maintain a meaningful relationship with his children. See *Brown, supra*. The relocation to the Washington, D.C., area is over 1,000 miles from Bradley's home. It will dramatically affect Bradley's contact with his children and make it impossible for him to maintain the relationship that he had enjoyed. The distance, expense, and time involved in such travel are appropriately considered in evaluating the degree to which the move would affect Bradley's contact and relationship with his children. See *id.* Although Kimberly has been ordered to pay for the children to visit Bradley in the summer and specified school holidays, the evidence showed that Bradley had extensive physical custody of the children and contacted them by telephone on the days he did not see them. Summer and holiday vacations will not compensate him or the children for this daily interaction.

In addition, Bradley petitioned for custody in this case. A noncustodial parent's interest in securing custody as well as the feasibility of a change in custody are factors to be considered in assessing the impact of a move on the noncustodial parent relationship. See *Farnsworth, supra*. The evidence showed that the children's relationship with Bradley was very close, that they in

fact wished to remain with Bradley, and that their ties to the extended family and community were strong. Both Bradley and the children would have considerable support from his parents and stability from their existing relationships within their community. Bradley's mother stated that she and Bradley's father had provided childcare in the past and could continue to do so whenever needed. Thus, transferring custody to Bradley was a realistic alternative to relocating the children to Virginia.

4. Best Interests of Children

As noted, the district court failed to make any findings to indicate that the relocation would be in the children's best interests. But the court did state that based on evidence from the guardian ad litem, it had concerns about the effect the move would have on the children as well as the effects of Butler's future assignments and transfers. Nevertheless, the trial court ignored these concerns and permitted the relocation.

II. CONCLUSION

Reviewing the record de novo, I conclude that the evidence failed to show that the quality of life for these children would be enhanced by the relocation and that any speculation on this issue was significantly outweighed by the detrimental effects the move would have on the children's relationship with Bradley. I would reverse the decision of the district court allowing the removal of the children.

McCormack, J., joins in this dissent.

Frankie Levi Cole, appellant, v.
Kathy Blum et al., appellees.

637 N.W.2d 606

Filed January 11, 2002. No. S-01-295.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Courts.** It is the court's duty to prevent frivolous proceedings in the administration of justice.
3. **Affidavits.** In forma pauperis access to the courts is generally not a matter of right, but a privilege, and abuse of such privilege should not and will not be permitted.

4. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial.
5. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
6. **Declaratory Judgments: Justiciable Issues.** In a declaratory judgment action, when the named defendant or defendants have no power to affect the plaintiff's rights, such an action fails to present a justiciable controversy.
7. **Statutes: Affidavits.** Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000) contains no requirement that the court grant leave to amend the underlying petition before denying a request to proceed in forma pauperis.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Frankie Levi Cole, pro se.

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

HENDRY, C.J.

INTRODUCTION

On February 28, 2001, the Lancaster County District Court denied Frankie Levi Cole's petition to proceed in forma pauperis, finding that the action was frivolous pursuant to Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2000). Cole appealed.

FACTUAL BACKGROUND

On January 3, 2001, a prison disciplinary committee at the Nebraska State Penitentiary found Cole, an inmate at the facility, guilty of violating 68 Neb. Admin. Code, ch. 5, § 005II[N] (2000) (failure to work). The committee disciplined Cole by imposing 5 days' room restriction. The decision of the committee was affirmed by the Department of Correctional Services Appeals Board (appeals board).

Cole then filed an action in the Lancaster County District Court entitled "Civil Action Alleging Rights Violations Against Prison Employees," naming the four members of the appeals board, the penitentiary warden, and a penitentiary employee individually by name as defendants.

In his petition, Cole asserted that the action of the disciplinary committee was arbitrary and capricious because Cole was medically unable to perform his assigned work duties due to back problems. Cole then asked the district court to either declare that he has a right under Nebraska law to seek redress from the action of the appeals board or find that Neb. Rev. Stat. § 83-4,123 (Reissue 1999) is unconstitutional in that it does not permit appeals from decisions of the appeals board unless the discipline imposed involves loss of good time or disciplinary isolation. See *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994) (§ 83-4,123 authorizes appeal from decision of appeals board involving loss of good time credit or disciplinary isolation). See, also, *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995) (room restriction not disciplinary isolation under § 83-4,123).

With his petition, Cole submitted a request to proceed in forma pauperis and an affidavit showing that he did not possess the resources to pay the filing fees. The application to proceed in forma pauperis is file stamped February 22, 2001, by the clerk of the court. The underlying petition does not contain a file stamp date or any other indication of when it was received.

On February 28, 2001, the district court, on its own motion, denied Cole's in forma pauperis request as frivolous. The court set out its reasons, findings, and conclusion for determining the petition frivolous in a written order as required by § 25-2301.02(1). Cole appealed. His request to proceed in forma pauperis for purposes of appeal was granted pursuant to § 25-2301.02(2).

ASSIGNMENTS OF ERROR

Cole asserts, rephrased and summarized, that the district court erred in (1) finding that his petition was frivolous and (2) failing to grant leave to amend the petition before denying the motion to proceed in forma pauperis.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2).

ANALYSIS

Cole asserts the district court erred in finding that his petition was frivolous. The appeal presents this court with its first opportunity to consider the dismissal of a petition as frivolous under § 25-2301.02, which statute became effective August 28, 1999.

[2,3] As we noted in *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 856, 580 N.W.2d 95, 98 (1998), "It is the court's duty to prevent frivolous proceedings in the administration of justice." In forma pauperis access to the courts is generally not a matter of right, but a privilege, and "abuse of such privilege should not and will not be permitted." *Id.* at 858, 580 N.W.2d at 99. See, also, *Williams v. McKenzie*, 834 F.2d 152 (8th Cir. 1987) (no inherent right to in forma pauperis status).

Section 25-2301.02 states in relevant part:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. . . . An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. . . . In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

[4,5] Except in those cases where the denial of in forma pauperis status "would deny a defendant his or her constitutional right to appeal in a felony case," § 25-2301.02 allows the court "on its own motion" to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue "a written statement of its reasons, findings, and conclusions for denial." A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence.

See *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000) (applying Neb. Rev. Stat. § 25-824 (Reissue 1995)). See, also, *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (action is frivolous if it lacks arguable basis either in law or in fact).

[6] Under our de novo review, we construe Cole's petition as seeking declaratory relief. Cole is asking that the district court either declare Cole's right under Nebraska law to seek redress from the action of the appeals board or find that § 83-4,123 unconstitutionally denies him this alleged right. In *Miller v. Stolinski*, 149 Neb. 679, 684, 32 N.W.2d 199, 202 (1948), we noted that in a declaratory judgment action, when the named defendant or defendants have " 'no power to affect the plaintiff's rights,' " such an action fails to present a justiciable controversy. See, also, *Phillips v. Phillips*, 163 Neb. 282, 79 N.W.2d 420 (1956) (court will not render decree in declaratory judgment action which cannot fully adjudicate question presented). As in *Miller, supra*, the defendants named by Cole have no power as individuals to affect Cole's rights insofar as the constitutionality or appeals process under § 83-4,123 is implicated.

In *Miller, supra*, the plaintiffs brought a declaratory judgment action against the Douglas County assessor and Douglas County treasurer, asserting the Nebraska Community Property Act then in effect was unconstitutional. This court found that the plaintiffs' claim failed to present a justiciable issue because the county assessor and county treasurer had " 'no special interest to oppose the complaint [and] no special duties in relation to the matter which would be affected by any eventual judgment.' " *Id.* at 683, 32 N.W.2d at 202. Cole's petition suffers from the same defect which existed in *Miller*. The individual members of the appeals board, the penitentiary warden, and the penitentiary employee named by Cole as defendants have no special interest or special duties related to the constitutionality or appeals process under § 83-4,123. Therefore, we determine that the petition is without rational argument based on the law, in that it fails to name any proper defendants. The district court did not err in finding Cole's petition frivolous.

Cole next asserts the district court erred in failing to grant leave to amend his petition prior to denying his request to proceed in

forma pauperis. Cole argues that he must be granted leave to amend unless it is clear that no reasonable possibility exists that amendment will correct the defect. In making this argument, Cole is treating his petition as if the district court had sustained a demurrer to the petition for failure to state a claim. See Neb. Rev. Stat. §§ 25-806 and 25-854 (Reissue 1995). See, also, *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

[7] However, this case does not involve a demurrer to a petition under the rules of civil procedure; instead, this case involves a request to proceed in forma pauperis. The procedure for granting in forma pauperis status is set out in § 25-2301.02. This statute contains no requirement that the court grant leave to amend the underlying petition before denying a request to proceed in forma pauperis. In fact, such a requirement would be contrary to the plain language of § 25-2301.02, which authorizes the court to deny a frivolous request to proceed in forma pauperis summarily by written order. This assignment of error is without merit.

While not dispositive of this appeal, we note that the underlying petition in this case contained no indication from the clerk of the district court regarding when it was received by the court. We take the opportunity to point out that it is incumbent upon the clerk of the court, in cases in which an application to proceed in forma pauperis is filed, to indicate upon the face of the underlying petition when the petition is received by the court. This is necessary in order to address any issues which could conceivably arise concerning the timeliness of the underlying petition.

CONCLUSION

The order of the trial court denying Cole's in forma pauperis application as frivolous is affirmed.

AFFIRMED.

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