

SHAWN C. RANDALL, APPELLANT, v.
DEPARTMENT OF MOTOR VEHICLES, APPELLEE.
632 N.W.2d 799

Filed August 21, 2001. No. A-00-458.

1. **Administrative Law: Motor Vehicles: Judgments: Appeal and Error.** Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's decision.
4. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions 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, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
5. **Statutes.** There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions.
6. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
7. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
8. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation.** The purpose of administrative license revocation is to protect the public from the health and safety hazards of drunk driving by quickly getting driving while under the influence offenders off the road. At the same time, the administrative license revocation statutes also further a purpose of deterring other Nebraskans from driving drunk.
9. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time.** The time limitation in 247 Neb. Admin. Code, ch. 1, § 010.04 (1998), is not essential to the purpose of the administrative license revocation statutes, but, rather, the time limitation ensures order and promptness in administrative license revocation proceedings.
10. **Statutes: Time.** A legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory.
11. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time.** The time limit in 247 Neb. Admin. Code, ch. 1, § 010.04 (1998), is directory and not mandatory.

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

James E. Schaefer, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Shawn C. Randall appeals from an order of the district court for Douglas County affirming the revocation of Randall's driver's license by the Nebraska Department of Motor Vehicles (DMV). We affirm.

BACKGROUND

On April 24, 1999, Randall was the driver of a vehicle that was involved in a three-car accident in Omaha, Nebraska. Omaha police officer Craig Wylie was dispatched to the accident and upon arrival questioned each person involved in the accident. While talking with Randall, Officer Wylie smelled alcohol and determined that Randall showed signs of impairment. Officer Wylie had Randall perform field sobriety tests, and upon determining that Randall appeared to be intoxicated, Officer Wylie placed a radio call for an officer with an "alco-sensor" to come to the scene. Omaha police officer Patrick Soltys responded to the call and arrived at the scene with an alco-sensor and administered a breath test to Randall. The test showed that Randall's blood alcohol concentration was above the legal limit. Randall was arrested for operating a vehicle while intoxicated, pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 1998), and transported to the police station.

At the station, another breath test was administered to Randall, and it also showed that Randall's blood alcohol concentration was above the legal limit. Randall was given a "Notice/Sworn Report/Temporary License" informing him that his driver's license would be automatically revoked 30 days after the date of the arrest and that if he wished to contest the automatic revocation of his license, he needed to request a hearing by filing a petition with the DMV.

Randall subsequently filed a petition for administrative hearing to contest the revocation of his driver's license. An administrative license revocation (ALR) hearing was held on June 3,

1999. Officers Wylie and Soltys testified to the above events. James Brady, a crime laboratory technician, also testified. David Kofoed, a crime laboratory specialist, had been issued a subpoena, but failed to appear. Randall moved the hearing officer to request the aid of the district court to compel Kofoed to appear. The hearing officer complied with Randall's request and continued the hearing to a later date. The director of the DMV (Director) subsequently adopted the hearing officer's recommendations and ordered that Randall's motion to compel be granted and ordered that the hearing be continued on the Director's motion to allow the Director to seek the assistance of the district court. The hearing was continued for July 2.

At the continued hearing on July 2, 1999, Kofoed appeared and testified. However, before Kofoed testified, Randall argued that the DMV violated 247 Neb. Admin. Code, ch. 1, §§ 010.04 and 015.01I (1998), and he moved that the hearing be dismissed. Randall's motion was overruled. After the hearing concluded, the hearing officer recommended to the Director that Randall's driver's license be revoked for the statutory period. The Director adopted the hearing officer's recommendations and revoked Randall's license for 90 days. Randall appealed the Director's decision to the district court, again claiming that the DMV violated the time limitations in §§ 010.04 and 015.01I. The district court held that the time limitations found in §§ 010.04 and 015.01I were directory rather than mandatory and affirmed the Director's decision. Randall now appeals the decision of the district court.

ASSIGNMENT OF ERROR

Randall assigns that the district court erred in failing to dismiss the ALR proceedings when the DMV violated the time limitations found in §§ 010.04 and 015.01I.

STANDARD OF REVIEW

[1,2] Decisions of the Director, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act. Neb. Rev. Stat. § 60-6,208 (Reissue 1998); *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000). A final order rendered by a district court in a judicial review pursuant to the act may be

reversed, vacated, or modified by an appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918 (Reissue 1999); *Muir v. Nebraska Dept. of Motor Vehicles*, *supra*; *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999).

[3,4] When reviewing a question of law, however, an appellate court reaches a conclusion independent of the lower court's decision. *Muir v. Nebraska Dept. of Motor Vehicles*, *supra*; *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). The interpretation of statutes and regulations presents questions 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, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).

ANALYSIS

Randall contends that the DMV violated the time limitations found in §§ 010.04 and 015.01I when his ALR hearing was continued from June 3 to July 2, 1999. We first address Randall's argument that the DMV violated § 015.01I. Section 015.01I states:

If a party desires to request that the record be held open for additional evidence, the Hearing Officer may hold the record open for receipt of additional evidence. The record shall be held open for receipt of additional evidence not to exceed five (5) days after the hearing. Holding the record open shall not stay the automatic administrative license revocation unless the request to hold the record open is made on the Director's own motion. In no event shall the record be held open for more than five (5) days after the hearing date.

Randall argues that after the June 3 hearing, the record remained "open" until the hearing on July 2, thereby violating the "five-day rule" of § 015.01I. However, Randall's ALR hearing was not completed on June 3. The hearing held on June 3 was simply continued until a later date based on Randall's request for the aid of the district court in compelling Kofoed to appear. At

the June 3 hearing, after Randall asked that the hearing officer request the aid of the district court in enforcing the subpoena issued to Kofoed, the hearing officer stated that Randall's request would be granted and stated, "I would like to have it on record that this hearing will be continued to a later date." Subsequently, the Director ordered that Randall's motion to compel be granted and ordered that the hearing be continued. Neither party requested that the record be held open for additional evidence, nor did the hearing officer or Director ever state that the record was being held open.

The hearing was continued on July 2, 1999. At the end of the July 2 hearing, the hearing officer stated, "At this point I would like to close the hearing, since you don't have anything further to add." At the conclusion of the July 2 hearing, Randall's ALR hearing was complete. At this point, if either party had requested that the record be held open for additional evidence, § 015.01I would apply, and the record could remain open for 5 days after July 2. Section 015.01I does not apply to the time period between the June 3 hearing and the continuation of that hearing on July 2 because § 015.01I only applies "after the hearing." In addition, neither party requested that the record be held open for additional evidence after the conclusion of the July 2 hearing. Therefore, § 015.01I is not applicable to Randall's ALR hearing, and the DMV did not violate § 015.01I.

We further note that Randall states in his brief that the July 2, 1999, hearing was held open until July 9 in order to secure the testimony of a crime laboratory specialist involved in administering the second breath test on Randall and that this resulted in a violation of § 015.01I. There is nothing in the record to support this claim. The record shows that Kofoed, the crime laboratory specialist, testified on July 2, not July 9. The hearing was concluded on July 2, and there is nothing in the record to indicate that the record was held open for any period of time thereafter for additional testimony. Randall's claim that the DMV violated § 015.01I is without merit.

Randall also argues that the DMV violated § 010.04, which states: "Continuances granted on the Director's own motion shall in no event continue the hearing beyond forty-five (45) days from the date of arrest." Randall contends that the DMV violated

§ 010.04 because July 2, 1999, the day his ALR hearing was continued, is more than 45 days from the date of his arrest on April 24, 1999. Randall argues that the word "shall" in § 010.04 makes the 45-day time limitation mandatory and that a violation of such section should result in a dismissal of the ALR proceedings.

[5-7] There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State v. \$1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996). However, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *State v. \$1,947*, *supra*; *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, *supra*; *Sedlak Aerial Spray v. Miller*, *supra*; *In re Interest of Brandy M. et al.*, *supra*; *State ex rel. Grape v. Zach*, *supra*; *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977).

The Nebraska Supreme Court has addressed mandatory versus directory legislation in relation to time periods defined in statutes, although not in the context of ALR proceedings. The Nebraska Supreme Court has found on many occasions that time limitation language in statutes are directory rather than mandatory, despite the use of the word "shall." In *State v. \$1,947*, *supra*, the appellant asserted that the district court erred in refusing to dismiss the forfeiture action for failure to comply with the time limitations for instituting and maintaining a forfeiture action found in Neb. Rev. Stat. § 28-431 (Reissue 1995), which contains the word "shall." The Nebraska Supreme Court relied on a test set forth in *Matter of Sopoci*, 467 N.W.2d 799, 800 (Iowa 1991), for determining whether the statutory provision was mandatory or directory:

"If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a

violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown."

The Nebraska Supreme Court held that the failure to strictly adhere to the procedures outlined in § 28-431(4) does not interfere with the fundamental purpose of the statute, which is to ensure forfeiture of property or money used in drug transactions in a manner consistent with the requirements of due process. The court concluded that the time periods specified in § 28-431(4) are directory rather than mandatory and that the State's failure to strictly conform to them is not fatal to the forfeiture action.

In *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990), the Nebraska Supreme Court determined that the use of the word "shall" in Neb. Rev. Stat. § 43-278 (Reissue 1988), which directs that an adjudication hearing be held within 6 months after a petition is filed, was directory and not mandatory. The court held that because "shall" was directory, failure of the State to provide an adjudication hearing within the statutory 6-month limit did not require discharge from the petition when the subject of the petition had not indicated how she had been prejudiced by the delay. The court also noted that the Legislature has not directed that the case be dismissed, nor has the Legislature forged a remedy that deprives the juvenile court of jurisdiction to adjudicate a parental termination case in the event that § 43-278 is violated.

Similarly, in *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996), the Nebraska Supreme Court held that Neb. Rev. Stat. §§ 43-271 and 43-278 (Reissue 1993), both of which define a juvenile's right to a prompt adjudication are directory and do not require discharge of a juvenile not adjudicated within the prescribed time period. The court concluded that these statutes which define a juvenile's right to a prompt adjudication do so without specifying a sanction for noncompliance. Citing *In re Interest of C.P.*, *supra*, the court held that "[a] legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to

comply with that mandate, is directory." *In re Interest of Brandy M. et al.*, 250 Neb. at 523, 550 N.W.2d at 25. Both *In re Interest of C.P.*, *supra*, and *In re Interest of Brandy M. et al.*, *supra*, held that the essence of the Nebraska Juvenile Code statutes was to protect the best interests of the child and that failure to comply with the time limit did not interfere with this interest.

In *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987), the defendant was acquitted by reason of insanity and ordered admitted to the Lincoln Regional Center for a 90-day evaluation. Because the State failed to conduct an evidentiary hearing before the expiration of the 90-day period as provided in Neb. Rev. Stat. § 29-3702 (Reissue 1985), Steele argued that the court lacked jurisdiction and that he must be released from the Lincoln Regional Center. Relying on the rule that a provision of a statute which does not relate to the essence of the thing to be done but governs the time or manner of performance is generally considered to be directory as opposed to mandatory, the Nebraska Supreme Court held that the statute's time limits were directory and not mandatory. In addition, the court concluded that there was no announced penalty in the statute or the case law interpreting the statute for the State's failure to meet the statutory time limits and that Steele had not demonstrated that he had been prejudiced as a result of the delay. Therefore, Steele was not released from custody.

In coming to its decision, the *Steele* court relied in part on *Taylor v. Department of Transp.*, 260 N.W.2d 521 (Iowa 1977). In *Taylor*, the appellant requested a hearing after the revocation of his driver's license. Iowa Code Ann. § 321B.8 (West 1966) provided that such hearing shall be held within 20 days of the request. The appellant was not given a hearing within the statutory time limit and contended that the trial court and the department of transportation had lost jurisdiction as a result. The Iowa court stated:

Nevertheless, the time provision in § 321B.8 is clearly designed to provide order and promptness in the administrative process, the characteristic purpose of a directory statute. The main legislative goal of removing dangerous drivers from the highways can still be attained when hearings are late. In the absence of a showing of prejudice by

the licensee, a failure to hold the revocation hearing within 20 days of receipt should not preclude a later hearing. We hold that the hearing time provision of § 321B.8 is directory and not mandatory.

Taylor v. Department of Transp., 260 N.W.2d at 523. The Iowa court went on to say that statutes which fix the form, mode, or time of performance by public functionaries are generally considered to be directory, as opposed to mandatory.

In *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977), the statute at issue required that the Nebraska Public Service Commission have a decision within 30 days of a hearing. The appellant claimed that the order of the commission was void because the commission failed to file its decision within 30 days after the hearing. The *Hartman* court stated:

“‘Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory. . . . Provisions governing the time for doing an act, or directing the doing of certain things within certain times without any negative words restraining the doing thereof afterward, are deemed to be directory.’”

Id. at 371-72, 249 N.W.2d at 475. Despite the use of the word “shall” in the statute at issue, the Nebraska Supreme Court held that the 30-day limit was not a mandate, but a directive. The *Hartman* court pointed out that the purpose of the statute at issue was to ensure that “‘all matters presented to the commission be heard and determined without delay.’” *Id.* at 372, 249 N.W.2d at 475. The *Hartman* court concluded that the delay did not prejudice or harm the appellant.

[8,9] In the instant case, the time limitation in § 010.04 is not “‘essential to the main objective’” of the ALR statutes. “[T]he purpose of ALR is to protect the public from the health and safety hazards of drunk driving by quickly getting [driving while under the influence] offenders off the road. At the same time, the ALR statutes also further a purpose of deterring other Nebraskans from driving drunk.” *State v. Young*, 249 Neb. 539, 541-42, 544 N.W.2d

808, 811 (1996), citing *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). The time limitation in § 010.04 is not essential to the purpose of the ALR statutes, but, rather, the time limitation ensures order and promptness in ALR proceedings. The failure to strictly abide by the time limitation in § 010.04 does not interfere with the fundamental purpose of the ALR statutes. The main goal of removing drunk drivers off the roads can still be attained when hearings are held past the 45-day time limitation. Therefore, § 010.04 is directory rather than mandatory.

Any violation of § 010.04 which occurred did not invalidate the proceedings unless Randall could show that he was prejudiced by the delay. Randall does not claim that he was prejudiced by the delay in the ALR hearing. The delay in the ALR hearing was caused by Randall's own request for a motion to compel at the June 3 hearing. Even though the ALR hearing was continued "on the Director's own motion," Randall is the one who asked for a motion to compel, thereby necessitating a continuance in order to comply with his request. The continuance was granted for Randall's benefit. Randall requested the motion to compel so that he could get the aid of the district court in enforcing the subpoena on Kofoed and have the benefit of having Kofoed testify at the ALR hearing. The first part of Randall's ALR hearing was held on June 3, 1999, 40 days after Randall's arrest. Because of the amount of time required to secure the motion to compel and reschedule the hearing, it was virtually impossible to reschedule the hearing within the 45-day window. The ALR hearing was completed on July 2, 70 days after the arrest. The ALR hearing was rescheduled within a reasonable amount of time. Therefore, Randall was not prejudiced by the delay in the ALR hearing.

[10] In addition, the Nebraska Administrative Code does not contain any sanctions for noncompliance with the 45-day limitation under § 010.04. "[A] legislative enactment providing that an act be accomplished within a specified time period, with no sanction for failure to comply with that mandate, is directory." *In re Interest of Brandy M. et al.*, 250 Neb. 510, 523, 550 N.W.2d 17, 25 (1996).

[11] The time limit in § 010.04 is directory and not mandatory. Any violation of such time limit did not invalidate Randall's ALR proceedings.

CONCLUSION

For the reasons set forth above, the judgment of the district court affirming the order of revocation by the Director is affirmed.

AFFIRMED.

RALPH NAVARETTE, APPELLEE AND CROSS-APPELLANT,
v. DEAN SETTLE, DIRECTOR OF THE COMMUNITY MENTAL
HEALTH CENTER OF LANCASTER COUNTY, AND KIM ETHELTON,
PROGRAM SUPERVISOR OF THE CRISIS CENTER, COMMUNITY
MENTAL HEALTH CENTER OF LANCASTER COUNTY,
APPELLANTS AND CROSS-APPELLEES.
633 N.W. 2d 588

Filed August 28, 2001. No. A-00-436.

1. **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.
2. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of the litigation.
4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon the existing facts or rights, in which the issues presented are no longer alive.
5. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
6. **Moot Question: Appeal and Error.** An appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
7. ____: _____. The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, 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 Lancaster County: KAREN FLOWERS, Judge. Reversed and remanded with directions to dismiss.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellants.

Dennis R. Keefe, Lancaster County Public Defender, and Dorothy A. Walker for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Dean Settle, director of the Community Mental Health Center of Lancaster County, and Kim Etherton, program supervisor of the Crisis Center, Community Mental Health Center of Lancaster County, hereinafter referred to collectively as the "Appellants," appeal from an order of the district court in this habeas corpus proceeding brought by Ralph Navarette. On appeal, the Appellants challenge the district court's refusal to dismiss the case as moot, as well as the court's finding that habeas corpus was an appropriate avenue for Navarette's claim that he was being unlawfully held without receiving prompt and adequate mental health treatment. Navarette has filed a cross-appeal challenging the district court's refusal to define the term "prompt treatment" as used in the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. § 83-1001 et seq. (Reissue 1999), to mean treatment within 24 hours of involuntary civil commitment. Because we find the district court erred in not dismissing the case as moot, we reverse, and remand the matter with directions to dismiss Navarette's habeas corpus petition.

II. BACKGROUND

On September 23, 1994, Navarette pled guilty and was convicted of first degree sexual assault on a child. Navarette was sentenced to 5 to 10 years' imprisonment. On September 30, 1999, the State filed a petition before the Douglas County Mental Health Board seeking a hearing to determine whether Navarette is a mentally ill dangerous person and what treatment alternative would suffice to prevent the occurrence of harm to others upon his release from the Omaha Correctional Center where he was apparently serving his sentence. Venue was transferred to the Lancaster County Mental Health Board.

On October 28, 1999, a hearing was conducted before the Lancaster County Mental Health Board. The State presented the testimony of two clinical psychologists, Drs. Nancy G. Mize and

Gerald K. Shannon. They testified that Navarette suffers from the mental illness of pedophilia and that as a result, he represents a danger of harm to others. Dr. Mize testified that in her opinion, Navarette presented "an extremely high risk to re-offend." Both psychologists further testified that they would recommend inpatient treatment for Navarette and that less restrictive alternatives would not be sufficient in this case.

On November 1, 1999, the Lancaster County Mental Health Board, upon consideration of the evidence presented at the hearing, determined in a supplemental order of commitment that there was clear and convincing evidence that Navarette is a mentally ill dangerous person and, as a result, presents a substantial risk of serious harm to others within the near future. The board further found that there was clear and convincing evidence that no less restrictive treatment alternatives were available to prevent the potential harm. Therefore, the board ordered Navarette to be committed on an inpatient basis to the Nebraska Department of Health and Human Services for individualized treatment.

Navarette was initially committed to the Lancaster County Community Mental Health Center (Crisis Center) on October 28, 1999. The Crisis Center is not a facility that provides treatment for patients. Navarette was initially committed to the Crisis Center because the Lincoln Regional Center did not have any available bedspace in its treatment program when he was committed. Navarette remained at the Crisis Center, without any treatment, until January 12, 2000.

On January 4, 2000, Navarette filed a petition for habeas corpus relief in the district court. Navarette alleged in his petition that he had a statutory right to prompt and adequate treatment pursuant to § 83-1066. He alleged that he had been detained at the Crisis Center without any treatment since October 28, 1999, and that such detainment without treatment violated his due process rights. Additionally, Navarette alleged that § 83-1066 specifically provided him the right to file an application for habeas corpus relief to challenge the legality of his treatment. Navarette asserted that he was being unlawfully detained and that he was entitled to be released.

In mid-December 1999, the Lincoln Regional Center notified the Crisis Center that it would have a bed available for Navarette

on January 5, 2000. The date was subsequently changed to January 12. On January 12, Navarette was discharged from the Crisis Center and admitted to the Lincoln Regional Center.

On February 3, 2000, the Appellants filed a response to Navarette's petition for habeas corpus relief in the district court asserting that the matter had become moot because Navarette was no longer in the custody of the Crisis Center and had been transferred on January 12. They further asserted that Navarette's petition did not state facts sufficient to constitute a cause of action for habeas corpus relief.

On February 4, 2000, the district court conducted a hearing on Navarette's petition for habeas corpus relief. Testimony was received concerning Navarette's detention at the Crisis Center, as well as testimony concerning the average length of detention at the Crisis Center pending available bedspace at a treatment facility. The court further received various exhibits, including the documentation concerning Navarette's commitment hearing before the Lancaster County Mental Health Board.

On March 23, 2000, the district court issued its order. The district court first addressed the mootness issue. The court recognized that cases are generally dismissed when there is no actual controversy existing at the time of trial, but further recognized that an exception to the general mootness rule exists "when the issues raised are a matter of public interest but, because of their transitory nature, will elude judicial review." The court found that the exception should be applied in this case.

The district court next addressed whether habeas corpus relief is an appropriate vehicle for Navarette to challenge his confinement at the Crisis Center without treatment. The court concluded that Navarette was entitled to file an application for habeas corpus relief pursuant to § 83-1066. The court further found that Navarette had demonstrated that his detention at the Crisis Center from October 28, 1999, until January 12, 2000, did violate his right to prompt and adequate treatment. The court declined to specifically define "prompt treatment," despite Navarette's assertion that such should be defined to mean treatment within 24 hours of commitment. In this regard, the court held: "I don't believe there is sufficient evidence for me to define 'prompt' in this case (other than to say it is something

less than eleven weeks), let alone conclude that prompt always means within 24 hours.” The court specifically declined to grant Navarette any personal relief and held that because he was then at the Lincoln Regional Center and receiving treatment, his release would not be ordered.

III. ASSIGNMENTS OF ERROR

On appeal, the Appellants have assigned four errors, which we consolidate for discussion to two. First, the Appellants assert that the district court erred in not dismissing the case as moot. Second, the Appellants assert that the district court erred in holding that habeas corpus proceedings were the proper avenue for Navarette to challenge his detention at the Crisis Center.

On cross-appeal, Navarette has assigned one error. Navarette asserts that the district court erred in not defining “prompt treatment” to mean treatment within 24 hours of commitment.

IV. ANALYSIS

1. MOOTNESS

[1,2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001); *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000). See, also, *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999); *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). 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. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, *supra*; *Greater Omaha Realty Co. v. City of Omaha*, *supra*.

[3-5] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of the litigation. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, *supra*; *Greater Omaha Realty Co. v. City of Omaha*, *supra*; *Elstun v. Elstun*, *supra*; *State v. Woods*, *supra*; *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997). A moot case is one which seeks to determine a question which does not rest

upon the existing facts or rights, in which the issues presented are no longer alive. *State ex rel. Lamm v. Nebraska Bd. of Pardons, supra*; *Greater Omaha Realty Co. v. City of Omaha, supra*. As a general rule, a moot case is subject to summary dismissal. *State ex rel. Lamm v. Nebraska Bd. of Pardons, supra*; *Greater Omaha Realty Co. v. City of Omaha, supra*; *Elstun v. Elstun, supra*.

The Appellants first assert that the district court erred in not dismissing the action as moot. They argue that the district court was without authority to apply the public interest exception to the mootness doctrine, that the exception should not be applied to the facts of this case, and that Navarette should not be allowed to benefit from the exception because the delay in bringing the action to court was caused by his own failure to file any proceedings at an earlier date.

The dispute concerns whether the district court properly applied a well-recognized exception to the mootness doctrine, the public interest exception.

[6,7] The Nebraska Supreme Court has held that an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. *State ex rel. Lamm v. Nebraska Bd. of Pardons, supra*; *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Elstun v. Elstun, supra*. The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, 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, supra*; *Hauser v. Hauser, supra*; *Greater Omaha Realty Co. v. City of Omaha, supra*; *Elstun v. Elstun, supra*; *State v. Woods, supra*; *State ex rel. Shepherd v. Neb. Equal Opp. Comm., supra*. See, also, 5 Am. Jur. 2d *Appellate Review* § 648 (1995) (noting distinction between public interest exception and exception to mootness for cases capable of repetition yet evading review).

We are unable to find any authority for a trial court applying this exception to the mootness rule. However, we need not specifically decide whether a trial court may ever apply the

exception because, even to the extent such application might be proper, the present case does not present an appropriate situation for applying the exception.

The specific issue before the district court in the present case was whether Navarette's detention at the Crisis Center from October 28, 1999, through the first part of January 2000 without any treatment, while the Crisis Center was awaiting the availability of a bed at an appropriate treatment center, violated Navarette's right to "prompt and adequate" treatment. See § 83-1066(2). Although the issue arguably could concern a public interest, to the extent other committed individuals have similar rights to prompt and adequate treatment and might be detained in a similar fashion, resolving the issue in Navarette's case does not provide an authoritative decision on what constitutes prompt and adequate treatment.

The district court was presented with evidence concerning delays in the Crisis Center's being able to transfer committed individuals to treatment facilities. That evidence indicated that the delay was different for sex offenders from other committed individuals because treatment facilities do not mix populations of sex offenders with other committed individuals. The court received evidence that the length of delay, as well as the number of sex offenders in the system, varies from month to month and year to year. Additionally, the court received evidence that the number of sex offenders being committed for treatment is increasing and that the Nebraska Department of Health and Human Services is being forced to adjust its planning for future years to make additional accommodation.

It is apparent that the determination of what constitutes "prompt and adequate" treatment, as those terms are used in § 83-1066(2), will inherently be a factual determination to be made based on the evidence and circumstances presented in each particular case. The district court implicitly recognized this fact by holding that there was not sufficient evidence to define "prompt," except to conclude that the period of time Navarette had to be detained at the Crisis Center did not constitute prompt treatment. That fact, however, does not necessarily mean that there are no factual circumstances under which such a period of time could be considered, as a factual matter, to be prompt.

The determination of what constitutes “prompt” treatment is inherently a factual determination to be made of necessity on a case-by-case basis. Thus, a judicial determination concerning whether the facts of a given case demonstrate prompt treatment will not provide an authoritative decision which can be applied uniformly to the myriad of factual situations which may arise concerning mental health commitment proceedings. As the determination of “promptness” is unique in each particular case, an authoritative adjudication for future guidance does not result from this case. Thus, the public interest exception to the mootness doctrine should not be applied. See *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000). Therefore, we find that the district court erred in applying the exception to this particular case and that it should have dismissed the matter as moot.

2. REMAINING ISSUES

Because we conclude that this case should have been dismissed as moot, we decline to further address the issues raised by the Appellants on appeal or by Navarette on cross-appeal.

V. CONCLUSION

Because the issues raised in Navarette’s petition for habeas corpus relief were moot, the district court should have dismissed the matter. The public interest exception does not apply to allow a judicial determination of this case. Accordingly, we reverse, and remand the matter to the district court with directions to dismiss Navarette’s petition.

REVERSED AND REMANDED WITH
DIRECTIONS TO DISMISS.

GLENN E. KOVANDA AND JOEL W. POSPISIL, APPELLEES, v.
DUANE VAVRA AND GREG KRUPICKA, APPELLANTS.

633 N.W.2d 576

Filed August 28, 2001. No. A-00-448.

1. **Pleadings: Judgments: Appeal and Error.** In the absence of appropriate pleadings seeking and justifying an award, a trial court cannot err by failing to award such relief.
2. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, the appellate court tries factual questions de novo on

the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.

3. **Easements.** The owner of a servient estate and the owner of a dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands.
4. _____. An owner whose land is burdened with a right-of-way, unless he or she has expressly agreed to the contrary, may use the land over which the way passes in any manner which does not materially impair or unreasonably interfere with its use as a way. The use of the servient owner must be reasonable and not such as will injure, impair, or obstruct the enjoyment of the way by the grantee or subject him or her to extra labor and expense in keeping it in repair, and the owner of the way may restrict such use by the owner of the servient tenement as is inconsistent with the enjoyment of the easement.
5. **Easements: Conveyances: Words and Phrases.** The extent of an easement created by a specific grant is fixed by the conveyance, and the meaning thereof is to be found in its language construed in the light of relevant circumstances.
6. **Easements: Conveyances.** The possessor of land subject to an easement created by a conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.
7. **Easements: Words and Phrases.** An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner. The owner of the easement may make use of it only for the special purpose that gave rise to the easement itself.
8. **Easements.** A servient owner of land subject to an easement may make such use of it as he or she sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose.
9. _____. A servient landowner cannot deny the right to enter and use the land found to be within the scope of the easement.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed as modified.

Shaylene M. Kolbo and Matthew Hanson, of Steinacher, Vosoba, Hanson & Kolbo, for appellants.

John C. Hurd, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellees.

HANNON, INBODY, and MOORE, Judges.

HANNON, Judge.

INTRODUCTION

The appellants, Duane Vavra and Greg Krupicka, who were the defendants in the trial court, own an easement to cross the

north 30 feet of an 80-acre field to obtain access to land Vavra owns. The easement is across land owned by one appellee, Glenn E. Kovanda, and rented by the other appellee, Joel W. Pospisil. In 1996, the appellees started to raise corn and to irrigate the part of the 80 acres that was subject to the easement with a center-pivot irrigation system. The use of the irrigation system interfered with the appellants' use of the easement, because when the irrigation system was over any part of the easement, it limited the height of the vehicles and equipment that the appellants could use on the easement. Irrigation also made the easement trail muddy and impassable by various farm vehicles for a couple of days afterward. Animosity arose between the parties, and both parties committed acts which were clearly in violation of the rights of the other party. The central issue of this appeal is the relative rights of the appellants to use the easement to those of the appellees as owner and tenant of the land subject to that easement. The trial court held that the appellees have the right to use their land, so long as that use does not unreasonably interfere with the appellants' use of their easement, and that the appellants had the burden to prove, and failed to prove, that the appellees' operation of the irrigation system was unreasonable under the circumstances. The trial court enjoined the appellants from blocking the irrigation system's path and enjoined the appellees from pushing up dirt or discing the easement area. The appellants now appeal and allege the trial court erred in failing to find that the appellees' activities interfered with their use of the easement and in not enjoining the appellees from such activity. Upon a de novo review, we find that the court erred as alleged by the appellants and modify the trial court's decree to enforce the appellants' rights under the easement as described herein.

BACKGROUND

In 1995, before the easement in question was granted to the appellants, Kovanda owned land in the southeast quarter of the northwest quarter and the southwest quarter of the northwest quarter of section 7 (north property). This land was irrigated by a center-pivot irrigation system, which pivoted at a point slightly north and west of the center of the northwest quarter, that is,

near the south line of Kovanda's property. This allowed the irrigation system to cover and irrigate a half circle of land on the north property. In early 1995, the west half of the southwest quarter (south property) was owned by Edward Kubicek. The south property is situated immediately south of the north property. In 1995, the two properties were separated by a fence, trees, and bushes. The south property was dryland farm ground.

Vavra owned farmland situated immediately east of the south property. Vavra owned the east half of the southwest quarter (east property). Turkey Creek cuts across the east property, land locking a 10-acre piece of Vavra's land west of Turkey Creek because the creek cannot be forded with vehicles or machinery. Since 1946, Vavra accessed the east property for farming purposes, with Kubicek's permission, by traveling along the north end of the south property along the fence and tree line. Vavra raised row crops of corn, beans, and milo on the east property, and at times, he also kept cattle there. Krupicka's interest in this action is chiefly as a tenant of Vavra's land, but he is also Vavra's grandson and owns unspecified land farther east of the south property and was also a grantee on the easement.

After Kubicek died in 1995, Kovanda purchased the south property at an auction. Just a few days before the sale, Kubicek's personal representative granted the appellants an express, written easement to cross the south property in order to access the east property. Kovanda testified that he knew of this easement when he bought the south property and that he knew of the appellees' use of the easement before it was reduced to writing. The document granted an easement on the west half of the southwest quarter of section 7, and specifically granted

the right, privilege and easement to Duane Vavra and Greg Krupicka [and] their heirs . . . the right of ingress and egress across the North Thirty feet . . . of the following described real estate, for the purpose of crossing the afore-described real estate to get to the property owned or leased by [the appellants] located directly East of the following described real estate. Such right of ingress and egress shall include the right to use any mode of transportation desired . . . including any and all farm machinery and equipment.

Also in the document, the appellants agreed to do "as little damage as possible to the aforesaid premises," to make reasonably satisfactory repairs to restore the premises as far as possible to its condition prior to any damage, to pay for any damages not completely restored, and to indemnify and hold the grantor harmless from any claims from the appellants' use or enjoyment of the easement.

After Kovanda purchased the property, the appellees took down the fence line and cut down the trees and bushes along the border between the north and south properties. The appellees also extended the use of the irrigation system that had originally irrigated only the north property so that it traveled over part of the south property as well. Irrigating the south property in this way caused the irrigation system while in operation to cross the easement.

Pictures of the irrigation system show it has a pipe, suspended approximately 9 or 10 feet from the ground, which carries the irrigation water, and this pipe extends for approximately one-eighth of a mile. The towers holding the pipe in the air are some distance apart. Cables are located under the pipe to make a tress system which supports the pipe between the towers. These cables are the lowest point on the system between the towers. Pospisil testified he measured the distance between a cable and the ground to be 8 feet 9 inches, but it is clear that during irrigation, the towers sink into the ground several inches. This obviously lowers the distances from the cable to the ground, and Vavra testified that he could not drive even his pickup under the irrigation system while it was operating because of this lowered height.

After the extension of the irrigation system's use into the south property, the system covers approximately three-fourths of the circle rather than one-half when used only on the north property, and thereby, the appellees are able to irrigate approximately 24.6 acres of the south property. The diagrams in evidence show that the system pivots on a center point slightly to the north of the east end of the property line between the north and south properties. When in operation, the irrigation system pivots counterclockwise across the south property from its north edge. When it first enters the south property from the north, the

system extends west across the easement and thereby irrigates that area. As the system rotates in a counterclockwise direction, it continually travels over some part of the easement area. Eventually, the system reaches near the east edge of the south property, at which point it extends approximately due south of the pivot point. At that point, it has irrigated all of the south property it can irrigate, and it reverses direction and returns to the north property by traveling back across the south property in a clockwise path.

As the above description and the evidence presented indicate, the irrigation system cannot make a complete circle, primarily because Kovanda does not own the east half of the southwest quarter, Vavra does. This necessitates running the irrigation system both ways around approximately three-fourths of a circle. The system is a type that cannot be moved without irrigating the land as it moves, but the speed at which it travels and the amount of water applied can be increased or decreased as the speed of rotation is decreased and increased. Pospisil testified that the system takes approximately 2½ hours at its top speed to circle in a counterclockwise direction from the easement to the point at which it stops and returns by going clockwise. The system usually returns at 20 percent of its top speed, taking approximately 16 to 20 hours to go the one-fourth pivot needed to return to the north property.

Thus, the heaviest irrigation is done when the system returns in the clockwise direction. Pospisil testified that the slow speed soaks the ground "real well." He admitted that because the system has to run both ways, it "overwater[s]" the area, and that the trail gets muddier than it would if the system could make a complete circle and not rewater the land so quickly. He also testified that it takes a four-wheel-drive vehicle to drive on the easement after it has been watered and that a two-wheel-drive vehicle would probably get stuck. He further admitted that a tractor, cultivator, planter, disc, or sprayer, all farm implements the appellants need to farm the east property, cannot travel across the easement during or after the system has irrigated the south property. He also admitted that the system makes tracks several inches deep where the towers travel. Vavra testified that neither of his pickups fit underneath the pivot while it runs across the

easement and that he has been stuck in the mud a number of times when the trail was wet from irrigating the south property because both of his pickups are two-wheel drive. Pospisil testified that a pickup can drive under the system, but Vavra testified that one of his pickups that has a stockrack on it which he regularly uses cannot go under the system. He also testified that his other pickup will not fit under the system either.

During the time the appellees were altering the south property to be irrigated by the system, the appellees clearly violated the appellants' easement rights by piling trees and dirt upon it; by discing it; and at times, by actually farming the easement area. Vavra also clearly violated the appellees' rights as owners of the servient estate by parking a truck upon the easement. This prevented the appellees from running the system over the easement area. Neither side alleged or prayed for damages for these past wrongs, and the trial court enjoined this type of abuse. Neither side appeals from that part of the trial court's order. Consequently, we shall not summarize these activities, except to the extent it bears on the use of the easement, because such evidence is irrelevant to the issues of this appeal.

After initially trying to farm the easement area, the appellees allowed an uncultivated path approximately 30 feet on the easement area to become packed by travel. The appellees commenced to use that trail as a means of access to their equipment located at the center of the irrigation system. The system still traveled on and across the trail. As it pivoted, the system would be almost directly on the trail along its length as it entered the south property. As the system pivoted south and returned, it remained across some part of the trail.

The length of the irrigation season depends upon the weather, but usually goes from May to August. Pospisil testified that it takes approximately 1 week for the system to irrigate all the land it covers. It does not travel constantly during the season. Pospisil's testimony would establish that the land is irrigated approximately 10 times during a farming season. The system operates across the trail 18 to 20 hours of each irrigation cycle.

The irrigation system broke down or became "stuck" because the ground was so muddy on several occasions, and it stood across the easement for 7 to 8 days each time. Further, Pospisil

sometimes left the system sitting across the easement for 2 to 3 days before having it retrace its path. This meant the system could be across the easement for 4 to 5 days at a time during the irrigation cycle.

Pospisil admitted that the trail would get muddy after the irrigation system had crossed it. He also agreed that the appellants could not get to their land to farm it when the system was irrigating the south property. Pospisil further agreed that a farmer must fertilize, water, and spray at certain times only and that a failure to do so will affect the yield. Vavra testified to several instances in which he found he could not get across the easement to farm or to take care of livestock he kept on the east property. The appellees never denied the appellants' claim that the use of the system interfered with or obstructed the appellants' use of the easement. There is no claim that the appellants have changed their use of the trail or significantly changed their activities on the east property in such a manner as to change or increase the frequency or nature of their need to use the easement.

There was some testimony about whether Turkey Creek could be crossed with trucks or machinery, and the parties disagreed on that point. The totality of the testimony clearly establishes that crossing the creek is not a viable option because of the depth of the creek and its steep banks.

The appellants argued that the appellees' irrigation system interfered with their easement in several respects. First, the system crossed the trail for several hours to several days while irrigating the south property, and Vavra could not pass underneath with his pickup or other machinery. Second, the system's operation made the trail muddy to the point that it was impassable because he had only two-wheel-drive pickups. Third, the system would occasionally break down and stand across the easement for several days at a time in such instances. Fourth, the appellees disced and plowed the easement in more than one farming season and actually planted crops on it during one season.

The record is clear that the parties have been fighting over the use and effect of the easement since Kovanda bought the south property. They were very acrimonious toward each other, but as we have indicated, most of these disputes are simply past history which is largely irrelevant to the issue now before this court. The

appellees filed a petition praying for a temporary restraining order, temporary injunction, and permanent injunction enjoining the appellants from interfering with their operation of the irrigation system. The appellants filed an answer and cross-petition seeking a temporary restraining order, temporary injunction, and permanent injunction enjoining the appellees from obstructing their use of the easement. The matter came for trial on January 10, 2000.

On March 27, 2000, the trial court issued a signed "Memorandum Finding," which was followed by an order entered on April 4. The significant relevant findings and conclusions of law contained in the memorandum were (1) that the appellants hold an easement, but the law gives the appellees the right to use the easement "so long as Plaintiffs' use is reasonable and does not interfere with the Defendants' reasonable use thereof"; (2) that the appellants may cross over the south property, "so long as their use is reasonable and does not interfere with Plaintiffs' reasonable use"; (3) that on its face, the appellees' operation of the irrigation system over the appellants' easement appeared to be reasonable; and (4) that the court considered the evidence and concluded that during the approximately 127-day irrigation season, the system operated approximately every 12 days, on average, and that the easement would be wet for 5 days and then dry for 7 to 10 days.

The trial court cited the appellants' claim that they had been prevented from spraying twice and concluded that "Defendants' right [to use the easement] is subject to Plaintiffs' reasonable right to use the pivot system" and that the appellants had the burden to prove that they could not have crossed the easement during the 10-day dry period or that they could not have made the crossing during "a critical time" and further that such a time period was the proximate cause of some damage. The court went on to address the appellants' claim that they "lost" two calves when the appellants were unable to cross the easement, but it found that they failed to prove what specifically caused the calves' deaths or that any denied use of the easement was the proximate cause. The court also found that the appellees could cross the easement at any time by foot or by a "three or four wheeler . . . vehicle common[ly] used in irrigation fields."

The trial court further observed:

The following observations are such that the Court, being a rural court, believes that it may consider. Even if considered, they do not seem to be critical.

If wheat were planted on [the east property], there is little chance of conflict because wheat is planted in September and harvested in July. Wheat stubble is not good grazing material.

If corn or milo is planted on those acres, it is likely that the parties' crop season would coincide. Defendants might, in this particular case, want to pasture their harvested bean stalks in July and August but would usually have other stalks available if they plant beans. See exhibit # 3. That exhibit also shows that the cattle herd would not always be located in an area where it would be convenient to use Defendants' right of ingress for checking on the herd.

In the order, the trial court found that the appellants failed to prove that the operation of the irrigation system was unreasonable under the circumstances. Accordingly, the trial court ordered (1) that the appellants were enjoined from obstructing the irrigation system from crossing the easement; (2) that the appellees were enjoined from obstructing the easement by pushing up dirt or other material, discing the easement, planting thereover, or parking the system thereover; and (3) that the appellees were to pay all of the court costs of the litigation. The trial court also found that the appellants had failed to adequately establish proximate causation for any monetary damages.

The appellants subsequently perfected this appeal.

ASSIGNMENTS OF ERROR

The appellants allege the trial court erred in (1) failing to find that the irrigation system unreasonably obstructed the use of the easement, (2) failing to award the appellants a permanent injunction preventing the appellees from obstructing the easement, and (3) failing to award the appellants monetary damages for losses incurred from the obstruction of the easement.

[1] In regard to the third assignment of error, we observe that the appellants did not plead or pray for an award of damages. In the absence of appropriate pleadings seeking and justifying an

award, a trial court cannot err by failing to award such relief. *One Pacific Place v. H.T.I. Corp.*, 6 Neb. App. 62, 569 N.W.2d 251 (1997) (relief should be confined to that prayed for and that justified by averments of pleadings; pleadings before trial court at time of decision form issues for that decision). We will therefore not further consider the third assignment of error.

STANDARD OF REVIEW

[2] “An action for injunction sounds in equity. . . . On appeal from an equity action, the appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.” (Citations omitted.) *White v. Board of Regents*, 260 Neb. 26, 33, 614 N.W.2d 330, 336 (2000).

ANALYSIS

The appellees cite *Shamblen v. Great Lakes Pipe Line Co.*, 158 Neb. 752, 64 N.W.2d 728 (1954), for the proposition that “[a]n easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property right of the owner.” Brief for appellees at 7. We have thoroughly read that case and do not find that language or any statement reasonably close to it therein. *Shamblen* involved the owner of real estate who sued the easement holder for damages allegedly caused by the easement holder’s installing a pipeline. Recovery was sought under the easement holder’s promise to pay damages, and the case did not consider the relative rights of the parties except under the terms of the contract. It contains no authority helpful to the resolution of the case at hand.

The appellees also cite and rely upon *Drieth v. Dormer*, 148 Neb. 422, 27 N.W.2d 843 (1947), in which the owner of the servient estate was not held in contempt for flooding the area of a prescriptive easement for a road. *Drieth* so held because the owner of the land was held to have the right to irrigate his land and the waste water interfering with the easement was found to flow naturally and in the usual course of drainage from the irrigation. *Drieth* held that the easement for travel was clearly subject to the burden of being made soft from the waste water

draining from irrigation. The easement in that case was a prescriptive easement, and the issue turned upon the rights that the easement holder acquired by prescription. The easement in this case is in writing, and as the authority cited below holds, the rights of the parties are determined by the words in the easement grant.

[3,4] We believe the following excerpt summarizes the applicable rules:

The owner of the servient estate and the owner of the dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other, and should exercise that degree of care and use which a just consideration for the rights of the other demands. . . . [U]se by both must be permitted in accordance with their interests. *So long as the dominant estate receives all of the uses that it bargained for and is entitled to under the easement, equity will not restrict the free and full utilization of the servient estate.*

Unless he expressly agrees to the contrary, the owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the owner of the dominant estate cannot interfere with this use.

(Emphasis supplied.) 28A C.J.S. *Easements* § 165(a) at 380 (1996). This authority clearly teaches that the court must first determine what right the easement holder received and that then the owner of the servient property can do anything with the land that does not interfere with those rights. These rules apply to rights-of-way, and this authority states:

[A]n owner whose land is burdened with a right of way, unless he has expressly agreed to the contrary, may use the land over which the way passes in any manner which does not materially impair or unreasonably interfere with its use as a way.

. . . However, the use of the servient owner must be reasonable and not such as will injure, impair, or obstruct the enjoyment of the way by the grantee or subject him to extra labor and expense in keeping it in repair; and the owner of

the way may restrict such use of it by the owner of the servient tenement as is inconsistent with the enjoyment of the easement.

28A C.J.S., *supra*, § 165(b) at 383-84.

When Kovanda purchased the south property, it was unirrigated and farmed as dryland only. The appellees clearly changed and altered the use of the land after Kovanda purchased it. "The owner of the servient estate cannot make any alterations in his property materially interfering with the enjoyment of the easement. . . . The owner of the easement has no obligation to accommodate the servient owner's wrongful alteration of the easement's character." 28A C.J.S., *supra*, § 175 at 393.

[5,6] The appellants' easement was created by a specific grant. The effect of that grant is clear. The Nebraska Supreme Court has recognized the rights created by such a grant: "[T]he extent of an easement created by such a conveyance is fixed by the conveyance and the meaning thereof is to be found in its language construed in the light of relevant circumstances. Restatement, Property, § 482 . . . § 483[.]" *Bors v. McGowan*, 159 Neb. 790, 799, 68 N.W.2d 596, 602 (1955). "The possessor of land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.'" *Id.* In the case at hand, the trial court concluded as a matter of law that the "Defendants may cross over Plaintiffs' land so long as their use is reasonable and does not interfere with Plaintiffs' reasonable use." We believe the above-quoted authority shows that the trial court erred in the latter part of its above-quoted legal conclusion. While the appellants' use of their easement must be reasonable, its use is not limited because of any interference with the appellees' use of their land. Stated another way, the appellants' use of their easement, according to its terms, is dominant over the appellees' use of the servient tenement.

[7] "One who purchases land burdened with an open and visible easement is charged with notice of the same, and the estate he purchases is servient to the easement." *Johnson v. Mays*, 216 Neb. 890, 896, 346 N.W.2d 401, 405 (1984).

An easement is usually defined as a right in the owner of one parcel of land, by reason of such ownership, to use

the land of another for a special purpose not inconsistent with the general property right of the owner. . . . The owner of the easement may make use of it only for the special purpose that gave rise to the easement itself.

(Citation omitted.) *Paloucek v. Adams*, 153 Neb. 744, 747, 45 N.W.2d 895, 897 (1951).

[8] While no case in this jurisdiction has answered this question directly, several cases hold that the property owner's use must bow to the easement holder's legitimate use of the property consistent with the easement's purpose. "The servient owner of land subject to an easement may make such use of it as he sees fit, subject only to the right of the dominant owner of the easement to use it for the purposes out of which the right arose." *Jurgensen v. Ainscow*, 155 Neb. 701, 710, 53 N.W.2d 196, 201 (1952) (involving prescriptive easement). Accord *Hopkins v. Hill*, 160 Neb. 29, 68 N.W.2d 678 (1955) (prescriptive easement). "The servient owner may make any use of it that he cares to make so long as he does not interfere with the rights of the dominant owner of the easement." *Paloucek*, 153 Neb. at 747, 45 N.W.2d at 897. See, also, *Nemaha Nat. Resources Dist. v. Village of Adams*, 207 Neb. 827, 301 N.W.2d 346 (1981) (holding that generally grant of easement over land does not preclude grantor from using land in any manner which does not unreasonably interfere with special use for which easement was acquired).

In *Graves v. Gerber*, 208 Neb. 209, 302 N.W.2d 717 (1981), the plaintiff had an easement to use part of the defendant's driveway for ingress and egress to a garage on the plaintiff's property. After the defendants erected a fence on the driveway—in which they left a 16-foot gap for plaintiff—the plaintiff's use of the easement was possible, but more difficult. The *Graves* court affirmed the trial court's order requiring the defendant to remove the fence as an unreasonable obstruction to the plaintiff's easement. The servient estate owner (defendant) argued that the easement holder (plaintiff) had access to the garage in question through the alley as well as via the easement, but this argument was ignored in favor of enforcement of the easement via the driveway. In our case, the trial court suggested that the appellants plant wheat on their land, which in the trial court's opinion would have the effect of modifying the appellants' need

for access to their land to a time of the year when the appellees' irrigation needs would not interfere with the appellants' need for access. Given the Nebraska Supreme Court's reaction to the servient estate owner's argument in *Graves*, this holding is clearly in error.

[9] In *Paloucek*, *supra*, the Nebraska Supreme Court affirmed the trial court's order requiring the servient landowner to allow the dominant landowner to bring in machinery to maintain the drainage ditch for which the dominant owner owned an easement. *Paloucek* stated that the servient landowner could not deny the right to enter and use the land found to be within the scope of the easement. The court would not allow the servient owner to fence the land so as to interfere with or defeat the easement. Specifically, the *Paloucek* court stated that the servient landowner "may farm or pasture the land subject to the easement, but such use is necessarily subject to the right of [the owner of the easement] to operate and maintain the ditch." 153 Neb. at 747, 45 N.W.2d at 897.

In this case, we find that the use of the irrigation system clearly interferes with and obstructs the appellants in the use of their easement. The written easement grants the appellants the right of ingress and egress over the north 30 feet of what we have called the south property by any mode of transportation desired by the appellants, including all farm machinery and equipment. That right is not limited by any use the appellees might develop on their real estate; rather, the appellees' use of the south property is limited by the appellants' reasonable use of the easement. This is contrary to the trial court's conclusion that the appellees can use their real estate for any farming purpose they desire. There is no suggestion that the appellants were using their real estate in an unreasonable manner by raising the crops or keeping livestock on the east property.

The record clearly shows that the appellees have blocked the easement area by having the irrigation system thereon and by having the system cross the easement area when the height of that system interferes with the appellants' travel. This conduct will continue to interfere with the appellants' obtaining access to their land by any mode of transportation the appellants might reasonably use to farm their land. It is clear that irrigating the

easement area, or part of it, to the extent that the appellants cannot drive across it with any reasonable mode of transportation or equipment they desire in the use of their land is an unreasonable interference with the language of the easement grant. The appellants have the right to do so at all reasonable times for the activities in which they engage on their land. The appellees' use of the south property since the tree and fence line were removed therefore violated the appellants' easement. As presently existing, it is doubtful if the appellees can irrigate the south property without interfering with the appellees' use of their easement, at least as the evidence shows the appellees have operated the system since 1995. Of course, parking a pickup on the easement by the appellants is not a reasonable use, as would be true of any act of the appellants which is not for the purposes specified in the easement.

CONCLUSION

For the reasons stated, we modify the order of the trial court and find that the appellees should be enjoined from operating the center-pivot irrigation system or otherwise farming their land in such a manner as to interfere with the appellants' use of their 30-foot easement access and that the costs of these proceedings should be taxed to the appellees.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
RICKY L. COX, APPELLANT.
632 N.W.2d 807

Filed August 28, 2001. No. A-00-1047.

1. **Final Orders: Speedy Trial: Pretrial Procedure.** A ruling on a motion to discharge under the speedy trial statute is a final, appealable order.
2. **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.
3. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four

factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to a finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded with directions to dismiss.

Arthur C. Toogood, Adams County Public Defender, for appellant.

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

HANNON, INBODY, and MOORE, Judges.

PER CURIAM.

INTRODUCTION

Ricky L. Cox appeals the denial of his motion for discharge based upon the State's alleged failure to provide him with a speedy trial in violation of his statutory and constitutional rights. For the reasons set forth, we reverse, and remand with directions to dismiss.

STATEMENT OF FACTS

On August 4, 1999, a complaint was filed in Adams County Court charging Cox with two counts of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). On September 9, a hearing was held in the county court, at which time Cox waived a preliminary hearing and was bound over to the district court. Cox was remanded to the custody of the Adams County sheriff until the bond, which had been previously ordered, was posted.

On November 4, 1999, the Adams County District Court filed an order to show cause why the case should not be dismissed since the information was not filed within 30 days of the bindover, see Rules of Dist. Ct. of 10th Jud. Dist. 10-17 (rev. 2000), and gave the State 7 days to show good cause by affidavit and motion why the case should not be dismissed without

prejudice. The State responded by filing a motion to extend the filing deadline and an affidavit in which the State set forth that the deadline for filing the instant case was on the same day as the county attorney's office would be moving to new offices, that the county attorney's office had been preparing to move for 7 days prior to the filing deadline, and that "the next arraignment date given by the court is for December 20, 1999 and by filing the cases the state [sic] would lose 5 weeks on the 6 months calculations prior to the arraignment." The State requested that the filing deadline be extended to December 1. Although there is nothing in our record establishing the disposition of this motion, the record does reflect that an information was filed in Adams County District Court on December 2 charging Cox with two counts of first degree sexual assault. Additionally, the record reflects that on or about November 11, Cox was released from jail upon posting bond.

On December 16, 1999, Cox filed a motion for discovery, which was granted by the district court on December 20. A jury trial was scheduled to begin on June 5, 2000; however, on May 31, Cox appeared before the district court and waived his right to a jury trial and requested a bench trial. When asked if the trial could be held on June 12, defense counsel agreed, and the bench trial was set for that date.

On June 9, 2000, Cox filed a motion for discharge based upon the alleged denial of his right to a speedy trial. On September 6, the district court denied the motion for discharge, finding:

The jury trial was set within six (6) months as required by statute. The Court deems the defendant's counsel to have requested a continuance when he appeared in Court five (5) days prior to jury term and waived a jury. Counsel knew at that time that the case would have to be continued to accommodate a trial to the Court. The Court set this case on June 12, 2000, the first available date after the jury term for trial to the bench. The defendant's counsel by waiving jury five (5) days prior to the trial in effect was requesting a continuance of the trial to accommodate his strategical decision to try the case to a Judge. This amounted to a continuance caused by defense counsel.

Cox then timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Cox contends that both his constitutional and statutory right to a speedy trial have been violated.

STANDARD OF REVIEW

[1] A ruling on a motion to discharge under the speedy trial statute is a final, appealable order. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Rieger*, 8 Neb. App. 20, 588 N.W.2d 206 (1999).

[2] 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. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000).

DISCUSSION

Statutory Right to Speedy Trial.

Cox's first assigned error is that the district court erred in denying his motion for discharge based upon the violation of his statutory right to a speedy trial.

Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that a defendant be tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. See, also, *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Applying § 29-1207 and its 6-month statutory period to the instant case, Cox was entitled to be brought to trial by June 2, 2000, unless certain periods could be excluded under § 29-1207(4).

The first excludable period arose from Cox's motion for discovery. Section 29-1207(4)(a) provides, in part, that the 6 months allowed to try a defendant is extended by the period of time from filing until disposition of pretrial motions of the defendant. Cox's discovery motion was filed on December 16, 1999, and the district court granted the motion on December 20. Thus, under § 29-1207(4)(a), 4 days could be properly excluded under § 29-1207(4), and Cox was now entitled to be brought to trial by June 6, 2000.

A jury trial was scheduled to commence on June 5, 2000; however, on May 31, just 5 days before the jury trial was to commence, Cox appeared before the district court for the purpose of

waiving his right to a jury trial in favor of a bench trial. The district court accommodated Cox in setting the matter for a bench trial. This continuance falls within the time periods excluded for speedy trial computations under § 29-1207(4)(b), which provides for "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." Consequently, the district court's denial of Cox's motion for discharge based upon his statutory right to a speedy trial was not clearly erroneous.

Constitutional Right to Speedy Trial.

Cox also contends that the district court erred in denying his motion for discharge based upon the violation of his constitutional right to a speedy trial. Cox bases this argument on the following facts: On September 9, 1999, Cox waived a preliminary hearing and was bound over to the district court; however, an information was not filed until December 2. On November 4, the district court filed an order to show cause why the case should not be dismissed, since the information was not filed within 30 days of the bindover, and gave the State 7 days to show good cause. The State responded by filing an affidavit in which the State set forth that the deadline for filing the instant case was on the same day as the county attorney's office would be moving to new offices, that the county attorney's office had been preparing to move for 7 days prior to the filing deadline, and that "the next arraignment date given by the court is for December 20, 1999 and by filing the cases the state [sic] would lose 5 weeks on the 6 months calculations prior to the arraignment." Thus, the question presented is whether a defendant's constitutional right to a speedy trial may be violated by the State's deliberate postponement of the filing of an information for the admitted purpose of circumventing the right to a speedy trial.

[3] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000). This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id.* None of these four

factors standing alone is a necessary or sufficient condition to a finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *Id.*

Applying the balancing factors to the instant case, the State did not file an information against Cox for 12 weeks following the preliminary hearing. During approximately 9 weeks of this period, Cox was incarcerated and was not released on bond until on or about November 11, 1999, and Cox timely asserted his rights. The factor which we find most compelling is the reason for the delay which was the State's admission that the State delayed filing the information against Cox for 2 months in order to avoid losing 5 weeks on the 6-month statutory speedy trial calculation. Because of the State's own admission that it delayed filing the information against Cox in order to avoid starting the 6-month speedy trial clock which caused prejudice to Cox in that he remained incarcerated for more than a 2-month period during which time there was not an information filed against him, we find that Cox's constitutional right to a speedy trial was violated.

CONCLUSION

Although we have found that the district court's denial of Cox's motion for discharge based upon his statutory right to a speedy trial was not clearly erroneous, the district court erred in failing to grant Cox's motion for discharge based upon the State's violation of Cox's constitutional right to a speedy trial. Consequently, the decision of the district court is reversed, and the cause is remanded to the district court with directions to dismiss the information against Cox.

REVERSED AND REMANDED WITH
DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V.
STEPHEN C. FLESNER, APPELLANT.
632 N.W.2d 403

Filed August 28, 2001. No. A-00-1252.

1. **Criminal Law: Statutes.** Where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding.

2. **Constitutional Law: Right to Counsel: Drunk Driving: Prior Convictions.** The only statutory procedure for challenging a prior driving under the influence conviction offered for purposes of enhancement is that set forth in Neb. Rev. Stat. § 60-6,196(3) (Supp. 1999), which permits only a first-tier challenge based upon denial of the Sixth Amendment right to counsel.
3. **Constitutional Law: Criminal Law: Drunk Driving: Prior Convictions.** There is no procedure in Nebraska for asserting second-tier challenges as to prior plea-based driving under the influence convictions, and thus, unless such a procedure is constitutionally mandated, it is unauthorized and therefore unavailable under Nebraska criminal procedure.

Appeal from the District Court for Pierce County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Pierce County, PHILIP R. RILEY, Judge. Judgment of District Court affirmed.

Rodney W. Smith, of The Law Offices of Rodney W. Smith, P.C., for appellant.

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

IRWIN, Chief Judge, and SIEVERS and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

Stephen C. Flesner appeals his conviction for third-offense driving under the influence (DUI), contending that the Pierce County District Court erred in affirming the use of a prior conviction for enhancement purposes. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On March 1, 2000, a complaint was filed in Pierce County Court charging Flesner with third-offense DUI, in violation of Neb. Rev. Stat. § 60-6,196 (Supp. 1999). Flesner was convicted of DUI, and an enhancement hearing was held on August 9, 2000.

At the hearing, the State offered exhibit 1, a certified copy of Flesner's 1996 Pierce County DUI conviction in case No. CR96-171, and exhibit 2, a certified copy of Flesner's 1999 Antelope County DUI conviction in case No. CR99-34. The defense offered exhibit 3, a journal entry in case No. CR96-171 filed on April 6, 1999, by the Pierce County Court in which the

court found that Flesner's DUI conviction in that case was not suitable for enhancement purposes because the taking of Flesner's plea did not satisfy the requirements of *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). The county court found that Flesner's conviction was "invalid and void and that the judgment of conviction is herewith set aside." Flesner argued that since the conviction in case No. CR96-171 had been set aside, it was not appropriate to use that conviction for enhancement purposes. The county court judge disagreed, stating that "I don't think that was an appropriate order in . . . case number 96-171 Pierce County, Nebraska. I don't think there was any basis for the Court making an order like that. . . . The judgement clearly was not a void judgement. Nor was it ever voided."

The county court found that both exhibits 1 and 2 represented valid proof of prior DUI convictions. Flesner was then sentenced for third-offense DUI to 120 days in jail and a \$600 fine, and his driving privileges were suspended for 15 years. Flesner appealed to the Pierce County District Court, which affirmed his conviction and sentence. Flesner has timely appealed to this court.

ASSIGNMENT OF ERROR

On appeal, Flesner contends that the district court erred in affirming the county court's determination that a prior DUI conviction was suitable for enhancement purposes.

ANALYSIS

Flesner contends that the district court erred in affirming the county court's determination that Flesner's 1996 DUI conviction in case No. CR96-171 was suitable for enhancement purposes. Although Flesner concedes that "[a] proceeding for separate relief ceased to be the approved method of challenging an invalid judgment of conviction" following the Nebraska Supreme Court's decision in *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999), he suggests that the collateral attack of his conviction in case No. CR96-171 which resulted in the county court's April 1999 judgment purporting to "void" his conviction was permissible because it preceded the Nebraska Supreme Court's ruling in *Louthan, supra*. Brief for appellant at 7-8. Thus, Flesner claims that the county court's order was correct at the time that it was entered pursuant to *State v.*

LeGrand, 249 Neb. 1, 541 N.W.2d 380 (1995), which was the law in effect at that time and which was later overruled by *Louthan*, *supra*.

[1-3] The flaw in Flesner's argument is that it disregards the rationale for the Supreme Court's holding in *Louthan* and its overruling of *LeGrand*, *supra*. As discussed in *Louthan*, 257 Neb. at 186, 595 N.W.2d at 925, "where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding." The only statutory procedure for challenging a prior DUI conviction offered for purposes of enhancement is that set forth in § 60-6,196(3), which permits only a first-tier challenge based upon denial of the Sixth Amendment right to counsel. *Id.* There is no procedure in Nebraska for asserting second-tier challenges as to prior plea-based DUI convictions, and thus, unless such a procedure is constitutionally mandated, it "'is unauthorized and, therefore, unavailable under Nebraska criminal procedure.'" *Louthan*, 257 Neb. at 186, 595 N.W.2d at 925. The court held that the due process requirements of both the state and federal Constitutions are satisfied by the right of direct appeal from a plea-based DUI conviction and the procedure set forth in § 60-6,196(3), which permits a defendant to challenge the validity of a prior DUI conviction offered for purposes of enhancement on the ground that it was obtained in violation of the defendant's Sixth Amendment right to counsel.

Because no statutory procedure exists for second-tier challenges to prior plea-based DUI convictions, such procedures are unavailable under Nebraska criminal procedure, and Flesner's attempt to collaterally attack his 1996 DUI conviction via a separate proceeding was not proper. Because Flesner's attempt to collaterally attack his 1996 DUI conviction was not authorized by Nebraska criminal procedure, the Pierce County Court did not have a proper motion before it, and its order purportedly voiding Flesner's conviction is without effect.

Finally, we note that exhibits 1 and 2 are valid proof of prior DUI convictions for the purposes of enhancement, in accordance with the requirement that the State prove in the current proceedings that at the time of the prior convictions, the defendant had counsel or validly waived counsel. *Louthan*, *supra*.

CONCLUSION

In sum, there is not now, nor was there in April 1999, any statutory authority for the county court to enter the judgment purportedly “voiding” Flesner’s DUI conviction in case No. CR96-171. Consequently, said judgment was itself void and the district court did not err in using Flesner’s April 1999 conviction for enhancement purposes. Therefore, the decision of the district court affirming the decision of the county court is affirmed.

AFFIRMED.

Theresa M. Lawson, Appellee, v.
Wayne Pass, Appellant.
633 N.W.2d 129

Filed September 4, 2001. No. A-00-512.

1. **Pleadings: Waiver: Appeal and Error.** Under Neb. Rev. Stat. § 25-808 (Reissue 1995), a defendant’s failure to timely object waives any error based upon a defect in a case caption.
2. **Child Support: Rules of the Supreme Court.** A court may consider earning capacity in lieu of a parent’s actual, present income and may include factors such as work history, education, occupational skills, and job opportunities in determining that parent’s total monthly income used in the basic net income and support calculation worksheet found in the Nebraska Child Support Guidelines.
3. **Child Support.** In determining the amount of a retroactive child support award, a trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children.
4. _____. Circumstances may exist so that a noncustodial parent lacks the ability to pay retroactive child support and meet current obligations.
5. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines provide that a parent’s support, child care, and health care obligation shall not reduce his or her net income below the minimum subsistence limitation set by those guidelines as periodically revised.
6. **Modification of Decree: Child Support: Rules of the Supreme Court.** All orders for child support, including modifications, must include a completed basic net income and support calculation worksheet from the Nebraska Child Support Guidelines.
7. **Divorce: Minors: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement.
8. **Child Support: Rules of the Supreme Court: Judges: Parties: Records.** A trial judge must use the Nebraska Child Support Guidelines and complete the requisite worksheets to determine a child support obligation, but the parties themselves should endeavor to create a complete record by supplying their completed worksheets.

9. **Child Support: Attorney Fees: Bankruptcy.** A trial court may not attempt to characterize attorney fees as a form of child support not dischargeable in bankruptcy because dischargeability is a question of federal law and not state law.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed in part, reversed in part, and in part vacated and remanded for further proceedings.

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

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

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

The father of a 7-year-old daughter born out of wedlock appeals the Douglas County District Court's paternity decree ordering him to pay retroactive child support in the amount of \$20,945, calculated at \$295 per month, which he is to pay at the rate of \$100 a month until he eliminates the arrearage. In attacking the decree, the father contests the propriety of the mother's bringing this action for support because she is not a real party in interest. He asserts that the trial court failed to complete the child support worksheets which justify the award. He further asserts that it was improper for the court to characterize an award of attorney fees for the mother as child support in order to make the award thereof nondischargeable in bankruptcy. The judge's failure to complete the child support worksheets, among other reasons, causes us to reverse, and remand portions of the decree. We affirm and vacate other portions of the decree.

I. FACTUAL BACKGROUND

Tiffany C. Pass was born to Theresa M. Lawson on April 1, 1994. Wayne Pass admitted paternity and was listed as the father on Tiffany's birth certificate. At the time Tiffany was born, Theresa was living with Wayne in Omaha, Nebraska, but they kept their finances separate. Theresa claims she owned a home, but Wayne says she was renting a home. In either event, Wayne did not dispute that Theresa alone paid the housing expense.

Wayne claims that he and Theresa lived together continuously for the first 3 years after Tiffany's birth, but Theresa challenges this claim, stating that they lived together "[o]ff and on."

Theresa was about 33 years old and Wayne was about 36 years old at the time of Tiffany's birth, and the highest level of education either Theresa or Wayne attained was a high school diploma. During the first few years of Tiffany's life, Theresa worked full time at a job which did not allow her time off to care for Tiffany, but the job did provide medical insurance for Tiffany. Theresa earned \$26,176 in 1994, \$27,154 in 1995, \$28,688.58 in 1996, and \$30,973 in 1997. Wayne was a painter with about 10 years' experience when Tiffany was born. During the first 3 years of Tiffany's life, he was self-employed while starting a painting business. He testified that he earned \$8,000 to \$10,000 annually in 1994, 1995, and 1996. Wayne claims his earnings were reduced during these years because Tiffany was frequently ill, and he often cared for her as Theresa could not freely leave work. However, Theresa disputes that Wayne shouldered much of the child-care responsibility at this time. Theresa claims that she usually dropped Tiffany off at Theresa's mother's house on her way to work and picked Tiffany up at the end of her workday. During this period, Wayne provided an unspecified amount of money for Tiffany's clothes and cash for Theresa. In 1994, he painted the interior of a house Theresa had bought and then sold 7 months later, in 1995, for a \$4,000 profit.

From early 1998 through early 2000, when Tiffany was 4 to 5 years old, Wayne lived with Theresa "[o]ff and on." In late 1997, Wayne began to work full time as a painter of commercial and residential buildings for the Lund Company, earning \$10 an hour. He testified that he earned about \$20,000 in 1997. His 1998 tax return shows that he earned \$21,436 that year. In 1998, Theresa earned \$35,867, according to her tax return. However, in December, Theresa began a new job as an insurance clerk for Omaha Psychiatric Associates, although her previous job paid more. Theresa made this change because her previous employer was going to transfer her to another department requiring her to work nights and other hours incompatible with Tiffany's child-care needs. Theresa is paid \$10 an hour and earned \$21,883 in 1999, according to her tax return. Wayne testified that he earned

\$10 an hour, or about \$20,000, in 1999. His March 3, 2000, earnings statement from the Lund Company showed that he was being paid \$11.25 an hour in 2000.

This earnings statement for a 2-week period shows that \$100 was withheld from Wayne's check for "Child Support." The "year to date" column for deductions shows that \$400 had been withheld from Wayne's pay in 2000, but there is no other evidence how often this deduction is taken. And while the record is otherwise silent on this matter, the inference is clear that this child support is for a child other than Tiffany, as the only undisputed evidence of Wayne's monetary support of Tiffany was a \$50 payment in June 1999. Wayne testified that his offers to provide monetary support after he moved from Theresa's home in 1997 were often spurned by Theresa due to her jealousy of his relationships with other women. However, there is no evidence of the amount he offered or Theresa accepted, except for the \$50 payment in June 1999, which Theresa agreed that she received.

II. PROCEDURAL BACKGROUND

Theresa filed a paternity action against Wayne in Douglas County District Court on May 11, 1999. Theresa sought child support on behalf of Tiffany, in a sum to be determined pursuant to the Nebraska Child Support Guidelines and applied retroactively to the date of Tiffany's birth. She also sought reasonable attorney fees. In his answer, Wayne admitted paternity, but disputed that the court should award retroactive child support because he alleged that he regularly made support payments in the past. Wayne's counsel conceded at oral argument in this court that retroactive support is the law generally applied in a paternity case.

Although the record does not include a petition filed by the State on Tiffany's behalf, it does contain Wayne's demurrer to a petition dated February 9, 2000, by the State. In this demurrer, Wayne referenced Theresa's action against him in the same court and asked that the State's petition be dismissed. On February 15, Wayne filed a motion to stay proceedings, alleging that Theresa was not the real party in interest and that she lacked standing to bring this action because she had made an assignment to the State concerning payments for Tiffany. Wayne

prayed that the court stay these proceedings pending resolution of the action involving the State. On March 10, the State filed a motion to intervene in Theresa's action against Wayne, alleging that Tiffany was receiving medicaid. A trial docket entry dated March 16, 2000, shows that the court deemed Wayne's motion to stay proceedings moot and granted the State's motion to intervene in Theresa's case.

Trial was held on Theresa's petition on March 22, 2000. The record shows that Theresa and Wayne stipulated that custody and visitation were not at issue. They further stipulated that "child support has been agreed to pursuant to the Nebraska child support guidelines in the sum of 295 dollars." The parties agreed that the retroactivity of the child support was an issue to be decided, but that the stipulated amount of \$295 per month was applicable only to future child support owed. However, both parties failed to submit a basic net income and support calculation worksheet supporting the figure of \$295 per month as Tiffany's future child support. Wayne and Theresa further agreed that he would pay half of any child-care expenses incurred by Theresa, on Tiffany's behalf, while Theresa is employed or obtaining training or education necessary to obtain a job or enhance her earning potential. Wayne agreed to maintain life insurance to ensure the child support obligation. He agreed to maintain health insurance on behalf of Tiffany and contribute 50 percent for payment of Tiffany's noncovered medical and dental expenses. There is no written stipulation in the record, as we have only the oral statements of counsel. The issues decided by the trial court were whether Wayne's child support obligation would be applied retroactively to the date of Tiffany's birth, the amount of such retroactive child support, and whether Wayne would be responsible for Theresa's attorney fees.

Theresa introduced evidence that her net monthly income is \$1,250, that monthly living expenses total \$1,945 for her and Tiffany, and that she receives financial assistance from her family to make ends meet. Wayne introduced evidence at trial that his biweekly gross pay is \$900. His earnings statement shows that Wayne's net pay for a 2-week period was \$561.95, but that figure does not take into account the increased premium he will pay in the future to provide Tiffany with medical and dental

insurance. At the end of the trial, the court questioned, but did not receive an answer, regarding whether the State would be reimbursed for medicaid payments made on Tiffany's behalf.

Ruling from the bench, the trial court opined that Wayne is a very healthy individual who did not testify to any physical or mental ailment precluding full-time employment. The trial court concluded from Wayne's testimony that the first time he held a steady job was in 1997, that he was currently 43 years old, and that he did not believe that he had failed to meet his parental financial obligations because Theresa "had a good job."

The trial court ordered Wayne to pay child support retroactive to the date of Tiffany's birth, using the sum of \$295 per month for 71 months to arrive at a total of \$20,945. The arrearage was to be paid at the rate of \$100 per month. The court's later written order provided that Wayne pay Theresa's counsel \$750 in attorney fees as "a liability in the nature of support," which the court intended to be nondischargeable in bankruptcy. Wayne testified that he filed a chapter 7 bankruptcy petition on March 22, 2000, but he expressly waived any stay from such filing for this paternity case. Wayne timely filed his appeal of the trial court's decree.

III. ASSIGNMENTS OF ERROR

Wayne's assignments of error are that the trial court erred in (1) finding that the cause of action for child support belongs to the mother, rather than to the child; (2) awarding retroactive child support; (3) failing to complete a basic net income and support calculation worksheet with respect to awarding retroactive child support; and (4) attempting to disguise an award of attorney fees as child support.

IV. STANDARD OF REVIEW

The standard of review of an appellate court in child support cases is de novo on the record. *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000). While a paternity action is one at law, the award of child support in such an action is equitable in nature. *Weaver v. Compton*, 8 Neb. App. 961, 605 N.W.2d 478 (2000).

On questions of law, an appellate court has an independent obligation to reach the correct conclusion. *Morrill County v. Darsaklis*, 7 Neb. App. 489, 584 N.W.2d 36 (1998). It is well established that the Nebraska Child Support Guidelines are

presumptively applicable in determining child support in cases of children born out of wedlock. *Id.* A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion. *Id.* A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from 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 the judicial system. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000).

V. ANALYSIS

1. CAUSE OF ACTION BELONGS TO CHILD

Wayne argues that the real party in interest in this action is Tiffany, not Theresa, and that because the case title included Theresa's name rather than Tiffany's, the wrong party filed the action for recovery of retroactive child support. The case caption simply reads, "Theresa M. Lawson v. Wayne Pass." In the body of the petition, Theresa sought child support from Wayne, without stating that she was acting on Tiffany's behalf. However, in the prayer portion of Theresa's petition, she requested that Wayne be required to pay "[c]hild support on behalf of the minor child."

Before the trial herein, Wayne filed a demurrer in the other case on the Douglas County District Court docket in which the State was apparently suing him for support of Tiffany. The petition in that case is not in this record, but Wayne's demurrer is, and the sole ground for the demurrer is the pendency of the instant action which he says also seeks to establish paternity. He asked that the court sustain his demurrer and dismiss the State's petition. Our record is silent on what action, if any, was taken on Wayne's demurrer. On February 15, 2000, Wayne filed a motion to stay proceedings in this case, alleging that Theresa had assigned her rights relating to Tiffany to the State and that therefore, she was not the real party in interest and lacked standing to maintain these proceedings. After a hearing on Wayne's motion, held March 16, the court made a trial docket entry in which the court granted the State leave to intervene in Theresa's petition and deemed Wayne's motion to stay proceedings moot.

At trial, as part of Wayne's counsel's relevancy objection to Theresa's counsel's line of questioning of Wayne regarding the financial support he could prove that he provided Tiffany, Wayne's counsel objected that Theresa's petition did not properly name Tiffany as the plaintiff. The trial court overruled the objection, agreeing with Theresa's counsel's argument that Wayne waived this objection by failing to raise it in his answer or in a demurrer. Further, the court noted that it could allow Theresa to amend the case title and that the amendment would take only seconds to do so, but such an amendment was not done.

[1] Neb. Rev. Stat. § 25-806 (Reissue 1995) provides, in relevant part, that a defendant may demur to a petition when it appears on its face that there is a defect of parties, plaintiff, or defendant. Moreover, Neb. Rev. Stat. § 25-808 (Reissue 1995) provides in part: "When any of the defects enumerated in section 25-806 do not appear upon the face of the petition, the objection may be taken by answer, and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same." These statutes were applied in *Professional Collection Service v. Coble*, 200 Neb. 683, 684, 264 N.W.2d 686, 687 (1978), where the court said that the "defendant's failure to timely object waived any error based on the defect in the caption." The defendant in *Coble* failed to object prior to trial that there was such defect, thereby waiving his objection. Wayne now alleges a defect of parties in this case which appeared on the face of the petition. Thus, he should have demurred on that basis to preserve the matter—but he did not. Therefore, he waived the objection that Theresa was not the proper party in interest to bring this action for child support against him.

2. AWARD OF RETROACTIVE CHILD SUPPORT

Wayne's counsel conceded at oral argument that in a paternity case, the law is that child support is retroactive. A father must support a child born out of wedlock "to the same extent and in the same manner as the father of a child born in lawful wedlock." Neb. Rev. Stat. § 43-1402 (Reissue 1998). See, *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995); *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993). The error argued is that the trial court was wrong in awarding

retroactive child support at the rate of \$295 per month, back to the first day of the month after Tiffany was born, that is, May 1, 1994. Wayne was ordered to repay the \$20,945 the court determined he owed in retroactive child support at the rate of \$100 a month. Clearly, retroactivity is the law; therefore, the question boils down to whether a proper amount was awarded.

[2] It is “‘entirely appropriate to use the guidelines in determining the amount of retroactive support to award a child born out of wedlock.’” *Weaver v. Compton*, 8 Neb. App. 961, 966, 605 N.W.2d 478, 483 (2000), quoting *Sylvis v. Walling*, *supra*. The guidelines provided by the Supreme Court pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998) for the establishment of child support obligations are the polestar for this case. When determining the amount of child support to be paid by a parent, the court must consider the earning capacity of each parent and apply the Nebraska Child Support Guidelines. *Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999). Paragraph D of the guidelines provides that a court may consider earning capacity in lieu of a parent’s actual, present income and may include factors such as work history, education, occupational skills, and job opportunities in determining that parent’s total monthly income used in the basic net income and support calculation worksheet found in the Nebraska Child Support Guidelines.

The parties orally stipulated to \$295 per month “pursuant to the Nebraska child support guidelines” and agreed at oral argument in this case that such stipulation was intended for the future only. And, while the trial court used \$295 per month retroactively, there is no finding that this was done because of the stipulation, because that was the right amount calculated under the guidelines using actual earnings, or because it was based on earning capacity. In short, we do not know, although the trial court should tell us, why it used \$295 per month for the retroactive support. There are no child support worksheets to guide our review, a matter to which we return later.

(a) Ability to Meet Current Obligations

[3] Wayne cites a child support modification case where we held that it was an abuse of discretion for a trial court to award

retroactive child support when the evidence revealed that the obligated parent lacked the ability to pay the \$13,884 awarded and still meet current obligations. *Cooper v. Cooper*, *supra*. In *Cooper*, we noted that “[i]n determining the amount of a child support award, this court has consistently held that the trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children.” 8 Neb. App. at 537-38, 598 N.W.2d at 478, quoting *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998).

[4] We extended this rule to retroactive child support awards and found that “the ability to pay is a paramount factor.” *Cooper v. Cooper*, 8 Neb. App. at 538, 598 N.W.2d at 478. However, *Cooper* addresses a modification of a divorce decree rather than child support ordered in a paternity decree. Additionally, the Supreme Court has now said that absent equities to the contrary, the rule should generally be that the modification of a child support order is applied retroactively to the first day of the month following the filing date of the application for modification. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). *Riggs* also says that circumstances may exist so that a noncustodial parent lacks the ability to pay retroactive child support and meet current obligations. However, neither *Riggs* nor *Cooper* makes it totally clear whether such a finding means that no retroactive support should be awarded or that the court should devise a payment plan as was attempted here. Additionally, *Cooper* was a modification of divorce support order, and whether the doctrine under discussion applies in a paternity setting was not decided. Nonetheless, Wayne has failed to provide us with evidence of his current obligations beyond what we can glean off of his March 3, 2000, Lund Company earnings statement and the company’s benefits summary sheet showing the amount of medical and dental insurance premiums he will have to pay when he adds Tiffany to his policy. Thus, while we acknowledge the holdings of *Riggs* and *Cooper*, this evidentiary record does not support the conclusion that under *Riggs* and *Cooper*, Wayne should be relieved of all retroactive child support, even if we were to hold that the *Cooper* doctrine applies to the retroactive portion of child support in a paternity case—a matter we do not decide. Therefore, on this

record, we find that the trial court did not abuse its discretion by ordering Wayne to pay retroactive child support. The amount ordered, however, remains another matter.

(b) Net Monthly Income Below
Basic Subsistence Limitation

[5] Wayne claims that the court's order will reduce his net monthly income to \$696, below the minimum subsistence limitation defined by the Nebraska Child Support Guidelines. Paragraph R of the guidelines presently provides:

A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of \$716 net monthly for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2)

The minimum net monthly income for one person was set at \$687, but was increased to \$696 in a March 15, 2000, amendment (1 week before trial). The figure was amended again on April 18, 2001, to the current figure of \$716.

Based upon Wayne's testimony, and his earnings statement showing that he is paid \$11.25 an hour and works a 40-hour week, we determine his monthly gross income to be \$1,950 (40 hours $\times$ 52 weeks $\times$ \$11.25 $\div$ 12). On a monthly basis, Wayne will pay \$270.86 for income taxes, \$115.22 for Social Security, \$146.62 for medical and dental insurance for Tiffany, and as much as \$216.67 for a child support obligation to a child other than Tiffany (depending on whether this support is \$100 per pay period or \$100 per month, a matter undisclosed by this record). Thus, Wayne's net monthly income could be \$1,200.63 before paying prospective child support of \$295, retroactive child support of \$100, and half of the child-care expenses for Tiffany, which amounts to \$172.50 (derived from Theresa's evidence that she spends \$345 per month on child care). Subtracting these amounts from \$1,200.63 reduces Wayne's available monthly income to \$633.13, less than all of the figures recited above as basic subsistence limitation minimum amounts for net monthly income of a parent ordered to pay child support.

Wayne's contention that the court's order compelling him to pay retroactive child support would impermissibly decrease his net monthly income below the amount considered the basic subsistence minimum limitation amount reported in paragraph R of the Nebraska Child Support Guidelines quite clearly has potential merit—depending on the details of the support for the other child—regardless of which minimum amount for subsistence is used. But so far as we can tell, paragraph R was not considered by the trial court. This is another problem created by the trial court's failure to heed the frequent pleas, admonitions, directions, and direct orders of the appellate courts to "use the worksheets," our next topic.

3. FAILURE OF TRIAL COURT TO PROVIDE WORKSHEET

[6] Most recently in *Stewart v. Stewart*, 9 Neb. App. 431, 434, 613 N.W.2d 486, 489 (2000), we said that paragraph C of the guidelines specifically mandates that "[a]ll orders for child support, including modifications, must include a basic income and support calculation worksheet" from the Nebraska Child Support Guidelines. We pointed out that this requirement has been repeatedly emphasized. See, *id.*; *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994); *Laubscher v. Laubscher*, 8 Neb. App. 648, 599 N.W.2d 853 (1999); *State of behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998); *Becker v. Becker*, 6 Neb. App. 277, 573 N.W.2d 485 (1997). "In short, the trial courts must show the appellate courts, and the parties, that they have 'done the math.'" *Stewart v. Stewart*, 9 Neb. App. at 434, 613 N.W.2d at 489.

[7] In *Stewart*, at least the record contained worksheets from the parties, although the trial court did not do its duty by adopting a worksheet or preparing its own. Here, the parties only orally stipulated that the prospective "child support has been agreed to pursuant to the Nebraska child support guidelines in the sum of 295 dollars." The trial court may have relied on this representation. However, parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000), citing *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991). Although this proposition of law is directed at

divorcing parents of children, it logically extends to parents of children born out of wedlock. But, if Wayne and Theresa did prepare worksheets under the guidelines to arrive at their stipulation, they should have put them in evidence to help create a more complete record to assist the trial court, as well as the appellate courts should an appeal result. The matter is complicated by the fact that although we have Theresa's 1994 through 1999 income tax returns, exhibits showing Theresa's gross monthly income and deductions, and her monthly living expenses, we have only Wayne's 1998 income tax return and one Lund Company earnings statement dated March 3, 2000, from which to deduce his monthly income and deductions, plus an insurance benefits summary providing the figures from which we can calculate the increase in monthly premium Wayne will need to pay to obtain medical and dental insurance for Tiffany. With respect to prospective child support, this is a less than ideal record.

While we are disinclined to do the trial court's work, we are mindful of the inequity to the parties of making them wait longer for the resolution of this matter because the trial court has not done what the higher courts have consistently said must be done—use the worksheets. Nonetheless, from the evidence about the parties' current earnings, we have done our own worksheet and discern that Wayne's prospective child support obligation of \$295 per month is within \$10 per month of what the guidelines would dictate. Considering that the \$295 is slightly above or below what the guidelines would require (depending on what one assumes about how often support for the other child is taken from Wayne's paycheck) and the fact that the parties stipulated to that amount and that no party assigns error to that figure, at least for future child support, as well as the delay and expense for the parties if we were to remand for preparation of a worksheet, we will not disturb the prospective support ordered by the court in reliance on the stipulation.

[8] However, we vacate the trial court's order concerning retroactive support because (1) there are no worksheets to support it and (2) the trial court arbitrarily used the \$295 per week for the entire time since Tiffany's birth without any supporting findings of fact on the record beyond the court's comment that Wayne was "a very healthy looking individual" without any

physical or mental ailments to prevent him from working full time. And while the court's intention may have been to use earning capacity for the entire time period since Tiffany's birth, that was not stated as a finding in the court's decision. Also, the payment of \$100 per month for retroactive support as ordered by the court results in an apparent violation of paragraph R of the guidelines concerning subsistence level. Finally, from the \$100 per month withheld as child support from Wayne's check, there is evidence that Wayne has another court-ordered support obligation which was not considered by the trial court. Thus, under line 2(e) of worksheet 1, a deduction may well be in order before Wayne's support for Tiffany can be calculated. However, we emphasize that on this issue, the parties wholly failed to make an adequate record for the district court or this court. The trial judge must use the guidelines and complete the requisite worksheets to determine a child support obligation, but the parties themselves should endeavor to create a complete record by supplying their completed worksheets. For all of these reasons, we vacate the award of retroactive support, both as to total amount and method of payment, and remand that matter to the trial court.

On remand, the trial court should complete the income and support calculations worksheet required by the guidelines to determine Wayne's retroactive child support obligations and attach it to its new judgment.

4. CHARACTERIZING AWARD OF ATTORNEY FEES AS CHILD SUPPORT

[9] Wayne asserts that in an apparent attempt to prevent attorney fees from being discharged by the U.S. Bankruptcy Court, the trial court directed Theresa's counsel to include language in the paternity decree evidencing the trial court's desire that the \$750 in attorney fees Wayne was ordered to pay be considered a form of child support so as not to be dischargeable in bankruptcy. This has been attempted before. A trial court may not attempt to characterize attorney fees as a form of child support not dischargeable in bankruptcy because dischargeability is a question of federal law and not state law. *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000); citing *In re Kline*, 65

F.3d 749 (8th Cir. 1995); *In re Williams*, 703 F.2d 1055 (8th Cir. 1983). In *Boamah-Wiafe*, we found that the part of the trial court's order stating a conclusion about the dischargeability of an attorney fee award should be stricken. We apply the same proposition of law here. Therefore, the portion of the paternity decree evidencing the court's desire that the attorney fees Wayne is to pay be considered a form of child support which the trial court intends "not be dischargeable in bankruptcy" is hereby stricken and shall be deemed of no force or effect, and obviously not binding on the federal bankruptcy court.

VI. CONCLUSION

We reject Wayne's argument that Theresa was not the real party in interest capable of bringing this support action. We affirm the trial court's order that Wayne pay \$295 per month in prospective child support. However, we find that the trial court erred in awarding retroactive child support in an amount that decreases Wayne's net monthly income below the basic subsistence limitation amount allowed by the Nebraska Child Support Guidelines. We also find that the trial court erred in failing to complete the necessary worksheets in determining Wayne's retroactive child support obligation (since that obligation extends for several years, it may be that several worksheets are necessary for various time periods). Therefore, we reverse, and vacate the court's paternity decree in these matters and remand the cause for the trial court's determination of these matters in a manner consistent with this opinion.

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

RAY HOFFART, APPELLANT, V.
FLEMING COMPANIES, INC., APPELLEE.
634 N.W.2d 37

Filed September 4, 2001. No. A-00-1185.

1. **Workers' Compensation.** Whether a claimant has sustained permanent impairment and the extent of impairment are questions of fact.

2. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court trial judge.
3. **Workers' Compensation.** Travel incident to and reasonably necessary to obtain reasonable medical services is compensable under Neb. Rev. Stat. § 48-120 (Reissue 1998).
4. _____. Pursuant to a doctor's recommendations, the cost of a relocation undertaken to lessen necessary medical treatment, additional injury, and pain are within a liberal definition of medical services under Neb. Rev. Stat. § 48-120 (Reissue 1998), so that the Nebraska Workers' Compensation Act can accomplish its beneficent purposes.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Joseph C. Dowding, of Dowding, Dowding & Dowding, for appellant.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Ray Hoffart appeals an award from the Workers' Compensation Court, arguing that the court erred in awarding a partial permanent impairment rating for his frostbitten foot without considering the effect of cold on his foot. Hoffart also appeals the denial of his request for reimbursement of relocation expenses he incurred in moving to a state with a warmer climate, a permanent move he made upon his doctor's recommendation.

BACKGROUND

In 1997, Hoffart was employed by Fleming Companies, Inc. (Fleming), as a grocery selector in the dry goods department in Fleming's warehouse in Lincoln, Nebraska. On March 25, he traded shifts with a coworker who worked in the freezer department. On that day, Hoffart was wearing the steel-toed tennis shoes he wore every day at his job. Hoffart worked in the freezer from 1 to 6 p.m., when he began experiencing a knifing pain in his right foot which caused him to limp. Hoffart worked the full shift that day, leaving at 9:30 p.m. He had the next day off from work, but

returned on March 27. After an hour of constant, knifing foot pain, a supervisor instructed him to seek medical treatment.

Hoffart's toes and the ball of his right foot had turned black; he was diagnosed with frostbite and treated for a suspected infection. Hoffart's doctor, Dr. Janet Wolfe, referred him to Dr. David Voigt. After Hoffart's first appointment on April 11, 1997, Dr. Voigt wrote a letter to Dr. Wolfe, reporting that Hoffart suffered from a significant cold injury to his great toe and minor cold injury to the other toes and forefoot of his right foot. Dr. Voigt mentioned in the letter that the cold injury might be a permanent condition and that Hoffart must learn to care for a neuropathic foot that would be hypersensitive and painful, especially in cold weather. Hoffart saw Dr. Voigt again on April 18 to have his great, second, and fourth toes debrided. Dr. Voigt wrote another letter to Dr. Wolfe, reporting the treatment he provided and stating that Hoffart's frostbite was healed, but that his toes still felt a bit cold. Dr. Voigt said that he anticipated that Hoffart's condition would improve over time, but that it was possible that Hoffart might never fully recover from the injury.

Hoffart was off work for about 4 weeks and received workers' compensation benefits during that time. When he returned, Hoffart worked full time in the grocery department. He spent about 6 months working in the meat and dairy area where temperatures stay below 50 degrees. Hoffart continued to experience pain he described as a feeling of needles poking into his foot. Every 2 hours, he needed to sit down to relieve the pressure on his foot. For the next 1½ years, Hoffart was assigned to the dry goods area, where he was not exposed to cold temperatures. However, he still needed to frequently sit down.

On December 9, 1998, Hoffart returned to see Dr. Voigt, seeking a permanent release from working in the cold. Hoffart complained that his foot still hurt when exposed to cold temperatures. Dr. Voigt performed arterial Doppler studies to determine the blood flow impairment to Hoffart's right foot. According to Dr. Voigt's history and physical report, he prescribed Procardia XL to increase blood flow to Hoffart's right foot and combat vasospasm. Hoffart saw Dr. Voigt again on January 4, 1999. Dr. Voigt increased Hoffart's Procardia dosage and scheduled an appointment for the next month. If the Procardia proved ineffective, he

would try another blocking agent. Dr. Voigt ended his report by writing that Hoffart might need to move to a warmer climate.

On February 15, 1999, Dr. Voigt provided Hoffart with his requested "impairment rating" in a letter explaining that in arriving at his rating, he consulted the "American Medical Association Guide to the Evaluation of Permanent Impairment." Dr. Voigt mentioned that the arterial Doppler studies showed some improvement in blood flow after Hoffart began using Procardia, but that the blood flow was not normal, indicating that Hoffart suffered a vascular injury as well as a peripheral neural injury. Dr. Voigt found that Hoffart suffered a "class IV" impairment due to the vascular injury. He ultimately opined that Hoffart's foot injury "calculates to be 82% disability." Dr. Voigt wrote that he anticipated that Hoffart would suffer chronic pain, as frostbite causes a progressive vasculitis, and that he would need to take calcium channel blockers the rest of his life. Dr. Voigt stated that Hoffart's permanent physical restriction is avoidance of cold temperatures.

Fleming's insurance company requested that Dr. Scott McMullen assess Hoffart's condition to determine the partial permanent impairment rating for his right foot. Dr. McMullen wrote that he did not believe that Hoffart's pain was related to vascular ischemia, but that a report showing change in vascular status following use of Procardia did exist. Dr. McMullen rated Hoffart's vascular status as "Class I." Dr. McMullen explained that he referred to the same guide used by Dr. Voigt to arrive at a 24-percent impairment rating for Hoffart's right foot.

Dr. Voigt saw Hoffart again in May and June 1999, and discussed the possibility of Hoffart's moving to a warm climate. At the end of the June appointment, Dr. Voigt gave Hoffart a permanent release from working in temperatures below 50 degrees and sent a letter to Hoffart's attorney with his recommendation that Hoffart move to a warm climate. Hoffart stopped working at Fleming in June and moved to North Carolina, where his brother lives. He is employed by Simmons Mattress Company in the shipping department. Hoffart works in a temperate warehouse; however, he still must stop and sit every couple of hours when it becomes uncomfortable for him to walk. Hoffart seeks moving expenses totaling \$1,604.21, which include gas, hotels, and food.

In July 1999, Dr. Chet Paul, Dr. Voigt's colleague, sent a letter to Hoffart concurring with Dr. Voigt's recommendation that Hoffart move to a warmer climate in order to prevent the possibility of ulceration, pain, and loss of digits from his right foot. An independent medical examiner assigned by the Workers' Compensation Court, Dr. Donald Bell, reported in a response form dated July 16 that Hoffart suffered no vascular compromise in a "non-cold" environment. Dr. Bell reported his findings in a letter sent to Fleming's insurance carrier, in which he stated that Hoffart had achieved his maximum medical improvement. In the letter, Dr. Bell wrote that he agreed with Dr. McMullen's assessment that Hoffart suffered only a 24- to 25-percent partial permanent impairment, saying that he believed Hoffart suffered an almost total neurological deficit that was not limiting in the absence of cold exposure. Dr. Bell was deposed February 11, 2000, and explained his reasoning for his partial permanent impairment rating of Hoffart's right foot. Dr. Bell testified that he believed Hoffart suffered vascular impairment, but only in a cold environment. Further, Dr. Bell stated that Hoffart's vascular impairment might not be permanent because his vasospasms in cold environments might cease. Dr. Bell explained that he opted not to test Hoffart in a "pathologic state" using the cold testing Dr. Voigt performed because the testing itself causes a form of injury, plus, he had reviewed Dr. Voigt's test results before arriving at his conclusions.

In response to the reports from Drs. Bell and McMullen, Dr. Voigt stated that his review of the documents revealed that the doctors did not perform any invasive vascular studies or stress vascular studies. Dr. Voigt opined that his studies—in which he placed Hoffart on a treadmill, cooled his leg, and performed Doppler studies—were more reliable and exact in diagnosing vasospastic disease. He concluded that in the absence of these studies, one will not see the injury or reproduce the symptoms the patient reports. Therefore, in Dr. Voigt's opinion, his estimation of disability "stands."

Hoffart filed a petition against Fleming with the Workers' Compensation Court on April 23, 1999. In relevant part, he sought temporary total and/or partial disability, permanent partial and/or total disability, and future medical expenses. A hearing was held February 17, 2000, and the trial judge entered an award

on April 27, finding that Hoffart suffered a "50 percent loss of use of his right foot."

The trial judge further found that Hoffart's move to North Carolina was undertaken to relieve the pain he felt when his right foot was exposed to cold temperatures. However, because the move was not made pursuant to a rehabilitation plan, the judge found that Hoffart's moving expenses were not compensable. The judge also noted that Hoffart had requested payment of the moving expenses under Neb. Rev. Stat. § 48-120 (Reissue 1998), which the judge said provides that the "employer is liable for medical, surgical, and hospital services, appliances, supplies, as and when needed which are required by the nature of the injury and which relieve pain or promote and hasten the employee's restoration to health and employment." The judge concluded that Hoffart made a permanent move after he reached maximum medical recovery and that the move relieved his pain and hastened his restoration to health and continued employment when it was reasonably certain that Hoffart could not continue his employment in Nebraska. Although the judge recognized that the Nebraska Workers' Compensation Act is to be liberally construed, and the purpose of the act is to get the employee back to work and keep the employee at work, the judge found that the expenses of a permanent move are not ongoing medical expenses and are not contemplated within § 48-120.

Fleming appealed the award to the Workers' Compensation Court review panel on May 10, 2000. An order of affirmance, in part, and reversal, in part, on review was entered by the panel on October 16. In addressing Hoffart's cross-appeal, the panel found that the trial judge was not clearly wrong in finding that Hoffart suffered a 50-percent partial permanent disability in his right foot, as evidence exists in the record to support the trial judge's decision. The panel also agreed with the trial judge's finding that reimbursement of moving expenses are not contemplated under § 48-120 and affirmed the decision rejecting the compensability of Hoffart's moving expenses. Hoffart appealed to this court.

ASSIGNMENTS OF ERROR

Hoffart assigns error to the review panel's failure to award an 82-percent partial permanent impairment rating of his frostbitten

right foot. Hoffart also assigns as error the decision that Fleming need not pay his moving expenses for relocation to a warmer climate.

STANDARD OF REVIEW

An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision 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. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *Haro v. Beef America*, 9 Neb. App. 957, 622 N.W.2d 170 (2001).

In determining whether to affirm, modify, reverse, or set aside a judgment of a Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing; the findings of the single judge will not be disturbed on appeal unless clearly wrong. *Guico v. Excel Corp.*, *supra*. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Id.*; *Haro v. Beef America*, *supra*.

ANALYSIS

Partial Permanent Impairment Rating.

Hoffart argues that his partial permanent impairment rating should reflect that in cold weather he suffers a vascular compromise which results in more impairment than present in warm weather. He cites *Kalhorn v. City of Bellevue*, 227 Neb. 880, 420 N.W.2d 713 (1988), which he says advances the proposition that a plaintiff's partial permanent disability benefits should be calculated upon the condition of an employee's injury in its uncorrected state. In *Kalhorn*, an employee injured his eye at work. The employee's damaged lens was replaced by a synthetic intraocular lens implanted to prevent the formation of a cataract that would have robbed the employee of vision. The Workers' Compensation Court based disability benefits upon the employee's uncorrected vision because the lens implant was not fully corrective and created ongoing problems in the form of blurred vision and headaches.

Hoffart says that by moving to a warmer environment, he is simply taking corrective measures, such as “placing a band-aid on his foot” or “glasses on a bad eye.” Brief for appellant at 7. Hoffart argues that his partial permanent disability rating should be based upon the condition of his right foot in a cold environment, in order to avoid “ruling out” from his rating the vascular compromise he experiences in cold temperatures. However, relocation is not the same as medical implantation of a corrective device in the body, and thus, *Kalhorn* does not control the result. In any event, we see the level of permanent impairment as a question of fact, not law.

Reports assessing Hoffart’s impairment of his right foot were provided by Dr. Voigt, Hoffart’s doctor, and by Dr. McMullen, Fleming’s designated physician. Dr. Voigt reported an 82-percent impairment rating of the foot, whereas Dr. McMullen reported a 24-percent rating. After reviewing the reports of the medical experts, the trial judge found that Hoffart suffered a 50-percent “loss of use” of his right foot.

[1] Whether a claimant has sustained permanent impairment and the extent of impairment are questions of fact. See *Crouch v. Goodyear Tire & Rubber Co.*, 255 Neb. 128, 582 N.W.2d 356 (1998). If the record contains evidence to substantiate the factual conclusions reached by the Workers’ Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers’ Compensation Court. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *Haro v. Beef America*, 9 Neb. App. 957, 622 N.W.2d 170 (2001). The findings of the single judge will not be disturbed on appeal unless clearly wrong. *Guico v. Excel Corp.*, *supra*.

[2] Here, the record reveals that the court did not adopt either Dr. Voigt’s or Dr. McMullen’s opinion as to Hoffart’s partial permanent impairment rating of his right foot. The court did not explain why it chose a 50-percent “loss of use” rating. Nonetheless, evidence in the record shows that Dr. Voigt’s 82-percent rating was based upon results from a “cold test” that Dr. McMullen did not use in reaching his 24-percent rating. Dr. Bell, the court-appointed physician, explained in his deposition that although he did not conduct this test either, he took the results of Dr. Voigt’s test into account before deciding that a

24- to 25-percent rating was appropriate. Dr. Bell stated that although Hoffart suffered vascular compromise in a cold environment, that condition might be temporary and that Hoffart did not suffer vascular impairment in a warm environment. Dr. Bell further stated that although an 82-percent rating was appropriate when Hoffart was exposed to cold temperatures, if Hoffart avoided the cold, that rating was "way out of line." Dr. Bell testified that he arrived at the 24- to 25-percent rating because in a warm climate Hoffart suffered no vascular compromise. Based upon our review of the record, we cannot say that the court was clearly wrong in finding that Hoffart suffered a 50-percent "loss of use" of his right foot. Moreover, where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court trial judge. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). There was no error in the trial judge's finding concerning permanent impairment.

Reimbursement of Moving Expenses.

Hoffart contends that the "clear language" of § 48-120 provides that his relocation expenses are compensable. Section 48-120 provides:

The employer shall be liable for all reasonable medical, surgical, and hospital services . . . appliances, supplies, prosthetic devices, and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment

Hoffart argues that his moving expenses should be reimbursed under the Nebraska Workers' Compensation Act because the Supreme Court has consistently held that the terms of the act are to be broadly construed to accomplish the beneficent purpose of the act. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000); *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998).

[3] Hoffart recognizes that the Nebraska appellate courts have not directly addressed whether an injured worker should be reimbursed for the relocation costs of moving to a warmer climate when the relocation is undertaken upon a doctor's

recommendation due to a work injury. However, Hoffart relies upon *Newberry v. Youngs*, 163 Neb. 397, 80 N.W.2d 165 (1956), where the Supreme Court held that under § 48-120, an employer is liable for the costs of travel incident to and reasonably necessary to obtain reasonable medical and hospital services. In *Newberry*, the worker had to travel to medical providers to receive a special shoe to relieve his pain. The court in *Newberry* noted that § 48-120 specifically states that the employer is liable for reasonable medical and hospital services. Therefore, the court held that travel "incident to and reasonably necessary" to obtain those services is compensable. *Id.* at 404, 80 N.W.2d at 170. This rule is now firmly established. Hoffart extrapolates the holding from *Newberry* to his situation. He argues that travel reasonably necessary to obtain medical services should encompass relocation to a warmer environment when the relocation is prescribed by a doctor to relieve pain, hasten the employee's restoration to health and employment, and avoid additional injury which stems from the original injury.

Hoffart also directs our attention to *Koterzina v. Copple Chevrolet*, 1 Neb. App. 1000, 510 N.W.2d 467 (1993), where we ordered reimbursement of construction expenses incurred in making the plaintiff's home handicapped-accessible. We determined that the improvements were an appliance or supply which "relieve pain or promote and hasten the employee's restoration to health and employment." See § 48-120. We also note an instance of obviously liberal construction of the term "devices" under § 48-120 which are compensable when their purpose is to relieve pain. See *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990) (cost of penile implant found compensable as prosthetic device to relieve pain, i.e., mental anguish).

The trial judge noted in his decision here that "[o]ther states have held that a permanent move to a new location are not covered by that state's workers' compensation statute," citing *Stritt v. State Ins. Fund*, 37 Or. App. 893, 588 P.2d 136 (1978). In *Stritt*, the Oregon court refused to award an employee the costs of a permanent move recommended by the employee's doctor. The *Stritt* court stated that under a statute providing reimbursement for medical services, an employee would be entitled to travel expenses required for the employee to undergo a temporary,

medically prescribed course of treatment. An employee would not be entitled to expenses related to making a permanent move, even if the move was occasioned in whole or in part by a compensable injury. *Id.* In so finding, the *Stritt* court distinguished two cases advanced here by Hoffart, *Levenson's Case*, 346 Mass. 508, 194 N.E.2d 103 (1963), and *Clark v. Fedders-Quigan Corp. et al.*, 284 A.D. 430, 131 N.Y.S.2d 575 (1954). The *Stritt* court noted that in these cases, the claimants were advised by doctors to travel to Florida to seasonally alleviate the symptoms of each claimant's compensable injury. The claimants in *Levenson* and *Clark* sought transportation expenses rather than expenses resulting from permanent moves. At oral argument, Fleming's counsel seemed to acknowledge the potential for the compensability of seasonal travel expenses under these cases while maintaining that the permanency of the move here makes the expenses at issue noncompensable. However, it seems readily apparent that in terms of overall cost to the employee, a permanent move to alleviate symptoms is far more economical, and thus more reasonable, than repeated seasonal travel to avoid symptoms of a work-related injury.

Hoffart cites *Wilhelm v. Kern's Inc.*, 713 S.W.2d 67 (Tenn. 1986), where a schizophrenic patient (whose condition was due to a work injury) was "bored" in a Tennessee psychiatric facility and wished to be relocated to a suitable facility in Washington, D.C., where the patient had lived as a college student. The Tennessee Supreme Court denied the patient's request for reimbursement of travel expenses related to the relocation. The court found that under the relevant statute, travel expenses would be compensable only if the travel was "therapeutic in itself" or "necessary to enable the employee to acquire a 'reasonably required' medical, surgical, dental or nursing service." *Id.* at 68. Here, while the act of traveling to North Carolina cannot be seen as therapeutic by itself, the undisputed medical evidence is that relocating to a warmer climate has a number of therapeutic benefits. While denying the travel expenses, the *Wilhelm* court found that the costs of living in a "'half-way house'" in Washington, D.C., were compensable medical or nursing expenses because the plaintiff would need those services due to his condition, regardless of where he lived. *Id.* at

69. In our view, *Wilhelm* is factually a very different case from that before us, but it nonetheless illustrates that we should not ignore the therapeutic purpose of the move, and as previously noted, moving is more economical than seasonal travel.

There are few “pure” relocation cases. In *Decker v. City of West Palm Beach*, 379 So. 2d 1004 (Fla. App. 1980), the claimant sought relocation expenses from Florida to North Carolina, a move he made upon his psychiatrist’s advice. The psychiatrist testified that the move was necessary to treat the claimant’s mixed anxiety depressive neurosis, but the court denied the claimant’s request for relocation expenses. The court stated that there was no showing that a move to North Carolina (where his in-laws were moving) was reasonable or necessary for the claimant’s treatment, even assuming that relocation may be considered remedial treatment. However, *Decker* is not on point because it does not have the causal connection between the claimant’s injury, his symptoms, and the new location that is revealed by the evidence here. Hoffart sustained a cold injury, and Nebraska has cold winters which significantly increase Hoffart’s pain and put him at risk for further injury from cold due to decreased sensitivity and circulation. All of the doctors agree that living in a warm climate will relieve pain and reduce future risk—which makes Hoffart a more functional worker.

The tight causal connection between injury, residual effects of the injury, and a warmer climate, coupled with our duty to liberally construe the Nebraska Workers’ Compensation Act to accomplish its beneficent purpose, *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000), compels us to conclude that the Workers’ Compensation Court erred in finding the moving expenses noncompensable.

[4] In reaching this conclusion, we remember that travel necessary for medical treatment is clearly compensable. Thus, relocation expenses, pursuant to a doctor’s recommendations, in order to lessen necessary medical treatment, additional injury, and pain are within a liberal definition of “medical services” under § 48-120, so that the Nebraska Workers’ Compensation Act can accomplish its beneficent purposes. We have not ignored Fleming’s argument that such an award is the proverbial “slippery slope.” Instead, we have focused on the unique facts

presented by the nature of a cold injury, the resulting pain and susceptibility to additional injury from living in a cold climate, and the undisputed benefit of relocating.

By analogy, the doctors' advice to move and the associated costs seem to be the functional equivalent of a prescription for pain medicine, only here it is only a one-time expense; whereas, traditional pain medicine prescriptions can be lifelong, but nonetheless compensable. Given the undisputed nature of the evidence, the compensability of relocating was essentially a question of law, upon which the trial judge and review panel erred. However, having rejected the compensability of the expenses as a legal matter, the trial judge never reached the factual question of whether the expenses were reasonable. Thus, we reverse the denial of benefits for relocation, but remand the issue to the review panel so that it can order the trial judge to determine, on the record already made, whether the expenses sought to be recovered were reasonable.

ATTORNEY FEES

Hoffart's counsel has moved for an award of attorney fees and has filed a supporting affidavit showing a fee of \$3,675.05. While Hoffart succeeded on his appeal concerning the expense of relocation, he did not succeed with respect to the percentage of impairment awarded. Therefore, we award attorney fees in the amount of \$1,525.

CONCLUSION

The Workers' Compensation Court was not clearly wrong in finding that Hoffart suffered a 50-percent partial permanent impairment rating of his frostbitten right foot. The court erred in finding Hoffart's relocation expenses to North Carolina noncompensable, but the question of the reasonableness of the tendered expenses remains to be addressed by the trial court.

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

STATE OF NEBRASKA, APPELLEE, V.
EUGENE T. BUTLER, APPELLANT.
634 N.W.2d 46

Filed September 11, 2001. No. A-00-881.

1. **Confessions: Miranda Rights: Police Officers and Sheriffs.** *Miranda* safeguards apply whenever a person in custody is subjected to either express questioning or its functional equivalent, and a court may infer questioning has occurred when a police officer asks a person who has made a statement to provide more details.
2. **Criminal Law: Miranda Rights: Police Officers and Sheriffs.** *Miranda* procedures are not meant to preclude law enforcement personnel from performing their traditional investigatory functions, such as general on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the factfinding process.
3. **Pretrial Procedure: Depositions.** A court may order the taking of a deposition when it finds the testimony of the witness (1) may be material or relevant to the issue to be determined at the trial of the offense or (2) may be of assistance to the parties in the preparation of their respective cases.
4. **Pretrial Procedure: Depositions: Proof.** A defendant must present some basis with a factual showing that a deponent's testimony satisfies the conditions of materiality and relevance expressed in Neb. Rev. Stat. § 29-1917(1) (Reissue 1995).
5. **Trial: Evidence: Photographs.** A photograph is admissible in evidence if the subject matter or contents are accurately depicted at a time pertinent to the inquiry and the photograph has probative value as relevant evidence.
6. **Criminal Law: Trial: Juries: Evidence.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
7. **Speedy Trial: Indictments and Informations.** Every person indicted or informed against for any offense shall be brought to trial within 6 months, and such time shall be computed as provided by Neb. Rev. Stat. § 29-1207 (Reissue 1995).
8. **Judgments: Final Orders: Time.** Under Neb. Rev. Stat. § 25-1931 (Reissue 1995), proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within 30 days after the rendition of the judgment or making of the final order.
9. **Homicide: Assault: Intent.** Reasonable and adequate provocation exciting the passion of the defendant and obscuring and disturbing his or her power of reasoning to the extent that he or she acted rashly and from passion, without due deliberation and reflection, rather than from judgment, mitigates an intentional killing. This analysis of provocation mitigating an intentional killing also logically applies to assault cases.
10. **Self-Defense: Intent.** Under Neb. Rev. Stat. § 1409(4)(a) (Reissue 1995), in order to deprive a defendant of the defense of self-defense, the defendant's provocation must be with the intent that the defendant will then cause death or serious bodily injury to the one that the defendant provoked, and it must be all in the same encounter.
11. **Jury Instructions: Appeal and Error.** Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous.

12. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded for a new trial.

James H. Monahan and Maureen K. Monahan, of Monahan & Monahan, for appellant.

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

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Eugene T. Butler appeals his conviction for second degree assault. Butler was accused of stabbing Ronald McCart in the shoulder with a steak knife during a fistfight McCart initiated after Butler accosted McCart's wife, Angie, at a party. Because the trial court erred in its jury instruction concerning self-defense and provocation, we reverse, and remand for a new trial.

FACTUAL BACKGROUND

An annual party called the Blues Festival was held at a cabin at Thomas Lakes in Saunders County, Nebraska, on August 7, 1999. The party attracted as many as 100 people at some time during that day. Butler and a group of friends drove from Omaha to attend the party. McCart and Angie drove from their home in Kansas City, Missouri, to attend the festival with several of their friends who resided at the lake.

That evening, Angie and Jennifer Jones were behind the cabin listening to the band when one of Butler's friends approached them and asked Angie if she would like to meet one of his friends. Angie demurred, and the man left. But about 15 minutes later, he returned with Butler. There is a dispute as to what was said, but the women claim Butler made inappropriate comments and suggestions to Angie, while Butler's friend claims Butler simply spoke to the women in a cordial manner. Angie told McCart about this interaction, and McCart told Butler's friend to quit making

“advances” toward and talking to Angie. Butler apparently was not present when McCart spoke to Butler’s friend.

Shortly after Angie’s brief interaction with Butler, she and Jones decided to leave the party. They walked around the side of the cabin toward their car, which was parked on the adjacent road. The women said that they saw someone in the bushes next to the road and determined that it was Butler. The women allege that after Angie asked him to leave her alone, Butler emerged from the bushes, shouted obscenities at Angie, and threw beer on her. They stated that when Angie threw the beer container back at Butler, he shoved her to the ground. The women said they escaped when a man emerged from the side of the cabin and challenged Butler’s treatment of them. The women ran back to the cabin in order to find McCart and Jones’ boyfriend. Butler retreated, after being chased by a group of men including McCart, to Butler’s uncle’s cabin, which was next door to the cabin where the festival was held. McCart went to his car, removed his sandals, and put on a pair of boots.

While in his uncle’s cabin, Butler picked up a steak knife and put it in his pocket. After about 15 minutes had passed, Butler left his uncle’s cabin and began to walk across the property toward picnic tables located on the edge of his uncle’s lot. At about the property line separating the two lots, McCart tackled Butler from the side. McCart was on top of Butler punching him in the face when Butler stabbed McCart in the side of his shoulder. McCart retreated to a cabin on the other side of the lake, where his wound was dressed. Butler went to his uncle’s cabin to call the police.

When Deputy Sheriff Eric Hummel arrived at Butler’s uncle’s lot, Butler met him in the yard. As Butler reported the beating he had received from McCart, Marc Snyder yelled from a crowd of about 20 to 30 people still gathered at the festival that Butler had stabbed McCart with a knife. Deputy Hummel told Butler to wait there for him while he went to call for “backup.” When Deputy Hummel returned, he asked Butler to continue his statement. Butler said that he took a knife from his uncle’s cabin and that he stabbed McCart in self-defense during their fight. Deputy Hummel arrested Butler for second degree assault, handcuffed him, and placed him in the back of his patrol car.

Several deputies arrived at the scene. Deputy Hummel directed one of them to search the area for the knife used in the assault. Deputy Hummel approached the patrol car and asked Butler about the location of the knife, which Butler described as having a wood or black plastic handle. At no time did Deputy Hummel give *Miranda* warnings to Butler. The deputy assigned to search the area found a black-handled steak knife with the blade stuck in the space between the slats of a picnic table located near the property line on Butler's uncle's lot. There were no visible traces of blood on the knife, and it is not known whether this knife was used to stab McCart. However, the deputy also found bloodstains on the grass within a few feet of the picnic table. Deputy Hummel had sent two other deputies to the cabin where McCart was receiving treatment to interview him and other witnesses to the evening's events. One of the deputies radioed Deputy Hummel to report their findings, and Deputy Hummel instructed them to issue a citation charging McCart with third degree assault. Snyder's wife drove McCart to a hospital for treatment of his wound. McCart later pled guilty to a reduced charge of disturbing the peace.

PROCEDURAL BACKGROUND

The State filed a complaint against Butler in Saunders County Court on August 10, 1999, charging him with second degree assault, a Class IIIA felony. The county court held a preliminary hearing September 29. In its preliminary hearing order of the same date, the court bound Butler over to the district court. On October 1, the State filed an information against Butler in the district court for Saunders County charging him with second degree assault.

Three days later, Butler filed a motion to suppress all statements he made to all officers of the State because the statements were not freely and voluntarily given and because he made them without being informed of his constitutional rights. Testimony at the suppression hearing was that Butler told Deputy Hummel he stabbed McCart in self-defense and gave a description of the knife he used and that after he was formally arrested and handcuffed, he made statements regarding the knife's location. The court overruled the motion to suppress in a journal entry filed March 1, 2000, finding that Butler was not in custody when

Deputy Hummel instructed him to remain where he was after Snyder volunteered from the crowd that Butler stabbed McCart. The court wrote: "There can be no reasonable inference of 'custody' . . . drawn from the circumstances wherein an officer says 'wait here' and then leaves to interview another person." The court also found that preliminary crime scene investigation does not constitute custodial interrogation.

Butler filed a supplemental motion for discovery, specifically requesting the right to depose Snyder. The district court overruled this motion in a journal entry filed March 20, 2000. Butler filed a motion in limine. He requested that the court prohibit the State from making statements, introducing evidence or witnesses, or asking any questions in the jury's presence regarding the steak knife taken at the scene. A hearing on the motion was held May 1. The court sustained Butler's motion with respect to this issue, thereby prohibiting use of the knife in the State's case in chief, unless the defense first raised the subject. The court memorialized its ruling in a journal entry that day.

On May 8, 2000, Butler filed a motion to dismiss the complaint and information against him because he was not granted a speedy trial. In a journal entry filed May 9, the district court overruled this motion, finding that "a minimum of 64 days remain in which defendant can be brought to trial."

Trial was held on May 9, 2000. McCart was not present to testify, nor was his deposition of December 29, 1999, placed in evidence. Snyder testified for the State. He said that he saw several people chasing Butler away from the party. He also said that when Angie told McCart that Butler threw beer on her and shoved her to the ground, McCart went looking for Butler. Snyder testified that he saw the fight between Butler and McCart, including the stabbing, and that he informed Deputy Hummel of the stabbing during the deputy's conversation with Butler.

One of Butler's friends testified that after the fight, he picked up the steak knife Butler used to stab McCart and placed it in the kitchen sink in Butler's uncle's cabin. The deputy who found a steak knife on the picnic table testified that while searching for a weapon, he found a "weapon," which he took into evidence. Butler objected to further questioning on this matter, relying upon the court's previous ruling on his motion in limine. At a

conference outside the jury's presence, the trial court determined that the testimony revealed that Butler armed himself with a steak knife, that a witness viewed the stabbing, and that McCart had been wounded. The court found that it was not unduly prejudicial to Butler for the State to elicit testimony that a steak knife was found near the location of the stabbing. However, the trial court would not allow that knife to be placed in evidence. Nonetheless, the court did allow into evidence a photograph of the steak knife lying on the picnic table where a deputy found it.

At the end of the State's case in chief, Butler moved to dismiss the case on the ground of insufficient evidence. In arguing this point, he cited McCart's failure to testify. The trial court overruled this motion. The trial continued on May 10, 2000. At the close of evidence, the court again overruled Butler's motion to dismiss, made on the ground that if Butler did stab McCart, he did so in self-defense. In response to Butler's argument, the trial judge stated that "we have a real question as to whether or not the force that was used in response to the force that was used in the attack, we have that question of reasonableness, whether it was reasonable for the defendant to use a knife in response to the attack."

At the jury instruction conference, Butler's counsel submitted proposed jury instruction No. 8, addressing the issue of self-defense. In tendering the final jury instructions, the trial court noted that it refused Butler's proposed instruction because the evidence showed that the court should include the "deadly force self-defense instruction." This instruction allowed the jury to consider Butler's provocation of McCart.

On May 10, 2000, the jury returned a verdict finding Butler guilty of second degree assault. The trial court ordered a presentence investigation, and McCart's deposition was included in the presentence investigation report. Butler filed a motion for new trial, and a hearing on the motion was held July 31. The motion for new trial was overruled on August 1. While such a motion is fraught with procedural dangers, see *State v. Nash*, 246 Neb. 1030, 524 N.W.2d 351 (1994), this appeal was filed on August 21 after the sentencing of that day, and thus it is timely. Butler was sentenced to 7 days in jail and 2 years' intensive supervised probation.

ASSIGNMENTS OF ERROR

Butler assigns, restated and reordered, that the trial court erred in failing to (1) suppress a statement he made to law enforcement officers; (2) grant his motion for supplemental discovery; (3) keep certain physical evidence and testimony, to which Butler objected, out of evidence; (4) dismiss the case under the speedy trial statute; (5) dismiss the case at the end of the State's case in chief and at the close of evidence because the State failed to produce all "Res Jestae [sic] Witnesses"; and (6) properly instruct the jury.

Butler also alleges that the judgment and verdict are not sustained by the evidence and are contrary to law, and he assigns error to the court's failure to sustain his motion for new trial. However, Butler did not argue these two assignments of error. Errors that are assigned but not argued will not be addressed by an appellate court, *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000), and we discuss these matters no further.

STANDARD OF REVIEW

The standard of review applicable to a particular assignment of error will be set forth in the discussion of that assignment.

ANALYSIS

Motion to Suppress Statement.

Butler argues that he was in custody when he made statements to Deputy Hummel without the benefit of being advised of his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and that such statements should have been suppressed.

In reviewing a motion to suppress statements to determine whether an individual was "in custody" for purposes of *Miranda*, findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination of whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave is reviewed de novo. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). In *Burdette*, the Nebraska Supreme Court recognized:

The U.S. Supreme Court held in *Miranda*[, *supra*], that in order to safeguard the uncounseled individual's Fifth

Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have the right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation.

259 Neb. at 698-99, 611 N.W.2d at 631.

The *Burdette* court also recognized that the U.S. Supreme Court in *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), set forth the standards governing a state court's determination of when an individual is "in custody." *State v. Burdette*, 259 Neb. at 699, 611 N.W.2d at 632. Two discrete inquiries are essential to the determination: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave. *Id.* The first inquiry is distinctly factual, while the second calls for application of the controlling legal standard to the historical facts. *Id.*

[1] Butler claims that the totality of the circumstances indicate that he was not free to leave the scene after Deputy Hummel heard Snyder say that Butler had stabbed McCart, because Deputy Hummel told Butler to wait on his uncle's lot until Deputy Hummel called for officer support. Under *Thompson v. Keohane*, *supra*, our first inquiry when determining whether Butler was in custody when he admitted to Deputy Hummel that he stabbed McCart is examining the circumstances, including determining whether an interrogation occurred. Deputy Hummel testified that after he called for backup, he returned to where Butler was waiting for him and asked Butler to continue telling him what happened. At that time, Butler admitted to stabbing McCart, but said he did it in self-defense. "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. . . ." *State v. Melton*, 239 Neb. 506, 510, 476 N.W.2d 842, 844 (1991), quoting *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). A court may infer questioning has occurred when a police officer asks a person who has made a statement to provide more details. Although the record does not show what specific questions

Deputy Hummel asked Butler, Deputy Hummel acknowledged at the suppression hearing that during Butler's statement, he probably asked Butler for details. We think the record clearly allows the inference that there was questioning, or at least its functional equivalent, about the allegation that Butler stabbed McCart. Therefore, we turn to whether Butler was in custody at that time.

Deputy Hummel and Butler testified at the suppression hearing that in their own minds, Butler was not then free to leave the scene. However, it is not what is in the minds of the suspect or the officers which is determinative, but, as we said above, whether a reasonable person would have felt at liberty to leave. Deputy Hummel also testified that he did not threaten, deceive, coerce, show his weapon, or arrest Butler, which would, of course, affect Butler's perception of the situation—as well as the “reasonable person's” perception.

In *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000), the court said that police officers are not required to administer *Miranda* warnings to everyone whom they question, or simply because the questioning takes place in a police station, or because the questioned person is one whom the police suspect. See, also, *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest. *State v. Burdette, supra*; *State v. Cody, supra*. We recall that the police were there at Butler's summons, that Butler was not formally placed under arrest, and that he was not handcuffed or at a police station.

[2] The trial court found that there could be no reasonable inference of custody drawn from Deputy Hummel saying “wait here” to Butler. The court also found that Deputy Hummel was conducting a preliminary crime scene investigation, not a custodial interrogation, when he spoke to Butler. The Nebraska Supreme Court has said that *Miranda* procedures are not meant to preclude law enforcement personnel from performing their traditional investigatory functions, such as general on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the factfinding process. *State v. Bennett*, 204 Neb. 28, 281 N.W.2d 216 (1979) (defendant interviewed as material witness at hospital, after he had directed

police to murder victim at scene; defendant was not then viewed as suspect and was not in custody). See *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996) (holding that general on-the-scene questioning as to facts surrounding crime does not constitute custodial interrogation in case where police, who arrived at scene of murder and were greeted by owner of mobile home with news that victim had been shot, had not taken defendant in custody when they asked her for her name and date of birth).

However, Butler argues that once Deputy Hummel learned of the stabbing, he should have advised Butler of his *Miranda* rights because Deputy Hummel should have known that continuing to talk with Butler would likely force him to make an incriminating statement. Butler contends that he was "prodded" into making a statement regarding self-defense by Deputy Hummel's action of stopping the interrogation, calling for "backup," and only continuing the questioning after Snyder's statement that Butler stabbed McCart. Brief for appellant at 16. We take Butler's claim to be that his admission to Deputy Hummel was not voluntary. Whether a statement is voluntary or the result of State coercion or promise is a question of fact. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). Whether a statement, admission, or confession has been freely and voluntarily made depends upon the totality of the circumstances. *State v. Melton*, 239 Neb. 506, 476 N.W.2d 842 (1991). See *State v. Garza*, *supra*. From all the circumstances, including the on-the-scene questioning in response to Butler's call to the police, we find that Butler was not in custody when he admitted stabbing McCart. Therefore, because Butler was not in custody, the admission he made to Deputy Hummel was voluntary.

Motion for Supplemental Discovery.

Butler argues that the trial court abused its discretion in refusing to allow him to depose Snyder because Snyder was the State's chief witness and only "Res Gestae [sic] Witness." We separately address the issue of res gestae witnesses later in our opinion.

[3,4] Unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion in the discovery ruling. *State v.*

Tuttle, 238 Neb. 827, 472 N.W.2d 712 (1991). See *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000). A court may order the taking of a deposition when it finds the testimony of the witness (1) may be material or relevant to the issue to be determined at the trial of the offense or (2) may be of assistance to the parties in the preparation of their respective cases. Neb. Rev. Stat. § 29-1917 (Reissue 1995). A trial court has the discretion to order depositions in criminal cases if the information may affect the outcome of the trial. *State v. Martinez*, 4 Neb. App. 192, 541 N.W.2d 406 (1995). Mere designation of a witness by the State does not establish materiality or relevance of the witness' testimony or its helpfulness in preparation of a criminal case for trial. *State v. Tuttle, supra*. A defendant must present some basis with a factual showing that the deponent's testimony satisfies the conditions of materiality and relevance expressed in § 29-1917(1). *State v. Tuttle, supra*.

Butler failed to explain in his motion for supplemental discovery why deposing Snyder would produce material and relevant evidence, and thus, the trial court did not abuse its discretion in overruling his motion. We further note that although a hearing on this motion took place, and Butler may have presented his reasons for deposing Snyder at that hearing, those proceedings are not in the bill of exceptions. It is incumbent upon the party appealing to present a record which supports the errors assigned. *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998). See *State v. Rubek*, 7 Neb. App. 68, 578 N.W.2d 502 (1998). While little would need to be shown to satisfy the standards set forth above for a deposition of Snyder, on this record, we cannot say that the trial court abused its discretion in denying Butler's request to depose Snyder.

Admission of Evidence/Testimony Regarding Knife.

Butler argues that the trial court improperly allowed a picture of a knife found near the stabbing scene to be entered into evidence when the knife itself had been excluded after a hearing on Butler's motion in limine. Butler asserts that the photograph of a knife that the State did not allege was the knife Butler used to stab McCart was not relevant to the case and that its admission into evidence prejudiced him.

[5] 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. Neb. Rev. Stat. § 27-401 (Reissue 1995). A photograph is admissible in evidence if the subject matter or contents are accurately depicted at a time pertinent to the inquiry and the photograph has probative value as relevant evidence. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). A photograph of a knife which the State does not contend was used to stab McCart is irrelevant evidence because it makes it no more or less probable that Butler stabbed McCart.

[6] In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *Id.*

Trial testimony and evidence established rather overwhelmingly that Butler stabbed McCart. No one testified that this was not how McCart received his wound. Butler's friend testified that he saw Butler leave his uncle's cabin with a steak knife immediately before he was tackled by McCart, and another friend said he saw Butler "pull out" the knife during the fight. Snyder saw Butler stab McCart and testified that when McCart got up and walked away from the fight, he said, "The son of a bitch stabbed me." One of Butler's friends testified that after the fight, he picked up the knife and placed it in the kitchen sink in Butler's uncle's cabin. Photographs of McCart's stab wound were admitted into evidence, and the deputy who took the photographs testified that the wound was about 1 inch wide and between 1 and 2 inches deep. And, of course, Butler admitted stabbing McCart in self-defense when he spoke to Deputy Hummel, evidence which we have already found to have been properly admitted. Which particular knife was used in the stabbing is not of great consequence. Therefore, while admitting into evidence a picture of a steak knife not alleged to be the knife Butler used to stab McCart was error, it did not materially

influence the jury to render a guilty verdict on the charge of second degree assault. The error was harmless.

Speedy Trial Statute.

Butler argues that because after a September 29, 1999, preliminary hearing he was bound over to district court and trial was not held until 8 months later, the case should have been dismissed because he was not given a speedy trial. 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. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

[7,8] Every person indicted or informed against for any offense shall be brought to trial within 6 months, and such time shall be computed as provided by Neb. Rev. Stat. § 29-1207 (Reissue 1995). The denial of a motion to discharge on speedy trial grounds affects a substantial right and, thus, is a final, appealable order. *State v. Meese*, *supra*. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Rieger*, 8 Neb. App. 20, 588 N.W.2d 206 (1999). Once a trial court has overruled a defendant's motion to discharge on speedy trial grounds, the defendant must secure his or her rights to appellate review by filing a timely notice of appeal. *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999). Proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced within 30 days after the rendition of the judgment or making of the final order complained of. *State v. Jacques*, *supra*, citing Neb. Rev. Stat. § 25-1931 (Reissue 1995). See *State v. Rieger*, *supra*.

In *Jacques*, the trial court overruled Jacques' motion to discharge upon speedy trial grounds. The case proceeded to trial. Jacques failed to appeal the court's denial of his motion until after his conviction, more than 30 days after the trial court's order overruling his motion to discharge. The Nebraska Supreme Court held that this court correctly decided that we lacked jurisdiction to address Jacques' speedy trial claim because it was not timely appealed. Here, Butler's motion to dismiss for lack of a speedy trial was overruled by the trial court in a May 9, 2000, hearing and memorialized in a journal entry of the same date. Trial proceeded

on May 9, and the jury returned a guilty verdict on May 10. However, Butler did not appeal the denial of his motion to dismiss within 30 days of May 9. Therefore, we do not have jurisdiction to review Butler's speedy trial claim or his claim that the trial court's findings on the motion were inadequate.

Res Gestae Witnesses (Sufficiency of Evidence).

Butler argues that because the Nebraska Supreme Court requires the State to produce all "Res Gestae [sic] Witnesses" at a criminal trial, the State violated the Confrontation Clause of the Sixth Amendment by not producing McCart at trial, offering no explanation for his absence and not issuing a subpoena for him. Therefore, Butler submits that this case should have been dismissed at the close of the State's case in chief or at the close of all evidence. Butler also contends that because McCart did not testify, a qualified medical expert had to testify that McCart was stabbed.

A res gestae witness is one who, having been at the scene of an incident, can give a firsthand account of what happened. Black's Law Dictionary 1597 (7th ed. 1999). While Butler relies on cases from Michigan to support his argument that all res gestae witnesses must be called by the prosecution to testify, we apply Nebraska law. Nebraska cases decided within the past 10 years refer almost exclusively to res gestae with respect to the admissibility of evidence, particularly excited utterances, see *State v. Sanchez-Lahora*, 9 Neb. App. 621, 616 N.W.2d 810 (2000), and *State v. Martin*, 239 Neb. 339, 476 N.W.2d 536 (1991), or the hearsay exception for medical diagnosis and treatment, see *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994), and *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). We find no recent cases addressing the issue of res gestae witnesses and only a handful that speak of res gestae with respect to evidence of "events at issue." See, *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985); *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981); *State v. Escamilla*, 193 Neb. 503, 227 N.W.2d 852 (1975); *State v. Castor*, 193 Neb. 86, 225 N.W.2d 420 (1975).

The only Nebraska case Butler cites to support his argument is *Johnson v. State*, 88 Neb. 328, 129 N.W. 281 (1911). In *Johnson*,

the trial court found that the evidence created no doubt that the allegation made against the defendant was true. The court said that the *res gestae*, or event at issue, was clearly proved. Thus, testimony from three witnesses whom the State endorsed upon the indictment but did not question was unnecessary. Therefore, the Nebraska Supreme Court found that it was not an abuse of discretion for the trial court to refuse to require the prosecution to call witnesses supposed to be interested in the defense. *Id.* We think the proper view of who does or does not testify is decided by the sufficiency of the evidence. On review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). See *State v. Hiemstra*, 6 Neb. App. 940, 579 N.W.2d 550 (1998).

We find that to the extent that *Johnson* has any application, it is only for the proposition that the evidence, properly admitted, must be sufficient to sustain the conviction. Accordingly, McCart need not have testified because there was sufficient evidence, recounted earlier in this opinion, to establish the “*res gestae*.” Butler’s arguments about the evidence—produced and not produced—are resolved in the context of our well-established rules for appellate review of the sufficiency of the evidence. See *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000) (appellate court reviews evidence most favorably to State, and question is whether any rational trier of fact could have found essential elements of crime beyond reasonable doubt). Without reciting all the evidence again, we find that the evidence, taken as a whole, was sufficient to sustain the conviction.

We do, however, address Butler’s insistence that *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), means that his right to confront his accusers was abridged by the trial court’s failure to require the prosecution to produce McCart at trial. It is hard to imagine a case more distinguishable from the present case than *Sheets*. In *Sheets*, the only evidence sufficient to convict the defendant was an inadmissible, tape-recorded statement from an accomplice who committed suicide shortly after implicating Sheets in a murder. Because the confession of an accomplice which incriminates a criminal defendant is deemed to be inherently unreliable, the statement lacked the particularized

guarantee of trustworthiness necessary to overcome the defendant's confrontation rights. *Id.* Here, we have eyewitness testimony from Snyder, the deputy who photographed McCart's stab wound, Butler's witnesses, and Butler himself, all of which tends to establish that Butler stabbed McCart. Butler's right to confront his accuser was not violated because the victim, McCart, did not testify at trial. (If Butler's argument were correct, all murders would go unpunished because the victims obviously cannot testify.)

Jury Instructions/Self-Defense/Provocation.

Butler argues that the trial court improperly instructed the jury about self-defense by allowing the jury to consider Butler's provocation of McCart, when the evidence did not show provocation. Whether a jury instruction given by a trial court is correct is a question of law. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Smith v. Fire Ins. Exch. of Los Angeles, supra*. The trial court's jury instruction No. 9 on self-defense, apparently derived from NJI2d Crim. 7.3, reads in relevant part that Butler "acted in self defense if: . . . (2) Eugene T. Butler did not provoke Ronald L. McCart to use such force against him with the intent of stabbing Ronald L. McCart in response."

[9] Provocation is usually discussed in Nebraska case law with respect to mitigating what could be a murder conviction to the lesser offense of manslaughter. See, Neb. Rev. Stat. §§ 28-303(1) and 28-305 (Reissue 1995); *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994); *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992); *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991); *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984). In *State v. Lang*, 197 Neb. 47, 246 N.W.2d 608 (1976), an assault case, the court said that the issue of whether there was justifiable provocation was an issue for the jury as the evidence was in conflict. For a killing to be manslaughter, the killing is done upon a sudden quarrel, a legally recognized and sufficient provocation, which causes a reasonable person to lose normal self-control.

See, § 28-305; *State v. Cave, supra*. In determining whether an intentional killing occurred upon a sudden quarrel, the question is whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment. *Id.* Here, the offense is assault, rather than murder. But the analysis of provocation which mitigates an intentional killing logically applies to assault cases as well, given that the core difference between the two crimes is generally whether the victim lives or dies. Butler accosted McCart's wife two times. During the second encounter, he allegedly swore at her, threw beer on her, and shoved her onto the ground. Assuming that McCart was aware of such behavior, it could possibly be adequate provocation to cause McCart to attack Butler in a prosecution of McCart. But, we must keep in mind that McCart is not on trial and that provocation was used by the trial court in connection with Butler's claim of self-defense.

Neb. Rev. Stat. § 28-1409(4)(a) (Reissue 1995) states that the use of deadly force in self-defense is not justifiable if "[t]he actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter." Nebraska is among only a handful of states whose self-defense statute denies the defense if the defendant provokes the victim with the intent to purposely cause death or serious bodily harm to the victim in the same encounter. See, Del. Code Ann. tit. 11, § 464(e)(1) (1995); Me. Rev. Stat. Ann. tit. 17-A, § 108 (West 1999); N.H. Rev. Stat. Ann. § 627:4 (1996); N.J. Stat. Ann. § 2C:3-4 (West 2001); 18 Pa. Cons. Stat. Ann. § 505(b)(2)(I) (West 1998). To date, Nebraska appellate courts have not analyzed § 28-1409(4)(a), but New Jersey and Pennsylvania courts have interpreted the same language in their statutes.

In *State v. Bryant*, 288 N.J. Super. 27, 671 A.2d 1058 (1996), Bryant argued that the lower court erred in instructing the jury about provocation within the self-defense instruction. The court instructed, "'[I]f you find that the defendant, with the purpose of causing death or serious bodily harm to another, provoked or incited the use of force against himself in the same encounter, then the defense [of self-defense] is not available to him.'" *Id.*

at 37, 671 A.2d at 1063. Affirming Bryant's conviction for, among other things, aggravated assault and murder, the appellate court found that the trial court did not err in giving this instruction. The court explained that self-defense is only available to one who acts without fault and a person who provokes an assault cannot escape criminal liability by invoking self-defense as a defense to an injury done to another, citing *State v. Rivers*, 252 N.J. Super. 142, 599 A.2d 558 (1991).

[10] In *Commonwealth v. Samuel*, 527 Pa. 298, 590 A.2d 1245 (1991), the question was whether Samuel forfeited his right to claim self-defense by provoking the fatal encounter. Samuel was asked by his sister to move into her apartment after she asked her estranged husband to move out. Her visibly intoxicated husband showed up unexpectedly, and after a verbal confrontation with his wife, refused to leave. Samuel was present for this exchange, and his handgun was visible. After his wife called the police, the husband went to the bedroom, retrieved a sawed-off shotgun, and confronted his wife in the hallway. Hearing his sister's screams, Samuel left the kitchen after he picked up the gun he had laid on the table, entered the hallway, and pointed his gun at the husband after the husband pointed the shotgun at him. Samuel fatally shot the husband. The trial court found Samuel guilty of voluntary manslaughter, holding that displaying his gun provoked the incidents which followed. Pennsylvania's self-defense statute contains the same language as our § 28-1409(4)(a). The Pennsylvania Supreme Court reversed the conviction because the prosecution failed to prove that Samuel provoked the incident with the intent to cause death or serious bodily injury. The court recounted that Samuel had not pointed the gun at the husband, had not assaulted him, and had not had any physical contact with him and that Samuel fired only after the husband pointed the shotgun, which he had just cocked, at Samuel. The court described the husband upon entry into the living room with the shotgun as the "aggressor" and ruled that as a matter of law, there was no provocation present to deny Samuel the defense of self-defense. *Samuel* strongly illustrates the key point which derives from a careful reading of § 28-1409(4)(a): To deprive a defendant of the defense of self-defense, the defendant's provocation must be with the intent that the defendant will then cause death

or serious bodily injury to the one that the defendant provoked, and it must all be in the same encounter.

On the evidential record before us, even assuming that Butler's actions toward Angie constitute provocation of McCart, the State failed to show that Butler behaved in this manner to provoke McCart into a fight, with the intent of causing McCart's death or serious bodily harm. In short, there is no evidence, absent the wildest speculation, that Butler accosted Angie with the purpose that McCart would be provoked so that Butler could use deadly force to seriously injure or kill McCart. As is apparent from review of the foregoing sentence, exclusion of self-defense by provocation under § 28-1409(4)(a) requires a complex chain of reasoning and behavior by Butler to the effect of "I will do these foul things to Angie so that her husband will attack me so I can then kill or injure him." Given the absence of evidence that Butler or McCart even knew each other, or had previous troubles, coupled with Butler's retreat to the safety of his uncle's property, there is no evidentiary support for allowing the jury to deny Butler the defense of self-defense because of provocation. In short, there was no evidence of that requisite intent on Butler's part.

Additionally, the language of § 28-1409(4)(a) and the facts of this case require that we consider the meaning of the words "in the same encounter." The Pennsylvania Supreme Court in *Commonwealth v. Samuel*, 527 Pa. 298, 590 A.2d 1245 (1991), addressed when an incident of provocation occurs "in the same encounter" in which the defendant was attacked. In *Samuel*, the Pennsylvania Supreme Court concluded that even if Samuel's initial display of his gun when the husband first arrived could be categorized as provocative, the balance between the parties shifted when the husband left the room to retrieve a shotgun. The subsequent confrontation between Samuel and the husband initiated a new sequence of activity in which the husband was the aggressor when he pointed the shotgun at Samuel.

Here, Butler retreated to his uncle's cabin after a group of men, including McCart, chased him from the festival after his second encounter with Angie. Fifteen minutes later, when he left his uncle's cabin and approached the picnic table located on the edge of his uncle's lot, Butler was tackled by McCart. Because of

this undisputed gap in space and time (during which McCart went to his car to put on a pair of boots and then hunted up Butler on the lot owned by Butler's uncle), there is no evidence that the fight started by McCart's tackling Butler was part of "the same encounter" as when Butler earlier accosted Angie. In short, the record fails to contain evidence that any provocation of McCart by Butler occurred in the "same encounter" which is a necessary prerequisite to the concept of denial of self-defense by provocation. And, as in *Samuel*, McCart clearly became the aggressor.

Lesser-Included Offenses.

[11] Butler also assigns error to the trial court's refusal to instruct the jury on attempted second degree assault or third degree assault. Butler claims that the court ruled that if Butler requested a self-defense instruction, that it could not instruct the jury on these lesser offenses. However, the bill of exceptions shows that the court did not say this. Moreover, the record shows that Butler never objected to the court's instruction on second degree assault and never requested an instruction on lesser offenses. Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous. *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). See *State v. George*, 3 Neb. App. 354, 527 N.W.2d 638 (1995). For these reasons, as well as the fact that the law of lesser-included offenses is well established, we do not believe it necessary to discuss these matters further, even though they could be raised at a new trial.

Retrial.

[12] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), citing *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). See *State v. Anderson*,

supra. The evidence was sufficient to sustain the conviction. Thus, the Double Jeopardy Clause does not prevent a retrial.

CONCLUSION

The trial court did not abuse its discretion in overruling Butler's motions to suppress and for supplemental discovery. The speedy trial claim was not properly presented for appellate review. The trial court erred in admitting the photograph of a steak knife which the State did not prove or even contend that Butler used to stab McCart. However, it was harmless error.

The trial court committed reversible error in giving its jury instruction No. 9 on the defense of self-defense by including therein provocation. Because sufficient evidence was adduced to support the guilty verdict, the principles of double jeopardy do not prevent a new trial, which we hereby order.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, v.
LUKE KELLOGG, APPELLANT.
633 N.W.2d 916

Filed September 18, 2001. No. A-00-1204.

1. **Effectiveness of Counsel: Records: Appeal and Error.** While claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto, the determining factor is whether the record is sufficient to adequately review the question.
2. **Convictions: Presentence Reports: Sentences.** When an offender is convicted of a felony, sentence shall not be imposed without a presentence investigation and due consideration thereof, unless it is impractical to do so.
3. **Convictions: Presentence Reports: Waiver.** Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2000) is a mandate upon the sentencing court to obtain and consider a presentence investigation with every felony conviction which is for the benefit of the defendant, but the right may be waived.
4. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
5. **Presentence Reports.** Under Neb. Rev. Stat. § 83-1,105.01 (Reissue 1999), a presentence investigation which the sentencing judge finds inadequate is a predicate to an evaluation by the Nebraska Department of Correctional Services.

6. **Presentence Reports: Waiver.** While there can be a waiver of a felony offender's right to a presentence investigation, it must be done knowingly and voluntarily, which would include advisement by the court of the right being waived.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Sentence vacated, and cause remanded with directions.

Timothy M. Schulz, of Yost, Schafersman, Lamme, Hillis, Mitchell, Schulz & Twidwell, P.C., for appellant.

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

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

This appeal addresses whether a convicted felon can be properly sentenced when a presentence investigation has not been performed.

BACKGROUND

Luke Kellogg was charged in the district court for Dodge County with one count of burglary, a Class III felony, and multiple counts of forgery, Class IV felonies. Kellogg could have been charged as a habitual criminal. As a result of a plea bargain, Kellogg entered a plea of no contest to the burglary charge and guilty to two counts of forgery, with the State forgoing the habitual criminal charge and dismissing two other forgery charges, in a hearing on July 10, 2000. After the trial court accepted the pleas, the following exchange occurred:

[The court:] Now, earlier you had mentioned, [prosecutor], that there was an agreement between the parties for an evaluation. You want to set that on the record again? What's you're [sic] request?

[Prosecutor]: Yes. Your Honor, at this time prior to sentencing the State would request a 90-day evaluation at the Department of Corrections.

THE COURT: [Defense counsel]?

[Defense counsel]: We concur with that request, Your Honor.

THE COURT: Is that correct, Mr. Kellogg?

[Kellogg]: Yes, sir.

THE COURT: The Court will order an evaluation at the Department of Corrections, and the length of that will be an evaluation not to exceed 90 days which, I believe, is according to statute.

Anything else, [defense counsel]?

[Defense counsel]: No, Your Honor.

THE COURT: Anything else, [prosecutor]?

[Prosecutor]: No, Your Honor.

The trial court indicated that an order would be prepared for the evaluation, which would be no longer than 90 days, and that when it was concluded, or close to being concluded, a sentencing date would be set. That concluded the plea hearing with no one ever mentioning "presentence report" or "presentence investigation."

There was no presentence investigation concerning Kellogg. Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2000) provides: "Unless it is impractical to do so, when an offender has been convicted of a felony, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation."

Additionally, Neb. Rev. Stat. § 83-1,105.01 (Reissue 1999), which requires the court to fix the minimum and maximum limits of indeterminate sentences, contains the following provision which forms the basis for the "evaluation" referred to in the quoted exchange between the court and counsel:

(3)(a) When the court is of the opinion that imprisonment may be appropriate but desires *more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report required by section 29-2261*, the court shall commit an offender to the Department of Correctional Services for a period not exceeding ninety days. The department shall conduct a complete study of the offender during that time, inquiring into such matters as his or her previous delinquency or criminal experience, social background, capabilities, and mental, emotional, and physical health and the rehabilitative resources or programs which may be available to suit his or her needs.

(Emphasis supplied.) Section 83-1,105.01(3)(a) then provides that after the evaluation, the offender shall be returned to court for sentencing. The statute also specifies that the court shall be provided with a written report of the results of the study, including recommendations of the Nebraska Department of Correctional Services, and that after receiving the report and recommendations, the court shall proceed to sentence the offender with the term of the sentence running from the date of the original commitment for evaluation.

With these statutes in mind, we return to the record in the instant case which contains another hearing on September 25, 2000, with the judge, the prosecutor, Kellogg, and defense counsel present. The court indicated that it had received the evaluation of the Department of Correctional Services on September 8 and had received on September 22 a motion for continuance from defense counsel. After the court ascertained that defense counsel had reviewed the report of the evaluation, the court heard argument on the motion for continuance. Defense counsel asserted that while doctors in Lincoln had given Kellogg a physical examination during the 90-day evaluation and found multiple sclerosis, they did not look at any of his other medical records or psychological records. Defense counsel suggested Kellogg had bipolar disorder and argued that the evaluation did not address the contents of his previous medical records. The trial judge quite clearly expressed the opinion that there was little concerning Kellogg's psychiatric or physical condition which would impact sentencing, given Kellogg's long history of crime. However, the court ultimately agreed to a continuance of the sentencing for 1 month, although observing that Kellogg was "without question" going to the penal complex.

Sentencing occurred on October 23, 2000, and again there was never any mention by anyone of a presentence report. The "sentencing materials" contain a 6-page "Nebraska Department of Correctional Services Adult Division Classification Study." This has one page of background information, including his prior crimes and a list of chemicals that he does or does not use. Additionally, the evaluation includes the case manager's comment and summary and the psychologist's comment and summary, but no recommendation on sentencing. There are also a

few letters to the judge from friends and relatives arguing that Kellogg should not go to prison. Finally, there is a letter of argument from defense counsel.

The court sentenced Kellogg to 20 months' to 5 years' imprisonment on each of the two counts of forgery. The forgery counts are not involved in this appeal. The court then sentenced Kellogg to 10 to 15 years' imprisonment on the burglary count "at hard labor, Sundays and holidays excepted as to hard labor." The two sentences on the forgeries were to be served concurrently, but consecutive to the burglary sentence. Kellogg appeals.

ASSIGNMENTS OF ERROR

Kellogg contends that his defense counsel was ineffective because (1) counsel did not heed Kellogg's requests to decline the plea offer and proceed to a jury trial and (2) counsel did not request a presentence investigation. Kellogg also contends that the trial court erred in ordering a 90-day evaluation in lieu of a presentence investigation and in imposing an excessive sentence for the burglary.

ANALYSIS

Ineffective Assistance of Counsel.

Kellogg claims that his defense counsel was ineffective in failing to heed Kellogg's requests to decline the plea bargain and proceed to trial. From our review of Kellogg's brief, it is questionable whether the assignment is both assigned and argued, as Nebraska appellate courts require. See *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). In any event, Kellogg's brief concedes that the record does not recount any communication between defense counsel and Kellogg about the decision to accept the plea bargain on the burglary charge. Kellogg acknowledges that we may, therefore, conclude that this claim can only be considered in a postconviction action.

[1] While claims of ineffective assistance of counsel raised for the first time on direct appeal, as this is, do not require dismissal ipso facto, the determining factor is whether the record is sufficient to adequately review the question. *State v. Toof*, 9 Neb. App. 535, 616 N.W.2d 32 (2000). All we have here is an assertion in Kellogg's brief that his counsel failed to heed his requests to try the case. The conclusion that the record is inadequate to review

this claim is obvious. At a minimum, an adequate record would include testimony from counsel and Kellogg about their communications concerning the merits of trial versus acceptance of the plea agreement. Without such evidence, the record is wholly inadequate for appellate review at this time, and thus, the assigned error is without merit in this appeal.

Under this heading of "ineffective assistance of counsel," we also include the second assignment of error that defense counsel did not demand or request that a presentence investigation be completed prior to sentencing. Admittedly, the record does not show any such request or demand by counsel. However, given that Kellogg has a substantial prior record of some consequence, one can readily envision a strategy of choosing a Department of Correctional Services' evaluation and eschewing a presentence report, as a way of obscuring his history from the sentencing judge. Thus, it may be that a strategic decision of counsel was involved in forgoing a presentence investigation, but the record is silent on any such strategy. Accordingly, the record is likewise inadequate to address this claim on the basis of ineffective assistance of counsel. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000) (appellate court gives due deference to trial counsel's strategic decisions). However, our conclusion on this assignment of error does not resolve the question of the lack of a presentence investigation.

Presentence Investigations—Mandatory for Felony Sentencings?

[2] The third assignment of error is that the trial court erred in ordering the 90-day evaluation at the Diagnostic and Evaluation Center of the Department of Correctional Services in lieu of first ordering a presentence investigation. We have previously quoted the seminal statute, § 29-2261(1). That statute, when summarized, provides that when an offender is convicted of a felony, sentence shall not be imposed without a presentence investigation and due consideration thereof, unless it is impractical to do so. The record before us does not reveal anything which would make it impractical to do a presentence investigation before deciding on the sentence for the burglary charge.

The first mention of § 29-2261(1) in the reported decisions is found in *State v. Jackson*, 192 Neb. 39, 218 N.W.2d 430 (1974).

Justice Spencer's succinct opinion in *Jackson* noted that the statute was enacted in 1971; that it makes a written presentence investigation of all felony offenders "mandatory, unless impractical to do so"; and that because such provision was not followed, the sentence in *Jackson* was vacated and the matter remanded "for resentencing according to law." *Id.* at 40-41, 213 N.W.2d at 431. In *State v. Zobel*, 192 Neb. 480, 222 N.W.2d 570 (1974), the court also vacated a sentence with directions to have a presentence investigation prepared and given due consideration, citing § 29-2261. The *Zobel* court, referencing its opinion in *Jackson*, said: "We have recently held that this statute must be complied with." 192 Neb. at 484, 222 N.W.2d at 573.

In *State v. Simants*, 197 Neb. 549, 557, 250 N.W.2d 881, 887 (1977), the court stated that § 29-2261 "requires" a court to order a presentence investigation. See, also, *State v. Cardin*, 194 Neb. 231, 231 N.W.2d 328 (1975). In contrast to the instant case, the defendant in *State v. Bruns*, 200 Neb. 612, 265 N.W.2d 210 (1978), contended that it was improper for the trial court to order a presentence investigation in his misdemeanor case. The court cited § 29-2261 and said: "While the court should not impose sentence in any felony without a presentence investigation, the court is specifically authorized to order a presentence investigation in any case." 200 Neb. at 614, 265 N.W.2d at 211. The court rejected the defendant's argument of being punished by his prior misdeeds and found that it would be a "dereliction of duty" to ignore his three previous assault and battery convictions. *Id.* These four decisions appear to leave little doubt that the trial court must have a presentence investigation before sentencing a felony offender.

[3] However, none of these four cases discuss whether there had been a waiver of the right to a presentence investigation by a defendant so that the defendant was precluded from claiming noncompliance with § 29-2261 as error. The question of waiver is first discussed in *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986), where the defendant pled guilty to one count of escape as a result of her departure from an alcohol treatment program in which she was enrolled while serving a 90-day sentence for various misdemeanor convictions. When the plea on the escape charge was taken, counsel for the defendant suggested

that the court simply review the extensive presentence investigation which had been done for her misdemeanor convictions rather than requiring a new investigation because nothing had changed in the intervening 2 months since the completion of the presentence investigation for the misdemeanors. The court agreed to follow that procedure, but at sentencing, the court specifically asked the defendant and her counsel if they desired to waive her right to have a presentence investigation completed with regard to the escape conviction, to which both responded in the affirmative. (This was not done in Kellogg's case.) On appeal, the defendant assigned error to the sentencing court's failure to obtain a presentence investigation. The Supreme Court quoted the language of § 29-2261 and said that it construed this statute "as a mandate upon the sentencing court to obtain and consider a presentence investigation with every felony conviction." 223 Neb. at 795, 394 N.W.2d at 289. The court further stated that this was for the benefit of the defendant, that the statute gave the defendant a statutory right to a presentence investigation, but that the right "may be waived." *Id.* But, the Supreme Court in *Tolbert* did not hold, except by implication, that there had been a waiver of the investigation which it had described in *State v. Jackson*, 192 Neb. 39, 218 N.W.2d 430 (1974), as "mandatory."

We think it valuable to examine the case cited by the *Tolbert* court as support for the notion that the presentence investigation may be waived, *State v. Hiross*, 211 Neb. 319, 318 N.W.2d 291 (1982). In discussing *Hiross*, the *Tolbert* court said that once Hiross waived the court's offer to provide her with a presentence investigation, Hiross could not later claim error. However, it may be noteworthy that in *Hiross*, the crime at issue was a misdemeanor, whereas § 29-2261 applies only in the event of a felony conviction.

After its discussion of waiver, the *Tolbert* court recounted the availability of the complete presentence investigation done on Tolbert 2 months earlier, noting that in instances of probation revocation, successive and repetitive presentence investigations are not required, citing *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), and *State v. Herzog*, 203 Neb. 195, 277 N.W.2d 705 (1979). The *Tolbert* court then said that the "saving clause" where a presentence investigation is not required in

cases where it would be impractical, meant that a presentence investigation in Tolbert's situation would be needlessly repetitive of the one completed a short time earlier and thus the earlier investigation "satisfied the mandate of § 29-2261." 220 Neb. at 796, 394 N.W.2d at 289.

[4] We see *Tolbert* as teaching that there are two situations in which the presentence investigation mandated by § 29-2261 is not required before a felony sentencing. There is the obvious ground specifically set forth in the statute, i.e., when it is "impractical" to do a presentence investigation. The second is when the defendant waives the right to a presentence investigation, but since there was not an express finding of waiver in *Tolbert*, exactly what a waiver might entail appears somewhat uncertain. Generally, "[a] waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct." *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986).

We have previously quoted the exchange between the court and the attorneys about the 90-day evaluation which, as far as the record reveals, began as a request from the prosecutor to the court, as part of the plea bargain, for "a 90-day evaluation at the Department of Corrections," to which defense counsel responded, "We concur with that request, Your Honor." And while Kellogg verbally assented, the record lacks any showing that Kellogg was aware that a presentence investigation was mandatory before a felony sentencing, as the court in *State v. Jackson*, *supra*, described it, nor does the record show that Kellogg was aware that having such an investigation was his "right" as said by the court in *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986). Accordingly, we cannot find that there was a voluntary and intentional relinquishment of a known right by Kellogg. To assist our analysis, we refer to a criminal defendant's waiver of his or her Sixth Amendment right to counsel and note that in such context, it has been said that "the key inquiry is whether [the defendant] was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel" in determining whether there has been a knowing and intelligent waiver. *State v. Wilson*, 252 Neb. 637, 648, 564 N.W.2d 241, 250 (1997). *Wilson* deals with a constitutional right which is absolutely

critical to the proper functioning of our adversarial criminal justice system, which comes into play before a defendant is ever convicted and sentenced. A presentence investigation does not rise to the same level. Nonetheless, the notion that the record should establish some level of knowledge on the part of the defendant that he or she has a statutory right to a presentence investigation before there can be a waiver only makes sense.

We find no advisement by the court of the right given to Kellogg by § 29-2261 or any other evidence of his understanding that such a right existed. His only involvement, as far as the record reveals, was his perfunctory assent to what counsel told the judge. The fact that a presentence investigation was never even discussed in this entire plea-taking and sentencing process is of no small consequence and also precludes a finding that there was a waiver.

We now address the State's argument that Kellogg waived any right to a presentence investigation at the plea hearing. The State points out that when recounting the agreement for the judge, the prosecutor said that "the State would recommend along with defense counsel that the defendant be sent to the Nebraska Department of Corrections for a 90-day evaluation prior to sentencing." The State also points to a motion made by defense counsel to continue the sentencing date of September 25, 2000. That motion sets forth a number of reasons and factual predicates, including that Kellogg was committed by the court to the Department of Correctional Services for evaluation pursuant to Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2000) and that "the above commitment was done with the agreement of the Defendant and the State to waive a Presentence Investigation and utilize the evaluation to provide the necessary information for sentencing." Defense counsel stated in the motion that "it was believed by the Defendant's counsel that the evaluation would provide the best and most complete information for the use of the parties and the Court in preparation for sentencing." We cannot agree that this shows a waiver. The statement at the plea taking fails to account for the case law making the presentence investigation "mandatory" as well as a right of the defendant—and the record does not reveal the level of knowledge on the part of Kellogg which is typically associated with waivers of

rights by criminal defendants. As for the motion of defense counsel, it is merely counsel's after-the-fact characterization of what has already occurred, which is of little moment when the record does not show a waiver.

Savings Clause—Impracticality.

As has been shown from the cases cited above, the existence of a presentence investigation done shortly before the sentencing at issue has been used to trigger the savings clause of the statute because it is impractical to duplicate what has already been recently done. While there is no other presentence investigation as such in this record, there is the evaluation by the Department of Correctional Services, and we believe we must consider whether it contains information upon the subjects which are mandated by § 29-2261 so that repetition thereof by a separate presentence investigation becomes "impractical."

[5] The evaluation procedure used by the district court is found at § 83-1,105.01(3)(a), and that statute begins with the premise that when the court believes that imprisonment may be appropriate, "but desires more detailed information as a basis for determining the sentence" than has been provided by the presentence report, then the offender may be committed for 90 days for an evaluation by the Department of Correctional Services. Thus, the statute contemplates that the evaluation while the defendant is incarcerated is for the provision of information over and above what is in the presentence report in order to assist the judge in the sentencing decision. In short, under the statute, a presentence investigation, which the judge finds inadequate, is a predicate to an evaluation by the Department of Correctional Services. Thus, in considering "impracticality," an obvious problem is presented when there is no presentence investigation, as here. In any event, § 83-1,105.01 provides that the Department of Correctional Services shall conduct "a complete study of the offender . . . inquiring into such matters as his or her previous delinquency or criminal experience, social background, capabilities, and mental, emotional, and physical health and the rehabilitative resources or programs" available to suit his or her needs. The statute allows the Department of Correctional Services to make recommendations which it deems helpful to the proper resolution.

Section 29-2261(3), providing for presentence investigations, mandates what shall be included, when available: an analysis of the circumstances attending the commission of the crime, the offender's history of delinquency or criminality, physical or mental condition, family situation and background, economic status, education, occupation, and personal habits and "any other matters that the probation officer deems relevant or the court directs to be included." Additionally, all local and state police records and reports are to be included. Finally, if victim statements are not included, then the probation officer is to indicate that he has contacted the victim to no avail. § 29-2261(4)(a).

Thus, with the various statutory requirements of evaluation and presentence investigation in place, we raise the question of whether it could be said that it was "impractical" to order a presentence investigation, as in *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986), i.e., because a presentence investigation would be duplicative of what had already been done in the evaluation. (In asking this question, we must attempt to ignore the fact that the statute which authorizes the evaluation clearly contemplates that the evaluation follows a presentence investigation which the judge finds does not provide adequate information.) In *Tolbert*, there was a 2-month-old presentence investigation from misdemeanor convictions when the matter of the felony sentencing was before the court, and additionally, there was an advisement by the court on the record on the right to a new presentence investigation before the court took the express waiver. The situation in *Tolbert* was markedly different and distinguishable from what is present here. Moreover, we note that the presentence investigation includes a focus on the crime for which sentence is being pronounced, including police reports and victim impact statements, which is not found in the evaluation procedure. Previous delinquency or criminal experience, social background, family situation, economic status, and education are all arguably required in both an evaluation and presentence investigation, but a presentence investigation and a Department of Correctional Services' evaluation are not the same thing.

We have examined the Department of Correctional Services' evaluation of Kellogg and find that it includes the basic information of his previous criminality by listing the offenses, dates, and

dispositions, but no details of those crimes are provided. His family background and use of chemicals is detailed. The evaluation includes a psychologist's assessment as well as an evaluation of the likelihood of success if community-based probation were used. The evaluation includes his intellectual functioning in the bright, normal range of skills according to the "Shipley Hartford Scale." There is no recommendation for sentencing except that if he is placed on probation, he be involved in a drug program.

CONCLUSION

The forgery counts, while not directly involved in this appeal, obviously impact the burglary matter because they reveal additional criminal behavior. Those offenses involved checks taken from his older sister and forged (according to the evaluation) for the purpose of obtaining methamphetamine. The burglary involved the entry into a closed Wendy's restaurant and the removal of a safe containing approximately \$800 in cash and gift certificates. The sentence imposed upon this 22-year-old offender, albeit one who has been previously incarcerated for burglary on one occasion and second degree forgery on another, is a significant sentence, although it is well within the range of the statutory limits. The Department of Correctional Services' evaluation, at six pages, is somewhat superficial, based on our experience of looking at thousands of presentence investigations. The letters to the court included as part of that evaluation include information suggesting that Kellogg has mental illness of some consequence given the range of medications allegedly prescribed for him during his previous incarcerations. For these reasons, putting aside the problem with the evaluation's being a procedure which by statute follows a presentence investigation, we find that the evaluation does not substitute for the presentence investigation or make it "impractical" as in *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986).

[6] Additionally, while there can be a waiver of a felony offender's right to a presentence investigation, it must be done knowingly and voluntarily, which would include advisement by the court of the right being waived. We point out that one of the purposes for a presentence investigation is for use by the appellate courts in the event of an appeal. Showing that the defendant

knows that no investigation would be available to the appellate courts also goes into assessing whether the waiver was knowing and voluntary.

The district court erred in sentencing Kellogg to a term of 10 to 15 years' imprisonment on the burglary charge without having a presentence investigation as required by § 29-2261 and without there being a knowing and voluntary waiver thereof on the record. Therefore, as was done in *State v. Jackson*, 192 Neb. 39, 218 N.W.2d 430 (1974), and *State v. Zobel*, 192 Neb. 480, 222 N.W.2d 570 (1974), we vacate the sentence and remand the cause to the district court for Dodge County with directions to have a presentence investigation completed and to resentence Kellogg on the burglary conviction. Kellogg will obviously remain in prison during this process due to the unappealed sentences on the forgery convictions. We need not address the claim that the sentence imposed for the burglary conviction was excessive due to our remand.

SENTENCE VACATED, AND CAUSE
REMANDED WITH DIRECTIONS.

WILSON P. HILL, APPELLEE, v.
TWYLA J. HILL, APPELLANT.
634 N.W.2d 811

Filed October 2, 2001. No. A-00-867.

1. **Property Division: Alimony: Appeal and Error.** The division of property and the awarding of alimony are matters entrusted to the discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of the trial judge's discretion.
2. **Evidence: Appeal and Error.** In a de novo review on the record, an appellate court reappraises the evidence as presented by the record and reaches independent conclusions from those of the trial court. However, if evidence is in conflict, the appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
4. _____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.

5. _____. In awarding alimony, a court should consider, in addition to specific statutory criteria, the income and earning capacity of each party as well as the general equities of each situation.
6. _____. When a marriage of significant length is linked with a significant difference in income or earning capacity between the parties, an award of alimony is appropriate.
7. **Rules of Evidence.** In all 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.
8. **Evidence: Trial: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
9. **Rules of Evidence: Hearsay: Videotapes.** A videotape may be admissible pursuant to Nebraska's learned treatise exception to the hearsay rule provided that sufficient foundation is laid for its admission.
10. **Rules of Evidence: Hearsay: Expert Witnesses: Testimony.** Pursuant to the language of Nebraska's learned treatise exception to the hearsay rule, a learned treatise is only admissible in conjunction with testimony by an expert witness.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Paul M. Conley for appellant.

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

HANNON, INBODY, and MOORE, Judges.

INBODY, Judge.

INTRODUCTION

Twyla J. Hill appeals from the portion of the order of the Lancaster County District Court dissolving her marriage to Wilson P. Hill which denied her an alimony award. Twyla also claims that the district court erred in excluding from evidence a videotape of a seminar presentation on fibromyalgia.

STATEMENT OF FACTS

Twyla and Wilson were married on March 14, 1977. The parties adopted one child, Julane, who has since reached the age of majority.

In 1979, the parties purchased a home located in Lincoln, Nebraska. In 1989, the parties separated. Twyla and Julane remained in the marital home, and Wilson moved into an

apartment. Julane resided with Twyla at the marital home for nearly 3 years, during which time Wilson paid one-half of the mortgage and provided some monetary support for Julane. Additionally, after moving out of the home, Wilson continued his previous efforts to remodel the home and contributed some of his own money to fund the remodeling. In June 1992, Julane moved in with Wilson, and from that time until November 1999, Wilson provided most of Julane's support except for one 6-month period of time when Julane was in the custody of the Lancaster County Separate Juvenile Court.

On March 9, 2000, Wilson filed a petition for dissolution. Trial in this matter was held on June 29. At the time of trial, Wilson was 48 years old and was unemployed. However, Wilson did not have any medical conditions which prevented him from working, he was actively seeking employment as a cook or chef, and his earning capacity is approximately \$25,000 annually. Wilson had previously worked as an executive chef, earning \$29,500 in 1997. However, Wilson left that employment in March 1998 when he moved to North Carolina to take care of his mother, who was terminally ill.

At the time of trial, Twyla was 50 years old and was employed as a licensed practical nurse earning over \$12 per hour and working 40 hours per week. This equates to an annual income of approximately \$25,000. Twyla also receives health insurance and retirement benefits through her employment. At trial, Twyla testified that she did not expect her employment to continue beyond another 3 or 4 weeks because of a medical condition known as "fibromyalgia chronic fatigue syndrome," which causes her pain, stiffness, and fatigue. Twyla sought to introduce a videotape of a seminar presentation on fibromyalgia. Wilson posed hearsay, foundation, and relevance objections to the exhibit, which objections were sustained by the trial court.

On July 1, 2000, the Lancaster County District Court filed an order dissolving the parties' marriage and denying Twyla's request for alimony. Twyla has timely appealed to this court.

ASSIGNMENTS OF ERROR

On appeal, Twyla claims that the district court erred in failing to award her alimony and in excluding from evidence a videotape of a seminar presentation on fibromyalgia.

ANALYSIS

Alimony.

Twyla's first assigned error is that the district court erred in failing to award her alimony.

[1,2] The division of property and the awarding of alimony are matters entrusted to the discretion of the trial judge and, on appeal, will be reviewed de novo on the record and will be affirmed in the absence of an abuse of the trial judge's discretion. *LaBenz v. LaBenz*, 6 Neb. App. 491, 575 N.W.2d 161 (1998). In a de novo review on the record, an appellate court reappraises the evidence as presented by the record and reaches independent conclusions from those of the trial court. *Id.* However, if evidence is in conflict, the appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

[3,4] In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id.*

[5,6] Factors which should be considered by a court in determining alimony include (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. Neb. Rev. Stat. § 42-365 (Reissue 1998); *Kalkowski v. Kalkowski*, *supra*. In awarding alimony, a court should consider, in addition to specific statutory criteria, the income and earning capacity of each party as well as the general equities of each situation. *Kosiske v. Kosiske*, 8 Neb. App. 694, 600 N.W.2d 840 (1999). When a marriage of significant length is linked with a significant difference in income or earning capacity between the parties, an award of alimony is appropriate. See *Wenger v. Wenger*, 200 Neb. 446, 263 N.W.2d 855 (1978).

In the present case, the evidence reflects a marriage lasting approximately 24 years; however, the parties have been separated for the past 12 years. The only child of the marriage has reached the age of majority. The record establishes that both parties were employed during the marriage, and there is no evidence that either party interrupted any career or educational opportunities for the marriage. Further, the evidence reflects that the earning abilities of both parties are nearly equal and that Twyla's medical condition had not caused a decrease in her earning capacity at the time of trial. On these facts, we cannot conclude that the denial of alimony was an abuse of discretion.

Videotape Evidence.

Twyla's second assigned error is that the district court erred in excluding from evidence a videotape of a seminar presentation on fibromyalgia. Twyla claims that she "sought to introduce a videotape seminar on fibromyalgia to explain her condition and the medical effects of that condition as it relates to her employability in the future." Brief for appellant at 14. Wilson contends that the district court properly excluded the videotape because a proper foundation by an expert witness was not laid, and consequently, the videotape did not qualify under the learned treatises exception to the hearsay rule.

[7,8] In all 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. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *Crowdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990).

Since August 28, 1999, Neb. Rev. Stat. § 27-803 (Cum. Supp. 2000) has included a learned treatise exception to the hearsay rule. This exception found in subsection (17) provides:

Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert

testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits.

This language contained in this subsection of Nebraska's statute was clearly taken from Fed. R. Evid. 803(18), which contains identical language, albeit, arranged in a different order. Because the learned treatise exception to the hearsay rule has not heretofore been addressed by Nebraska courts, we look to the federal court's interpretation of rule 803(18) for guidance.

[9] The first issue that we must address is whether videotapes, although not specifically mentioned in the learned treatise exception to the hearsay rule, nonetheless fall within its dictates. The Second Circuit Court of Appeals has recently held that videotapes may be sufficiently authoritative to be admitted as a learned treatise under rule 803(18) even though they are not mentioned. The court stated that there is no reason to deprive a jury of the authoritative learning simply because it is presented in visual, rather than printed, format. *Costantino v. David M. Herzog, M.D., P.C.*, 203 F.3d 164 (2d Cir. 2000). We agree and hold that a videotape may be admissible pursuant to Nebraska's learned treatise exception to the hearsay rule provided that sufficient foundation is laid for its admission. Thus, we next proceed to address whether there was sufficient foundation laid for the videotape sought to be introduced in the instant case.

It has been held in the context of the federal learned treatise exception that a learned treatise is only admissible in conjunction with testimony by an expert witness. See *U.S. v. Turner*, 104 F.3d 217, 221 (8th Cir. 1997) (pursuant to learned treatise exception to hearsay rule, "portions of the text may be read only to the extent that it is called to the attention of an expert witness or relied upon by the expert witness in direct examination"); *Tagatz v. Marquette University*, 681 F. Supp. 1344, 1351 (E.D. Wis. 1988), *aff'd* 861 F.2d 1040 (7th Cir. 1988) ("learned treatises are excluded by the hearsay rule unless they are called to the attention of an expert witness or relied upon by the witness"); *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (admission of medical articles improper where plaintiff's medical expert did

not testify regarding the articles); *Tart v. McGann*, 697 F.2d 75 (2d Cir. 1982).

The reasoning for this requirement has been succinctly set forth by 5 Joseph M. McLaughlin, Weinstein's Federal Evidence § 803.23[1] (2d ed. 2001):

The difficulty with learned treatises is not the usual hearsay danger of admitting unreliable evidence, but rather the possibility that the jurors will misunderstand and misapply the evidence without expert guidance. Consequently, only those treatises whose existence is disclosed while an expert is on the stand, either by the expert on direct examination or by the questioner in the course of cross-examination, are admissible.

[10] Stated another way, an expert witness must be "on the stand and available to explain and assist in the application of the treatise" in order to alleviate the risk that a treatise might be misunderstood and misapplied by the jury. Rule 803 Notes of Advisory Committee on Proposed Rules. Although these authorities reference the federal learned treatise exception, the reasoning is equally applicable to Nebraska's statute. Thus, we hold that pursuant to the language of Nebraska's learned treatise exception to the hearsay rule, a learned treatise is only admissible in conjunction with testimony by an expert witness.

In the instant case, Twyla sought to introduce into evidence the videotape of the seminar presentation without the benefit of expert testimony. This violates the language of § 27-803(17) which contemplates that the learned treatise exception to the hearsay rule will be either used by calling statements "to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination." Consequently, the district court properly excluded the videotape of the seminar presentation, and this assigned error is without merit.

CONCLUSION

In sum, the district court did not abuse its discretion in failing to award alimony to Twyla or in excluding from evidence the videotape of the seminar presentation on fibromyalgia. Consequently, the decision of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF BROOK P. ET AL.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,
v. NATHAN P., APPELLANT, AND ROBYN P., APPELLEE
AND CROSS-APPELLANT.

634 N.W.2d 290

Filed October 2, 2001. No. A-01-129.

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 juvenile court's findings.
2. **Juvenile Courts: Parental Rights: Notice: Appeal and Error.** Neb. Rev. Stat. § 43-279.01(2) (Reissue 1998) requires that adequate notice of the possibility of the termination of parental rights must be given in adjudication hearings before the juvenile court may accept an in-court admission from a parent as to all or any part of the allegations of the petition before the juvenile court.
3. **Juvenile Courts: Parental Rights: Jurisdiction: Appeal and Error.** In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction.
4. **Collateral Attack: Jurisdiction.** Generally, collateral attacks on previous proceedings are impermissible, unless the attack is grounded upon the court's lack of jurisdiction over the parties or the subject matter.
5. **Juvenile Courts: Jurisdiction: Parental Rights.** The juvenile court properly acquires jurisdiction over an original action to terminate parental rights as provided in the Nebraska Juvenile Code without prior juvenile court action, including adjudication.
6. **Statutes: Juvenile Courts: Pleadings: Parental Rights.** Neb. Rev. Stat. § 43-292(1) through (5) (Reissue 1998) does not require, imply, or contemplate juvenile court involvement, including adjudication, prior to the filing of the petition for termination of parental rights.
7. **Constitutional Law: Due Process: Parental Rights.** In a hearing on the termination of parental rights without a prior adjudication hearing, where such termination is sought under Neb. Rev. Stat. § 43-292(1) through (5) (Reissue 1998), such proceedings must be accompanied by due process safeguards, as statutory provisions cannot abrogate constitutional rights.

Appeal from the County Court for Hall County: DAVID A. BUSH, Judge. Affirmed.

Patrick L. Neid for appellant.

Denise D. Myers for appellee Robyn P.

Robert J. Cashoili, Deputy Hall County Attorney, for appellee State, and Arthur S. Wetzol, guardian ad litem.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Nathan P. and Robyn P. appeal the termination of their parental rights to their three children by the Hall County Court, sitting as a juvenile court. Nathan and Robyn allege that the juvenile court's failure to advise them at a prior adjudication hearing of the possibility of losing their parental rights, before they admitted the allegation in the juvenile petition, results in a lack of jurisdiction in the subsequent parental rights termination proceeding.

FACTUAL BACKGROUND

Nathan and Robyn are the parents of Brook P., Tanner P., and Molly P. In 1993, when Robyn was 19, she was anorexic and bulimic, was hospitalized for attempting suicide through overdose, and was diagnosed with dependent personality disorder. While living with her parents in Grand Island, Nebraska, Robyn gave birth to her and Nathan's daughter, Brook, on January 11, 1994. Nathan was not immediately aware of the birth because he was incarcerated in Lincoln, Nebraska, on burglary and assault charges. After his release, Nathan and Robyn married, and they moved in with Nathan's parents in Kearney, Nebraska.

On May 26, 1995, the Department of Social Services received a telephone call from one of Robyn's family members concerning Robyn's alleged neglect of Brook. Robyn admitted to a department caseworker that she was using drugs while Brook was in the apartment. Robyn told the caseworker that Nathan would lock her in the apartment and that she had been injecting a gram of methamphetamine four or five times a day. The house was dirty and cluttered. Later, the caseworker spoke to Nathan and Robyn, and Nathan told her that he had been through inpatient treatment for drug and alcohol problems on five occasions. At this time, Brook was essentially living with her maternal grandparents.

On July 26, 1995, the caseworker visited the home again because of concerns that Robyn was using drugs and because Robyn was considering divorcing Nathan, which would likely disrupt any stability in the home. Upon Nathan and Robyn's request for assistance, the caseworker helped Nathan and Robyn find a more suitable apartment. The Department of Social Services assigned a family support provider to teach Nathan and

Robyn budgeting and household maintenance and to ensure that they attended drug and alcohol support groups. The department also allocated resources to help both Nathan and Robyn maintain employment. This voluntary case was closed in October 1995, as the caseworker determined that Nathan and Robyn had stabilized their lives and were appropriately caring for Brook. Robyn gave birth to another child, Tanner, on April 27, 1996.

Between 1995 and 1997, Nathan and Robyn sporadically used drugs. On January 23, 1997, the family was driving to Kearney from their home in Grand Island when Nathan and Robyn argued about their drug use. After Nathan pulled the vehicle over to the side of the road, Robyn attempted to leave the car with Brook and Tanner. Nathan tried to restrain Robyn, bloodying her nose. As a result, he was arrested for domestic abuse. The authorities at the scene found that the children were inadequately dressed for the cold weather. An investigation showed that Nathan and Robyn were heavily using drugs, had received an eviction notice from their mobile home, and were frequently relying on the maternal grandparents to care for their children. Brook was reportedly having nightmares and was afraid of Nathan.

Brook and Tanner were removed from Nathan and Robyn's care, they were adjudicated as children within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998), and a juvenile case plan was developed to help reunify them with Nathan and Robyn. Nathan and Robyn were found to have methamphetamine dependence, a marital relational problem, and a parent/child relational problem. Both received chemical dependency counseling. Robyn's random urinalysis tests were negative, whereas no evidence of Nathan's urinalysis tests are in the record because it was the responsibility of his probation officer to order such tests. Both worked at solving their marital problems. But by July 1997, Nathan attended counseling sessions less frequently, ostensibly due to his work schedule. Nathan and Robyn were then referred to an intensive family preservation program to improve their parenting skills and financial management. The program included in-home visits with the entire family, as Brook and Tanner had been returned to Nathan and Robyn's care in October 1997.

Nathan relapsed and used drugs again in March 1998 and apparently failed to comply with the case plan's requirements of attending narcotics anonymous meetings. Robyn entered the recommended codependency counseling program and received mental health counseling in April. She began to take classes toward a nurse's aide degree while working and living with her parents. The juvenile case was dismissed in October. In November, Nathan and Robyn divorced. Robyn ceased codependency counseling of her own accord in January and reunited with Nathan on January 1, 1999. She also stopped attending classes. Molly was born February 13, 2000.

On June 8, 2000, Nathan called the Nebraska State Patrol to report that he and Robyn had used methamphetamine a few times in the past few months and that he did not think that they could care for their children. Nathan reported that Molly was in the home when both he and Robyn injected drugs the previous evening. At the time, neither Nathan nor Robyn had a job, and they were living in a motel. The children were removed from Nathan and Robyn's home on June 9, placed in the temporary custody of the Department of Health and Human Services, and ultimately placed with their maternal grandparents. Robyn took out a protection order against Nathan in July. Neither was attending narcotics anonymous meetings, but both began to see a therapist to deal with their substance abuse and relationship problems after the children were removed from their home.

A psychotherapist who began working with Brook and Tanner in July 2000 found that they were experiencing anxiety and depression. Brook was very sad, withdrawn, and attempting to "parent" her brother and sister. She told the psychotherapist that being removed from her parents' home was her fault and that if she could be a more perfect child, she would be returned. Tanner was physically aggressive with his sisters and grandparents and very defiant. Brook and Tanner displayed some sexual "acting out." Their behavior improved over the summer, and both children enjoyed visiting their parents. However, the psychotherapist testified at the trial upon the State's motion to terminate Nathan's and Robyn's parental rights that permanency placement was necessary. On July 5, 2000, Nathan's and Robyn's urinalysis tests

showed that they had used drugs the previous day. They admitted to further use in November.

PROCEDURAL BACKGROUND

The State filed a juvenile petition on June 9, 2000, with the Hall County Court, sitting as a juvenile court, alleging that Brook, Tanner, and Molly were children within the jurisdiction of the juvenile court because they were in a situation dangerous to life or limb, or injurious to their health or morals. In a separate order entered the same date, the court placed the children in the temporary custody of the Department of Health and Human Services. At an initial hearing, on June 19, the juvenile court informed Nathan and Robyn of their rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 1998). While the judge explained that upon adjudication, he could do a number of things as he saw fit, the court did not mention that included in that list of possible consequences was the termination of their parental rights. Nathan and Robyn admitted the allegation in the juvenile petition, and the court deemed their admissions knowingly, voluntarily, and intelligently made. The juvenile court orally found on the record that Brook, Tanner, and Molly were children within § 43-247(3)(a); however, as far as our record reveals, there was never a similar written judgment entered.

On August 29, 2000, the date of the scheduled disposition hearing, the State filed a motion to terminate Nathan's and Robyn's parental rights because of their substantial and continuous or repeated neglect of their children, as well as their habitual use of alcohol or drugs. A journal entry of the same date reports that Nathan and Robyn made an initial appearance before the juvenile court upon the State's motion to terminate their parental rights. The journal entry shows that the juvenile court explained to Nathan and Robyn the nature of the allegations of the motion to terminate parental rights, as well as the consequences, should the court grant the motion. The journal entry further states that both Nathan and Robyn entered a denial of the motion to terminate parental rights.

Trial was held December 7 and 8, 2000. In a journal entry dated December 27, the juvenile court found that Nathan and Robyn had a "long standing and well recognized chemical

dependency problem.” Further, the court found that their use of drugs created serious consequences for their children because Nathan and Robyn frequently moved from place to place as a result of being unable to pay the rent and because Nathan was often unemployed. The court noted incidents of domestic violence in the home, at public places, and in the children’s presence. Upon this basis, the juvenile court found clear and convincing evidence that Nathan and Robyn substantially and continuously or repeatedly neglected their children, that they were unfit to parent by reason of habitual use of intoxicating liquor or narcotic drugs, and that it was in the children’s best interests to terminate Nathan’s and Robyn’s parental rights. Nathan and Robyn have timely appealed to this court.

ASSIGNMENTS OF ERROR

In Nathan’s appeal and Robyn’s cross-appeal, they assign error to the juvenile court’s failure to notify them during the initial adjudication that their parental rights could be terminated and allege that this violation of § 43-279.01 prevented the court from acquiring jurisdiction in the instant case. Both Nathan and Robyn also assign error to the juvenile court’s determination that they had substantially and continuously or repeatedly neglected their children and refused to give them the necessary parental care and protection, that they were unfit to parent by reason of habitual use of intoxicating liquor or narcotic drugs, and that it was in their children’s best interests to terminate their parental rights. Although both Nathan and Robyn argue that the court failed to make reasonable efforts to reunify the family, neither assigned this as error. Errors that are argued but not assigned will not be addressed by an appellate court. See *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

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 juvenile court’s findings. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000); *In re Interest of Billie B.*, 8 Neb. App. 791, 601 N.W.2d 799 (1999).

ANALYSIS

Failure to Advise of Possible Loss of Parental Rights.

Nathan and Robyn argue that their due process rights were violated by the juvenile court's failure to inform them at the June 19, 2000, initial adjudication hearing, before their admission of the allegations, that a potential consequence of the court's finding that their children were juveniles within the provisions of § 43-247(3)(a) was that their parental rights could be terminated. At this hearing, both admitted the petition's allegation that their children were in a situation dangerous to life or limb, or injurious to their health or morals. Nathan and Robyn cite § 43-279.01 and *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992), to support their claim. Section 43-279.01 provides:

(1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 . . . the court shall inform the parties of the:

(a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295. [Sections 43-288 to 43-295 address orders as to juveniles, including possible termination of parental rights.]

....
(2) After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission. . . .

[2] Interpretation of a statute presents a question of law. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). An appellate court reviews questions of law independent of the trial court's decision. *Id.* Section 43-279.01(2) means that a juvenile court should accept a parent's in-court admission only after informing the parties as to the nature of the proceedings and the possible consequences or dispositions, including termination of parental rights. In *In re Interest of N.M. and J.M.*, 240 Neb. at 696, 484 N.W.2d at 81, the court said that "adequate notice of the possibility of the termination of parental rights must be given in adjudication hearings before the juvenile court may accept an in-court admission . . . from a parent as to all or any part of the allegations of the petition before the juvenile court."

[3] Therefore, if there had been an appeal of the original adjudication, the juvenile court's failure to inform Nathan and Robyn of the potential consequences of the juvenile proceeding before accepting their admission to the allegations would have been fatal to the adjudication, as the adjudication was based on the parents' admission. This court has similarly ruled. See, *In re Interest of Billie B.*, *supra*; *In re Interest of Joelyann H.*, 6 Neb. App. 472, 574 N.W.2d 185 (1998). However, neither Nathan nor Robyn appealed the juvenile court's initial adjudication. In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Bryce C.*, 8 Neb. App. 907, 603 N.W.2d 684 (2000).

*Jurisdiction to Terminate Parental Rights
Without Prior Advisement.*

[4] Regardless of their failure to directly appeal from the initial adjudication, Nathan and Robyn contend that the juvenile court's failure to properly inform them as to the possible consequences of the State's juvenile petition prevented the juvenile court from obtaining jurisdiction over them in this proceeding to terminate their parental rights. Generally, collateral attacks on previous proceedings are impermissible, unless the attack is grounded upon the court's lack of jurisdiction over the parties or the subject matter. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). See *In re Interest of Billie B.*, 8 Neb. App. 791, 601 N.W.2d 799 (1999).

Undisputedly, during the initial adjudication hearing, the juvenile court failed to adequately advise Nathan and Robyn of the potential consequences of a juvenile proceeding before Nathan and Robyn admitted that their children were in a dangerous situation as the State alleged in the petition. As to the effect of that failure in the subsequent termination proceeding instituted by the State's motion to terminate, we turn to the Supreme Court's analysis in *In re Interest of Joshua M. et al.*, *supra*. That case resulted from a mother's appeal to this court of the termination of her parental rights to her four children for neglect and habitual use of intoxicating liquor or narcotic drugs. We reversed the juvenile court's order of termination as to three

of the children, finding that the court lacked jurisdiction over the children because it failed to adjudicate them before entering its order terminating the mother's parental rights. See *In re Interest of Joshua M. et al.*, 7 Neb. App. 872, 587 N.W.2d 131 (1998). The State successfully petitioned for further review.

[5] The Supreme Court upon its further review noted that Neb. Rev. Stat. § 43-291 (Reissue 1998) states, "'Facts may also be set forth in the *original petition*, a supplemental petition, or motion filed with the court alleging that grounds exist for the termination of parental rights. . . .'" *In re Interest of Joshua M. et al.*, 256 Neb. at 605, 591 N.W.2d at 564. The court also noted that the plain language of § 43-247(6) states that the juvenile court shall have jurisdiction of "[t]he proceedings for termination of parental rights as provided in the Nebraska Juvenile Code.'" *In re Interest of Joshua M. et al.*, 7 Neb. App. at 608, 591 N.W.2d at 565. The court concluded that these two sections taken together "indicate that the juvenile court properly acquires jurisdiction over an original action to terminate parental rights as provided in the Nebraska Juvenile Code without prior juvenile court action, including adjudication." *Id.* at 608-09, 591 N.W.2d at 565.

A motion to terminate is included in the relevant language of § 43-291. Thus, the juvenile court also acquires jurisdiction to terminate parental rights when a motion to terminate parental rights containing the grounds for termination is filed, without prior juvenile court action, including adjudication. In the instant case, the State filed a motion to terminate Nathan's and Robyn's parental rights after the initial hearing at which there was an adjudication, based on Nathan's and Robyn's admissions, and while those admissions should not have been accepted and are of no force and effect because of the defective rights advisement, that defect in the prior proceeding does not taint the instant proceeding initiated by the State's motion to terminate.

[6] In *In re Interest of Joshua M. et al.*, *supra*, the Supreme Court examined Neb. Rev. Stat. § 43-292(1) through (7) (Reissue 1998) to determine upon what grounds a juvenile court may terminate parental rights without a prior adjudication. The court found that § 43-292(1) through (5) "do[es] not require, imply, or contemplate juvenile court involvement, including

adjudication, prior to the filing of the petition for termination of parental rights.” *In re Interest of Joshua M. et al.*, 256 Neb. 596, 609, 591 N.W.2d 557, 566 (1999).

Here, the State’s motion to terminate parental rights was based upon § 43-292(2) and (4), the same subsections at issue in *In re Interest of Joshua M. et al.* According to the Supreme Court in *In Re Interest of Joshua M. et al.*, an adjudication was not required prior to the juvenile court’s termination of the mother’s parental rights based upon the grounds present in § 43-292(2) and (4). Therefore, applying that result here, the juvenile court had jurisdiction to terminate Nathan’s and Robyn’s parental rights to Brook, Tanner, and Molly whether or not a prior adjudication had occurred. Due to the defect in the adjudication proceedings, we treat the first proceeding as the functional equivalent of “no prior adjudication,” using the conceptual framework of the Supreme Court’s decision in *In re Interest of Joshua M. et al.* But, as said, that by itself does not deprive the juvenile court of jurisdiction to proceed.

[7] However, the Supreme Court in *In re Interest of Joshua M. et al.*, 256 Neb. at 613, 591 N.W.2d at 568, did hold that when a juvenile court proceeds “with a hearing on the termination of parental rights without a prior adjudication hearing where such termination is sought under § 43-292(1) through (5) . . . such proceedings [must] be accompanied by due process safeguards, as statutory provisions cannot abrogate constitutional rights.”

This holding is directly applicable here. Therefore, we examine the record to ensure that Nathan and Robyn were accorded their due process rights after the State filed its motion to terminate—particularly with respect to the matter of the advisement of their rights and the possible consequences of the motion to terminate. In a journal entry dated August 29, 2000, the court recounted that it “explains to the parents the nature of the allegations of the Motion to Terminate Parental Rights as well as the consequences if the Court were to grant the motion.” The journal entry further recounts that Nathan and Robyn were advised about such things as the burden of proof, the right to confront and cross-examine witnesses, the right to subpoena witnesses, et cetera. We do not recite all matters recounted in the journal entry, as it is sufficient to say that the advisement was complete, comprehensive, and

complied with the requirements of § 43-279. This advisement occurred at a first court appearance of Nathan and Robyn on the State's motion to terminate. This was several months before the December 7 and 8, 2000, trial upon the State's motion to terminate parental rights in which Nathan and Robyn were represented by counsel, presented their own witnesses, and cross-examined the State's witnesses.

We find that the advisement of rights recounted in the court's journal entry of August 29, 2000, was adequate to safeguard Nathan's and Robyn's due process rights. Thus, under *In re Interest of Joshua M. et al.*, *supra*, the juvenile court had jurisdiction to terminate Nathan's and Robyn's parental rights on the statutory grounds found in § 43-292(2) and (4), even though there was not a valid prior adjudication due to failure of the juvenile court to make a proper advisement in the earlier proceeding.

Sufficiency of Evidence to Terminate Parental Rights.

Finding that the juvenile court did not lack jurisdiction to terminate Nathan's and Robyn's parental rights, we turn to whether the evidence of neglect under § 43-292(2), or habitual use of intoxicating liquor or narcotic drugs under § 43-292(4), was sufficient to terminate their parental rights to Brook, Tanner, and Molly. To terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds exists and that termination is in the children's best interests. *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000).

We have already comprehensively recounted the history of this family in our "Factual Background" portion of this opinion, which we derived from the evidence introduced on the motion to terminate. We do not repeat those facts here, but conclude, as did the juvenile court, that the evidence clearly and convincingly shows that the use of drugs render Nathan and Robyn unfit and that it is in the children's best interests that Nathan's and Robyn's parental rights be terminated. Both Nathan and Robyn argue that their drug use was sporadic and that they had self-reported their relapses, which they argue forgives or at least reduces the seriousness of their continued usage. We reject that notion as Nathan and Robyn have used drugs repeatedly over

many years and have been unable to abstain from them despite extensive help from various counselors and the Department of Health and Human Services. In short, being a parent demands that at some point the parent's good intentions become reality—that never happened here. Having found sufficient evidence to terminate Nathan's and Robyn's parental rights pursuant to § 43-292(4), we need not consider whether under § 43-292(2) Nathan and Robyn substantially and continuously or repeatedly neglected their children as the State must prove only one of the statutory grounds for parental rights to be terminated. See *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000). Nonetheless, it is impossible to review this record without observing that Nathan's and Robyn's insidious drug use substantially interfered with their ability to care for their family, hold jobs, and maintain housing for the family—all of which is evidence of neglect.

With respect to the best interests of the children, we note that the psychotherapist who worked with Brook and Tanner in July 2000 testified to the negative impact Nathan and Robyn's lifestyle had on their children. Admittedly, the psychotherapist did not examine Molly, who was not even 6 months old at the time the psychotherapist examined her siblings. However, Nathan said that Molly was in the room when he and Robyn injected methamphetamine, and that incident resulted in the children's being removed from Nathan and Robyn's care for the second time. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Lisa W. & Samantha W.*, *supra*; *In re Interest of Michael B. et al.*, *supra*. The juvenile court did not err in finding that it was in the best interests of Brook, Tanner, and Molly to terminate Nathan's and Robyn's parental rights.

CONCLUSION

As a prior adjudication was unnecessary for the juvenile court to terminate Nathan's and Robyn's parental rights, the juvenile court's failure to properly advise Nathan and Robyn of the

potential consequences deriving from a juvenile petition before accepting their admission to the juvenile petition's allegation at the initial adjudication hearing did not deprive the court of jurisdiction to later terminate their parental rights on statutory grounds found in § 43-292(2) and (4). This is because their statutory right of advisement and due process rights were safeguarded by the court's advisement of the potential consequences of a juvenile proceeding at the time that the State filed its motion to terminate parental rights. Finally, the juvenile court did not err in finding that the evidence of Nathan's and Robyn's habitual use of intoxicating liquor or narcotic drugs sufficient to terminate their parental rights to Brook, Tanner, and Molly and that it was in those children's best interests to terminate Nathan's and Robyn's parental rights.

AFFIRMED.

IN RE CONSERVATORSHIP OF KEITH J. MARSHALL,

A PROTECTED PERSON.

NEBRASKA HEALTH SYSTEM AND UNIVERSITY

MEDICAL ASSOCIATES, APPELLANTS, V.

JULIE E. BEAR, CONSERVATOR, APPELLEE.

634 N.W.2d 300

Filed October 9, 2001. No. A-01-100.

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 of the court below.
2. **Health Care Providers: Liens: Judgments.** The hospital lien statute, Neb. Rev. Stat. § 52-401 (Reissue 1998), generally provides that when an injured person receives medical care and subsequently secures a judgment, settlement, or compromise for such injury, the physician, nurse, or hospital who provided the medical care has a lien against the settlement or judgment for the amount due for the usual and customary charges of such physician, nurse, or hospital applicable at the times services are performed.
3. **Statutes: Liens: Courts.** A lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the statute. It cannot be extended by the court to cases not within the statute.
4. **Health Care Providers: Liens: Notice.** Substantial compliance with the notice requirements of Neb. Rev. Stat. § 52-401 (Reissue 1998) is necessary to perfect a hospital lien.

5. **Health Care Providers: Liens: Time.** An attempt to perfect a Neb. Rev. Stat. § 52-401 (Reissue 1998) hospital lien after the personal injury claim has been settled is untimely and renders the lien unenforceable.
6. **Statutes: Health Care Providers: Liens: Contracts.** The underlying common-law contractual obligation between a patient and a medical provider is not affected by a statutory lien.

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

Lawrence K. Sheehan and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, for appellants.

Julie E. Bear, pro se.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Nebraska Health System (NHS) and University Medical Associates (UMA) (collectively claimants) appeal from the order of the county court for Cass County, Nebraska, which denied their claim against the conservatorship of Keith J. Marshall, a minor, for the cost of medical services.

FACTUAL BACKGROUND

On June 10, 1995, Keith injured his right hand in a hog roaster while attending an outdoor event in Mead, Nebraska. Keith was 3 years old at the time of the injury. He was treated at the University of Nebraska Medical Center from June 10 until June 19, 1995. The cost of hospital services totaled \$10,702.91. UMA performed physician services for Keith at a cost of \$4,230.30.

On November 15, 1995, Keith's parents filed for chapter 7 bankruptcy. Their debts to the University of Nebraska Medical Center and UMA were discharged on August 19, 1997. Keith's parents never made any payment on the hospital or physician bills.

PROCEDURAL BACKGROUND

On May 20, 1997, Keith, by and through his parents, sued the city of Mead for his injuries. The parties settled in early 2000 for \$125,000. On January 26, 2000, the county court for Cass County appointed Julie E. Bear as conservator of the settlement

funds. After attorney fees were paid, \$81,450.81 remained in the conservatorship. The conservator filed an inventory with the county court on February 22.

On June 14, 2000, claimants filed a statement of claim against the conservatorship for \$8,123.60. The conservator filed a disallowance of the claim on June 15. Claimants filed a petition for allowance of claim on June 19 and an amended statement of claim seeking \$15,302.26 on June 30.

Claimants argued that under Neb. Rev. Stat. § 52-401 (Reissue 1998), a hospital lien in their favor attached to the \$125,000 settlement upon Keith's admission to the hospital for treatment in 1995, and the lien survived Keith's parents' bankruptcy discharge. In addition, claimants asserted that under the law of "necessaries," Keith could be held to an implied contract for his medical care, despite his minority, because his parents were unable to pay. According to claimants, the 4-year statute of limitations on both the lien and implied contract began to run only when the conservatorship was funded with settlement proceeds. Claimants argue that they timely filed a claim under either of these theories.

The conservator's response requested that the court disallow the lien claim "based upon the fact that said claim is time-barred under the applicable statute of limitations." According to the conservator, Keith's liability could be based only upon quasi-contract or quantum meruit, and because the statute of limitations for these claims began running on June 29, 1995, the last date that medical services were provided, claimants' action was time barred as of June 29, 1999.

The county court denied claimants' claim, adopting the conservator's theory that the statutes of limitations for the lien and quasi-contract actions began to run on June 29, 1995. Finding that claimants had not filed their claim within the 4-year limitations period, the court found it unnecessary to decide whether Keith as a minor was actually liable in quasi-contract for the medical services.

ASSIGNMENTS OF ERROR

On appeal, claimants assert that the county court erred in finding that their claims were time barred. Claimants argue only

that their claim under the hospital lien statute, § 52-401, was timely. And while claimants do not argue that Keith is personally liable in contract or quasi-contract, they imply in their argument that Keith is personally liable under the lien statute.

STANDARD 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 of the court below. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

ANALYSIS

Hospital Lien Statute.

[2] The hospital lien which claimants seek to enforce against Keith is created by § 52-401. The statute generally provides that when an injured person receives medical care and subsequently secures a judgment, settlement, or compromise for such injury, the physician, nurse, or hospital who provided the medical care has a lien against the settlement or judgment for "the amount due for the usual and customary charges of such physician, nurse, or hospital applicable at the times services are performed." We quote the key portion of § 52-401:

In order to prosecute such lien, it shall be necessary for such physician, nurse, or hospital to serve a written notice upon the person or corporation from whom damages are claimed that such physician, nurse, or hospital claims a lien for such services and stating the amount due and the nature of such services, except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.

Statutory Requirements for Perfection of Lien.

[3] The Nebraska Supreme Court has stated:

"[A] lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the statute. It cannot be extended by the court to cases not within the statute."

West Neb. Gen. Hosp. v. Farmers Ins. Exch., 239 Neb. 281, 285, 475 N.W.2d 901, 905 (1991), quoting *County Board of Platte County v. Breese*, 171 Neb. 37, 105 N.W.2d 478 (1960).

[4,5] Section 52-401 provides without qualification that a party seeking to enforce the statutory hospital lien must first serve written notice upon the person from whom damages are claimed. The notice must state the amount due and the nature of the medical services performed. At the very least, "substantial compliance" with the notice requirements of § 52-401 is necessary to perfect a hospital lien. *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, *supra*. The *West Neb. Gen. Hosp.* court also noted that the tort-feasor is generally the party against whom a medical provider must assert the lien provided for in § 52-401. While the statute does not specify when notice must be given, the Supreme Court made it very clear in *West Neb. Gen. Hosp.* that an attempt to perfect a § 52-401 hospital lien after the personal injury claim has been settled is untimely and renders the lien unenforceable.

Where a statute creating a lien provides no method for its enforcement, it may be enforced by an ordinary action at law for the collection of the debt. 53 C.J.S. *Liens* § 32 (1987). But when a statutory lien provides for a remedy, the remedy is regarded as exclusive and must be pursued. *Id.* A statutory lien can be enforced only under the facts and conditions provided in the statute. See *County Board of Platte County v. Breese*, *supra*. Here, § 52-401 contains the remedy for enforcement of the lien. In this case, claimants made no attempt to comply with the statute, giving no such notice at all. Instead, claimants waited until after Keith's action against the city of Mead was settled and then filed a claim against his conservatorship. There is no evidence that the two medical providers ever gave notice to the city of Mead, the tort-feasor, or filed a notice of their lien in the action by Keith against the city of Mead while it was pending. And, while *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, *supra*, requires only "substantial compliance" with the lien perfection requirements of § 52-401, here there was no compliance whatsoever. Thus, the lien was never validly perfected and is unenforceable against the conservatorship.

Enforcement Against Patient.

Claimants suggest in their brief that they were not required to give notice of the lien because they are enforcing this lien against the patient, Keith. The analysis of the county court regarding the statute of limitations suggests that it may have decided the case

under such theory. Claimants' position relies upon the following language from *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 284, 475 N.W.2d 901, 905 (1991): "*The hospital's lien is enforceable as against the injured party upon attachment, regardless of whether the hospital complies with the statute's notice provisions.* Perfection, on the other hand, is required if the hospital seeks to enforce the lien against third parties, such as the tort-feasor." (Emphasis supplied.) (Emphasis in original.) (Emphasis omitted.)

[6] We read the quoted and emphasized sentence from *West Neb. Gen. Hosp.* to mean only that the underlying common-law contractual obligation between a patient and a medical provider is not affected by a statutory lien. Given the clear language of the statute and the intent of the statutory scheme as outlined in *West Neb. Gen. Hosp.*—to protect payment for those who provide medical services to negligently injured persons by ensuring payment from tort-feasors—the quoted language can only be a reference to the patient's common-law liability to one who provides medical services to the patient. If a patient receives medical services, he or she is always responsible for payment irrespective of whether there is a financially responsible tort-feasor against whom a statutory lien can be asserted in the event of a settlement or judgment from a tort-feasor in the patient's favor. In short, the patient's personal liability for medical services remains intact irrespective of the lien statute. Other language in the *West Neb. Gen. Hosp.* opinion supports our reading of the passage upon which claimants rely: "[T]he statutory scheme [for medical provider liens] is similar to the well-known rule that the recording of a deed or mortgage is only relevant as against subsequent purchasers for value, but does not affect the validity of the transaction as between the parties themselves." *Id.* at 284, 475 N.W.2d at 905.

Keith could be held personally liable for the medical bills under some circumstances, despite his minority, if they were deemed "necessaries." See *Webster Street Partnership v. Sheridan*, 220 Neb. 9, 368 N.W.2d 439 (1985). However, the instant case brought by the claimants is not an in personam action against a minor for necessaries. In any event, such an action would now be barred by the statute of limitations, which

at the latest would have run 4 years from June 29, 1995, the last date upon which the claimants provided medical services to Keith. See Neb. Rev. Stat. § 25-206 (Reissue 1995). Thus, the finding by the county court that this action was barred by the statute of limitations was generally correct. As an action to enforce the statutory lien which has allegedly attached to the specific funds in Keith's conservatorship, it is an action in rem. The res at issue here is Keith's settlement with the city of Mead. We cannot simply treat the action as an enforcement suit "against" Keith, as claimants would have us do, when that is not what claimants alleged in their claim and to do so would substantially change the cause of action.

CONCLUSION

Because claimants did not comply with the statutory requirements of § 52-401, their lien is not enforceable. While the county court should have first addressed whether the lien was enforceable, the court reached the correct decision in denying the claims of claimants against Keith's conservatorship. Finally, even if we could somehow view this action as a contract action against Keith for his common-law liability, the action was filed well after the applicable statute of limitations. That 4-year statute began to run no later than when the services were completed and the settlement with the city of Mead would be irrelevant to such a claim. An appellate court may affirm a trial court's decision on grounds other than those advanced by that trial court, if the result is correct. *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ANGELA MCKIMMEY, APPELLANT.
634 N.W.2d 817

Filed October 16, 2001. No. A-01-006.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** An appellate court is to reach independent conclusions on questions of law.

3. **Lesser-Included Offenses: Jury Instructions: Evidence.** The elements test for determining when a court must instruct the jury on a lesser-included offense consists of two prongs, both of which must be satisfied before a court is required to give a lesser-included offense instruction: (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. **Lesser-Included Offenses: Jury Instructions.** If the first prong of the elements test for determining when a court must instruct the jury on a lesser-included offense is not satisfied, it is unnecessary to analyze the second prong.
5. **Lesser-Included Offenses: Courts.** To determine whether one crime is a lesser-included offense of another, a court compares criminal statutes to determine if it is impossible to commit the greater offense without at the same time committing the lesser offense.
6. **Lesser-Included Offenses: Controlled Substances.** It is impossible to commit the crime of distribution of a particular controlled substance without at the same time committing the lesser crime of possession of such particular controlled substance.
7. **Lesser-Included Offenses: Jury Instructions: Evidence.** It is not prejudicial error to fail to 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.
8. ____: ____: _____. If 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.
9. **Controlled Substances: Words and Phrases.** To possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature.
10. **Convictions: Appeal and Error.** Regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard of review is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
11. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
12. ____: _____. 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 Adams County: TERRI HARDER, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

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

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

SIEVERS, Judge.

Angela McKimney appeals her conviction and sentence for aiding and abetting the distribution or delivery of a controlled substance. The primary issue is whether the jury should have been given a lesser-included instruction for the crime of possession of a controlled substance.

FACTUAL BACKGROUND

On April 21, 1999, Investigator Wendy Brehm of the Nebraska State Patrol met Deb Perry, a previous contact for purchasing methamphetamine and cocaine, at Perry's residence in Hastings, Nebraska. Brehm had earlier informed Perry that she needed help in purchasing an "eight ball" of methamphetamine. As Brehm and Perry drove around Hastings, they encountered Curtis Mulnix, who suggested McKimney as a source and directed them to a residence where she could be found. Perry went into the residence while Brehm and Mulnix remained in the car. After speaking with McKimney, Perry returned to the car to tell Brehm that McKimney could get an eight ball of methamphetamine for \$175. Brehm entered the residence, where McKimney informed her that it would be approximately 10 minutes before presumably the methamphetamine would be delivered. Approximately 20 to 25 minutes later, a man named "Alex" arrived and met with McKimney in the kitchen. Brehm could see McKimney and Alex, but could not hear their conversation. Then McKimney walked over to Brehm and handed her the methamphetamine. After telling Alex that \$170 was all the money she had, Brehm handed him \$170 in cash, and Alex accepted that amount.

PROCEDURAL BACKGROUND

McKimney was charged in the district court for Adams County with one count of aiding and abetting another under Neb. Rev. Stat. § 28-206 (Reissue 1995) to distribute or deliver a controlled substance. The aider and abettor may be prosecuted

and punished as if he or she were the principal offender under § 28-206. The controlled substance here was methamphetamine, classified under Neb. Rev. Stat. § 28-405(c)(3) [Schedule II] (Cum. Supp. 1998). Under Neb. Rev. Stat § 28-416(2)(b) (Cum. Supp. 1998), any person who knowingly or intentionally manufactures, distributes, delivers, or dispenses a Schedule II controlled substance is guilty of a Class III felony, with some exceptions not applicable to this case.

During McKimmey's jury trial, defense counsel moved to dismiss the case on the ground that the State had failed to establish a prima facie case. The motion was denied. Counsel later moved for a directed verdict on the same ground, which was denied as well. McKimmey's counsel orally requested a jury instruction on the lesser-included offense of possession of methamphetamine. The district court declined to give such instruction. The jury found McKimmey guilty, and the district court overruled defense counsel's motion that the verdict be set aside for insufficiency of evidence. McKimmey was found to be an unsuitable candidate for probation and was sentenced to a prison term of 3 to 5 years.

ASSIGNMENTS OF ERROR

McKimmey assigns four errors on appeal, which we reduce to three: (1) The district court erred in refusing to instruct on the lesser-included charge of possession of methamphetamine, (2) the district court erred in finding that McKimmey's conviction was supported by sufficient evidence, and (3) the district court imposed an excessive sentence.

ANALYSIS

Lesser-Included Offense Instruction.

[1,2] McKimmey claims that the district court erred in refusing to instruct the jury on the "lesser-included offense" of possession of methamphetamine. McKimmey argues that "you cannot distribute methamphetamine without possessing it." Brief for appellant at 7. We assume that counsel is actually seeking an instruction on aiding and abetting possession, but has used "shorthand" terminology in speaking of possession as a lesser-included offense of delivery or distribution without specifically adding the words "aiding and abetting." We treat counsel's request below and argument here as seeking an instruction on

aiding and abetting possession of a controlled substance. Whether jury instructions given by a trial court are correct is a question of law. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000). An appellate court is to reach independent conclusions on questions of law. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

[3] *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), sets forth the “elements” test for determining when a court must instruct the jury on a lesser-included offense. The elements test consists of two prongs, both of which must be satisfied before a court is required to give a lesser-included offense instruction:

- (1) [T]he 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.

Id. at 965, 503 N.W.2d at 566.

[4,5] If the first prong of the *Williams* test is not satisfied, it is unnecessary to analyze the second prong. *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001) (holding that while test is stated in conjunctive in *Williams*, it is two-step test with first step being to analyze elements of crimes at issue). When applying *Williams*, a court is to look initially not to the evidence, but to the statutory elements of the crimes at issue. See *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). The process is a comparison of criminal statutes to determine if it is impossible to commit the greater offense without at the same time committing the lesser offense. See *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

[6] Turning to the required comparison, *State v. Johnson*, 261 Neb. 1001, 1009, 627 N.W.2d 753, 760 (2001), holds that “possession of a particular controlled substance is a lesser-included offense of distribution of such particular controlled substance.” Thus, it is impossible to commit the crime of distribution without at the same time committing the lesser crime of possession. We note that we see no real difference between “delivery” and “distribution,” as defined in Neb. Rev. Stat. § 28-401(9) and (12) (Cum. Supp. 2000). Section 28-401(12) defines “delivery” as “the

actual, constructive, or attempted transfer from one person to another of a controlled substance.” Section 28-401(9) defines “distribute” as “to deliver other than by administering or dispensing a controlled substance.” The logical extension of *Johnson, supra*, is that if possession is a lesser-included offense of distribution, when the elements of the two crimes are compared, then aiding and abetting possession is likewise a lesser-included offense of aiding and abetting distribution. The only additional element that aiding and abetting adds is “aiding another,” but that element is present regardless of whether the crime is aiding and abetting possession or aiding and abetting distribution.

The language of the aiding and abetting statute, § 28-206, is that “[a] person who aids, abets, procures, or causes another to commit any offense *may be prosecuted and punished as if he were the principal offender.*” (Emphasis supplied.) It is the emphasized language which seems crucial. If the aider and abettor is prosecuted and punished as if he or she were the principal offender, in this case the one actually doing the distributing, then he or she should receive the benefit of the same lesser-included offenses as would the principal offender. In other words, if an aider and abettor is prosecuted and punished as a deliverer because he or she has provided “mere encouragement or assistance,” held to be sufficient participation in the criminal act for conviction of aiding and abetting, see *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992), then the defenses available to the principal should be equally available to the aider and abettor. Accordingly, for this reason, and given the holding of *Johnson, supra*, we find that the first step in the analysis pursuant to *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), is satisfied.

Second Prong: Is There Rational Basis to Acquit of Greater and Convict of Lesser?

At trial, both Brehm and McKimmey testified that McKimmey helped arrange the transaction. McKimmey said that she was using methamphetamine, that she had gotten it in the past from Alex, and that she contacted Alex to come over and “do this deal” because she knew he would probably have it. She hoped to obtain some of the methamphetamine for her own use.

Brehm testified that McKimney "said something about wanting to take a bump of it," and McKimney testified as follows:

Q [Prosecutor]: You took an active role in this transaction, didn't you?

A: Yes.

....

Q: . . . [A]t no time did you ever step back and say, "I don't want anything to do with this, you guys go do the deal," you stayed involved, didn't you?

A: Yes, hoping to get . . . my part because that was really my only way of being able to get it.

McKimney admitted that she got the methamphetamine from Alex and handed it to Brehm. There is ample evidence, just from her own testimony, that she called Alex to come to her apartment and sell the methamphetamine to Brehm. Clearly and undisputedly, she arranged this sale by actively assisting and encouraging Alex's "distribution" and "delivery," as the terms are defined in § 28-401(9) and (12).

[7,8] As previously discussed, the question is now whether this evidence produces a rational basis for acquitting McKimney of a greater offense and convicting her of the lesser offense. See *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001). It is not prejudicial error to fail to 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. *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001); *State v. Becerra*, *supra*. Moreover, if 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. *State v. Johnson*, *supra*; *State v. Becerra*, *supra*.

[9] In *State v. Johnson*, the court said that "[t]o possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature." 261 Neb. at 1010, 627 N.W.2d at 761, quoting *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). See, also, *State v. Williams*, 211 Neb. 650, 655, 319 N.W.2d 748, 751 (1982)

(word “‘possess’ when used in a criminal statute means something more than momentary control”). In *Johnson*, the court found that the defendant’s testimony that he had not sold marijuana to the confidential informant but admittedly had placed marijuana in a pipe was more than momentary or passing control. In *Johnson*, a lesser-included offense instruction of possession in a distribution prosecution was necessary because the Supreme Court found that the jury could have either believed the confidential informant’s testimony that Johnson delivered two baggies of marijuana to her or believed that he possessed marijuana but did not distribute it. Thus, in *Johnson*, the giving of a lesser-included offense instruction was warranted.

Here, there is no rational basis to say that McKimmey only possessed the methamphetamine but did not engage in its distribution as an aider and abettor. Her possession was momentary and fleeting, as the evidence, including her own, is that she passed it from Alex to Brehm. The State’s evidence that she made the telephone call to get Alex to bring methamphetamine to her apartment to sell to Brehm is uncontroverted, and it conclusively establishes the assistance and encouragement necessary to establish that she is guilty of aiding and abetting distribution. Thus, we conclude that there is no rational basis upon which a jury could convict her of just possessing methamphetamine and acquit her of the greater charge of aiding and abetting in the distribution and delivery of methamphetamine. In contrast to *Johnson, supra*, here McKimmey admits the greater crime. Therefore, the lesser-included offense instruction was properly refused.

Claim of Insufficient Evidence to Support Conviction.

[10] McKimmey also claims that the district court erred in finding that McKimmey’s conviction was supported by sufficient evidence when it overruled her motion to set aside the jury’s verdict. *State v. Anderson*, 10 Neb. App. 163, 166, 626 N.W.2d 627, 630 (2001), summarizes the applicable standard of review for a claim of insufficient evidence:

Regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard of review is the

same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

McKimmey's brief summarily states that "[t]he evidence in this case is lacking in probative force," brief for appellant at 8, but it fails to articulate why that is true. McKimmey's brief does point out that "Appellant did not receive any money or controlled substances for the transaction" and that "Perry contacted Appellant but she had no controlled substance to sell." *Id.* However, no authority is cited, or argument made, as to why such things render the evidence insufficient.

When cross-examined, McKimmey agreed that she was actively involved in the transaction. In addition, Brehm testified to McKimmey's participation. The evidence clearly establishes that McKimmey "assisted" the transaction. This evidence, viewed most favorably to the State, is sufficient to support McKimmey's conviction for aiding and abetting distribution or delivery, and the district court did not err in so finding.

Claim of Excessive Sentence.

McKimmey's third and fourth assignments of error are that the district court abused its discretion in denying probation and imposing a prison sentence that she claims is excessive. McKimmey combines these assignments of error into a single assignment when arguing them, and we do the same.

[11,12] We begin with the well-established rule that "a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion." *State v. Philipps*, 242 Neb. 894, 897, 496 N.W.2d 874, 877 (1993). "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.*

McKimmey was found guilty of aiding and abetting distribution or delivery of a controlled substance and may be punished as if she were the principal offender. See § 28-206. Distribution

or delivery of a Schedule II substance is a Class III felony. § 28-416(2). Class III felonies are punishable by 1 to 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000).

In determining McKimmey's sentence, the district court considered her alcohol and drug addictions, characterizing them as "choices" McKimmey made at great cost to herself. In addition, the court considered McKimmey's previous drug- and alcohol-related offenses, which include two convictions for driving under the influence of alcohol and a conviction for possession of a controlled substance. The district court found McKimmey an unsuitable candidate for probation and noted that "placing [her] on probation would promote disrespect for the law." Finally, the court found that it is likely McKimmey would engage in criminal behavior if she were put on probation.

The court sentenced McKimmey to the Department of Correctional Services for a term of 3 to 5 years' imprisonment, though § 28-105 would permit a sentence of up to 20 years' imprisonment. The sentence is well within the statutory limits. Further, the court denied probation in accordance with the factors outlined in Neb. Rev. Stat. § 29-2260(a) and (c) (Reissue 1995): "The risk is substantial that during the period of probation the offender will engage in additional criminal conduct," and "[a] lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law." The district court did not abuse its discretion in denying probation and imposing a sentence of 3 to 5 years' imprisonment.

CONCLUSION

For the foregoing reasons, we find that the district court did not err in refusing to give the jury an instruction on a lesser-included offense, in finding that McKimmey's conviction was supported by sufficient evidence, and in imposing a prison sentence of 3 to 5 years instead of imposing probation. We therefore affirm McKimmey's conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
STANLEY SPIDEL, APPELLANT.
634 N.W.2d 825

Filed October 23, 2001. No. A-00-1268.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information received from an informant, the affidavit in support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. The affidavit must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant.
5. _____. Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
6. _____. The status of citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred.
7. **Search Warrants: Probable Cause: Words and Phrases.** When considering the sufficiency of probable cause to issue a search warrant based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime. Unlike the professional informant, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends. A citizen informant is a citizen who purports to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement.

8. **Search Warrants: Affidavits: Probable Cause.** In order to invalidate a warrant, a defendant must show both that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged material is "material," that is, necessary to a finding of probable cause. Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit.
9. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
10. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts.
11. **Search Warrants: Affidavits: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review.
12. **Search Warrants: Affidavits: Courts.** Courts should not invalidate search warrants by interpreting affidavits in a hypertechnical rather than a commonsense manner.
13. **Criminal Law: Photographs: Minors.** A determination of whether a defendant took photographs for the purpose of real or simulated overt sexual gratification or sexual stimulation should include consideration of (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.
14. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.
15. ____: _____. An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

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

Dennis R. Keefe, Lancaster County Public Defender, and Webb E. Bancroft for appellant.

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

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

I. INTRODUCTION

Stanley Spidel appeals from an order of the district court for Lancaster County, Nebraska, finding Spidel guilty of two counts of visual depiction of sexually explicit conduct of a child and sentencing him to two consecutive terms of imprisonment of 2 to 5 years in the Department of Correctional Services. For the reasons set forth below, we affirm.

II. BACKGROUND

On March 1, 1999, the Lincoln Police Department received a telephone call from a man identifying himself as Thomas McFarland. McFarland spoke with Officer Kerry Crosby, an investigator with the family crimes unit. In that conversation, McFarland told Crosby that Spidel was his employer and that Spidel had a business involving unloading trucks at Fleming Foods. McFarland stated that about 1 week previously, he had gone to Spidel's residence in Lincoln, Nebraska, to pick up his paycheck. McFarland stated that while there, Spidel showed him two photographs of two females who were nude from the waist up. McFarland told Crosby that Spidel stated that the two females were his daughter's 15-year-old babysitters. McFarland also told Crosby that Spidel had stated that one of the photographs was taken with a digital camera and that Spidel had loaded the photograph onto his personal computer. The other photograph was a Polaroid photograph.

McFarland gave Crosby his own address and told Crosby that he was currently living with his mother. When asked where he could be reached, McFarland stated that he did not have a telephone, but that he could be reached at "corrections" since he was about to serve time in the county jail for a "DWI sentence or a driving while suspended sentence or something like that." McFarland also gave Crosby his date of birth.

In an affidavit subsequently prepared by Crosby, Crosby stated:

KERRY D. CROSBY, being first duly sworn upon oath, deposes and says that he is a police officer of the City of

Lincoln, Lancaster County, Nebraska. Affiant further states that I have a witness, Thomas McFarland, who advised this officer that approximately one week ago he went to the residence of his employer, Stanley Spidel, to pick up his paycheck. That the Spidel residence is located . . . in Lincoln, Lancaster County, Nebraska. While at the Spidel residence, Stanley Spidel showed him photos of two females in a partial state of nudity. The females appeared to be approximately 13 - 15 years of age. Witness was informed by Spidel, the females were 15 year old babysitters of his daughter.

Your affiant was further advised by Mr. McFarland that Spidel told him that one of the photos was taken with a digital camera and loaded onto Spidel's personal computer. The other photo shown Mr. McFarland was a polaroid type photo.

Your affiant has investigated innumerable cases involving child pornography and knows from both personal experience in the investigation of these cases and training concerning the investigation of these child pornography cases that child pornographers frequently store their pornography on computers where they are later accessible and can be easily converted to digital storage both of a temporary and permanent nature. That often this pornography is stored on floppy discs and/or CD's [and] is exchanged with other people who collect or exchange child pornography. That based on my training and experience child pornographers often accumulate other documentary evidence such as catalogues, brochures, etc. all designed for the purchase and exchange of such pornographic material.

The above does constitute grounds of probable cause for the issuance of a Search Warrant to search the premises located at [Spidel's address] for the following items:

photographs depicting nude and partially nude young adolescent females located in the residence and/or stored on computer(s) owned by the suspect and found in the above described residence; any cameras or equipment which may be used to produce, generate or reproduce photographic

material including any digital flash storage contained therein and authorizing and directing seizure of the same.

On March 3, 1999, Crosby presented this affidavit to a Lancaster County Court judge. Officers executed the warrant on March 5 and seized several items, including a computer, a printer, a digital camera, a Polaroid camera, a tripod, several videotapes, and numerous photographs and negatives. A search of these items showed that Spidel had taken photographs of two girls, one age 15 and the other age 16.

In these photographs, the girls, L.A. and C.R., are shown in various stages of undress. While the girls are partially dressed in some of the photographs, the girls are completely nude in many of the photographs. In some of the photographs, the girls are shown nude from the waist up as well as nude from the waist down. The photographs show the girls from the front fully nude and from the rear fully nude in addition to showing the girls in such a way as to reveal their genitalia.

On August 5, 1999, the State filed a three-count information in Lancaster County District Court charging Spidel with two counts of visual depiction of sexually explicit conduct of a child pursuant to Neb. Rev. Stat. § 28-1463.03 (Reissue 1995) and one count of first degree sexual assault on a child pursuant to Neb. Rev. Stat. § 28-319 (Reissue 1995). The State subsequently dropped the first degree sexual assault charge against Spidel.

Visual depiction of sexually explicit conduct of a child is a Class III felony under § 28-1463.04 if the offense is a first offense and under Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2000), a Class III felony carries a sentence of 1 to 20 years' imprisonment, a \$25,000 fine, or both. Additionally, conviction under § 28-1463.03 requires registration under the Sex Offender Registration Act, Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2000).

On August 11, 1999, Spidel was arraigned, and Spidel entered not guilty pleas to both counts.

On February 25, 2000, Spidel filed an amended motion to suppress evidence. In Spidel's motion, he requested that all evidence seized from his home on or about March 5, 1999, be suppressed. Spidel alleged that the search of his residence was conducted in

violation of his rights guaranteed to him by the 4th and 14th Amendments to the U.S. Constitution; article I, § 7, of the Constitution of the State of Nebraska; and Nebraska statutes. Spidel also requested that he be permitted to make a preliminary showing through an offer of proof as to the statements and material omissions made by Crosby in his affidavit in reckless disregard of the truth.

A hearing on Spidel's motion was held on February 28, 2000. At that hearing, the court allowed Spidel to present evidence supporting Spidel's argument that Crosby's affidavit contained material, false statements, and/or omissions in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

At the hearing, Crosby testified that after McFarland called him and before he presented the affidavit for a search warrant, he reviewed certain computer screens made available at the police department. One of the screens Crosby reviewed was a personal information display screen for McFarland. Crosby testified that a personal information display screen is a standard screen in the police department's database which shows a person's name, address, date of birth, physical description, and present address or last known address where the person was contacted, as well as the person's previous address and other identifying characteristics. Crosby testified that he also reviewed the Lancaster County Sheriff's contact listing for McFarland, a citation and arrest display listing for McFarland, and a police department contact list.

Crosby testified that none of these documents corroborated the address McFarland relayed to him on the telephone. Furthermore, although McFarland told Crosby that he could reach him at "corrections" because he had to go to county jail to serve a driving under the influence of alcohol (DUI) sentence or driving under suspension (DUS) sentence, Crosby testified that he was unable to find any information suggesting that McFarland had recently been convicted of DUI or DUS in Lancaster County. Additionally, Crosby testified that the birth date McFarland gave Crosby was a couple of days off from the birth date listed for McFarland in police records.

At the hearing, Spidel contended that these omissions were material and that if the county judge had known of these

omissions, the warrant would not have been issued. In orders filed May 23 and June 6, 2000, the district court overruled Spidel's motion to suppress.

On June 19, 2000, Spidel waived his right to a jury trial and his right to a speedy trial. On July 17, a bench trial was held. The case was tried pursuant to a stipulation which states as follows:

1. On March 5, 2000 [sic], Investigator Kerry Crosby, Investigator Mark Unvert, and Sergeant Mark Merwick of the Lincoln Police Department executed a search warrant at the residence of Stanley Spidel . . . Pursuant to the search warrant, officers seized a computer, computer scanner, numerous floppy discs, and a Minolta digital camera from the bedroom of the residence.

2. Investigator Ed Sexton of the Lincoln Police Department examined the computer and floppy discs. Inv. Sexton numbered each of the discs as he examined them. Discs 87, 88, and 89 contained photographs of two girls who appeared to be under the age of 18 years in various stages of dress. It also appeared that the photographs were taken at the residence of Spidel. Inv. Sexton compiled exact copies of these photographs onto one CD Rom disc for ease of viewing.

3. Copies of the photographs have been printed from the CD Rom prepared by Inv. Sexton. They are marked as Exhibits 1 through 3. Exhibit 1 contains photographs found on disc 87. Exhibit 2 contains photographs found on disc 88. Exhibit 3 contains photographs found on disc 89.

4. Each of the photographs on each computer disc were named on the disc as "Pic" followed by a specific number.

5. Inv. Crosby was able to determine the identity [of] the two girls in the above-mentioned photographs as [L.A.] and [C.R.].

6. The following is a list of photographs and the person depicted in each photograph:

Exhibit 1 (disc 87):

Pic 00001 - [L.A.]

Pic 00003 - [C.R.]

Pic 00004 - [L.A.] (left) and [C.R.] (right)

Pic 00005 - [L.A.] (left) and [C.R.] (right)

Pic 00006 - [L.A.] (left) and [C.R.] (right)
Pic 00007 - [L.A.] (left) and [C.R.] (right)
Pic 00008 - [L.A.] (left) and [C.R.] (right)
Pic 00009 - [L.A.] (left) and [C.R.] (right)
Pic 00010 - [C.R.]
Pic 00011 - [L.A.] (left) and [C.R.] (right)
Pic 00012 - [L.A.] (left) and [C.R.] (right)
Pic 00013 - [L.A.] (left) and [C.R.] (right)
Pic 00035 - [L.A.] (left) and [C.R.] (right)
Pic 00037 - [L.A.]
Pic 00045 - [C.R.]
Pic 00050 - [L.A.] and [C.R.]

Pic 00051 - [C.R.] (left) and [L.A.] (right)

Exhibit 2 (disc 88):

Pic 00048 - unknown which girl

Pic 00053 - [C.R.]

Exhibit 3 (disc 89):

Pic 00016 - [L.A.] (left) and [C.R.] (right)
Pic 00019 - [L.A.] (left) and [C.R.] (right)
Pic 00025 - [L.A.] (left) and [C.R.] (right)
Pic 00026 - [L.A.] (left) and [C.R.] (right)
Pic 00027 - [L.A.] (left) and [C.R.] (right)
Pic 00028 - [L.A.] (left) and [C.R.] (right)
Pic 00029 - [L.A.] (left) and [C.R.] (right)
Pic 00032 - [L.A.] (left) and [C.R.] (right)

The photographs contained in Exhibits 1 through 3 are fair and accurate depictions of the photographs found by Inv. Sexton on discs 87, 88, and 89.

7. Inv. Crosby interviewed [L.A.] on July 8, 1999. [L.A.] would testify that her date of birth is July 13, 1983. She knows the defendant, Stanley Spidel, and has babysat for his daughter in the past. [L.A.] would testify that Spidel took the photographs in Exhibits 1-3 and additional photographs at his residence and she saw him load some of those photographs into a computer. She believes that this happened on three or four occasions. Spidel paid [L.A.] and [C.R.] to take the photographs. [L.A.] believes that the photographs were first taken in July, 1998, and last taken in March, 1999.

8. [C.R.] was interviewed by Inv. Crosby in [sic] August 13, 1999. Reynolds date of birth is 11-20-82. She would testify that on one occasion Stanley Spidel took nude photographs of [L.A.] and herself at his residence. She believes the photographs were taken sometime during 1998, prior to the beginning of the school year.

9. On July 9, 1999, Inv. Crosby arrested Stanley Spidel. He was interviewed at the jail after being advised of and waiving his Miranda rights. Inv. Crosby would testify that Spidel admitted knowing [L.A.] and [C.R.]. He admitted taking photographs of both girls, but stated that they also took photographs of themselves, and that he believed [L.A.'s] boyfriend also took some photographs of her, too. He indicated that he paid them \$30 to \$50 each time he took pictures of them. He said that they wanted to make some money and that he suggested the photographs as a way for them to make money. He admitted taking photographs of the two girls in his kitchen and then his bedroom. These photographs are contained in Exhibits 1, 2, and 3.

10. All events occurred in Lancaster County, Nebraska. On September 25, 2000, the trial court found Spidel guilty of two counts of visual depiction of sexually explicit conduct of a child.

On November 7, 2000, the court sentenced Spidel to 2 to 5 years' imprisonment on each count, the sentence on count II to be served consecutively to the sentence imposed on count I. The trial court ordered Spidel to pay the costs of the action and gave Spidel credit for 488 days spent in custody. The "Sex Offender Registration Notice" was executed and filed.

Spidel appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Spidel argues that the district court erred in (1) overruling his motion to suppress, (2) finding sufficient evidence to sustain the judgments against him, and (3) ordering him to serve excessive sentences.

IV. STANDARD 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).

[2] To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *Id.*

[3] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001).

V. ANALYSIS

1. MOTION TO SUPPRESS

On appeal, Spidel argues that the district court erred in overruling his motion to suppress. Specifically, Spidel argues that the affidavit upon which the search warrant was based was insufficient to establish probable cause.

(a) McFarland's Reliability

Spidel argues that the affidavit in support of the search warrant fails to establish McFarland's reliability or the reliability of McFarland's information.

[4] When a search warrant is obtained on the strength of information received from an informant, the affidavit in support of the issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity. The affidavit must also either establish the informant's credibility or set forth a police officer's independent investigation of the information supplied by the informant. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

[5] Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a

search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Peters, supra*.

Clearly in the instant case, the affidavit does not state that McFarland has given reliable information to the police officers in the past, that McFarland made a statement against his or her penal interest, or that Crosby's independent investigation established McFarland's reliability or the reliability of the information McFarland gave. Therefore, the question is whether McFarland is a citizen informant.

[6] The status of citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred. *State v. Peters, supra*.

[7] When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). Unlike the professional informant, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends. *Id.* A citizen informant is a citizen who purports to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. *Id.*

In the affidavit, Crosby stated that he had a witness, McFarland, who had advised him that approximately 1 week previously he went to his employer's residence to pick up his paycheck. McFarland told Crosby that Spidel was his employer and gave Crosby Spidel's home address. The affidavit states that while at Spidel's residence, Spidel showed McFarland two photographs of two females in a "partial state of nudity." Crosby stated that McFarland was informed by Spidel that the two females were 15 years old and babysat for Spidel's daughter. McFarland also told Crosby that Spidel stated that one of the

photographs was taken with a digital camera and loaded onto Spidel's personal computer and that the other photograph Spidel showed him was a Polaroid photograph.

Clearly, the affidavit shows that McFarland's statements to Crosby were based on McFarland's personal knowledge in that McFarland personally saw the photographs in question. Moreover, there is no evidence on this record showing that McFarland had any selfish motivation for contacting the police, whether that be leniency or monetary gain. Additionally, the fact that McFarland was Spidel's employee gives credence to the view that McFarland was acting openly and was motivated by good citizenship.

(b) Material Omissions

Spidel contends that if the affidavit supports the view that McFarland is a reliable citizen informant, it is because the affidavit contains material, false statements, and/or omissions in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

At the hearing on Spidel's motion to suppress, Crosby testified that between the time of McFarland's telephone call and his presentation of the affidavit for a search warrant, he reviewed several documents that he accessed through the police department. Crosby testified that although these documents listed an address for McFarland, the address listed did not match the address McFarland had given Crosby for himself over the telephone. Furthermore, although McFarland told Crosby that he could reach him at "corrections" because he had to go to county jail to serve a sentence for DUI or DUS, Crosby testified that he was unable to find any information suggesting that McFarland had recently been convicted of DUI or DUS in Lancaster County. Additionally, the birth date McFarland gave Crosby was a couple of days off from the birth date listed for McFarland in police records.

[8] Spidel argues that the above information was material information and its omission misled the judge who issued the warrant. *Franks v. Delaware*, *supra*, indicates that in order to invalidate a warrant, a defendant must show both that the affiant made a deliberate falsehood or acted with reckless disregard for the truth and that the challenged material is "material," that is,

necessary to a finding of probable cause. Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), *overruled on other grounds*, *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

In overruling Spidel's motion to suppress, the trial court noted Spidel's argument that the address, birth date, and criminal record contained in the police department's records did not match the information McFarland gave Crosby. The court stated:

The fact that the address did not match is of no consequence. The address kept in the computer data bank reflects the address given at the time of a police contact. People move. The birth date is close and may be little more than a scrivener's error. The criminal record is more troubling. Crosby testified that McFarland told him he was due to begin serving jail time on a DWI or driving while suspended "something like that." Exhibit 5 shows no arrests in Lancaster County for those offenses. In addition, the Lancaster County offenses do not appear to be the type of offenses that carry a jail sentence. . . . Defendant asserts that this information, known to Crosby, should have been included in his affidavit. He further argues that if it had been, the warrant would not have been issued. I am not convinced that is true.

Essentially, in the instant case, the trial court held that the omitted information in Crosby's affidavit did not mislead the county judge who issued the warrant.

On this record, we cannot conclude that the trial court's findings in this regard were wrong. Even though Crosby omitted the fact that he could not corroborate some of the information McFarland gave him, we find, as did the trial court, that none of this information was material enough to mislead the county judge who issued the search warrant.

(c) Probable Cause

Having determined that McFarland was a reliable citizen informant, we address the question of whether the affidavit

established probable cause to issue the warrant. The affidavit presented to the county judge contained the following facts: (1) Spidel showed McFarland photographs of two "partially nude" 15-year-old girls, (2) the two girls had previously babysat for Spidel's daughter, and (3) one of the photographs Spidel showed McFarland was taken with a digital camera and loaded onto Spidel's computer. Furthermore, in the affidavit, Crosby stated that he had investigated other child pornography cases and that child pornographers frequently use their computers to share and exchange pornography.

[9] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

Spidel argues that the affidavit was insufficient to establish probable cause, since the affidavit stated that the girls in the photographs shown by Spidel to McFarland were "partially nude." Spidel argues that it is not a crime to take or have pictures of girls 15 years of age "in a partial state of nudity" and that "[a]nyone in a swimsuit is 'partially nude.'" Brief for appellant at 14.

In pertinent part, Neb. Rev. Stat. § 28-807 (Reissue 1995) states:

(9) Nudity shall mean the showing of the human, post-pubertal male or female genitals, pubic area, or buttocks with less than a full opaque covering, the depiction of covered male genitals in a discernibly turgid state, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple.

Clearly, § 28-807(9) sets out that female nudity can be the showing of the "female genitals, pubic area, or buttocks with less than a full opaque covering . . . or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple." Therefore, although it may have been more helpful to the county court judge if Crosby had been more specific regarding the girls' nudity, we determine that the county court judge could have easily construed partial

nudity to mean that the photographs showed the girls' "genitals, pubic area, or buttocks with less than a full opaque covering" or "the breast with less than a full opaque covering of any portion thereof below the top of the nipple."

[10-12] Furthermore, a magistrate's determination of probable cause to issue a search warrant should be paid great deference by reviewing courts. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996). After-the-fact scrutiny by courts of the sufficiency of an affidavit used to obtain a search warrant should not take the form of a de novo review. *Id.* Additionally, courts should not invalidate search warrants by interpreting affidavits in a hypertechnical rather than a commonsense manner. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Given this standard, we conclude, as did the trial court, that the affidavit provided sufficient probable cause to issue the search warrant.

2. SUFFICIENCY OF EVIDENCE

On appeal, Spidel argues that the evidence is insufficient to support his convictions. Specifically, Spidel contends that the State failed to produce evidence proving every element of his offenses beyond a reasonable doubt.

As stated above, when reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001).

Section 28-1463.03(1) states: "It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers."

Sexually explicit conduct is defined in Neb. Rev. Stat. § 28-1463.02(5) (Reissue 1995) as

- (a) [r]eal or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between a human and an animal

or with an artificial genital; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; (e) erotic nudity; or (f) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved.

At the stipulated trial, the visual depictions or photographs found in Spidel's possession were received into evidence. The question in the instant case is whether these pictures contain "erotic nudity," since the photographs do not depict anything else covered in the statute.

To prove "erotic nudity," the State must prove beyond a reasonable doubt that the "erotic nudity" was "for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved." § 28-1463.02(2) and (3).

Spidel argues that there is nothing in the record which supports the conclusion that Spidel took the pictures for the purpose of real or simulated overt sexual gratification or sexual stimulation.

[13] A determination of whether a defendant took photographs for the purpose of real or simulated overt sexual gratification or sexual stimulation should include consideration of (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993).

Having viewed the photographs in evidence, we conclude that the trial court did not err in finding that the State had proved every element of Spidel's offenses beyond a reasonable doubt. In many of the photographs Spidel took, the focal point is the girls' genitalia or pubic areas. The setting of many of the visual depictions, a bedroom, is also sexually suggestive. In many of the photographs, the girls are depicted in unnatural poses. The photographs show the girls from the front fully nude and from the rear fully nude in

addition to showing the girls in such a way as to reveal their genitalia. Additionally, in some of the photographs, the visual depiction clearly suggests sexual coyness or a willingness to engage in sexual activity. This record leaves little doubt that Spidel's visual depiction of the girls was intended or designed to elicit a sexual response in the viewer, Spidel. Therefore, we conclude that the trial court did not err in finding that there was sufficient evidence to sustain Spidel's convictions.

3. EXCESSIVE SENTENCES

[14] Spidel contends that the district court erred in imposing excessive sentences. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

[15] An abuse of discretion occurs 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.*

Spidel was convicted of two Class III felonies. A Class III felony carries a sentence of 1 to of 20 years' imprisonment, a \$25,000 fine, or both. Because Spidel's sentences were within the statutory limits, we conclude that the district court did not abuse its discretion when sentencing Spidel. Accordingly, Spidel's assignment of error regarding sentencing is without merit.

VI. CONCLUSION

After reviewing the record, we conclude that the district court did not err in overruling Spidel's motion to suppress or in finding sufficient evidence to sustain Spidel's convictions. Additionally, the trial court did not order Spidel to serve excessive sentences. Therefore, we affirm Spidel's convictions and sentences.

AFFIRMED.

KARI LEA JACOBSON, NOW KNOWN AS
KARI LEA JACOBSON KELLEY, APPELLANT, v.
STEVE MARLIN JACOBSON, APPELLEE.

635 N.W.2d 272

Filed November 6, 2001. No. A-00-1057.

1. **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.
2. **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.
3. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Actions: Statutes.** A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
6. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
7. **Final Orders: Words and Phrases.** When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a party, the order affects a substantial right.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Appeal dismissed.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Lori L. Phillips, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

HANNON, INBODY, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Kari Lea Jacobson Kelley appeals the decision of the district court for Phelps County denying her application to remove the

parties' minor children from Nebraska to Missouri. We dismiss the appeal for lack of jurisdiction because the order appealed from did not determine custody and therefore was not final.

BACKGROUND

Kari Lea and Steve Marlin Jacobson were divorced pursuant to a decree of dissolution filed in the district court for Phelps County, Nebraska, on August 18, 1998. Two children were born to the couple during the marriage: Alyssa Lianne born December 20, 1988, and Danielle Renae born November 21, 1990. Kari Lea was granted custody of the children, and Steve was granted visitation rights of every other weekend in addition to holiday and summer vacations.

At the time of the divorce decree, both parties were residents of Holdrege, Nebraska. Following the divorce, Kari Lea made a series of frequent moves with the children and her boyfriend (now husband), David Kelley, prompted by David's pursuits of various employment opportunities related to the restaurant industry.

In July 2000, Kari Lea filed a request for permission to remove the children from the state so that she could join David in St. Joseph, Missouri, where he had taken a new position. In response to Kari Lea's request for removal, Steve filed a cross-petition, alleging a material change of circumstances since the entry of the decree by virtue of Kari Lea's frequent moves and unstable employment which negatively affected the children. The prayer of the cross-petition requested a change of custody should Kari Lea be allowed to move the children to Missouri. A hearing was held on August 25 on Kari Lea's request to remove the children from the jurisdiction. The court denied the request at the conclusion of the hearing, finding (1) that Kari Lea did not have a legitimate reason for moving to Missouri, (2) that her marriage was not stable at that point in time, and (3) that the move to Missouri did not have the potential for enhancing the quality of life for the children. At the conclusion of the hearing, the court refrained from ruling on the custody issue and indicated that it was a matter still pending before the court. The court also ordered Steve to immediately enroll the children in the Phelps County School District No. R-7 located in the Holdrege area.

Following the removal hearing, Kari Lea filed a motion for a new trial based on the district court's failure to take into consideration numerous factors in deciding her request for permission to remove the children from Nebraska. The motion was denied, and this appeal was filed.

ASSIGNMENTS OF ERROR

Kari Lea asserts that the district court erred in overruling her motion to remove the children from Nebraska to Missouri along with her motion for a new trial for the following reasons: (1) She had a legitimate reason for leaving Nebraska and it was in the children's best interests to continue to live with her, (2) the court's finding that her marriage was unstable was contrary to the evidence, and (3) the statements made by one of the children was found controlling when the statements were devoid of any factual basis or sound reasoning. Kari Lea also assigns error to the district court's decision ordering Steve to enroll the children in the Phelps County School District No. R-7.

STANDARD OF REVIEW

[1-3] 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. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Paulsen v. Paulsen*, ante p. 269, 634 N.W.2d 12 (2001). 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. *Id.* When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Id.*

ANALYSIS

In this case, we are called upon to determine whether the order denying Kari Lea's application to remove the children from Nebraska, while reserving the issue of custody modification in Steve's cross-petition, constitutes a final, appealable order.

[4] The three types of final orders which may be reviewed on appeal under Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order

affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[5] The order denying Kari Lea's motion to remove the children from Nebraska clearly does not fall within the first or third categories. Orders which fall into the second category of § 25-1902 must meet two requirements: a substantial right must be affected, and the court's order must be in a special proceeding. *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999). The Nebraska Supreme Court has construed the phrase "special proceeding" to mean civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000); *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994). Requiring a custodial parent to obtain permission of the court to remove children from the state is a remedy which stems from custody determinations under chapter 42 of the Nebraska Revised Statutes, not chapter 25, and is therefore a special proceeding.

[6,7] "A substantial right is an essential legal right, not a mere technical right." *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 724, 592 N.W.2d 894, 904 (1999). When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a party, the order affects a substantial right. *In re Estate of Peters, supra*; *Holste v. Burlington Northern RR. Co., supra*. The denial of a request to remove the parties' minor children from the State of Nebraska does affect a substantial right of the custodial parent; that being the right to determine where to reside with the minor children. The denial of the request to remove the children in this action may also impact Kari Lea's right to custody, which is clearly a substantial right. See *Templeton v. Templeton*, 9 Neb. App. 937, 622 N.W.2d 424 (2001).

Despite the fact that the court's order denying Kari Lea permission to remove the children from the jurisdiction is an order affecting a substantial right made during a special proceeding, our inquiry does not end there. The order at issue did not decide all of the issues pending before the court as the issue of custody, raised in Steve's cross-petition, was scheduled for hearing at a later date. This court recently addressed a similar situation in

Paulsen v. Paulsen, ante p. 269, 634 N.W.2d 12 (2001), wherein a custody modification order was entered, but the issue of child support was reserved for determination at a subsequent hearing. We dismissed the appeal as the trial court did not decide all of the issues submitted to the court in the special proceeding, citing *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990) (court's resolution of one issue raised by modification application, but retention of other issues does not constitute final order for purpose of appeal), and *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984) (trial court's order dissolving marriage and disposing of property issues, but reserving issues of custody and support was interlocutory and not final).

We believe this case is also governed by Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000), which provides as follows:

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.

(Emphasis supplied.)

In the instant action, while the court decided the only issue raised by Kari Lea in her application for permission to remove the children from the jurisdiction, it did not address the issue of custody raised in Steve's cross-petition. Further, the court did not make the express determination and direction for entry of a final judgment as required by § 25-1315(1).

For the foregoing reasons, the order entered by the district court denying Kari Lea's application was not a final, appealable order, and this court is without jurisdiction to hear the appeal.

CONCLUSION

Because the trial court did not decide all of the issues submitted to it in the special proceeding, the order was not a final order. Accordingly, this court does not have jurisdiction to hear the appeal.

APPEAL DISMISSED.

MARVIN HALE, APPELLEE, v.
VICKERS, INC., APPELLANT.
635 N.W.2d 458

Filed November 13, 2001. No. A-01-326.

1. **Appeal and Error.** In order to be considered by an appellate court, an assignment of error must be both specifically assigned and argued as error in the appellant's brief.
2. **Workers' Compensation: Appeal and Error.** 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 single judge who conducted the original hearing.
3. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.
4. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
5. **Workers' Compensation: Appeal and Error.** Findings of fact by the Workers' Compensation Court trial judge are not to be disturbed on appeal unless clearly wrong.
6. ____: _____. An appellate court may not substitute its view of the facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
7. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Cum. Supp. 2000) authorizes a penalty of 50 percent of compensation payable where there is no reasonable controversy regarding an employee's claim for workers' compensation and payment is delinquent for 30 days. Whether a reasonable controversy exists under § 48-125 is a question of fact.
8. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases: Appeal and Error.** A reasonable controversy under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2000) may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's

claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.

9. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures.** To avoid the penalty provided for in Neb. Rev. Stat. § 48-125 (Cum. Supp. 2000), an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation.
10. **Workers' Compensation: Trial.** Whether an injury is caused by a work-related accident is a question of fact.
11. **Workers' Compensation.** It has long been recognized that the lighting up or acceleration of preexisting conditions by accident is compensable.
12. _____. Neb. Rev. Stat. § 48-134 (Reissue 1998) provides that if the employer so requests, an employee seeking benefits under the Nebraska Workers' Compensation Act shall submit to an examination by a physician or surgeon furnished by the employer.
13. **Workers' Compensation: Evidence.** Under the plain language of Neb. Rev. Stat. § 48-134 (Reissue 1998), one purpose of the statute is to allow an employer to gather medical evidence to analyze, and perhaps dispute, all or part of a claim. This would include gathering evidence as to whether a proposed course of medical treatment is necessitated by a compensable work accident.
14. **Workers' Compensation.** Neb. Rev. Stat. § 48-134 (Reissue 1998) does not allow a complete denial of benefits, even if there is an unreasonable refusal to be examined, because the employer's sole remedy under the statute is that the employee is deprived of compensation during the continuance of such refusal.
15. _____. The fundamental question of the compensability of a employee's claim stands separate from whether the employee can be deprived of benefits under Neb. Rev. Stat. § 48-134 (Reissue 1998) during the time of an unreasonable refusal to undergo an employer's medical examination.
16. **Workers' Compensation: Trial.** Whether an employee's refusal to submit to a Neb. Rev. Stat. § 48-134 (Reissue 1998) medical examination was unreasonable is a fact question.
17. **Workers' Compensation: Expert Witnesses.** Whether proceeding with surgery impacted any physician's ability to assess causation and necessity of the surgery requires expert testimony when the patient's condition is a subjective injury rather than an objective one.
18. **Workers' Compensation: Time.** Where the total amount of compensation due for permanent disability is in dispute, the employer has a duty under Neb. Rev. Stat. § 48-125(1) (Cum. Supp. 2000) to pay within 30 days of the notice of disability any undisputed compensation; the only legitimate excuse for delay in the payment is the existence of a genuine dispute from a medical or legal standpoint that any liability exists.
19. **Workers' Compensation: Time: Appeal and Error.** If an employer does not have an actual basis, in law or fact, for disputing the employee's claims and thus is not justified in appealing the award, the employer is not excused from paying benefits within 30 days of the award, notwithstanding that an appeal was filed.
20. **Workers' Compensation: Evidence: Proof.** When the employee presents evidence of medical expenses resulting from injury, it has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable.

Appeal from the Nebraska Workers' Compensation Court.
Affirmed as modified.

Paul F. Prentiss and Paul E. Larson, of Timmermier, Gross & Prentiss, for appellant.

Dirk V. Block, of Marks, Clare & Richards, for appellee.

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Vickers, Inc., appeals from the Nebraska Workers' Compensation Court's award to Vickers' employee Marvin Hale. At issue is whether Hale unreasonably refused to submit to an examination by Vickers' physician, thereby creating a reasonable controversy about the compensability of Hale's claim, and whether the trial court adhered to the fee schedule of the Workers' Compensation Court in awarding Hale medical expenses.

FACTUAL BACKGROUND

Hale has a history of knee problems. Hale testified before the Workers' Compensation Court trial judge that in the late 1970's, his right knee often locked up due to loose cartilage. In 1978 or 1979, Hale became unable to work, so he underwent knee surgery. Hale testified that following this surgery, he did not seek any additional treatment to his right knee, that the surgery did not limit his activities, and that he never missed any work due to knee problems until the instant situation.

On July 11, 1999, while working for Vickers as a machine operator, Hale stepped off of the platform on which he worked, wedging his right foot between the platform and the floor. He twisted his right knee as he fell. Hale told his employer immediately that he had been hurt but continued his shift that day. When he got home, Hale made an appointment with Dr. Samar Ray, who saw him on July 16, 1999. Dr. Ray wrote the following in his progress note of that date:

Marvin says on 07/12/99 he fell at work and twisted his right knee and since then, he has had considerable discomfort in the knee. The knee is also swollen. He said he can hardly walk on this knee. In the past, he had an open meniscectomy of the right knee, might be about 20-25 years

ago. He said he never really had any problem with the right knee until he fell.

Dr. Ray also noted that x rays of the knee showed moderately advanced degenerative arthritis. He gave Hale a cortisone injection and a program of physical therapy. Hale continued to work, but with substantial difficulties. On July 30, 1999, Hale reported to Dr. Ray that he was better than before, but still felt numbness while driving and a tightness in his knee. Dr. Ray prescribed anti-inflammatory medication and advised Hale to continue with the physical therapy.

On August 6, 1999, Hale reported to Dr. Ray that he "really [was] not making any progress," "continue[d] to have significant pain," could not "do many of the activities he would like to do," and was "having problems sleeping at night." Dr. Ray noted in his progress report that the cortisone injection had provided Hale some relief, but that Hale felt ready to proceed with total knee arthroplasty. Hale ceased work at this time, as Dr. Ray advised Hale not to work until after the surgery.

According to Hale, his condition continued to worsen from the day of the accident up to the date of surgery, which Dr. Ray had scheduled for August 25, 1999. Dr. Ray first mentions the surgery in his progress note of August 6, although the note does not specify a date for the procedure. Vickers' labor relations manager testified that Vickers did not learn of the proposed surgery until August 18, when its industrial nurse received a copy of Dr. Ray's progress note of August 6.

Soon after receiving notice of the scheduled surgery, Katie Eilers, a Vickers claim representative, telephoned Hale to request that he submit to an examination by a doctor of Vickers' choice. Hale agreed, and Eilers told him that Vickers had scheduled an August 30, 1999, appointment for Hale to be seen by Dr. Michael Morrison. Hale said that he could not keep that appointment because of his surgery on August 25, and Eilers told him to postpone the surgery. Hale testified that he told her "[n]o, I'm in too much pain. I can't sleep. I'm eating . . . Advil by the bottles. I'm not postponing my surgery." Eilers sent Hale a letter on August 20, confirming the appointment as follows: "As per our telephone conversation, an appointment has been made for you with Dr. Michael Morrison on August 30, 1999 at 3:15 P.M. . . . As we

discussed, when the type of surgery that is involved is this extensive, it is important to have a second opinion."

Hale underwent surgery as scheduled and therefore did not attend the August 30, 1999, appointment with Dr. Morrison. On October 21, Eilers wrote Hale a letter denying his workers' compensation claim. The letter explains the denial as follows:

It is our position that your refusal to attend this examination prior to surgery substantially prejudiced our rights to investigate the extent your injury affected your preexisting degenerative knee condition.

For this reason, we assume your surgery is related solely to your preexisting degenerative knee condition, and are thus denying the expenses for surgery and your claim for benefits due to time missed from work as unrelated to your alleged work injury.

After Hale filed this action for benefits, Vickers hired Dr. Peter Cimino to examine Hale's knee, and Hale saw Dr. Cimino as Vickers requested. Dr. Cimino's August 17, 2000, report indicates that Hale's accident at work "led to acute onset of severe knee pain." Further, Dr. Cimino noted:

He went to therapy without relief. I believe he did try an injection. His unrelenting pain eventually led to a total knee replacement by Dr. Ray in August of 1999. The surgery has proved very helpful for his pain relief. He was returned back to work in December of 1999 with a 25 pound lifting restriction. I believe he has been back to work ever since.

Dr. Cimino also noted Hale's "significant" history for knee problems and stated that "[h]e did have some aching discomfort intermittently but never severe until the work accident." Finally, Dr. Cimino acknowledged that "[t]he claim is complicated by the fact that there was a pre-existing condition. The work injury exacerbated [sic] this condition, thus leading to the knee replacement procedure." Dr. Cimino found that "the procedure was a success and Mr. Hale will be able to continue with very little restrictions."

Dr. Ray rendered an opinion that a right total knee replacement was required as a result of the aggravating injury and that Hale had "sustained a permanent partial disability of thirty-seven percent (37%) of the right lower extremity." In his letter to Vickers' attorney, Dr. Cimino generally agreed with this

assessment: "It does appear that the knee replacement procedure was excelerated [sic] by the work aggravation on July 11, 1999. I am in agreement with the permanent assessment of 30 percent to the right lower extremity as a result of the knee replacement."

PROCEDURAL BACKGROUND

Hale filed a petition for hearing with the Nebraska Workers' Compensation Court on September 27, 1999. The trial judge found that Hale's compensable accident at work aggravated his preexisting degenerative arthritis and that Hale had sustained a "37 percent permanent partial disability to his right leg." The trial judge also found that Hale did not refuse to submit to an examination and that no reasonable controversy existed with respect to the compensability of Hale's claim. Accordingly, the judge ordered that Hale be paid disability of \$468 per week for a period of 16½ weeks for temporary total disability and, thereafter, \$468 per week for 79½ weeks for a 37-percent permanent partial disability to the right leg. Hale was also awarded a 50-percent penalty of all unpaid and due disability payments, attorney fees of \$2,792, and hospital and medical expenses totaling \$32,882.47.

Vickers appealed to the compensation court's review panel, which affirmed in all respects, and now Vickers appeals to this court.

ASSIGNMENTS OF ERROR

[1] Vickers assigns as error that the trial judge and the review panel erred in awarding Hale benefits when Hale refused to postpone elective surgery to allow an examination by Vickers' physician. Vickers' brief does not argue this assignment, and in order to be considered by an appellate court, an assignment of error must be both specifically assigned and argued as error in the appellant's brief. See *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Thus, the compensability of the claim is not at issue in this appeal.

The two assignments of error which are both assigned and argued, and which we decide, are the Workers' Compensation Court's (1) awarding Hale waiting-time penalties and attorney fees after finding that no reasonable controversy existed to justify Vickers' denial of benefits and (2) failing to direct that medical

expenses should be paid pursuant to the fee schedule as required by Neb. Rev. Stat. § 48-120 (Cum. Supp. 2000).

STANDARD OF REVIEW

[2-4] 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 single judge who conducted the original hearing. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. *Hernandez v. Hawkins Constr. Co.*, 240 Neb. 129, 480 N.W.2d 424 (1992). In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

[5,6] Findings of fact by the Workers' Compensation Court trial judge are not to be disturbed on appeal unless clearly wrong. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998). An appellate court may not substitute its view of the facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

ANALYSIS

Reasonable Controversy About Facts or Applicable Law.

[7] Vickers claims that the trial judge erred in finding that no reasonable controversy existed to justify Vickers' denial of benefits and that thus waiting-time penalties and attorney fees should not have been awarded. Neb. Rev. Stat. § 48-125 (Cum. Supp. 2000) authorizes a penalty of 50 percent of compensation payable where there is no reasonable controversy regarding an employee's claim for workers' compensation and payment is delinquent for 30 days. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000). Whether a reasonable controversy exists

under § 48-125 is a question of fact. *Hobza, supra*. As said in *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000), the penalty statute is to encourage prompt payment of benefits. In summary, the mandate for prompt payment of benefits requires that employees and insurers promptly handle and decide claims. If they do not, and there is no reasonable controversy about compensability, then penalties will be assessed.

[8,9] A reasonable controversy may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Guico, supra*. To avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

[10] Whether an injury is caused by a work-related accident is a question of fact. *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). Vickers argues that the accident might not have caused the disability necessitating surgery: "Dr. Ray testified that Hale suffered from degenerative arthritis due to knee surgery in 1979," and "Dr. Ray stated the cause of the degenerative arthritis was due to the 1979 surgical removal of cartilage in Hale's knee." Brief for appellant at 15. This evidence, according to Vickers, "strongly suggests that Hale's total knee replacement surgery related solely to his preexisting degenerative condition; thus, there is a basis for finding a reasonable controversy." *Id.*

[11] It has long been recognized that the lighting up or acceleration of preexisting conditions by accident is compensable. *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 112 N.W.2d 531 (1961). Because aggravating injuries have long been compensable, no reasonable controversy of a legal nature was presented because Hale had a knee operation in 1979 or because he had preexisting degenerative arthritis in the knee.

As far as a factual controversy is concerned, Vickers produced no evidence which even hinted that the July 11, 1999, incident did not occur as Hale said it did. That leaves only medical evidence for Vickers to point to as showing that the July 11 incident was not a cause of the surgery and resulting disability. However, there simply is no such medical evidence or even any dispute between the two physicians involved. Dr. Ray said, and Dr. Cimino agreed, that Hale's injury occurred at work, that the incident aggravated a preexisting medical condition so that surgery was necessary, and that temporary and permanent disability resulted. There was a complete absence of evidence that Hale's injury was not compensable, and no "reasonable but opposite conclusions" could have been reached by the trial judge regarding the compensability of Hale's claim, given the clear and unanimous nature of the medical evidence. See *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000).

Reasonable Controversy: Was Examination by Vickers' Physician Refused?

[12-15] Neb. Rev. Stat. § 48-134 (Reissue 1998) provides that if the employer so requests, an employee seeking benefits under the Nebraska Workers' Compensation Act shall submit to an examination by a physician or surgeon furnished by the employer. As we understand it, Vickers' position is that while it does not seek a ruling from us that no benefits were payable because of Hale's alleged unreasonable refusal to be examined, it does advance the proposition that Hale's action created a reasonable controversy over compensability which excludes the award of penalties. Under the plain language of § 48-134, one purpose of the statute is to allow an employer to gather medical evidence to analyze, and perhaps dispute, all or part of a claim. This would include gathering evidence as to whether a proposed course of medical treatment is necessitated by a compensable work accident. But, it is crucial to note that the statute does not allow a complete denial of benefits, even if there is an unreasonable refusal to be examined, because the employer's sole remedy under the statute is that the employee is deprived of compensation "during the continuance of such refusal." § 48-134. Thus, Vickers' suggestion that an unreasonable refusal

to be examined justifies a complete denial of benefits is untenable and contrary to the clear language of the statute, unless of course, the refusal continued during the entire time when benefits were payable. We hold that the fundamental question of the compensability of a employee's claim stands separate from whether the employee can be deprived of benefits under § 48-134 during the time of an unreasonable refusal to undergo an employer's medical examination.

The trial judge saw the issue a bit differently. He framed this issue as whether Vickers could "dictate that an injured worker can only get treatment after the examination of [sic] Section 48-134," and the judge answered in the negative. This is fundamentally correct, but begs the question because an employee can get any treatment he or she desires—the issue is really whether the employer will pay for the treatment. If there has been a compensable injury, if the treatment is necessary, and if the cost is fair and reasonable, then the employer is liable for the expense. See, § 48-120; *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985) (employer is liable for those reasonable medical expenses incurred as result of compensable accident). However, the fact that the trial judge may not have precisely framed the issue is of little consequence.

Vickers argues that it was unable to acquire medical evidence to defend the claim because Hale refused to postpone his surgery to be examined. Vickers introduced evidence that it received notice of Hale's surgery just 1 week before it was scheduled and argues that the earliest appointment date available for Hale's examination was 12 days later on August 30, 1999. According to Vickers, "providing Vickers only one week's notice before an elective surgery for a total knee replacement and then refusing to postpone the surgery to accommodate a reasonable request for a second opinion evaluation is tantamount to an unreasonable refusal . . . and justifies Vickers' denial of benefits." Brief for appellant at 12. While Vickers' answer did not plead the alleged refusal as either a complete defense or as the basis of a reasonable controversy, the parties clearly tried this issue and the trial judge decided it. Therefore, we conclude that Hale has waived any claim that the defense was not properly raised by Vickers.

[16] Whether an employee's refusal to submit to a § 48-134 medical examination was unreasonable is a fact question. *Behrens v. American Stores Packing Co.*, 234 Neb. 25, 449 N.W.2d 197 (1989). The trial judge found that Hale "never refused to submit to an examination." According to the judge, Hale "testified, and [Vickers] does not dispute, that [Hale] was willing to be examined by a physician of [Vickers'] choice." The judge also noted that Dr. Cimino's report shows that Hale did indeed submit, though after his surgery, to an examination by a physician of Vickers' choice on August 16, 2000.

There is no evidence that Hale ever told Vickers' representative, Eilers, that he would not undergo an examination. Rather, the evidence is that he refused to postpone his surgery on August 25, 1999, in order to be examined by Dr. Morrison on August 30. But Vickers did not reschedule the examination to an earlier date, nor did it introduce any evidence showing that it could not reschedule the examination before Hale's surgery. Evidence on either point would greatly assist Vickers' claim that Hale's action amounts to a refusal, but there was no such evidence. Accordingly, the trial judge's conclusion that there was not a refusal to undergo an examination is not clearly wrong, and we do not disturb that finding.

Failure to Postpone Surgery: Prejudicial to Vickers?

[17] Vickers next argues that Hale's failure to postpone his surgery prejudiced Vickers' ability to determine whether the surgery was necessary or caused by a work-related injury which in turn created a reasonable controversy over payment of benefits. As a matter of law, and as we have already held, this argument is fundamentally unsound because § 48-134 does not allow for a complete denial of benefits, even if there is a refusal to be examined. As a matter of evidence, this "prejudice argument" also fails because Vickers introduced no evidence showing that because Hale proceeded with the surgery, Dr. Morrison (or any other physician who could have been hired by Vickers) was prevented from assessing Hale's knee and rendering opinions on causation and the necessity of surgery. Absent such evidence, Vickers' claim of "prejudice" is pure speculation. Whether proceeding with surgery impacted any physician's ability to assess causation and necessity of the surgery requires expert testimony when the

patient's condition is a subjective injury rather than an objective injury. See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999) (holding that where character of injury is subjective rather than objective, cause and extent of injury must be established by expert medical testimony). There is no evidentiary support for Vickers' claim of prejudice; thus, the claim must fail, even if we were to conclude that a failure to postpone surgery was the equivalent of a refusal to be examined, a matter we need not reach because the predicate evidence is not in the record. A reasonable controversy cannot be created by mere speculation, nor by an employer's claim, unsupported by evidence, that the employer's potential defenses were prejudiced because the employee had surgery before an examination by the employer's physician. In reaching this conclusion, we obviously are mindful of the frequency that expert medical opinions are rendered merely on the basis of examination of the medical records, x rays, and other test results.

Variance in Disability Ratings as Reasonable Controversy.

Vickers claims that Dr. Ray's assessment of permanent impairment is the basis for a finding that there was a reasonable controversy because his assessment of permanent impairment is fraught with inconsistencies. Dr. Ray's deposition was taken July 10, 2000, and he testified that in his opinion, Hale had suffered some permanent impairment because he only had movement of the knee from 0 to 120 degrees, whereas normal full movement would be to 140 to 150 degrees. He said that as a result, Hale had "sustained some permanent partial disability to that knee." We quote the exchange which directly followed:

Q: Have you ascribed that a percentage rating at this time?

A: No, because we would have to go to the AMA book to find out exactly how much, 10 to 15 percent, I believe.

Q: Doctor, if I request that in writing, will you provide that to me?

A: Yes.

Q: But, in any event, it's your opinion based on a reasonable degree of medical probability that he does have permanent impairment?

A: Yes.

Thereafter, in response to a letter of July 11, 2000, from Hale's counsel, Dr. Ray wrote a letter of July 28, in evidence as exhibit 2, in which he said:

In going through the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition, I think, although he had a good result following his total knee replacement, as he had to have a total knee replacement, he has sustained a permanent partial disability of thirty-seven percent (37%) of the right lower extremity, which comes to fifteen percent (15%) of the whole person.

Vickers had Hale seen by Dr. Cimino, whose letter of August 17 was received in evidence as a late-filed trial exhibit. Dr. Cimino stated: "I am in agreement with the permanent assessment of 30 percent to the right lower extremity as a result of the knee replacement." It is probably a reasonable inference that Dr. Cimino meant to agree with the 37-percent impairment assessed by Dr. Ray—since no doctor assessed the impairment at 30 percent. The trial judge found that the permanent impairment was 37 percent.

[18] We first note that the fact that a portion of the disability may be in dispute does not allow the employer to withhold payment of all disability. In short, the employer must pay, within 30 days of accrual, the payments which are undisputed.

[W]here the total amount of compensation due for permanent disability is in dispute, the employer has a duty under the provisions of § 48-125(1) to pay within 30 days of the notice of disability any undisputed compensation; the only legitimate excuse for delay in the payment is the existence of a genuine dispute from a medical or legal standpoint that any liability exists.

(Emphasis supplied.) *Grammer v. Endicott Clay Products*, 252 Neb. 315, 320, 562 N.W.2d 332, 335 (1997). *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 905, 448 N.W.2d 591, 594 (1989), establishes the rule that an employer is responsible for paying benefits when the presence of disability itself is undisputed:

Although there is a controversy in regard to the nature and extent of the plaintiff's permanent disability, there is no evidence to support a contention that the plaintiff has no

permanent disability. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

Applying these principles, we note that there is no evidence that from August 6, 1999, until his release to return to work on November 30, Hale was not totally disabled by an aggravating injury which occurred at work. Thus, all temporary total disability had accrued, was unpaid, and was subject to penalty when the case was tried on August 8, 2000.

As far as permanent impairment of the leg is concerned, the only real factual dispute in the record is that Dr. Ray assessed it at 37 percent of the leg and Dr. Cimino said it was 30 percent. We cannot agree that by itself, the deposition of Dr. Ray creates a reasonable controversy because he plainly says that there is impairment, but he has not yet consulted the "AMA Guides to the Evaluation of Permanent Impairment, 4th edition." Once he did so, he put the impairment at 37 percent—a figure that Vickers' own doctor does not dispute—or if he does, only the difference between 30 percent and 37 percent. Hence, there was no controversy as to whether Vickers owed Hale for at least a 30-percent impairment of the leg, or 64½ weeks at his compensation rate of \$468 per week. But, we note that as of trial, no compensation whatsoever had been paid, and that at oral argument, both counsel agreed that such remained true.

However, the trial judge did not specify the precise amount of the penalty, saying only that it applied to the "due and owing" disability payments. While the precise amount of the penalty should be specified, a remand is not feasible here as the trial judge is no longer on the bench. Therefore, we modify the award so that it is appropriately specific about the penalty. There are 16⅔ weeks of temporary total disability and 64½ weeks of permanent partial disability about which there is no reasonable controversy, which has not been paid, and which became 30 days' delinquent on April 1, 2001.

[19] The pendency of this appeal does not prevent the assessment of the penalty, nor does it relieve Vickers of timely paying the weeks of temporary and permanent disability over which there was no controversy. See *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998) (if employer does not have actual basis, in law or fact, for disputing employee's claims and thus is not justified in appealing award, employer is not excused from paying benefits within 30 days of award, notwithstanding that appeal to review panel was filed). The statutory penalty is \$19,004.15 (16½ weeks temporary total disability + 64½ weeks permanent partial disability = 81.2143 weeks × \$468 × 50 percent). Vickers shall also pay the attorney fees ordered by the trial judge, those ordered by the review panel, and those which we will award after compliance with Neb. Ct. R. of Prac. 9F (rev. 2000).

Workers' Compensation Court's Fee Schedule.

Vickers cites a portion of § 48-120, which provides that "the provider or supplier of [medical] services shall not collect . . . from any employer . . . any amount in excess of the maximum fee established by the compensation court for any such service." Vickers assigns error because the trial judge's award of benefits was allegedly not in accordance with the fee schedule. Vickers states that "the compensation court is statutorily obligated to ensure that medical providers not receive any amount in excess of the maximum fee established by the compensation court." Brief for appellant at 17-18.

[20] We need not reach the merits of Vickers' argument, because in addition to voicing no objection at the trial to Hale's offer of the evidence of his medical expenses, Vickers introduced no evidence of its own that the expenses claimed by Hale and awarded by the compensation court were unreasonable, unnecessary, or outside the fee schedule contemplated by § 48-120. When the employee presents evidence of medical expenses resulting from injury, it has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable. *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). Having not contested the fairness and reasonableness of the medical expenses at trial, Vickers

cannot do so at the appellate level. This assignment of error is without merit.

CONCLUSION

The trial court was not clearly wrong in finding that Hale did not refuse to submit to the examination Vickers requested pursuant to § 48-134 and that no reasonable controversy existed about the compensability of Hale's claim. Vickers' claim of prejudice by Hale's actions is rejected as being completely without any evidentiary basis, dispensing with any need for us to analyze whether that claim has any legal merit. We have no evidence that the trial court failed to award expenses in accordance with the compensation court's fee schedule. For those reasons, we affirm the compensation court's order and award in every respect, except as to the foregoing modification to specify the amount of the penalty.

AFFIRMED AS MODIFIED.

DESIGN BUILDERS, INC., AND DONALD D. SCHROEPPPEL,
SOLE STOCKHOLDER, APPELLEES, V. SANDY R. HEYD-LAMB,
APPELLEE, DOUGLAS M. LAMB, APPELLANT, AND
SHIRLEY J. HEYD, APPELLEE.

635 N.W.2d 543

Filed November 20, 2001. No. A-00-976.

1. **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.
2. ____: _____. An appellate court has jurisdiction to determine whether it has jurisdiction.
3. **Judgments: Records.** Under Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000), judgment is not entered until the clerk of the court places a file stamp and date upon the judgment, and of course, there is no judgment until the judge renders a judgment by signing a written notation of the relief granted or denied.
4. **Courts: Motions to Vacate.** A district court has the inherent authority to vacate or modify its decision within the same term in which the initial decision was rendered.
5. **Courts: Motions to Vacate: Time.** A district court retains authority to rule upon a motion to vacate a default judgment made within the original term during which the default judgment was rendered.
6. **Default Judgments: Proof.** The vacation of a default judgment rests in the discretion of the district court, and the burden rests on the person adversely affected by the

Cite as 10 Neb. App. 642

court's order to affirmatively establish an abuse of discretion. But this discretion is not an arbitrary one, and it must be exercised reasonably.

7. ____: _____. Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default.
8. ____: _____. Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
9. **Default Judgments.** In considering a request to set aside a default judgment, a court may consider promptness of the motion to vacate, negligence or want of diligence of the party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in the administration of justice.
10. **Pleadings: Service of Process: Time.** The answer to a petition shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant and (2) a statement of any new matter constituting a defense, counterclaim or setoff, in ordinary and concise language, and without repetition. The answer shall be filed within 30 days after service of the summons and petition upon the defendant and be subscribed by the party or his or her attorney.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

Melvin C. Hansen and Dan Kotrapu, of Hansen, Engles, Ketcham, Olson & Buckley, P.C., for appellant.

C. Jan Headley for appellees Design Builders, Inc., and Donald D. Schroepfel.

HANNON, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Douglas M. Lamb appeals from an order of the district court for Sarpy County denying Lamb's motion to set aside the default judgment entered against him. For the reasons stated below, we reverse, and remand the matter for further proceedings.

BACKGROUND

Design Builders, Inc., and Donald D. Schroepfel, hereafter collectively referred to as "Builders," filed a petition on April 9, 1999, in the district court alleging that Sandy R. Heyd-Lamb, as an employee of Builders, had embezzled \$51,134.58. Builders also alleged that Heyd-Lamb's husband, Lamb, and Heyd-Lamb's

mother, Shirley J. Heyd, were unjustly enriched by receiving benefits of the moneys alleged to have been taken from Builders by Heyd-Lamb. The transcript before us contains a copy of a return of service indicating that the sheriff for Sarpy County completed personal service of process on Lamb on April 12, 1999.

Each of the three defendants responded individually, without legal counsel, to the petition by filing typewritten letters with the clerk of the district court. Lamb's responsive letter, file stamped on April 30, 1999, denied any knowledge of or benefit from the alleged embezzlement by Heyd-Lamb.

Builders filed a motion for default judgment or in the alternative upon the pleadings against Heyd-Lamb, which the district court granted on September 28, 1999, entering a judgment against Heyd-Lamb in the amount of \$51,134.58 plus costs. On October 26, Builders filed a similar motion for default judgment against Lamb and Heyd for failure to answer, provided notice of hearing, and indicated in the certificate of service that the motion and notice were served on Lamb and Heyd at their respective addresses on October 25. In a docket entry dated November 12, 1999, the district court noted that Builders appeared with counsel, that Heyd-Lamb appeared pro se, and that neither Lamb nor Heyd appeared on the motion for default judgment. The court further noted that as Heyd-Lamb had filed an appeal to this court of the default judgment entered against her, it lacked jurisdiction to consider the motion for default judgment against Lamb and Heyd. Heyd-Lamb's appeal (case No. A-99-1255) was subsequently summarily dismissed on February 23, 2000, by this court for lack of jurisdiction under Neb. Ct. R. of Prac. 7A(2) (rev. 2000), as the order Heyd-Lamb appealed from failed to dispose of the claims as to all of the parties.

On March 8, 2000, Builders filed a second motion for default judgment against Lamb and Heyd for failure to answer. Builders' motion again included a notice of hearing, which indicated that hearing was set for March 24. The attached certificate of service indicated that the motion and notice had been served on March 7 by regular U.S. mail, postage prepaid, upon all three defendants at their respective addresses. The district court sustained the motion for default and entered judgment

against Lamb and Heyd on April 7 in the amount of \$51,134.58 plus costs.

Lamb filed a motion to set aside the default judgment on June 12, 2000. In his motion, Lamb asserted that he had a meritorious defense as set forth in the April 30, 1999, letter to the court, which he filed with the court in response to the summons he received on April 12. Lamb further asserted that he had a meritorious defense as set forth in the affidavits of Lamb and Heyd-Lamb and in the proposed amended answer, all attached to his motion. The affidavit from Heyd-Lamb, which Lamb filed with his motion, stated that Heyd-Lamb did not provide any money to be used for the benefit of Lamb. Lamb's own affidavit asserted that he had no knowledge of the alleged embezzlement by Heyd-Lamb, that he did not receive any benefit from the moneys allegedly embezzled by Heyd-Lamb, and that he received no notice of hearing on the motion for default judgment against him. The proposed amended answer generally denied the allegations contained in Builders' petition. Although Lamb's motion to set aside the default judgment contained a notice of hearing, indicating that a hearing on his motion was scheduled for June 23, 2000, the bill of exceptions before us does not contain anything with regard to a hearing on Lamb's motion.

In a docket entry on June 26, 2000, the district court overruled Lamb's motion to set aside the default judgment without further comment. Lamb filed a notice of his intention to appeal from the district court's docket entry on July 7. That case became case No. A-00-719, which this court dismissed on August 23, 2000, for lack of entry of judgment in the required form of a file-stamped order.

On September 11, 2000, the district court entered a written, signed, file-stamped order stating that "[t]his matter came on for consideration on June 26, 2000, on the Motion of [Lamb] to Set Aside the Default Judgment" and that the court, "being fully advised in the premises, overruled [Lamb's] Motion by docket entry only." The court then overruled Lamb's motion to set aside the default judgment without further elaborating its reasons for doing so. Lamb timely appealed from the district court's September 11 order.

ASSIGNMENT OF ERROR

Lamb asserts that the district court erred in overruling his motion to set aside the default judgment entered against him.

STANDARD OF REVIEW

In reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion. *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996).

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

Jurisdiction.

[1,2] We first consider Builders' assertion that this court does not have jurisdiction to hear this appeal. 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). However, an appellate court has jurisdiction to determine whether it has jurisdiction. *Swain Constr. v. Ready Mixed Concrete Co.*, 4 Neb. App. 316, 542 N.W.2d 706 (1996). Builders argues that Lamb's appeal was not timely filed because Lamb is appealing the order of the district court entered by docket entry on June 26, 2000, and his notice of intention to appeal was not filed until September 18, "well past thirty (30) days after the court's docket entry."

[3] This court has previously noted that under Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000), judgment is not entered until the clerk of the court places a file stamp and date upon the judgment, and of course, there is no judgment until the judge renders a judgment by signing a written notation of the relief granted or denied. *Mumin v. Hart*, 9 Neb. App. 404, 612 N.W.2d 261 (2000).

It is clear that the district court in the present case, presumably in response to this court's dismissal of Lamb's earlier appeal, issued the September 11, 2000, signed, file-stamped

order as a means of complying with § 25-1301. As Lamb has timely appealed from the September 11 order, Builders' argument regarding jurisdiction is without merit.

Default Judgment.

[4,5] Lamb asserts that the district court erred by failing to vacate the default judgment entered against him. A district court has the inherent authority to vacate or modify its decision within the same term in which the initial decision was rendered. *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999). More specifically, a district court retains authority to rule upon a motion to vacate a default judgment made within the original term during which the default judgment was rendered. *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

[6,7] The vacation of a default judgment rests in the discretion of the district court, and the burden rests on the person adversely affected by the court's order to affirmatively establish an abuse of discretion. But this discretion is not an arbitrary one, and it must be exercised reasonably. *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987); *Vacca v. DeJardine*, 213 Neb. 736, 331 N.W.2d 516 (1983). Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default. *Fredericks v. Western Livestock Auction Co.*, *supra*.

[8,9] Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits. *Steinberg v. Stahlnecker*, 200 Neb. 466, 263 N.W.2d 861 (1978). In considering a request to set aside a default judgment, a court may consider promptness of the motion to vacate, negligence or want of diligence of the party moving to vacate, and avoidance of unnecessary delays and frivolous proceedings in the administration of justice. *Fredericks v. Western Livestock Auction Co.*, *supra*.

Lamb argues that he has raised a meritorious defense to Builders' petition. Lamb argues that the letter he originally filed essentially asserted a general denial to all claims against him in

Builders' petition. Lamb argues that this letter, together with the proposed amended answer and the affidavits supporting his motion to vacate the default judgment, all demonstrate that he did not have any knowledge of Heyd-Lamb's alleged conduct.

[10] The cases relied upon by the parties in their briefs on appeal, while helpful in analyzing motions for default judgments, are distinguishable from the present case in that the defendants in those actions failed to file an answer to the petition within the statutory time. See, *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970); *Commercial Sav. & Loan Assn. v. Holly Development, Inc.*, 182 Neb. 335, 154 N.W.2d 510 (1967). In this case, however, Lamb did promptly respond to the suit filed against him by filing a letter with the court. While the district court obviously did not treat this letter as an answer by virtue of the award of the default judgment, the letter arguably met the statutory criteria of an answer. Neb. Rev. Stat. § 25-811 (Reissue 1995) provides that "[t]he answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant; and (2) a statement of any new matter constituting a defense, counterclaim or setoff, in ordinary and concise language, and without repetition." Neb. Rev. Stat. § 25-821 (Reissue 1995) requires that the answer be filed within 30 days after service of the summons and petition upon the defendant. Neb. Rev. Stat. § 25-823 (Reissue 1995) requires that the answer be subscribed by the party or his attorney.

Lamb's letter was addressed to the "Sarpy County Courthouse" and identified the relevant docket and case identification numbers. The first paragraph of Lamb's letter stated, in part:

I Douglas Lamb am responding to the Summons I received on 4-14-99 regarding a suit between Design Builders, Inc./ Donald D Schroepel & Sandy R Heyd-Lamb for the amount \$51,134.58. . . . This letter shall serve as written notice that even as husband of Sandy R Heyd-Lamb I knew nothing, nor did participate nor did benefit in anyway from this alleged crime.

Lamb then made more specific assertions regarding his lack of knowledge of or benefit from Heyd-Lamb's alleged actions. Lamb closed his letter by indicating that he felt the accusations

against him were unjustified and asking that his name be removed from the suit. Lamb then signed the letter. Lamb's letter was file stamped by the clerk of the district court on April 30, 1999.

We note that Lamb's letter did not contain a proof of service showing that it had been mailed to the other parties or their attorneys as required by Neb. Ct. R. of Dist. Cts. 3 (rev. 2000). Based on a rule applied by Texas courts, 61A Am. Jur. 2d *Pleading* § 281 at 241 (1999) states that "[a] letter, or any document, that is filed with the court and substantively responds to the complaint may constitute an answer, notwithstanding its failure to comply with all of the technical requirements of the rules of civil procedure." Additionally, 61A Am. Jur. 2d *Pleading* § 224 at 217-18 (1999) provides that "[a] defendant's signed letter, which identifies the cause of action, the parties, and includes his or her current address, constitutes a timely pro se answer, and therefore, a default judgment cannot be rendered." See, *Smith v. Lippmann*, 826 S.W.2d 137 (Tex. 1992); *Faunce v. NCNB Texas Nat. Bank*, 846 S.W.2d 876 (Tex. App. 1992).

Although this is not an appeal from the entry of the default judgment, we find that Lamb's letter qualified as an answer, as per the statutory requirements, such that he was not in default for failure to file an answer. See §§ 25-811, 25-821, and 25-823. See, also, *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990) (character of pleading is determined by its content, not by its caption). By this ruling, we are not suggesting that Lamb, as a pro se defendant, should have been given special consideration, but only finding that his letter meets the statutory requirements for an answer and thus qualified as an answer such that he was not in default. See *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W.2d 51 (1998) (pro se litigant is held to same standards as one who is represented by counsel).

Since the district court did not elaborate its reasons for denying the motion to set aside the default judgment and we do not have a record from the hearing, we are uncertain of the court's reasons for denying the motion. The record reveals that in addition to having answered the petition, Lamb did file a motion to set the default judgment aside, tendering therewith a proposed amended answer and affidavits and disclosing a meritorious defense to the action. While Lamb waited over 2 months to file

the motion after entry of the judgment, the motion was filed presumably within the same term of the court. Based upon this record, we find that the district court abused its discretion in overruling Lamb's motion to set aside the default judgment, primarily since Lamb was not in default.

CONCLUSION

Because we find that the district court abused its discretion in overruling Lamb's motion to set aside the default judgment, we reverse, and remand the matter to the district court with instructions to sustain Lamb's motion to set aside the default judgment and for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
TRAVIS W. DUPSKY, APPELLANT.

635 N.W.2d 539

Filed November 20, 2001. No. A-01-317.

1. **Constitutional Law: Criminal Law: Pleas: Records.** Group arraignments are acceptable so long as the record affirmatively discloses that the criminal defendant was present when the court advised those charged of their rights.
2. **Constitutional Law: Criminal Law: Pleas.** In order to support a finding that a guilty or no contest plea was freely, intelligently, voluntarily, and understandingly made, the court must have informed the defendant as to (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. Additionally, the court must examine the defendant to ensure that he or she understands the foregoing rights. Compliance therewith is sufficient to ensure that a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested.
3. **Pleas: Self-Incrimination: Records.** Where the record discloses that the trial court at arraignment failed to advise the defendant of his or her right against self-incrimination, the record does not support a finding that the plea was voluntarily and intelligently entered.

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

David E. Copple and Jim K. McGough, of Copple & Rockey, P.C., for appellant.

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

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

As a result of a plea bargain, Travis W. Dupsky pled no contest to one count of first degree sexual assault, a Class II felony, and was sentenced by the district court for Red Willow County to 12 to 15 years' imprisonment. Dupsky, a 33-year-old married man, was charged with sexually assaulting his stepdaughter. She said that this occurred from the time she was about 12 years old until November 2000, when she was 15 years old, and that the assaults often included penetration.

Dupsky appeals, assigning as error that the trial court failed to completely and properly advise him of his constitutional and statutory rights as required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). He also contends that the sentence was excessive. Because this case involves a plea, under our rules, we decide the case without oral argument. The matter has been briefed and is now ready for decision.

Dupsky contends that he was not advised of his right against self-incrimination before he entered his plea of no contest. At 10:35 p.m. (we assume that this is a court reporter's mistake and that the time was actually a.m.) on December 20, 2000, the trial court conducted an arraignment of a defendant named "John C. Jensen, Jr.," who was represented by counsel. Jensen had numerous charges against him. At the beginning of the arraignment, the court told Jensen that under the Fifth Amendment to the U.S. Constitution, he could not be compelled to give evidence against himself, but that the court was going to ask him questions which the court expected Jensen to answer unless he claimed his privilege. The court then asked Jensen if he understood, and he responded affirmatively.

After Jensen was advised of the charges against him and the penalties, the court proceeded to advise him of "certain constitutional and statutory rights." Jensen was told that these rights

included a trial by a jury of 12 people who would listen to the evidence; that he would have the presumption of innocence which would only be overcome when the jury was convinced unanimously beyond a reasonable doubt that he was guilty; and that he had a right to confront witnesses who testified against him, to present his own evidence, to have his attorney cross-examine witnesses, and to have witnesses subpoenaed. Jensen was asked if he understood that if he entered a plea of guilty or no contest, he would be "giving up" those rights. Within the court's litany of rights, no mention was made of self-incrimination.

Then at 10:55 a.m. on the same day, the county attorney arraigned Dupsky, who was represented by the same counsel for Jensen. Dupsky was advised by the court at the very beginning of the procedure that under the Fifth Amendment, "you cannot be compelled to give evidence against yourself. The purpose of today's hearing is an arraignment. I'm going to ask you some questions, and I expect you'll answer them unless you claim your privilege not to; do you understand that?" Dupsky answered in the affirmative, and the arraignment proceeded with advisement as to the nature of the crime, a Class II felony, which the court said was generally called statutory rape, subject to a maximum of 50 years' imprisonment. The court then asked, "Mr. Dupsky, were you present when I explained to Mr. Jensen the various constitutional and statutory rights that he has?" Dupsky responded, "Yes, Your Honor." The court asked, "Were you able to hear those?" Dupsky responded, "Yes, Your Honor." At this point, the county attorney interjected that the sentence could be enhanced if there were subsequent convictions, plus there was the "whole business of the sex offender registration." The court told the county attorney, "Yes, we'll go through that," and the court then proceeded:

THE COURT: Thank you. Thank you, [county attorney]. You were able to hear the constitutional and statutory rights?

[Dupsky]: Yes, Your Honor.

THE COURT: You understand that those apply to you also?

[Dupsky]: Yes, Your Honor.

THE COURT: You understand that if you enter a plea of guilty today, or no contest, you're going to give up those rights?

[Dupsky]: Yes, Your Honor.

The court then explained the penalty and that a second offense of statutory rape or first degree sexual assault required a minimum of 25 years' imprisonment, with no possibility of probation. The court also explained the sex offender statute and registration. After the plea bargain, which we earlier mentioned was detailed, a plea of no contest was entered. A factual basis was recited, which we need not repeat here.

Dupsky argues that when Jensen was being arraigned and told of "certain constitutional and statutory rights," the court did not tell Jensen about his right against self-incrimination in a trial. Dupsky notes that when he was arraigned, the court failed to supplement the advisement from Jensen's arraignment in any way so as to provide advice about the right against self-incrimination in a trial.

[1] At the outset, it is clear that group arraignments such as occurred here (even though the group was apparently only two) are acceptable, see *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997), so long as the record affirmatively discloses that the criminal defendant was present when the court advised those charged of their rights. In *State v. Miller*, 225 Neb. 269, 404 N.W.2d 45 (1987), the court said that the record must affirmatively establish that the defendant was indeed present throughout the group arraignment, which fulfills the requirements for taking a valid no contest plea. Dupsky acknowledged on the record that he was present when Jensen received his advisement of rights and that he had heard and understood the rights advisory.

Thus, the "group arraignment," by itself, is not a problem. However, when the trial court was advising Jensen of his constitutional rights with respect to a trial, which then became the rights advisory received by Dupsky, there was no mention whatsoever of a defendant's privilege against self-incrimination. The only time self-incrimination was mentioned in the arraignment of either Jensen or Dupsky was at the very beginning of each arraignment. When the record of both arraignments is read, it is apparent that the trial court, whether intentionally or not,

separated self-incrimination during arraignment from those rights which the defendant would have at a trial. This was done by advising the defendant only about the Fifth Amendment in the context of the questions the court was preparing to ask during the arraignment. And, the right against self-incrimination was never mentioned again, and certainly not in the context of how a trial would be conducted.

[2] *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), requires that in order to support a finding that a guilty or no contest plea was freely, intelligently, voluntarily, and understandingly made, the court must have informed the defendant as to (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. Additionally, the court must examine the defendant to ensure that he or she understands the foregoing rights. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). Finally, the record must establish a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she was charged. *Id.* *Buckman* reasons that compliance with the requirements of *Irish* are sufficient to ensure that "a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested." *Buckman*, 259 Neb. at 931, 613 N.W.2d at 472, quoting *Irish*, *supra*.

[3] Where the record discloses that the trial court at arraignment failed to advise the defendant of his or her right against self-incrimination, the record does not support a finding that the plea was voluntarily and intelligently entered. *State v. Litzenburg*, 220 Neb. 807, 374 N.W.2d 1 (1985) (failure of trial court to give proper advice found to be plain error). In *State v. Turner*, 221 Neb. 132, 134, 375 N.W.2d 154, 155 (1985), the court said that the record did not clearly show that the defendant had been informed of "her right to remain silent and not testify at trial."

Here, there are two virtually identical arraignments, and the arraignment of Dupsky, who was arraigned second, incorporates by reference the advisement of rights given in the first arraignment. That procedure is not inherently deficient. However, the

format used here is defective because the only advisement about self-incrimination was made solely in the context of the questions the court was about to ask each defendant at arraignment and the advisement was given separate from the rights listed by the trial court, which were applicable at trial, meaning that the privilege against self-incrimination was not mentioned in the context of a trial. Thus, the procedure used by the district court was flawed and does not comply with the requirements in *Irish, supra*. At the most fundamental level, Jensen, whose rights advisory becomes Dupsky's, was never told directly, as he should have been, that if he went to trial, he had a right not to testify.

The essence of the doctrine in *Irish, supra*, is to ensure a free, voluntary, and intelligent choice between alternatives. To ensure that goal, the premise in *Irish* is that there will be full advisement of rights, including the rights that are guaranteed in the event of a trial, which are in turn waived when a plea is entered. After a complete examination of Jensen's and Dupsky's proceedings, we must conclude that the format used by the trial court fails to provide the advisement of constitutional rights required by *Irish*. Thus, we find that the plea was not knowingly, freely, and voluntarily made, requiring that we reverse Dupsky's conviction and vacate his sentence.

We remand the matter to the district court for Red Willow County for further proceedings. Obviously, this result dispenses with any need to discuss Dupsky's claim that the sentence was excessive.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

BILLY ROY TYLER, APPELLANT, v.
LAVON STENNIS, APPELLEE.
635 N.W.2d 550

Filed November 20, 2001. No. A-01-977.

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

IRWIN, Chief Judge, and HANNON and SIEVERS, Judges.

SIEVERS, Judge.

Billy Roy Tyler, the plaintiff herein, is an inmate at the Nebraska State Penitentiary. He sold a house in 1992 to Calvin Dunn. The property was encumbered by a child support lien in the approximate amount of \$2,300, and part of the proceeds from the sale were to be used to satisfy that lien. LaVon Stennis, an attorney, was involved in the real estate closing. Through a series of lawsuits and other proceedings, Tyler has maintained that Stennis fraudulently presented a check for negotiation and absconded with funds which Tyler claims were his. In the above-captioned appeal, we have a 329-page transcript. That transcript has been paid for at public expense as Tyler proceeds in forma pauperis. Tyler seeks to appeal the August 9, 2001, order of Douglas County District Court Judge Mary G. Likes, which order states, "Pursuant to Rule 4-12, this case shall be reassigned to Judge John Hartigan, Jr., who has a lower-docketed companion case at Doc. 958, No. 242."

No citation of authority is necessary to establish the proposition that the foregoing order, essentially an administrative matter on the part of the district court for Douglas County, Nebraska, is not a final, appealable order.

This appeal is obviously frivolous. The definition of a frivolous action is well established as a legal position wholly without merit, meaning without rational argument based on either law or evidence to support a litigant's position. *State ex rel. Mooney v. Duer*, 1 Neb. App. 84, 487 N.W.2d 575 (1992).

This court is not unfamiliar with Tyler's actions against Stennis and Dunn. The Douglas County District Court case, docket 958 page 242, which Judge Likes referenced in her order, has spawned 19 previously docketed appeals or original actions, all taken by Tyler, from 1997 through this appeal. (Two additional appeals to this court involving Stennis and Dunn, cases Nos. A-01-1059 and A-01-1060, have been filed since the instant case was docketed, which additional appeals we dismiss today by separate orders without opinions.) All of these appeals in one way or another flow from Tyler's attempt to sue Stennis and Dunn as briefly summarized above. This court in our case

No. A-00-591 summarily affirmed a dismissal by the district court of Tyler's claim against Stennis and Dunn, and our mandate issued on November 7, 2000. That decision legally ended the matter, but Tyler continues to inundate the courts with claims and appeals from a case which was finished long ago. Tyler's propensity for frivolous litigation has been the subject of several court orders limiting his access to both state and federal district courts. See, *In re Tyler*, 677 F. Supp. 1410 (D. Neb. 1987), *aff'd* 839 F.2d 1290 (8th Cir. 1988); *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998).

The Nebraska Supreme Court has entered administrative orders limiting Tyler's access to the judicial process. (See administrative orders dated October 28, 1999.) Frequent and frivolous suits unsettle the fair administration of justice, and all courts have the duty to deny in forma pauperis status to those individuals who have abused the system. *In re Sindram*, 498 U.S. 177, 111 S. Ct. 596, 112 L. Ed. 2d 599 (1991). The Nebraska Supreme Court noted in one of its orders of October 28, 1999, about Tyler that it was its duty to prevent frivolous proceedings in the administration of justice, citing *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984). We have the same duty, as do the trial courts. Tyler's repeated frivolous actions against Stennis and Dunn result in other litigants being deprived of limited judicial resources. Moreover, Tyler's frivolous lawsuits are at public expense because he is usually given in forma pauperis status by trial courts. Therefore, with respect to Tyler, Stennis, and Dunn, this court shall fulfill this duty, recognizing that Tyler has had his day in court on his claims against Stennis and Dunn.

When appropriate, such as in the case of frivolous lawsuits, trial courts have the obligation to deny in forma pauperis status to a litigant and should do so. It follows that we too have an obligation to responsibly manage our docket. If the trial court has incorrectly granted a litigant in forma pauperis status in an obviously frivolous case, we are obligated to dismiss the appeal.

It is therefore ordered that the Clerk of the Court of Appeals is directed not to accept any further appeals instituted by Billy Roy Tyler, also known as Billy Tyler, in any proceedings in which LaVon Stennis or Calvin Dunn is a named litigant unless such notice of appeal includes a signed statement under oath by Tyler

that such case has no connection or relationship in any way to the real estate transaction in 1992 in which Tyler, Stennis, and Dunn were involved. The clerk of this court shall not docket any appeal which violates this order, but shall maintain a record of any such attempted appeals by Tyler involving Stennis or Dunn for further action by the court. Copies of this order shall be mailed to Tyler, Stennis, Dunn, Judges Hartigan and Likes, and the clerk of the district court for Douglas County.

It is further therefore ordered, adjudged, and decreed that this appeal be and is hereby dismissed.

APPEAL DISMISSED.

ROGER EUGENE PARKER, APPELLEE, v. BEVERLY MAXINE PARKER,
NOW KNOWN AS BEVERLY MAXINE WASHINGTON, APPELLANT,
AND LISA PARKER, INTERVENOR-APPELLEE.

636 N.W.2d 385

Filed December 4, 2001. No. A-00-678.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, in which case the appellate court must reach a conclusion independent from the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: 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.
4. **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.
5. **Appeal and Error.** A finding by a trial court is not an appealable order.
6. **Jurisdiction: Final Orders: Appeal and Error.** 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.
7. **Judgments: Records: Words and Phrases.** The phrase "It is so ordered," when used to end a journal entry, adds nothing to the journal, because a finding by a court does not clearly mean the court intends to award the relief someone might conclude is necessary; usually, the expression is either unnecessary or meaningless in determining what, if anything, the trial court had ordered.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Appeal dismissed.

David L. Herzog, of Herzog & Herzog, P.C., and Kathy Pate Knickrehm for appellant.

Lisa Parker, pro se.

HANNON, INBODY, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

This is an appeal by Beverly Maxine Parker, now known as Beverly Maxine Washington, from an order of the district court for Douglas County denying Beverly's motion to set aside Roger Eugene Parker's quitclaim deed to Lisa Parker conveying his interest in real property located in Omaha, Nebraska. Lisa filed a motion and petition in intervention and was granted permission by the court to intervene in this matter. Because the order appealed from makes findings but neither grants nor denies the relief sought by Lisa in her petition in intervention, we conclude that the order appealed from is not final. Therefore, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

Roger and Beverly were married and had three children prior to 1977. Roger and Beverly were divorced on February 3, 1977, in Minnesota. The Minnesota judgment and decree of dissolution required Roger to pay Beverly \$100 per month in child support. Roger filed a petition for registration of foreign judgment in the district court for Douglas County on September 16, 1977, seeking the registration in Nebraska of the Minnesota decree as well as specific visitation rights. Roger paid child support for approximately 3 years and then ceased paying child support to Beverly.

Roger married Lisa on October 8, 1977. One child was born on February 20, 1980, as a result of their marriage. Roger and Lisa were divorced in Minnesota on September 30, 1985. No support was ordered in the decree, which indicated that child support was "reserved" as Roger was unemployed at that time. Although no longer married, Roger continued to live with Lisa and the minor child.

In 1992, while Roger and Lisa were roommates, Lisa applied for a loan to build a new house. She was informed by the mortgage broker that her income was not sufficient to qualify her for the loan. Roger agreed to assist her in connection with obtaining a loan. A loan was granted to Roger and Lisa for \$74,400 to purchase a house in Omaha. The property was purchased in June 1992, and both Roger's and Lisa's names appear on the deed as joint tenants.

With regard to their postdivorce living arrangement, Roger and Lisa maintained separate finances. Lisa permitted Roger to live in the house to fulfill his parental obligation to their minor child. In exchange, Lisa did not seek any child support from Roger or any rent. Lisa paid the entire downpayment, made all mortgage payments, and paid for all of the improvements on the property. Roger did, however, pay for the utilities and also performed some yardwork. In mid-October 1999, Roger and Lisa's child moved out of Lisa's house, having reached the age of majority in February of that year. Roger moved out of the house on approximately November 1, 1999.

On January 28, 2000, Beverly filed a motion for judgment on unpaid child support and accrued interest against Roger following unsuccessful efforts to collect child support from Roger. Thereafter, Lisa asked Roger to sign a quitclaim deed to the property. Roger agreed and signed a quitclaim deed on February 2. Roger testified that he voluntarily signed the quitclaim deed because Lisa asked him to and because he felt he did not have any interest in the property, having merely cosigned the loan to enable Lisa to obtain the mortgage. Roger also testified that he was not paid anything when he signed the quitclaim deed. Roger acknowledged that he had an obligation to pay a substantial sum of unpaid child support to Beverly at the time he executed the quitclaim deed.

On February 7, 2000, Beverly filed the instant motion seeking an order vacating and setting aside the conveyance of the property by quitclaim deed from Roger to Lisa, alleging said conveyance was fraudulent under the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. § 36-701 et seq. (Reissue 1998). Lisa filed a motion requesting leave to intervene in the proceedings on February 11. Although not separately file-stamped, a petition in intervention

was included with the motion to intervene. Allegations in both Lisa's motion and petition included the assertions that there was a lien against her real property resulting from the unpaid child support owed by Roger to Beverly, that Beverly had refused to sign a release of that lien, and that as a result of Beverly's refusal, Lisa had been unable to refinance the existing loan on her property. Lisa's petition requested an order releasing the child support lien. The district court granted Lisa the right to intervene on February 17 and entered an order of judgment on March 3 against Roger in favor of Beverly for unpaid child support and accrued interest in the total amount of \$27,420.99.

The court held hearings in March, April, and May 2000 on the issues surrounding the quitclaim deed. Lisa's attorney attended all of these hearings, and Lisa was present for all but the April 24 hearing, where no direct testimony was adduced. Beverly's attorney elicited direct testimony from Lisa on issues surrounding the quitclaim deed and the property at the March 1 and 23 hearings. In turn, Lisa's attorney elicited direct testimony from Roger at the March 1 hearing on these same issues and presented rebuttal testimony from Lisa at the May 30 hearing. Beverly's attorney offered various documentary exhibits at these hearings, such as a copy of the quitclaim deed, documentation related to the loan obtained on the property, and Roger's deposition, which were admitted into evidence by the court. In its order filed June 7, 2000, the district court overruled Beverly's motion to vacate and set aside the quitclaim deed, concluding that there was not clear and convincing evidence that the execution of the quitclaim deed was fraudulent within the meaning of § 36-705.

The court further found that the evidence established that Roger's interest in the property prior to execution of the quitclaim deed was mere legal title. The court found the evidence undisputed that although the title was taken in joint tenancy, all the money invested in the property was Lisa's. The court noted that both parties treated the property as Lisa's only. The court noted that at the time the present proceedings commenced, Roger had not been living on the property for at least 3 months. The court found Roger's testimony that he had no interest in the property to be very credible, especially in light of the fact that it was clearly adverse to his economic interests in the case, where

he was facing a substantial judgment for unpaid child support and accrued interest.

The district court cited *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 215 N.W.2d 629 (1974), and *Halsted v. Halsted*, 169 Neb. 325, 99 N.W.2d 384 (1959), in support of the propositions that a judgment lien does not attach to mere legal title where equitable and beneficial interests are in another, that a judgment lien is a lien only on the actual interest of the judgment debtor, and that a judgment lien is subject to all existing equities, whether of record or not. The court reasoned that Roger's interest in the property was bare legal title and that all the equitable and beneficial interests in the property were with Lisa. The court concluded that Beverly had not met her burden of proof on this ground by a preponderance of the evidence.

Finally, the court cited *Nowka v. Nowka*, 157 Neb. 57, 58 N.W.2d 600 (1953), in support of the proposition that a lien for unpaid child support comes into existence upon service of the summons of the action seeking unpaid child support. The court reasoned that at the time the quitclaim deed was executed on February 2, 2000, no lien against Roger for unpaid child support existed. The court concluded that the lien against Roger for unpaid child support came into existence on February 10, 2000, when Roger was served with the motion and notice of hearing. The court further concluded that the lien did not attach in the present case as Roger's interest in the property before the quitclaim deed was executed was mere legal title.

Although the court made a number of findings, as indicated above, regarding the existence and attachment of a lien for child support on the property, the court did not directly address the request contained in Lisa's petition in intervention seeking a release of the lien from the property. The court overruled Beverly's motion to vacate and set aside the quitclaim deed but neither granted nor denied the relief sought by Lisa.

Beverly's motion for new trial was overruled, and Beverly subsequently perfected her appeal to this court.

ASSIGNMENTS OF ERROR

Beverly asserts that the district erred in (1) finding that she failed to meet her burden of proof concerning Roger's alleged

fraudulent transfer of his interest in the property to Lisa, (2) failing to set aside Roger's transfer of his interest in the property to Lisa, and (3) finding no lien on the property against Roger existed prior to the time the quitclaim deed was executed.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, in which case the appellate court must reach a conclusion independent from the lower court's decision. *Martin v. Martin*, 261 Neb. 125, 621 N.W.2d 511 (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. *In re Appeal of Stoller*, 261 Neb. 150, 622 N.W.2d 878 (2001). Our concern is that the court's June 7, 2000, order does not adjudicate all claims of all parties because it neither grants nor denies the relief prayed for by Lisa in her petition in intervention and that therefore it is not a final order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

[4] In *Keef v. State*, *supra*, the district court entered a partial summary judgment on fewer than all of the claims of the plaintiffs and attempted to invoke Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998) in determining that its order of partial summary judgment was a final order. On appeal, the Nebraska Supreme Court discussed § 25-705(6), now codified at Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000). Section 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.

The *Keef* court noted that § 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. The *Keef* court further noted:

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. . . . 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. . . .

Section 25-1315 does not, however, provide “magic words,” the invocation of which transforms any order into a final judgment for purposes of appeal.

(Citations omitted.) 262 Neb. at 628-29, 634 N.W.2d at 758.

In the present case, there is no such express determination regarding delay or direction for entry of judgment, and therefore the court’s June 7, 2000, order is not appealable unless all of the claims of Beverly as plaintiff and Lisa as intervenor are viewed as adjudicated.

The last paragraph of the June 7, 2000, order indicates: “IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion to vacate and set aside the quitclaim deed is hereby overruled.” (Emphasis omitted.) The preceding paragraphs of the order outline the factual and procedural background of the case and set forth the factual and legal findings made by the court

relating to the alleged fraudulent nature of conveyance by quitclaim deed and to the existence and/or attachment of a lien for unpaid child support to the property. However, there is nothing in the June 7 order translating the court's findings regarding the lien into an order or judgment on Lisa's petition in intervention, and there is no other document in the transcript before us that purports to address the request for relief asserted by Lisa in her petition in intervention.

[5] It has long been the rule that a finding by a trial court is not an appealable order. See *State v. Carney*, 220 Neb. 906, 374 N.W.2d 59 (1985) (where Nebraska Supreme Court said that after granting motion which determined defendant was entitled to acquittal, trial court should have entered judgment dismissing action). The *Carney* court also quoted with approval from 49 C.J.S. *Judgments* § 4 (1947): "As a general rule, decisions, opinions, findings, or verdicts do not constitute a judgment or decree but merely form the basis on which the judgment is subsequently to be rendered." 220 Neb. at 908, 374 N.W.2d at 61. See, also, Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2000) (stating that "[a] judgment is the final determination of the rights of the parties in an action").

[6] The order appealed from in this case is not final. Accordingly, this court is without jurisdiction to consider Beverly's appeal, and it must be dismissed. 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[7] Recently, this court has had to dismiss several appeals because a trial court failed to either grant or deny all of the relief prayed for by one of the parties. We suggest, at least in equity cases, that the trial judge include at the end of any journal intended to be a final order a phrase to the effect that "any request for relief by any party not specifically granted by this order is denied." Along the same lines, we suggest that trial courts discontinue the practice of stating findings and then ending the journal with the phrase "It is so ordered." This phrase adds nothing to the journal, because a finding by a court does not clearly mean the court intends to award the relief someone might conclude is necessary; usually, the expression is either

unnecessary or meaningless in determining what, if anything, the trial court had ordered.

CONCLUSION

The June 7, 2000, order of the district court did not dispose of all issues and is, therefore, not a final, appealable order.

APPEAL DISMISSED.

RONNIE R. SMITH, APPELLANT, V. THE GOODYEAR TIRE
AND RUBBER COMPANY, APPELLEE.

636 N.W.2d 884

Filed December 4, 2001. No. A-01-154.

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. ____: _____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Judgments: Appeal and Error.** Whether an injury arose out of and in the course of employment is clearly a question of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.
4. **Workers' Compensation: Proof.** In a workers' compensation case, in order for a claimant to be entitled to an award of benefits, the claimant must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment.
5. **Workers' Compensation: Rules of Evidence.** The Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure.

Appeal from the Nebraska Workers' Compensation Court.
Reversed and remanded for further proceedings.

Jeffry D. Patterson, of Bartle & Geier, for appellant.

Anne E. Winner and Joel D. Nelson, of Keating, O'Gara,
Davis & Nedved, P.C., for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Ronnie R. Smith appeals from an order of the Nebraska Workers' Compensation Court review panel affirming the Workers' Compensation Court trial judge's dismissal of Smith's petition for benefits relating to injuries Smith allegedly sustained to his left knee while employed at The Goodyear Tire and Rubber Company (Goodyear). For the reasons set forth below, we reverse, and remand for further proceedings.

BACKGROUND

On April 15, 1999, Smith filed a petition alleging that on July 17, 1992, while working for Goodyear, he sustained an injury to his left knee when he was struck on the left knee by a metal bar which caused him to fall and further twist his knee. Smith alleged that he had received treatment for his injury, including surgery on April 20, 1993. Smith stated that although he returned to his job with Goodyear, he continued to experience problems with his left knee. Smith also alleged that on June 10, 1997, he experienced a material change in the severity of his left knee symptoms. Smith stated that as the result, he underwent a second surgery on his left knee on August 19, 1997. Smith alleged that following surgery, he was subject to permanent work restrictions and was unable to return to work at Goodyear. Smith prayed for an award of workers' compensation and medical expenses.

In an answer filed May 4, 1999, Goodyear generally denied Smith's allegations and affirmatively alleged that Smith failed to give Goodyear proper notice, that Smith's claim was barred by the statute of limitations, and that Smith's claim was the result of an independent intervening cause.

On July 30, 1999, Smith filed a motion to disqualify Goodyear's counsel, stating that Goodyear's counsel's law firm previously represented Smith in a similar or substantially related matter.

In an order filed August 6, 1999, the trial court overruled Smith's motion to disqualify Goodyear's counsel.

Trial was held on June 2, 2000. At trial, Smith testified that on July 17, 1992, he was struck on the left knee with a metal bar at work. The record shows that subsequently, Smith received conservative treatment for his left knee from the Goodyear medical

staff. After this treatment proved unsuccessful, Smith was referred to an orthopedic surgeon, Dr. Patrick Clare, who performed arthroscopic surgery on Smith's left knee in April 1993. The record shows that eventually, Smith was able to return to work at Goodyear without restrictions.

The record shows that on August 8, 1996, while working at Goodyear, Smith reported to the Goodyear dispensary complaining of back pain after "wrestling some sort of tub or large object." On September 16, a Goodyear doctor referred Smith to physical therapy at the Goodyear Fitness Center for his back injury.

The evidence at trial shows that the fitness center is a nonprofit organization and independent from Goodyear itself. However, the director of the fitness center is a Goodyear employee, and this employee supervises all the activities at the fitness center except those in the physical therapy area. Goodyear leases the physical therapy portion of the fitness center and supplies most of the equipment in the physical therapy area. The physical therapists in the fitness center are not Goodyear employees; rather, Goodyear contracts with St. Elizabeth Community Health Center, which provides physical therapists for the fitness center. The record shows that the fitness center is the Goodyear doctors' first choice for physical therapy for Goodyear employees, provided the fitness center can manage the specific injury.

On December 10, 1996, Smith visited the dispensary, complaining of right elbow pain. After seeing a Goodyear doctor, Smith was placed on light duty and was eventually referred to a non-Goodyear doctor, Clare. On January 10, 1997, Smith was referred to the fitness center by a Goodyear doctor for physical therapy on his elbow.

The record shows that while undergoing physical therapy for both his knee and his back, a Goodyear doctor wrote an order in early February 1997 expanding Smith's physical therapy to include aerobic exercise, including use of a stair stepper. The record also shows that at one point, Smith's doctor ordered an increase in Smith's use of the stair stepper. Smith testified that when the physical therapist increased his use of the stair stepper, it caused pain in his left knee. Smith testified that most likely, this incident occurred on February 21, 1997. Smith testified that he did not return to physical therapy after this.

Smith testified that after the stair stepper incident, he was able to do his job, but was in great pain. Smith testified that 5 or 6 weeks after he experienced increased left knee pain, he was unable to do his job and sought medical care. The record shows that Smith saw Clare on June 10, 1997, for his knee pain. When conservative measures failed to alleviate Smith's pain, Smith underwent knee surgery on August 19. The record shows that after surgery and subsequent physical therapy, Smith was unable to return to his old job at Goodyear.

Clare opined that as of January 8, 1998, Smith was at maximum medical improvement. On January 16, a Goodyear doctor stated that Clare indicated that "Ronnie should be restricted from work involving prolonged standing, pushing or pulling and should be involved in work in a seated position through the work shift." Smith underwent four jobsite evaluations in an attempt to return to work. The record shows that one of these jobs was found to be within Smith's restrictions, but apparently, Goodyear did not make this job available to Smith.

In a letter to Smith's counsel dated December 10, 1999, Clare wrote:

I feel Ron's current left knee condition is the direct and natural result of his initial left knee injury but I would further qualify that by mentioning that his exogenous obesity in addition to the knee injury is a contributing factor. Furthermore, I think the type of work he was doing which was extremely heavy has contributed to his present left knee condition.

In a letter to Goodyear's counsel dated April 28, 2000, Dr. Dean Wampler, who interviewed and examined Smith upon Goodyear's request, stated:

The findings at the time of [Smith's] 1997 surgery indicate a new injury. Not only was there mild advancement of the pre-existing chondromalacia problem of '92-'93, there was a new medial meniscus tear on the posterior horn. This tear cannot be considered an advancement of the underlying condition produced by his 1992 injury. The findings are a new traumatic event.

Mr. Smith's description of the events on the stair stepper in June of 1997 are very compatible with a new injury

to the medial meniscus. A person weighing more than 300 lb., using a stair stepper in an aggressive manner can produce stresses to the knee that are expected to produce meniscus tearing.

In an order of dismissal filed August 14, 2000, the trial court dismissed Smith's petition, finding that Smith was not entitled to workers' compensation benefits for his 1997 knee injury.

Smith appealed, and the Workers' Compensation Court review panel affirmed without opinion. Smith appeals.

ASSIGNMENTS OF ERROR

Smith argues, condensed and restated, that the trial court erred in (1) concluding that the injury Smith suffered to his left knee while receiving physical therapy in February 1997 was not compensable, (2) concluding that Smith suffered an aggravation of a preexisting left knee condition in February 1997, and (3) allowing Goodyear's counsel to cross-examine Smith regarding a prior injury to his right knee.

STANDARD OF REVIEW

[1,2] 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. *Blizzard v. Chrisman's Cash Register Co.*, 261 Neb. 445, 623 N.W.2d 655 (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

On appeal, Smith argues that the trial court erred in concluding that the injury Smith suffered to his left knee while receiving physical therapy in February 1997 was not compensable.

[3] There is no factual dispute in this case. Whether an injury arose out of and in the course of employment is clearly a question

of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *LaCroix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998).

[4] Neb. Rev. Stat. § 48-101 (Reissue 1998) compensates an employee for injury caused by an accident arising out of and in the course of his or her employment. *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment. *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000).

Goodyear contends that Smith failed to satisfy the second prong of § 48-101, that being whether Smith's injury was in the course of his employment. Specifically, Goodyear argues that Smith did not suffer his knee injury in the course of employment because at the time of his injury, "Smith was pursuing exercise and rehabilitation rather than his work duties." Brief for appellee at 11. Goodyear also argues that an injury suffered during physical therapy is only compensable if and only if the injury sustained during rehabilitation was to the body part which is the subject of the workers' compensation claim. We disagree with Goodyear on both counts.

In its order, the trial court found that the episode on the stair stepper was not within Smith's course of employment and dismissed Smith's petition. Smith argues that the trial court erred as a matter of law in reaching this conclusion.

Given the lack of comparable cases in Nebraska, we look to the leading treatise in the area, 1 Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation Law* § 10.05 at 10-11 (2001), which states:

Since, in the strict sense, none of the consequential injuries we are concerned with are in the course of employment, it becomes necessary to contrive a new concept, which we may for convenience call "quasi-course of employment." By this expression is meant activities undertaken by the employee following upon his or her injury which, although they take place outside the time and space limits of the employment, and would not be considered employment

activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury.

Thus, in the instant case, although Smith's physical therapy for his back and elbow injuries in 1997 was outside the time and space limits of Smith's employment, the question becomes whether Smith's physical therapy related to his employment in the sense that Smith's therapy was a necessary or reasonable activity that Smith would not have undertaken but for his back and elbow injuries.

Other jurisdictions have addressed similar situations. In *Moretto v. Samaritan Health System*, 198 Ariz. 192, 8 P.3d 380 (Ariz. App. 2000), Moretto injured his knee at work. While in the hospital after knee surgery, Moretto injured his back while undergoing physical therapy for his knee. In holding that Moretto's back injury was compensable, the Arizona Court of Appeals stated that at the time of his second injury, Moretto was fulfilling a duty of his employment by undergoing necessary treatment of his compensable knee injury.

The Oregon Court of Appeals reached the same conclusion in *Barrett Business Services v. Hames*, 130 Or. App. 190, 881 P.2d 816 (1994). In *Barrett Business Services*, Hames suffered a compensable dislocation of his right shoulder when he fell from a ladder scaffold at work. During treatment for his shoulder, Hames developed a "frozen shoulder." During physical therapy to treat Hames' frozen shoulder, Hames' right ulnar nerve was injured. Hames' employer denied Hames' workers' compensation claim and the referee upheld that denial. The workers' compensation board reversed, and awarded Hames' benefit for his ulnar nerve injury. The Oregon Court of Appeals affirmed the board's decision, stating that Hames' ulnar nerve injury was compensable because that injury was a direct result of pursuing a reasonable and necessary course of treatment, that being physical therapy for his compensable shoulder injury.

Similarly, in the instant case, Smith's 1997 knee injury was the direct result of a reasonable and necessary course of treatment, that being physical therapy for his elbow and back injuries. The evidence Smith produced at trial clearly showed that on August 8,

1996, Smith suffered an injury to his back while at work, and that in early September, a Goodyear doctor referred Smith to physical therapy at the fitness center for his back injury. In December 1996, Smith injured his elbow at work, and in January 1997, a Goodyear doctor sent Smith to the fitness center for physical therapy for his elbow. While Smith was undergoing physical therapy for his back and his elbow concurrently, the Goodyear doctor wrote an order including aerobic exercise in Smith's physical therapy, specifically, use of a stair stepper. In late February, Smith's doctor increased Smith's use of the stair stepper, and Smith testified that on February 21, he experienced pain in his left knee while using the stair stepper. Given this evidence, we conclude that Smith's physical therapy related to his employment in the sense that Smith's therapy was a necessary or reasonable activity that Smith would not have undertaken but for his back and elbow injuries. Therefore, we conclude that the trial court erred as a matter of law in concluding that Smith's 1997 knee injury did not arise out of and was not in the course of Smith's employment.

We reach this conclusion after taking into consideration Goodyear's argument that Smith cannot recover for his 1997 knee injury, because although Smith introduced evidence about his back and elbow injuries requiring physical therapy in February 1997, he did not plead these injuries in his petition. Essentially, Goodyear argues that Smith is unable to recover because of a variance between his pleadings and the evidence at trial.

[5] Neb. Rev. Stat. § 48-168(1) (Reissue 1998) states in part: "The Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided." Neb. Rev. Stat. § 25-846 (Reissue 1995) states in part: "No variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits."

In *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds*, *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the Nebraska Supreme Court cited the above statutes in addressing an employer's claim on appeal. On appeal, the employer

contended that Hayes could not recover workers' compensation benefits, because while the compensation court found that the injury resulted from the cumulative trauma attendant to Hayes' frequently working on her knees, Hayes had pled that the injury occurred as the result of a specific, single incident, the lifting of a beam. The employer argued that the compensation court's finding was outside the issues of the case.

The Supreme Court dismissed the employer's argument, finding that Hayes' employer was not misled by the variance between Hayes' pleadings and the evidence, since the pleadings did not fail to advise Hayes' employer of the issues to defend, that is, whether Hayes sustained injuries arising out of and in the course of her employment. See, also, *Sands v. School Dist. of City of Lincoln*, 7 Neb. App. 28, 581 N.W.2d 894 (1998) (holding that plaintiff's petition which alleged cause of her knee injuries which was different from cause proved at trial did not preclude award of workers' compensation benefits). For the above reasons, we conclude that the variance between Smith's pleading and proof does not preclude Smith's recovery.

CONCLUSION

After reviewing the record, we conclude that the trial court erred as a matter of law in concluding that Smith was not entitled to workers' compensation benefits because his 1997 knee injuries did not arise out of and were not in the course of Smith's employment with Goodyear. Given our conclusion, it is unnecessary to address Smith's remaining assignments of error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

We reverse the trial court's decision and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

LINDA L. KOZIOL, APPELLEE, V.
DAVID D. KOZIOL, APPELLANT.
636 N.W.2d 890

Filed December 11, 2001. No. A-00-596.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
3. **Courts: Judgments.** The power of courts to vacate or modify their own judgments is limited.
4. **Divorce: Final Orders.** Once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself.
5. **Final Orders.** The nature of an order itself, as disclosed by its terms, indicates whether it is a final order.
6. **Divorce: Pensions: Final Orders.** Some decrees dividing a pension are so fashioned that they dispose of all of the issues raised and therefore are final orders notwithstanding some provision for a qualified domestic relations order or an order in lieu thereof.
7. **Final Orders: Words and Phrases.** To be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory.
8. **Divorce: Final Orders.** If any substantial rights of the parties remain undetermined and the cause is retained for further action, the order, including the dissolution of the marriage, is interlocutory and not final.
9. **Property Division: Pensions.** A pension plan is part of the marital estate.
10. ____: _____. The marital estate includes only that portion of the pension which is earned during the marriage.
11. ____: _____. If the deferred distribution method of division of a pension is used, the pension need not be valued and the present value of the right is irrelevant.
12. **Wages: Pensions: Mortgages: Words and Phrases.** Indexing is defined as adjusting or tying wages, pensions, mortgages, or other debt issues to some measure of inflation to preserve the purchasing power of future benefits and investment earnings.
13. **Property Division: Pensions.** Provisions for an increase in a pension due to cost of living adjustments have been held to be passive adjustments, and when they are tied to market or other forces, then both spouses should benefit so far as the marital portion is concerned.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Remanded with directions.

Pamela J. Dahlquist, of Kutak Rock, for appellant.

Brent M. Kuhn, of Harris, Feldman, for appellee.

HANNON, INBODY, and MOORE, Judges.

HANNON, Judge.

INTRODUCTION

In this dissolution action, the trial court entered a decree settling all of the various issues except the division of David D. Koziol's pension benefits from the Omaha Fire Department. The decree stated that the marital portion of the pension should be equally divided, but reserved jurisdiction to enter a supplemental order in lieu of a qualified domestic relations order (QDRO). Later, the trial court entered a supplemental order, and David appeals from that order. David argues that the court can only divide the marital "value" of the pension, that is, his contribution to the pension while married, and that the supplemental order changed the distribution of the pension from that contained in the previous decree. We conclude that the order entered as a decree was not a final order, but that the supplemental order entered made it final. We also conclude that the court could enter a decree dividing the marital portion of the pension equally, but that the formula used in the supplemental order could give Linda L. Koziol some of the nonmarital portion of the pension. Accordingly, we modify the formula used to divide the marital portion of the pension equally and remand to incorporate our modification.

The parties were married on July 14, 1973. They had one daughter, who had reached the age of majority at the time of decree. Throughout the marriage, David was employed full time by the Omaha Fire Department. Linda held various jobs during the course of the marriage, and at the time of the decree, she was employed full time.

In October 1998, Linda filed a petition for dissolution. A trial was held on April 19, 1999. The trial judge announced his decision by letter shortly thereafter, but the court was confronted with the difficulty of dividing David's pension in view of the fact that the city of Omaha does not recognize a QDRO order. A hearing was held on that issue, and on August 6, 1999, a decree

was entered dissolving the parties' marriage and settling all of the other issues, including alimony, property settlement, and attorney fees. The trial court purported to divide the marital portion of David's pension but reserved jurisdiction to enter a supplemental order in lieu of a QDRO order. All of the issues appealed concern the division of David's pension.

SUMMARY OF EVIDENCE

As a result of his work as a firefighter for the city of Omaha, David held two pension funds, which were designated as pre-414h and 414h. (Except for unclear references to a possible difference in their taxability upon withdrawal, the record does not explain why there are two funds rather than one.) A letter from the senior payroll clerk of the city of Omaha to David told him that as of December 31, 1998, the amount of the "Pre 414h" fund was \$64,904.09 and the amount of the 414h fund was \$62,272.60, for a total of \$127,176.69. There is no clear evidence showing the meaning or significance of these figures. The letter from the payroll clerk stating these figures refers to the amounts as contributions, but also refers to interest, and does not clearly state the entire value of David's contributions, or even his contributions plus interest on his contributions. In his testimony, David called these funds "what [I have] paid in." He also testified that since the December 31, 1998, date used by the payroll clerk, he had paid in more money, and that on the day of trial, the pension fund held \$129,284. He also testified that if he would retire on the day of the trial and take all of the money out, he would receive his contributions. As will be explained later, this figure is clearly not the value of the pension, but we assume David was correct when he testified that the \$129,284 is what he contributed over the course of his employment with the fire department.

In his brief, David called these figures the value of the pension. Linda also refers to these figures as the value of the pension, but at the same time asks for a share of the pension benefits David will receive. Linda's counsel somewhat inconsistently argues that the "payouts over the years can exceed what that value is." Whatever these figures represent, they do not represent the value of David's actual pension benefits.

The letter from the payroll clerk stating the above figures also states the following:

Pre-414h contributions cannot be rolled over, and the interest portion will be taxable to you if you terminate your employment and withdraw your funds. The entire 414h total would be taxable under these circumstances. There are no provisions for withdrawal prior to termination of employment.

Depending on your years of service, you may be able to vest your pension. If you leave employment, please inquire in the Personnel Department to either vest or withdraw your funds.

David takes the position that Linda should receive only slightly less than one-half of the \$129,284, or approximately \$63,000 in cash, less estimated income taxes, as the marital portion of the pension. We observe that the letter from the payroll clerk shows that not all of the fund (the noninterest portion of the pre-414h contribution) would be taxable, but no evidence shows the actual amount that would be taxable.

An exhibit that accompanied the letter from the payroll clerk, entitled "City of Omaha Pension Estimate," gives an estimate of David's retirement benefits if he should retire and information on how that pension is calculated. This exhibit shows that David was 49 years of age on December 31, 1998, having been born on October 16, 1949, that his "projected retirement date" is October 16, 1999, and that at retirement, he will have 27 years 9 months of service with the fire department. It shows the date of his pension membership is January 3, 1972. The parties were married on July 14, 1973.

This document states that in calculating the pension at the time of retirement, David's last 5 years of income will be reviewed and that the "highest 26 consecutive pay periods will be identified and used." Other evidence shows David is paid 26 times per year. The estimate also states that the pension will vary from the estimate. In this document, it states that for the estimate of his pension, his income over the past 2 years had been reviewed, and that the income for the period from January 1998 to December 12, 1998, was selected as a basis for the estimate. It also states what types of compensation he might receive that will be used to determine his income. The document estimates David's monthly pension will be \$3,660.29 upon retirement at age 50.

David was eligible to retire on October 16, 1999, immediately following the April 19 hearing. Thus, if he had retired on October 16, he could have started his pension, or he could have withdrawn his contribution, which is the \$129,284 that he paid into the fund plus any sum he contributed after April 19. David testified that he planned on continuing his employment with the Omaha fire department and that he was a battalion chief holding the position of fire marshal. He is in good health except for a bad back and high blood pressure. It is possible that he could be transferred to another position, but if he made a move, it would be a lateral one with no increase in pay. He did not have any capability of advancing. David testified that he took an assistant fire chief's test and placed seventh. He testified that the department has only one or two positions for assistant fire chief and that the city has reduced the positions so there are not going to be tests given in the future. David testified that a new contract between the fire department and the city of Omaha assures him of automatic raises for the next 2 years, but there is no evidence showing the amount or date of these expected pay increases.

David testified that if he works until age 60 and retires, the amount of the money he will receive from his pension will go up. He also testified that the city of Omaha does not have a QDRO and that if he dies, Linda could not get any of his pension even if the court should order it.

During this testimony, the trial court indicated a familiarity with QDRO orders under the federal Employee Retirement Income Security Act and questioned this testimony. David's counsel then stated that he understood the QDRO order was not available because David's employer was exempt from the federal act and that the city of Omaha has a policy of not accepting QDRO's. Linda's counsel suggested the use of a supplemental order, which she asserted could accomplish the same effect as a QDRO.

David asked the court to award him all of his pension. He introduced an exhibit, that he testified was prepared by his accountant, which combined 4 months of his 1999 income (\$18,343), an Aetna annuity valued at \$98,088 (ultimately awarded to David), and the \$129,284 that could be withdrawn from the pension fund upon his retirement to arrive at \$245,715.

From this figure, the exhibit shows that the standard deduction and personal exemption allowed for income tax were subtracted to get a figure designated as taxable income. David testified that the preparer of the exhibit computed the federal and state income tax on this figure and allocated a portion of the computed tax to the annuity, the pension fund, and the earnings. The exhibit displays the accountant's computation of the net after-tax value of the combined value of the pension fund and annuity at \$143,126. David testified that this exhibit shows that the preparer of the exhibit takes the position that if David would retire on the date of trial and take all the money out of his pension fund and the annuity, he would have \$143,126 after taxes. He requested that the court give him the pension fund and the annuity, to be valued at \$143,126.

David started working January 3, 1972, and the parties were married on July 14, 1973. At the time of the decree, the pension fund had accrued over a period of 27 years 3 months (327 months), but at the time of retirement eligibility, the fund would have accrued for a period of 27 years 9 months 13 days. The parties were married 25 years 9 months at the time of the trial on April 19, 1999. By our calculations, that is 309 months of marriage.

By a letter dated April 27, 1999, the judge announced his decision on all points. In that letter, the judge stated that "[t]he Petitioner shall be awarded a one half interest in that portion of Respondent's pension earned during the time of the marriage, payable when Respondent retires." By a letter dated July 8, 1999, the judge informed the parties:

I intend that the pension be divided and allocated in such a way that Mrs. Koziol will receive a portion of Mr. Koziol's retirement benefits upon retirement. That portions of the monthly payment that she would receive would be that percentage of the monthly benefit accrued during the marriage as related to the total benefit payable.

By correspondence and in subsequent hearings, David argued that a cash settlement of 96 percent of half of the \$126,000 value (probably this statement was a short way of saying half of the marital portion of \$129,284) was the only possible and fair distribution, in spite of the fact that the hearings were clearly held

for the purpose of accomplishing the judge's intent as expressed in those letters. There is no indication in the record that the judge intended to change his position from that announced in those letters.

After the judge announced his intended decision, the judge and the parties corresponded, and on August 6, 1999, a hearing was held in an attempt to settle upon a decree which would effectuate the judge's intended decision in a manner that would be acceptable to the city of Omaha. David reargued his position and even stated an offer that he would pay Linda \$63,000 in cash for the pension benefits and ignore the possible tax consequences. Linda argued that she be awarded one-half of that portion of the pension that accrued during the marriage. Linda argued that a result similar to that obtainable by a QDRO order could be accomplished by a supplemental decree and that a share of the future pension benefit was more valuable than the "cash value." Apparently, both parties came prepared with a proposed decree containing a provision which would adopt their respective views. The judge took the decree proposed by Linda to study and signed it the same day.

The decree purported to settle all of the numerous issues of the dissolution. With respect to the division of the pension the decree states:

Petitioner shall be awarded a portion of Respondent's Pre 414h and 414H retirement account benefits (except the Aetna account) with the City of Omaha, in an amount equal to the actuarial equivalent of fifty-percent (50%) of the Marital Portion of the Respondent's Accrued Benefit . . . The Marital Portion shall be determined by multiplying Respondent's Accrued Benefit by a fraction (less than or equal to 1.0), the numerator of which is the number of months of Respondent's service with the City of Omaha Fire Department while receiving Pre 414h or 414h benefits earned during the marriage (from July 14, 1973 to April 19, 1999), and the denominator of which is the total number of months of Respondent's service . . . as of the earlier of his date of cessation of benefit accruals or the date the Petitioner commences her share of the benefits hereunder. All said accounts (Pre 414h and 414h) shall be allocated

between the parties through the use of a Supplement to Decree in lieu of a Qualified Domestic Relations Order (QDRO) so as to result in no immediate tax recognition to either party. The Supplement to Decree to be prepared by Petitioner's legal counsel herein and approved by the Court herein for which the Court shall retain jurisdiction in this matter for entry of the supplement to Decree in Lieu of the Qualified Domestic Relations Order.

(Except for a few words which we will discuss in detail later, the portion of the quoted material which is in *italics* was quoted in the supplemental order. We do this to make it easier to compare the decree and the supplemental order.)

On April 4, 2000, Linda filed a motion for entry of a supplement to decree of dissolution, and a hearing was held thereon on April 25. At that hearing, Linda introduced evidence consisting of a copy of a "Supplement to Decree of Dissolution" which had been submitted to the Omaha City Attorney's office for approval and the city attorney's comments to Linda's proposed supplement. The city attorney stated the changes that would be necessary to make the supplement acceptable to the city and also commented on the following provision of the supplement drafted by Linda, paragraph 9, to-wit:

[T]he Alternate Payee's benefit shall consist of fifty (50) percent of the gross amount of the marital portion of the Participant's vested and accrued benefit as of the date on which the Participant becomes eligible to receive benefits upon disability, retirement, or otherwise provided by the Plan . . . at the time the Alternate Payee begins receiving any benefit payments under the Plan, including disability, retirement, or otherwise.

The city attorney's comment was that that provision appears to give Linda additional benefits if David continues to work for a period of time prior to commencement of benefits and that if that is what the parties contemplated, the provision was acceptable to the city. The sentence in paragraph 9 to which the city attorney referred in her comments remained in the supplemental order which was signed by the judge. The interpretation of this paragraph by the city attorney is arguably correct. Since we have concluded that the formula used by the judge must be

altered for other reasons, this possible defect will be removed by this opinion.

David's counsel presented a proposed supplement to decree, which he advised the court was also approved by the city of Omaha. He maintained that by its terms, the decree already awarded Linda the cash amount and not a share of the pension when it was received. The proposed supplement he presented directed the city to pay Linda 50 percent of 96.3 percent (David's calculation of the marital portion) of David's pension fund accrued as of April 19, 1999, or \$61,235.57. It provided that Linda may commence her benefit as administratively feasible under the plan and that she should receive her benefit "as a portion of the Participant's (David's) monthly benefit, payable for as long as the Participant lives." In an affidavit, David stated that April 19, 1999, was used for the value of the pension fund because it was the date nearest the trial date.

In the affidavit, David swore that his proposed decree complied with the plan; that indexing is not available under the plan; that the pension plan prevents David from collecting Social Security benefits unless he works for 2 more years, at which point he will receive 40 percent of minimal Social Security; and that Linda will be eligible to receive from \$500 to \$700 per month in Social Security if she retires at age 62. This affidavit is the first time that Linda's Social Security is put forth as a reason for decreasing the amount of the pension fund to which Linda was entitled.

At the hearing on April 25, 2000, both parties presented arguments in support of the supplement they respectively proposed and arguments in opposition to the supplement proposed by the opposing party. The judge allowed time for briefing and took the matter under advisement.

On May 24, 2000, the trial court filed a "Supplement to Decree of Dissolution" (supplemental order), which used the form submitted by Linda. This supplemental order contained the above-quoted provision and the formula for determining the marital portion. In addition, it provided that the court retain jurisdiction in the event of any dispute concerning the order. In summary, it also provided (1) that a copy of the supplemental order be sent to the city of Omaha officials; (2) that the parties

were to keep the plan administrator advised of their respective current addresses; (3) that Linda's share be distributed directly to her; (4) that Linda "shall participate in the indexing of benefits, if applicable"; (5) that Linda shall be entitled to receive the benefits in any form available, but shall pay all costs arising by reason of her benefits; (6) that if benefits due Linda are paid to David, he shall reimburse her within 48 hours; and (7) that if the pension plan is replaced by a successor plan, her rights shall continue in the replacement plan. David appeals from this supplemental order.

ASSIGNMENTS OF ERROR

David assigns that the trial court erred in entering the supplemental order because (1) it is inconsistent with the trial court's allocation of marital assets found in the decree of dissolution; (2) it awards Linda further contributions to David's pension fund that are not assets of the marital estate; and (3) it unjustly enriches Linda, who will be eligible for Social Security benefits, while David is not eligible for Social Security as a result of his status as a beneficiary to the city of Omaha's police and fire pension plan.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000).

The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

Because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter an order which should have been made as reflected by the record. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997).

[2] When reviewing a question of law, an appellate court has an obligation to resolve the question independently of the conclusion

reached by the trial court. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

ANALYSIS

Jurisdictional Argument.

Linda claims that this court lacks jurisdiction to consider the issues raised in David's brief. In this respect, she argues that the decree of dissolution was a final order, that David did not appeal from it, and that therefore, he cannot raise the issue of the division of his pension in this appeal. By his first assignment of error, David alleges that the trial court erred in entering the supplemental order because it was inconsistent with the decree. These arguments are settled by a determination of one issue, and that is, the finality or lack of finality of the decree.

[3,4] The power of courts to vacate or modify their own judgments is limited. *Karrer v. Karrer*, 190 Neb. 610, 211 N.W.2d 116 (1973). While the law is clear that during the term the trial court has the inherent power to modify its judgment, see *Hyde v. Shapiro*, 216 Neb. 785, 346 N.W.2d 241 (1984), an order of May 2000 would not appear to have been entered in the same term as the one of August 6, 1999. It is well settled that once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997). See, also, *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993); *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993). Therefore, if the decree was in fact a final order, it could not have been changed by the supplemental order.

In the recent case of *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001), the Nebraska Supreme Court encountered a case involving an Omaha firefighter and the division of his pension in a dissolution action. The decree of dissolution provided for a QDRO to be entered dividing the marital portion of the pension. Thereafter, the parties learned that Omaha's police and fire retirement plan did not recognize QDRO's. The wife filed an application for an order modifying the decree to provide for a supplement to the decree. The trial court's action was approved only because the modification was necessary to prevent a gross

inequity to the wife. Other courts with rules similar to Nebraska's on the finality of decrees and the inability of courts to change a decree once it has become final have encountered the problem of how to make a final order in a dissolution case and at the same time reserve to the court the power to enter a QDRO, or an order in lieu of such. The QDRO order has been held to be an enforcement device of the decree. See, *Beltrami v. Rossi*, 726 A.2d 401 (Pa. Super. 1999); *Seal v. Raw*, 954 S.W.2d 681 (Mo. App. 1997). See, also, *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 636 N.E.2d 691, 201 Ill. Dec. 259 (1993) (appellate court found that original decree was not final order and therefore supplement was final order).

[5] We believe a review of Nebraska case law on the meaning of a final order is necessary to resolve the issue. *Goldenstein v. Goldenstein*, 110 Neb. 788, 195 N.W. 110 (1923), throws light upon the subject of the finality of decrees in Nebraska. In that case, the trial court had entered a decree providing for a divorce, child custody, child support, and alimony. Later, upon the basis of a change of circumstances, the respondent filed an application for modification of the decree, and the trial court set aside the previously ordered allowances for alimony and child support and provided that the determination of the amounts of these allowances was reserved for future consideration. A few months later, the trial court entered an order setting the dollar amount of these allowances. At that time, the time for appealing the order setting aside the allowances had passed. The petitioner appealed the setting aside of the allowances and was confronted with the argument that the time for appeal from that order had passed. The *Goldenstein* court stated that "the nature of this order itself [the earlier order] as disclosed by its own terms, indicates that it was not, and could not be, a final order." 110 Neb. at 791, 195 N.W. at 112.

This same principle has been consistently followed in Nebraska case law. See, *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990) (involving modification that did not settle all issues presented by application for modification); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984) (where appeal from divorce decree was dismissed because trial court had not decided all property issues presented); *Humphrey v. Humphrey*,

215 Neb. 664, 340 N.W.2d 381 (1983) (where dissolution was bifurcated from property settlement matters and appeal was taken after property matters were decided); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001) (order modifying decree was held not to be final and appealable because court had not disposed of all issues raised).

On the other hand, in the case of *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998), the Nebraska Supreme Court affirmed the order of the trial court entering a QDRO when the decree provided the wife should receive one-fourth of any payments the husband received from his pension and retirement plan at the time such payment was received by the husband. The decree in the *Hoshor* case clearly settled all issues, and the QDRO was merely a method of providing the wife a means to receive what she had been awarded under the decree directly from the retirement fund administrator.

[6] Some decrees dividing a pension are so fashioned that they dispose of all of the issues raised and therefore are final orders notwithstanding some provision for the QDRO or an order in lieu thereof. It may be that other decrees are not fashioned to dispose of all issues and therefore are not final. As the *Goldenstein* court held, the issue is to be determined by the nature of the order itself as disclosed by its terms. The question before this court in this case is whether by its terms the decree of August 6, 1999, disposed of all of the issues presented.

Paragraph 12 of the decree, which is quoted above and is the only provision in the decree that deals with David's pension, states in part that the "Petitioner shall be awarded a portion of Respondent's . . . retirement account benefits." This is the only provision in the decree dealing with the pension. Later in paragraph 12, the words "shall be" are again used, and then it states that "the Court *shall* retain jurisdiction." (Emphasis supplied.) This wording must be considered with the organization of the remainder of the 15-page decree. In all of the other paragraphs in the decree which award either party assets of the marriage, the decree uses the word "is" in contrast to the word "shall" used in paragraph 12. For example, paragraph 12 is immediately followed by an unnumbered small paragraph which provides in part: "The Respondent *is* awarded the Aetna Account." (Emphasis supplied.)

[7] More importantly, paragraph 12 itself provides that the court shall retain jurisdiction for entry of the supplemental order in lieu of a QDRO. "To be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory." *Olsen v. Olsen*, 248 Neb. 393, 397, 534 N.W.2d 762, 765 (1995).

In the instant case, the trial court clearly intended to enter a final decree, except for the distribution of the pension. So by its terms, the decree did not dispose of all issues before it. The decree of dissolution was not a final order because it did not purport to presently transfer the share of the pension, but provided that the pension "shall be" divided and thus left unsettled one of the issues. The trial court retained jurisdiction to do so.

[8] The Nebraska Supreme Court has said: "[I]f any substantial rights of the parties remain undetermined and the cause is retained for further action, the order, including the dissolution of the marriage, is interlocutory and not final." *Kimball v. Kimball*, 228 Neb. 702, 705-06, 424 N.W.2d 122, 125 (1988). In the *Kimball* case, the decree purported to reserve jurisdiction when there was no issue to be settled at the time of the decree although there was a possibility of an issue of property division arising in the future. The *Kimball* court held that the effect of *Humphrey v. Humphrey*, 215 Neb. 664, 340 N.W.2d 381 (1983), and *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984), was to invalidate any attempt of a dissolution court to retain jurisdiction.

Since the decree was not a final order, it was an interlocutory order, and David could not have appealed from the decree. But he could and did appeal from the supplemental order, and that appeal is also an appeal from the provisions of the decree and the modifications in the supplemental order. This interpretation also disposes of the dispute over the effect of the slight difference between the wording in the decree and the supplemental order. The controlling provisions are those in the supplemental order, not the interlocutory decree entered by the trial court. See *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945).

We are therefore concerned by the meaning and effect of the decree plus the supplemental order, and the issues before us are the meaning of the combined documents and whether the

trial court abused its discretion with respect to the division of the pension.

David's second and third assignments of error amount to arguments that the trial court abused its discretion in assigning an interest in the pension because (1) an interest in the pension as opposed to David's contribution cannot be transferred; (2) some or all of the transferred parts of the pension were not marital assets; and (3) the amount awarded to Linda was too much, because Linda will have Social Security benefits and David will not. For simplicity, we consider the last assigned error first.

Social Security.

David assigns as error the trial court's entering of the supplemental order, as it "unjustly enriches" Linda because she is entitled to receive Social Security benefits when she retires. Brief for appellant at 15. This issue was not presented to the trial court until the end of the April 25, 2000, hearing, and then only by an affidavit and argument of counsel. In addition to being presented too late, this assignment must fail for several other reasons. First, the division of the pension fund is merely a part of the division of the marital estate. Whether the trial court considered Linda's possible Social Security benefits in making the division of the property is unknown, but clearly if such an element should be considered in dividing property, the court would not be limited to considering it as a setoff for a particular pension fund. We point out that the record shows that David did receive an annuity worth some \$98,000 and that the parties had considerable wealth, which the trial court divided without apparent complaint. Second, while we have seen cases where possible Social Security benefits have been considered for the support needed for a particular party, we are not aware of any cases where possible Social Security benefits are considered as an item of property. We do not believe they are. Furthermore, as a matter of general knowledge, it is obvious that David's right as a spouse to benefit by Linda's Social Security is a matter of federal law. We find David's argument on the issue to be without merit.

Pension Rights Owned by David.

David argues that the value of the pension established at trial is meaningless. He argues that Linda's share as determined in

the supplemental order is based on speculation: David's retirement date. We would express this notion differently. The record does not contain evidence of the value of the pension. We will therefore start with an analysis of the evidence relative to the pension's value.

Unfortunately, the parties did not see fit to introduce definitive information on the terms and conditions of David's pension rights. Documents and testimony do establish that David's pension fund held contributions from David of \$129,284 on the day of the final hearing. David has the right to withdraw that fund only when he retires. The amount of this fund will clearly increase to some extent by his contributions after the divorce, and the information from the payroll clerk indicates it probably will also increase by accrued interest; however, we do not know the amount of these expected increases. The evidence shows that when David retires, he can either withdraw the fund then and receive slightly more than \$129,284, or he can receive a monthly pension payment for life. There is no evidence that the amount contributed to this fund controls or even influences the amount of the monthly pension he will receive when and if he retires. The evidence we do have would support the conclusion that the monthly pension David will receive upon retirement is dependent upon his rate of compensation during the highest 26 pay periods of the last 5 years that he is employed.

The evidence shows that David was eligible to retire within a few months after the final hearing, several months before a final decree was entered. If he did so, the evidence shows he would receive \$3,660.29 per month. We also know that this amount is determined by the amount of his average pay for the highest 26 consecutive pay periods. David testified that he will receive an already scheduled pay raise, but that otherwise, he did not have any expectations of an increase in salary. We do not know if the scheduled pay increase would have started before the date that he was eligible to retire. Except for a possibility of an increase due to an increase in pay, there is no other evidence that the amount of his monthly pension will be increased if he continues to work after the date that he is eligible to retire. We do not know if he must continue to pay into the pension fund after he reaches retirement eligibility. However, the evidence that we have would

not justify a conclusion that any contributions David makes after the date he is eligible to retire will not increase the amount of his pension except as might result from the already scheduled pay raise. We draw this conclusion from the evidence that the amount of the benefit is dependent upon the highest 26 consecutive pay periods reviewed in the last 5 years of employment.

We know that the monthly pension he will receive is not likely to go below \$3,660.29 per month. The value of such pension rights are properly the subject of expert testimony, but the parties did not see fit to introduce any expert testimony. David's attorney persisted in calling David's contribution to his pension fund the *value* of the pension, which it clearly is not.

In 1 year, David would receive \$43,923.48 from the monthly pension of \$3,660.29. This sum is more than one-third of the \$129,284 that could be withdrawn in lieu of the right to receive the monthly payment. It is obvious that the value of the pension is clearly worth a great deal more than the right to receive \$129,284. By taking judicial notice of certain actuarial facts and common arithmetic, this difference becomes more startling. The difference in these values is great. The "Commissioners 1980 Standard Ordinary Mortality Table" in the appendix to the 2000 cumulative supplement to the Nebraska Revised Statutes shows that the continued life expectancy of a 50-year-old male is 24.94 years. Other tables in the appendix show a lower life expectancy, the lowest of these being 20.18 years. We take judicial notice of these common facts and conclude that at age 50, David had a continued life expectancy of at least 20 years.

In Am. Jur. 2d Desk Book, item No. 270 (1998), the annuity tables show a factor of 11.4699 that is used to determine the present worth (figured on the basis of 6 percent per annum interest) of an annual sum that will be received for 20 years. If David receives \$3,660.29 each month, then annually, he will receive \$43,923.48. Using these amounts and the factors from the table, the present worth of David's right to receive \$3,660.29 per month for life is \$503,797.92. The desk book also gives a separate table for lives of males and females. In this table, the factor for the life of a 50-year-old man is 11.3329. Using this factor with those same amounts used above would give a present value of \$497,780.41 for the right to receive \$43,923.48 per year for

David's expected life. Clearly, David's right to receive \$3,660.29 per month for the remainder of his expected life exceeds the value of the right to withdraw \$129,284 at retirement and invest it.

No one would seriously expect David to withdraw the fund he could withdraw upon retirement in lieu of the right to receive that monthly, lifetime pension. It is also easy to see why David wants to pay \$63,000 cash to Linda based on the mathematics above. But a final decree must provide for a division of that lump sum in the event that he does so withdraw the entire amount. A fair distribution would seem to require a division that would consider both possibilities.

Under David's testimony, he does not expect any great increase in salary, but he does expect to get raises of unknown amounts which have already been scheduled under the fire department's existing contract. We do know that many retirement plans which pay benefits based upon the years of service plus earnings while the person is working do not require a person who has reached maximum retirement benefits to continue to pay toward the pension plan because the pensioner will not benefit from later contributions. We know that David reached retirement eligibility on October 16, 1999, but we do not know if that means he has reached maximum retirement benefits.

From independent study of the subject of pension valuation and division in dissolution proceedings in 3 Valuation & Distribution of Marital Property §§ 45.06 through 45.50 (2001); Barth H. Goldberg, Valuation of Divorce Assets §§ 9.1 through 9.5 (1984); and Brett R. Turner, Equitable Distribution of Property §§ 6.01 through 6.12 (2d ed. 1994), we conclude that David's retirement plan is what is termed a "defined benefit plan" as opposed to a "defined contribution plan," see Turner, § 6.02 at 289. The defined benefit plan has fixed or determinable benefits. *Id.* All that is known is the employee's future retirement benefits earned to date, but the valuation of such a plan requires use of experts, generally, actuaries or accountants who are highly trained and skilled in the valuation. See Goldberg, § 9.2.

The method used by the trial court in this case is called the "deferred distribution method," that is, the court makes no immediate division of retirement benefits, but determines a percentage

share which the nonowning spouse will receive when the owning spouse retires and orders that the nonowning spouse receive that percentage of every payment check which the owning spouse is entitled to receive. *Turner*, § 6.11 at 350. This is in opposition to the "immediate offset method" where the court determines the present value of a share in the pension of the owning spouse and immediately awards the nonowning spouse a lump-sum amount in view of that value. *Id.* at 347. The amount that David seems to maintain the court should have awarded Linda is based on the immediate offset method, but there is no evidence showing the present value of David's pension benefits. David contends Linda should be awarded only 50 percent of his contribution to the fund while married. Such an award would be patently unfair.

Law Controlling Division of Pension Rights.

[9,10] Under Neb. Rev. Stat. § 42-366(8) (Reissue 1998), a pension is part of the marital estate. In *Reichert v. Reichert*, 246 Neb. 31, 35, 516 N.W.2d 600, 604 (1994), the Nebraska Supreme Court interpreted this statute and adopted the rule that "the marital estate includes only that portion of the pension which is earned during the marriage." In *Shockley v. Shockley*, 251 Neb. 896, 899, 560 N.W.2d 777, 780 (1997), the court stated that "[c]ontributions to pensions before marriage or after dissolution are not assets of the marital estate."

[11] Most courts hold that if the deferred distribution method of division of a pension is used, the pension need not be valued and that the present value of the right is irrelevant. *Turner, supra*, § 6.12. This is one of the major advantages to the deferred distribution method. *Id.* We realize that this court has previously stated that it did not adopt the view that "in awarding a percentage of the pension plan it is unnecessary to determine the value of the pension fund." *Polly v. Polly*, 1 Neb. App. 121, 127, 487 N.W.2d 558, 562 (1992). However, the reason for that conclusion in *Polly* was that the value of the entire marital estate needed to be determined and considered to arrive at the marital estate for division. In this case, there is no argument that in giving Linda one-half of the marital portion of the pension, the marital estate was unfairly divided. Furthermore, in *Polly*, the possibility of early retirement created a problem of division. In

the decree, the employed spouse was required to pay the other spouse a fixed sum each month when the pension was received and not a portion of the pension that was received. The situation in this case is clearly distinguishable. It seems clear that if neither party sees fit to introduce evidence on the present worth of David's monthly pension payments, a court cannot fairly distribute the pension except by a division of a share of the marital portion of that pension.

The evidence shows that David will be entitled to at least \$3,660 per month for his life when he does retire. The marital portion of that payment can be computed. If the city of Omaha is agreeable, there is no reason why one-half of the marital portion of these rights cannot be assigned to Linda and paid to her when David starts receiving his retirement benefit. The fact that Linda will receive only a right to payment when and if David retires, and then only while he lives, will affect the value of the right that the court is awarding Linda. These facts do not affect the court's ability to award her a percentage share of that right.

With the evidence showing that the amount of David's pension will depend upon his earnings for the highest 26 pay periods of the past 5 years, the evidence effectively shows the monthly pension payment can increase only slightly as a result of David's postdissolution work, that is, by the amount the city has already agreed to increase his pay by contract. The statements by the trial judge clearly indicate that he intended one-half of the marital portion of the pension rights to be assigned to Linda. David does not seem to directly dispute the reasonableness of such a division. We understand David's argument to be an assertion that in view of the attitude of the city of Omaha, the court cannot accomplish its intent, but must award Linda only a cash sum for one-half of the marital portion of the pension rights and also, that the decree does not accomplish the trial judge's intention.

In *Polly, supra*, we discussed three possible methods of valuing and dividing a pension plan upon a dissolution and stated: "The third and most widely accepted method is to determine a fixed percentage of the future benefits to be paid to the spouse, payable if and when they are payable to the owner of the plan." *Polly v. Polly*, 1 Neb. App. 121, 127, 487 N.W.2d 558, 562 (1992), citing *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d

235 (1978). See *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981). We think that the trial court's intention is clearly within the power of the trial court and that such a division is reasonable and is not an abuse of discretion.

The question of whether the supplemental order followed the trial judge's announced intent can only be answered by an examination of the decree and supplemental order. Since the case law in this area is clear that the court may award Linda only a share of the marital portion of the pension, we must determine if the supplemental order entered by the trial court awards Linda contributions to the pension before the marriage or after the dissolution of the marriage.

What Decree and Supplemental Order Purport to Give Linda.

We will first consider the formula used by the trial court to divide the pension between marital and nonmarital interest. We will not repeat that formula because it is quoted in full above and is lengthy, but we will summarize and analyze it under evidence of this case. Simplified, Linda is to be awarded "an amount equal to the actuarial equivalent of fifty-percent (50%) of the Marital Portion of the Respondent's [David's] Accrued Benefit" under the plan "as of Respondent's commencement date, or Petitioner's [Linda's] benefit commencement date, if earlier." The supplemental order provides essentially the same, except the phrase "Petitioner's benefit commencement date" in the decree is changed to "Respondent's benefit commencement date" in the supplement. Insofar as we can determine, this change makes the phrase redundant. In addition, near the end of the portion of paragraph 12 in the decree is the phrase "as of the earlier of his date of cessation of benefit accruals or the date the Petitioner commences her share of the benefits hereunder." In the supplemental order, the word "Petitioner" is changed to "Respondent." This change has the effect of merely correcting a clear error in the decree. The decree goes on to provide that the pension shall be allocated between the parties by a supplemental decree, and the paragraph ends. There are several other provisions in the supplemental order that are not in the decree. Generally, these paragraphs are concerned with the method of accomplishing the transfer of interest, not the amount of the interest transferred. These provisions will be listed and discussed later.

The formula used in both the decree and supplemental order is patterned after what is called the "coverture fraction." 3 Valuation & Distribution of Marital Property § 45.41 (2001); Brett R. Turner, Equitable Distribution of Property § 6.10 (2d ed. 1994). Simplified, the coverture formula provides that the numerator of the fraction used to determine the marital portion is essentially the number of months of credible service of the employed spouse while married and therefore is the pension contribution *while married* and that the denominator is the total number of months that the spouse has or will be employed which resulted in the pension the employee will receive. This denominator number includes and will include the time the employed spouse worked before, during, and after the marriage. The application of that formula using the day that David would be eligible to retire (October 16, 1999) results in a determination that the marital portion of the pension is 92.5 percent of the whole pension. (See below for the computation.) Under the formula, the numerator will stay the same because the months of marriage up to dissolution will remain constant, but the denominator has the potential to increase as David continues to work after dissolution. As the denominator increases, the marital portion and hence Linda's share of future benefits will decrease. In his brief, David argues that the formula in the supplemental order will increase the marital share of the pension if David continues to work. We do not agree with this argument, because as David works after the marriage, the denominator will become larger and therefore the marital portion of the pension will be less. Under the formula, a decrease in the marital portion will necessarily occur if David works until the "earlier of his date of cessation of benefit accruals or the date the Respondent commences his share of any benefits thereunder." There is no evidence that David's monthly pension payments will increase simply because he continues to work after the date that he becomes eligible to retire, that is, October 16, 1999. The formula would protect him in case the evidence is incomplete and there are continued "benefit accruals" after the retirement date. In that respect, the formula does no harm to David, but under the evidence, such an adjustment is unnecessary.

The evidence shows that the pension is based upon David's compensation and not his contributions. The evidence shows that

the pension David will receive upon retirement will increase only if David continues to work after his retirement eligibility date and only if his postretirement compensation is greater for 26 consecutive pay periods than it was before his retirement eligibility date. The amount of the pension fund contributions could increase with continued employment if that is what the plan provides. There is no evidence that the pension would increase simply because David continues to work without receiving an increase in compensation. However, the record shows that since he will receive a scheduled, contractual pay increase, his compensation will increase by some amount if he continues to work and hence there will be some postdivorce increase in his pension. However, that increase will not be related to the length of time he works, but will depend upon his compensation's being increased. Furthermore, if the amount of his pension will increase by reason of his work after the retirement eligibility date (which is also after the dissolution date), there is reason to believe that the increase will be proportional to the length of time he is employed. Therefore, it is possible that Linda could get a benefit from David's postdivorce employment, but it might give her less, all depending upon the relationship of the amount of the pension David ultimately receives to the length of his employment. There is no indication of this relationship. It appears that the "coverture formula" does not work under the evidence in this case. The "coverture formula" has been criticized because the fraction does not take into consideration many possibilities that may exist. 3 Valuation & Distribution of Marital Property § 45.41 (2001). Since the evidence in this case is so incomplete, we cannot tell if any of the several weaknesses of the formula apply to this case.

In the case at hand, we conclude that these unfair aspects could be present, although possibly in a rather minor degree. We see no reason to affirm the use of a formula, when under the evidence, we cannot determine the effect under possible factual scenarios. In short, the formula allows for variations which may or may not be fair, depending upon the unknown terms of David's pension plan.

Formula to Fit Evidence.

David's retirement date, October 16, 1999, was known at the time of the final hearing held on April 19, 1999, as was the date

of the marriage, July 14, 1973, and the date David commenced his employment as a firefighter with the city of Omaha, January 1, 1972. We therefore can easily compute the marital period as 309 months and the employment period as 334 months to the date of retirement eligibility. We use the date of the final hearing, April 19, 1999, because under the procedure followed in this case, the entry of a final decree was delayed only in an effort to define what the judge intended and therefore April 19, 1999, would have been the only date available to the trial judge to compute the length of the marriage. We use the retirement eligibility date because we have the amount of benefits that David could begin receiving on that date in evidence. By dividing 334 months into 309 months, we calculate that the marital portion was 92.5 percent of the employment period that resulted in the pension. The marital portion of the \$3,660.29 monthly pension David could have received if he retired on October 16, 1999, is \$3,385.77 (\$3,660.29 multiplied by .925) and one-half thereof is \$1,692.89. Under the evidence in this case, for Linda to receive 50 percent of the marital portion of the pension, she should receive \$1,692.89 from the monthly pension payment. If David's monthly pension increases from \$3,660.29 per month at retirement, that increase would necessarily be due to David's postmarriage employment (except possibly for indexing which we shall separately consider).

If David continues his employment for 5 years or more after retirement eligibility, and if during the last 5 years of his employment he should receive less than he did during the period of time used to compute the pension, that is, calendar year 1998, it is possible that David's monthly pension could decrease. This unlikely eventuality can be provided for in the order by stating that Linda shall receive \$1,692.89 per month or one-half of 92.5 percent of the monthly pension David receives, whichever is less. Since it might be possible for David to decrease his monthly pension by some unknown elections that pension plans frequently have, the provision for a decrease should be limited to exclude any decrease in the monthly pension resulting from any election David might make under the plan. We therefore conclude that the decree and the supplemental order should be modified to provide the following in lieu of a formula in paragraph

12 of the decree, and the related paragraph of the supplemental order should read:

That the marital portion of David's pre-414H and 414H pension is determined to be 92.5 percent of those pension rights as of October 16, 1999, and therefore Linda shall be and is awarded from David's pension fund \$59,793.85 (92.5 percent of one-half of the marital portion of his contribution as of that date) if David should elect to withdraw his entire contribution to the pension. If David does not withdraw his entire contribution and becomes entitled to a monthly pension of \$3,660.29 or more at retirement, Linda shall receive \$1,692.89 (one-half of 92.5 percent) of each monthly payment from David's pension for the entire period that David receives such monthly pension. If the amount of the monthly pension is less than \$3,660.29, then Linda shall receive one-half of 92.5 percent of the amount of each monthly payment that David is entitled to receive unless the monthly payment to David of less than \$3,660.29 is a result of any election David is entitled to and does make under the pension plan. If David makes any election which has the effect of lowering the monthly benefits, then Linda shall receive from his monthly pension a monthly sum which is the actuarial equivalent of her rights absent such election. Linda is not awarded and shall not receive any other benefits, increases, or payments due David from said pension.

Difference Between Decree and Supplemental Order.

The supplemental order states other provisions not contained in the decree. These relate to the allocation of the pension. The provisions of the supplemental order which have a bearing on the allocation of the pension provide:

6. Distributions [to Linda] shall be taxable to [her].
7. Actuarial calculations . . . shall be [done] in accordance with the Plan's actuarial assumptions. . . . [Linda] shall participate in the indexing of benefits, if applicable.
8. [Linda's] right . . . to receive a portion of the benefits and benefit rights that have accrued with respect to the Participant [David] under the Plan is hereby created and recognized.

9. An amount equal to the actuarial equivalent of fifty (50) percent of the marital portion of the vested and accrued benefits and benefit rights described in paragraph one (1) of this Order is hereby awarded to the Alternate Payee [Linda]. The amount of the Alternate Payee's benefit shall consist of fifty (50) percent of the gross amount of the marital portion of the Participant's [David's] vested and accrued benefit as of the date on which the Participant becomes eligible to receive benefits upon disability, retirement, or otherwise provided by the Plan reduced by any actuarial or other adjustments required by the terms of the Plan at the time the Alternate Payee begins receiving any benefit payments under the Plan

10. [Linda] shall . . . receive her benefits in any form available under the plan[, and she shall pay costs incurred by reason of her benefits].

11. [Linda] shall be entitled to [receive] benefits [when David] becomes eligible to receive any benefits The duration of [Linda's] benefit payment will be determined by the form of benefit selected by [David].

. . . .

13. . . . Any changes in Plan . . . shall not affect [Linda's] rights

The evidence shows that the city attorney thought that portion of the supplemental order which we quoted above, paragraph 9, gave Linda additional benefits if David continued to work. With the modifications we are making, the marital portion of the pension as determined by this court is now set and determined as a fixed percentage of a known figure, or less than that sum, and cannot be increased above that sum. Therefore, the need for this provision in the supplemental order no longer exists, and paragraph 9 of the supplemental order should be stricken.

Indexing.

[12] David argues that the supplemental order allows for benefits to Linda as a result of indexing that are not part of the marital estate. However, the record shows that the city of Omaha currently does not provide indexing of benefits. Unfortunately, the record contains no definition of the meaning that the parties or the court attached to the term "indexing." Among the definitions

of the word "index," we find the word defined as "a number used to measure change in prices, wages, employment, production, etc.: it shows percentage variation from an arbitrary standard, usually 100, representing the status at some earlier time." Webster's New World Dictionary of American English 686 (3d College ed. 1988). Indexing is defined as "[a]djusting or tying wages, pensions, mortgages, or other debt issues to some measure of inflation (*e.g.*, Consumer Price Index) to preserve the purchasing power of future benefits and investment earnings." Black's Law Dictionary 771 (6th ed. 1990). Neither dictionary gives any authority for its definitions. We find no cases defining indexing. We find no evidence in the record which would establish what factors might combine to increase or decrease the pension due to inflation.

[13] Provisions for an increase in a pension due to cost of living adjustments have been held to be passive adjustments, and when they are tied to market or other forces, then both spouses should benefit so far as the marital portion is concerned. Brett R. Turner, *Equitable Distribution of Property* § 6.10 (2d ed. 1994). With these definitions and authority in mind, and with the evidence showing the plan does not provide for indexing to the pension, a provision in the supplemental order stating that the "Alternate Payee shall participate in the indexing of benefits" is so broad as to be meaningless. There is no way of knowing if a form of indexing that might be adopted would be one which would only give a passive increase and therefore in which both spouses should benefit. We therefore conclude that under the evidence in this case, the provision for "indexing" should be stricken as meaningless, ambiguous, unnecessary, and possibly erroneous.

CONCLUSION

We conclude that the formula to be used in the determination of the marital portion of David's city of Omaha pension shall be modified to read in conformity with what is outlined above, that Linda be awarded the share as described above, and that all of the last sentence in paragraph 7 and all of paragraph 9 of the decree shall be stricken.

We further realize that the provision in the order for division of the pension to be entered must be approved by the city of Omaha. We therefore provide that the trial court shall have

counsel seek approval of a supplement that is modified to comply with the terms of the modification above provided and upon receipt of such approval enter a supplemental order to enforce the division of David's pension from the city of Omaha.

For the reasons stated above, we remand with directions to modify the supplemental order in conformity with this opinion. Both parties shall pay their own attorney fees.

REMANDED WITH DIRECTIONS.

RANDY L. SMEAL, APPELLANT, v.
RICKARD W. OLSON, APPELLEE.
636 N.W.2d 636

Filed December 11, 2001. No. A-00-834.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Pleadings: Notice: Limitations of Actions.** Relation back is dependent upon four factors, all of which must be satisfied: (1) The basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.
3. ____: ____: _____. The keystone determining whether a change in party defendant relates back to the original pleading is whether the substituted party had notice of the suit within the period of limitations.
4. **Limitations of Actions: Service of Process: Dismissal and Nonsuit.** Neb. Rev. Stat. § 25-217 (Reissue 1995) does not allow Nebraska courts to extend the time for service of process.
5. **Limitations of Actions: Service of Process: Jurisdiction: Dismissal and Nonsuit.** Neb. Rev. Stat. § 25-217 (Reissue 1995) is a self-executing statute which, once the 6 months has run, deprives the district court of jurisdiction to take any further action in the case.

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

Terry M. Anderson and Timothy J. O'Brien, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Jeffrey H. Jacobsen and Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

In this tort litigation, the original petition was timely filed, but against the wrong defendant, who was timely served. The amended petition which substituted the correct defendant was filed after the statute of limitations had run. And the new defendant was not served with process until after the 4-year statute of limitations and the 6-month grace period for service of process had both run. Therefore, the question is whether the amended petition can relate back to the timely-filed original petition so that the plaintiff can maintain this suit against the second defendant.

BACKGROUND

Randy L. Smeal, an Omaha, Nebraska, resident, sued Rickard K. Olson (father), a Buffalo County, Nebraska, resident, for negligence in causing an automobile accident in Kearney, Nebraska, on December 15, 1994, which injured Smeal. Smeal filed his petition in the district court for Buffalo County on December 15, 1998, 1 day before the statute of limitations would have barred his claim under Neb. Rev. Stat. § 25-207 (Reissue 1995). The father was served with summons by certified mail on June 11, 1999, 4 days before the expiration of the 6-month grace period allowed by Neb. Rev. Stat. § 25-217 (Reissue 1995) for service of process.

In his answer, dated June 28, 1999, the father admitted that he was operating a vehicle which collided with Smeal, but he denied any negligence. However, on October 14, the father filed a motion to file an amended answer to "clearly reflect" the fact that it was his son, Rickard W. Olson (son), who was driving the vehicle which collided with Smeal. The district court allowed Smeal to file an amended petition, which he did on November 17, which named the son as the driver. The next day, the father filed his amended answer in which he alleged that the driver was his son. Smeal filed a motion to substitute parties on December 6. The court sustained the motion, and the son was served summons on February 1, 2000, at an address different from the address at which the father had been served.

After successfully demurring to the amended petition by alleging that the statute of limitations had run, the son again attempted to assert the statute of limitations as a bar to the suit by demurrer. The trial court overruled the son's demurrer because it found that the second amended petition did not show on its face that the statute of limitations had run against the son. The son filed his answer on May 26 and also filed a motion for summary judgment, asserting that Smeal's action was barred by the statute of limitations.

The district court sustained the son's motion for summary judgment and dismissed the action against the son, relying upon its interpretation of *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991). The district court said that although Nebraska law allows a 6-month grace period for obtaining proper service upon a defendant after a petition has been filed, the grace period does not extend the statute of limitations. Because the father was not notified of this lawsuit until June 11, 1999, 4 days short of a full 6 months after the 4-year statute of limitations had expired, the son could not be charged with knowledge of the filing of the action before that date. Therefore, the statute of limitations barred Smeal from relating his action against the son back to the original suit and his service of process on the father. Smeal appeals to this court.

ASSIGNMENT OF ERROR

Smeal assigns error to the district court's decision that the relation back rule does not permit substitution of the son for the father.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Stinson v. City of Lincoln*, 9 Neb. App. 642, 617 N.W.2d 456 (2000). This appeal essentially presents an issue of law.

ANALYSIS

Relation Back: Nebraska Courts Look to Federal Rule.

Smeal notes that while Nebraska permits an amended pleading to relate back to the date of the filing of the original pleading, we

lack a controlling statute, and that therefore, the development of the doctrine in Nebraska has been left to case law. See, *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000); *Zyburo v. Board of Education*, *supra*; *Pittman v. Foote Equip. Co.*, 1 Neb. App. 105, 487 N.W.2d 584 (1992).

[2] The Nebraska Supreme Court addressed the issue of substituting parties and relation back to the original action in *Zyburo v. Board of Education*, *supra*. Zyburo filed a petition against a school board, claiming unlawful termination of his employment. The petition against the board was timely filed within the required 30 days of the board's order discharging Zyburo, but the amended petition against the school district was not timely filed. Zyburo claimed the substitution of the parties did not render the amended petition untimely, because the original petition naming the board gave the district notice of the suit within the 30-day limitations period. The court cited *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), which held that an amendment substituting parties relates back to the original complaint when a defendant has notice of the first complaint prior to the time bar. The *Schiavone* Court stated: "Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party." 477 U.S. at 29. The U.S. Supreme Court said of the applicable federal rule, Fed. R. Civ. P. 15(c) (1994):

Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. 477 U.S. at 29.

[3] The court in *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), acknowledged the similarity between the quoted holding of *Schiavone* based on rule 15(c) and Nebraska's case law. However, the *Zyburo* court noted that an

amendment which substantially changed the nature of the claim was not permitted, citing *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987), and that where the defendant was prejudiced because the statute of limitations had run, the amendment would not relate back to the time of original filing, citing *Chlopek v. Schmoll*, 224 Neb. 78, 396 N.W.2d 103 (1986). The *Zyburo* court said that "the keystone determining whether a change in party defendant relates back to the original pleading is whether the substituted party had notice of the suit within the period of limitations." 239 Neb. at 169, 474 N.W.2d at 676. In the case at hand, there is no evidence whatsoever that the son had notice of the suit before December 16, 1998, when the 4-year statute of limitations ran on this tort action, bearing in mind that the father was not served with process until June 11, 1999, well after the statute of limitations had run.

Smeal points out that after *Schiavone* was decided, rule 15(c) was amended by Congress to overrule that decision. As a result of the amendment, rule 15(c) now provides that the amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied *and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.*

(Emphasis supplied.)

Under the 1991 amendments to rule 15(c)(3), "the notice required . . . no longer is tied to the governing limitations period, but is linked to the federal service of process period of 120 days or any additional time resulting from a court-ordered extension.'"

Ocasio Ortiz v. Betancourt Lebron, 146 F.R.D. 34, 37 (D.P.R. 1992), quoting 6A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1498 (Supp. 1992). Thus, Smeal is correct, at least under federal law, when he asserts that if the substituted party had notice of the action during the grace period, the amended pleading relates back to the original pleading. Fed. R. Civ. P. 4(m) (1994) provides for a grace period of 120 days for service after filing of a complaint in the federal system, just as § 25-217 provides for a grace period of 6 months to accomplish service of process after filing of a petition in Nebraska's courts. Smeal contends that the issue to be decided is whether "acquisition of knowledge by the party to be substituted after the limitation period had run but before the expiration of the six-month service of process [period] permits relation back to the original petition filed within the limitation period." Brief for appellant at 7. However, to so frame the issue requires the predicate assumption that the father informed the son of the lawsuit after the father was served on June 11, 1999, before the grace period ended 4 days later on June 15—or that the son somehow otherwise knew of the suit against his father. The problem, after our examination of the record, is that Smeal introduced no evidence to support such assumption, nor do the pleadings, by themselves, allow any such assumption.

Although Nebraska has used rule 15(c) for guidance, we obviously must use our own 6-month grace period for service of process found in our statute, § 25-217, rather than the 4-month period under federal law. Otherwise, *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), and its endorsement of the federal law still guides our decision. Smeal filed his original petition, naming the father as the defendant on December 15, 1998. Because Smeal timely sued the father and perfected service on the father within the 6-month grace period, his amended petition, naming the son as a defendant, relates back if (1) the son had such notice that he is not prejudiced in his defenses and (2) the son must have known, or should have known, that but for the mistake of identity he would have been the one originally sued. And, it is abundantly clear that these two things must have occurred within the "prescribed limitations period." See, *Schiavone v. Fortune*, 477

U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986); *Zyburo v. Board of Education*, *supra*.

*Whether Son Had Notice Within Limitations Period
So That His Defenses Are Not Prejudiced.*

Before answering this question, we first observe what may well be obvious: Notice to the added defendant within the prescribed limitations period necessarily means notice other than by formal service of process, because if the added defendant could be timely served, there would be no need to even bother with relating back.

We now turn again to rule 15(c) and the federal cases for guidance. Subsection (3) of rule 15(c) does not require actual service upon a late-added defendant in order for the notice requirement to be satisfied, nor does the rule require that the notice issue directly from the plaintiff. *Loveall v. Employer Health Services, Inc.*, 196 F.R.D. 399 (D. Kan. 2000). Informal notice to the new party of commencement of the action is sufficient. *Bruce v. Smith*, 581 F. Supp. 902 (W.D. Va. 1984). For purposes of analysis, we assume, without deciding, that the phrase "within the period of limitations" includes both the statute of limitations plus whatever time might be added by a state's grace period.

A case nearly identical on the facts to the instant case is *Eddinger v. Wright*, 904 F. Supp. 932 (E.D. Ark. 1995). After a traffic accident on March 3, 1990, Eddinger filed an action against Robert Wright in both state and federal courts. Eddinger filed a complaint naming as the defendant Robert Wright in the Arkansas state courts on March 3, 1993, 1 day before the state's 3-year statute of limitations for the action would have run. A copy of the complaint and a summons were sent to where both Robert L. Wright, father, and Robert A. Wright, son, lived at the time of the accident. However, by the time suit was filed and process served, Robert A. had moved to Tennessee.

Robert L. filed an answer to the complaint, denying that he was negligent, but admitting some facts, such as the occurrence of the accident and the kind of car Eddinger was driving. Whether Robert L. was the driver was not addressed by the answer. Several days after the 120-day grace period under Arkansas law for service of process expired, Robert L. moved

for summary judgment. In that motion, Robert L. contended that he was not the driver of the car involved in the accident and that Robert A. had been driving the vehicle when the accident occurred. Eddinger amended her complaint and served Robert A., who moved for summary judgment or dismissal on the basis that the action was barred by the applicable statute of limitations, or alternatively, because he was served more than 120 days after the filing of the original complaint.

The case proceeded through the Arkansas appellate courts and ended up before the federal district court via procedural routes not relevant here. The federal court said the issue was "whether a defendant may purposely mislead a plaintiff into believing proper service has been made and then succeed in having the case dismissed for improper service and expiration of the statute of limitations." 904 F. Supp. at 934.

The court found that Eddinger's failure to correct the defective service or file a motion for an extension of time to do so as allowed under Arkansas law was "understandabl[e]" as Robert L. "artfully" avoided revealing that he was not the operator of the car involved in the accident and he knew Robert A. was the person Eddinger intended to sue. *Id.* at 935. The court noted that the federal rules, similar to Arkansas law, required denials to "fairly meet the substance of the averments denied." *Id.* The court pointed out that if Robert L.'s answer had "'met the substance'" of the allegations that he was involved in a motor vehicle collision, Eddinger would have realized her mistake and would have had ample time in which to perfect service on Robert A. *Id.* Instead, Robert L. waited until after the 120-day period allowed for service of process expired before filing his motion for summary judgment, in which he stated for the first time that Robert A. was the driver.

The court said it looked without success for "an Arkansas case where the person served has pretended to be the correct party until the end" of the grace period for perfecting service. *Id.* at 936. Because of the deception involved, the court found that there was "good cause for failure to perfect the service on the original complaint within 120 days." *Eddinger v. Wright*, 904 F. Supp. 932, 936 (E.D. Ark. 1995). Thus, the court concluded it would not penalize Eddinger for failing to file a motion for

extension of the 120 days, characterizing the situation as "involving an evasion of service through the use of an imposter." *Id.* The court concluded that Robert L.'s deceptive answer was part of a "scheme" to enable Robert A. to avoid service of process. *Id.* at 937. (Robert L. and Robert A. had the same counsel.) Finding that the original complaint was filed within the statute of limitations and that Eddinger's failure to serve Robert A. within 120 days was excused, Robert A.'s motion for summary judgment was denied.

Here, the father was served June 11, 1999, 4 days before the 6-month grace period for service of process allowed by Nebraska law expired. The father's inaccurate answer to Smeal's original petition was filed on June 28, within the 30 days allowed for a responsive pleading to the petition. But, the filing was several weeks after the grace period for service of process had expired. In his answer, the father admitted that he was operating the vehicle involved in the collision with Smeal's vehicle, but he denied any negligence. On October 14, the father filed a motion to file an amended answer "to clearly reflect the fact that he was not the operator of a vehicle involved in a collision with the plaintiff . . . said vehicle having been operated by Rickard W. Olson, Rickard K. Olson's son."

[4,5] Although the father's answer certainly qualifies as "artful" avoidance, and perhaps part of a "scheme" of deception, the key findings upon which the *Eddinger* court denied the late-added defendant's motion for summary judgment, we note that § 25-217 does not allow Nebraska courts to extend the time for service of process, as does Arkansas' statute. Moreover, the Nebraska courts have held that § 25-217 is a self-executing statute which, once the 6 months has run, deprives the district court of jurisdiction to take any further action in the case. See, *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000); *McDaneld v. Fischer*, 8 Neb. App. 160, 589 N.W.2d 172 (1999). Even a voluntary appearance entered after the 6 months in lieu of service does not revive the action to give the district court jurisdiction because the action is deemed dismissed even without action of the trial court once the grace period has run. See *Vopalka v. Abraham*, *supra*.

In a phrase, we have construed § 25-217 as having a "drop dead" effect for a case in which service is not perfected within

the grace period. Thus, while the court's opinion in *Eddinger v. Wright*, *supra*, may resonate with our sense of justice, we are bound to decide this case under Nebraska law. And, the "drop dead" feature of our grace period statute means that *Eddinger v. Wright* is distinguishable. The Arkansas statute specifically allows a court-ordered extension, but under the present state of Nebraska law, courts lack the ability to expand the grace period or dispense with the statute of limitations. If the grace period is to be expanded where there is deception by the named defendant who is related or connected to the added defendant, then the Legislature must change the statute, we cannot.

Because we find that the grace period cannot be expanded, we are left with determining whether the record establishes that all four conditions for relation back from *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), were satisfied within the period of limitations, and again, we include the 6-month grace period. The key factor is clearly whether the son had notice of the suit by means other than service, because he was not served until well after the statute of limitations and the grace period had run. There were only 4 days left in the grace period for the son to gain such notice, but Smeal introduced no evidence whatsoever that he did, or even evidence which would allow such an inference. Smeal cannot credibly assert that he would have served the son within the limitations period had the father made it immediately clear in his answer that Smeal had mistakenly named him as the driver, because the father was served only 4 days before the grace period for service of process expired and of course the father's answer was not due until long after the grace period ran—even assuming that the grace period is within the limitations period. And, as previously said, there is no authority to extend the grace period of § 25-217.

Wanting our analysis to be complete, we point out that although the father and the son shared the same attorney, as did Robert L. and Robert A. in *Eddinger v. Wright*, 904 F. Supp. 932 (E.D. Ark. 1995), the court in *Eddinger* did not identify that factor as sufficient to impute notice to Robert A. of Eddinger's claim and original service upon Robert L. Compare *Bruce v. Smith*, 581 F. Supp. 902 (W.D. Va. 1984) (same attorney represented original and additional defendants at all times from institution of suit,

such that relation back of amendments substituting individual police officers in place of fictitious defendants allowed). Moreover, although Robert L. and Robert A. were known to be living at the same address at the time of the accident in *Eddinger*, here there is no proof in the record that the father and the son in this case lived together when the accident with Smeal occurred. In fact, the father's amended answer alleged that the son was a resident of another county. Further, the record shows that Smeal served the father on June 11, 1999, at a different address in Mitchell from the address at which the son was served on February 1, 2000.

We can certainly speculate that the son may have actually known or should have known before the limitations period ran, that but for Smeal's mistake in naming the defendant, the action would have been brought against him. However, evidence of such knowledge or circumstances from which such knowledge could be inferred is required, and Smeal has provided no such evidence. Smeal did not undertake discovery as to when the father or the son knew the original claim had been filed. While the district court in its analysis gave Smeal the benefit of the doubt by assuming the son had notice of the action as soon as his father was served, that assumption has no evidentiary basis, as it must, to be determinative. Accordingly, we make no such assumption in our analysis.

The son moved for summary judgment, and the record clearly shows that he was sued outside the statute of limitations and served outside the grace period. Thus, the burden shifted to Smeal to prove by evidence that the factual predicates for application of the doctrine of relation back existed. See *Naidoo v. Union Pacific Railroad*, 224 Neb 853, 402 N.W.2d 653 (1987) (if moving party shows entitlement to summary judgment, burden of proof shifts to opposing party to produce contrary evidence).

Under *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991), first, the son must have known, or should have known within the limitations period, even if such time period is construed to include the grace period, that but for the mistake of Smeal, the action would have been brought against him and second, that he had such notice that he would not be prejudiced in his defenses—which includes the defense of the

statute of limitations. See *Simmons v. Fenton*, 480 F.2d 133 (7th Cir. 1973) (loss of defense of statute of limitations is prejudice to defendant when determining if relation back will be allowed). Finding no evidence that the son had such notice or evidence from which to infer such notice even viewing the record most favorably to Smeal as we must on the son's motion for summary judgment, we find that the amended petition against the son does not relate back to the timely suit filed against the father. Even if we were to extend that timeframe to include the 6-month grace period, as Congress did by amending rule 15(c) to overrule *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), the result does not change, given the complete lack of evidence on the matter of notice. Accordingly, while our analysis might differ somewhat from that of the district court, that court properly granted summary judgment and dismissed the action against the son, Rickard W. Olson.

AFFIRMED.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION,
DOING BUSINESS AS LINCOLN ELECTRIC SYSTEM, AND
MIDAMERICAN ENERGY COMPANY, APPELLEES, V.
NEBRASKA PUBLIC POWER DISTRICT, APPELLANT.

636 N.W.2d 645

Filed December 18, 2001. No. A-00-421.

1. **Declaratory Judgments.** A suit for declaratory judgment is an action sui generis and may involve questions of law or equity or both; whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
2. **Actions: Contracts.** When the essence of the dispute sounds in contract, the action is to be treated as one at law.
3. **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.
4. **Declaratory Judgments: Appeal and Error.** Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong.
5. **Contracts: Appeal and Error.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.

6. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
7. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.
8. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
9. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.
10. **Contracts: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

William M. Lamson, Jr., and David J. Schmitt, of Lamson, Dugan & Murray, L.L.P., John R. McPhail, and Robert A. Green for appellant.

Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee City of Lincoln, John E. Matthews, Brad Fagg, and C. Brian Meadors, of Morgan, Lewis & Bockius, L.L.P., for appellees City of Lincoln and MidAmerican Energy Company, and Jerrold L. Strasheim of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee MidAmerican Energy Company.

IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Nebraska Public Power District (NPPD) appeals from an order of the district court for Lancaster County granting a declaratory judgment in favor of the City of Lincoln, doing business as Lincoln Electric System (LES), and MidAmerican Energy Company (MEC). For the reasons set forth below, we affirm.

BACKGROUND

This case is an appeal from a declaratory judgment action involving the Cooper Nuclear Station (Cooper). NPPD owns and operates Cooper, an electric utility system providing for the generation, transmission, and distribution of electric power to customers in Nebraska and elsewhere. NPPD is a public corporation and political subdivision of the State of Nebraska. MEC is a public utility corporation organized under the laws of Iowa. MEC provides electrical service to customers and communities in Iowa, South Dakota, and Illinois. LES is a municipal corporation created by and organized under the laws of Nebraska. LES operates an electric generation and distribution system pursuant to its home rule charter and municipal code.

LES and MEC receive certain percentages of Cooper's electricity, 12.5 percent for LES and 50 percent for MEC. In exchange, LES and MEC pay corresponding percentages of Cooper's construction and operating costs.

In 1966, NPPD determined that it would need additional electric generating capacity to meet the needs of its customers. NPPD then determined that a nuclear power station with a capacity of approximately 800 megawatts would meet NPPD's needs and create additional power for future sale. Similarly, by 1966, MEC, then known as Iowa Power and Light Company, had determined that it could use additional energy to serve its own customers.

Thus, in the summer of 1966, NPPD and MEC agreed that Cooper would be constructed. In 1967, NPPD and MEC entered into a long-term power sales contract in which NPPD and MEC agreed that MEC would receive 50 percent of Cooper's electricity while paying 50 percent of the cost of Cooper's construction and operation. The evidence shows that NPPD and MEC desired to enter into a partnership, but were unable to do so. The record shows that this is because a partnership between NPPD and MEC would negatively affect Cooper's ability to obtain the necessary permits and approvals from the Nebraska Power Review Board. A partnership would also negatively impact Cooper's ability to issue tax-exempt revenue bonds. In addition, there was some concern about MEC's ability to own property under Nebraska law. Therefore, NPPD and MEC directed the attorneys

drawing up the contract to keep things as close as possible to a partnership concept, while making the contract legal.

The record shows that in 1968, NPPD entered into a similar power sales contract with LES. In that contract, NPPD agreed to sell LES approximately 12.5 percent of Cooper's electricity, with LES paying 12.5 percent of Cooper's costs of construction and operation. The history of the negotiations between LES and NPPD is not included in the record before us.

NPPD's power sales contract with LES ends on September 22, 2003, and NPPD's power sales contract with MEC terminates on September 21, 2004. Because the power sales contracts between NPPD and MEC, and NPPD and LES are essentially identical, we will hereinafter refer to the power sales contracts collectively as the contracts.

This case is centered around two sections of the parties' contracts, sections 13 and 15. Section 13 of the contracts requires NPPD to make available to LES and MEC "[a]ll operating and financial records and reports" relating to Cooper and states that "[t]he Purchaser's [LES and MEC] representative[s] shall at all reasonable times be given reasonable access to the Nuclear Facility and the records and reports" referred to above. Section 15 also requires that NPPD "confer with [LES and MEC] at all reasonable times when requested by [LES and MEC] and to give good faith consideration to [LES' and MEC's] reasonable recommendations in regard to operating practices of [NPPD] as related to [Cooper]."

From the beginning of Cooper's operation in 1974 until the mid-1990's, it appears that LES' and MEC's access to Cooper's operating and financial records and reports in addition to LES' and MEC's access to Cooper itself were not contested issues. The record shows that in the early to mid-1990's, issues began to arise under the contracts. In 1993, Cooper experienced an extended outage. Additionally, Cooper was shut down from May 1994 until February 1995 after the Nuclear Regulatory Commission found Cooper to be in violation of the commission's standards. As a result, LES and MEC began requesting more information about and greater access to Cooper. Additionally, LES and MEC filed suit against NPPD because of the financial costs to LES and MEC due to Cooper's shutdown.

In October 1998, NPPD issued a document entitled "PCM-01," its stated purpose being "to better assure that the Parties consistently observe the provisions of the Contracts." In section 6.0 of PCM-01, NPPD states:

The District has often provided the Participants with information and access not required by the Contracts. . . . [W]hile the District will continue to provide the Participants with information and access as required by the Contracts, and may provide additional information or access, the District will not at any time be required to provide a Participant with information or access that is not required by the Contracts, even if similar information or access has been provided in the past.

Specifically, PCM-01 provides that from then on, NPPD would only provide LES and MEC with certain information through an NPPD employee with the title of project manager. Specifically, PCM-01 contains the following provisions:

6.1 Information to be provided to MEC and LES.

6.1.1 Participants will be advised that requests for information concerning CNS [Cooper] or the Contracts will be made in writing and sent to (or a copy provided to) the Project Manager. . . .

. . . .

6.1.4 Information regarding District non-nuclear activities will not be provided under this procedure.

6.1.5 Information provided to the Participants will not include discussion of business proprietary, privileged or other confidential information of the District.

6.1.6 Information provided will not include draft information unless the District is requesting specific input or comment from the Participants on draft information.

6.1.7 The District will not analyze, manipulate, prepare data in specific reporting formats, or otherwise expend resources to present data in a manner other than that in which it is generally available for the specific use of the Participants.

Paragraph 6.2 of PCM-01, entitled "Site Access," contains the following relevant provisions:

6.2.2 MEC and LES representatives will not be allowed unescorted access to the facilities described above. Reasonable access will be allowed upon written request, at a minimum of two days prior to the requested time, to the Project Manager.

6.2.3 The Project Manager, in providing access, will ensure an NPPD escort has been assigned to the Participant representative for the duration of the visit. Upon completion of site access, the escort will report to the Project Manager on the events of the Participant's visit.

6.2.4 The Participant representative shall not access, review, or copy any District reports or records without the approval of the Project Manager.

6.2.5 The Participant representative shall not remove any documentation from the site without the approval of the Project Manager.

Paragraph 6.3 of PCM-01 provides for conferences between the parties in the form of an advisory operating committee. In regard to this committee, PCM-01 states:

6.3.1 The Project Manager will formally request MEC and LES to provide written suggestions for agenda items.

6.3.2 Information requests or suggested discussion items not considered suitable for the Advisory Operating Committee by the Project Manager will not be addressed at these meetings.

6.3.3 The Project Manager will produce an agenda at least one week in advance of the scheduled meeting. This agenda will include appropriate items suggested by the Participants, and other items that the Project Manager believes are timely and appropriate based on communications with the Participants or NPPD management, or otherwise.

6.3.4 The meetings will normally be held on a monthly basis at the District's General Office in Columbus, Nebraska.

Subsequently, both LES and MEC voiced objections to PCM-01 and asked NPPD not to implement it. When NPPD refused, LES and MEC brought the instant suit, contending that the contracts unambiguously require NPPD to afford them the sort of access to Cooper and to Cooper's records that they had been afforded prior to NPPD's imposition of PCM-01 in 1998. NPPD

counterclaimed, alleging that PCM-01 is not a breach of the parties' contract, but, rather, that PCM-01 affords LES and MEC greater access to Cooper and its documents than the contracts require. LES and MEC moved for summary judgment, which the trial court denied. Trial was held February 28 through March 2, 2000.

Terry Bundy, administrator and chief executive officer of LES, testified regarding the information flow between NPPD and LES in the period prior to 1990. Bundy testified that prior to 1990, LES was getting some level of periodic reports. Bundy testified that because Cooper was operating well in LES' view, LES did not think a lot of day-to-day oversight was required. Additionally, Bundy testified that LES was well aware that MEC had an increased involvement in Cooper because MEC paid a much greater percentage of NPPD's costs. Bundy testified that LES drew some comfort in this fact. Bundy also testified that prior to 1990, no one from LES exercised the right to unescorted access to Cooper, although MEC representatives routinely did so. Bundy testified that LES felt that if it was necessary, it could get unescorted access to Cooper at a later point in time.

Bundy testified that after 1990, problems at Cooper developed, including extended power outages. Bundy testified that in addition, LES was receiving information indicating that the Nuclear Regulatory Commission had some concerns regarding Cooper's operation. Bundy testified that LES felt it necessary to increase its involvement and get additional access to information at that time. Bundy testified that in 1994, he met with Ronald Watkins, president and chief executive officer of NPPD at that time, and asked for additional information. Bundy testified that Watkins provided him with additional information regarding Cooper. Additionally, Bundy testified that Watkins offered to provide an office for LES at Cooper. Bundy testified that LES accepted Watkins' offer and chose an LES representative, Ron Stoddard, to staff the office. Bundy testified that Stoddard eventually became "badged" for access to Cooper, allowing Stoddard unescorted access to Cooper. The record shows that to become badged, a person must pass certain tests in addition to a background check. The record also shows that Stoddard and other badged persons do not have unrestricted access to Cooper.

Rather, a person badged for Cooper has unescorted access to Cooper subject to certain safety and security precautions set out by Cooper and the Nuclear Regulatory Commission.

Bundy testified that over the next few years, NPPD and LES' relationship was satisfactory, but that the situation changed upon LES' receipt of PCM-01 in October 1998. Bundy testified that LES did not have an opportunity to provide any input regarding PCM-01 in advance of its receipt of PCM-01. Bundy testified that LES was very concerned about PCM-01 and that he wrote a letter to NPPD indicating that he considered PCM-01 to be a breach of the parties' contract.

Bundy testified that NPPD then went on to implement PCM-01 and that LES then filed a lawsuit because LES felt that it was being denied access to Cooper and to Cooper's records. Bundy testified that after NPPD issued PCM-01, NPPD took away Stoddard's badge and indicated that he needed to vacate the office he was using.

Two former MEC employees testified at trial regarding MEC's access to information and to Cooper both prior to and after NPPD's implementation of PCM-01. Richard Singer testified that he was a consultant with MEC for 15 years from 1984 to 1999. Singer testified that he worked closely with the Cooper plant during this time. Singer testified that from 1985 on, the atmosphere at Cooper was extremely open and that he could ask for just about any document and that NPPD would provide it. Singer testified that NPPD provided MEC with both preliminary and projected information regarding Cooper. Singer testified that he first became badged in 1987 and was allowed unescorted access to Cooper at that time. Singer testified that he did not visit Cooper on a daily basis or attend daily meetings because he felt that he could get the information he needed by calling Cooper employees. Singer testified that at certain times, he would visit Cooper frequently, especially if Cooper was experiencing a power outage.

William Turnbull also testified on MEC's behalf. Turnbull, an engineer, testified that he became employed with MEC in April 1994 and that subsequently, his attention became almost entirely devoted to Cooper. Turnbull testified that in late 1994, he became badged and received unescorted access to Cooper. Turnbull testified that he then made trips to Cooper, attended meetings on site,

and called people at Cooper for information. Turnbull testified that from 1994 to 1998, he had access to any Cooper documents he wanted and in all forms.

Turnbull testified that after PCM-01 was adopted, information flow from NPPD to MEC was restricted. Specifically, Turnbull testified that PCM-01's requirement that MEC's requests for information be in writing was extremely time consuming. Turnbull testified that prior to PCM-01, he could have gained access to the same information by sitting in on a meeting or by calling a Cooper employee. Turnbull testified that since NPPD's adoption of PCM-01, NPPD had denied MEC access to documents that MEC had previously received and prohibited MEC representatives from attending meetings MEC representatives had previously attended. Turnbull also testified that although NPPD continued to provide MEC with certain information, NPPD now did so on a delayed basis.

LES and MEC also called several witnesses who had worked in the nuclear industry to define the phrases "reasonable access" at "all reasonable times" and "all operating and financial records and reports." All of MEC's witnesses defined these terms very broadly. Regarding "reasonable access" at "all reasonable times," these witnesses testified that in the nuclear industry, this commonly means unescorted access to a nuclear facility 24 hours a day, 7 days a week, without notice to the facility.

Regarding "all operating and financial records and reports," each witness gave a slightly different opinion, but agreed that although LES and MEC are not entitled to all documents relating to Cooper, the phrase "all operating and financial records and reports" should be construed very broadly. For example, one of these witnesses defined an operating record as any record that is required to run or manage a business and stated that financial records are a subset of operating records, encompassing everything relative to accounting and tax. This witness also testified that record includes recorded information of any kind regardless of media and format, in addition to draft information and future projections. Each witness called by LES and MEC testified that PCM-01 is inconsistent with the parties' contracts because it severely restricts the access to Cooper and Cooper's documents that LES and MEC are entitled to under the contracts.

NPPD also called several witnesses at trial. Guy Horn, senior vice president of energy supply for NPPD since 1997 and an NPPD employee since 1961, testified that from 1986 through 1990 he had little contact with LES or MEC representatives. Horn testified that from 1990 to 1993, he had some interaction with MEC representatives and began to give MEC monthly packets of information. Horn testified that from 1990 through 1993, representatives of LES and MEC attended some meetings at Cooper, but very infrequently. Horn testified that during this same time period, LES and MEC representatives were not at Cooper on a daily or a weekly basis. Horn testified that in 1994, both LES and MEC became more interested in activities at Cooper, and that the meetings NPPD had with LES and MEC increased with an extended power outage at Cooper which occurred from May 1994 until February 1995.

Horn testified that subsequent to the above outage, LES and MEC filed lawsuits against NPPD and that LES' and MEC's requests for information became more intrusive at this time. Horn stated that NPPD implemented PCM-01 because of NPPD's concern over the purpose of LES' and MEC's needs for more information. Horn also testified that NPPD was experiencing difficulty in managing its contract relationship with LES and MEC. Horn testified that upon implementation of PCM-01, he pulled the badges from those LES and MEC representatives who had them. Horn testified that while NPPD will allow LES and MEC to attend some meetings at Cooper on a periodic basis, NPPD will not allow LES and MEC to attend these meetings on a routine basis. Horn testified that it is his belief that under the contract, LES and MEC do not have a right to attend any meetings at Cooper with the exception of the advisory operating committee monthly meetings.

On cross-examination, Horn testified that the requirement under PCM-01 that LES and MEC give NPPD 2 days' advance notice before visiting Cooper would not be reasonable in all circumstances. Horn also stated that if a document is considered a record under the parties' contracts, NPPD cannot deny LES and MEC access to this document by claiming that it is confidential or that it might be used for litigation. Horn also stated that it would be appropriate for LES and MEC to file a lawsuit if they

believed they had a need to do so. Horn testified that it is not improper for LES and MEC to seek information that they might later use in a lawsuit against NPPD.

NPPD also produced evidence through its accounting manager, Traci Bender. Bender testified that NPPD was converting to a new accounting system at the time of trial. Bender testified that this change had adversely affected the flow of financial information between the parties somewhat, but that NPPD's implementation of PCM-01 produced very little change in the flow of financial information between the parties.

Alan Dostal, the project manager or NPPD contact person under PCM-01, testified regarding the information NPPD supplies to LES and MEC. Dostal testified that NPPD supplies a wealth of information to LES and MEC. Dostal testified that this information includes a daily report and a telephone number regarding the status of Cooper's operation. Dostal testified that after NPPD adopted PCM-01, LES and MEC representatives were no longer entitled to attend certain meetings that they had previously attended. In addition, Dostal testified that after PCM-01, NPPD had offered LES and MEC certain information on the condition that it not be used in litigation.

NPPD also called its own experts to testify as to the meaning of the phrase "all operating and financial records and reports." One of these experts, Donald Skupsky, a records retention expert, testified that operating records in the nuclear industry would involve those records related to the actual operation of the plant and the production of the electricity, including logs that are developed in that process. Skupsky testified that his definition of operating records does not include drafts or works in progress.

Skupsky defined financial records as those records that document expenses and revenues. Skupsky testified that under his definitions of financial and operating records, the following categories of records would not be included: human resources, general administration, public relations, planning, and insurance policies. Skupsky testified that the phrase "operating and financial records and reports" is certainly not synonymous with all documents, but, rather, incorporates only a percentage of a company's documents.

In an order filed April 3, 2000, the district court ruled in LES and MEC's favor. The trial court declared sections 6.1.1, 6.1.2, 6.1.4, 6.1.5, 6.1.6, 6.1.7, and 6.2 of PCM-01 void as a breach of the parties' contracts. The court stated that PCM-01 curtailed both the access to Cooper and the access to information regarding Cooper that LES and MEC historically enjoyed. Regarding LES' and MEC's "reasonable access" to Cooper at "all reasonable times," the trial court stated that it is not unreasonable for LES and MEC to designate representatives under the contracts who qualify for badging. The trial court stated that once these representatives are badged, they should be entitled to unescorted access to Cooper. The trial court stated that in the event that LES or MEC select a representative who does not qualify for badging, NPPD may require that a nonbadged person be escorted at all times when present at Cooper.

Regarding LES' and MEC's access to all of Cooper's "operating and financial records and reports," the trial court noted that it was the intention of the parties that their contracts be as close to a partnership agreement as they could be without being a partnership.

The court specifically stated:

Placed in the context of a partnership agreement philosophy, there is no evidence that at the time the contract was entered into, any party contemplated that "all operating and financial records and reports" meant anything other than every piece of information which a business partner might find useful in making the most effective and efficient use of the financial investment that partner had in the venture. In the context of the issues now before this court, that translates into a sharing of operating and financial information to the extent necessary to allow each partner to be as profitable as a result of the relationship created by these agreements.

The trial court also stated that NPPD has a duty under section 15 of the contracts to confer with LES and MEC at all reasonable times when requested by LES or MEC. The court stated that it is a breach of the contracts for NPPD to direct any of its employees to refrain from conferring with LES or MEC as requested by LES or MEC. NPPD appeals.

ASSIGNMENTS OF ERROR

NPPD argues, condensed and restated, that the trial court erred in (1) failing to properly apply rules of contract interpretation; (2) determining that PCM-01 fails to provide LES and MEC with reasonable access to Cooper and its records and reports at all reasonable times; (3) rendering a decision that is vague, overbroad, and ambiguous and incapable of adherence by NPPD; and (4) finding that LES and MEC sustained their burden of proof for a declaratory judgment.

STANDARD OF REVIEW

[1,2] A suit for declaratory judgment is an action *sui generis* and may involve questions of law or equity or both; whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). When the essence of the dispute sounds in contract, the action is to be treated as one at law. *Id.*

[3] 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. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000).

[4] Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

ANALYSIS

Contract Interpretation.

On appeal, NPPD argues that the trial court erred, as a matter of law, in failing to properly apply rules of contract interpretation. Specifically, NPPD argues that the trial court erred in finding the parties' contracts to be unambiguous. Additionally, NPPD contends that the trial court improperly reviewed the parties' conduct under the contracts prior to NPPD's imposition of PCM-01 in 1998.

[5-7] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb. App. 721, 619 N.W.2d 78

(2000). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Id.*

[8] A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Ruble v. Reich, supra.*

In the instant case, we are concerned with the phrases "all operating and financial records and reports" and "reasonable access" at "all reasonable times" as used in section 13 of the contracts. NPPD argues that the trial court erred in finding these phrases to be unambiguous. We agree with NPPD and determine as a matter of law that these phrases are ambiguous because they can be fairly interpreted in more than one way.

[9] If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. *Id.* Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. *Miller v. City of Omaha, supra.* Therefore, we review the extrinsic evidence in this record to determine the meaning of the contracts, keeping in mind that we cannot overturn the trial court's factual findings unless they are clearly wrong.

In its order, the trial court reviewed the extrinsic evidence and determined that the parties' course of conduct prior to NPPD's imposition of PCM-01 in 1998 was of great importance in determining the meaning of the contracts. We agree with the trial court's determination.

[10] The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996); *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996).

On appeal, NPPD contends that the trial court erred in failing to properly review course of conduct evidence in determining the parties' true intent under the contracts. NPPD argues that the evidence regarding the parties' prior course of conduct shows that prior to NPPD's imposition of PCM-01 in 1998, NPPD provided LES and MEC with limited access to Cooper and related information. Therefore, NPPD contends that the parties' true intent under the contracts was that LES and MEC receive only limited access rights to Cooper and its information. NPPD argues that the access rights accorded to LES and MEC by the trial court are dramatically more expansive than the parties intended.

In its order, the trial court made several factual findings regarding the parties' prior course of conduct under the contracts. The trial court found that from 1967 until 1994, the relationships between LES, MEC, and NPPD were typically problem free. The court found that prior to 1990, Cooper was operating smoothly, at minimal cost to all parties. The court stated that prior to NPPD's imposition of PCM-01, MEC routinely had a badged representative with unrestricted access to Cooper. The trial court noted that from time to time, MEC representatives visited Cooper and that "[t]he times, dates, and duration of these visits were determined by the MEC representative." The trial court stated that in addition, prior to 1994, NPPD was responsive to all of MEC's requests and inquiries.

In regard to LES' involvement with NPPD prior to 1994, the trial court stated that "LES did not routinely have a representative in contact with NPPD personnel or present at the Cooper facility during the period from 1974 through the early 1990s." The trial court stated that instead, LES' contact regarding the Cooper facility was generally by communicating with the MEC representative. The court also noted that during that time period, LES' view was that MEC was protecting LES' interest because of their similar contractual positions.

The trial court stated that during the early 1990's, Cooper experienced a number of problems. In 1993, the court stated that Cooper was shut down for an extended refueling outage. In 1994, the court noted that the Nuclear Regulatory Commission found Cooper to be in violation of commission standards and that Cooper was shut down from May 25, 1994, until February

1995 to correct these problems. The trial court stated that as LES and MEC became aware of Cooper's problems, LES and MEC each requested and received from NPPD greater access to Cooper, its documents, and Cooper personnel. Additionally, an LES representative became badged for Cooper, and NPPD gave LES an office at Cooper. The court stated that disputes arose between the parties over the shutdown from May 1994 until February 1995 and that LES and MEC filed suit against NPPD because of the financial costs to the parties of Cooper's shutdown. The trial court found that NPPD's reaction to this litigation was to adopt and implement PCM-01 in October 1998.

In essence, the trial court found that prior to PCM-01, LES and MEC requested and were granted a great deal of access to Cooper and its records and reports. Although NPPD provided some contrary evidence at trial, we cannot say that the trial court's factual findings regarding the parties' course of conduct were clearly wrong. Based on its findings regarding the prior course of conduct between the parties, the trial court found that it was the intent of the parties under the contracts to allow LES and MEC very liberal access to Cooper and its documents. Given the record before us, we cannot say that the trial court erred in its conclusion.

PCM-01 Violation of Contracts.

On appeal, NPPD argues that the trial court erred in determining that PCM-01 fails to provide LES and MEC with reasonable access to Cooper and its financial and operating records and reports at all reasonable times. In its order, the trial court found that NPPD's adoption of PCM-01 violated the contracts because PCM-01 restricted the access to information and to Cooper that LES and MEC had historically enjoyed.

NPPD argues that PCM-01 did not significantly change the amount of access LES and MEC had previously received to Cooper and information regarding Cooper. Although NPPD produced some evidence to this effect at trial, LES and MEC produced a large amount of evidence to the contrary. Specifically, LES and MEC showed that after NPPD's adoption and implementation of PCM-01, NPPD removed the badges from all of the LES and MEC representatives who had them. Under PCM-01, LES and MEC must now request permission to visit Cooper 2

days in advance, and an NPPD employee must be with them at all times. NPPD also asked LES to vacate its office at Cooper. Regarding meetings at Cooper, LES and MEC showed at trial that subsequent to PCM-01, NPPD denied them access to a variety of meetings, stating simply that it “does not plan to have” LES or MEC attend.

LES and MEC also showed, and the trial court held, that PCM-01 significantly restricted the flow of information from NPPD to LES and MEC. We agree. The record shows that on a number of occasions, NPPD refused LES’ and MEC’s requests for certain operating and financial records and reports relating to Cooper. Specifically, the trial court noted that after PCM-01’s implementation and adoption, NPPD denied LES and MEC access to certain documents, including draft information, plan-of-the-day documents, minutes of management meetings, agenda for site senior manager’s meetings, and documents associated with change control board activities. Additionally, in regard to several other documents, the record shows that NPPD provided these documents to LES and MEC, but did so on a delayed basis.

Given the record before us, we conclude that the trial court did not err in determining that NPPD’s adoption and imposition of PCM-01 constituted a violation of the parties’ contracts. The trial court correctly determined that PCM-01 fails to provide LES and MEC reasonable access at all reasonable times to Cooper and Cooper’s records and reports.

Impossibility of Adherence.

NPPD contends that the trial court’s decision is vague, overbroad, and ambiguous, resulting in an impossibility of adherence by NPPD.

Specifically, NPPD states:

For example, the trial court found the parties intended MEC and LES receive “every piece of information which a business partner might find useful . . . [.]” On the other hand, the trial court also found “the contracts limit the information NPPD is required to make available to the plaintiffs. Plaintiffs are not entitled to every scrap of paper or electronic file defendant possesses.”

Brief for appellant at 34.

Clearly, NPPD's argument pertains to that portion of the trial court's order regarding which documents NPPD is required to grant LES and MEC access to. Besides stating that LES and MEC are entitled to receive every piece of information which a business partner might find useful, the trial court stated that for the duration of the contracts, NPPD must make certain types of documents available to LES and MEC. Specifically, the trial court stated that NPPD is required to make available to LES and MEC for inspection and copying "any information possessed by NPPD or under its control, stored on any medium, including, without limitation, plans, projections, estimates, expectations, or possible needs, which reflect, refer to or bear on" nine different categories of information that LES and MEC are entitled to, including information regarding outages or shutdowns at Cooper, whether NPPD has properly allocated expenses authorized by the contracts and costs of production of energy at Cooper, and whether NPPD has properly distributed the power generated by Cooper.

NPPD argues that the trial court erred in listing out categories of documents that NPPD must grant LES and MEC access to. Instead, NPPD contends that the trial court was required to pinpoint the exact documents NPPD is required to give LES and MEC.

NPPD states:

For example, the court ordered NPPD make available all such information as to "[w]hether NPPD is complying with its duty to operate and maintain and make renewals and replacements to the Cooper Nuclear Facility and the EHV facilities in an efficient and economical manner, consistent with good business and utility operating practices." . . . However, those documents are not identified, nor as noted herein, were they even offered in evidence to enable the trial court to specifically find whether they are operating or financial records and reports and thereby provide a basis for NPPD to comply with the order.

Brief for appellant at 34-35.

Clearly, the trial court was not required to set out each and every document that is included within each of the nine categories. Nor would it have been possible for the trial court to do

so, since the documents NPPD generates may well change over time. Similarly, it would have been impossible for LES and MEC to enter into evidence each and every document that the parties have exchanged or may exchange in the future.

After reviewing the record, we conclude that the trial court's order which sets forth nine categories of information that NPPD must provide to LES and MEC is capable of adherence by NPPD. We also conclude that that portion of the trial court's order granting LES and MEC access to information about Cooper is neither vague, overbroad, nor ambiguous. Thus, NPPD's argument is without merit.

Burden of Proof and Lack of Jurisdiction.

NPPD argues that the trial court lacked jurisdiction to enter its order because LES and MEC failed to sustain their burden of proof for a declaratory judgment. Specifically, NPPD states:

MEC and LES failed to offer in evidence documents in dispute between the parties as to whether they constitute operating and financial records and reports, and also failed to offer any evidence regarding access to information and facilities within the context of the subject contracts. The trial court therefore lacked jurisdiction as it rendered an advisory opinion only, and MEC and LES have failed to sustain their burden of proof.

Brief for appellant at 37.

We do not agree with NPPD's contention. The record before us consists of 954 pages of testimony and 5 large volumes of exhibits, each volume consisting of several hundred pages. The record before us contains over 100 exhibits. Our review of the evidence reveals that LES and MEC offered into evidence numerous examples of documents constituting operating and financial reports. Similarly, a review of the evidence produced at trial shows that LES and MEC offered a substantial amount of evidence regarding their access to information regarding Cooper and to Cooper itself. Given that evidence, we conclude that the evidence produced by LES and MEC was more than sufficient and that LES and MEC met their burden of proof for a declaratory judgment.

CONCLUSION

After reviewing the record, we conclude that the trial court properly applied rules of contract interpretation to determine that PCM-01 violates the parties' contracts in that PCM-01 fails to provide LES and MEC with reasonable access to Cooper and its financial and operating records and reports at all reasonable times. Additionally, the trial court's decision is not vague, overbroad, or ambiguous, nor did LES and MEC fail to sustain their burden of proof for a declaratory judgment. Therefore, we affirm the trial court's order granting LES and MEC's petition for a declaratory judgment.

AFFIRMED.

DALE SHAUL AND KLAYTON JOHNSON, APPELLANTS, V.
ROBERT M. BRENNER, BANNER COUNTY ATTORNEY, APPELLEE.
637 N.W.2d 362

Filed December 18, 2001. No. A-00-1124.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader.
2. **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.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
4. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any ground on which it was asserted is well taken.
5. **Contracts: Fraud: Election of Remedies.** One who has been induced to enter into a contract by virtue of a material misrepresentation, that is to say, by virtue of fraud, may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before the entry into the contract.
6. **Contracts: Fraud: Damages: Rescission: Words and Phrases.** Damages depend upon the existence of a contract. Rescission depends upon the concept that because of fraud, no contract came into existence.
7. **Contracts: Parties.** All parties to an instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants.
8. **Counties.** Each county, established in this state according to the laws thereof, shall be a body politic and corporate and by that name may sue and be sued.

9. _____. A county must be sued in the name designated in the statute.
10. **Counties: Time.** Neb. Rev. Stat. § 23-135 (Cum. Supp. 2000) provides for filings of a claim with the county clerk within 90 days.
11. **Contracts: Principal and Agent: Liability.** If a contract is made with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon.

Appeal from the District Court for Banner County: KRISTINE R. CECAVA, Judge. Affirmed.

James L. Zimmerman, of Sorensen, Zimmerman & Mickey, for appellants.

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

HANNON, SIEVERS, and MOORE, Judges.

HANNON, Judge.

INTRODUCTION

Dale Shaul and Klayton Johnson (plaintiffs) sued Robert M. Brenner, Banner County Attorney, for “disaffirmance” of diversion agreements they respectively entered into with Banner County to avoid prosecution for alleged criminal offenses and to recover the money they each paid pursuant to the agreements. Brenner demurred for all of the six reasons stated in Neb. Rev. Stat. § 25-806 (Reissue 1995), and the demurrer was sustained upon a finding that there were a defect of parties and a lack of jurisdiction. Plaintiffs elected to stand on their petition, and the action was dismissed. We affirm.

SUMMARY OF FACTS

Summarized, in the petition, plaintiffs allege that they are county commissioners of Banner County, Nebraska; that Brenner was the county attorney for Banner County; that they, along with two other county commissioners, were advised in a letter from Brenner, acting in his capacity as county attorney, to appear with counsel at the courthouse in Harrisburg, Banner County, at 9 a.m. on February 12, 1999; and that at the meeting, Brenner handed each of the persons present a sheet of paper, a copy of which was attached to the petition as an exhibit, which contained a list of the crimes each person was alleged to have committed and the citations to the statutes allegedly violated. The crimes listed were

perjury, false reporting, false statement under oath, abuse of public records, theft greater than \$500, obstructing government operations, official misconduct, failure to report/disclose in violation of accountability and disclosure act, failure to disclose potential conflicts of interest, and false reporting of income on financial statement to the county and state.

The petition also alleged that plaintiffs requested Brenner to disclose which crimes listed were applicable to them specifically. Brenner declined to do so, and he did not state any facts to support those crimes listed. Brenner then handed each person a diversion agreement and stated that every person had to agree to the diversion agreement and pay the money listed within or else those above-listed criminal charges would be filed against all of them. Copies of the signed diversion agreements were attached as exhibits to the petition. Plaintiffs alleged that Brenner stated that if any of the four, even just one person, elected to not sign the agreements or pay the money listed, then charges would be filed against all of them.

Plaintiffs alleged that they had an attorney present at this meeting and that the attorney signed the diversion agreements as their attorney. Plaintiffs allege that Brenner should have known that when he stated that the charges would be filed if even one person did not sign the agreement, a conflict of interest would arise between each party and the one attorney who was representing all of them, and that this attorney could not advise them because of that conflict.

Plaintiffs further alleged that they asked Brenner how he arrived at the amount of money they were required to pay under the agreement, but that he declined to answer. Plaintiffs signed the diversion agreement, and each agreed to pay \$10,000 by March 12, 1999. The agreement stated that \$7,000 was to be paid to Banner County for the "Banner County Weed Department" and a receipt was to be given reflecting the amount paid to the weed department and that \$3,000 was to be paid to the "Banner County School" as an unspecified gift. Plaintiffs paid the money by checks payable to Brenner's trust account with notations indicating the purposes. Of the money each plaintiff paid, \$3,000 was paid to the Banner County School District, but \$7,000 was credited to the road fund, not the weed department.

The petition goes on to allege that Brenner was interviewed by a reporter from a Scottsbluff, Nebraska, newspaper and that Brenner stated that the settlement was reached because there was insufficient evidence for prosecution. Plaintiffs allege that they were fraudulently induced to sign the diversion agreement by virtue of material misrepresentations and fraud by Brenner; that Brenner did not act in good faith, but with a corrupt motive; that he represented that he had sufficient evidence to charge plaintiffs with various crimes; and that Brenner acted maliciously, intentionally, and recklessly when he induced plaintiffs to sign the agreement.

Plaintiffs also allege that Banner County had not adopted a diversion program as provided by Neb. Rev. Stat. § 29-3603 (Reissue 1995) because the diversion agreement did not contain a provision allowing them to withdraw from the agreement.

The prayer of the petition then asked for an order disaffirming the diversion agreement and an order requiring Brenner to repay the sums paid.

Brenner filed a demurrer in which he listed all the grounds provided in § 25-806. After a hearing, the district court sustained the demurrer, stating there was a defect of parties, both plaintiffs and defendant, and that the court lacked subject matter jurisdiction because of governmental immunity. Plaintiffs elected to stand on the petition, and the case was dismissed. Plaintiffs appealed.

ASSIGNMENT OF ERROR

Plaintiffs assign that the trial court erred in finding that the district court lacked jurisdiction over the subject matter because of governmental immunity.

STANDARD OF REVIEW

[1] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

[2] 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. *Cobb v. Sure Crop Chem. Co.*, 255 Neb. 625, 587 N.W.2d 355 (1998); *Sweeney v. City of Gering*, 8 Neb. App. 675, 601 N.W.2d 238 (1999).

[3] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001).

ANALYSIS

[4] Brenner demurred on all of the statutory grounds, but the court sustained the demurrer based upon governmental immunity and defect of parties, both plaintiffs and defendant. Plaintiffs state that the trial court's finding that there was a defect of parties is moot because the trial court found it lacked jurisdiction. We do not agree with that position. An order sustaining a demurrer will be affirmed if any ground on which it was asserted is well taken. *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). We will therefore consider the first and simplest issue which is dispositive of this appeal.

The trial court concluded it lacked jurisdiction because of governmental immunity. Plaintiffs, in disagreement with the trial court's finding, cite *Koch v. Grimminger*, 192 Neb. 706, 223 N.W.2d 833 (1974), which held that a public prosecutor acting within the general scope of his authority is immune from suit, but it also stated that a prosecutor who knows that a particular charge is groundless in law or in fact and who nonetheless files a charge and thus acts with a corrupt motive is not immune from suit. *Id.*

Plaintiffs then argue that the diversion program was not established by Banner County with the concurrence of the county board as required by Neb. Rev. Stat. § 29-3602 (Reissue 1995) and that the Legislature's findings contained in Neb. Rev. Stat. § 29-3601 (Reissue 1995) show the program was to be voluntary with the accused having an opportunity for counsel prior to the decision to participate in the diversion program. Plaintiffs then argue that Brenner's action forced them to sign the diversion agreement to protect their colleagues and that since all four county commissioners had one attorney and were told they all must sign or Brenner would withdraw the offer to all, they

lacked an attorney without a conflict. Thus, they argue they have a cause of action.

One of the basic problems with plaintiffs' argument is that it ignores the prayer of their petition. In the prayer, they asked for "an Order disaffirming the **Diversion Agreement** and order the defendant, Robert M. Brenner to repay to them the sums of money paid by them as a result of their detrimental reliance." While the word "disaffirming" is used, the prayer really asks that the diversion agreement be canceled (on the ground of fraud) and that they recover from Brenner the money they paid. Such an action is frequently called a suit for rescission.

In *Koch v. Grimminger, supra*, the action was a tort action, and it was analyzed as such with the court citing to the Restatement (Second) of Torts for authority. Here, plaintiffs do not allege or pray for any damages, but, rather, for a return of the money paid.

[5,6] The Nebraska Supreme Court has stated:

[O]ne who has been induced to enter into [a contract] by virtue of a material misrepresentation, that is to say, by virtue of fraud, may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract.

Genetti v. Caterpillar, Inc., 261 Neb. 98, 120, 621 N.W.2d 529, 546 (2001). See, also, *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). "This is so because one remedy, damages, depends upon the existence of a contract, and the other, rescission, depends upon the concept that because of the fraud, no contract came into existence." *Genetti*, 261 Neb. at 120, 621 N.W.2d at 546. Likewise, our courts have held that the remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter on affirmance of the contract. *Genetti, supra; Russo, supra*.

[7-9] The diversion agreements attached to the petition stated: "Banner County, by and through its County Attorney, Robert M. Brenner, first party . . . [.] This action is an action to rescind separate contracts between each of the plaintiffs and Banner County. " "All parties to [an] instrument sought to be canceled are necessary parties to the suit for cancellation, either as plaintiffs or as defendants" *Rumbel v. Ress*, 166 Neb. 839,

846, 91 N.W.2d 36, 42 (1958). Neb. Rev. Stat. § 23-101 (Reissue 1997) provides: "Each county, established in this state according to the laws thereof, shall be a body politic and corporate . . . and by that name may sue and be sued . . ." A county must be sued in the name designated in the statute. *Jameson v. Plischke*, 184 Neb. 97, 165 N.W.2d 373 (1969) (suit against board of supervisors was held not against county in suit involving deed). Since plaintiffs were asking the trial court to disaffirm the diversion agreement based upon fraud or misrepresentation and return money to plaintiffs, this is an action asking to rescind the contract, and Banner County is a necessary party that was not made a party.

[10] Furthermore, Neb. Rev. Stat. § 23-135 (Cum. Supp. 2000) provides for filings of a claim with the county clerk within 90 days. That statute has been held to apply to all claims against a county arising ex contractu. *McCullough v. County of Douglas*, 150 Neb. 389, 34 N.W.2d 654 (1948). There is nothing in the record which shows such a claim was filed by plaintiffs.

[11] In the prayer of their petition, plaintiffs ask Brenner to repay them what they paid Brenner. Attached to the petition are checks showing that plaintiffs paid the sums of money to Brenner's trust account. However, plaintiffs also attached receipts showing that the sums paid to the trust account had been paid out to the county and to the county school. While the petition shows Brenner to be a county official, he is not the county. He was representing the county as an agent of the county. The allegations in the petition clearly show an agent-principal relationship was disclosed to plaintiffs. A "longstanding tenet of the law is that if a contract is made with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon." *Coffey v. Mann*, 7 Neb. App. 805, 810, 585 N.W.2d 518, 523 (1998). Accord *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). This court has also recently held:

In order to exempt an agent from liability upon an instrument executed by the agent within the scope of the agent's agency, the agent must not only name his or her principal, but must express by some form of words that the

writing is the act of the principal, though done by the hand of the agent. If the agent expresses this, the principal is bound and the agent is not.

780 L.L.C. v. *DiPrima*, 9 Neb. App. 333, 340, 611 N.W.2d 637, 644 (2000). See *Lincoln Equipment Co. v. Eveland*, 173 Neb. 174, 112 N.W.2d 755 (1962).

The diversion agreement clearly states in the beginning, "Banner County, by and through its County Attorney, Robert M. Brenner," and in conclusion, the signature line reads, "COUNTY OF BANNER COUNTY, By [Brenner's signature] Robert M. Brenner, Banner County Attorney." Regarding the effect of the signature of an agent, it is generally understood that in "the absence of a contrary manifestation in the document, the following signatures and descriptions, among others, create an inference that the principal and not the agent is the party: The principal's name followed by the agent's name preceded by a preposition such as 'by' or 'per.'" Restatement (Second) of Agency § 156 at 372 (1958). See, also, 3 Am. Jur. 2d Agency § 171 (1986); 780 L.L.C. v. *DiPrima*, *supra*. The manner of Brenner's signature on the diversion agreement clearly shows he signed the document on behalf of the county, not in his individual capacity.

We therefore conclude that the petition does not state a cause of action against Brenner and that Banner County is a necessary party. An order sustaining a demurrer will be affirmed if any ground on which it was asserted is well taken. *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). Regarding the other grounds, we do not address those here. An appellate court is not obligated to engage in an analysis which is unnecessary to adjudicate the case and controversy before it. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999).

CONCLUSION

Since Brenner was acting as an agent for Banner County in entering into the diversion agreement with plaintiffs and not in his individual capacity, under contract law, he is not liable for the acts of the disclosed principal, Banner County. We find that the trial court did not err in sustaining the demurrer as it clearly

did not state a cause of action against Brenner and that there is a defect of parties. We affirm the dismissal of the petition.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF CHRISTOPHER S. DADY,
A MINOR CHILD, APPELLEE, V. MICHAEL L. SNELLING, APPELLANT.

637 N.W.2d 906

Filed December 18, 2001. No. A-01-205.

1. **Paternity: Appeal and Error.** In a filiation proceeding, the appellate court reviews the trial court's judgment de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Paternity: Presumptions.** When genetic tests show a probability of paternity of 99 percent or more, a rebuttable presumption is created without the need for any other evidence.

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

Sheila C. Stoffel and Marian G. Heaney, of Nebraska Legal Services, for appellant.

Robert G. Tribolet, of Child Support Services of Nebraska, for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Michael L. Snelling appeals the order of the district court for Douglas County which determined that he is the biological father of Christopher S. Dady and ordered Snelling to pay child support. On appeal, Snelling contends that the trial court erred in concluding that genetic testing results alone are sufficient evidence to establish paternity. Finding no error, we affirm the judgment of the trial court.

BACKGROUND

On May 10, 2000, the State of Nebraska filed a petition for establishment of paternity and support on behalf of Christopher, born March 29, 1992. The petition stated (1) that Kristine L. Manard is the mother of Christopher; (2) that during the probable period of conception of Christopher, Snelling and Manard had sexual intercourse with each other, and that as a result of which, Manard became pregnant and gave birth to Christopher; (3) that Snelling is the father of Christopher; (4) that Christopher is in need of financial support from Snelling; and (5) that Snelling is capable of providing such support for Christopher. The State filed a motion for genetic testing on the same date. Pursuant to a stipulation, Snelling, Manard, and Christopher submitted to genetic testing. The results of the genetic testing concluded that Snelling "cannot be excluded as the biological father of the child, CHRISTOPHER S. DADY, since they share genetic markers. . . . [T]he probability of paternity is 99.99%, as compared to an untested, unrelated man of the Caucasian population."

Subsequently, the district court referee conducted a hearing on the petition. The referee received the written results of the genetic testing into evidence over Snelling's objection. Neither Snelling nor Manard testified as to the sexual relations, or the absence of relations, between the two of them. The referee recommended that the court find that Snelling is the biological father of Christopher and owes a corresponding duty of support.

Snelling filed an exception to the referee's report, and a trial was conducted before the district court. Snelling argued that the referee improperly considered the results of the genetic testing because there must first be evidence of sexual intercourse between Snelling and Manard before the genetic testing can be considered. The trial court overruled Snelling's exception and entered an order finding Snelling to be Christopher's father and ordering him to pay child support. Snelling appeals.

ASSIGNMENT OF ERROR

Snelling assigns that the trial court erred in concluding that genetic testing results alone are sufficient evidence to establish paternity.

SCOPE OF REVIEW

[1,2] In a filiation proceeding, the appellate court reviews the trial court's judgment *de novo* on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998); *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988). When reviewing a question of law, however, an appellate court reaches a conclusion independent of the lower court's ruling. *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000); *Pfeifer v. E.I. Du Pont De Nemours & Co.*, 258 Neb. 756, 606 N.W.2d 773 (2000).

ANALYSIS

Snelling argues that because there was no evidence of sexual intercourse between Snelling and Manard, the genetic testing results alone were inadequate to establish paternity. Snelling relies on *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996). In that case, Rial appealed a judgment that was entered against him in accordance with a jury verdict finding him to be the biological father of Joseph. Joseph's mother testified that she and Rial dated from July 1987 until early October 1988 and that during that time, she and Rial would have sexual intercourse once or twice a week. She also testified that she did not have sexual intercourse with any other man while she was involved with Rial. Rial admitted having sexual intercourse with the mother and testified that the last time he had sexual intercourse with her was in late July 1988. Joseph was born on May 30, 1989. The results of genetic testing were also admitted into evidence. On appeal, Rial argued that the trial court erred in refusing certain proffered jury instructions. Rial argued that the trial court should have given the following proposed instruction: "If you find that the Defendant had vaginal sexual intercourse with [the mother] at or about the time when . . . the child was conceived, you may then consider the probability of paternity results." *Id.* at 6-7, 554 N.W.2d at 774. The court gave an instruction which stated: "If you find that the defendant had sexual intercourse with [the mother] at or about the time when Joseph . . . was conceived, you may then consider the probability of

paternity results.’” *Id.* at 7, 554 N.W.2d at 774. The Nebraska Supreme Court found that Rial had waived any error with respect to the instruction given because of his failure to object to such instruction and further found that the trial court did not err in refusing Rial’s proposed instructions because “the instructions given by the court adequately informed the jury it had to first find Rial engaged in sexual intercourse with [the mother] before it could consider the paternity testing results.” *Id.* at 8, 554 N.W.2d at 774.

In the instant case, the trial court disregarded *State on behalf of Joseph F. v. Rial*, *supra*, and instead relied on Neb. Rev. Stat. § 43-1415 (Reissue 1998), which provides:

(1) The results of the tests, including the statistical probability of paternity, shall be admissible evidence and, except as provided in subsection (2) of this section, shall be weighed along with other evidence of paternity.

(2) When the results of tests, whether or not such tests were ordered pursuant to section 43-1414, show a probability of paternity of ninety-nine percent or more, there shall exist a rebuttable presumption of paternity.

(3) Such evidence may be introduced by verified written report without the need for foundation testimony or other proof of authenticity or accuracy unless there is a timely written request for personal testimony of the expert at least thirty days prior to trial.

We conclude that § 43-1415 rather than *State on behalf of Joseph F. v. Rial* controls the outcome of the present case. The *Rial* opinion does not cite to or mention § 43-1415. However, its holding concerning the previously discussed jury instruction is consistent with the language in § 43-1415. At the time of Rial’s trial, which was October 29, 1993, § 43-1415 did not contain the rebuttable presumption language now found in subsection (2). At the time of Rial’s trial, § 43-1415 (Reissue 1993) stated:

The results of the tests, including the statistical probability of paternity, shall be admissible evidence and shall be weighed along with other evidence of paternity. Such evidence may be introduced by verified written report unless there is a timely request for personal testimony of the expert at least thirty days prior to trial.

At the time, § 43-1415 required that results of genetic tests be weighed along with other evidence under all circumstances, no matter what the probability of paternity was. Therefore, when the Nebraska Supreme Court considered the jury instructions that were given at Rial's trial, the court's determination that other evidence of paternity must be offered before the genetic testing results have any meaning was not at odds with the version of § 43-1415 in effect at the time.

[3] The current version of § 43-1415, which became operative July 1, 1994, states that results of genetic tests are to be weighed along with other evidence of paternity, except when the results of tests "show a probability of paternity of ninety-nine percent or more, there shall exist a rebuttable presumption of paternity." Therefore, when genetic tests show a probability of paternity of 99 percent or more, a rebuttable presumption is created without the need for any other evidence.

In the present case, pursuant to § 43-1415(1) and (2), the results of the genetic tests were admissible and created a rebuttable presumption of paternity because the results showed that "the probability of paternity is 99.99%, as compared to an untested, unrelated man of the Caucasian population." Snelling did not present any evidence to rebut the presumption that he is the father of Christopher. In addition, under § 43-1415(3), evidence of genetic testing results can be introduced without foundational testimony or other proof of authenticity or accuracy in regard to the testing itself, unless there is a written request for personal testimony of the expert at least 30 days prior to trial. Snelling did not make such a written request. Therefore, we affirm the order of the district court finding Snelling to be the biological father of Christopher and ordering Snelling to pay child support.

CONCLUSION

The trial court did not err in concluding that evidence of genetic testing results alone was sufficient evidence to establish paternity because the results of the tests showed a probability of paternity of 99 percent or more, creating a rebuttable presumption under § 43-1415 that Snelling is Christopher's biological father.

AFFIRMED.

DENNIS MELLING, APPELLEE, v. DALE L. MATTLEY AND
ERLYN M. MATTLEY, APPELLANTS, AND RONDA L. MATTLEY
ET AL., APPELLEES.
637 N.W.2d 661

Filed January 8, 2002. No. A-00-857.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **States: Courts: Jurisdiction: Real Estate: Title.** State courts have jurisdiction to decide questions involving title to lands within their borders even though federal law is determinative.
4. **Actions: Quiet Title: Proof.** In an action to quiet title, the plaintiff generally has the burden of proof and must recover upon the strength of his or her title.
5. **Real Estate: Tax Sale: Deeds: Evidence.** In accordance with 26 U.S.C. § 6339(b)(1) (1994), in the case of the sale of seized real property pursuant to 26 U.S.C. § 6335 (1994), the deed of sale given pursuant to 26 U.S.C. § 6338 (1994) shall be prima facie evidence of the facts therein stated.
6. **Real Estate: Tax Sale: Deeds: Liens: Conveyances.** With regard to sales of seized property by the Internal Revenue Service, if the proceedings have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.
7. **Statutes: Real Estate: Notice: Deeds: Proof.** The burden of proving that the Internal Revenue Service complied with the statutory notice requirements is upon the one claiming the land under the director's deed.
8. **Property: Tax Sale: Notice.** Generally, strict compliance with notice requirements governing seizure and sale of property for delinquent federal income taxes is required.
9. **Equity: Statutes: Property: Tax Sale: Notice.** When the underlying action is an equitable one brought by a citizen who has relied on an apparently lawful sale conducted by the government, the court must look to the equities when deciding whether there must be strict compliance with statutory notice requirements for an Internal Revenue Service seizure and sale.
10. **Equity: Statutes: Property: Tax Sale: Notice: Quiet Title.** The Internal Revenue Service should comply with the notice statutes when it seizes and sells a citizen's property, but a failure to provide statutory notice makes the sale only voidable. And, whether such sale is to be voided requires an examination of the equities of the situation, because an action to quiet title is fundamentally an equitable action.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed.

Gene Oglesby, of Oglesby Law Offices, P.C., for appellants.

Dale C. Crandall for appellee Dennis Melling.

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Dale L. Mattley and Erlyn M. Mattley (the Mattleys) appeal the decision of the district court for Garfield County quieting title to their commercial real estate in Dennis Melling, the tax sale purchaser of the land. The issue is whether the Mattleys received sufficient notice by the Internal Revenue Service (IRS) of the levy, seizure, and sale of their real property for nonpayment of delinquent taxes such that the IRS was able to transfer title to the property to Melling and his wife by a valid director's deed.

FACTUAL BACKGROUND

In the mid-1950's, the Mattleys acquired the real estate at issue in Burwell, Nebraska, upon which they opened a general store, known as Mattleys. They moved into the house located directly behind the store in the mid-1960's. In the 1980's, the Mattleys had transferred their commercial real estate through various trusts, but retained beneficial ownership. They also began receiving notices from the IRS that they owed delinquent taxes. In 1991, the IRS levied upon and seized the store and the land upon which it was located. The Mattleys protested the seizure in a letter dated March 18, 1991, to the IRS district director. The IRS then proceeded to sell the property. Melling and his wife bought the real estate on April 18, having submitted the highest sealed bid of \$8,626.97.

PROCEDURAL BACKGROUND

After buying the commercial real estate, Melling and his wife received a certificate of sale of seized property from the IRS. Melling and his wife waited for the 180-day redemption period to expire, during which time the Mattleys did not redeem the property, so Melling and his wife requested the deed to the land from the IRS district director. After losing the original director's deed, Melling and his wife had it replaced by a deed dated November 7, 1996, which they filed the next day. After their divorce, Melling's wife transferred her interest in the land to Melling via a quitclaim deed dated February 14, 1997.

Melling's subsequent attempts to sell the real estate were frustrated by his inability to acquire title insurance, apparently due to the attempted transfers of the land by the Mattleys in the 1980's to so-called trusts. Therefore, Melling filed a petition to quiet title on July 20, 1998, with the district court for Garfield County. In his petition, Melling claimed that the Mattleys' various transfers of the real property to trusts, and their letter protesting the seizure of the property, cast a cloud upon his title. He asked the district court to quiet title in the property in him and to permanently enjoin the Mattleys and anyone claiming any interest in the real estate through them from asserting any claims against the property.

The Mattleys cross-petitioned and filed a second amended cross-petition on May 13, 1999, which is the operative filing. The Mattleys alleged that the IRS failed to follow its own procedures by not personally serving them with notice of intent to levy, notice of seizure, and notice of sale as required by the Internal Revenue Code. They asked the district court to find that this failure voided the tax sale and deed and for judgment declaring them fee simple owners of the property to the exclusion of Melling or anyone claiming through him. The Mattleys also sought a judgment awarding them actual damages for the economic loss due to their inability to use the property.

A hearing was held on June 21, 2000. The Mattleys asserted that they were not personally served with notices of levy, seizure, or sale. They further asserted that they did not receive these notices at their store or home and that they only acquired copies under the Freedom of Information Act. See 5 U.S.C. § 552 et seq. (1994 & Supp. V 1999). Dale Mattley testified that he was confronted by a "gang" of people who took physical possession of the property prior to the sale. He further stated that he never saw notices of the sale posted on the store, but that he did see an advertisement about the sale in the local newspaper. Melling entered into evidence exhibit 11, the March 18, 1991, letter from the Mattleys to the IRS district director in which they protested the seizure of their store. Melling testified that he learned of the sale by "[w]ord of mouth" and from notices posted on the store's windows and doors. He introduced into evidence exhibit 14, the certificate of sale of seized property, and exhibit 12, the IRS district

director's deed he received after the mandatory 180-day redemption period.

The district court entered its order on June 28, 2000. The court found that the Mattleys "must have had notice of the levy and seizure when the [IRS] agents took over their property." The court added that they had notice of the seizure of the property as early as March 14, 1991, as well as of their right to administrative review as evidenced by their letter to the IRS of March 18, which was written a month before the sale. The court concluded that the Mattleys must have known of the sale from the newspaper advertisement they saw prior to the sale. The district court also quoted 26 U.S.C. § 6339(b) (1994), which states:

In the case of the sale of real property pursuant to section 6335—

(1) Deed as evidence

The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title

If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

The district court quieted title to the commercial real estate in Melling, and the Mattleys appealed to this court.

ASSIGNMENTS OF ERROR

The Mattleys' three assignments of error may be reduced to two. The Mattleys assign error to the district court's holding that their actual notice of the levy, seizure, and sale of their property constituted sufficient compliance by the IRS with federal law on such matters so that the director's deed transferring title to Melling was valid. They further assign error to the court's holding that they had actual notice of levy, seizure, and sale before the sale.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998);

Schram Enters. v. L & H Properties, 254 Neb. 717, 578 N.W.2d 865 (1998). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Id.*

ANALYSIS

Federal Notice Statutes: Levy, Seizure, and Sale of Real Property.

[3] Although this action to quiet title between two Nebraska citizens was tried and is appealed in state courts, the critical issue of whether the Mattleys received notice adequate to legitimize the IRS' tax sale of their commercial property is a question of federal law. Nonetheless, state courts clearly have jurisdiction to decide questions involving title to lands within their borders even though federal law is determinative. See, *Dimondale v Grable*, 240 Mich. App. 553, 618 N.W.2d 23 (2000); *Kelly v. Lunding*, 131 Ill. App. 3d 410, 475 N.E.2d 1093, 86 Ill. Dec. 714 (1985).

Federal statutes provide in 26 U.S.C. § 6330(a)(1) (Supp. V 1999) that "[n]o levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made." Subsection (a)(2) states:

The notice required under paragraph (1) shall be—

- (A) given in person;
- (B) left at the dwelling or usual place of business of such person; or
- (C) sent by certified or registered mail, return receipt requested, to such person's last known address; not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

The provision addressing notice of seizure provides:

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property . . . or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address.

Such notice shall specify the sum demanded and shall contain . . . in the case of real property, a description with reasonable certainty of the property seized.

26 U.S.C. § 6335(a) (1994). Section 6335(b), notice of sale, further requires that "notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made."

The Mattleys argue that the federal government's failure to strictly comply with the notice requirements of §§ 6330 and 6335 invalidates the levy, seizure, and sale of their commercial property. The Mattleys claim that IRS compliance with these statutes is necessary, regardless of whether they had actual notice of the levy, seizure, and sale of the property.

Plaintiff's Burden of Proof in Quiet Title Action.

[4] Determining who has the burden of proof in a case such as this is an important part of the analysis. In an action to quiet title, the plaintiff generally has the burden of proof and must recover upon the strength of his or her title. *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991); *Vogel v. Bartels*, 1 Neb. App. 1113, 510 N.W.2d 529 (1993). Our review of the record reveals that Melling offered no evidence that the IRS personally served the Mattleys with notice of levy, seizure, or sale of their property. Nor did Melling introduce evidence that the IRS left written notices of these actions at the Mattleys' store or home, a type of service allowed by § 6330(a)(2) and by § 6335(a) and (b) when the seized property is located in the same revenue district as where the federal government seized the property. The lack of such evidence takes us to the statutory presumption.

Evidence of Notice from Certificate of Sale and Deed of Sale.

[5,6] Section 6339(b)(1) provides that in the case of the sale of seized real property pursuant to § 6335, the deed of sale given pursuant to 26 U.S.C. § 6338 (1994) shall be prima facie evidence of the facts therein stated. Section 6338(a) and (b) provides that a purchaser of property sold pursuant to § 6335 receives a certificate of sale, and if the property is real property, the purchaser exchanges the certificate of sale for a deed after the statutory redemption period expires. According to § 6338, the certificate of sale and the deed must detail the real property

purchased, for whose taxes the property was sold, the purchaser's name, and the price paid. Thus, if these facts are included in the certificate of sale and the deed, the deed of sale becomes prima facie evidence of the facts stated therein under § 6339(b)(1). Section 6339(b)(2) then provides:

If the proceedings . . . have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

Melling received exhibit 14, the certificate of sale of seized property, from the IRS upon purchasing the Mattleys' property. Exhibit 12 is the IRS district director's deed, which the Mellings received after the statutory redemption period expired. The certificate states that the property was seized due to the Mattleys' nonpayment of delinquent IRS taxes, names the Mellings as the purchasers, lists the sale amount, and describes the property.

The deed states that pursuant to the authority vested in him by § 6330, the IRS district director "did cause levy to be duly executed, and did cause the property hereinafter described to be seized for the nonpayment of delinquent United States Internal Revenue taxes due from Dale L and Erlyn Mattley." Thus, the person for whose taxes the property was sold is named, as required by § 6338, and the deed further states that levy upon the property was duly executed. We quote from the deed:

AND WHEREAS, the notice of said seizure having been given in accordance with the provisions of Section 6335(a) of the Internal Revenue Code;

AND WHEREAS, the time, place, manner, and condition of sale of said seized property hereinafter described having been duly advertised in accordance with the provisions of Section 6335 of the Internal Revenue Code, and the regulations promulgated thereunder, the same was sold at public sale under sealed bid in accordance with said Section 6335, for the sum of \$8,626.97 to the highest bidder therefore, namely [Melling and his wife.]

The purchaser of the property is named and the price paid reported in the deed, as required by § 6338, and the IRS avers that

it complied with the notice of seizure provisions of § 6335(a) and the notice of sale provisions of that section. The deed ends with a proper legal description of the land the Mellings purchased, also as required by § 6338.

Because the requirements for the recitals in the deed from § 6338 are present, the deed provides prima facie evidence of the other facts stated therein as provided by § 6339(b)(1). Of particular significance are the factual assertions of the IRS in the deed that it complied with the statutory notice requirements for levy, seizure, and sale under § 6335. However, the deed is only prima facie evidence of such matters, and in this case, the Mattleys testified that they did not receive the notices of levy, seizure, and sale due them under §§ 6330 and 6335 until they requested the documents, after the sale, from the IRS under the Freedom of Information Act. Melling never adduced any evidence contesting the Mattleys' claim that they had not received their statutory notices.

[7] There is no Nebraska case addressing the effect of such an evidentiary posture in a quiet title action having its genesis in an IRS tax sale. But the issue was decided in *Dimondale v Grable*, 240 Mich. App. 553, 618 N.W.2d 23 (2000). In *Dimondale*, the grantee of a purchaser of land at an IRS tax sale filed a petition to quiet title to the property. The delinquent taxpayer answered that the tax sale was invalid because the IRS failed to comply with the notice requirements of § 6335. The trial court granted summary judgment to the grantee, but upon review, the Michigan Court of Appeals reversed, and remanded for the trial court to enter summary judgment in favor of the delinquent taxpayer. The appellate court recognized that under § 6339(b), a tax deed is valid on its face because the deed is prima facie evidence of the facts stated within it. But while the tax deed contained a statement that the tax sale was conducted in compliance with the statutory notice requirements in *Dimondale*, the delinquent taxpayer rebutted this deed's assertions by showing inadequate notice, a claim which the grantee did not disprove with contrary evidence. Therefore, the court in *Dimondale* held that the statement in the tax deed that the IRS complied with all relevant statutory provisions had no effect on the court's quiet title decision. The Michigan court held that "“the burden of showing literal

compliance with statutes governing the sale of land for taxes is upon the claimant upon the tax sale.”” 240 Mich. App. at 568, 618 N.W.2d at 31. The Illinois Court of Appeals has also imposed the burden of proving that the IRS complied with the statutory notice requirements upon the one claiming the land under the director’s deed. See *Kelly v. Lunding*, 131 Ill. App. 3d 410, 475 N.E.2d 1093, 86 Ill. Dec. 714 (1985).

In the instant case, Melling failed to controvert the Mattleys’ testimony that they did not receive the statutorily required notice of levy, seizure, and sale. Thus, any prima facie effect of the assertions in the deed that the IRS had properly given the required notices to the Mattleys was rebutted. However, despite the foregoing authority, we believe that there is one more analytic step, which is to examine whether the Mattleys received actual notice of levy, seizure, and sale. If the Mattleys received actual notice, we must decide whether such notice is enough to legally validate the tax sale of their real estate.

Effect of Actual Notice of Seizure and Sale.

Although there is no evidence in the record showing that the Mattleys had actual notice of levy, the Mattleys cannot claim that they lacked actual notice of seizure and sale of the land where their store was located. We note in passing that compared to the import of seizure and sale, it seems that notice of levy is rather inconsequential—particularly in the instant case where the evidence shows that for a number of years, the IRS was attempting to collect taxes from the Mattleys. In other words, the fact that the IRS was after them would have been no shock to the Mattleys, and therefore, we do not think the matter of notice of levy is particularly meaningful in the analysis. Dale Mattley’s testimony and the Mattleys’ letter to the IRS district director establish that they were present at the seizure of their store. Further, although there was conflicting evidence of whether sale notices were posted at their store, Dale Mattley admitted that he learned of the sale by advertisements placed in the local newspaper. Thus, we find that the Mattleys had actual notice. Accordingly, the issue becomes whether the Mattleys’ actual notice of seizure and sale of their property is sufficient to validate the tax sale to Melling. The authority on this point is in conflict.

[8] Generally, strict compliance with notice requirements governing seizure and sale of property for delinquent federal income taxes is required. See, *Goodwin v. U.S.*, 935 F.2d 1061 (9th Cir. 1991); *Reece v. Scoggins*, 506 F.2d 967 (5th Cir. 1975) (literal compliance with statute requiring that taxpayer be given notice of sale of land for delinquent income taxes is required before government's sale of land can stand). See, also, *Johnson v. Gartlan*, 470 F.2d 1104 (4th Cir. 1973). Despite evidence that the taxpayer had actual notice, the Michigan Court of Appeals in *Dimondale v. Grable*, 240 Mich. App. 553, 618 N.W.2d 23 (2000), found that the failure of the IRS to provide proper statutory notice could not be excused and that the tax deed was invalid. The final result in *Dimondale* was that title was quieted in the delinquent taxpayer and that the grantee from the tax sale lost the property. Compare *Kelly v. Lunding*, *supra* (substantial compliance with notice of seizure requirements was sufficient).

There are federal cases finding the landowner's actual notice of the tax sale sufficient when the delinquent taxpayer had received ample opportunity to attend the sale of the seized property. *Van Skiver v. U.S.*, 751 F. Supp. 1522 (D. Kan. 1990); *Howard v. Adle*, 538 F. Supp. 504 (E.D. Mich. 1982). However, in *Van Skiver*, the delinquent taxpayers had been personally served with notice of seizure in compliance with § 6335(a). And while the IRS did not attempt personal service of the notice of sale, as required by § 6335(b), the IRS did provide notice by certified mail, and the return receipt bore the taxpayer's signature. Moreover, when the sale was rescheduled because no buyers appeared at the first sale, the IRS again sent notice of the second sale to the taxpayers. The court's analysis in *Van Skiver* is grounded in equity: the court first noting that a quiet title action is an equitable action, that the taxpayers waited over 2 years after the sale before bringing the quiet title action, and that the IRS' noncompliance with statutory notice provisions was "technical," plus that there was no claim by the taxpayers that they did not have actual knowledge of the seizure and sale. *Id.* at 1526. Finally, the *Van Skiver* court noted that the purpose of the notice statute, § 6335(b), was satisfied. *Reece v. Scoggins*, *supra*, represents the other side of the coin.

In *Reece*, the Fifth Circuit Court of Appeals said that because the taxpayer never received statutory notice of the tax sale, the

sale was void ab initio. Adopting a rule of strict compliance with the notice statutes, the court contrasted the inviolability of private ownership of property with the fact that seizure and sale was the most potent weapon in the "government's tax collection arsenal." 506 F.2d at 971. The court described seizure and sale as a weapon of a "Damoclean nature" which can deprive a taxpayer of a sometimes significant capital investment plus a source of income. *Id.* The *Reece* court found that in such circumstances, given that the language of § 6335 was clear and mandatory, strict compliance would be required. The court found that the record showed that the IRS "failed completely to comply with the notice provisions of the Code." 506 F.2d at 971.

Reece was distinguished in *Howard v. Adle, supra*, upon the ground that the *Reece* court moved from finding the sale voidable to holding the sale void, without any consideration of whether the taxpayer should have equitable relief under the applicable state law. And in finding for the tax sale purchasers, the court in *Howard* noted that although there were defects in the notice given the taxpayers, there was no claim that they were thereby denied the opportunity to be present at the sale. Central to the court's reasoning in *Howard* was recognition that such cases are quiet title actions. The court said that under Michigan state law where a serious defect occurs in a tax sale, it may be attacked by the owner, providing he acts promptly and does equity. *Id.*, citing *Detroit Trust Co. v. Lieberwitz*, 275 Mich. 429, 266 N.W. 406 (1936).

Howard, supra, also distinguishes upon grounds of equity another strict compliance case, *Aqua Bar & Lounge, Inc. v. United States*, 438 F. Supp. 655 (E.D. Pa. 1977). In *Aqua Bar & Lounge, Inc.*, a Pennsylvania federal district court reasoned that the government knew the taxpayer's address and should have delivered the required notices to him at that address, concluding that the possibility that he may have received actual notice by the mail was "irrelevant." *Id.* at 657. Additionally, the court in *Aqua Bar & Lounge, Inc.*, quickly brushed aside in a footnote any notion that the good faith of the buyer should prevent the sale from being voided. In another strict compliance case involving an automobile seizure, *Kulawy v. U.S.*, 917 F.2d 729, 735 (2d Cir. 1990), the court said, "A stickler for enforcing the statutory notice it is

entitled to receive, the government should be no less punctilious with respect to the statutory notice it is required to give."

Resolution: Strict Compliance or Weighing of Equities.

How a court resolves the obvious conflict between these conflicting lines of authority perhaps depends upon the view taken of "the government." One view is that the government acts through its employees, people just trying to do their jobs, and that government employees are no more infallible than other people. Thus, the mistakes and lapses, and the effect thereof, of government employees, including those working for the IRS, must be judged in the context of the real effect on the citizen. A contrary view is that Congress has designed a system which allows the government to seize and sell a citizen's property without the protection of the judicial system, an obviously powerful weapon subject to potential abuse, and that as a result before such drastic measures are taken, the government must strictly "follow the rules." And if the government "cuts corners" or makes mistakes, its sale of the citizen's property is void, not just voidable.

[9] While both viewpoints have their attractions, and there are undoubtedly other ways of characterizing the philosophies which drive the split in authority, we find that because the underlying action is an equitable one brought by a citizen who has relied on an apparently lawful sale conducted by the government, we must look to the equities. In doing so, we bear in mind that the competing parties here are both citizens. Adopting a bright-line rule of "strict compliance" or the sale is void—without regard to when the claim of noncompliance is raised—tends to favor one who was in violation of the law to begin with by not paying internal revenue taxes over the innocent citizen purchaser who had relied upon the government to conduct a lawful sale. Such a result causes discomfort unless the evidence shows that the delinquent taxpayer was actually disadvantaged by the government's lapses. Consequently, we reject the rule of strict compliance and analyze the equities of the situation as revealed by the evidence.

This record is lacking in proof that the Mattleys received personal service, service at their home or business, or service by certified or registered mail of notice of levy under § 6330. The

record does suggest that the Mattleys received notice of seizure or notice of sale under § 6335(a) and (b). There was no evidence they received personal service, service at their home or business (both located within the internal revenue district where the seizure was made), or notice mailed to their home. Upon our de novo review of this record, we believe that this lack of evidence stems from a failure of the purchaser, Melling, to appreciate that the burden of proof fell to him to adduce such evidence once the Mattleys denied receiving the statutory notices, rather than because the IRS actually failed to give such notice. We say this because Dale Mattley's testimony that he eventually received the notices under the Freedom of Information Act clearly suggests to us the permissible inference that the government did not act in total disregard of its duty to give statutory notices.

The record, as stated earlier herein, shows that the Mattleys were personally aware of the seizure of their property, of the sale of their property, and of when it was to be sold. Thus, the purpose of the notice statutes was satisfied, and the Mattleys had the knowledge necessary to bid on their property if they were so inclined and had the means to do so. Moreover, the situation is one which they created by their failure to pay taxes as all who earn money are required to do. The property was sold to an innocent purchaser, Melling, for value, who held the property for nearly 9 years before he sought to clean up the title from clouds created by the Mattleys' maneuvers in trying to transfer it to trusts once the IRS began actively seeking payment of the unpaid taxes. It was only when the innocent purchaser sought to quiet title that the Mattleys collaterally attacked the IRS sale, after sitting on their ability to potentially void the sale for years and years. Obviously, judicial approval of such tactics would place the certainty of real estate titles in real jeopardy. In other words, if the taxpayer who has at the very least received actual notice of the seizure and sale has a claim upon which to void the sale, we will require that such claim be asserted in a reasonably timely fashion. This the Mattleys did not do.

[10] Thus, while we agree that the IRS should comply with the notice statutes when it seizes and sells a citizen's property, we hold that a failure to provide statutory notice makes the sale only voidable. And, whether such sale is to be voided requires

an examination of the equities of the situation because an action to quiet title is fundamentally an equitable action. Here, the Mattleys had actual notice of seizure and sale, and we can find no equities in the record which would require that we void the sale to an innocent purchaser. Thus, we affirm the district court's decision quieting title to the property in question in Melling.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JEROME M. CLARK, APPELLANT.
637 N.W.2d 671

Filed January 8, 2002. No. A-01-049.

1. **Insanity: Proof.** Any person may plead that he or she is not responsible by reason of insanity at the time of the offense, and in such case, the burden shall be upon the defendant to prove the defense by a preponderance of the evidence.
2. ____: _____. The two elements of the defense of insanity are (1) that the defendant had a mental disease and (2) that the defendant did not understand the nature and consequences of his or her actions or did not know the difference between right and wrong with respect to what he or she was doing.
3. **Criminal Law: Weapons.** Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony.
4. **Criminal Law: Weapons: Words and Phrases.** A firearm is any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or frame or receiver of any such weapon.
5. **Criminal Law: Weapons.** It is irrelevant whether or not a gun is operable to convict a person of using a deadly weapon during the commission of a felony.

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

Thomas C. Riley, Douglas County Public Defender, and Brenda J. Leuck for appellant.

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

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Jerome M. Clark appeals from his convictions for attempted kidnapping, kidnapping, first degree sexual assault, and use of a deadly weapon to commit a felony. Clark argues that the trial court erred in not finding that he was legally insane at the time the crimes were committed. Clark also argues that the crime of use of a deadly weapon was not proved because the handgun involved was inoperable. For the reasons stated below, we affirm the decision of the district court regarding the insanity issue. We also affirm the district court's decision regarding the use of a deadly weapon conviction, because we conclude that the operability of a handgun is not relevant to whether it is a deadly weapon as defined by Neb. Rev. Stat. § 28-1201 (Reissue 1995).

II. BACKGROUND

On March 13, 1998, Clark approached A.F. in Omaha, Douglas County, Nebraska, while she was delivering mail on her route. Clark pointed a handgun at her and asked her to get into his car. When A.F. refused to get into the car, Clark began to get out of his car, still pointing the gun at her. A.F. then pulled out her Mace, forcing Clark back into his car. A.F. ran to a house along her route, where the resident let her in.

Later that same day, in Omaha, Clark approached S.S. At gunpoint, Clark ordered S.S., who was 13 years old, to get into his car. S.S. got in the vehicle, and Clark drove her to another area of Omaha. Clark told S.S. that she was going to do a "favor" for him and perform oral sex. S.S. tried to talk her way out of doing this, but was continuously threatened with a handgun. Eventually, S.S. did perform oral sex on Clark. Next, Clark told S.S. he was letting her go because she did not know what a "sister" was. From the record, it is unclear what was meant by this statement. After exiting the vehicle, S.S. walked home. At about 7 p.m., S.S. told her aunt what had happened, and then S.S. contacted the police. Later that evening, S.S. gave the police a statement about the incident that had occurred several hours earlier.

The police received an anonymous tip that led them to Clark. He was subsequently arrested. Pursuant to a search warrant, the

police searched Clark's residence and found a semiautomatic handgun under a chair cushion. Both A.F. and S.S. identified Clark as the person who approached them, and they also identified the gun as the one he used. During the initial interview at the police station, Clark cooperated. When asked why he committed these crimes, he stated that "he just didn't know."

On April 7, 1998, Clark was charged by information with the following four counts: count I, attempted kidnapping in violation of Neb. Rev. Stat. §§ 28-201 and 28-313(1) (Reissue 1995); count II, kidnapping in violation of § 28-313(1); count III, first degree sexual assault in violation of Neb. Rev. Stat. § 28-319 (Reissue 1995); and count IV, use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1995).

On June 2, 2000, the court held a competency hearing and found Clark competent to stand trial. A bench trial was held on August 10. At trial, the State entered the police reports and affidavits of A.F. and S.S. to prove Clark committed these crimes. Dr. Bruce Gutnik then testified for the defense that on July 13, 1998, he evaluated Clark to determine whether Clark was insane at the time the crimes were committed. Following his evaluation, Dr. Gutnik concluded Clark suffered from schizoaffective disorder. Dr. Gutnik also found Clark was unable to understand, at the time the crimes were committed, the nature and consequences of his actions or the difference between right and wrong.

In rebuttal, the State called Drs. Scott A. Bresler and Scott Moore to establish that Clark was legally sane at the time the crimes were committed. Dr. Moore testified that Clark was admitted to the Lincoln Regional Center in December 1998. The record indicates all three doctors found Clark suffered from a mental illness, but Drs. Bresler and Moore testified this mental illness did not impair Clark's ability to understand the nature and consequences of his actions or his ability to know right from wrong. Drs. Bresler and Moore found Clark legally sane at the time the crimes were committed.

After taking the case under advisement, the court filed an order on September 7, 2000, finding Clark guilty of counts I, II, III, and IV. In the order, the court found that Clark was not legally insane at the time the crimes were committed. On

December 13, the court sentenced Clark to 5 to 10 years' imprisonment for attempted kidnapping, 15 to 20 years' imprisonment for kidnapping, 15 to 20 years' imprisonment for first degree sexual assault, and 5 to 10 years' imprisonment for use of a deadly weapon to commit a felony. Counts II and III were ordered to be served concurrently with each other. Count I was ordered to be served consecutively to counts II and III. Count IV was ordered to be served consecutively to counts I, II, and III. We note that Clark states in his brief that counts I, II, and III were to be served concurrently with each other. Clark also states count IV is to be served consecutively to the first three counts. However, this is not an assigned error, and it is clear on the record that these three counts were not ordered to be served concurrently. We also note that in addition to being sentenced on these four counts, Clark was also sentenced on another assault conviction which is not an issue in this appeal. Clark's timely appeal is now before us.

III. ASSIGNMENTS OF ERROR

On appeal, Clark has assigned two errors. Clark argues that the court should have found him to be legally insane at the time these crimes were committed. Clark also alleges there was insufficient evidence to find he used a deadly weapon during the commission of a felony.

IV. ANALYSIS

1. STANDARD OF REVIEW

Since Clark's two assigned errors include sufficiency issues, the following standard of review applies to both. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001); *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). Regardless of whether evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as failure to direct a verdict, insufficiency of evidence, or failure to prove

a prima facie case, the standard of review is the same. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the 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. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

2. INSANITY DEFENSE

[1] Clark first argues that the district court erred in not finding him legally insane at the time the crimes were committed. We note that Clark had the burden under Neb. Rev. Stat. § 29-2203 (Reissue 1995) to prove he was legally insane. Section 29-2203 states in pertinent part: "Any person . . . may plead that he or she is not responsible by reason of insanity at the time of the offense and in such case the burden shall be upon the defendant to prove the defense . . . by a preponderance of the evidence."

[2] The two elements of the defense of insanity are (1) that the defendant had a mental disease and (2) that the defendant did not understand the nature and consequences of his or her actions or did not know the difference between right and wrong with respect to what he or she was doing. *State v. Hurst*, 8 Neb. App. 280, 594 N.W.2d 303 (1999).

Since there is no dispute that all three expert witnesses found Clark had a mental disease, we begin by addressing the second prong of the insanity defense. At trial, Clark adduced testimony from Dr. Gutnik that at the time the crimes were committed, Clark did not understand the nature and consequences of his actions or know the difference between right and wrong. The State adduced testimony from Drs. Bresler and Moore that Clark did understand the nature and consequences of his actions and did understand the difference between right and wrong.

Dr. Bresler explained during his testimony how a person could suffer from a mental illness and still understand the nature and consequences of his actions and know right from wrong. In this case, Dr. Bresler testified he found Clark had hallucinations as a result of his mental illness. But Dr. Bresler

found these hallucinations had no connection to his actions on March 13, 1998. From the record, it appears Clark thought he was "Godlike," the "son of Jesus," or "Elijah" during his hallucinations. Dr. Bresler stated at trial that he could find no connection between Clark's thinking these things and "the abduction and forcible fellatio of a 12-year-old girl."

At Clark's trial, the court heard all of the evidence and took into consideration the testimony of all three expert witnesses. In the court's order, the judge explicitly stated that he found Clark "legally sane," while noting the disagreement between the doctor testifying for Clark and the doctors testifying for the State. This decision was based on the testimony that Clark knew the difference between right and wrong and understood the consequences of his actions.

Even though there is conflicting evidence in this case, we do not resolve that conflict or reweigh the credibility of the witnesses. Thus, viewing the evidence in the light most favorable to the State, Drs. Bresler's and Moore's testimonies are sufficient to establish Clark was not legally insane at the time the crimes were committed. The court did not err in finding Clark failed to meet his burden of proof as required by § 29-2203. As such, this assigned error is without merit.

3. USE OF DEADLY WEAPON TO COMMIT FELONY

Clark also challenges the sufficiency of the evidence to support his conviction for use of a deadly weapon during the commission of a felony in violation of § 28-1205. More specifically, Clark asserts that because the gun was not proved to be operable, he cannot be convicted of use of a deadly weapon to commit a felony.

[3,4] There are two statutory sections which must be examined to determine if there is merit to Clark's assigned error. The first is § 28-1205, which states in pertinent part:

(1) Any person who uses a *firearm*, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a *firearm*, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of

this state commits the offense of using a deadly weapon to commit a felony.

(Emphasis supplied.) The second pertinent section is § 28-1201, which defines a firearm as “any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or frame or receiver of any such weapon.”

In this case, Clark does not dispute that he used a semiautomatic handgun during the commission of these crimes. Clark did not argue at trial nor does he argue on appeal that the gun he used to commit these crimes does not fall under the definition set forth in § 28-1201, that is, that the handgun used was a “weapon which is designed to or may readily be converted to expel any projectile.” What Clark did argue at trial, and now argues on appeal, is that the statute requires the gun to be operable for him to be guilty of the crime of using a firearm during the commission of a felony.

At trial, a crime laboratory report from the Omaha Police Department was admitted as an exhibit at trial. This report described the gun found in Clark’s residence as a “.32 ACP caliber semiautomatic pistol S/N 169775 [with a] matching magazine.” In that same report, the police concluded the gun was non-operational at the time of testing. However, there is no evidence that this gun was not a “weapon which is designed to or may readily be converted to expel any projectile,” i.e., the statutory language defining what is a firearm.

Other jurisdictions have dealt with this same issue regarding whether it is sufficient for a firearm to be designed to be operational at some point, whether that be in the past or the future. The North Carolina Supreme Court found that operability was not an essential element to prove a felon was in possession of a firearm. *State v. Jackson*, 353 N.C. 495, 546 S.E.2d 570 (2001). Like the Nebraska statute, the statute in North Carolina did not specifically address whether the weapon had to be operational for it to be considered a firearm. Additionally, the defendant in *Jackson* argued that if a firearm was inoperable at the time of possession, then it was not a firearm under the statutory definition. The court did not agree with this “illogical conclusion” and found that it

“‘beg[ged] reason to assume that our Legislature intended to allow convicted felons to possess firearms so long as they

are unloaded, or so long as they are temporarily in disrepair, or so long as they are temporarily disassembled, or so long as for any other reason they are not immediately operable.’” *Id.* at 502, 546 S.E.2d at 574, quoting *State v. Padilla*, 95 Wash. App. 531, 978 P.2d 1113 (1999).

The Court of Appeals of Virginia also found inoperability irrelevant. *Armstrong v. Commonwealth*, 36 Va. App. 312, 549 S.E.2d 641 (2001). The defendant in *Armstrong* conceded on appeal that the rifle was “‘designed or intended to expel a projectile by discharge or explosion of gun powder.’” *Id.* at 315, 549 S.E.2d at 642. The defendant also argued that the evidence established the gun was inoperable at the time the crime was committed and that therefore, the evidence was insufficient to sustain his conviction for felon in possession of a firearm. There was no language included in the Virginia statute distinguishing between operable and inoperable as part of the definition of firearm. The court found: “Had the legislature wished to draw a distinction between operable and inoperable firearms, it would have done so with clear and distinct language.” *Id.* at 321, 549 S.E.2d at 645. The court further stated that since the legislature made no such distinction, there was sufficient evidence to find the defendant guilty, even if the weapon was inoperable.

Other jurisdictions have statutes which clearly state that a “firearm” under the statute can be operable or inoperable, loaded or unloaded. See, *Fortt v. State*, 767 A.2d 799 (Del. Super. 2001); *State v. Webster*, 94 Hawaii 241, 11 P.3d 466 (2000); *Hughes v. State*, 12 P.3d 948 (Nev. 2000); *State v. Middleton*, 143 N.J. Super. 18, 362 A.2d 602 (1976). The federal circuit courts have found that the inoperability of a firearm is not an affirmative defense. See *U.S. v. Adams*, 137 F.3d 1298 (11th Cir. 1998).

[5] Based on the above-persuasive authority and our independent analysis of this statute, we conclude that the Nebraska statute defining a firearm fits in the category of cases where the Legislature would have included operability if that is what was intended. We agree with the rationale of the Virginia and North Carolina courts that it would be irrational to allow a person committing a felony to use a nonoperational gun, but which was in fact designed to expel a projectile. It is irrelevant whether or not

a gun is operable to convict a person of using a deadly weapon during the commission of a felony. The evidence in this case shows that Clark used a weapon "designed" to expel a projectile. The police report stated the weapon found was a ".32 ACP caliber semiautomatic pistol S/N 169775 [with a] matching magazine." The language in § 28-1201 encompasses a weapon which is designed to or may readily be converted to expel any projectile which this gun was. We find this assignment is without merit.

V. CONCLUSION

We affirm the district court's judgment finding that Clark failed to prove he was legally insane at the time the crimes were committed. We also affirm the district court's judgment that Clark used a deadly weapon during the commission of a felony. This is so because the operability of a handgun is not relevant to whether it is a deadly weapon as defined by § 28-1201.

AFFIRMED.

RAYMOND BOREN, APPELLEE, v. THE BURLINGTON NORTHERN
& SANTA FE RAILWAY COMPANY, FORMERLY KNOWN AS
BURLINGTON NORTHERN RAILROAD COMPANY,
A DELAWARE CORPORATION, APPELLANT.

637 N.W.2d 910

Filed January 15, 2002. No. A-00-894.

1. **Federal Acts: Railroads: Damages: Negligence.** The Federal Employers' Liability Act preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity.
2. **Federal Acts: Courts: Jurisdiction.** Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act.
3. **Federal Acts: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act.
4. **Jurisdiction.** Procedural matters are dictated by the law of the forum.
5. **Federal Acts: Railroads: Negligence: Proximate Cause: Proof.** The traditional concept of proximate cause is abrogated in Federal Employers' Liability Act cases by

the fact that the plaintiff's proof is sufficient to state a claim if it shows that the carrier's negligence, however slight, played some part in causing the injury.

6. **Evidence.** Generally, the admissibility of evidence is a procedural matter governed by the law of the forum.
7. **Expert Witnesses: Appeal and Error.** A lower court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there is an abuse of discretion.
8. **Rules of Evidence: Expert Witnesses.** Although the Nebraska Supreme Court adopted the test for the admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and abandoned the test in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the court specifically noted that the new rule would apply only for trials commencing on or after October 1, 2001.
9. **Trial: Rules of Evidence: Expert Witnesses.** In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.
10. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
11. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
12. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
13. **Damages: Evidence: Proof.** Damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury.
14. **Damages: Proof.** Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage.
15. **Damages.** There is no fixed rule for determining the amount of compensation for damages for impairment of future earning capacity, except as may be fair and reasonable under the circumstances.
16. **Damages: Juries.** Recovery for a loss or diminution of the power to earn in the future may be based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. It is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his or her past earnings.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., and, on brief, Cheryl R. Zwart for appellant.

Richard J. Dinsmore for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

The Burlington Northern & Santa Fe Railway Company (Burlington) appeals from a jury verdict in favor of Raymond Boren in his Federal Employers' Liability Act (FELA) action for exposure to toxic chemicals over a period of 30 years while working for Burlington. On appeal, Burlington challenges, *inter alia*, the trial court's denial of two motions for summary judgment, the trial court's allowance of various expert testimony, the jury instructions given by the trial court, and the trial court's denial of motions for directed verdict and judgment notwithstanding the verdict. For the reasons discussed at length herein, we find no merit to Burlington's assertions on appeal and affirm.

II. BACKGROUND

This case presents, in the context of FELA, what is commonly referred to as a "toxic tort" case. As such, the case is replete with complex medical terminology and railroad terminology, and the record consists of nearly 2,000 pages of testimony, exclusive of exhibits. As much as practicable, we will set forth the relevant background here in as basic terms as possible.

Boren was born in December 1940. Boren began working for the railroad in 1964. Boren initially worked for Burlington Refrigerated Express in Pacific Junction, Iowa, as a laborer, cleaning out railcars and "picking up various things." Boren then became an "apprentice carman," working "in the shadow" of another carman. Boren became a carman in approximately 1971. In that role, Boren was responsible for making sure that "everything was working right" on the railcars, including the mechanics of the refrigeration unit.

In fall 1977, Burlington Refrigerated Express discontinued the refrigeration line in this part of the country, and Boren went to work for Burlington. Boren began with Burlington working at Gibson Yard (Gibson) in Omaha, Nebraska. Gibson was a receiving and departing yard, which included an area for repairing railcars. While working as a carman at Gibson, Boren would straighten handholds and doorsills, make sure all doors on the railcars would close tightly, change brake shoes and wheels, and "repack journals." The record indicates that journals are part of the wheel on railcars and include bearings and weights that are removed and then cleaned with a cleaning solvent and oiled.

Boren testified that each railcar had eight journals and that two or three times per week he worked on cleaning and repacking journals. During these times, Boren would use a 5-gallon bucket of solvent for 2 to 4 hours per railcar. The 5-gallon bucket of solvent would be filled from a larger 55-gallon drum. According to Boren, he was never provided with any protective breathing apparatus, specialty gloves, or education and direction concerning the use of this solvent. Boren testified that using the solvent would cause his hands to get "real chapped and red" and that they would sometimes "split and break open on the ends."

In 1982, Boren transferred from Gibson to the Havelock Shop (Havelock) in Lincoln, Nebraska. While working at Havelock, Boren began transitioning toward doing inspection work. Boren began doing some inspection work, in addition to his regular duties as a carman, in fall 1984. In 1986, Boren began doing inspection work on a full-time basis. In 1990, his full-time inspection job was abolished, and he again did carman duties and some occasional inspection work. He continued doing occasional inspection work at the scales at Havelock until 1992.

In doing inspection work, Boren was required to inspect railcars coming out of the paintshop for defects. Boren checked the couplers that connected the railcars, checked the sides of the railcars, stenciled the load and weight limits on the side of the railcars, checked hatch covers on the railcars, and looked inside the railcars for other defects in the railcar or the paint inside the railcar. Boren inspected railcars that had Marblethane-coated floors and railcars that had been painted on the inside with Polyclutch paint. When inspecting the railcars with Marblethane-coated

floors, Boren would open the door and look inside the railcars. When inspecting the Polyclutch-painted railcars, Boren would be required to climb on the roof of the railcar, open a hatch on the roof, and lower his head inside the railcar to inspect the interior. In addition to the inspection of the railcars, Boren would be required to clean stencils by placing them into a tank full of solvent, soaking them, and then cleaning them off with a rag.

Boren also testified to the use of an aerosol to loosen bolts at both Gibson and Havelock. According to Boren, the aerosol was sprayed onto various bolts to loosen them when they could not be cut off the railcars and had to be removed with a wrench. Boren also testified to using a liquid graphite product when removing couplers from the railcars. Boren testified that the liquid graphite would be stirred and then applied onto the couplers with either a brush, stick, or rag.

In February 1993, Boren was hospitalized. Boren testified that his health had generally been "good" prior to the middle of 1992. At that time, he began suffering fatigue. In February 1993, Boren suffered a severe headache, went to see his doctor, and was hospitalized for problems associated with his liver and esophageal varices. After being hospitalized, Boren was off work from February to September 1993. He then returned to work through the end of 1993. Boren underwent surgery in January 1994 to have a distal splenorenal shunt inserted. Boren again returned to work in June 1994. He took a job with Burlington doing full-time inspection work where he was no longer exposed to chemicals.

On March 29, 1996, Boren filed a second amended petition. In the petition, Boren alleged that during his employment with Burlington, he was exposed to a variety of organic chemicals, including 1,1,1-trichloroethane, petroleum distillates, toluene, and xylene. Boren alleged that Burlington was negligent in failing to provide necessary tools and equipment, failing to warn of the dangers presented by the solvents, failing to provide adequate ventilation, and failing to adequately train employees concerning use of the chemicals. Pursuant to FELA, Boren sought compensation for damages he alleged were sustained as a result of his exposure to the various chemicals. Specifically, Boren alleged that he suffered "cirrhosis of the liver and esophageal varices" as a result of his exposures.

On June 18, 1998, Burlington filed its first motion for summary judgment. Burlington offered Boren's deposition and answers to interrogatories, the affidavits of a retired Burlington employee and a doctor, and the deposition of another doctor. In response, Boren offered excerpts from Boren's deposition, Material Safety Data Sheet(s) (MSDS) concerning various chemicals Boren alleged exposure to, medical journals concerning liver damage associated with exposure to the various chemicals, an affidavit from Boren's treating physician, and an article from the National Institute of Occupational Safety and Health (NIOSH). On February 25, 1999, the court denied Burlington's first motion for summary judgment. The court received all the exhibits offered by Burlington and Boren and ruled that there were genuine issues of material fact relative to Burlington's alleged negligence.

On February 18, 2000, Burlington filed its second motion for summary judgment. On February 25, Burlington filed a motion in limine seeking to prevent Boren from presenting evidence concerning various chemicals and MSDS. Another motion in limine, which appears to be substantially identical to the February 25 motion, was filed by Burlington on March 22. Burlington's second motion for summary judgment and motion in limine were both heard by the court at the same time. In support of the motions, Burlington offered depositions of various doctors, documents concerning predecessor entities of the Burlington company, responses to interrogatories, NIOSH documents, medical treatises, and the deposition of an industrial hygiene expert, and Burlington reoffered the evidence presented at the hearing on the first motion for summary judgment. In response, Boren offered the curriculum vitae of various doctors, offered an affidavit indicating what various doctors would be testifying to, and reoffered the evidence presented at the hearing on the first motion for summary judgment. On March 28, the court entered an order denying both motions.

The case came on for trial before a jury on April 3 through 12, 2000. The trial record consists of more than 1,100 pages of testimony, in addition to two videotape depositions which amount to more than 300 additional pages of transcribed testimony. In addition, there are more than 150 exhibits composing 7 additional volumes of record.

During the 8 days of trial, the jury heard testimony concerning Boren's employment history as set forth above. Additionally, the jury heard testimony concerning specific chemicals and specific solvents used by Boren during the course of his employment and heard testimony concerning whether those chemicals caused Boren's liver disease.

Boren testified that when cleaning journals at Gibson, the solvent used was called "Stay-Kleen (sic) or something like that." According to Burlington's counsel, stay-kleen and Safety-Kleen were presumed to be the same thing. Another employee testified that mineral spirits was used in cleaning journals. Boren testified that the aerosol product used to loosen bolts said "something about 666 on it." Other evidence at trial indicates this product was 6-66 (aerosol). Boren testified that he inspected railcars that had their floors treated with Marblethane and other railcars that had been painted with Polyclutch. Boren testified that he used Polyclutch thinner to clean stencils. Boren testified that he also used a liquid graphite product to loosen couplers. This liquid graphite was apparently called Part-Ease.

Boren presented the evidence of Dr. Michael Ellenbecker, an industrial hygiene expert, who testified that petroleum distillates are a group of organic solvents that go by a variety of names, including Stoddard solvents, naphtha, mineral spirits, and Safety-Kleen. He further testified that the Marblethane Boren was exposed to contain a chemical called xylene and that 6-66 (aerosol) contains 1,1,1-trichloroethane.

MSDS received at trial indicate that Safety-Kleen is synonymous with petroleum distillates, mineral spirits, and Stoddard solvent and contains, among other chemicals, toluene, xylene, and 1,1,1-trichloroethane. MSDS received at trial indicate that lacquer thinner and Polyclutch solvent contain, among other chemicals, toluene and xylene. MSDS received at trial indicate that 6-66 (aerosol) contains, among other chemicals, petroleum distillate and 1,1,1-trichloroethane. MSDS received at trial indicate that Marblethane contains, among other chemicals, toluene and xylene. MSDS received at trial indicate that Part-Ease liquid graphite contains, among other chemicals, 1,1,1-trichloroethane. MSDS received at trial indicate that Polyclutch contains, among other chemicals, toluene and xylene.

During the trial, the jury heard medical evidence that toluene, xylene, 1,1,1-trichloroethane, petroleum distillates, and mineral spirits are a class of materials that "are well known for their ability and propensity to cause liver damage." The jury heard evidence that in Boren's case, other causes of his liver disease, including alcohol consumption or hepatitis, had been ruled out. The jury heard medical testimony that Boren had been exposed to a variety of organic solvents and chemicals known to produce liver disease in an amount such that liver disease resulted from the exposure over a number of years while working for Burlington. Burlington presented various evidence generally contradicting the evidence presented by Boren on causation.

The jury also heard testimony concerning Boren's medical problems after 1993. Boren presented testimony concerning changes in his lifestyle, including changes in the hobbies he pursued both before and after his medical problems began. Additionally, Boren testified concerning his ability to assist his wife in caring for their son, who suffers severe medical problems.

At the conclusion of Boren's case, Burlington moved for a directed verdict. Burlington asserted that Boren had failed to adduce sufficient evidence of negligence on Burlington's part and failed to adduce sufficient evidence that his liver disease was caused by the exposure to chemicals while employed by Burlington. Burlington's motion was overruled.

The jury ultimately returned a verdict in favor of Boren. The jury awarded Boren a judgment of \$500,000. Burlington subsequently moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. The court denied these motions. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

Burlington has assigned 10 errors on appeal, which we consolidate for discussion to 7. Burlington asserts (1) that the trial court erred in admitting expert testimony offered by Boren at various stages of the proceedings, (2) that the trial court erred in receiving MSDS offered by Boren at various stages of the proceedings, (3) that the trial court erred in denying two motions for summary judgment filed by Burlington prior to the trial, (4) that the trial court erred in overruling a motion in limine concerning

testimony about certain chemicals, (5) that the trial court erred in allowing a portion of a medical treatise to be read into evidence during the trial, (6) that the trial court erred in giving jury instructions objected to by Burlington, and (7) that the trial court erred in overruling various posttrial motions filed by Burlington.

IV. ANALYSIS

1. STANDARD OF REVIEW

[1-5] FELA preempts state law and statutorily supplies uniform law controlling a railroad employee's claim for damages caused by negligence of the employer railroad while the employee is engaged in the railroad's interstate commerce activity. *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997). Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by FELA. *Crafton v. Union Pacific RR. Co.*, 7 Neb. App. 793, 585 N.W.2d 115 (1998). See 45 U.S.C. § 56 (1994). In disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act. *Crafton v. Union Pacific RR. Co.*, *supra*. Procedural matters are dictated by the law of the forum. *Id.* The traditional concept of proximate cause is abrogated in FELA cases by the fact that the plaintiff's proof is sufficient to state a claim if it shows that the carrier's negligence, however slight, played some part in causing the injury. *Naidoo v. Union Pacific Railroad*, 224 Neb. 853, 402 N.W.2d 653 (1987).

2. EXPERT TESTIMONY

Burlington first challenges the trial court's decision to admit expert testimony offered by Boren. Specifically, Burlington asserts that the expert testimony offered by Boren failed to meet the general standards of admissibility for expert testimony in Nebraska. Burlington asserts that Boren presented no admissible evidence concerning medical causation of his liver cirrhosis.

(a) Admissibility in General

[6,7] Generally, the admissibility of evidence is a procedural matter governed by the law of the forum. *Crafton v. Union Pacific*

RR. Co., supra. In Nebraska, a lower court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there is an abuse of discretion. *Id.*

In the present case, Burlington has argued on appeal that Boren's proffered expert testimony should have been excluded under both the doctrine announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and the general test for admissibility of expert testimony in Nebraska. See *Crafton v. Union Pacific RR. Co., supra*. We find that the methodology employed by Boren's experts was generally accepted in the relevant scientific community and that accordingly, the standard of *Frye v. United States, supra*, was satisfied. We also find that the proffered testimony satisfied the general test for admissibility of expert testimony in Nebraska.

(i) *Frye Standard*

Until recently, the Nebraska Supreme Court had mandated that courts of this state use a different standard for determining the admissibility of expert testimony from that used by the federal courts. See *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). In the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the U.S. Supreme Court redefined the standard for admission of expert testimony in federal courts to provide that pursuant to Fed. R. Evid. 702, expert testimony may be admitted if scientific or specialized knowledge will assist the trier of fact and if the witness is properly qualified as an expert. In that case, the Supreme Court annunciated numerous factors to be considered in determining the reliability of an expert's proffered opinion to assess whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact. The Court noted that the inquiry should be a flexible one designed to assess the scientific validity and reliability of the principles underlying a proposed opinion.

[8] Prior to the Nebraska Supreme Court's opinion in *Schafersman v. Agland Coop, supra*, the Nebraska Supreme Court had adhered to a different standard for the admissibility of expert testimony and reaffirmed the standard set forth in *Frye v. United States, supra*. As such, prior to the court's opinion in

Schafersman v. Agland Coop, supra, expert testimony in Nebraska concerning a novel form of expertise was admissible if the principle, technique, or process upon which the opinion was based was generally accepted in the relevant scientific community. Although the Nebraska Supreme Court adopted the *Daubert* test and abandoned the *Frye* test in *Schafersman*, the court specifically noted that the new rule would apply only for trials commencing on or after October 1, 2001. As such, the initial inquiry in this case is whether the proffered expert testimony satisfies the test of *Frye*.

Under the *Frye* test, the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. *Schafersman v. Agland Coop, supra*. Stated otherwise, the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications or by presenting testimony from scientists as to the attitudes of their fellow scientists. *Id.*

In the present case, Burlington specifically challenges the medical causation opinions given by Drs. Jeremiah Donovan, Richard Clapp, and Arthur Frank. Boren's medical experts based their opinions on what is known as differential diagnosis. Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (4th Cir. 1999). According to federal courts, this technique has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results. *Id.* The admission of an expert opinion on causation based on differential diagnosis has been upheld by the federal courts. *Id.*

Drs. Donovan and Frank both testified that other potential causes of Boren's cirrhosis had been ruled out in the present case. Both testified, in addition, that a long history of medical journals and peer-reviewed articles indicated that exposure to the various chemicals involved in this case can cause cirrhosis.

Both opined that based on this differential diagnosis, Boren's cirrhosis was caused by his long-term exposure to the variety of chemicals at issue.

Dr. Clapp testified that he had reviewed the various MSDS concerning the chemicals at issue, as well as information from NIOSH and peer-reviewed medical journals. Dr. Clapp testified that MSDS are generally accepted to be accurate. Based on those resources, Dr. Clapp testified that Boren was exposed to a substantial amount of solvents consistent with literature indicating that the same solvents cause cirrhosis. He testified that this causal relationship is shown in medical articles as early as 1982, and perhaps as far back as the 1960's.

In *Schafersman v. Agland Coop.*, 262 Neb. 215, 631 N.W.2d 862 (2001), the Nebraska Supreme Court noted that the *Frye* test is to be employed when a court is faced with an offer of a novel form of expertise which has not yet received judicial sanction. In such a case, the court must conduct an initial inquiry to determine whether the new technique or principle is sufficiently reliable to aid the jury in reaching accurate results. *Id.* A review of the record in the present case, as set forth above, reveals that the expert testimony being offered by Boren's medical causation witnesses was not an offer of a novel form of expertise. There is no indication anywhere in the record that the methodology utilized by Boren's experts was novel. Indeed, federal cases have expressly adopted the methodology of differential diagnosis. As such, we conclude that the *Frye* standard was satisfied with regard to the proffered testimony of Drs. Donovan, Clapp, and Frank.

(ii) *General Test for Admissibility*

[9] In Nebraska, in determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its

probative value is substantially outweighed by the danger of unfair prejudice or other considerations. *Crafton v. Union Pacific RR. Co.*, 7 Neb. App. 793, 585 N.W.2d 115 (1998). We conclude that the trial court did not abuse its discretion in concluding that this general test was satisfied.

Burlington asserts on appeal that the medical causation experts lacked a proper factual basis for their opinions because they did not have information on the specific chemicals Boren was exposed to and did not have information on the specific dose, length, or level of exposures. The bulk of Burlington's brief on appeal is devoted to arguing that Boren failed to adduce any specific evidence concerning the specific doses of the various chemicals to which he was exposed and that absent such proof, the experts' opinions should have been ruled inadmissible. We conclude that there was sufficient evidence of both the specific chemicals to which Boren was exposed and the level of exposure.

As noted in the factual background, Boren himself testified that he used products such as Safety-Kleen, 6-66 (aerosol), Marblethane, Polyclutch, Polyclutch thinner, and Part-Ease liquid graphite. Other employees of Burlington testified similarly concerning the products that were used and the methods of use in carrying out the employment responsibilities at Burlington. There was evidence presented to indicate that these products contained various chemicals such as mineral spirits, toluene, xylene, and 1,1,1-trichloroethane. Burlington adduced testimony via cross-examination that the MSDS which showed the chemical compositions of the various products could have been slightly different during the times of Boren's exposures. However, Boren presented evidence indicating that the specific chemical makeup of the various products would vary only slightly from one time period to another. Additionally, Boren presented testimony from Dr. Frank that no specific chemical could be pinpointed as a cause, but, rather, that the mixture of these chemicals over a period of years is what caused Boren's problems. As such, we conclude that the trial court did not abuse its discretion in concluding that there was sufficient evidence of the specific chemicals to which Boren was exposed.

There is no dispute that Boren was unable to present any specific information concerning the dose or level of any of the

chemicals to which he was exposed. Burlington asserts that such evidence was necessary before the proffered expert opinions could be deemed admissible. As noted, this argument comprises the bulk of Burlington's brief on appeal. However, we conclude that Boren did not need any more specific evidence than was presented on this issue.

Boren presented general testimony concerning how often he would use the various chemicals and for how long he would use them on various occasions. Other employees of Burlington that testified also testified concerning how long various tasks would take, during which time an employee would be exposed to the chemicals. However, Boren had no specific evidence concerning exact dosage levels.

Dr. Frank testified that in his experience as a specialist in occupational medicine, information on specific dosage levels is generally unavailable. He testified that there is generally no way for an employee to measure such levels or doses of exposure and that the only way such information would be available would be if the employer were to make measurements and keep records. Dr. Frank testified, however, that such specific information is not necessary to form an opinion on causation. Dr. Frank testified that such specific information is not necessary when conducting a differential diagnosis because there was evidence that Boren was exposed to the variety of chemicals over a period of years, that there was evidence that such exposure could cause the medical problems experienced by Boren, and that there was evidence to rule out other possible causes of Boren's medical problems. In addition, Dr. Frank testified that the fact that Boren had acute reactions to the chemicals on a number of occasions, including skin reactions, breathing problems, and headaches, was indicative of the level of exposure being adequate to form an opinion on causation.

Although Burlington cites this court to a number of federal cases that have held, on their particular facts and records, that expert opinions were inadequate without specific evidence of levels or doses of exposure, we find them unpersuasive in the instant case. See, *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999); *Mitchell v. Gencorp, Inc.*, 165 F.3d 778 (10th Cir. 1999) (concerning need for quantifiable evidence of levels

of exposure); *Savage v. Union Pacific R. Co.*, 67 F. Supp. 2d 1021 (E.D. Ark. 1999). In the present case, there was specific evidence presented that an opinion of causation is not dependent on having evidence of specific levels of exposure. Boren did not need to produce a mathematically precise table equating levels of exposure with levels of harm in order to show that he was exposed to a toxic level of the various chemicals. See *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924 (8th Cir. 2001). Rather, he needed only to present evidence from which a reasonable person could conclude that his exposure probably caused his injuries. See *id.*

On the specific facts of the present case, Boren established that over a period of 30 years, he was exposed to a variety of chemicals. He established in general terms the length of time he would spend using the various chemicals. He testified regarding acute reactions to the symptoms. He presented evidence of other workers to confirm the acute reactions experienced by other workers. He presented evidence that ruled out other causes of his medical condition. He presented evidence that various medical literature has long suggested a causal link between the chemicals he was exposed to and the medical condition he experienced. He also presented evidence that all of these factors are sufficient to form the basis of an opinion on causation. On these specific facts, we do not find that the trial court abused its discretion in concluding that Boren presented adequate evidence of levels of exposure.

As noted, Burlington's brief on appeal is concerned primarily with arguing that Boren needed to present more evidence of the specific chemicals and the specific dose or levels to which he was exposed. Burlington does not argue in what other fashion the experts' testimony fails the general test of admissibility for expert testimony set forth above. We find no merit to either of Burlington's grounds for arguing the opinions were inadmissible.

(b) Summary Judgment

[10] Burlington assigns as error that the court should not have received Dr. Donovan's affidavit at the first summary judgment hearing. Burlington also assigns as error that there was no admissible evidence to prove medical causation at the second summary judgment hearing. To the extent these assigned errors

assert that the medical testimony was inadmissible, they are not argued except as set forth above. For the reasons previously discussed, these assigned errors are without merit. To the extent Burlington assigns that the opinions were inadmissible at the summary judgment hearing on any other grounds, Burlington has failed to adequately argue the issue. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000); *Richardson v. Anderson*, 8 Neb. App. 923, 604 N.W.2d 427 (2000). As such, we will not further discuss this assignment of error.

(c) Motion in Limine

Burlington assigns as error that the court erred in denying Burlington's motion in limine to preclude the testimony of Boren's experts. Burlington does not argue this assigned error, except to the extent Burlington has argued that the various medical opinions were generally inadmissible as discussed above. For the reasons stated above, this assigned error is without merit. To the extent Burlington assigns the motion should have been sustained or that the opinions were inadmissible on grounds other than those discussed above, Burlington has failed to adequately argue the issue, and we will not further address it. See *id.*

(d) Trial

Burlington also asserts that the trial court erred in allowing the various experts to testify at trial. As discussed above, we conclude that the trial court did not abuse its discretion in ruling that the expert opinions were admissible. This assigned error is without merit.

3. MSDS

Burlington next asserts that the trial court erred in receiving MSDS into evidence. Burlington assigns the admission of these documents at both the first summary judgment hearing and at trial. We find the court did not abuse its discretion in receiving the documents.

(a) Admissibility in General

On appeal, Burlington asserts that the specific contents of various chemicals Boren claims to have been exposed to were uncertain because the evidence at trial indicated that the MSDS for 6-66 (aerosol) and Safety-Kleen that were received at trial were dated after Boren allegedly used the products. Because MSDS were not available from the specific dates during which Boren was using the products, Burlington asserts that the specific chemical makeup of the products during the time of Boren's alleged exposure is unknown. The last product for which an MSDS was received that Burlington discusses in its brief on appeal is Part-Ease liquid graphite, which Burlington asserts "no one testified to using." Brief for appellant at 38. The sum total of Burlington's argument in the brief on appeal concerning the admissibility of all these MSDS is as follows: "These MSDS were irrelevant and [Burlington's] initial objections to receipt and motions to strike these MSDS, and the others for which no relevancy was shown, constitutes prejudicial error." *Id.*

The various MSDS were initially received over objections on foundation, relevance, and hearsay. The MSDS were demonstrated to have been business records routinely kept in the course of Burlington's business, and it was demonstrated that the documents were retrieved from Burlington's premises through the discovery process. As noted, the only objection that Burlington has raised on appeal concerns the relevancy of the MSDS for 6-66 (aerosol), Safety-Kleen, and Part-Ease liquid graphite.

Boren testified that when working at both Gibson and Havelock, he used an aerosol product to loosen bolts. According to Boren, the aerosol was sprayed onto various bolts to loosen them when they could not be cut off railcars and had to be removed with a wrench. Boren testified that the product said "something about 666 on it." The MSDS which was located at Burlington's offices was for an aerosol product called 6-66 (aerosol). The MSDS for 6-66 (aerosol) was dated June 1988 and indicated that the product contained, among other chemicals, petroleum distillate and 1,1,1-trichloroethane. One of Boren's experts, Dr. Ellenbecker, an industrial hygienist, testified that he had seen another MSDS for 6-66 (aerosol) that indicated the product did not contain 1,1,1-trichloroethane. Dr. Ellenbecker testified

that the version which did not contain 1,1,1-trichloroethane had an increased amount of petroleum distillate.

Boren testified that when cleaning journals at Gibson, the solvent used was called "Stay-Kleen or something like that." Burlington's counsel conceded to the court at trial that "Stay-Kleen" and Safety-Kleen were presumed to be the same thing. Other employees testified to using mineral spirits to clean the journals. The MSDS received at trial indicate that mineral spirits, petroleum distillates, Stoddard solvent, and Safety-Kleen are all synonymous terms. The MSDS indicate that Safety-Kleen contains, among other chemicals, toluene, xylene, and 1,1,1-trichloroethane. Dr. Frank testified that these various chemicals are "well known for their ability and propensity to cause liver damage." The MSDS for Safety-Kleen is dated March 1990.

Finally, Boren testified to using a liquid graphite product to loosen couplers that connected the railcars. In cross-examining Dr. Donovan, Burlington's counsel referred specifically to Part-Ease. The MSDS for Part-Ease located at Burlington's offices indicates that it is a "[b]lack liquid aerosol." The colloquy between the attorneys and the court during trial indicates that Part-Ease was the only liquid graphite product for which an MSDS was found at Burlington's offices.

Burlington's primary argument appears to be that these MSDS were not relevant either because they were dated at a time after Boren's alleged exposure or because they indicate a product in an aerosol form instead of a liquid form, as Boren testified he used. 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 or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). In the present case, Dr. Ellenbecker testified that although he had not seen the MSDS from the specific times at which Boren alleged exposure, there would not likely be any significant difference, and that even with slight variations in chemical composition, the various products would still be comparable organic solvents. Burlington's

counsel cross-examined each of Boren's expert witnesses concerning the MSDS and the difference in dates, and the court specifically noted in ruling on Burlington's motion for directed verdict that the court was not going to limit Burlington's counsel's argument on the issue to the jury. On the basis of the entire record presented on appeal, we do not find an abuse of discretion by the trial court in finding the MSDS at issue were relevant.

(b) Summary Judgment

According to Burlington's brief on appeal, the MSDS concerning Part-Ease was not at issue at the hearing on Burlington's first motion for summary judgment. As such, the only assignment of error remaining concerning the MSDS and the first motion for summary judgment is whether the court erred in receiving the MSDS concerning 6-66 (aerosol) and Safety-Kleen. For the reasons stated above, the court did not commit an abuse of discretion in concluding that the MSDS were relevant. This assigned error is, therefore, without merit.

(c) Trial

Burlington also assigns as error that the trial court erred in receiving the MSDS at issue at trial. As noted above, the record before us indicates that the court did not abuse its discretion in concluding that the MSDS were relevant and that the remaining questions concerning their accuracy were matters of fact for the jury to decide. As such, this assignment of error is also without merit.

4. MOTIONS FOR SUMMARY JUDGMENT

Burlington has assigned as error that the trial court erred in overruling both the first and second motions for summary judgment filed by Burlington. The argument in Burlington's brief on appeal regarding these issues is confined to whether the court erred in admitting the expert medical testimony discussed above and whether the court erred in admitting the MSDS discussed above. Inasmuch as we have already concluded that there was no error in the court's rulings receiving such evidence, there is likewise no merit to Burlington's argument that the motions for summary judgment were erroneously denied.

5. MOTION IN LIMINE REGARDING CHEMICALS

Burlington filed a motion in limine on February 25, 2000, and another on March 22, both of which appear to be substantially identical. The court overruled the motion on March 28. On appeal, Burlington has assigned as error the court's ruling "denying [Burlington's] motion in limine to preclude [Boren] from testifying about chemicals that did not provide a basis for any medical opinion."

Our review of Burlington's brief on appeal indicates no argument or indication whatsoever that Boren did, in fact, testify about any chemicals that did not provide a basis for the opinions of the medical experts. We have previously discussed the chemicals that Boren testified about, and all of them were discussed in the course of the medical experts' testimony concerning their opinions. As such, on the record and briefs before us, we find no merit to this assignment of error.

6. MEDICAL TREATISE

Burlington next assigns as error that "[t]he court erred in allowing a portion of a medical treatise to be read into evidence without a showing of reliability." However, a review of Burlington's brief on appeal reveals no argument concerning this issue. As such, without further guidance we are left to try to discern where, in the course of over 1,100 pages of testimony, this alleged error occurred. Alleged errors that are not both assigned and argued in the brief on appeal will not be considered by this court. See, *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000); *Richardson v. Anderson*, 8 Neb. App. 923, 604 N.W.2d 427 (2000). As such, we will not further discuss this alleged error.

7. JURY INSTRUCTIONS

Burlington has assigned as error that the court erred in instructing the jury that a violation of Occupational Safety and Health Administration (OSHA) regulations constitutes negligence per se and in instructing the jury that it could award damages for the loss of earning capacity and loss of household services. We find this assignment of error to be without merit in both respects.

[11,12] 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); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001). In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*; *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 595 N.W.2d 911 (1999).

(a) Negligence Per Se

The negligence per se instruction given by the trial court was jury instruction No. 9. The instruction instructed the jury that evidence had been received with respect to OSHA rules and regulations and that if the jury were to find that Burlington violated any of the OSHA standards and that such violation contributed to Boren's injuries, then the jury was to return a verdict for Boren. The instruction then indicated that the jury was to "go to Instruction No. 23 and verdict form #2 and determine [Boren's] damages." The transcript presented on appeal, however, includes an affidavit of the trial judge indicating that verdict form No. 2 was not filled out by the jury. In addition, the transcript presented on appeal clearly indicates that the jury instead filled out verdict form No. 1.

As noted, Burlington bears the burden on appeal of demonstrating that the given instruction somehow caused prejudice. Inasmuch as the jury did not make a finding in accordance with the complained of instruction, Burlington has failed to meet this burden on appeal. This assigned error is without merit.

(b) Damages

Instruction No. 23 given by the trial court instructed the jury concerning what factors could be considered by the jury in assessing the amount of damages to award. Specifically, the instruction included that the jury could consider the reasonable value of household services which Boren has been unable to perform for himself to date and the present value of household services Boren is reasonably certain to be unable to perform for himself in the future. The instruction also included that the jury

could consider the reasonable value of the loss of earning capacity suffered by Boren.

(i) Household Services

Burlington challenges the portion of the jury instruction No. 23 which instructed the jury that damages could be awarded for the reasonable value of household services which Boren has been or will be unable to perform for himself. Burlington asserts that there was no evidence that Boren cannot perform any household services for himself and that there is no evidence of what the value of any such loss should be.

Boren testified that on a day-to-day basis, his activity level is now "[a]bout half of what [he] used to do." He testified that he cannot "necessarily" do things around the house or do any outside work. He confirmed that he has suffered memory losses. Additionally, both Boren and his wife testified to his inability to perform household services related to the care of their profoundly disabled son. Boren's wife confirmed that Boren "sleeps the majority of the time that he's home."

On the record before us, there was sufficient evidence presented for the court to give the challenged instruction. Both Boren and his wife testified concerning his inability to help out with household chores, specifically caring for their profoundly disabled son. To allow recovery for Boren's inability to perform these household chores is not, as Burlington asserts, allowing an improper award for loss of consortium. Compare *Anderson v. Burlington Northern, Inc.*, 469 F.2d 288 (10th Cir. 1972) (holding that FELA does not permit loss of consortium damages). The instruction did not allow the jury to award damages suffered by Boren's wife or children on account of his injury, but limited the permissible scope of damages to the reasonable value of Boren's loss of ability to perform household chores for himself. This assigned error is without merit.

(ii) Earning Capacity

Burlington further challenges the portion of the jury instruction which instructed the jury that damages could be awarded for any loss of earning capacity suffered by Boren. Burlington argues that the instruction was not warranted because there was

no medical evidence that Boren was disabled or had any restrictions. We do not believe that such evidence is a prerequisite to an instruction on lost earning capacity in Nebraska.

[13-16] Damages for permanent impairment of future earning capacity may not be based on speculation, probabilities, or uncertainty, but must be shown by competent evidence that such damages are reasonably certain as the proximate result of the pleaded injury. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988). Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage. *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 401 N.W.2d 489 (1987). There is no fixed rule for determining the amount of compensation for damages for impairment of future earning capacity, except as may be fair and reasonable under the circumstances. *Uryasz v. Archbishop Bergan Mercy Hosp.*, *supra*. Such recovery for loss may be based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. *Id.*; *Chirnside v. Lincoln Tel. & Tel. Co.*, *supra*. It is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary value of the plaintiff's loss without recourse to his or her past earnings. *Chirnside v. Lincoln Tel. & Tel. Co.*, *supra*.

In the present case, both Boren and his wife testified about his general health and habits since his hospitalization in 1993. Boren testified that after recovering from surgery, he returned to work on a different shift from the one he had previously worked, that he took a different shift to be working away from the chemicals, and that he generally suffers fatigue that he did not suffer prior to his hospitalization. Boren's physician, Dr. Donovan, testified that the scarring of Boren's liver is permanent and that as a result of his medical condition, he will continue to suffer "tremendous fatigue." The jury had specific evidence concerning Boren's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and the railroad industry. From our review of the record, there was ample evidence to sustain the court's decision to instruct the jury on potential loss of earning capacity. This assigned error is without merit.

8. REMAINING MOTIONS

Finally, Burlington has assigned that the trial court erred in denying Burlington's motions for directed verdict and judgment notwithstanding the verdict "for the reason that there was no admissible evidence of defendant's negligence or causation." Additionally, Burlington assigns that the trial court erred in not granting a new trial to correct the various other errors complained of.

Our review of Burlington's brief on appeal reveals that there is no argument concerning any of these issues, except to the extent Burlington's argument asserts that the court erred in receiving expert testimony and the MSDS as discussed above. Inasmuch as we have already concluded that those assignments of error are without merit, we likewise find no merit to this assignment of error.

V. CONCLUSION

In this appeal, Burlington has assigned numerous errors concerning the admissibility of evidence proffered by Boren concerning chemicals he was exposed to while employed at Burlington and the causal connection between those chemicals and his subsequent development of cirrhosis of the liver. For the reasons stated herein, we find no merit to Burlington's assertions of error. Additionally, we find no merit to Burlington's assertions that the court erred in instructing the jury. For these reasons, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
FRED W. SCHNEIDER, JR., APPELLANT.
638 N.W.2d 536

Filed January 15, 2002. No. A-01-546.

1. **Final Orders: Speedy Trial: Pretrial Procedure.** A ruling on a motion to discharge under the speedy trial statute is a final, appealable order.
2. **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.

3. **Speedy Trial: Indictments and Informations: Complaints.** Although the speedy trial act expressly refers to indictments and informations, the act also applies to prosecutions on complaint.
4. **Speedy Trial: Complaints.** 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.

Appeal from the District Court for Douglas County, J. MICHAEL COFFEY, Judge, on appeal thereto from the County Court for Douglas County, JEFFREY L. MARCUZZO, Judge. Judgment of District Court affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

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

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

INBODY, Judge.

INTRODUCTION

Fred W. Schneider, Jr., appeals the Douglas County District Court's order affirming the Douglas County Court's denial of his motion for absolute discharge on speedy trial grounds. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On May 4, 2000, a complaint was filed in Douglas County Court charging Schneider with second-offense driving under the influence in violation of Omaha city ordinance § 36-115. On May 10, Schneider filed a demurrer which he amended on May 30. That same date, he also filed a motion to quash which was also amended on May 30. On May 12, Schneider filed a motion for production of documents. On June 8, the county court granted the motion for production of documents and denied the motion to quash. The amended demurrer was sustained by the county court on July 27.

On September 7, 2000, a complaint was filed in Douglas County Court based on the same set of facts as the earlier complaint except charging Schneider with second-offense driving under the influence in violation of Neb. Rev. Stat. § 60-6,196(2)(b) (Supp. 1999).

On November 6, 2000, Schneider filed a motion for absolute discharge based upon the alleged violation of his right to a speedy trial. A hearing on this motion was held, and the motion was denied by the county court. Schneider appealed to the Douglas County District Court which affirmed the decision of the county court. Schneider has timely appealed to this court.

ASSIGNMENT OF ERROR

On appeal, Schneider contends that the district court erred in affirming the county court's denial of his motion for absolute discharge on speedy trial grounds.

STANDARD OF REVIEW

[1] A ruling on a motion to discharge under the speedy trial statute is a final, appealable order. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001).

[2] 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. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000); *State v. Cox*, *supra*.

ANALYSIS

Schneider's sole assigned error is that the district court erred in affirming the county court's denial of his motion for absolute discharge on speedy trial grounds. Schneider argues that the complaints filed pursuant to the driving under the influence ordinance and the state statute are, in essence, one and the same offense and that thus, the time from the filing of the complaint filed pursuant to the ordinance should be counted for speedy trial purposes. We need not make this determination, because assuming without deciding that Schneider is correct in that the time from the filing of the complaint filed pursuant to the ordinance should be counted for speedy trial purposes, the 6-month speedy trial time still had not elapsed.

[3,4] "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." Neb. Rev. Stat. § 29-1207(1) (Reissue 1995). 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).

Applying § 29-1207 and its 6-month statutory period to the instant case, Schneider was entitled to be brought to trial by November 4, 2000, unless certain periods could be excluded under § 29-1207(4). Section 29-1207(4) provides that the following periods shall be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including . . . the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue. . . .

(b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel.

In the instant case, the complaint was filed against Schneider on May 4, 2000, and a demurrer and motion to quash were filed on May 10, 2000, and the demurrer and motion to quash were not ruled on until June 8, 2000. Since the 29 days between the filing on Schneider's motions and the court's rulings thereon are excluded by § 29-1207(4)(a) in calculating the time for speedy trial, Schneider was not entitled to be brought to trial until December 3, 2000. Schneider's motion for absolute discharge was filed on November 6, 2000, at which point, Schneider's right to a speedy trial had not yet run. Consequently, the district court correctly affirmed the county court's denial of Schneider's motion for absolute discharge based upon the alleged violation of his right to a speedy trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
SUSAN DAILEY, APPELLANT.
639 N.W.2d 141

Filed January 22, 2002. No. A-01-179.

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. **Constitutional Law: Speedy Trial.** The constitutional right to a speedy trial is distinct from the statutory provision for a speedy trial prescribed by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 1995).
3. **Speedy Trial.** Every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. _____. The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel shall be excluded in computing the time for trial.
5. **Speedy Trial: Proof.** The burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) is applicable when the defendant is not tried within 6 months.
6. **Speedy Trial: Waiver.** A defendant may waive the right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1995) so long as the defendant is properly advised of the right to a speedy trial and the waiver is entered voluntarily, knowingly, and intelligently.
7. _____. A previous waiver of speedy trial rights is terminated when the defendant files a written request for trial with the clerk of the court, with a copy to the prosecutor, and the clerk forwards a copy thereof to the trial judge.
8. **Speedy Trial: Notice.** When a defendant has sought and obtained an indefinite continuance, it is his or her affirmative duty to end the continuance by giving notice of request for trial. Otherwise, the court can end the continuance by setting a trial date or specifically ordering that the continuance has ended.
9. **Speedy Trial.** An accused cannot generally take advantage of a delay in being brought to trial, where he or she is responsible for the delay by either action or inaction.

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

Larry L. Brauer for appellant.

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

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Susan Dailey appeals the Seward County District Court's denial of her motion for absolute discharge of the felony charges against her, alleging that her right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1995) was violated. We examine whether the trial court correctly calculated the number of days properly excluded under § 29-1207(4), addressing the unique matter of an "indefinite continuance."

PROCEDURAL BACKGROUND

Dailey was charged with two counts of knowing and intentional abuse of a vulnerable adult under Neb. Rev. Stat. § 28-386 (Cum. Supp. 2000), a Class IIIA felony, in an information filed in the Seward County District Court on June 17, 1999. Most of the procedural background which we recite and upon which we ultimately rely comes from the court trial docket, in evidence as exhibit 1.

On August 2, 1999, Dailey filed a motion for discovery, and the State filed a motion for reciprocal discovery. Both motions were heard and granted on September 7. On December 23, the court scheduled a pretrial conference for January 4, 2000. At that pretrial conference, the State filed a motion for joint trial of Dailey and her husband on the ground that the Daileys participated in the same act or transaction constituting an offense. The State also filed a motion for reciprocal discovery and a pretrial status report. The trial court continued the pretrial conference until January 10.

At the continued pretrial conference held January 10, 2000, Dailey's attorney filed a motion to withdraw, and the court granted the motion, directing Dailey to file an application for appointed counsel. In the trial docket sheet, the trial court judge wrote, "On defense request, cont'd on defendant's request for at least 60 days after discussing & explaining speedy trial to defendants." The bill of exceptions does not include any transcription of the January 10 hearing. Dailey filed a financial affidavit on January 13, and the court appointed a new attorney. That attorney reported a conflict and filed a motion to withdraw on January 18, and that same day, the trial court appointed current counsel to represent Dailey.

On March 10, 2000, the court sent out a letter setting a pre-trial conference for April 4, but the record does not reflect that the conference was held, as the trial docket entry for that date is simply: "Jury trial set for 5-17-00 at 9:30 a.m." Other than a motion and order about attorney fees, nothing further happened until May 17 when Dailey filed a motion to continue, which recited that her attorney was assigned to the case late in the proceedings and lacked an adequate opportunity to prepare for trial. A status hearing was scheduled for and held August 30. The trial docket shows that at this status hearing, the court noted that discovery was "ongoing" and "reset" the State's joint trial motion for September 18. The trial court judge wrote in the trial docket: "Counsel to file partial waiver of speedy trial (discovery related)." A September 18 trial docket entry states: "Discovery not yet completed." The State's motion for joint trial of Dailey and her husband was granted, and a jury trial was set for October 4 and 5.

Dailey filed a motion to continue on September 29, 2000, because discovery was not completed and her counsel needed additional time to interview defense witnesses and consider plea offers. The trial court granted the motion on October 2, continuing the proceeding to October 31 "for re-arraignment."

Dailey filed a motion for absolute discharge on October 31, 2000, alleging that the matter had not been brought to trial within 6 months from the filing of the information, as required by § 29-1207. The trial court set the motion for hearing on November 13. At the November 13 hearing, the procedural history we have recounted above was placed in evidence, and the State filed an affidavit of good cause. The affidavit listed events occurring during these proceedings not specifically enumerated within § 29-1207, but which according to the State constituted good cause for the delay in bringing Dailey to trial, as allowed by subsection (4)(f) of the statute. In that affidavit, the State noted that the January 4 pretrial conference was continued until January 10 to allow Dailey to prepare for the State's motion for joint trial, that Dailey requested several continuances for time to prepare for trial, and that although Dailey represented on September 18 that she would execute a waiver of speedy trial, no documents had been filed.

TRIAL COURT DECISION

In its order denying the motion to discharge, the trial court explained that as the information was filed June 17, 1999, the State had until December 17 to try Dailey, unless a period of time between those dates was excluded as allowed under § 29-1207(4). The court reviewed the proceedings in this case and calculated the excluded periods as follows: (1) Thirty-five days were excluded under § 29-1207(4)(a) from August 2, Dailey's filing of a motion for discovery, until September 7, when that motion was heard and granted; (2) 6 days were excluded under § 29-1207(4)(b) from January 4, 2000, when Dailey requested a continuance of the pretrial conference to address the State's motion for joint trial and to file a pretrial report, to January 10, the date the pretrial conference resumed; (3) 127 days were excluded under § 29-1207(4)(b) and (f) from January 10, when Dailey's request for a continuance was granted and the matter continued for at least 60 days after the court explained her speedy trial rights, to May 17, the date the court scheduled for jury trial; and (4) 163 days excluded under § 29-1207(4)(b) and (f), the good cause portion of the statute, from May 17, when Dailey filed a motion to continue, to October 31, Dailey's filing of her motion for absolute discharge. With regard to its good cause finding, the trial court explained that it excluded 163 days, May 17 to October 31, because on August 30 and September 18, Dailey reported that discovery was not completed and that she was unprepared for trial. She never presented a written waiver of speedy trial as she represented she would do, and she filed a motion to continue on September 29, which extended until Dailey filed her motion for absolute discharge on October 31.

Consequently, the trial court calculated that there were 35, 6, and 127 excluded days up to the scheduled trial date of May 17, 2000, plus 163 days after that date, for a total of 331 excluded days. By adding 331 days to December 17, 1999, the trial court found that the last day the State could commence trial would be November 18, 2000. Therefore, the trial court found that Dailey's motion for absolute discharge filed October 31 was premature, and it was denied in an order filed January 24, 2001. Dailey timely appealed to this court.

ASSIGNMENT OF ERROR

Dailey assigns error to the trial court's denial of her motion for discharge based upon her statutory right to a speedy trial pursuant to § 29-1207.

STANDARD 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); *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001).

ANALYSIS

[2] Dailey does not base her appeal upon the constitutional right to a speedy trial. The constitutional right to a speedy trial is distinct from the statutory provision for a speedy trial prescribed by the Nebraska speedy trial act, Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 1995). *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990); *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999) (constitutional right to speedy trial and statutory implementation of that right exist independently of each other). Therefore, we address only Dailey's statutory right to a speedy trial.

Speedy Trial Statute.

[3-5] Section 29-1207(1) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Cox*, *supra*. To calculate the time within which the State had to bring Dailey to trial, we use the "'move forward 6 months, but then back up 1 day" rule.'" *State v. Sumstine*, 239 Neb. 707, 712, 478 N.W.2d 240, 244 (1991), citing *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). Here, the State filed the information against Dailey on June 17, 1999. Under *State v. Sumstine*, *supra*, the State had until December 17 to commence Dailey's trial. Under § 29-1208, if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge. Section 29-1207(4) provides, as is relevant here:

The following periods shall be excluded in computing the time for trial:

....
(b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. . . .

....
(f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

The burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months. *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978); *State v. Borland*, 3 Neb. App. 758, 532 N.W.2d 338 (1995). To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *State v. Johnson, supra*, citing *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

Exclusion of 6-Day Continuance Granted at Pretrial Conference.

Dailey argues that it was clear error for the trial court to exclude the 6 days between January 4 and 10, 2000, due to a continuance of the pretrial conference which Dailey requested in order to address motions filed by the State and to file a pretrial report. Dailey asserts that her counsel had no prior notice of these newly filed motions and that therefore, the 6 days should not have been excluded. Dailey cites no case law to support her argument, and § 29-1207(4)(b) states that the period of delay resulting from a continuance granted at the request or with the consent of the defendant is excluded. The State's affidavit of good cause noted that Dailey requested this continuance in order to prepare for the State's newly filed motion for joint trial and to prepare a witness list. Section 29-1207(4)(b) does not differentiate between reasons for a requested continuance. Therefore, the fact that Dailey's counsel had no prior warning of the State's motion is not determinative, and it was not clear error for the trial court to exclude the 6 days from the requested continuance until the pretrial conference resumed.

*Excluding 127 Days for Continuance
Granted January 10, 2000.*

Dailey next argues that the trial court clearly erred by excluding 127 days, from January 10, 2000, until May 17, in computing the 6-month period allowed for trial under § 29-1207(1). She first asserts that the record does not reflect a waiver of her right to a speedy trial, merely that her right to a speedy trial was “discussed and explained” at the continued hearing held January 10. Brief for appellant at 9. We agree that the record before us fails to show that there was a waiver of Dailey’s rights under the speedy trial act.

[6] A defendant may waive the right to a speedy trial under § 29-1207 so long as the defendant is properly advised of the right to a speedy trial and the waiver is entered voluntarily, knowingly, and intelligently. *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999). There is no bill of exceptions from the January 10, 2000, pretrial conference, and thus, there is nothing of record upon which we could find that Dailey waived her right to a speedy trial on that date. Obviously, without a record, the State cannot demonstrate that any alleged waiver was voluntarily, knowingly, and intelligently done.

Nonetheless, the trial docket entry for January 10, 2000, includes a statement that Dailey requested a continuance “for at least 60 days after discussing & explaining speedy trial to defendants.” Therefore, although there is insufficient evidence showing any waiver of Dailey’s right to a speedy trial, the record shows that she requested an indefinite continuance under § 29-1207(4)(b) on January 10. Where there is no bill of exceptions, it will be presumed on appeal that the evidence supports the trial court’s judgment. *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983). Similarly, we assume that the proceeding which was held on January 10 supports the trial docket entry from that date.

The determinative question is how long did the requested continuance last. The trial court’s docket entry of January 10, 2000, said that the matter was continued for at least 60 days at Dailey’s request. Sixty days expired on March 10, and according to the trial docket, on that day, the trial court sent a letter setting a

pretrial conference for April 4. The record does not show that the pretrial conference was held April 4, but the trial docket does say: "Jury trial set for 5-17-00 at 9:30 a.m." We find that the continuance of "at least 60 days" was still in effect until at least May 17, the date when the court said the case would be tried. Thus, these 128 days (accounting for the fact that the year 2000 was a leap year) are excluded from the speedy trial clock by virtue of the continuance sought by Dailey and granted on January 10. While she would have us find that her continuance ended March 10, the end of the 60 days and when the court set the matter for pretrial conference, we do not think that Dailey can request an indefinite continuance and then have it end and be converted into "time definite continuance" without action on her part to accomplish that result.

[7] This conclusion derives in large part from analogy to *State v. Andersen, supra*, a case where the defendant expressly waived his speedy trial rights. The court was faced with deciding what happened when the defendant revoked or terminated his waiver. The *Andersen* court rejected the defendant's suggestion that the clock should start running again with only the time remaining which was left when the waiver occurred and, instead, held that the 6 months would start afresh. *Id.* A previous waiver of speedy trial rights is terminated when the defendant files a written request for trial with the clerk of the court, with a copy to the prosecutor, and the clerk forwards a copy thereof to the trial judge. See *id.* Under *Andersen*, after a waiver of speedy trial rights, the State has 6 months from the date of the defendant's written request for trial to bring the defendant to trial, subject to periods excluded under § 29-1207.

The case before us is not on all fours with *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), because the record does not show a waiver by Dailey, but, rather, an indefinite continuance. But, the circumstances are similar, and the result should likewise be similar. The record fails to show any action at any time by Dailey which could be taken as evidence that the indefinite continuance which she had requested on January 10 and which is clearly excluded, had ended, or that she wanted it to end, or was ready for it to end. At no time after the indefinite continuance did Dailey notify the prosecution or the court that

she was ready for trial. The record shows that instead of trying the case on May 17, 2000, per the court's trial setting, Dailey filed another motion for a continuance.

[8] Under these circumstances, it would hardly be fair to have the speedy trial clock running against the State during an open-ended continuance requested by the defendant. When a defendant has sought and obtained an indefinite continuance, it is his or her affirmative duty to end the continuance by giving notice of request for trial, as outlined in *Andersen, supra*. Otherwise, the court can end the continuance by setting a trial date or specifically ordering that the continuance has ended. Here, the court set trial for May 17, 2000, and the indefinite continuance ended that day. But, the 6 months under § 29-1207 does not start anew because there was no waiver. Instead, the time between the start of the indefinite continuance and the end thereof is simply excluded from the 6 months in which the State had to bring Dailey to trial, and in this case, that is 128 days.

Our holding is also similar to that reached in *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997), where the defendant sought to avoid the exclusion from the speedy trial clock of the time that his motions for DNA testing and appointment of a private investigator were pending beyond the date that he originally noticed them for hearing, March 7, 1995, and when they were finally heard, May 11. Turner's argument was that only the period of time that the motions were "reasonably pending" should be excluded, which, in his view, was from the date of filing until the date they were originally to be heard on March 7. *Id.* at 628, 564 N.W.2d at 237.

[9] The court in *Turner* rejected the argument on two grounds. First, as the motions were the defendant's, the period of delay to be charged to the defendant was determined by § 29-1207(4)(a), which meant that the time from filing to resolution was excluded without consideration of whether that timeframe was reasonable. The *Turner* court pointed out that it was only under the "catchall" provision of § 29-1207(4)(f), which excludes delay for "good cause," that an analysis of whether the delay was unreasonable becomes necessary. 252 Neb. at 629, 564 N.W.2d at 237. Second, the court in *Turner* said that the record showed that the reason for the delay was the failure of Turner's counsel

to pursue the motion and that such responsibility was his, rather than the State's or the court's. The *Turner* court said:

Turner cannot take advantage of the delay in being brought to trial where by his own inactions he is responsible for the delay. See *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983) (under § 29-1207(4)(a), entire period of time in which portion of defendant's pretrial motion for discovery lay dormant was properly chargeable against defendant). "An accused cannot generally take advantage of a delay in being brought to trial, where he is responsible for the delay either by action or inaction." *Lafley*, 225 Neb. at 370, 405 N.W.2d at 582, quoting *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

252 Neb. at 630-31, 564 N.W.2d at 238.

Dailey has the same problem as Turner; the delay in going to trial is a consequence of Dailey's actions and inactions. It was Dailey who secured an indefinite continuance and never provided notice of any sort that she was ready for trial. In fact, when the court attempted to get her to trial on May 17, 2000, the date when the indefinite continuance ended, she sought and obtained another continuance.

Date of Absolute Discharge Under 6-Month Rule Plus Excluded Days.

The trial court found in its order denying discharge that from the filing of the information until May 17, 2000, 168 days should be excluded, and 163 days should be excluded after May 17 to the filing of the motion for discharge on October 31 for a total of 331 excluded days. We note that Dailey concedes that nothing which happened procedurally after May 17 is "significant to this appeal as Appellant filed a motion to continue the trial on May 17, 2000." Brief for appellant at 5. However, the trial court's count is in error as there are 169 days excluded before May 17 due to 2000 being a leap year and 168 days from May 17 to October 31.

Therefore, with a starting day of June 17, 1999, we go forward 6 months and back 1 day, which gives us December 17, to which we add 337 excluded days (169 + 168). This equals November 18, 2001. Thus, Dailey's motion to discharge filed

October 31, 2001, was premature, and at that time, the State had 18 days left to begin Dailey's trial. The trial court correctly overruled the motion for absolute discharge. We point out that the time during which Dailey's motion to discharge has been pending, including in this court, is also excluded. See, *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990); *State v. Borland*, 3 Neb. App. 758, 532 N.W.2d 338 (1995). As a result, the State has 18 days left from the completion of the appellate process in which to begin Dailey's trial. Because we find that the appeal is resolved by § 29-1207(4)(b), we need not address the trial court's finding that time could also be excluded for good cause under § 29-1207(4)(f).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. STEPHEN L. CALDWELL,
ALSO KNOWN AS STEVEN L. CALDWELL, ALSO KNOWN
AS CHARLES GIBSON, APPELLANT.
639 N.W.2d 663

Filed January 29, 2002. No. A-01-115.

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. **Trial: Time: Prisoners.** The procedures by which a Nebraska prison inmate may assert his or her right to a speedy disposition of pending Nebraska charges are provided in Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1995).
3. **Trial: Time: Prisoners: Good Cause: Indictments and Informations: Complaints.** Prisoners shall be tried within 180 days or within such additional time as the court for good cause shown in open court may grant for untried indictments, informations, or complaints.
4. **Speedy Trial: Prisoners.** In *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990), and *State v. Soule*, 221 Neb. 619, 379 N.W.2d 762 (1986), the Nebraska Supreme Court declined to apply the law and decisions under the speedy trial statutes, Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 1995), to Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1995).
5. **Good Cause: Words and Phrases.** Good cause means a substantial reason; one that affords legal excuse.
6. **Good Cause: Trial: Time: Prisoners.** Whether good cause exists for extending the time limit in Neb. Rev. Stat. § 29-3805 (Reissue 1995) is a subjective, factual question within the discretion of the trial court.

7. **Good Cause: Words and Phrases.** Good cause is something that must be substantial, but also a factual question dealt with on a case-by-case basis.

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

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

James S. Jansen, Douglas County Attorney, and Donald W. Kleine for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Stephen L. Caldwell filed a motion to discharge after his trial date was continued beyond the 180-day time limit set forth in Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1995). The district court denied Caldwell's motion to discharge. Caldwell asserts on appeal that the district court erred when it granted the State's motion to continue. Caldwell also argues that the district court erred when it denied his motion to discharge. For the reasons stated below, we affirm the district court's granting the State's motion to continue.

II. BACKGROUND

On July 7, 2000, the State filed a criminal complaint pursuant to Neb. Rev. Stat. § 28-311.01 (Reissue 1995) charging Caldwell with making terroristic threats against a juvenile court judge on June 7. At the time this criminal complaint was filed, Caldwell was incarcerated on an unrelated offense at a correctional facility in Nebraska. After the complaint was filed, the Douglas County sheriff's office filed a detainer against Caldwell. In accordance with § 29-3803, Caldwell made a written demand to the Director of Correctional Services for the disposition of this untried complaint against him.

On July 18, 2000, pursuant to § 29-3803, the director sent a notice to the Douglas County Attorney stating why Caldwell was imprisoned, the amount of time served and remaining to be served, and any decision of the Board of Pardons. The Douglas County Attorney received this notice on July 21.

On October 19, 2000, Caldwell was moved to the Douglas County Correctional Center for detention pending trial on the terroristic threat charge. Caldwell's preliminary hearing was held on November 28. On November 29, the State filed a criminal information charging Caldwell with making terroristic threats.

On January 8, 2001, the State filed an amended information charging Caldwell with making terroristic threats and with being a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995). A pretrial conference was held the same day where Caldwell pled not guilty to the amended information. The case was set for trial on January 17. On January 10, a hearing was held on the State's motion to continue. The State entered into evidence a letter from the juvenile court judge stating that he would be unavailable for trial on January 17. Caldwell objected to the continuance, arguing that the State did not show "good cause" for a continuance to be granted. We note that at this hearing, the State did not dispute the fact that the continuance would put Caldwell's trial date beyond the 180-day time limit. After finding good cause to continue the trial beyond the 180-day time limit, the district court granted a continuance from January 17 to January 22.

On January 22, 2001, Caldwell filed a motion to discharge, and a hearing was held the same day on that motion. Caldwell asserted that the State failed to bring him to trial within the 180-day time limit set forth in § 29-3805. In support of his motion, Caldwell argued that the State did not have good cause to continue the case. Caldwell argued that the good cause requirement under § 29-3805 should be defined by the standards set forth under the speedy trial statute, Neb. Rev. Stat. § 29-1207 (Reissue 1995). The State alleged that § 29-3805 was different from § 29-1207 and that the same standards should not be applied to both sections.

We note that at the hearing on the motion to discharge, the district court called its bailiff to testify. The district court's bailiff testified about the court's scheduling and whether trial could have been set prior to January 22, 2001. No error is assigned with regard to this procedure, and we make no comment on it. After the bailiff testified and counsel presented their arguments, the district court overruled Caldwell's motion to discharge. Caldwell's timely appeal is now before us.

III. ASSIGNMENTS OF ERROR

On appeal, Caldwell has assigned three errors. First, Caldwell asserts that the district court erred in granting the State's motion to continue. Second, Caldwell argues that the district court erred in overruling his motion to discharge. We combine these assigned errors for purposes of discussion. Finally, Caldwell asserts the district court "abused its discretion" by setting a trial date beyond the 180-day limit.

IV. ANALYSIS

1. STANDARD 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. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000); *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999).

2. MOTION TO CONTINUE AND MOTION TO DISCHARGE

(a) Applicable Statutes

Caldwell asserts that the district court erred in granting the State's motion to continue and in denying his motion to discharge. Prior case law in Nebraska has held that the provisions of §§ 29-3801 to 29-3809 apply to in-state prisoners. *Tucker, supra*; *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990); *State v. Soule*, 221 Neb. 619, 379 N.W.2d 762 (1986). The parties in this case agree that §§ 29-3801 to 29-3809 apply to Caldwell.

[2] Sections 29-3801 to 29-3809 provide the procedures by which a Nebraska prison inmate may assert his or her right to a speedy disposition of pending Nebraska charges. The issues in this case do not deal with whether those procedures were complied with. In fact, the record reveals that the parties agree Caldwell did everything necessary to trigger the 180-day time limit under the statutes. The issue is whether the district court erred when it found good cause to grant a continuance under § 29-3805.

(b) Good Cause

[3] Section 29-3805 states in pertinent part:

Within one hundred eighty days . . . or within such additional time as the court for *good cause* shown in open court

may grant, the untried indictment, information, or complaint shall be brought to trial with the prisoner or his or her counsel being present. The parties may stipulate for a continuance or a continuance may be granted on a notice to the attorney of record and an opportunity for him or her to be heard.

(Emphasis supplied.)

Sections 29-3801 to 29-3809 do not define "good cause." The parties do not offer, and we are unable to find, any case law defining "good cause" in the context of those statutes. As such, Caldwell contends that this court should look to the speedy trial provisions set forth in Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 1995) to define "good cause." The State contends that Nebraska case law distinguishes §§ 29-3801 to 29-3809 from the speedy trial provisions in §§ 29-1201 to 29-1209.

[4] In *Ebert* and *Soule*, the Supreme Court declined to apply the law and decisions under the speedy trial statutes to §§ 29-3801 to 29-3809. The Supreme Court determined that §§ 29-3801 to 29-3809 were more akin to interstate detainers as discussed in *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984). See *Soule*, *supra*. We also note that a review of the legislative history on §§ 29-3801 to 29-3809 reveals that the Legislature generally intended for those sections to be similar to the interstate Agreement on Detainers in Neb. Rev. Stat. §§ 29-759 to 29-765 (Reissue 1995). Therefore, we look to decisions from other states that have dealt with what good cause means in their intrastate or interstate detainer statutes.

[5,6] The Court of Appeals of Idaho stated that "[g]ood cause means a substantial reason; one that affords legal excuse." *State v. Knauff*, 115 Idaho 74, 76, 764 P.2d 441, 443 (Idaho App. 1988). The Court of Appeals of Minnesota stated that whether "good cause exists for extending the [Uniform Mandatory Disposition of Detainers Act] time limit is a subjective, factual question within the discretion of the trial court." *State v. Miller*, 525 N.W.2d 576, 580 (Minn. App. 1994).

The Supreme Court of Minnesota found that the prosecution had shown good cause when it produced evidence that it was difficult to locate crucial witnesses. *State v. Hamilton*, 268 N.W.2d 56 (Minn. 1978). The court further stated that it saw "no basis for

disturbing the trial court's ruling that good cause was shown for granting the continuance. The additional delay in defendant's trial was minimal; it began approximately a month after the end of the 6-month period." *Id.* at 62. Like Nebraska's §§ 29-3801 to 29-3809, the Minnesota statutes do not define "good cause." The Court of Criminal Appeals of Alabama similarly found good cause to grant a continuance when witnesses were ill and unable to testify. *Cheatham v. State*, 431 So. 2d 1350 (Ala. App. 1983). The Alabama court found the continuance was "reasonable, necessary, and for good cause." *Id.* at 1353.

The Supreme Court of North Dakota found in *State v. Kania*, 341 N.W.2d 361 (N.D. 1983), the constitutional speedy trial factors set out in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), pertinent in defining "good cause." However, the Nebraska Supreme Court has declined to apply the standards and decisions of the statutory speedy trial to §§ 29-3801 to 29-3809. See, *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990); *State v. Soule*, 221 Neb. 619, 379 N.W.2d 762 (1986). Thus, it would be logical to refuse to apply the factors of *Barker*, *supra*, to §§ 29-3801 to 29-3809. See, *Knauff*, *supra*; *Soule*, *supra*.

[7] Based on the above-persuasive authority and our independent analysis of the speedy trial statute, we conclude that Nebraska's §§ 29-3801 to 29-3809 fit in the category of cases where the definition of good cause is left to the discretion of the trial court. We agree with the rationale of the Minnesota and Idaho courts that good cause is something that must be substantial, but also a factual question dealt with on a case-by-case basis.

The evidence in this case shows that a pretrial conference was held on January 8, 2001, and that a jury trial was set for January 17. In a letter dated January 9, the juvenile court judge informed the State that he would be unavailable for trial on January 17. The next day, January 10, a hearing was held on the State's motion to continue. After entering the juvenile court judge's letter into evidence, the State requested the court to find good cause to continue because the juvenile court judge would be unavailable on January 17. The record reveals that the State came forward as soon as possible after the trial was scheduled to inform the district court and opposing counsel about the

conflict. The court continued the matter for 1 week. Good cause under §§ 29-3801 to 29-3809 encompasses a situation where a witness is unavailable. Given the facts of this case, it was not clearly erroneous for the district court to find good cause to continue the trial beyond the 180-day time limit. Because we find the motion to continue was properly granted, we also find the district court properly denied Caldwell's motion to discharge. Thus, these assigned errors are without merit.

3. ABUSE OF DISCRETION FOR SETTING TRIAL BEYOND 180-DAY LIMIT

Caldwell argues that the district court abused its discretion for setting the trial beyond the 180-day time limit. Caldwell asserts that § 29-1207 requires that he be brought to trial within 6 months of being indicted or informed. If Caldwell is arguing that § 29-1207 applies to this case, we have already decided that § 29-3805 is the appropriate statute. To the extent that Caldwell is attempting to argue that his constitutional right to a speedy trial was violated, he does not assign this as error. A claimed prejudicial error must be assigned and discussed in the brief of the asserting party. *Varela v. Fisher Roofing Co.*, 253 Neb. 667, 572 N.W.2d 780 (1998). This assigned error is without merit.

V. CONCLUSION

We affirm the district court's decision granting the State's motion to continue. Based on case law from Nebraska and other jurisdictions, we find the district court properly found good cause. Because we find the motion to continue was proper, we also find the district court properly denied Caldwell's motion to discharge.

AFFIRMED.

KOHL'S DEPARTMENT STORES, APPELLANT, v.
DOUGLAS COUNTY BOARD OF EQUALIZATION, APPELLEE.

638 N.W.2d 877

Filed January 29, 2002. No. A-01-403.

1. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

2. **Motions to Dismiss: Proof.** In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled.
3. **Property: Valuation: Witnesses.** An owner may testify to the worth of his or her property if the owner is familiar with the property and knows the worth.
4. ____: ____: ____: A corporate officer or president is not qualified to testify as to value of corporate property. In order to qualify, he or she must be shown to be familiar with the property and have a knowledge of values generally in the vicinity.
5. **Property: Valuation.** It is illogical that a prior assessment of a property is not relevant to the current assessment, but prior assessments of other properties are relevant to the current assessment.

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

Michael L. Schleich, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

James S. Jansen, Douglas County Attorney, and James R. Thibodeau for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

At issue is the proper valuation for the 2000 tax year of the store owned by Kohl's Department Stores (Kohl's) and located at 3551 Oakview Drive, Omaha, Douglas County, Nebraska (Oakview Property). After the Oakview Property was assessed, Kohl's protested the assessed value of the property to the Douglas County Board of Equalization (Board). The Board granted Kohl's partial relief, but denied the remaining objections. Thereafter, Kohl's appealed to the Nebraska Tax Equalization and Review Commission (TERC). After a hearing, the TERC affirmed the decision of the Board. For the reasons stated below, we affirm.

II. BACKGROUND

We generally describe the facts and testimony from the hearing before the TERC below. Additional facts necessary for the resolution of this appeal will be set forth in the analysis.

The land for the Oakview Property was purchased between 1994 and 1995, and the store was built in 1996. In 2000, Douglas County assessed the Oakview Property at \$7,054,500. Kohl's protested this amount to the Board. The record reveals that Kohl's objections to the Board included the assessed value for the building and the land. The Board reduced the assessment by 7 percent. We note this 7 percent reflects the amount of increase ordered by the TERC on all commercial property for tax year 2000. The Board denied Kohl's other objection, and Kohl's appealed the Board's decision to the TERC.

At the TERC hearing, Kohl's asked the TERC to take judicial notice of four cases, which included proposed comparable properties, that were decided in late 2000 or early 2001. Kohl's argued that these cases from the tax year 1999 were relevant to Oakview Property's current valuation. The TERC denied Kohl's request, stating that these four cases were not relevant to the valuation of the Oakview Property. In support of its appeal, Kohl's offered the testimony of Daniel Campbell, director of real estate expense at Kohl's, and Mark Kriglstein, real estate appraiser for the Douglas County assessor's office. The Board did not produce any witnesses to testify on its behalf.

Campbell generally testified that the county's assessment overvalued the land and the building. Campbell opined that the actual value of the property and building was \$4,724,246. In direct examination, Campbell stated why he thought the county's assessment was incorrect. On cross-examination, Campbell testified that he was not familiar with the area surrounding the Oakview Property or the Omaha area.

Kriglstein testified that he valued the Oakview Property using a cost approach. This valuation is what the Board based its decision on. Kriglstein stated that he later valued the Oakview Property using an "income and sales comparison approach" to test the information provided by Campbell.

At the conclusion of Kohl's presentation of evidence, the Board moved to dismiss the appeal. The Board argued that Kohl's failed to rebut the statutory presumption that states the TERC should affirm the Board's decision unless it is arbitrary or unreasonable. See *Garvey Elevators v. Adams Cty. Bd. of Equal.*, 261 Neb. 130, 621 N.W.2d 518 (2001). The TERC granted the

Board's motion to dismiss at the conclusion of Kohl's presentation of evidence. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Kohl's has assigned three errors, which are reordered for discussion. First, Kohl's asserts the TERC erred in applying the statutory presumption to the Board's assessment. Second, Kohl's asserts that the TERC erred when it dismissed Kohl's appeal for failure to overcome the statutory presumption. Finally, Kohl's asserts the TERC erred when it refused to take judicial notice of four of its prior decisions.

IV. ANALYSIS

1. STANDARD OF REVIEW

[1] We review the decision of the TERC for error appearing on the record. See Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2000). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998); *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

[2] In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Jessen v. DeFord*, 3 Neb. App. 940, 536 N.W.2d 68 (1995). See *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001).

2. APPLYING PRESUMPTION

Kohl's contends that the TERC erred in applying the presumption because the assessor did not personally inspect the Oakview Property. Neb. Rev. Stat. § 77-1511 (Reissue 1996) states that the TERC "shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary." The Supreme Court has

held this to mean that there is a presumption that a board of equalization has properly performed its official duties and that in making an assessment, it has acted upon sufficient competent evidence to justify its action. *Garvey Elevators, supra*.

Kriglstein stated during his testimony that he did not personally inspect the "non-public areas" of the property before the Board hearing. However, he did testify that the property had been inspected when the "building [was] new and we [got] the building permit and we [got] all of the characteristics [from] an appraiser from our office." Case law has established that it is not unreasonable to rely on another appraiser's physical measurements. *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999). Additionally, Kriglstein testified that subsequent to the Board's hearing but prior to the TERC hearing, he inspected the "nonpublic" areas of the Oakview Property. Kriglstein stated at the hearing that there were no "surprises" at the Oakview Property. Kriglstein testified that everything at the Oakview Property was just as he believed it was before the Board hearing. We find the TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Therefore, this assigned error is without merit.

3. EVIDENCE TO REBUT STATUTORY PRESUMPTION

Kohl's also contends that Campbell's testimony valuing the property at \$4,724,246 was competent evidence to rebut the statutory presumption. Kohl's argues that Campbell's testimony should be credited because he is an "owner who is familiar with his property and knows its worth." Brief for appellant at 7. Kohl's also asserts that Campbell's testimony should be credited because he used one of the prescribed methods under Neb. Rev. Stat. § 77-112 (Cum. Supp. 2000). The record shows that the TERC explicitly rejected Campbell's opinion.

[3,4] The Nebraska Supreme Court in *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999), held that an owner may testify to the worth of his or her property if the owner is familiar with the property and knows the worth. A corporate officer or president is not, as such, qualified to testify as to value of corporate property. In order to qualify, he or she must be shown to be familiar with the property and have a knowledge

of values generally in the vicinity. *First Baptist Church v. State*, 178 Neb. 831, 135 N.W.2d 756 (1965). See, also, *US Ecology, supra*. Campbell testified that he was not very familiar with the Omaha area, but believed that the land value of the Oakview Property had not increased since 1996. Campbell also admitted that his only basis for this testimony was his knowledge of the Oakview Property, not his knowledge of the Omaha area.

The TERC found Campbell was not "competent, in the legal sense, to testify as to the value of the land or the change, if any, in construction costs in Omaha, Nebraska, between 1996 and 2000." To the extent Kohl's challenges the TERC's finding that Campbell was not competent, this assertion is meritless. The evidence presented to the TERC establishes that Campbell did not have the requisite knowledge to testify about land values in the Omaha area. The TERC did not err in granting the motion to dismiss because there was no competent evidence before the TERC to rebut the statutory presumption. Therefore, this assigned error is without merit.

4. JUDICIAL NOTICE OF PRIOR PROCEEDINGS

Next, Kohl's asserts that the TERC erred when it refused to take judicial notice of its findings in four other cases. The assessments Kohl's asked the TERC to take judicial notice of were for the tax year 1999. Kohl's argues that the case law only prohibits looking at prior assessments of the *same* property to prove a subsequent year's value. Kohl's contends the case law allows the TERC to use prior assessments of other property to prove the Oakview Property is overvalued. The Board objected to the TERC taking judicial notice of these findings stating that it would be speculative for the TERC to assume the property values of these four cases would not change in the year 2000.

[5] The TERC found the prior assessments were not relevant to the current year's valuation. See, *Affiliated Foods Co-op v. County of Madison*, 229 Neb. 605, 428 N.W.2d 201 (1988); *DeVore v. Board of Equalization*, 144 Neb. 351, 13 N.W.2d 451 (1944) (holding that prior assessment is not admissible to prove value of real estate under subsequent assessment). We find that Kohl's argument is not compelling. It is illogical that a prior assessment of the Oakview Property is not relevant to the current

assessment, but prior assessments of other properties are relevant to the current assessment. Therefore, we find the TERC's decision was supported by competent evidence, conforms to the law, and is neither arbitrary nor capricious. This assigned error is without merit.

V. CONCLUSION

The TERC did not err when it found the statutory presumption applied to the findings of the Board. The TERC also did not err when it found Kohl's did not present competent evidence to rebut the statutory presumption. Finally, the TERC properly refused to take judicial notice of four prior decisions because they were not relevant to the Oakview Property's valuation.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ROLDAN CARDONA, APPELLANT.
639 N.W.2d 653

Filed January 29, 2002. No. A-01-451.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion.
4. ____: _____. 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.
5. **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.
6. **Pleas: Proof.** In order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a

- jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
7. **Criminal Law: Right to Counsel.** A criminal defendant who is represented by counsel need not be informed that she or he has a right to be so represented.
 8. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, 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.
 9. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal *ipso facto*; the determining factor is whether the record is sufficient to adequately review the question.

Appeal from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY, Judge. Judgment of District Court affirmed.

Mariclaire Thomas, of Orton, Thomas & O'Connell, for appellant.

John C. McQuinn, Chief Lincoln City Prosecutor, for appellee.

HANNON, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Roldan Cardona was convicted on the charge of refusing to submit to a chemical test in the county court for Lancaster County, Nebraska, in violation of Lincoln Mun. Code § 10.16.040 (1998). The Lancaster County District Court affirmed the lower court's conviction and sentence, and Cardona now appeals from the ruling of the district court.

BACKGROUND

On July 14, 2000, Cardona was involved in a car accident that resulted in Cardona's being cited for driving under the influence, refusing to submit to a preliminary breath test, and refusing to submit to a chemical test.

Cardona was arraigned on August 8, 2000, and appeared without legal counsel. The presiding judge questioned Cardona as to

his hiring an attorney, employment status, and living arrangements. Cardona told the judge that he did not have an attorney, was not working, and lived in an apartment with his son. The judge then entered not guilty pleas on behalf of Cardona and appointed a public defender to represent Cardona.

The case was set for disposition without trial on September 19, 2000. Cardona's court-appointed counsel made an appearance and informed the court that Cardona did not want to plead to any of the charges and that an interpreter would be needed for trial because Cardona's English was limited.

Trial was held on October 30, 2000, with an interpreter present. At the beginning of the hearing, Cardona's counsel informed the court that Cardona would enter a plea of no contest to the charge of refusing to submit to a chemical test and that the two remaining counts were to be dismissed. The trial court accepted Cardona's plea and subsequently sentenced him to serve 7 days in jail and pay a \$500 fine. The court also ordered him not to drive a motor vehicle for a period of 6 months and suspended his license for the same period of time.

Cardona then appealed to the district court alleging that the interpreter did not correctly communicate his directions to his legal counsel; that his plea was not entered freely, voluntarily, and knowingly; that the sentence imposed was excessive; and that he had ineffective legal counsel. The district court affirmed the judgment and sentence of the lower court, and this appeal was subsequently perfected.

ASSIGNMENTS OF ERROR

On appeal, Cardona contends that the district court erred in failing to find that (1) his plea of no contest was not made intelligently and voluntarily, (2) the interpreter did not correctly communicate Cardona's directions to his legal counsel, (3) Cardona had ineffective assistance of counsel, and (4) the sentence imposed on Cardona was excessive. Cardona also alleges that the trial court committed plain error in failing to give the interpreter an appropriate oath.

STANDARD OF REVIEW

[1] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as

a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Hopkins*, 7 Neb. App. 895, 587 N.W.2d 408 (1998).

[2] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

[3,4] Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion. *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

ANALYSIS

OATH OF INTERPRETER

We first address Cardona's assignment of error that the trial court committed plain error when it failed to administer an oath to the court-appointed interpreter as required in Neb. Rev. Stat. § 25-2405 (Reissue 1995).

A review of the transcript indicates that Cardona did not assign error to this issue in his appeal to the district court in his assignments of error filed December 13, 2000. Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 2000) provides:

[T]he appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the case will be limited to errors assigned and discussed. The district court may, at its option, notice a plain error not assigned.

However, a review of the order issued by the district court in this case indicates that the issue was presented and argued to the district court and a ruling made thereon. Therefore, we elect to proceed in analyzing this matter.

The statutory provision relating to court interpreters cited by Cardona provides:

Every interpreter appointed pursuant to sections 25-2401 to 25-2406, before entering upon his or her duties as such, shall take an oath that he or she will, to the best of his or her skill and judgment, make a true interpretation to such person unable to communicate the English language of all the proceedings in a language which such person understands and that he or she will, in the English language, repeat the statements of such person to the court, jury, or officials before whom such proceeding takes place.

§ 25-2405.

In appendix 1 of the Nebraska Supreme Court Rules Relating to Court Interpreters, the following oath is provided:

I, _____, swear or affirm that I will, to the best of my skill and judgment, after my appointment as interpreter, make a true (Language) interpretation of all court proceedings, probation activities, or any other proceeding into a language which the party understands and that I will in the English language repeat the party's statements to the court or jury.

The interpreter oath became effective on September 20, 2000.

The record reflects that the same interpreter was present when Cardona entered his plea of no contest and then again at sentencing. At Cardona's plea hearing, the interpreter was sworn in and given the following oath: "Do you swear that you will truthfully and accurately interpret for the defendant in this matter?," to which the interpreter responded, "I do." The interpreter was also present to interpret for Cardona at his sentencing hearing, but the court did not administer another oath to the interpreter prior to sentencing Cardona.

Nebraska case law dealing with matters of court interpreters in criminal cases is sparse. A review of the case law in the Eighth Circuit reflects that this issue has been addressed to some extent, but we have found no cases directly on point. However, we believe that some guidance can be gleaned from the circumstances set forth in *State v. Mitjans*, 408 N.W.2d 824 (Minn. 1987).

In Minnesota, the Legislature has promulgated rules relating to interpreters similar to those in Nebraska in that every qualified interpreter appointed shall take an oath. In *Mitjans*, a Spanish-speaking defendant had been arrested and brought in

for questioning. The defendant was initially questioned by a Spanish-speaking police officer, and then during subsequent questioning, the same officer served as an interpreter for another officer and the defendant. The police officer did not take an oath to interpret fairly before serving as an interpreter when the other officer questioned the defendant. Mitjans argued that his statements made during the subsequent questioning should be suppressed. The Minnesota Court of Appeals concluded, in part, that the police officer's failure to take an oath at the time he questioned the defendant violated the relevant statute. The Minnesota Supreme Court reversed and stated that "[t]he obvious purpose of the oath requirement in such a situation is to impress upon the interpreter that he is legally obliged to interpret fairly and accurately." *Id.* at 829. The court further stated that the police officer presumably had taken an oath as a police officer and knew at the time of the interrogation that he had a legal and ethical duty to translate fairly and accurately.

Although *Mitjans* is not directly on point, it does give some guidance in the instant case concerning the administration of the oath. The interpreter was administered an oath, albeit not in the precise language of the statute or the court rules, at Cardona's plea hearing on October 30, 2000. The interpreter was again present and interpreted for Cardona at the sentencing hearing. Presumably, after being given the oath at Cardona's plea hearing, the interpreter knew that he was legally obligated to interpret fairly and accurately at both the plea hearing and the sentencing hearing.

[5] 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 do not believe plain error is evident from the record in the instant case, and further, Cardona does not indicate how the court's alleged failure to administer the appropriate oath affected a substantial right or allege that the interpreter's translation was faulty.

Therefore, we conclude that the failure to administer the precise statutory oath to the interpreter at the plea hearing and the

failure to re-administer an oath at the sentencing hearing was not plain error and reject this assignment of error.

PLEA OF NO CONTEST

Cardona next alleges that the district court erred in affirming the lower court's finding that Cardona freely, voluntarily, and knowingly waived his rights before accepting his plea of no contest because the trial court failed to make an adequate inquiry as to whether Cardona actually understood the consequences of a no contest plea.

The dialog between the court and Cardona at the time Cardona entered his plea of no contest to the charge of refusal to submit to a chemical test was as follows:

THE COURT: Okay. Sir, you're charged with on or about July 17th — no, I'm sorry — July 14th, July 14th, the year 2000, you did refuse to submit to a chemical test of your blood, breath or urine for the determination of alcohol. This does carry a possible penalty of a minimum seven, maximum 60 days imprisonment, four hundred to five hundred dollar fine, and a six months license suspension. Do you understand the charge and the possible penalties?

[Interpreter]: "Yes."

THE COURT: And how do you plead to the charge?

[Interpreter]: "No contest."

THE COURT: No contest. Do you understand that by pleading no contest you're waiving and giving up a number of rights guaranteed by both the U.S. and Nebraska Constitution?

[Interpreter]: (There was no audible response).

THE COURT: Do you understand that you're waiving and giving up your right to be presumed innocent; your right to confront and face your accusers; your right to bring your own witnesses and subpoena witnesses to tell your side of the facts; your right to remain silent and not incriminate yourself; your right to a trial; and your right to have the State produce evidence to convict you beyond a reasonable doubt. Do you understand you're waiving and giving up those rights?

[Interpreter]: "Yes."

THE COURT: Okay. And did you go over this form with the interpreter and your attorney?

[Interpreter]: "Yes."

THE COURT: And they're kinda the same rights — had the same rights I just told you.

[Interpreter]: (There was no audible response).

THE COURT: Have you had enough time to talk with your attorney?

[Interpreter]: "Yes."

THE COURT: And the agreement is if you change your plea to Count 2, the remaining counts will be dismissed. Is that your understanding?

[Interpreter]: "Yes."

THE COURT: Has anybody made any other promises to you or threats against you to get you to plead?

[Interpreter]: "No."

THE COURT: And, again, how do you plead to the charge of refusing to submit to a chemical test? Are you pleading no contest?

[Interpreter]: "No contest."

THE COURT: Do you enter this plea freely, voluntarily and knowingly?

[Interpreter]: "Yes."

THE COURT: And are you entering this plea waiving those rights that we talked about?

[Interpreter]: "Yes."

THE COURT: And do you feel like you know what you're doing when you plead no contest?

[Interpreter]: "Yes."

THE COURT: Factual basis.

[Cardona's attorney]: We'd stipulate to a factual basis, jurisdiction and venue and that he refused to take the test.

THE COURT: The Court makes the following findings beyond a reasonable doubt. The defendant's acting voluntarily. He understands the — he understands the nature of the charge. He understands his constitutional rights and freely, voluntarily and knowingly waives them. He understands the consequence of his plea. The plea was made intelligently, voluntarily and freely. There's a factual basis

to accept the plea. I do accept the plea and find you guilty beyond a reasonable doubt. Order a presentence investigation. Sentencing set December 8th at 11 o'clock in Courtroom 26. Is this a true first offense? Okay. The remaining counts are dismissed.

[6] In order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997); *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

[7] In the trial court's examination of Cardona during the plea hearing, the trial court advised Cardona of the nature of the charges against him; his right to the presumption of innocence; his right to confront his accusers, to subpoena and present witnesses, and to remain silent and not incriminate himself; and his right to a trial. The court also advised Cardona that the State was required to prove his guilt beyond a reasonable doubt. The court did not, however, advise that he had a right to counsel. A criminal defendant who is represented by counsel need not be informed that she or he has a right to be so represented. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

Although the responses to the court's inquiry were given by the interpreter rather than Cardona, there is nothing in the record to suggest, nor does Cardona argue, that the interpreter did not accurately translate each question to Cardona and accurately give Cardona's response to each question to the court. Further, the record shows that the trial court adequately advised Cardona of the consequences of a no contest plea. Cardona's claim that he did not voluntarily, intelligently, and

understandingly enter his no contest plea is not supported by the record and is without merit.

INTERPRETER COMMUNICATION

Cardona's next assignment of error alleges that the interpreter did not correctly communicate Cardona's directions and desires to his court-appointed counsel. Specifically, Cardona asserts that he repeatedly told his counsel that he did not want to plead to anything and that the interpreter unduly influenced him by persuading him to enter into a plea agreement instead of telling his attorney he wanted a trial.

The obvious difficulty that we have in reviewing this assignment of error is the lack of any record regarding conversations between the interpreter, Cardona, and his counsel. Presumably, any such conversations were held off the record, as all we have from the plea hearing are the court's questions and the interpreter's responses. There is no indication or argument that the court reporter did not make a verbatim record of the proceedings at the plea and sentencing hearings, as required by Neb. Ct. R. of Prac. 5 (rev. 2000), nor was there evidence of a request for any additional record as provided by said rule.

Based upon a review of the record from the plea hearing, limited as it is, there is no indication that Cardona was having a problem communicating with the interpreter or his counsel. Likewise, there is nothing in the record to indicate Cardona was hesitant in responding to the court's questions via the interpreter. At the sentencing hearing, Cardona declined an opportunity provided by the court to say anything further before he was sentenced. In fact, in response to the court's question, "Is there anything you want to say?" Cardona responded in the negative using English before his answer was even given by the interpreter for the court.

With no support in the record that Cardona was unable to communicate satisfactorily through the interpreter, we conclude that this assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

Cardona next contends that the district court erred in finding that his attorney did not provide ineffective assistance of counsel. Cardona claims that his attorney was ineffective for failing

to file a motion to suppress on the grounds that there was insufficient probable cause for Cardona to be arrested for driving under the influence and that an evidentiary hearing should have been conducted and thereafter the case be brought to trial. Cardona argues that had he prevailed on that issue, any evidence would have been suppressed, which would have prevented Cardona from being further prosecuted for refusal to submit to a chemical test.

[8] In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[9] Cardona makes this ineffectiveness claim on direct appeal, and there has been no evidentiary hearing on his allegations. Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Coleman*, 10 Neb. App. 337, 630 N.W.2d 686 (2001).

Because of the plea of no contest and the stipulation to the factual basis of Cardona's refusal to take the chemical test, the record is devoid of evidence concerning the initial stop of Cardona, other than references in the presentence report. The record before this court is therefore insufficient to adequately review the question of effectiveness of counsel. Any deficiencies of counsel or alleged prejudice to Cardona cannot be determined based on the record before us. Accordingly, we do not reach Cardona's claim of ineffective assistance of counsel on this direct appeal.

EXCESSIVE SENTENCE

Lastly, we address whether Cardona's sentence is excessive. The penalty imposed pursuant to § 10.16.040 for refusing to submit to a chemical test of blood, breath, or urine for the determination of alcohol or drug content is imprisonment in the "county

jail for not less than seven days nor more than sixty days,” and a fine of “not less than \$400.00 nor more than \$500.00,” along with an order “not to drive any motor vehicle . . . for a period of six months” and the “operator’s license . . . be revoked for a like period” of time.

Cardona pled no contest to the charge of refusing to submit to a chemical test and was sentenced to serve 7 days in jail and pay a \$500 fine. The court also ordered him not to drive a motor vehicle for a period of 6 months and suspended his license for the same period of time. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of discretion. *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (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. *Id.* Cardona’s sentence was within the statutory limits. Having reviewed the record, including the presentence investigation report, we conclude that the trial court did not abuse its discretion in the sentence imposed.

CONCLUSION

Finding no merit to the assigned errors, we affirm.

AFFIRMED.

72ND PROPERTY, L.L.C., APPELLANT, V.
DOUGLAS COUNTY BOARD OF EQUALIZATION, APPELLEE.
MAPLE JOINT VENTURE, APPELLANT, V.
DOUGLAS COUNTY BOARD OF EQUALIZATION, APPELLEE.
638 N.W.2d 872

Filed January 29, 2002. Nos. A-01-479, A-01-480.

1. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, an appellate court’s inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Expert Witnesses.** The value of the opinion of an expert witness is no stronger than the facts upon which it is based.

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

Michael L. Schleich and Daniel J. Guinan, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

James S. Jansen, Douglas County Attorney, and James R. Thibodeau for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

At issue in these two cases are the proper valuations for the 2000 tax year of two Kohl's Department Stores (Kohl's) located at 909 South 72d Street (72nd Property, hereinafter referred to as the "72nd Street Property") and 13550 West Maple Road (Maple Joint Venture, hereinafter referred to as the "Maple Road Property"), Omaha, Douglas County. After the properties were assessed, Kohl's protested the assessed values to the Douglas County Board of Equalization (Board). The Board granted Kohl's partial relief, but denied the remaining objections. Thereafter, Kohl's appealed to the Nebraska Tax Equalization and Review Commission (TERC). After a hearing on each property, the TERC affirmed the decisions of the Board. We consolidated these two appeals for oral argument and disposition. For the reasons stated below, we affirm.

II. BACKGROUND

We generally describe the facts and testimony below. Additional facts necessary for the resolution of this appeal will be set forth in the analysis.

The 72nd Street Property was built in 1998. In 2000, the 72nd Street Property was assessed at \$6,627,600. Kohl's protested this amount to the Board. The Board reduced the assessment by 7 percent. This 7 percent reflects the amount of increase ordered by the TERC on all commercial property for tax year 2000. The Board denied Kohl's other objections, and Kohl's appealed this decision to the TERC.

The Maple Road Property was built in 1999. In 2000, the Maple Road Property was assessed at \$5,910,700. Kohl's also protested this amount to the Board. The Board reduced the entire assessment by 7 percent and also reduced the land value

further to equalize it with other land values in the area. Kohl's appealed the assessed value of the improvements of the Maple Road Property to the TERC.

At the hearing on each property before the TERC, Kohl's offered the testimony of Daniel Campbell, director of real estate expense at Kohl's, and Mark Kriglstein, real estate appraiser for the Douglas County assessor's office. The Board did not produce any witnesses to testify on its behalf.

Campbell testified that he used a cost approach and an income approach to value the 72nd Street and Maple Road Properties. Campbell stated that the county overvalued the improvements and land with respect to the 72nd Street Property and overvalued the improvements on the Maple Road Property. Kriglstein testified that he used a cost approach to assess the value of the 72nd Street and Maple Road Properties.

In each case, at the conclusion of Kohl's presentation of evidence, the Board moved to dismiss the appeal. The Board argued that Kohl's failed to rebut the statutory presumption that states that the TERC shall affirm the Board's decision unless it is arbitrary or unreasonable. See *Garvey Elevators v. Adams Cty. Bd. of Equal.*, 261 Neb. 130, 621 N.W.2d 518 (2001). In each case, the TERC denied the Board's motion to dismiss after Kohl's rested. The Board then rested its case and again moved the TERC to dismiss Kohl's appeal. In written rulings filed by the TERC, the Board's motions to dismiss were granted, and the decisions of the Board were affirmed. These timely appeals followed.

III. ASSIGNMENTS OF ERROR

Kohl's has assigned the same two assignments of error in the 72nd Street and Maple Road Properties appeals. Kohl's asserts that the TERC erred in affirming the Board's decisions and in refusing to reduce the assessed valuations of the properties. Kohl's also asserts that the TERC erred in finding that Kohl's failed to rebut the statutory presumption.

IV. ANALYSIS

1. STANDARD OF REVIEW

[1] We review the decision of the TERC for error appearing on the record. See Neb. Rev. Stat. § 77-5019(5) (Cum. Supp.

2000). When reviewing an order for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Harrison Square v. Sarpy Cty. Bd. of Equal.*, 6 Neb. App. 454, 574 N.W.2d 180 (1998); *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

2. JUDICIAL NOTICE

We note that at the 72nd Street Property hearing, the TERC took judicial notice of testimony and exhibits from a prior hearing concerning a Kohl's store located at 3551 Oakview Drive, Omaha, Douglas County (Oakview Property). The TERC stated that it would take "[j]udicial notice of all of the relevant items" from the Oakview Property case. At the Maple Road Property hearing, the TERC took judicial notice of testimony and exhibits from the Oakview and 72nd Street Properties cases. The TERC again stated it would take judicial notice of all of the "relevant information" from those prior proceedings. The record reveals that the parties did not object to the TERC taking judicial notice, nor do they raise it as error on appeal. This procedure employed appears inconsistent with prior holdings of this court. See *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997) (Court of Appeals sets forth procedure that should be used to judicially notice information from other proceedings). However, we do not find that it rises to the level of plain error. See *In re Interest of Jaden H.*, 10 Neb. App. 87, 625 N.W.2d 218 (2001) (plain error exists where there is error, plainly evident from record but not complained of at trial, which prejudicially affects substantial right of litigant and is of such nature that to leave it uncorrected would cause miscarriage of justice or result in damage to integrity, reputation, and fairness of judicial process). Since the parties do not raise this issue, we will not decide whether the TERC employed the proper procedure. We will assume, without deciding, that the judicially noticed information is properly before us. However, even with this information, we find the TERC's decision in each case to affirm the Board's decision was supported by competent evidence and was neither capricious nor arbitrary.

3. VALUE OF 72ND STREET AND MAPLE ROAD PROPERTIES

Kohl's contends the Board overvalued the 72nd Street and Maple Road Properties. Kohl's asserts it presented competent evidence to rebut the statutory presumption and prove the Board overvalued the properties. Kohl's is appealing the value of the improvements and land at the 72nd Street Property. Kohl's is only appealing the value of the improvements at the Maple Road Property.

Neb. Rev. Stat. § 77-1511 (Reissue 1996) states that the TERC "shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary." The Supreme Court has held this to mean that there is a presumption that a board of equalization has properly performed its official duties and that in making an assessment, it has acted upon sufficient competent evidence to justify its action. *Garvey Elevators v. Adams Cty. Bd. of Equal.*, 261 Neb. 130, 621 N.W.2d 518 (2001).

Campbell testified at the proceedings for both properties that he used a cost approach and an income approach to value the properties. Each approach will be set out separately below.

(a) Cost Approach

At the 72nd Street Property hearing, the TERC took judicial notice of all of the "relevant" exhibits and testimony from the Oakview Property hearing. At the Maple Road Property hearing, the TERC took judicial notice of all of the "relevant" exhibits and testimony from the Oakview and 72nd Street Properties hearings. One of the exhibits that was noticed at both hearings was the construction costs incurred by Kohl's to build the Oakview Property.

Campbell testified he used a cost approach to value the 72nd Street and Maple Road Properties. Campbell stated he relied on the construction costs incurred when the Oakview Property was built to establish the values of the 72nd Street and Maple Road Properties. The exhibit that states the construction costs for the Oakview Property reveals that this store was built in 1996. However, there is no testimony in the record that establishes whether construction costs have changed since 1996 or whether the same contractor was used to build the 72nd Street and Maple

Road stores, helping to keep the costs constant. Campbell testified that he arrived in Omaha the day before the hearings began and spent “at least a half a day” observing the properties involved in this case.

[2] It is well established that the value of the opinion of an expert witness is no stronger than the facts upon which it is based. *Bottorf v. Clay Cty. Bd. of Equal.*, 7 Neb. App. 162, 580 N.W.2d 561 (1998). The TERC found the cost approach used by Campbell unpersuasive. For the above reasons, the TERC found Kohl’s evidence insufficient to overcome the statutory presumption. We find the TERC’s decisions conform to the law, are supported by competent evidence, and are neither arbitrary, capricious, nor unreasonable. Therefore, this assigned error is without merit.

(b) Income Approach

Campbell testified that he also used an income approach to value the 72nd Street and Maple Road Properties. Campbell testified that his income approach formula came from the “Urban Land Institute Dollars and Cents Comparison of Rent to Sales to Discount Department Stores.” Campbell explained how he reached his valuations of the 72nd Street and Maple Road Properties.

From the record, it appears that none of the parties contest that “market rent” is an important factor in an income approach analysis. Campbell testified that he did not know what the market rent was for other properties in Omaha. Campbell stated that the market rent used to value the 72nd Street and Maple Road Properties was based solely on that particular property and not surrounding properties.

The TERC found that the income approach used by Kohl’s was “flawed.” “[N]othing in the record establishes that this ‘formula’ is commonly or ordinarily used to determine actual or fair market value.” The TERC found that Campbell had limited knowledge about the Omaha area and that nothing in the record supported his testimony about what the market rent should be for the 72nd Street and Maple Road Properties. Therefore, the TERC found Campbell’s testimony was not clear and convincing to rebut the statutory presumption. See *Bottorf, supra*.

After our review of the record, we conclude the TERC did not err. We find the TERC's decisions conform to the law, are supported by competent evidence, and are neither arbitrary, capricious, nor unreasonable. Therefore, this assigned error is without merit.

4. EQUALIZATION OF 72ND STREET AND MAPLE ROAD PROPERTIES

Finally, Kohl's contends that its evidence regarding the assessed value of comparable properties established that the Board's valuations of the 72nd Street and Maple Road Properties were in error. Kohl's is appealing the assessed value of the improvements and land at the 72nd Street Property and only the improvements at the Maple Road Property. The TERC concluded that the comparable properties set forth by Kohl's were not similar or comparable in light of the location of these properties, the improvements to the properties, the age of the properties, and the size of the properties. See *Bottorf, supra*.

At the 72nd Street Property hearing, Kohl's introduced five properties as proposed comparables. These proposed comparable properties are parking lots, located in a flood plain, or in different "field books" or assessment areas. The record from the Maple Road Property hearing reveals that the two comparable properties offered by Kohl's are several years older than the Maple Road Property or "considerably" larger than that property. Additionally, there is no evidence in the record that Campbell took these differences into consideration when discussing these "comparable" properties.

Based on our review of the record, we conclude that the TERC's determination that the properties introduced by Kohl's were not comparable to the properties at issue is supported by competent evidence and is not arbitrary, capricious, or unreasonable. This assigned error is without merit.

V. CONCLUSION

Based on our review of the record, we conclude the TERC did not act arbitrarily or capriciously in affirming the decisions of the Board. The TERC's determination is supported by competent evidence and conforms to the law.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
VERNON E. HAYES, JR., APPELLANT.
639 N.W.2d 418

Filed January 29, 2002. No. A-01-574.

1. **Judgments: Speedy Trial: Appeal and Error.** The 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.** The purpose of Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 1995), is protection of an accused from a criminal charge pending for an undue length of time.
3. **Speedy Trial: Preliminary Hearings: Probable Cause: Waiver: Indictments and Informations.** When an information is filed directly in the district court, the 6-month speedy trial clock begins to run when the district court finds probable cause at a preliminary hearing or when the defendant waives the preliminary hearing.
4. **Speedy Trial: Proof.** To avoid the defendant's absolute discharge from the offense charged, the State, by a preponderance of the evidence, must prove the existence of a period of time which is authorized to be excluded in computing the time for commencement of the defendant's trial in accordance with the speedy trial act.
5. **Speedy Trial: Pretrial Procedure: Motions to Suppress.** Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) specifically excludes the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence.
6. **Speedy Trial: Good Cause.** Where the excludable period properly falls under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude a delay.
7. **Speedy Trial: Motions to Suppress: Appeal and Error.** In the case of a defendant's successful motion to suppress evidence, the motion is not finally granted or determined, unless there is no appeal, until a judge of the Court of Appeals has decided the matter under Neb. Rev. Stat. § 29-116 (Cum. Supp. 2000). The time from the defendant's filing of such a motion until final determination is excluded in the speedy trial calculation.
8. **Speedy Trial: Appeal and Error.** There is a four-part balancing test to determine whether interlocutory appeal infringes upon a defendant's right to a speedy trial: the length of delay, the reason for the delay, the defendant's assertion of his or her right, and prejudice to the defendant. None of the four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant.
9. **Speedy Trial.** An accused cannot generally take advantage of a delay in being brought to trial where the accused is responsible for the delay by either action or inaction.
10. **Speedy Trial: Appeal and Error.** A State's unsuccessful appeal is not *prima facie* evidence of its unreasonableness.
11. **Speedy Trial: Motions to Suppress: Appeal and Error.** Absent undisputed facts and settled law, which would unquestionably make the evidence in dispute subject to suppression, the State's appeal from a district court's suppression order cannot, as a general rule, be considered to have been in bad faith.

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

Dennis R. Keefe, Lancaster County Public Defender, and Kristi J. Egger Brown for appellant.

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

HANNON, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

Vernon E. Hayes, Jr., was charged with homicide by child abuse. He claims that judicial delay, a State's continuance, and an interlocutory appeal initiated by the State deprived him of his statutory and constitutional rights to a speedy trial. Hayes appeals from the order of the district court for Lancaster County which denied his motion to discharge on speedy trial grounds. We address the effect of the prosecution's interlocutory appeal of a trial court's order suppressing evidence on the speedy trial rights of a defendant, a matter of first impression.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 4, 1998, Hayes was charged with homicide by child abuse, by an information filed in the district court for Lancaster County. He was arraigned on December 9, 1998, and his trial was set for February 22, 1999.

On January 7, 1999, Hayes filed motions to discover and to allow depositions. The court granted the motions. On March 26, Hayes filed a motion for a 60-day extension of time to take depositions. On April 1, in response to the motion, the court extended the deposition deadline to June 21, 20 days beyond Hayes' request.

On June 8, 1999, Hayes filed a motion to suppress statements he had made during interrogation by the police. When the matter came on for hearing on August 9, the State requested a continuance because the particular prosecutor involved had been assigned to the case only 1 week before the hearing. The new prosecutor told the court that she needed the continuance because she had not had adequate time to prepare for the hearing and because an FBI agent, formerly with the Lincoln Police Department, had to be

flown in to testify. The continuance was granted over Hayes' objection, and the court noted that it would determine later, if the need should arise, whether the time used by the State's continuance would be charged to the State. The hearing on Hayes' motion to suppress was continued to September 8. The hearing actually began on September 29, having been continued by the court from September 8. The judge's bailiff testified that the judge was unavailable on September 8 due to vacation. The bailiff testified that it would have been her practice to set the hearing for the next available date and that she "[p]robably" did so. However, the bailiff could not testify with absolute certainty that September 29 was in fact the next available date.

The evidence was not concluded on September 29, 1999, so the suppression hearing was scheduled to continue on October 14. But Hayes' counsel was ill, and the hearing was continued to November 19. The hearing was concluded on November 19. On May 9, 2000, the court sustained Hayes' motion to suppress.

The State appealed the court's decision to suppress Hayes' statements to a single judge of this court pursuant to Neb. Rev. Stat. § 29-824 (Cum. Supp. 2000). See *State v. Hayes*, No. A-00-515, 2000 WL 1701666 (Neb. App. Nov. 14, 2000) (not designated for permanent publication). The Honorable Everett O. Inbody affirmed the district court's judgment by an opinion released November 14, 2000. The mandate was issued on December 19. On December 21, the district court entered judgment on the mandate and allowed the State to endorse 19 additional witnesses.

On December 29, 2000, Hayes filed a motion to allow depositions of the new witnesses and a motion for change of venue. Hayes was also given leave at that time to reopen a previous rule 404 motion, see Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), and the State was ordered to disclose any potential rule 404 evidence to Hayes. The motion to allow depositions was granted that day. The State made a motion on January 19, 2001, to endorse additional witnesses, and that motion was heard on January 22. The change of venue motion was also heard on January 22.

After disclosure from the State, the court determined that a rule 404 hearing was necessary with respect to three witnesses.

A 2-day rule 404 hearing was scheduled for March 14, 2001, which continued on March 15, and ultimately was finished on March 22. The court ordered simultaneous written arguments to be submitted on April 6 and simultaneous written replies to be submitted on April 13. The judge's minutes indicate that an order was filed on the motion on May 15, but the order is not contained in the transcript.

On May 3, 2001, Hayes filed a motion to discharge on speedy trial grounds. The court denied Hayes' motion for change of venue on May 11. The motion to discharge was heard on May 8, and it was also denied on May 11. Hayes appeals.

II. ASSIGNMENT OF ERROR

Hayes claims that the district court erred in overruling his motion for absolute discharge on speedy trial grounds under the speedy trial act, Neb. Rev. Stat. §§ 29-1207 through 29-1209 (Reissue 1995), as well as under the Nebraska and U.S. Constitutions.

III. STANDARD OF REVIEW

[1] As a general rule, the 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); *State v. Miller*, 9 Neb. App. 617, 616 N.W.2d 75 (2000).

Constitutional interpretation and interpretation of a statute present questions of law. See, *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999); *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998). In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

IV. ANALYSIS

1. STATUTORY SPEEDY TRIAL

[2] The purpose of Nebraska's speedy trial act is protection of an accused from a criminal charge pending for an undue length of time. *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991).

Section 29-1207(1) and (2) provides that “[e]very person . . . informed against . . . shall be brought to trial within six months” and that the “six-month period shall commence to run from the date . . . the information [is] filed.” However, Neb. Rev. Stat. § 29-1607 (Reissue 1995) provides that “[n]o information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor”

[3] The Nebraska Supreme Court held in *State v. Boslau*, *supra*, that these two statutes, read together, mandate that when an information is filed directly in the district court, the 6-month speedy trial clock begins to run when the district court finds probable cause at a preliminary hearing or when the defendant waives the preliminary hearing. *State v. Thompson*, 10 Neb. App. 69, 624 N.W.2d 657 (2001).

The information against Hayes was filed in the district court, but there is no indication in the record that a preliminary hearing ever took place. Nor is there a waiver of the preliminary hearing in our record. Therefore, we calculate the time in which to try Hayes from the date of the information, as did the district court. This is the date most favorable to Hayes.

Speedy trial time is calculated by excluding the date the information was filed, counting forward 6 months, backing up 1 day, and then adding the excludable time periods to that date. See, *State v. Sumstine*, *supra*; *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981); *State v. Borland*, 3 Neb. App. 758, 532 N.W.2d 338 (1995). The information against Hayes was filed on December 4, 1998, making May 4, 1999, the latest permissible trial date, before the addition of excludable time periods. Hayes filed his motion for discharge on May 3, 2001, some 30 months after the information was filed.

[4] To avoid the defendant’s absolute discharge from the offense charged, the State, by a preponderance of the evidence, must prove the existence of a period of time which is authorized to be excluded in computing the time for commencement of the defendant’s trial in accordance with the speedy trial act. §§ 29-1207(4) and 29-1208; *State v. Sumstine*, *supra*. Section 29-1207(4)(a) provides that in computing the time for trial, we exclude “the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence,

motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue.”

(a) State’s Continuance While Hayes’
Motion to Suppress Was Pending

The trial court excluded the entire period from June 8, 1999, the date on which Hayes filed his motion to suppress, until May 9, 2000, the date on which the trial court ruled on the motion. It did not, however, specifically discuss the continuance given to the State within that timeframe. Hayes therefore argues that “[t]he District Court did not specifically find good cause for the continuance requested by the State on August 9, 1999, as none existed, and the time from August 9, 1999, to September 29, 1999, should not be excluded in calculating speedy trial time.” Brief for appellant at 18.

[5,6] Section 29-1207(4)(a) specifically excludes “the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence.” The trial court was not required to do a good cause analysis with respect to the continuance requested by the State on August 9, 1999, because it occurred within an already running excludable period occasioned by Hayes’ motion to suppress. A time period absolutely excluded by § 29-1207(4)(a) does not implicate § 29-1207(4)(f) (delays not specifically enumerated within statute may be excluded only for good cause). See *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997) (holding that where excludable period properly falls under § 29-1207(4)(a) rather than catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude delay).

The State’s continuance was properly excluded under § 29-1207(4)(a) because it fell within a timeframe which was already excluded by the pendency of Hayes’ motion to suppress.

(b) Briefing Extensions Included Within
Time for Motion to Suppress

According to the trial judge’s minutes, on January 6, 2000, the court extended the briefing schedule on Hayes’ motion to suppress, making the simultaneous replies due on January 31 instead of January 17 as it had ordered on November 19, 1999. Hayes argues that the time from January 17 to 31, 2000, should

be included in the speedy trial time. The same analysis as above controls as the time for briefing was encompassed in the time for resolution of Hayes' motion to suppress.

(c) Appeal of Motion to Suppress by Prosecution

Hayes contends that the period of time while the State's appeal of the district court's order sustaining his motion to suppress was pending in this court on single-judge appellate review cannot be excluded from the speedy trial calculation. Hayes focuses on the period from May 9, 2000, when his motion to suppress was sustained in the district court, to December 21, 2000, when the district court entered judgment on this court's mandate. Nebraska courts have not yet specifically addressed whether the time for an interlocutory appeal, initiated by the State, is excludable time from the 6-month speedy trial period. Other jurisdictions provide guidance.

In *State v. Young*, 136 Idaho 113, 29 P.3d 949 (2001), the Supreme Court of Idaho held that the State's interlocutory appeal from an order excluding evidence justifies a delay in the trial under the speedy trial statute, because if the evidence was erroneously excluded and, as a result, the defendant was acquitted, a later appeal could not correct that error.

The Supreme Court of Kansas has said: "We hold that from the time the State files its timely notice of interlocutory appeal, pursuant to K.S.A. 22-3603, the statutory speedy trial provisions are tolled until the mandate is received by the trial court." *State v. Brown*, 263 Kan. 759, 762-63, 950 P.2d 1365, 1368 (1998).

Likewise, the Superior Court of Pennsylvania has held that "excusable delay" for purposes of its speedy trial statute includes delay caused by appellate review of pretrial motions, even if initiated by the State. *Com. v. DeBlase*, 542 Pa. 22, 31, 665 A.2d 427, 431 (1995).

In the instant matter, the trial court noted that § 29-1207(4)(a) excludes the time until "final disposition" of the defendant's pretrial motion and that final disposition did not occur until the appeal was over. While we are required to reach a conclusion independent of the trial court on questions of law, *State v. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001), the trial court's interpretation of § 29-1207 is correct.

In *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), the court held that a defendant's pretrial motion is finally disposed of on the date that it is granted and that the excludable period attributable to such a motion is calculated from the date the motion was filed until the date the motion was granted. The *Ward* court then addressed the effect of an interlocutory appeal:

We have held, with reference to § 29-1207(3), that the 6-month period in which the State is to retry a defendant following a successful appeal is fixed by reference to the date on which the district court first takes action pursuant to the mandate of the appellate court. *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999). Our rationale for that holding was that the date of the district court's first action on the mandate was the date on which the district court had reacquired jurisdiction over the case from the appellate courts. *Id.* See, also, *State v. Belmarez*, 254 Neb. 436, 577 N.W.2d 255 (1998).

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

257 Neb. at 386, 597 N.W.2d at 620-21.

[7] The interlocutory appeal in *Ward* was initiated by the defendant, but the foregoing holding and rationale apply equally to interlocutory appeals commenced by the State. In this way, regardless of whether the State or the defendant appeals a district court ruling on a defendant's motion, the time until the appellate court has concluded its review is excluded. In the case of a defendant's successful motion in the district court to suppress evidence, the motion is not finally granted or determined, unless there is no appeal, until a judge of the Court of Appeals has decided the matter under Neb. Rev. Stat. § 29-116 (Cum. Supp. 2000). The time from the defendant's filing of such a motion until final determination is excluded in the speedy trial calculation.

Finally, the State's right to appeal would be largely a nullity if the speedy trial clock were running during an appeal's pendency. This concern has been noted in other jurisdictions where the State has a statutory right to appeal. See, e.g., *State v. Brown*,

supra. Indeed, it would be a perverse result if the appellate judge were to reverse the suppression, but no time was left on the speedy trial clock because it had been running while the State sought reversal of a suppression order. In short, to avoid rendering the State's statutory right to appeal suppression orders meaningless, we hold that the speedy trial clock does not run while the State pursues such an appeal.

As a result, the 561 days from June 8, 1999, when Hayes filed the motion to suppress, until December 21, 2000, when the district court acted on this court's mandate, are excluded from the speedy trial calculation.

(d) Alleged Judicial Delay

Hayes argues that the trial court unreasonably delayed from November 19, 1999, the last day of testimony before the district court on the motion to suppress statements, to May 9, 2000, when the district court ruled on the motion to suppress, and during the time from submission of the motion for change of venue on January 22, 2001, to its denial on May 11, 2001. Hayes relies on *State v. Wilcox*, 224 Neb. 138, 395 N.W.2d 772 (1986), to argue that absent a showing by the State of good cause, judicial delay does not stop the running of the 6 months in which the State has to try the defendant, and he suggests we apply the Case Progression Standards for district courts.

Wilcox is distinguishable here in exactly the same way that the Nebraska Supreme Court distinguished it in *State v. Kinser*, 256 Neb. 56, 59, 588 N.W.2d 794, 797 (1999), where the court made it clear that § 29-1207(4) does not specify when the 6-month clock begins to run, but, instead, those periods during which its running is delayed.

Kinser relies on *State v. Wilcox*, 224 Neb. 138, 140, 395 N.W.2d 772, 774 (1986), in which we stated: "Neither does judicial delay, absent a showing by the State of good cause, toll the [speedy trial] statute . . ." *Wilcox* addressed the issue of whether delays by a trial court could be excluded from the 6-month period under § 29-1207(4). *Wilcox* is distinguishable from the present case, however, in that the clock was running at the time of the alleged delay. Here, Kinser is claiming that alleged delays occurring during the

pendency of an appeal triggered the commencement of the 6-month period for retrial. We reject this argument because it is clear from the language of § 29-1207(3) that this 6-month period is triggered by the appellate court's mandate, not by the opinion which precedes the mandate. We need not determine whether any portion of the time during which Kinser's appeal was pending was an excludable period of delay under § 29-1207(4) because under the plain language of § 29-1207(3), the 6-month period was not running at the time of the alleged delays.

The "judicial delays" about which Hayes complains occurred while the "clock was stopped," because they occurred while his motion to suppress was pending and before its final determination. We reiterate the rule from *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997), that excludable time periods because of a defendant's motion falling within the ambit of § 29-1207(4)(a) do not involve, or require, consideration of whether any delay inherent in the resolution of the motion was reasonable. Therefore, the Case Progression Standards do not affect this case.

(e) Trial Court's Addition of Time to
That Requested by Hayes

Hayes complains of the 20-day period from June 1 to 21, 1999, which the court added to the 60 additional days it granted, at Hayes' request, for the taking of depositions. The time during which depositions are being taken, after a motion to do so has been granted, is not excluded time under § 29-1207(4)(a), but may be excluded under § 29-1207(4)(f), depending on whether there is good cause for such delay because of the taking of depositions. *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998). The trial court excluded the first 60 days, finding good cause and citing *Murphy, supra*. No error is assigned to that decision, but we wanted to clarify why we exclude the first 60 days while depositions were being taken in our final resolution of this case.

The trial court also noted in its order deciding the motion for discharge that June 21, 1999, was the first day of the first regularly scheduled jury term following the requested extension. The

court also excluded the extra 20 days for good cause under § 29-1207(4)(f) because Hayes' trial "could not have started before June 21, 1999 (unless the Court were to call a special jury term)." The defendant must accept delay as a consequence of making pretrial motions for purposes of the speedy trial statute, where the delay is not inordinate or unreasonable. § 29-1207(4)(a); *State v. Borland*, 3 Neb. App. 758, 532 N.W.2d 338 (1995). However, the analysis of this issue by the district court fails to take into account the fact that on June 8, 1999, Hayes filed his motion to suppress, which without question starts a period of excludable time. Thus, the 20 days really are not at issue, as it is only the time from June 1 until the motion to suppress was filed on June 8, a period of only 7 days, that is conceivably includable time. Under Neb. Rev. Stat. § 27-201 (Reissue 1995), the court was entitled, without request, to take judicial notice of its own jury term scheduling as a "fact . . . not subject to reasonable dispute" because it was "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The absence of a regularly scheduled jury term is certainly good cause for delay, and a 7-day period is not inordinate or unreasonable. See *State v. Borland*, *supra*.

To get a trial started before June 8, 1999, meant that there were only 7 days for the court to call a special jury, even if that were reasonable and necessary, which it is not. We are aware that holding a jury trial outside of the regular jury term is a complex undertaking, with associated additional costs. Given that only 7 days are involved and the difficulty of convening a special jury, there was plainly good cause to add what turns out to be only 7 days to Hayes' requested continuance because a special jury setting was not required. The time from June 1 to 8 was properly excluded.

2. RESOLUTION

Having excluded all time periods which Hayes claims are attributable to the State, we find that Hayes' statutory right to a speedy trial was not infringed. We conclude this portion of our opinion by calculating, in summary fashion, the excluded and the included days under the Nebraska speedy trial act:

December 4, 1998	Information filed.
March 26, 1999	Hayes' motion for additional time to take depositions filed. 114 days included
April 1, 1999	Hayes' extra time to take depositions running.
June 8, 1999	Hayes' motion to suppress filed. 69 days excluded
June 9, 1999	Motion to suppress pending.
December 21, 2000	District court acts on Court of Appeals mandate re suppression. 561 days excluded (extra day for leap year)
December 29, 2000	Hayes' motion to reopen rule 404 hearing. 8 days included
December 30, 2000	Rule 404 hearing at Hayes' request pending.
May 3, 2001	Hayes files motion to discharge. 125 days excluded
Totals as of filing date of motion to discharge:	122 days included 755 days excluded

Consequently, when Hayes filed his motion to discharge, only 122 days of the allowable 6 months had run. Thus, the trial court properly denied the motion to discharge on statutory grounds. Obviously, the time while Hayes' appeal of the motion to discharge has been pending before this court is excluded.

3. CONSTITUTIONAL SPEEDY TRIAL

The constitutional right to a speedy trial is found in U.S. Const. amend. VI and Neb. Const. art. I, § 11. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992).

[8] In *United States v. Loud Hawk*, 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986), the U.S. Supreme Court applied a four-part balancing test to determine whether interlocutory appeals infringed upon a defendant's right to a speedy trial. The

test, adopted from *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), assesses the length of delay, the reason for the delay, the defendant's assertion of his or her right, and prejudice to the defendant. According to the Supreme Court, the *Barker* test furnishes the flexibility to take account of the competing concerns of orderly appellate review on the one hand and a speedy trial on the other. Determining whether a defendant's constitutional right to a speedy trial has been violated requires the same balancing test under the Nebraska Constitution as under the federal Constitution. The courts must approach each case on an ad hoc basis. None of the four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

Hayes first claims that the period of delay was excessive in light of the reason for the delay: "Several months went by with the District Court taking certain defense motions under advisement, exceeding the periods allowed under the Case Progression Standards Over seven months of the time . . . was spent in the State's interlocutory appeal" Brief for appellant at 21. As reflected in the resolution of the statutory claim, the great majority of the time since the filing of the information has been consumed by obtaining final resolutions of motions made by Hayes. Thus, the question really boils down to whether the State unreasonably delayed the resolution of Hayes' motions.

Hayes' motion to suppress was of great significance for both the defense and the State, and it consumed a considerable amount of time in the trial court—from June 8, 1999, through May 8, 2000, or approximately 11 months. However, the record reveals that there was no inordinate or unreasonable delay as the motion progressed to disposition. A review of the procedural history of the motion to suppress shows that in August 1999, the State requested a continuance because a different prosecutor had been assigned, a perfectly reasonable request. In September, the motion was heard, though later in that month than originally planned because the court was closed for vacation. In October,

the court attempted to resume the hearing, but Hayes' counsel was ill; in November, the court resumed and concluded the hearing. Briefs were due at the end of January 2000, and the court entered its order on May 9, 2000. In light of the importance of the motion to both sides and the complexity of the issues involved in the motion to suppress, we cannot say that the trial court delayed unreasonably in disposing of the motion.

On December 29, 2000, Hayes filed a motion to allow taking of depositions of newly endorsed witnesses and a change of venue motion. These motions were heard on January 22, 2001, consuming an additional month. But, additionally, at Hayes' request on December 29, 2000, the rule 404 hearing was reopened. The rule 404 hearing was held on March 14, 15, and 22, 2001, but briefing was not completed until April 13, and the matter was still under advisement less than 1 month later when Hayes filed his motion for discharge on May 3.

[9] Much of the "delay" Hayes attributes to the State occurred during timeframes when Hayes' pretrial motions were being handled by the court. The State's motion for continuance in August 1999 was to get a new prosecutor involved and prepare as well as to transport a material witness from out of state for his testimony. The continuance was granted during the pendency of Hayes' motion to suppress. The State then appealed the court's ruling on the motion to suppress in an attempt to retain evidence important to its case. After our review of Judge Inbody's opinion upholding the suppression, we cannot conclude that the appeal was taken for the purpose of delay or in bad faith. The suppression issue was complex. The State's subsequent request to endorse additional witnesses was necessary because key evidence was eliminated by Judge Inbody's affirmance. In any event, as the trial court pointed out in its order, "the additional discovery, including the 404 hearing, [was] accomplished while the case was delayed, anyway, by the Defendant's motion to change venue." An accused cannot generally take advantage of a delay in being brought to trial where the accused is responsible for the delay by either action or inaction. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

[10,11] The district court order noted that under *United States v. Loud Hawk*, 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640

(1986), certain factors, if present, may tilt the balance in favor of the defendant in a constitutional speedy trial challenge. For instance, the State's unreasonableness or bad faith in bringing about delays may mitigate in favor of the accused. In this case, however, it is clear that the prosecution did not act unreasonably or in bad faith. We cannot agree with Hayes that the State's unsuccessful appeal is *prima facie* evidence of its unreasonableness. *United States v. Loud Hawk, supra*, does note that winning an appeal is *prima facie* evidence of its reasonableness. But the Court does not indicate that the converse is necessarily true, and to us, that proposition would be inherently illogical. We conclude that absent undisputed facts and settled law, which would unquestionably make the evidence in dispute subject to suppression, the State's appeal from a district court's suppression order cannot, as a general rule, be considered to have been in bad faith. That clearly does not apply here. Our examination of Judge Inbody's decision reveals the complexity of the suppression issue, and even though the State was unsuccessful, it cannot be said that the appeal was in bad faith. Thus, appealing the decision was reasonable, as was the need to endorse additional witnesses upon Judge Inbody's affirmance.

The third factor, Hayes' assertion of his right to a speedy trial, weighs in Hayes' favor. It is clear that Hayes asserted his right at key moments during the trial, i.e., when the State requested a continuance.

The fourth factor in the balancing test is prejudice to the defendant. Hayes argues that his "due process rights were negatively affected and his speedy trial rights denied," particularly by the State's endorsement of additional witnesses. Brief for appellant at 24. But, the need for additional witnesses flows directly from Hayes' successful motion to suppress, which obviously weakened the State's case. Adding witnesses, after other evidence is suppressed, is not the sort of prejudice which we believe the Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), had in mind. There is no hint that the delay caused Hayes' defenses to be weakened, that he lost favorable evidence or witnesses, or that he otherwise was in a worse position as a result of the delay during the State's appeal, which would be the sort of prejudice the Court in *Barker* meant. In fact, winning the

appeal improved his situation because Judge Inbody's decision was the final word—and it was favorable to Hayes.

Finally, Hayes argues he was prejudiced by delay because he “has been incarcerated the entire time that the case has been pending.” Brief for appellant at 24. While we are not insensitive to the length of time Hayes has spent in jail awaiting trial, most of the additional time was a direct result of Hayes' own defense strategy and, of course, is only really prejudicial should he be found not guilty.

As said earlier, an accused cannot generally take advantage of a delay in being brought to trial where the accused is responsible for the delay by either action or inaction. *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Forgoing the motion to suppress and taking his chances on a quick trial and perhaps getting out of jail was an option which Hayes eschewed in favor of litigating about the admissibility of his statements. We can find no prejudice whatsoever to Hayes, except his incarceration, which is really the result of being bound over for trial and being unable to make bail rather than delay in the litigation process.

After considering the four factors from *Barker v. Wingo*, *supra*, we find that only one, the assertion of the right to a speedy trial, cuts in Hayes' favor. Therefore, we agree with the trial court that Hayes' constitutional right to a speedy trial was not infringed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
LAMONT A. ROBINSON, APPELLANT.

639 N.W.2d 432

Filed January 29, 2002. No. A-01-671.

1. **Blood, Breath, and Urine Tests.** There are four foundational requirements which the State must establish to put the results of a breath test into evidence: (1) The testing device was properly working at the time of testing, (2) the person administering the test was qualified and held a valid permit, (3) the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) all other statutes were satisfied.

2. **Blood, Breath, and Urine Tests: Evidence: Proof.** Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.
3. **Drunk Driving: Evidence: Proof.** Alcohol-related violations of Neb. Rev. Stat. § 60-6,196 (Reissue 1998) may be proved by establishing either that one was in actual physical control of a motor vehicle while under the influence or by establishing that one was in actual physical control of a motor vehicle while having more than the prohibited amount of alcohol in his or her body.
4. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed only if the sentence complained of is an abuse of discretion.

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

Thomas C. Riley, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

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

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Lamont A. Robinson appeals from his conviction and sentence for fourth-offense driving under the influence (DUI). On appeal, Robinson asserts that the trial court erred in receiving the results of an Intoxilyzer test without sufficient foundation, that the trial court erred in convicting him without sufficient evidence, and that the trial court erred in imposing an excessive sentence. We find no merit to any of these assigned errors, and accordingly, we affirm.

II. BACKGROUND

On February 17, 2000, an information was filed charging Robinson with DUI. On February 24, Robinson pled not guilty. On October 6, Robinson waived his right to be tried by a jury, and the case proceeded to a bench trial commencing on November 29.

Officer Scott Gray of the Omaha Police Department testified that he was on patrol with his partner, Officer Charles DiDonato, on February 15, 2000. Gray testified that the officers observed a vehicle stopped in an alley where there were signs posted indicating there was to be “no stopping, standing or

parking, either side, any time." Gray testified that the lights of the stopped vehicle were "[o]ff." The officers ultimately approached the vehicle and observed that "it had a taillight lens on the left side that was broken" and "displayed white light to the rear." Based on the broken taillight and the vehicle's being parked in a no-parking area, the officers made contact with the driver of the vehicle.

Gray testified that the driver initially identified himself as Sim Robinson, but that the officers eventually discovered his correct name to be Lamont Robinson. Gray testified that upon contact with Robinson, Gray "[n]oticed some signs of intoxication, including red glassy eyes and slurred speech and strong odor of alcoholic beverage." DiDonato testified that he also observed signs of intoxication, including "bloodshot glassy eyes."

DiDonato testified that he asked Robinson to submit to field sobriety tests. DiDonato related to the court his background and training to administer such tests, including that he had administered field sobriety tests "[s]everal dozen times" before. DiDonato testified that prior to having Robinson submit to any field sobriety tests, he asked Robinson if he was on any medication or had any physical impairments which would affect Robinson's performance on the tests. DiDonato then administered the "horizontal gaze nystagmus" test, and he testified that Robinson showed signs of impairment based on the test. According to DiDonato, he attempted to have Robinson perform other field sobriety tests, including "an ABC test" and a "count backwards" test, but Robinson "stated he was unable to perform" those tests.

DiDonato testified that Robinson voluntarily submitted to a breath test at police headquarters. The test was administered by Richard Ingraham, an Omaha Police Department crime laboratory technician who has been trained and has a permit to use the Intoxilyzer for administering breath tests. The State presented evidence to establish that the various maintenance and operation requirements outlined in title 177 of the Nebraska Administrative Code were complied with. One such requirement is a "190 day check" wherein the Intoxilyzer must be "checked with a simulator check sample within 190 days prior to an analysis." 177 Neb. Admin. Code, ch. 1, § 007.06B (1998). The State

attempted to adduce evidence from the person at the Omaha Police Department responsible for the maintenance of the Intoxilyzer, Karenina Smith, concerning compliance with the 190-day check requirement.

At trial, the evidence indicated that exhibit 10, the document from the Department of Health and Human Services (DHHS) which indicates the results of the 190-day check performed on February 5, 2000, indicated that the serial number for the Intoxilyzer being checked was "0660004370," while other evidence indicated that the serial number for the Intoxilyzer at the Omaha Police Department used to test Robinson was "66-004370." Because the serial number on exhibit 10 did not match the serial number on the Intoxilyzer at the Omaha Police Department, the court initially sustained a foundational objection to the admission of exhibit 10. The court granted the State a continuance, apparently to allow the State to obtain the correct documentation.

When the trial commenced again, the State presented exhibit 14, a certified document from DHHS concerning the February 5, 2000, 190-day check on the Intoxilyzer at the Omaha Police Department. Exhibit 14 is a certified document from the State "Administrator of 177 NAC 1" and indicates that the "serial number of [the testing] device and [the] percent deviation" had been corrected from exhibit 10. The testimony concerning exhibit 14 indicated that in addition to having the corrected serial number, the exhibit also indicated that the sample tested on February 5, 2000, deviated from the target value by 5.03 percent, while exhibit 10 had indicated a deviation of 1 percent, although both exhibits indicate the exact same target value and actual result (indicating that the difference between the two concerning the amount of deviation was the result of a mathematical error on exhibit 10). Both deviations are within the allowable margin for the 190-day check to indicate the Intoxilyzer was accurate and could be used to test for alcohol content.

The court received exhibit 14, but reserved ruling on whether the State had established compliance with the Nebraska Administrative Code concerning maintenance of the Intoxilyzer. It appears that Robinson was asserting at trial that the State had

failed to show compliance with the code, because the State had not demonstrated that the results of the 190-day check were in the physical possession of the Omaha Police Department on the date Robinson was tested.

During the course of the trial, DiDonato testified that in his opinion, exclusive of the breath test results, Robinson was impaired. Additionally, the court received the test card printed out by the Intoxilyzer when Robinson was tested, which indicated that Robinson's breath alcohol content was .131 grams of alcohol per 210 liters of breath. Smith gave her opinion that the Intoxilyzer was operating properly on the date of Robinson's test, and Ingraham, who actually administered the breath test, testified that the Intoxilyzer was working properly on the date of Robinson's test.

At the conclusion of the evidence, the court took requested letter briefs from the attorneys concerning whether the 190-day-check records had to be in the physical possession of the Omaha Police Department on the date of the test to comply with the Nebraska Administrative Code and whether DUI could be proven through the opinion testimony of an officer exclusive of the Intoxilyzer test results. On March 13, 2001, the court entered a verdict of guilt. The court ruled that the necessary foundational requirements for the admission of the Intoxilyzer test were satisfied, ruling on Robinson's trial objection to exhibit 14 on which ruling had been reserved during the trial. The court then found Robinson guilty. Robinson's conviction was then enhanced to a fourth-offense DUI through the admission of prior convictions. On June 11, the court sentenced Robinson to 1 year in jail, revoked Robinson's driver's license for 15 years, and fined Robinson \$1,000. Robinson then filed this timely appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Robinson has assigned three errors. First, Robinson asserts that the trial court erred in receiving the results of the Intoxilyzer without proper foundation. Second, Robinson asserts that the trial court erred in finding sufficient evidence to support a conviction. Third, Robinson asserts that the trial court erred in imposing an excessive sentence.

IV. ANALYSIS

1. FOUNDATION FOR TEST RESULTS

Robinson first asserts that the court erred in receiving the results of the Intoxilyzer test because there was not sufficient foundation for their receipt at trial. Specifically, Robinson asserts that the court erred in finding that exhibit 14, the results of the 190-day check, were properly maintained by the Omaha Police Department. Robinson argues that the 190-day-check results were not properly maintained, that the Omaha Police Department therefore failed to comply with the administrative requirements of the Nebraska Administrative Code, and that there was therefore inadequate foundation for admission of the test results. We find that the State presented reasonable proof that the Intoxilyzer was accurate and functioning properly and that, accordingly, there was adequate foundation for admission of the test results.

[1] In *State v. Bullock*, 223 Neb. 182, 388 N.W.2d 505 (1986), the Nebraska Supreme Court noted that there are four foundational requirements which the State must establish to put the results of a breath test into evidence: (1) The testing device was properly working at the time of testing, (2) the person administering the test was qualified and held a valid permit, (3) the test was properly conducted under the methods stated by DHHS, and (4) all other statutes were satisfied. In the present case, Robinson asserts that the State failed to adequately prove compliance with the regulations established by DHHS for ensuring that the testing device was properly working, a requirement of Neb. Rev. Stat. § 60-6,201 (Reissue 1998). We conclude, however, that the State did adequately prove compliance with the regulations.

The Nebraska Administrative Code provides that “‘testing devices used for direct breath testing shall have been checked within 190 days prior to an analysis by a person responsible for maintenance and calibration.’” *State v. Lowrey*, 239 Neb. 343, 348, 476 N.W.2d 540, 543 (1991). See § 007.06B. Additionally, the code requires that the holder of a permit to administer breath tests shall “[m]aintain or have access to . . . [t]he results of the Department of Health and Human Services Regulation and Licensure report of the periodic 190 day device check sample.”

§ 007.05E. Because the evidence at trial indicated that on the date Robinson was tested, the Omaha Police Department did not have exhibit 14 in its physical possession, Robinson asserts that this regulation was not complied with and that the foundational requirements for admission of the breath test were not satisfied. We disagree.

[2] The Nebraska Supreme Court has repeatedly held that reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence. *State v. Lowrey*, *supra*; *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988). See, also, *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969). Exhibit 14, although prepared in December 2000, is a certified document from DHHS indicating that a 190-day check was performed on the Intoxilyzer used to test Robinson on February 5, 2000, that the check indicated that the sample tested within the allowable margins of deviation, and that the 190-day check was in compliance with the Nebraska Administrative Code requirements. The code requires that the permit holder “[m]aintain or have access to” the state-certified results of the 190-day check, not that such results be within the physical possession of the permit holder at all times. See § 007.05. The State adduced reasonable proof that this section was complied with and reasonable proof that the Intoxilyzer was operating properly on the date in question. As noted above, such reasonable proof is all that is required to meet the foundational requirements of *State v. Bullock*, *supra*. This assigned error is without merit.

2. SUFFICIENCY OF EVIDENCE

Robinson next asserts that there was insufficient evidence to support his conviction for DUI. Robinson’s argument concerning the sufficiency of the evidence concerns entirely the opinion testimony of the involved police officer, apparently premised on the notion that we would agree with Robinson that the test results were improperly received. However, in light of our analysis above, the trial court properly had before it the results of the Intoxilyzer test indicating a breath alcohol content level of .131 grams of alcohol per 210 liters of breath.

[3] Neb. Rev. Stat. § 60-6,196 (Reissue 1998) provides, in relevant part:

(1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:

(a) While under the influence of alcoholic liquor or of any drug;

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

Alcohol-related violations of this statutory prohibition may be proved either by establishing that one was in actual physical control of a motor vehicle while under the influence or by establishing that one was in actual physical control of a motor vehicle while having more than the prohibited amount of alcohol in his or her body. See *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987). As such, because we have already concluded that the State had before it test results indicating that Robinson's blood alcohol content was .131, the court had sufficient evidence to find him guilty of DUI. This assigned error is without merit.

3. EXCESSIVE SENTENCE

Finally, Robinson asserts that the trial court imposed an excessive sentence. Although Robinson acknowledges that the sentence imposed was within the statutory limits for his offense, fourth-offense DUI, he nonetheless asserts that the trial court abused its discretion by not imposing probation. Robinson argues that "[t]here is no question that in the present case, no one was harmed or injured, no erratic or dangerous driving by [Robinson] was evident, and there is no person who stands victimized." Brief for appellant at 16. Robinson also asserts that "[i]t is clear that [he] was, if over the limit at all, only by a small amount and that he contemplated no harm by his actions." *Id.*

[4] Sentences within statutory limits will be disturbed only if the sentence complained of is an abuse of discretion. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). There is no assertion that the sentence imposed is not within the statutory limits. The trial court noted that this is Robinson's fourth DUI conviction, that he had been fined between the date of the present offense and the sentencing hearing for having an open container of liquor, that he denied having any drinking problem or

needing any treatment, and that the probation officer recommended against probation. The court further noted that because of Robinson's history, the court was worried that somebody would "get killed" if he continued to drink and drive. On the record before us, we find no abuse of discretion. This assigned error is without merit.

V. CONCLUSION

The trial court did not err in receiving the Intoxilyzer results. There was sufficient evidence to support the conviction, and the sentence imposed was not excessive. The judgment is affirmed.

AFFIRMED.

PATTY L. WRIGHT, PERSONAL REPRESENTATIVE OF THE
ESTATE OF RAQUEL S. WOODRUFF, APPELLANT, v.
PRESTON RESOURCES, INC., ET AL., APPELLEES.

639 N.W.2d 149

Filed February 5, 2002. No. A-00-1056.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a motion for summary judgment, the question is not how a factual issue is to be decided, but, rather, whether any issue of material fact exists.
3. ____: _____. In reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
5. **Summary Judgment: Proof.** Summary judgment is properly granted only when the movant satisfactorily shows that no genuine issue of material fact appears from the pleadings, admissions, depositions, affidavits, and stipulations in the record or from the reasonable inferences deducible from that evidence and that the movant is entitled to judgment as a matter of law. Once the movant has met this burden, the nonmoving party has the burden of showing that an issue of material fact exists that prevents judgment as a matter of law.
6. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.

7. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
8. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate cause, and damages.
9. **Negligence: Invitor-Invitee: Licensee: Trespass.** For causes of action arising prior to the decision in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), a landowner's duty of care depends upon whether the plaintiff is classified as an invitee, a licensee, or a trespasser.
10. **Trespass: Words and Phrases.** A trespasser is legally defined as a person who enters or remains upon the premises of another without a privilege to do so created by the possessor's consent, either express or implied.
11. **Negligence: Trespass.** An owner of premises owes only a very limited duty to refrain from willfully or wantonly injuring a trespasser.
12. **Negligence: Intent.** For conduct to be willful or wanton, two criteria must be met: First, the defendant must have actual knowledge of the danger. Second, the defendant must have intentionally failed to act to prevent harm which was reasonably likely to result.

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

Vincent M. Powers, of Vincent M. Powers & Associates, for appellant.

Daniel P. Chesire and Raymond E. Walden, of Lamson, Dugan & Murray, for appellees.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Patty L. Wright, personal representative of the estate of Raquel S. Woodruff, appeals from an order of the district court for Douglas County granting summary judgment to Preston Resources, Inc., Preston Investments, Inc., William Preston, and Linda Preston (hereinafter collectively referred to as "Preston"), in this premises liability action arising out of the murder of Woodruff in the basement of an apartment building owned and managed by Preston. Because we agree with the district court that there exists no genuine issue of material fact, we affirm.

II. BACKGROUND

On August 22, 1997, Wright filed an amended petition in the district court for Douglas County, Nebraska. Wright alleged that

Preston was the owner and manager of certain real property located in Omaha, Nebraska. Wright alleged that Woodruff was "killed by a person or persons" while on the premises owned and managed by Preston on or about June 16, 1995. Wright alleged negligence on the part of Preston and sought recovery in tort for damages arising out of Woodruff's death.

On September 3, 1997, Preston filed an answer to the amended petition. Preston alleged that Woodruff was a trespasser and that she was killed by another trespasser on the premises. Preston denied any allegations of negligence, affirmatively alleged Woodruff was guilty of contributory negligence or assumption of the risk, and alleged that Wright failed to state sufficient facts to constitute a cause of action.

On February 29, 2000, Preston filed a motion for summary judgment. Preston alleged that there existed no genuine issue of material fact concerning Woodruff's status, the duty owed to her, or the circumstances of her killer's entry onto the premises and that Preston was entitled to judgment as a matter of law.

On April 24, 2000, Preston's motion for summary judgment was heard by the court. The court received various exhibits, including pleadings, answers to interrogatories, police reports, and a transcription of trial testimony in the criminal trial of Woodruff's killer. On September 18, the district court found, based on the exhibits offered at the hearing, that Woodruff was a trespasser at the time she was killed. The court found that Preston had not acted with willful or wanton negligence. As such, the court granted Preston's motion for summary judgment and dismissed the amended petition. This timely appeal followed.

III. ASSIGNMENT OF ERROR

On appeal, Wright has assigned three errors, which we consolidate for discussion to one: The district court erred in granting Preston's motion for summary judgment.

IV. ANALYSIS

1. STANDARD OF REVIEW

[1-4] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material

fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Kouma v. Blue Valley Co-op*, 6 Neb. App. 714, 576 N.W.2d 854 (1998). In reviewing a motion for summary judgment, the question is not how a factual issue is to be decided, but, rather, whether any issue of material fact exists. *Id.* In reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Olson v. SID No. 177*, 251 Neb. 380, 557 N.W.2d 651 (1997); *Kouma v. Blue Valley Co-op*, *supra*. However, conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Darrah v. Bryan Memorial Hosp.*, *supra*; *Kouma v. Blue Valley Co-op*, *supra*.

[5] Summary judgment is properly granted only when the movant satisfactorily shows that no genuine issue of material fact appears from the pleadings, admissions, depositions, affidavits, and stipulations in the record or from the reasonable inferences deducible from that evidence and that the movant is entitled to judgment as a matter of law. *Terry v. Metzger*, 241 Neb. 795, 491 N.W.2d 50 (1992). Once the movant has met this burden, the nonmoving party has the burden of showing that an issue of material fact exists that prevents judgment as a matter of law. *Id.*

[6,7] The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Olson v. SID No. 177*, *supra*. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

2. PREMISES LIABILITY

(a) General Propositions

[8] In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate cause, and damages. *Olson v. SID No. 177*, *supra*. In premises liability actions, the duty owed by a landowner to another person depends on the person's

status. To ascertain the duty owed by landowners to entrants upon their land, courts traditionally have classified entrants as either invitees, licensees, or trespassers. See *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

[9] In *Heins v. Webster County*, *supra*, the Nebraska Supreme Court abrogated the distinction between invitees and licensees. However, the Supreme Court did so only prospectively, holding that the abrogation of the distinction between the two statuses would be applied only to causes of action arising after the date of the *Heins* opinion, August 23, 1996. The present action is based upon allegations that Preston acted negligently on or about June 16, 1995. Therefore, this case is governed by the premise existing in Nebraska cases prior to the *Heins v. Webster County* decision, that a landowner's duty of care depends upon whether the plaintiff (or in our case the decedent, Woodruff) is classified as an invitee, a licensee, or a trespasser. See, *Olson v. SID No. 177*, *supra*; *Heins v. Webster County*, *supra*. As such, we proceed as if the traditional distinctions which existed prior to the *Heins v. Webster County* decision are still in full force and effect.

An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage. *Heins v. Webster County*, *supra*. Landowners owe invitees the duty of reasonable care to keep the premises safe for the use of the invitee. *Id.* A business visitor is considered an invitee, and thereby receives this higher degree of care, reasonable care, ostensibly because he or she conveys some benefit upon the landowner. *Id.*

A licensee has been defined as a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor. *Id.* Courts have limited the duty that a landowner owes to a licensee. *Id.* An owner or occupant of premises owes only the duty to refrain from injuring a licensee by willful or wanton negligence or designed injury, or to warn him or her of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee, who is required to exercise ordinary care. *Id.*

[10,11] A trespasser is legally defined as a person who enters or remains upon the premises of another without a privilege to do so created by the possessor's consent, either express or implied. *Terry v. Metzger*, 241 Neb. 795, 491 N.W.2d 50 (1992). An owner of premises owes only a very limited duty to refrain from willfully or wantonly injuring a trespasser. See *id.*

(b) Woodruff's Status

The first issue we must resolve is whether the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is a genuine issue as to Woodruff's status on Preston's property when she was killed. The district court found that the record would only support the inference that Woodruff was a trespasser. On appeal, Wright alleges that the district court erred in reaching this conclusion and in not affording Wright the benefit of reasonable inferences deducible from the evidence concerning Woodruff's status on the property. Our review of the record discloses no genuine issue concerning Woodruff's status, and we agree with the district court that the only reasonable inference deducible from the record is that Woodruff was a trespasser.

In support of the motion for summary judgment, Preston introduced various exhibits, including answers to interrogatories, affidavits, depositions, and a transcription of the testimony given in the criminal trial of the man convicted of killing Woodruff. These documents satisfied Preston's burden to establish that no genuine issue existed concerning Woodruff's status.

Attached to the affidavit of Linda Preston were Preston's tenant payment records between February and June 1995. These payment records, in addition to the amended petition, established that Woodruff was not at any time a tenant of Preston. In interrogatories, Preston requested that Wright disclose whom Woodruff might have visited on the premises, and Wright repeatedly answered that she "[did] not know." The closest Wright was able to come in this regard was to indicate that Woodruff "had a friend by the name of Carolyn Carson" who had resided on the premises. However, the tenant payment records established that Carson ceased being a tenant of Preston when she was evicted from the premises in April 1995, more than 1 month prior to the date of Woodruff's death.

Preston also offered the deposition of Linda Preston, taken by Wright. In her deposition, Linda Preston testified that Woodruff "wasn't supposed to be in [the] building. . . . [Woodruff] wasn't a tenant, she didn't belong there." Preston also offered the deposition of William Preston, in which he testified that "[t]o our knowledge, no tenant knew [Woodruff]," that "[w]e've never seen her before," and that "[s]he certainly had no business activity with us."

Preston presented evidence, as indicated above, to establish that Woodruff was not a tenant, that she was not on the premises for any business purpose associated with Preston, and that she was not a guest of any tenant. The reasonable inferences deducible from the evidence presented by Preston show no genuine issue of material fact concerning Woodruff's status and lead to the inference that Woodruff was on the property without any consent, either express or implied, of the premises owner. As such, Preston's evidence establishes that Woodruff was merely a trespasser on the property when she was killed.

Once Preston satisfied the burden of establishing the lack of a genuine issue of material fact, the burden shifted to Wright to establish that an issue of material fact exists concerning Woodruff's status. See *Terry v. Metzger*, 241 Neb. 795, 491 N.W.2d 50 (1992). Wright presented no evidence to establish that Woodruff had any legitimate purpose for entering Preston's property other than as a trespasser. Wright asserts on appeal that testimony from the criminal trial of Woodruff's killer indicates that according to Woodruff's sister, Woodruff was visiting somebody named "Jackie" or "Nickie" "[o]n Howard Street" in the week preceding her death. However, Woodruff's sister testified that she was not sure of the name and did not have a specific address of where the person might have lived. As such, the evidence did not provide any reasonable inference that Woodruff was visiting or was a guest of anyone residing in the apartment building where she was killed, especially when it is noted that a review of the tenant listings provided as part of Preston's evidence does not indicate any tenant with a name comparable to Jackie or Nickie residing at the property between January and June 1995.

Wright argues on appeal that the evidence "certainly does not preclude the possibility that [Woodruff] was actually invited to

the building by a tenant.” Brief for appellant at 8. This argument, however, provides nothing more to substantiate Wright’s assertion that Woodruff was anything other than a trespasser. At most, Wright has established that, through speculation or conjecture, one choice of possibilities is that Woodruff was invited onto the premises by a tenant.

The law in Nebraska is firmly established that conclusions based upon guess, speculation, conjecture, or a mere choice of possibilities do not create material issues of fact for purposes of summary judgment. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997); *In re Estate of Ellis*, 9 Neb. App. 598, 616 N.W.2d 59 (2000); *Kouma v. Blue Valley Co-op*, 6 Neb. App. 714, 576 N.W.2d 854 (1998). Although Wright was not required to eliminate all alternate theories regarding how Woodruff came to be on Preston’s property, in light of the evidence presented by Preston, she was required to establish with a reasonable probability that Woodruff was an invitee or licensee. See *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999) (plaintiff not required to eliminate all alternate theories but required to establish with reasonable probability that accident happened in manner alleged in petition).

A review of the record presented to us leads us to conclude, as the district court did, that the only reasonable inference deducible from the evidence presented is that Woodruff was merely a trespasser on the date of her death. The district court did not improperly afford Preston the benefit of the inferences, and the court did not err in concluding that Woodruff was a trespasser. As such, the next issue we must address is the duty owed to Woodruff, a trespasser, by the premises owner, Preston, concerning the actions that led to Woodruff’s death.

(c) Preston’s Duty

Wright argues on appeal that even if Woodruff was merely a trespasser, the evidence establishes that Preston breached even the limited duty owed to trespassers. Our review of the record, however, reveals that Preston acted in a manner foreclosing a conclusion of willful or wanton negligence and that Preston therefore did not breach any duty owed to a trespasser such as Woodruff.

Because Woodruff was a trespasser, Preston owed her a very limited duty with regard to her safety while on the property. See *Terry v. Metzger*, 241 Neb. 795, 491 N.W.2d 50 (1992). Preston was only obliged to refrain from willfully and wantonly injuring Woodruff. See *id.* A review of the record shows that no material issue of fact existed as to the willfulness and wantonness of Preston's conduct.

The requirements for "willful and wanton" conduct are well established:

"In order for an action to be willful or wanton, the evidence must prove that a defendant had *actual* knowledge that a danger existed and that the defendant *intentionally* failed to act to prevent harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or the omission to act, and a constructive intention as to the consequences. . . .

"To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury."

(Emphasis in original.) *Id.* at 798-99, 491 N.W.2d at 53-54, quoting *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988).

[12] For conduct to be willful or wanton, two criteria must be met. *Terry v. Metzger*, *supra*. First, the defendant must have actual knowledge of the danger. *Id.* Second, the defendant must have intentionally failed to act to prevent harm which was reasonably likely to result. *Id.* The record before us establishes that the second requirement is not met, and we will not further specifically address the first.

The record before us establishes that Preston had security doors on the apartment building to keep trespassers out. These security doors required the entry of a numerical code to open the doors from the outside and automatically locked upon closing. The record further establishes that when trespassers were found on the premises by maintenance or other employees of Preston, they were instructed to leave the premises. On occasion, law

enforcement was called to remove trespassers. The concern to be addressed is whether the evidence establishes that the premises owner took steps to prevent danger from befalling trespassers, and the uncontroverted evidence shows that Preston took steps to prevent trespassers from entering the premises. Taking such measures precludes a finding that Preston acted with such reckless disregard of security and right as to imply bad faith. See *Terry v. Metzger, supra*.

Regardless of whether Preston had actual knowledge of the danger, an issue we specifically decline to address, Preston's actions did not rise to the level of willfulness or wantonness. Because Woodruff was a trespasser, Preston was only required to take slight action to protect her. *Terry v. Metzger, supra*. Preston satisfied this duty by utilizing locking security doors and taking action to remove trespassers whenever discovered. Although these measures unfortunately failed to keep out the trespassers involved in this case, both Woodruff and her killer, the presence of such actions shows that Preston was more than indifferent concerning trespassers.

(d) Resolution

We can find no authority in this state imposing any higher duty upon premises owners to protect one trespasser from the intervening criminal actions of another trespasser. Compare *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994) (cases cited therein concerning business invitees and third party criminal actions). The evidence in the record before us and our review of the applicable Nebraska law lead to only one conclusion: Preston refrained from willfully and wantonly injuring Woodruff. Reasonable minds cannot differ on this point. As such, the district court correctly granted Preston's motion for summary judgment.

V. CONCLUSION

We find no genuine issue of material fact concerning Woodruff's status as a trespasser on Preston's property or Preston's fulfillment of the limited duty owed to trespassers. Accordingly, we affirm the district court's decision granting summary judgment to Preston.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD J. DAVLIN, APPELLANT.

639 N.W.2d 168

Filed February 12, 2002. No. A-00-698.

1. **Right to Counsel: Appeal and Error.** The denial of a motion for substitution of counsel is reviewed for an abuse of discretion.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Constitutional Law: Postconviction: Proof.** For relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which could have been litigated on direct appeal.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When the same attorney represents a defendant at trial and on direct appeal, the first opportunity to assert ineffective assistance of trial counsel is in the motion for postconviction relief.
6. **Right to Counsel.** Mere distrust of, or dissatisfaction with, a court-appointed attorney is not a sufficient reason to require appointment of substitute counsel.
7. _____. When a defendant raises a seemingly substantial complaint about counsel, the judge has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction.
8. _____. A request for substitute counsel is not a complex legal or procedural undertaking. Once the request is made, the court has a duty to inquire into the factual basis of the defendant's dissatisfaction.
9. **Constitutional Law: Right to Counsel.** A defendant's complaint about court-appointed counsel, when based upon proper grounds, implies an abridgement of the constitutional right to assistance of counsel.
10. **Right to Counsel.** To insist that a defendant could procure removal of his or her non-communicative attorney only by having the same lawyer file a motion for appointment of substituted counsel would be illogical and impractical.
11. _____. Where a defendant, before the commencement of trial, makes it appear to the trial judge that he or she desires to discharge his or her court-appointed counsel, the trial judge, in order to protect the indigent's right to effective counsel, should make an inquiry of the defendant as to the reason for the request to discharge.
12. **Due Process: Effectiveness of Counsel.** The failure to inquire into a defendant's dissatisfaction with counsel is a denial by a court of the effective assistance of counsel, that is, a denial by a court of due process.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Nancy K. Peterson, of the Nebraska Commission on Public Advocacy, for appellant.

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

HANNON, INBODY, and MOORE, Judges.

HANNON, Judge.

INTRODUCTION

Clifford J. Davlin was convicted of first degree sexual assault on a child, use of a weapon to commit the crime, and of being a habitual criminal. He was sentenced to a total of 25 to 35 years' imprisonment on all convictions. His convictions and sentences were affirmed on direct appeal by a memorandum opinion. See *State v. Davlin*, 3 Neb. App. xiii (case No. A-94-505, Feb. 28, 1995). Later, Davlin filed a second amended motion for post-conviction relief, alleging he was denied due process and effective assistance of counsel in the district court's denial of his request for substitute counsel without a hearing and effective assistance of counsel both at trial and upon his direct appeal. He appeals from the denial of that motion. We conclude Davlin's due process rights were violated by the trial court's refusal to inquire into his dissatisfaction with court-appointed counsel, and therefore, we reverse, and remand for a new trial.

BACKGROUND

After Davlin was charged, Thomas J. Garvey, Sarpy County public defender, was appointed to represent Davlin, and Davlin pled not guilty. Shortly before trial, Davlin complained in a letter to the trial judge about the representation he was receiving. The judge refused to consider his complaint, but told him that if he discharged Garvey, another lawyer would not be appointed. Davlin elected to keep Garvey. A few days later, the jury trial was held, with Garvey representing Davlin.

Evidence at Original Trial.

During a jury trial which was held on March 14 and 15, 1994, 15-year-old M.D. testified that on November 20, 1993, she was hitchhiking in Lincoln, when Davlin picked her up. She told him that she needed a ride to Omaha. After she got in Davlin's car, they went to a bar, where he bought an alcoholic drink for himself and for her. Davlin suggested that she stay overnight at his

apartment and that they would go to Omaha in the morning. M.D. agreed, and he took her to his apartment, where she showered and attempted to sleep on the couch. Three times during the night, Davlin came out of his room and stood naked in front of M.D. while she pretended to be asleep.

They left for Omaha the next morning, via Syracuse and Nebraska City, Nebraska. After crossing a bridge, Davlin said he wanted to visit some friends and turned off the two-lane highway onto a gravel road with hills. They then drove over a dirt road past a Sarpy County sign, and Davlin stopped near an abandoned house. M.D. testified that she attempted to get out of the car when Davlin made an advance on her, but he pulled a knife and told her to get back in the car. He then ordered her to perform oral sex on him and ejaculated in her mouth, which she testified she spit out upon the floor of the car. After making M.D. undress, Davlin digitally penetrated her rectum and had oral sex and vaginal intercourse with her. Then he drove her to Bellevue, Nebraska, where he dropped her off near a school and some apartment buildings and told her to return there in 4 hours so he could pick her up or he would come looking for her.

M.D. went to the nearest store and had the police called. A police officer was dispatched at approximately 11:35 a.m. and met M.D. at a store in Omaha. This officer took M.D. to a hospital, where she was given a complete physical examination and samples were taken for a sexual assault kit.

The physician who examined her testified that by palpations both through the vagina and the abdominal wall, she detected tenderness in the lower right quadrant of M.D.'s abdomen, which is consistent with aggressive sexual intercourse. A nurse's notes documented that M.D. complained of lower abdominal and anal pain.

An investigator with the Sarpy County sheriff's office testified that M.D. directed him to the site of the assault and to Davlin's apartment in Lincoln. She identified Davlin as her attacker from a photographic array and again in court. In searching Davlin's car and apartment pursuant to a warrant, the police found a knife in the car. Tattoos on Davlin's body fit those described by M.D. as being on her attacker. The investigator testified that Davlin's date of birth is May 15, 1953.

Vicky Cowan, a forensic serologist, testified about her examinations of hair and blood samples from M.D. and Davlin as well as swabs taken in the sexual assault kit. Forensic serology involves analyzing items of evidence for the presence of body fluids and then attempting to individualize the body fluids with the use of genetic markers. Cowan concluded that the donor of the semen present in the swab taken from the sexual assault kit may have had the same blood type as Davlin, type A, or may have had blood type AB. She further concluded that Davlin did not match the genetic marker "PGM" found in the vaginal swab and testified that no PGM marker was identified from the genital swab or the dried secretions. Cowan testified that this did not necessarily exclude Davlin as the donor. A comparison of hair samples taken from M.D. and Davlin to hair samples found in Davlin's car led Cowan to conclude that hair samples found in the car were microscopically consistent with known pubic hairs of both individuals.

A friend of Davlin's testified that Davlin visited her at her apartment in Lincoln on November 21, 1993, at about 3:10 p.m. When she was in his car that day, he produced a knife from underneath the seat to help her get a cigarette loose from the window. He told her he had been to Omaha over the weekend because his father had had a heart attack. She stated that he later changed his story and said that he had never been in Omaha.

An investigator testified that he interviewed Davlin. He testified that Davlin admitted that he met M.D. on November 20, 1993, and took her to a bar and then to his apartment, where she took a shower. He claimed he dropped her off at a truckstop that same night and denied sexually assaulting her. The investigator testified that Davlin admitted he had a knife in his car, but did not know how M.D. could have seen it.

Verdict, Sentence, and Direct Appeal.

The jury returned verdicts of guilty on March 15, 1994. An evidentiary hearing on the habitual criminal charge was held on March 17, and Davlin was determined to be a habitual criminal on March 21, which enhanced his sentences. At his sentencing on May 6, Davlin said that he should not be sentenced for the crimes he was convicted of because his attorney declined to

have appropriate DNA testing done and did not put up a defense. Davlin was sentenced to 15 to 25 years' imprisonment on the sexual assault conviction and a consecutive 10 years' imprisonment on the weapons conviction.

In his direct appeal, Davlin was represented by Gregory A. Pivovar, assistant public defender for Sarpy County. Two errors were assigned: The trial court erred (1) in sustaining the State's motion in limine excluding M.D.'s juvenile court record thereby denying Davlin the right to confront and cross-examine witnesses and (2) in finding the evidence sufficient to establish guilt beyond a reasonable doubt. This court affirmed the trial court's decision by memorandum opinion. See *State v. Davlin*, 3 Neb. App. xiii (case No. A-94-505, Feb. 28, 1995).

Postconviction Motion.

Davlin later filed a second amended motion for postconviction relief and was represented on that motion by lawyers from the Nebraska Commission on Public Advocacy. In summary, restated, he alleged in his operative motion (1) that the court denied his right to due process of law and to effective assistance of counsel by denying his pretrial request for substitution of counsel; (2) that he was denied effective assistance of counsel at trial by counsel's allowing without objection a jury instruction that incorrectly told the jury (a) that one of the elements of the offense of first degree sexual assault was that M.D. was 16 years of age or younger, when the statutory language states less than 16 years of age, (b) that one of the elements of the use of a weapon to commit a felony was that he used or possessed a knife during the commission of the offense, and (c) that one instruction linked the use of a weapon charge to a strict liability offense, to-wit: statutory rape; (3) that he was denied effective assistance of counsel in preparation for trial by his counsel's (a) failing to investigate, (b) not obtaining DNA testing of body fluids and hair collected as evidence to show the samples were not from him, (c) not obtaining the odometer reading on his recently purchased automobile to show he could not have gone to Sarpy County by the circuitous route claimed by M.D., (d) not having his automobile screened for body fluids to show the absence of semen and body fluid which M.D.'s testimony indicated should be there; and (4) that he was denied

effective assistance of counsel during trial by counsel's (a) failing to object under Neb. Rev. Stat. § 27-404 (Reissue 1995) to the evidence of other alleged wrongful acts, to wit, that he procured an alcoholic beverage for M.D., (b) failing to impeach M.D. by cross-examination concerning inconsistencies between her deposition testimony and her trial testimony, (c) failing to object to the evidence on the possible similarity of hairs when such evidence has been recognized as unreliable and inadmissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), thus preventing an appeal on that issue, and (d) failing to object to the documents introduced to establish the habitual criminal charge because they do not have the proper judicial signature to certify Davlin was convicted by a judge and sentenced in Iowa to at least 1 year's imprisonment. The above is only a summary of the allegations in the motion and is not a complete recitation of the factual allegations of the motion.

Postconviction Hearing.

At the March 27, 2000, hearing on the motion, Davlin testified by deposition that he had been incarcerated since November 23, 1993. The evidence showed that Garvey did not meet with Davlin more than three times before the trial; that Davlin wrote Garvey and telephoned him numerous times, but received no letter in reply; and that the only tests done by the state laboratory were two serology tests. In reference to the first serology test, dated January 10, 1994, Davlin said that Garvey told him that "the [S]tate didn't have anything on me, that the lab reports showed negative. . . . [J]ust relax." Davlin testified that after he received the laboratory's report on the second testing, dated February 23, 1994, he asked Garvey if they could have some independent testing done. Davlin was incarcerated and could not pay for the DNA testing himself. He claimed Garvey said that "he was not going to spend 40,000 fucking bucks on me to prove me innocent." During the direct appeal, he brought the issue of DNA testing to Pivovar's attention. He was told by Pivovar that Pivovar could only raise issues his boss, Garvey, told him to raise. Davlin wrote letters complaining about the lack of DNA testing in his case to the director of the state laboratory, to the Governor, and to the judge.

Davlin also testified that he asked Garvey to investigate the mileage on his car, because he purchased the car about 3 days before the alleged incident (he "believe[d] it was on the 19th" of November that he purchased it) and the mileage would have shown he could not have driven from Lancaster County to Sarpy County via Syracuse and Nebraska City and back as M.D. testified. After he read M.D.'s deposition and police reports, he asked Garvey to have the car inspected for the semen which M.D. claimed to have spit out or any evidence related to a sexual assault. Garvey did not reply to the request.

Davlin testified that he did not trust Garvey and that Garvey treated him with disrespect. At one point in front of two other inmates, Garvey gave him police reports and said that "here's your fucking police reports and shut the fuck up and quit crying." Davlin testified that he was shocked and devastated. Davlin also said in his deposition that Garvey would always ask, "[D]idn't you say you had consensual sex with her," and that Davlin would have to remind him that he never had any sex with M.D.

Davlin testified that he wrote a letter to the Nebraska State Bar Association on March 7, 1994, regarding his dissatisfaction with the services of Garvey. On April 27, before Davlin had been sentenced, Garvey responded to the Nebraska State Bar Association and wrote, "[Davlin's] insistence on my spending taxpayer's dollars for further DNA testing I deemed unnecessary as he was not excluded by the DNA testing." (The record shows that no DNA testing had been performed at that time.) Garvey further admitted to the bar association that he told Davlin to "shut up" on numerous occasions, but stated he did so because he did not wish to listen to the irrelevant information Davlin was stating to him.

Davlin testified that he wrote a letter to the judge, requesting the court to provide substitute counsel. A copy of that letter was introduced into evidence. During a hearing on the State's application to endorse witnesses held on March 11, 1994, the judge referred to having received a four-page letter from Garvey. A more complete summary of this colloquy from the record made at the time will be given later when we consider the issue. In substance, the judge stated he had not read and would not read the entire letter and, without any inquiry into the matter, told Davlin he would have to represent himself if he discharged Garvey.

Davlin maintained that even after his conviction, he tried to have the items of evidence in his case tested for the presence of DNA. In a letter to the Nebraska State Bar Association dated May 21, 1994, Davlin claimed that he contacted Garvey about DNA testing after his incarceration and that Garvey responded, "'There won't be any DNA tests done now or any other time either.'" The record shows the only evidence which could have been subjected to DNA testing was destroyed, without a court order, on January 24, 1996.

Davlin's counsel from the Nebraska Commission on Public Advocacy produced the deposition of Charlotte Word, the deputy laboratory director for Cellmark. Cellmark does DNA identification testing and would have been available for DNA testing in the fall of 1993. Word stated that any testing conducted would depend on the size (i.e., how much sperm was present) and quality of the sample. She estimated that back in 1993 or 1994, tests could easily have been done for \$1,500 to \$2,000.

Trial Court's Ruling on Motion.

The State presented no evidence at the hearing. The district court rendered its decision on Davlin's motion by a formal opinion in which it reviewed the authorities it thought should apply in determining claims of ineffective performance of counsel raised in postconviction proceedings. It then considered the burdens imposed on Davlin by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* holds that to establish that a defendant was denied effective assistance of counsel, the defendant must demonstrate that counsel's performance was deficient and that the defendant was prejudiced thereby. See *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). The trial court noted that the State did not offer any evidence or even call Garvey as a witness and concluded that Davlin requested Garvey have DNA testing done, have his vehicle's odometer checked, and have his vehicle screened for body fluids; that his requests were met with refusals, silence, or inaction; that Davlin's requests were reasonable; and that absent some showing of a reasonable basis for refusal, Garvey's failure to do so fell below the minimum standard and that Garvey's response lacked the civility that even the most difficult client should expect.

Nonetheless, the court concluded that the second prong of the *Strickland* test applied and that Davlin had failed to show prejudice. It separately considered Davlin's complaints of ineffective assistance of counsel based upon action or the lack thereof during trial and during appeal. It concluded that these actions were within a trial lawyer's discretion and that the *Strickland* test was not satisfied. It denied the motion, and Davlin appeals. When relevant, further details of the order will be stated.

ASSIGNMENTS OF ERROR

Davlin alleges that he was (1) denied effective assistance of counsel and due process in the district court's disposition of his request for substitute counsel and (2) denied effective assistance of counsel at trial and on direct appeal.

STANDARD OF REVIEW

[1] The denial of a motion for substitution of counsel is reviewed for an abuse of discretion. See *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988). See, also, *U.S. v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001); *U.S. v. Smith*, 62 F.3d 1073 (8th Cir. 1995); *State v. Bronson*, 122 Or. App. 493, 858 P.2d 467 (1993); *State v. Valencia*, 27 P.3d 573 (Utah App. 2001). Compare *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000) (stating that under Sixth Amendment jurisprudence, state trial court has no discretion to ignore indigent defendant's timely motion to relieve appointed attorney).

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

ANALYSIS

[3] For relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution. *State v. Caddy*, *supra*. Davlin argues that two of his constitutional rights were violated: (1) his right to due process of law by the court ruling on his motion to substitute counsel without a hearing and (2) his right to effective assistance of counsel by his court-appointed counsel's action. We

conclude that the failure of the trial court to inquire as to the basis for Davlin's dissatisfaction when he moved for substitution of counsel denied Davlin his right to due process and requires Davlin's convictions and sentences be set aside and a new trial ordered. We therefore do not consider the second issue.

[4] Davlin's convictions were affirmed on appeal. A motion for postconviction relief cannot be used to secure review of issues which could have been litigated on direct appeal. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). When the record reflects that a defendant had different counsel on his or her direct appeal from counsel representing him or her at trial, any issues that could have been raised during direct appeal, but were not raised, are not properly preserved for review in a motion for postconviction relief based upon ineffective assistance of trial counsel. *State v. Billups*, 10 Neb. App. 424, 632 N.W.2d 375 (2001).

[5] The record in the instant case discloses that Garvey, public defender for Sarpy County, defended Davlin at the trial level and Pivovar, assistant public defender for Sarpy County, handled the direct appeal. Davlin testified that at the time the appeal was being prepared, Pivovar told him he could only raise the issues on appeal that Garvey would allow him to raise. In *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000), Soukharith was similarly represented both at trial and on direct appeal by lawyers employed by the office of the Sarpy County public defender. The Nebraska Supreme Court found that when the same attorney represents a defendant at trial and on direct appeal, the first opportunity to assert ineffective assistance of trial counsel is in the motion for postconviction relief. *Id.* We use *Soukharith* as a guide and find that Davlin's claims are not procedurally barred.

Court's Disposition of Request for Substitute Counsel.

Davlin claims that he was denied effective assistance of counsel and due process in the trial court's disposition of his request for substitute counsel without an adequate hearing. His trial was set to begin on March 14, 1994. The transcript shows that on March 11 a letter from Davlin to the judge dated "3-9-94" was filed in the case file. This letter contains allegations of Garvey's failure to take actions that Davlin requested him to take, including the request for further testing of the body fluids, and of

Garvey's attitude, his refusal to answer Davlin's correspondence, his vulgar remarks toward Davlin, and his statement when he denied Davlin's request for DNA testing.

At a March 11, 1994, hearing on a motion by the State to endorse witnesses, the judge acknowledged receipt of the letter. He said that he had not read Davlin's letter in its entirety and did not want to get into the things requested. The judge stated that from the letter, he had gathered that Davlin was writing to express dissatisfaction with Garvey as his counsel and a desire to have him terminated as his counsel. The judge told Davlin that if the court granted his request and discharged Garvey, there would not be another lawyer appointed. The judge also stated that he was not going to respond to letters coming out of the county jail and that things such as discharging a lawyer should come in appropriate pleadings. The court informed Davlin that whether there was meaningful representation is an issue that cannot be decided until after the fact and that if the public defender's office does not afford meaningful and competent representation, Davlin may be entitled to have any conviction that results set aside and receive another trial. Davlin stated that he was not capable of representing himself and that he would continue with Garvey.

[6] It is well settled in Nebraska that mere distrust of, or dissatisfaction with, a court-appointed attorney is not a sufficient reason to require appointment of substitute counsel. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Rosales*, 3 Neb. App. 26, 521 N.W.2d 385 (1994). " 'When a defendant becomes dissatisfied with court-appointed counsel, unless the defendant can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if competent to do so.' " *State v. Dunster*, 262 Neb. at 353, 631 N.W.2d at 900, quoting *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

[7] Davlin's counsel relies upon *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991). The principle stated in the *Lockhart* case that is most significant is:

When a defendant raises a seemingly substantial complaint about counsel, the judge "has an obligation to inquire thoroughly into the factual basis of defendant's

dissatisfaction.” [Citations omitted.] The trial court must make the kind of inquiry that might ease the defendant’s dissatisfaction, distrust, or concern. [Citation omitted.] That inquiry should be on the record.

Id. at 1320.

In its order denying postconviction relief on this issue, the trial court recognized that the *Lockhart* case would support the proposition contended by Davlin’s counsel, but it distinguished the cases. It did so by stating that in *Lockhart*, the defendant did not accept the counsel who had a conflict. We interpret this to mean that the court felt Davlin waived a hearing on his expressed dissatisfaction with counsel by not discharging Garvey and defending himself pro se. The court also stated in its order denying the motion for postconviction relief that “although there was obviously a conflict of personalities between Garvey and Davlin, Davlin’s contentions in wanting Garvey replaced were all premised on actions or conversations by Garvey with which Davlin disagreed.”

The State argues that “if Davlin had effective assistance of counsel at trial, it follows that he suffered no prejudice from the trial court’s disposition of his request for substitute counsel.” Brief for appellee at 10. The State then goes through the several actions of Davlin’s counsel during trial and relies upon the trial court’s separate findings with respect to them. The argument ignores the fact that those alleged deficiencies of representation had not occurred when Davlin expressed dissatisfaction with Garvey and that the trial court found that Garvey’s failure to respond to Davlin’s reasonable requests fell short of the minimum standard for counsel and his lack of civility was less than the most difficult client could expect. From that finding, the trial court then went on to consider the second prong of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), as applied to Garvey’s failure to do the things Davlin had requested. The order can only be interpreted as a finding that the first prong of the *Strickland* test had been satisfied with respect to Garvey’s performance at the time Davlin moved to dismiss him.

The State also argues that the request for substitute counsel was not properly before the court because Davlin did not file a

formal motion. This point was mentioned by the trial court during the proceeding wherein the trial court refused to consider Davlin's dissatisfaction. We shall consider this issue later. The State also argues this case is distinguishable from *Lockhart*, because the trial court found as a matter of law that there was "no conflict of interest." Brief for appellant at 21. In the *Lockhart* case, the dissatisfaction grew out of a claim that counsel had a conflict of interest. Apparently, the State feels that the principle stated in *Lockhart* applies only to dissatisfaction arising from a feared conflict of interest. The case does not so state, and the cases we cite below apply the principle to situations other than to a conflict of interest.

The State also argues that the court could not consider the issue of pretrial satisfaction because a trial court must not interfere with the counsel's conduct of a legal defense. The trial court stated this proposition in its opinion and cited *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), to support it. We agree that *Ryan* indicates the existence of that rule. However, the *Ryan* court's discussion on the subject related to the trial judge interfering during the actual trial, and it has no application to the consideration of a pretrial motion to substitute counsel. In our view, the *Ryan* case teaches nothing about a trial judge's duty to inquire upon learning that a defendant is dissatisfied with his attorney.

Heretofore, we have discussed the proposition from *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991), as though that is the only case which has considered the proposition. There are several cases that recognize the rule and apply or refuse to apply the principle depending on the facts in the particular case. We shall review a number of these cases in order to benefit from their teaching before we apply the questioned principle to the facts in this case.

The Eighth Circuit revisited the issue in *U.S. v. Smith*, 62 F.3d 1073 (8th Cir. 1995), where the defendant requested new counsel, the judge questioned her on the morning of the trial, and she said that "there were 'some issues' on which she and her attorney did not 'see eye-to-eye.'" *Id.* at 1076. The motion was denied, and after she was convicted, she renewed her motion for substitution of counsel. An evidentiary hearing was held that time, and the motion was denied. The court recognized that a

defendant asking for substitute counsel had the burden to show justifiable dissatisfaction and that the defendant did not make the necessary showing in that case.

[8] Other federal courts have followed this rule. See, *U.S. v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001) (trial court's judgment was reversed though it had made inquiries and then denied substitute counsel, because it had abused its discretion by making inadequate inquiry and failed to recognize serious breakdown in trust and communication between client and attorney); *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000) (stating that it is well established and clear that Sixth Amendment requires on record appropriate inquiry into grounds for motion requesting substitute counsel and that matter be resolved on merits before case goes forward); *King v. Rowland*, 977 F.2d 1354 (9th Cir. 1992) (stating inquiry need only be as comprehensive as circumstances permit); *Hudson v. Rushen*, 686 F.2d 826, 830 (9th Cir. 1982) (where state trial court's inquiry was held to be "an adequate and fair hearing" and as comprehensive as circumstances reasonably would permit); *Sagin v. Hill*, No. C98659S IPR, 2000 WL 194809 (N.D. Cal. Feb. 15, 2000) (holding colloquy between judge and defendant where defendant was allowed to explain his problem with counsel and unequivocally indicated he did not want to discharge his attorney wholly satisfied judge's duty to inquiry). As stated in *U.S. v. Blum*, 65 F.3d 1436, 1441 (8th Cir. 1995): "A request for substitute counsel is not a complex legal or procedural undertaking. Once the request is made, the court has a duty to inquire into the factual basis of the defendant's dissatisfaction."

In *State v. Richardson*, 256 Kan. 69, 883 P.2d 1107 (1994), the Kansas Supreme Court recognized the trial court's duty to inquire when it became aware of a conflict between the defendant and counsel, but held in that case the trial court did not abuse its discretion when it denied appointment of substitute counsel after it asked the defendant to explain why he was dissatisfied with counsel. In *State v. Simpson*, 29 Kan. App. 2d 862, 32 P.3d 1226 (2001), it was held the trial court abused its discretion when the record indicated a potential conflict and it did not more fully inquire into the defendant's alleged problems with counsel.

In *State v. Lovell*, 984 P.2d 382 (Utah 1999), the Supreme Court of Utah recognized the rule that when a defendant

expresses dissatisfaction with counsel, the trial court must make reasonable efforts to determine the nature of the defendant's complaint. That court noted that it is not reversible error to fail to inquire when the complaints "do not rise to a constitutional level requiring the appointment of new counsel." *Id.* at 389. In *Lovell*, the court concluded the failure to inquire was harmless error because there was nothing to suggest that the outcome would have been different if different counsel had been appointed. In *State v. Valencia*, 27 P.3d 573, 576 (Utah App. 2001), the Utah appeals court concluded that the trial court erred in not conducting a more meaningful inquiry into the defendant's complaints when it asked only a very few questions to "explore the substantiality of [Valencia's] allegations.'" The appellate court determined that the error was harmless because the record contained enough information to support the trial court's finding that good cause to substitute counsel did not exist.

[9] In *State v. Coffey*, 158 Or. App. 112, 972 P.2d 1219 (1999), the defendant wrote a letter to the judge complaining that his court-appointed attorney had done only one thing on his case, had not contacted any potential alibi witnesses, and otherwise refused to communicate with him. The judge sent copies of the letter to the attorneys but made no inquiry. Later, the judge granted the State's motion to exclude the alibi evidence, and in a hearing on this matter, the defense counsel admitted facts showing he did not contact the defendant. The *Coffey* court stated, by way of a quote, that a "'defendant's complaint about court-appointed counsel, when based on proper grounds, implies an abridgement of the constitutional right to assistance of counsel. . . .'" 158 Or. App. at 115, 972 P.2d at 1220. The *Coffey* court held that the defendant's letter explicitly identified particular complaints about the adequacy of representation and that the trial court did not inquire further and therefore did not satisfy its affirmative duty. The conviction was reversed, and the cause was remanded for a new trial.

[10] In *Coffey*, the prosecution argued that the court had no obligation to inquire into the defendant's pretrial complaint because it was contained in a letter rather than a formal motion. The *Coffey* court stated that "to insist that defendant could procure the removal of his noncommunicative attorney only by having the

same attorney file a motion for appointment of substituted counsel would be illogical and impractical.” 158 Or. App. at 116, 972 P.2d at 1221.

In *State v. Grcich*, 148 Or. App. 337, 939 P.2d 649 (1997), before trial, the defendant asked for new counsel, the appellate court found that the trial court’s inquiry fell below the required standard, and the cause was remanded for a new trial. In that case, when the defendant stated he did not feel his attorney was helping him at all, the judge did not pursue the inquiry, and his statements and questions indicated he assumed the defendant was at fault. The judge admonished the defendant to behave and stated that the only way he would appoint a new lawyer was if he revoked the defendant’s release status and sent him to jail.

In another case, the Oregon appellate court said, “The court’s failure to inquire into the nature of the conflict and evaluate the merits of the request for a different attorney was reversible error, because the court had ‘no basis on which to determine whether [defendant’s] constitutional right to effective counsel was being honored.’” *State v. Bargas-Perez*, 117 Or. App. 510, 513, 844 P.2d 931, 932 (1992). Further, when a statement of reasons for dissatisfaction with the attorney is required, the defendant’s statement must be on the record. *State v. Bronson*, 122 Or. App. 493, 858 P.2d 467 (1993) (where new trial was granted because record did not disclose specific concerns and conflicts, but did show trial court had inquired off record).

In *State v. Gallagher*, 288 Mont. 180, 955 P.2d 1371 (1998), and *State v. Weaver*, 276 Mont. 505, 917 P.2d 437 (1996), the Montana court held that the trial court’s inquiries were inadequate to determine the validity of the defendants’ complaints. Both *Gallagher* and *Weaver* were remanded for determinations of the validity of the defendants’ complaints and for new trials if the complaints were determined to be valid.

[11] The following is the most complete statement of the rule that we found:

[W]here a defendant, before the commencement of trial, makes it appear to the trial judge that he desires to discharge his court appointed counsel, the trial judge, in order to protect the indigent’s right to effective counsel, should make an inquiry of the defendant as to the reason for the

request to discharge. If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Nelson v. State, 274 So. 2d 256, 258-59 (Fla. App. 1973).

We think that generally, Nebraska judges have followed this practice. For example, in *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983), and *State v. Davis*, 6 Neb. App. 790, 577 N.W.2d 763 (1998), the trial courts each learned of the defendant's dissatisfaction with counsel, orally in the first two cases and by written motion in the last one, and each time the trial court allowed the defendant to state his reasons. In *Bjorklund*, the prosecutor and public defender were allowed to state facts disputing Bjorklund's assumptions. Bjorklund maintained the trial court should have held an evidentiary hearing, but the Nebraska Supreme Court said the court held all the hearing that was necessary. The trial court's denial of substitute counsel was upheld because the reasons stated were held to be inadequate. We find no case which implies that the trial court should not inquire when a defendant expresses dissatisfaction with his court-appointed counsel.

In the case at hand, the trial judge's statement on the record at the time the dissatisfaction was brought to his attention shows that he had not read the letter containing Davlin's complaints, that he informed Davlin that he was not going to act on the letter, and that he did not want to get into the matters raised in the letter. The judge went so far as to state that if Davlin's court-appointed attorney failed to afford meaningful and competent representation, he would be entitled to have any conviction set

aside and to get another trial, but if he discharged Garvey, Davlin would have to represent himself.

In this case, the trial court stated to Davlin at the March 11, 1994, hearing that "[t]hose things [complaints about counsel] should come in with appropriate pleadings if you want to discharge a lawyer or do other things." Like the Oregon court in *State v. Coffey*, 158 Or. App. 112, 972 P.2d 1219 (1999), we think it is impractical to expect an incarcerated defendant to draft a formal pleading to discharge the only lawyer available to him. While the document Davlin sent was a letter, except for lacking a caption, it would clearly serve as a pro se motion, and it was better drafted than most such pro se documents we see.

This case is somewhat unique in that in the postconviction proceeding, the trial judge found Davlin's pretrial complaints to be reasonable and the conduct of the lawyer to be below standard with respect thereto. We also conclude that this is not a case like *State v. Lovell*, 984 P.2d 382 (Utah 1999), where the record showed the defendant's complaints were unsubstantial. In the case at hand, we cannot read the trial court's order as anything but a finding that Garvey's pretrial conduct was ineffective assistance of counsel.

The trial court concluded that Davlin failed to show prejudice as is required by the second prong of the test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The trial court also concluded that it was a difficult question, but that the circumstances were not such as to entitle Davlin to a presumption of prejudice as recognized in *United States v. Cronin*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). The *Cronin* rule as summarized by the Nebraska Supreme Court in *Trotter*, is as follows:

Pursuant to *Cronin*, under certain specified circumstances, prejudice to the accused is to be presumed. The text of *Cronin* lists the following three circumstances in which prejudice will be presumed: (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify a presumption

of ineffectiveness without inquiry into counsel's actual performance at trial. According to footnote 28 in *Cronic*, it appears that prejudice will also be presumed where there is an actual conflict of interest among multiple defendants jointly represented by the same counsel.

259 Neb. at 218, 609 N.W.2d at 38. But, here, the trial court merely stated without explanation that whether the circumstances justify the presumption of prejudice provided for in *Cronic* "is a close call, but one I make in favor of the State."

The *Trotter* opinion states that the trial court had found that Trotter had failed to show there was a reasonable probability that absent his counsel's failure to perfect his appeal in the required manner, the result of the appeal would have been different. The Supreme Court reversed the judgment after stating it found as a matter of law that Trotter was denied his constitutional right to effective assistance of counsel and was entitled to postconviction relief. We therefore conclude that whether or not circumstances justify the presumption of prejudice provided for in *Cronic* is a question of law.

The question of the pretrial motions for substitute counsel in the above-cited cases arose in a number of ways. Several were by direct appeal. *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991), on the other hand, was a habeas corpus case where the state court had affirmed the conviction and the federal district court denied the writ. The Eighth Circuit Court of Appeals reversed, and remanded the cause without considering whether the defendant was prejudiced. In *State v. Gallagher*, 288 Mont. 180, 955 P.2d 1371 (1998), the Montana Supreme Court reversed the lower court's decision for a hearing on and a determination of the validity of the defendant's complaint and for a new trial if the complaint was found to be valid. In *Hudson v. Rushen*, 686 F.2d 826 (9th Cir. 1982), the federal district court had granted the writ of habeas corpus, and upon appeal, that order was reversed because the trial court's inquiry was determined to be adequate. In *Nelson v. State*, 274 So. 2d 256 (Fla. App. 1973), the appellate court granted the requested relief by vacating the conviction and sentence and ordering a new trial. The other cases were on direct appeal and, when the inquiries were found to be inadequate and the reasons stated to be substantial, the convictions were reversed and new trials ordered.

[12] In *Lockhart, supra*, the court concluded that the defendant was denied counsel during a critical stage of the proceedings because after Lockhart had been denied the hearing, he represented himself at an omnibus hearing which was considered a critical stage of the proceedings. This appears to be within the first of the circumstances listed in *Cronic* where prejudice will be presumed, but no reference was made to that case. Neither *Lockhart* nor any of the cases discuss any requirement of prejudice in analyzing the denial of substitute counsel. We conclude this is because the failure to inquire into a defendant's dissatisfaction with counsel is a denial by a court of the effective assistance of counsel, that is, a denial by a court of due process.

For a defendant to be required to go to trial with counsel the defendant finds unsatisfactory or to try his or her case pro se when before trial facts exist which, if the court knew of them, would show that the defense counsel had a conflict of interest, that communication between counsel and the defendant had completely broken down, or that counsel has refused upon request to take reasonable steps to present or discover evidence that would be helpful, would in effect be requiring the defendant to be represented by ineffective counsel. When a defendant is deprived of a pretrial opportunity to disclose any such shortcoming to the court, that defendant is being deprived of due process. This situation is distinct from where appointed counsel might not have been effective during trial because in the former situation the court might be able to prevent the defendant from being deprived of his or her right to counsel at every significant step of the proceedings. That deprivation requires a new trial.

The evidence also shows that without judicial approval, the evidence which would have been subject to DNA testing was destroyed. The trial court seemed to take this as conclusively establishing that Davlin could not show prejudice. The effect of the destruction of the evidence, if any, is something which can be litigated in the retrial.

CONCLUSION

We therefore reverse Davlin's convictions and sentences and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

ROBERT E. DAY, JR., APPELLANT, V.
ROBIN E. HELLER, APPELLEE.
639 N.W.2d 158

Filed February 12, 2002. No. A-00-928.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing 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. _____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
4. **Res Judicata: Collateral Estoppel: Issue Preclusion: Words and Phrases.** Res judicata, which refers to claim preclusion, and collateral estoppel, which refers to issue preclusion, are really two different concepts, although the two terms are often used in the literature together or interchangeably.
5. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, means that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action.
6. **Judgments: Collateral Estoppel: Issue Preclusion.** The doctrine of collateral estoppel, or issue preclusion, applies when an ultimate fact has been determined by a final judgment with the result that the issue cannot be litigated again between the same parties in a future lawsuit.
7. **Divorce: Paternity: Res Judicata: Collateral Estoppel: Torts.** Although the doctrines of res judicata and collateral estoppel arguably preclude any relitigation of the legal finding of paternity made in a dissolution decree, subsequent causes of action sounding in tort are not barred because of the legal finding of paternity in the dissolution case.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for further proceedings.

John W. Ballew, Jr., of Ballew Schneider & Covalt, for appellant.

Mark L. Laughlin and Robert F. Peterson, of Laughlin, Peterson & Lang, for appellee.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Robert E. Day, Jr., appeals from an order of the district court for Sarpy County granting summary judgment in favor of Robin E. Heller and dismissing Robert's petition. In Robert's action against Robin, he sought damages in tort for fraud, assumpsit, and emotional distress upon discovering that he is not the biological father of Adam, who was born during Robin and Robert's marriage. The district court granted summary judgment on the basis that Robin was entitled to a judgment on the merits and on a finding of paternity in Robert and Robin's earlier dissolution proceeding which acted as *res judicata* and barred Robert's current causes of action. Because we find that Robert's causes of action in tort are not barred by the doctrine of *res judicata*, we find that summary judgment was improper, and we reverse, and remand for further proceedings.

II. BACKGROUND

A decree of dissolution was entered on May 31, 1991, dissolving Robin and Robert's marriage. The decree indicates that one child was born during the parties' marriage, Adam, born July 14, 1987. In the decree, Robin was granted custody of Adam, and Robert was ordered to pay child support in the initial amount of \$270. Robert was also ordered to provide medical insurance coverage for Adam. According to Robert's petition in the present action, the trial court entered subsequent orders increasing Robert's child support obligation and requiring Robert to pay one-half of Robin's employment-related daycare costs for Adam. In addition, the court entered a modification order in which Robert was ordered to pay one-half of the uninsured medical expenses for Adam. In April 1999, Robert and Adam underwent DNA testing.

On May 19, 1999, Robert consented to the adoption of Adam by Robin's new husband, Patrick Heller. Patrick adopted Adam on July 27, 1999, and a decree of adoption was entered by the Douglas County Court.

On February 15, 2000, Robert filed a petition alleging that on April 22, 1999, following DNA testing, he determined that he was not the biological father of Adam. Robert alleged that at all

times following Adam's birth, Robin represented to him that he was Adam's biological father. Robert also stated that he could not have previously, through the exercise of reasonable diligence, determined that he was not Adam's biological father and that the circumstances were such that he was not put on inquiry by the facts surrounding the birth and subsequent care of Adam.

In his petition, Robert pled three causes of action. In his first cause of action, fraud, Robert alleged that Robin had intentionally and willfully concealed the fact that another man was Adam's biological father. Robert alleged that Robin's misrepresentation and concealment concerning Adam's paternity was made with the intention that Robert would rely on it, which he did. Robert alleged that as a direct and proximate result of Robin's concealment, he suffered damages.

In his second cause of action, *assumpsit*, Robert alleged that since entry of the decree in 1991, he had paid certain sums of money for child support, employment-related daycare expenses, and health insurance. Robert alleged that because he is not Adam's biological father, Robin has been unjustly enriched, and that fairness and justice require Robin to repay this money to him.

In his third cause of action, emotional distress, Robert alleged that Robin's conduct in misrepresenting and concealing the true paternity of Adam for nearly 12 years was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency so as to be considered utterly intolerable. Robert alleged that he suffered and continues to suffer emotional distress.

On August 9, 2000, Robin filed a motion for summary judgment, stating that there was no genuine issue as to any material fact and that she was entitled to judgment as a matter of law. A summary judgment hearing was held on August 28. In an order filed August 31, the trial court granted Robin's motion for summary judgment and dismissed Robert's petition. The court found that there was no genuine issue of material fact and that Robin was entitled to judgment as a matter of law. The court initially made a specific finding that Robert's causes of action were not barred by the doctrine of *res judicata* and the paternity finding from the earlier dissolution decree. The court made findings that there was no genuine issue of material fact concerning each of

Robert's causes of action. The court then noted that "[m]aybe res judicata is the answer after all." The court dismissed Robert's petition. Robert has filed this appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Robert argues that the trial court erred in granting Robin's motion for summary judgment. Specifically, Robert contends that the trial court erred in (1) determining that there is no genuine issue as to any material fact and (2) finding that his petition fails to state a cause of action upon which relief can be granted.

IV. ANALYSIS

1. STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (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*, 262 Neb. 387, 631 N.W.2d 510 (2001).

2. GENUINE ISSUE OF MATERIAL FACT

Robert first challenges the court's conclusion that there was no genuine issue of material fact concerning his causes of action. Specifically, the court found that "there is no evidence of 'representation' or 'misrepresentation' made by [Robin] in the instant case" and that "reasonable people would not find [Robin's] conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency." Concerning Robert's cause of action for assumpsit, the court simply found that "this cause of action [should not] stand in the instant case." We disagree with the court's conclusion that there was no genuine issue of material fact.

The record presented to us reveals that a reasonable factfinder could find the following: Robin became pregnant during the course of her marriage to Robert, but there is evidence that the child, Adam, is not Robert's. Robin did not indicate to Robert that the paternity of Adam was in question, and Robert has asserted that there was no reason for him to suspect that such was an issue. As a result of Robin's alleged misrepresentation concerning Adam's paternity, the parties' dissolution decree indicated that Robert was Adam's father and ordered Robert to make various payments, including child support, insurance, and daycare payments. Robin's alleged misrepresentation of Adam's paternity lasted for over 12 years until Robert discovered evidence indicating that he is not Adam's father. Robert alleges that he has suffered emotional distress as a result of these circumstances.

[3] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001). In the present case, it is apparent that the district court, rather than determining if any real issue of material fact exists, attempted to decide the factual issues, inter alia, of whether Robin misrepresented Adam's biological paternity, whether Robin's actions were intended to mislead Robert, whether Robin's actions in fact misled Robert, and whether Robin's actions resulted in harm to Robert, including both financial and emotional damages. The district court erred in so doing and erred in finding no genuine issue of material fact.

3. RES JUDICATA

On appeal, Robert argues that the trial court erred in granting Robin's motion for summary judgment. Robert asserts that in support of her summary judgment motion, Robin relied solely on the Nebraska Supreme Court's decision in *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994), in support of her assertion that the adjudication of paternity in the parties' dissolution decree should be res judicata and bar Robert's present tort actions. In the district court's order granting summary judgment, the court initially found that res judicata did not bar Robert's action, but later stated that "[m]aybe res judicata is the answer after all, if as in DeVaux, scientific evidence is disregarded."

Robert contends that the Nebraska Supreme Court's ruling in *DeVaux* does not preclude the filing of his action for damages in tort. We agree with Robert.

(a) Supreme Court's Opinion in *DeVaux*

In *DeVaux v. DeVaux*, *supra*, Erin Colleen Zaback, formerly known as Erin Colleen DeVaux, filed an application to modify the decree dissolving her marriage to Richard Arlen DeVaux II. In the application to modify, Zaback sought specifically to have the dissolution decree's finding of paternity modified and to have the decree modified to reflect that DeVaux was not the father of a minor child born during the marriage. In her application, Zaback alleged that she had discovered through blood tests that DeVaux was not the child's natural father. Zaback sought, in addition to having the specific paternity finding modified, to have the child support and visitation provisions of the decree terminated.

DeVaux demurred to Zaback's application. In his demurrer, DeVaux asserted, *inter alia*, that the finding of paternity in the dissolution decree was *res judicata*. The trial court overruled DeVaux's demurrer and ultimately granted Zaback's application to modify. On appeal, the Nebraska Supreme Court held that the trial court erred, both in overruling DeVaux's demurrer and in granting Zaback's application to modify. Specifically, the Supreme Court held that under the doctrine of *res judicata*, Zaback was precluded from relitigating the dissolution decree's finding of paternity.

DeVaux v. DeVaux, *supra*, is inapposite to the present case. The most significant distinction is that in *DeVaux*, the party bringing the subsequent action was seeking to relitigate the legal finding of paternity and the attendant legal rights and responsibilities associated with such a finding, namely, visitation and child support. In the present case, Robert, by contrast, is bringing the subsequent action seeking to recover damages in tort for the fraud perpetrated upon him by Robin's allegedly outrageous conduct in willfully misrepresenting to Robert that he was Adam's father. Robert is not seeking to relitigate the legal finding of paternity made in the dissolution action and is not seeking to impact in any way the attendant legal rights and responsibilities associated with the legal finding of paternity. In fact, in

presenting his case to prove the alleged torts, part of Robert's proof will necessarily be that there is, indeed, a legal finding of paternity in the dissolution decree. This, in addition to the evidence concerning the biological relationship between Robert and Adam, will be necessary to proving the alleged torts. For that reason, Robert is not seeking in any way to alter the legal finding of paternity in the dissolution decree.

If Robert was asking the court to terminate his legal status as Adam's father, we would be more inclined to agree with the district court that *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994), might provide the answer. Robert is not, however, asking the court to terminate his legal status as Adam's father. Robert is asking the court to consider the issues of the lack of a biological relationship with Adam, Robin's alleged conduct leading Robert to believe he was the biological father, and Robin's conduct constituting the intentional infliction of emotional stress upon Robert. See *Miller v. Miller*, 956 P.2d 887 (Okla. 1998). A judgment in Robert's favor in the present case would not in any way alter the legal rights and responsibilities established by the legal finding of paternity in the parties' dissolution decree. Robert's biological connection to Adam is merely part of the proof that will be necessary to prove that certain torts may have been committed by Robin. Offering such proof regarding the lack of a biological relationship between Robert and Adam is not the same as Zaback's attempt in *DeVaux* to challenge the legal finding of paternity. As such, we disagree with the district court's conclusion that *DeVaux* provides the answer to this case.

We also note, as the district court did, that a somewhat similar issue was also addressed by the Nebraska Supreme Court in *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). In *State on behalf of Hopkins*, the court was presented with a situation where a woman and her husband had been divorced and the former husband had been ordered to pay child support for children, including one child that was ultimately established not to be his. The State brought a paternity action on behalf of the child seeking to establish a support obligation on the biological father. The Supreme Court found that the prior dissolution decree and its finding of legal paternity did

not preclude the subsequent paternity action on the basis of res judicata because the biological father who was a party in the paternity action had not been a party in the dissolution proceedings. The Supreme Court further specifically noted that the issue of the former husband's future support obligation, after an order of support was entered against the biological father, was not before the court. This opinion seems to suggest that the holding in *DeVaux v. DeVaux*, *supra*, should not be read to mean that a dissolution decree's finding concerning the legal status of paternity does not, in all situations, constitute a final resolution of the issues of paternity, both biological and legal.

(b) Claim Preclusion and Issue Preclusion

[4-6] In *DeVaux v. DeVaux*, *supra*, the Supreme Court referred to "the doctrine of res judicata" and noted that the doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. We have recently noted that res judicata, which refers to claim preclusion, and collateral estoppel, which refers to issue preclusion, are really two different concepts, although the two terms are often used in the literature together or interchangeably. In *re Interest of Jaden H.*, 10 Neb. App. 87, 625 N.W.2d 218 (2001). See, also, *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975). The doctrine of res judicata, or claim preclusion, means that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action. *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 596 N.W.2d 24 (1999). The doctrine of collateral estoppel, or issue preclusion, applies when an ultimate fact has been determined by a final judgment with the result that the issue cannot be litigated again between the same parties in a future lawsuit. *Id.*

Res judicata, or claim preclusion, applies if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). Collateral estoppel, or issue preclusion, applies if (1) the identical issue was decided in a

prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *In re Interest of Jaden H.*, *supra*. The similarity in when these doctrines apply reveals how similar the doctrines can be in any given case. In *DeVaux*, the Supreme Court applied the doctrine of res judicata when the legal finding of paternity was attacked by an application to modify a dissolution decree. By contrast, the doctrine of collateral estoppel is also implicated in the present case because Robert has brought a different cause of action, involving allegations of tort, in which Robin asserts that paternity is a common issue.

(c) Application

In attempting to apply the concepts of res judicata and collateral estoppel to the facts of the present case, the distinction between the present case and *DeVaux* that is noted above becomes of paramount importance. Specifically, it is crucial to note and remember that in the present case, Robert is not seeking to relitigate the legal finding of paternity made in the dissolution decree. Application of the doctrines of res judicata and collateral estoppel to the present case does reveal that the issue of the legal finding of paternity made in the dissolution decree cannot be relitigated.

The dissolution decree was rendered by a court of competent jurisdiction, the dissolution decree contained a final judgment on the issue of legal paternity and established attendant rights and responsibilities, and both the dissolution decree and the present action involved Robert and Robin. The only element of the doctrines of res judicata and collateral estoppel which is left open to debate is the final element of the doctrine of collateral estoppel, whether there was an opportunity to fully and fairly litigate the issue of paternity in the dissolution action when Robin allegedly misrepresented that Robert was Adam's father. However, the fact that Robert is not seeking to relitigate the legal finding of paternity renders this final question moot.

4. SUBSEQUENT TORT ACTIONS

[7] Although the doctrines of res judicata and collateral estoppel arguably preclude any relitigation of the legal finding of

paternity made in the dissolution decree, the question in the instant case is whether Robert's claims for fraud, assumpsit, and intentional infliction of emotional distress are also barred by the legal finding of paternity in the dissolution decree. We conclude that Robert's causes of action are not barred because of the legal finding of paternity in the dissolution case. This precise issue of whether, after a dissolution proceeding has been finalized, someone can bring a tort action against a former spouse appears to be an issue of first impression in Nebraska.

Nebraska abolished the doctrine of interspousal immunity in the case of *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979). As such, the fundamental notion of one spouse bringing a tort action against another, or against a former spouse, is not inherently prohibited. On the precise issue of whether the subsequent tort action can be grounded on facts and issues which were at issue in the dissolution proceeding, we look outside Nebraska literature for guidance, and we find that other jurisdictions which have addressed this issue have ruled in the affirmative.

(a) Other Jurisdictions

In *Miller v. Miller*, 956 P.2d 887 (Okla. 1998), the Oklahoma Supreme Court was presented with a case that is factually almost identical to the present case. A former husband sued his former wife for damages on theories of fraud, intentional infliction of emotional distress, and quantum meruit based on allegations that the former wife had falsely represented that he was the father of her child. A divorce decree between the parties specifically included, as the decree in the present case did, a legal finding of paternity and ordered the former husband to pay child support. The Oklahoma Supreme Court recognized that despite the legal finding of paternity in the dissolution proceeding, the former husband could proceed with a tort action against the former wife precisely because his tort action did not constitute an attempt to relitigate the legal finding of paternity or to change any of the attendant rights and responsibilities which arose as a result of the legal finding of paternity in the dissolution decree.

In *G.A.W. v. D.M.W.*, 596 N.W.2d 284 (Minn. App. 1999), the Minnesota Court of Appeals held that a former husband's tort claims against his former wife for fraud and emotional distress

were not barred by the doctrines of res judicata or collateral estoppel or by public policy considerations. The former husband's tort claims were based specifically on his allegations that his former wife had misrepresented to him that he was the father of two minor children born during the marriage, despite her knowledge otherwise. Additionally, the fact that the former husband became aware that he was not the children's father during the dissolution proceedings and the parties entered into a dissolution settlement including a clause releasing him from child support and maintenance obligations did not prevent him from later bringing a tort action based on the former wife's actions.

Several other jurisdictions have also held that issues litigated in a dissolution proceeding do not preclude a later tort action. In *McCulloh v. Drake*, 24 P.3d 1162 (Wyo. 2001), the Supreme Court of Wyoming held that a civil action in tort is fundamentally different from a divorce proceeding and ruled that tort claims could not be joined with dissolution proceedings. As such, the Wyoming court specifically held that principles of res judicata would not bar the former wife's later tort actions, even though Wyoming's allowance of fault factors in the dissolution proceeding resulted in the same issues which served as the basis for the subsequent tort action having been litigated in the dissolution proceeding. According to the Wyoming court, even the goal of promoting judicial economy is not significant enough to override the fact that the two proceedings are fundamentally different. In *Sotirescu v. Sotirescu*, 52 S.W.3d 1 (Mo. App. 2001), and *Henriksen v. Cameron*, 622 A.2d 1135 (Me. 1993), the Missouri Court of Appeals and the Supreme Court of Maine, respectively, similarly held that res judicata did not bar a former wife's tort claims against her former husband even though the tort claims arose out of facts and issues which had been at issue during the dissolution proceedings.

Finally, in *County of Fresno v. Ruiz*, 66 Cal. App. 4th 1432, 79 Cal. Rptr. 2d 684 (1998) (ordered not published by California Supreme Court on January 13, 1999), the California Court of Appeals took the issue even one step further. In *Ruiz*, the California court held that a man whose legal paternity had been established by a default judgment was entitled to have the default judgment set aside 7 years later on the basis of fraud

where the mother of the child had misrepresented to the man that he was the father of her child.

Our research reveals no case factually comparable to the present case where any appellate court has used *res judicata* or collateral estoppel to preclude a subsequent tort action despite the basis of the tort action involving issues and facts which were determined during an earlier dissolution proceeding. This is true, although other jurisdictions have ruled similarly to *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994), on facts more comparable to *DeVaux*. See, *Ghrist v. Fricks*, 219 Ga. App. 415, 465 S.E.2d 501 (1995) (legal finding of paternity made in dissolution decree cannot be challenged in subsequent paternity action); *Slagle v. Slagle*, 11 Va. App. 341, 398 S.E.2d 346 (1990) (legal finding of paternity made in dissolution decree cannot be challenged in subsequent proceeding to modify child support); *Com. ex rel. Coburn v. Coburn*, 384 Pa. Super. 295, 558 A.2d 548 (1989) (legal finding of paternity made in dissolution decree cannot be challenged in subsequent contempt of child custody proceeding). Indeed, in *Cornelius v. Cornelius*, 15 P.3d 528 (Okla. App. 2000), the Oklahoma Court of Appeals recognized that the parties to a dissolution proceeding cannot generally challenge the legal finding of paternity in such proceedings as actions to modify child support. See, also, *Arnold v. Arnold*, 207 Okla. 352, 249 P.2d 734 (1952). Nonetheless, when presented with a factual situation comparable to the one in the present case, the Oklahoma Supreme Court, as noted above, reached the result we reach today. See *Miller v. Miller*, 956 P.2d 887 (Okla. 1998).

(b) Resolution

We conclude, on the basis of the reasoning of the various courts discussed above, that Robert's tort actions should not be precluded simply because there was a legal finding of paternity in the earlier dissolution proceeding. We conceptualize Robert's present action differently from the trial court and conclude that Robert's present action is not one to establish or disestablish legal paternity of Adam and the attendant rights and responsibilities of such a finding. Indeed, the legal finding of paternity made in the dissolution decree is not only part of the proof Robert will need to establish his present torts, but any judgment

in his favor on the alleged torts will not have any impact on the legal finding of paternity made in the dissolution proceeding. See *Miller v. Miller*, *supra*.

As the Oklahoma Supreme Court stated:

Plaintiff in the present case is not disputing paternity as it relates to any of the rights and responsibilities established between him and A [minor child]. Rather, in this tort action, plaintiff's biological nexus to A is the sole issue. *The relief plaintiff seeks is not a change of legal status, but damages in tort.* A judgment establishing the legal status of paternity in a divorce proceeding may not be invoked to bar a determination of biological paternity in a tort action based upon the kind of fraudulent conduct alleged here.

(Emphasis in original.) 956 P.2d at 897-98. To rule otherwise would effectively leave Robert with no remedy or recourse whatsoever for Robin's alleged tortious conduct.

We further note that the particular factual circumstances of the present case render this result all the more appropriate. In *DeVaux v. DeVaux*, 245 Neb. at 619-20, 514 N.W.2d at 646, quoting *Hackley v. Hackley*, 426 Mich. 582, 395 N.W.2d 906 (1986), the Nebraska Supreme Court noted, "'There is no more forceful example of the rationale underlying the requirement of finality of judgments than the chaos and humiliation which would follow from allowing [persons] to challenge, long after a final judgment has been entered, the legitimacy of children born during their marriages.'" However, in the present case, Robert has already consented to the adoption of Adam by Robin's husband, and a decree of adoption has been entered by the Douglas County Court. Not only is Robert's action not seeking to alter any of the rights and responsibilities attendant to the legal finding of paternity made in the dissolution decree, but the chaos and humiliation of which the *DeVaux* court was mindful is not a concern in the present case.

On the record before us, the only basis for finding that summary judgment was appropriate was the trial court's ultimate conclusion that Robert's causes of action were barred by res judicata. For all the reasons stated herein, we conclude that the court erred in reaching that conclusion. As such, there is no appropriate basis for finding that there is no genuine issue of

material fact and that Robin is entitled to judgment as a matter of law. See *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001). When we view the evidence in a light most favorable to Robert and give Robert the benefit of all reasonable inferences deducible from the evidence, summary judgment should not have been granted. See *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001). As such, the district court's grant of summary judgment must be reversed and the matter remanded for further proceedings.

V. CONCLUSION

After reviewing the record, we conclude that the district court erred in finding that there was no genuine issue of material fact and that Robert's claims were barred by *res judicata*. Therefore, the court erred in granting summary judgment in favor of Robin and dismissing Robert's claim. The order of the district court is reversed, and the matter is remanded for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

DOUG DETMER, AS GUARDIAN AND NEXT FRIEND OF
LEANNE DETMER, APPELLANT AND CROSS-APPELLEE, V.
DAWN BIXLER, APPELLEE AND CROSS-APPELLANT.
642 N.W.2d 170

Filed February 19, 2002. No. A-00-606.

1. **Res Judicata: Judgments.** The doctrine of *res judicata* is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
2. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
3. **Directed Verdict: Proof: Appeal and Error.** In considering an appeal from an order granting a motion for a directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence.
4. **Negligence: Proximate Cause: Damages: Proof.** In order to maintain a negligence action, a plaintiff must prove duty, breach, proximate cause, and damages.

5. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
6. _____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
7. **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.
8. **Negligence: Torts: Parties.** The proposition that the absence of an underlying tort precludes recovery against an employer is equally applicable against other parties charged with negligent supervision.
9. **Attorney Fees: Words and Phrases.** As used in the context of awarding attorney fees in a frivolous action, "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
10. **Attorney Fees: Appeal and Error.** The standard of review on the trial court's determination of a request for sanctions under Neb. Rev. Stat. § 25-824 (Reissue 1995) is whether the trial court abused its discretion.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

D. Kirk Wolgamott for appellant.

Susan I. Strong, of Plessman Law Offices, for appellee.

HANNON, INBODY, and CARLSON, Judges.

INBODY, Judge.

I. INTRODUCTION

Doug Detmer (Detmer), as guardian and next friend of his minor daughter Leanne Detmer (Leanne), appeals the district court's grant of Dawn Bixler's motion for a directed verdict and the dismissal of his complaint. Bixler cross-appeals the district court's denial of her motion for an award of attorney fees. For the reasons recited herein, we affirm.

II. STATEMENT OF FACTS

This case originated as an action by Detmer, on behalf of Leanne, against Leanne's minor boyfriend, Dallas Mills, and Mills' mother, Bixler. Leanne and Mills had engaged in consensual sexual intercourse when 16 years of age, which resulted in Leanne's becoming pregnant, which pregnancy was subsequently terminated by an abortion. Detmer's petition alleged that Bixler knew that Leanne and Mills were having sexual relations and that her negligent failure to properly supervise, control, and advise Mills or inform Leanne's parents of the sexual activities resulted

in personal, bodily, psychological, and emotional damage to Leanne, including medical expenses. The claim against Mills was dismissed on a motion for summary judgment because the acts of Leanne and Mills were consensual. The claim against Bixler proceeded to a jury trial held on February 24 and 25, 1999.

At trial, Leanne's mother, Sharon Detmer, testified that Leanne began having emotional problems at approximately age 15 and was prescribed anti-anxiety medications and underwent counseling, both of which were continuing at the time of trial. In 1996, Leanne, then 16 years old, began dating Mills, who was also 16 years old. At some point in time after Leanne and Mills began dating, they began having sexual relations.

On April 1, 1997, Leanne learned that she was pregnant and informed her parents. After learning of Leanne's pregnancy, Bixler came to the Detmers' home on several occasions, attempting to take Leanne to Bixler's home. Leanne's pregnancy was terminated by abortion on April 9.

On April 10, 1997, Leanne was committed to Child and Adolescent Psychiatric Services (CAPS) at Lincoln General Hospital because she was very angry and violent and was continually attempting to run away to Bixler's home, she was threatening suicide, and Leanne's parents could not control her. Leanne was released from CAPS on April 15, but was readmitted on April 20 after she ran away to Bixler's home. She was released on April 25 and returned to live with her parents.

Detmer testified that expenses were incurred as a result of Leanne's pregnancy, including the expenses relating to the abortion bill, doctor bills, CAPS bills, and psychiatry and other counseling bills.

Leanne testified that she never told Bixler or her parents that she and Mills were engaging in sexual relations and that she was trying to keep it a secret from the adults. However, according to Leanne, Bixler talked to both her and Mills about the fact that they were sexually active. Leanne further testified that she and Mills engaged in sexual relations approximately 15 times and that the couple had intercourse at Bixler's home and her parents' home.

On February 25, 1999, Bixler moved for directed verdict at the close of Detmer's case, alleging that Detmer failed to prove

a prima facie case of negligence. Specifically, Bixler argued that Detmer failed to prove (1) that Bixler owed Leanne a duty; (2) that duty, if any, was breached by Bixler; or (3) that Leanne's injury was a proximate cause of Bixler's conduct. The district court granted Bixler's motion and dismissed Detmer's petition. Specifically, the court determined that since Leanne was a dependent minor child, the Detmers were responsible for Leanne's medical expenses and that consequently, Detmer did not have a cause of action against Bixler for the medical expenses. Further, the court determined that there was no evidence that any of Leanne's injuries were caused by any negligence of Bixler and that insufficient evidence had been adduced regarding Leanne's injuries.

On March 8, 1999, Detmer filed a timely motion for new trial. On March 15, Bixler filed a motion for attorney fees on the ground that the action was frivolous. On March 23, Detmer appealed the district court's grant of Bixler's motion for directed verdict and the dismissal of his complaint, which appeal was dismissed by this court for lack of jurisdiction. See *Detmer v. Bixler*, 8 Neb. App. lii (No. A-99-454, Oct. 6, 1999).

Back at the trial court, Detmer withdrew the motion for new trial, and on May 11, 2000, Bixler's motion for attorney fees was denied. On June 6, Detmer again appealed the district court's February 25, 1999, grant of Bixler's motion for directed verdict and dismissal of his complaint. Bixler has filed a cross-appeal alleging that the district court erred in denying her motion for attorney fees and costs.

III. ASSIGNMENTS OF ERROR

Detmer's sole assignment of error is that the district court erred in granting Bixler's motion for directed verdict and dismissing his complaint. Bixler cross-appeals and assigns as error that the district court abused its discretion in denying her motion for attorney fees.

IV. ANALYSIS

1. JURISDICTION

Before addressing the merits of this appeal, we first address Bixler's claim that this court's summary dismissal of Detmer's

first appeal on jurisdictional grounds constitutes a judgment on the merits of Detmer's claims and that relitigation is barred pursuant to either res judicata or law of the case. Additionally, Bixler contends that Detmer's current appeal is untimely because Detmer's notice of appeal was not filed until June 6, 2000, which was more than 1 month after the court's February 25, 1999, grant of Bixler's motion for a directed verdict.

(a) Res Judicata or Law of Case

First, we address Bixler's claim that this court's summary dismissal of Detmer's first appeal operates to bar Detmer's second appeal pursuant to either res judicata or law of the case.

[1,2] The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997); *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001). " 'Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.' " *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 278, 631 N.W.2d 846, 859 (2001) (quoting *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998)).

On March 23, 1999, when Detmer filed the first notice of appeal regarding the grant of a directed verdict against him, there remained pending before the district court a motion for new trial. At that time, Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 1998) provided in part:

When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. A new notice of appeal shall be filed within the prescribed time from the ruling on the motion.

Because there was a timely motion for new trial pending before the district court at the time that Detmer filed his first

notice of appeal, pursuant to § 25-1912(2), the appeal was premature and had no effect. Consequently, this court lacked jurisdiction over Detmer's first appeal, and it was summarily dismissed. This determination was not a decision on the merits, and thus, the second appeal filed by Detmer is not barred by res judicata or law of the case.

(b) Timeliness of Instant Appeal

The next issue is whether Detmer's second notice of appeal in the instant case filed on June 6, 2000, purporting to appeal the district court's February 25, 1999, grant of Bixler's motion for directed verdict and dismissal of his complaint was timely. Bixler claims that Detmer's notice of appeal was filed more than 1 month after the February 25 grant of Bixler's motion for directed verdict and dismissal of his complaint and that thus, his appeal is untimely.

However, on March 15, 1999, Bixler filed a motion for attorney fees based on the ground that the action was frivolous, which motion was not ruled upon until May 11, 2000. In *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999), the Nebraska Supreme Court considered whether a district court's order in a condemnation of property case was a final, appealable order, absent a ruling on a pending motion for attorney fees. The court reasoned that because attorney fees are considered costs in condemnation proceedings and costs are considered part of the judgment, the order appealed from was not a final, appealable order due to the trial court's failure to rule on a motion for attorney fees which had been filed prior to the filing of the notice of appeal.

Similarly, pursuant to Neb. Rev. Stat. § 25-824(2) (Reissue 1995):

Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

Applied to the instant case, at the time Detmer voluntarily dismissed his motion for new trial, there still was a motion for attorney fees pending from March 15, 1999, which if allowed would be taxed as costs. Thus, the district court's order granting Bixler's motion for a directed verdict and dismissing Detmer's complaint had not disposed of the entire case and was not a final, appealable order until May 11, 2000, when the court ruled on Bixler's motion for attorney fees. Since Detmer filed his notice of appeal within 30 days of the court's May 11 ruling, his appeal is timely. We now proceed to consider the merits of this appeal.

2. DIRECTED VERDICT

Detmer contends that the district court erred in granting Bixler's motion for directed verdict and in dismissing his complaint.

[3] In considering an appeal from an order granting a motion for a directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence. *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001); *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000).

[4,5] In order to maintain a negligence action, a plaintiff must prove duty, breach, proximate cause, and damages. *Divis v. Clarklift of Nebraska*, 256 Neb. 384, 590 N.W.2d 696 (1999); *Gerlach v. State*, 9 Neb. App. 806, 623 N.W.2d 1 (2000). The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001); *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000).

[6,7] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Struempfer v. Estate of Kloepping*, 261 Neb. 832, 626 N.W.2d 564 (2001); *Claypool v. Hibberd*, *supra*; *Drake v. Drake*, *supra*; *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000); *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000). When reviewing questions of law, an appellate court has

an obligation to resolve the question independently of the conclusion reached by the trial court. *Struemppler v. Estate of Kloepping*, *supra*; *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000).

In *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993), the plaintiff brought an action for damages against the Catholic Archdiocese of Omaha and her parish priest, with whom she had engaged in a sexual affair. The plaintiff argued that the archdiocese was negligent in failing to supervise the priest in connection with his pastoral duties when it knew or should have known of his past sexual affairs and by failing to remove the priest from his position when it had this knowledge.

In affirming the dismissal of the plaintiff's claims upon demurrer, the Nebraska Supreme Court found that the plaintiff's consent barred any recovery against the priest and that since the plaintiff had no tort claim against the priest individually, then the plaintiff likewise can have no cause of action against the archdiocese. In making this determination, the court quoted with approval from *Strock v. Presnell*, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988): "[A]n underlying requirement in actions for negligent supervision . . . is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer.'" *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. at 723, 508 N.W.2d at 913.

[8] We believe that in actions for negligent supervision, the rationale for the Nebraska Supreme Court's holding that absence of an underlying tort precludes recovery against an employer is equally applicable against other parties charged with negligent supervision.

In the instant case, Detmer alleged in his complaint that Bixler was negligent in supervising, controlling, and advising Mills so as to prevent injury to Leanne. In the instant case, at the time that the district court granted Mills' motion for summary judgment, the court determined that the sexual intercourse engaged in by Leanne and Mills was consensual, and this determination was not appealed. Thus, there has been a final determination by the district court that Leanne consented to the intercourse which

resulted in her pregnancy and that no tort claim existed against Mills. Because no tort claim existed against Mills for the underlying tort, it follows that Detmer likewise can have no cause of action against Bixler. Consequently, the district court properly granted Bixler's motion for directed verdict, and this assignment of error is without merit.

3. BIXLER'S CROSS-APPEAL

Bixler has cross-appealed, contending that the district court abused its discretion in denying her motion for attorney fees pursuant to § 25-824 on the basis that Detmer's action was frivolous.

[9] A court may award attorney fees against an attorney or party if the court finds that the action brought by the attorney or party is frivolous or made in bad faith. § 25-824(2). As used in the context of awarding attorney fees in a frivolous action, "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Blecha v. Blecha*, 257 Neb. 543, 599 N.W.2d 829 (1999). However, § 25-824(5) also provides that "[n]o attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state"

[10] The standard of review on the trial court's determination of a request for sanctions under § 25-824 is whether the trial court abused its discretion. *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 596 N.W.2d 24 (1999). See *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

In the present case, Detmer sought a court determination of whether a parent who knows that the parent's minor child is engaging in sexual relations with another minor child has a legal duty to supervise the child in order to prevent such activity. Thus, the case presented, if not a new theory of law, the expansion or clarification of existing negligence law. Although we have affirmed the district court's dismissal of Detmer's petition, merely losing one's case is not the test for an award of attorney fees, and said rejection does not necessarily mean that the action was pursued with improper motive or was so without merit as to be ridiculous. Therefore, based upon our de novo review of the record, we cannot say that the district court abused its discretion in denying Bixler's motion for attorney fees.

V. CONCLUSION

For the reasons discussed above, we affirm the district court's grant of Bixler's motion for directed verdict and the denial of Bixler's motion for attorney fees.

AFFIRMED.

IN RE INTEREST OF STEPHANIE H. ET AL.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ELIZABETH W., APPELLANT.
639 N.W.2d 668

Filed February 19, 2002. No. A-01-959.

1. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Although an ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, an order under Neb. Rev. Stat. §§ 43-254 (Cum. Supp. 2000) and 43-247(3)(a) (Reissue 1998) after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing is final and thus appealable.
2. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Juvenile Courts: Jurisdiction: Parental Rights.** Without jurisdiction, the juvenile court has no power to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing.
4. **Juvenile Courts: Jurisdiction.** The jurisdiction of the State in juvenile cases arises out of the power every sovereignty possesses as *parens patriae* to every child within its borders to determine the status and custody that will best meet the child's needs and wants.
5. ____: _____. The juvenile court is not bound to give a district court order preclusive effect, because the sovereign exercises its *parens patriae* power primarily through the juvenile courts, which do not need to defer to prior district court orders.
6. **Juvenile Courts: Parental Rights: Affidavits: Records.** The grounds for an ex parte detention order from the juvenile court are to be contained in an affidavit of one having knowledge of the relevant facts to be presented to the juvenile court and made a part of the record of the proceedings.
7. **Juvenile Courts: Parental Rights: Proof.** The burden is upon the State to allege and prove in a detention hearing that the juvenile court should not place children with their other natural parent after the expiration of the first 48 hours of emergency detention under Neb. Rev. Stat. § 43-250(4) (Cum. Supp. 2000) during a period of temporary detention pending adjudication spawned by allegations under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) against their custodial parent.
8. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.

9. **Divorce: Child Custody.** The placement of a child in the custody of one parent as opposed to the other in a divorce action does not extinguish the noncustodial parent's right to custody, nor does it constitute an adverse determination of the fitness of the noncustodial parent in that or other proceedings.
10. **Juvenile Courts: Jurisdiction: Child Custody.** The juvenile court has broad jurisdiction under Neb. Rev. Stat. § 43-284 (Supp. 2001) to commit the juvenile to a suitable institution, to the care of a reputable citizen, to the care of a suitable family, or to the care and custody of the Department of Health and Human Services.
11. **Child Custody: Parental Rights: Proof.** A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
12. **Juvenile Courts: Parental Rights: Proof.** In order to demonstrate that a preadjudication detention should continue, the State must prove by a preponderance of the evidence that the custody of a juvenile should remain in the care of the Department of Health and Human Services pending adjudication.
13. **Juvenile Courts: Child Custody: Proof.** Preadjudication detention orders are dispositional in nature, and Neb. Rev. Stat. § 43-254 (Cum. Supp. 2000) requires the State to prove by a preponderance of the evidence that custody should remain with the Department of Health and Human Services pending adjudication.
14. **Juvenile Courts: Parent and Child.** Reasonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, JR., Judge. Reversed and remanded with directions.

James A. Mullen, of Lefler & Mullen, and Andrew D. Strotman and LeAnn Larson Frobom, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

James S. Jansen, Douglas County Attorney, and Kim B. Hawekotte for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

William H., the custodial parent of three minor children, was reported to be sexually abusing his two minor daughters. As a result of that report, the Douglas County Attorney (State) filed a juvenile petition in the separate juvenile court of Douglas County alleging that the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998), because they lacked proper parental care by reason of William's faults or

habits. The State also filed a motion asking that temporary custody of the children be placed with the Department of Health and Human Services (Department), which was ordered. The noncustodial parent, Elizabeth W., asked the juvenile court to place the children with her, but that request was denied, as was her request for visitation. Elizabeth contends that the actions of the juvenile court ignore her rights as a parent and deny her due process, given that there has been no allegation or proof by the State of her unfitness to have custody of her children.

PROCEDURAL AND FACTUAL BACKGROUND

During a weekend visitation on July 20, 2001, with Elizabeth, Stephanie H., born April 14, 1987; Skyler H., born October 1, 1988; and Samantha H., born March 28, 1991, told Elizabeth that William, the custodial parent by virtue of the divorce decree, had been forcing the girls, Stephanie and Samantha, to perform oral sex on him. Elizabeth immediately called the police and took them to be interviewed.

The petition filed in the juvenile court in this matter on July 23, 2001, alleged that William was the natural father of the two girls and their brother, Skyler; alleged that the children lacked proper care by reason of William's inappropriate sexual contact with the girls; and requested that the court make such orders as were appropriate concerning the care, custody, and control of the children. On that same date, the State filed its motion for temporary custody asking for placement of the children with the Department and attaching thereto the affidavit of Lisa Crouch, the police officer who had interviewed the girls. That motion alleged that the need for detention existed because of immediate and urgent necessity for the protection of the children.

Crouch's affidavit alleged that Elizabeth "does not have any legal custody rights at the time of th[is] report although [William] and [Elizabeth] have mutually agreed upon visitation." According to Crouch's affidavit, Elizabeth said she sees her children once or twice a month. Crouch recounted the details of her interviews with the two girls, which if true, would constitute inappropriate sexual contact between William and his girls, as the girls alleged that he had been repeatedly forcing them to perform oral sex on him.

On July 23, 2001, the juvenile court placed the children with the Department "for placement in foster care or other appropriate placement" due to exigent circumstances such that efforts need not be made to prevent or eliminate the need for the removal of the children from the custodial home. The court's order of July 23 was apparently done *ex parte* off the record and makes no mention of Elizabeth. It did, however, order a further hearing for July 30.

A summons was issued by the juvenile court for service on William, but on August 2, 2001, the return was filed showing no service as William was not found in Douglas County. Subpoenas were issued to Department employees for the "detention hearing" set for July 30. The detention hearing was held on that date, and Elizabeth appeared with counsel. While William was not present, and had not been served, an attorney representing him made a special appearance on his behalf, but the court nonetheless specifically found in its order from that hearing that "notice, service and the jurisdiction of the Court in this matter are proper." Curiously, the next paragraph of the court's order recites that William had not been served. In any event, at the beginning of this hearing, counsel for Elizabeth advised the judge of their intention "to file an application to intervene," as well as the fact that there was a divorce decree in 1993 providing William with primary custody subject to Elizabeth's reasonable rights of visitation. However, counsel failed to introduce that decree into evidence at that time, or at any time in these proceedings. Counsel indicated that the motion to intervene would be filed on that day, and it was actually filed the following day, July 31.

At the July 30, 2001, hearing, Crouch testified that she interviewed the girls at "Project Harmony" on July 20 after they had disclosed the sexual assaults by William to Elizabeth and that Elizabeth had driven them there. Crouch testified that the reason the children were placed "into protective custody or foster care" was "[f]or their safety." Crouch was asked whether she was aware "of any other persons who would provide for their safety at the time that [she] placed them in protective custody." Her responses follow: "A: Their mother was present but did not have any legal custody at that time. Q: And were you aware of anything as it

relates to her living situation? A: I did not get into detail on her living situation.”

Crouch related that William had been taken into custody on July 23, 2001, and that he had denied the allegations. Counsel for Elizabeth did not question Crouch, the only witness at the July 30 hearing, nor did he attempt to offer any evidence. The court found that it was in the best interests of the minor children to remain in the Department’s temporary care and custody “with placement to exclude the home of the father until further order of the Court.” The court then stated that the matter was set for a pretrial on August 21, at which point, Elizabeth’s attorney asked whether the court would “entertain visitation for the mother at this time? Is that something the Court can do at this time?” The court’s response is repeated here in full:

I don’t know anything about your client. I don’t know anything about the overall situation except what I just heard. Your client is not a named party. She hasn’t intervened yet. I’m not — I don’t have any information to say that I would be opposed to it if the Department were to set it up, but absent something more being presented to me, I would not order that at this time.

The court’s written order stemming from the July 30, 2001, hearing orders William, although he was not present at the hearing and had not yet been served, to “complete an affidavit of identification of the other parent of each minor child,” and a setting was also made in that order for a hearing on August 21 on Elizabeth’s motion to intervene. However, before that date, Elizabeth filed a motion for “detention review,” which was heard on August 8. In her motion, she asked for immediate custody of her children.

At the beginning of the August 8, 2001, hearing on Elizabeth’s “detention review,” she was formally allowed to intervene. Then after some colloquy between the judge and Elizabeth’s counsel about the burden of proof, Elizabeth testified. Elizabeth testified that she was the natural mother of the children and that she had custody pursuant to the recent district court order dated August 8, 2001, which was offered and received in evidence. Elizabeth testified that she lived in Omaha with her 8-year-old daughter and that she was in a position to

protect and provide for the needs and well-being of the three children involved in this proceeding. Elizabeth testified that she had secured a protection order against William to stay away from her and her residence and that she would call the authorities to enforce that order. She further testified that if the children were in her home, they would be allowed no contact with William. This concluded her direct examination.

Upon cross-examination, the State established that Elizabeth was living with a boyfriend, whom she had known for about 6 months. She was asked if she was aware if he had a police record and whether she was aware of any type of cruelty to animal charges against him, to which she answered in the negative on both matters. Counsel for the Department asked Elizabeth about her residence, and she responded it was a townhouse with two bedrooms and a full basement. She said she was employed at the University of Nebraska Medical Center as a research technician. When asked if she was aware of her boyfriend's being incarcerated for any reason, she said that she knew he was on work release but did not know what it was for and that "I didn't realize that was like he would have a criminal whatever because of being on work release." No evidence about the boyfriend was introduced nor was further evidence of any kind introduced. The juvenile court denied Elizabeth's motion for placement of the children with her and ordered the Department to undertake and complete a home study of Elizabeth to be available at the time of the "pretrial" on August 21.

Although Elizabeth filed her notice of appeal to this court on August 20, 2001, there was still a hearing of sorts on August 21. That hearing involved no evidence and no orders, but there was discussion about the status of the case and the home study. The court was aware that the appeal had been filed. Of note is the court's inquiry of the State as to whether service had been obtained on William, and the court was informed that he had not been served.

JURISDICTION

Elizabeth's notice of appeal states that she is appealing from the juvenile court's orders of "July 30, 2001, and August 10, 2001." (We presume she means the order signed August 8 and

file stamped August 9.) The State contends that we lack jurisdiction because the order of August 9 continuing temporary custody of the three children in the Department and denying Elizabeth's request for custody or visitation with her children does not affect a substantial right of Elizabeth and thus is not a final, appealable order. The procedural framework here is an *ex parte* detention order of July 23, an evidentiary hearing and order of July 30 continuing detention in the Department, and an evidentiary detention hearing on August 8, after which Elizabeth's request for custody of her children was denied. The order of August 9 continued the Department's custody of the children. All of the foregoing were prior to any adjudication of the children.

[1] Although an *ex parte* temporary detention order keeping a juvenile's custody from his or her parent for a short period of time is not final, an order under Neb. Rev. Stat. § 43-254 (Cum. Supp. 2000) and § 43-247(3)(a) after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing is final and thus appealable. See *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). See, also, *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). In *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997), the court said that unlike a detention order after a hearing, an *ex parte* temporary detention order keeping a juvenile from his or her parent is not final. Here we have orders of July 30 and August 9, 2001, both entered after hearings which continued the children's detention with the Department. The order of August 9 also denied Elizabeth's request for custody. The order of August 9 is a final, appealable order, and we have jurisdiction.

STANDARD OF REVIEW

[2] Juvenile cases are reviewed *de novo* on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and 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 Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). There is no conflict in the evidence here. In connection with questions of law, an appellate court has an obligation to reach an independent

conclusion irrespective of the decision made by the court below. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999).

ASSIGNMENTS OF ERROR

Elizabeth assigns 11 errors. We will not repeat each, but, rather, we use categories of assignments as logical divisions in our opinion, noting that there is a fair degree of overlap in the assignments. Elizabeth's claim can be summarized as being that she has been deprived of the right to have custody of her children by a juvenile court which has wrongfully imposed the burden of proof upon her to demonstrate her parental fitness when there are no allegations or evidence of her unfitness to have custody of her children and that the district court which entered her divorce decree has awarded her custody, in view of the allegation of sexual abuse against William. We have not found a similar Nebraska case.

ANALYSIS

Jurisdiction of Juvenile Court Versus District Court.

Elizabeth attacks the jurisdiction of the juvenile court upon numerous grounds in her assignments of error, including the juvenile court's (1) failure to serve William, (2) failure to advise her of her rights, (3) lack of allegations against her, (4) failure to allow Elizabeth to participate in the initial custody hearing, and (5) failure to defer to the district court's order granting her sole custody of the children.

Elizabeth argues that the juvenile court lacked jurisdiction over the children, citing *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994). At the outset, *In re Interest of Kelly D.* is distinguishable, because factually, it is the reverse of this case as it involved allegations against the noncustodial mother, but no allegations were made that the children lacked proper parental care because of the custodial father's actions or inactions. The *In re Interest of Kelly D.* court said the basic issue was what authority does a juvenile court have when a child's custodial parent is properly caring for the child but the noncustodial parent has propensities which pose a risk to the child and there is no allegation or evidence that the custodial parent is unwilling and unable to protect that child from the other parent.

[3] In *In re Interest of Kelly D.*, an adjudication had already occurred from which no appeal had been taken, and the case was at the dispositional phase, which is completely different from the instant case. Despite the lack of an appeal from the adjudication order in *In re Interest of Kelly D.*, we raised on our own whether subject matter jurisdiction was present, noting that if the pleadings and the evidence do not justify the court's acquiring jurisdiction of a child, then the court has no jurisdiction, citing *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992) (without jurisdiction juvenile court has no power to order parent to comply with rehabilitation plan, nor does juvenile court have any power over parent or child at disposition hearing). In *In re Interest of Kelly D.*, we found a lack of jurisdiction and ordered the proceedings dismissed, reasoning as follows:

[T]he petition contains no allegations claiming that the child lacked proper parental care by reason of the conduct of [the father], the person having custody of the child. The pleadings therefore show that [the father] was given no notice of any claim against him or of the fact that the proceeding might interfere with his constitutionally protected rights to his child. . . . In this case, we conclude that the petition must allege facts which would show that the child lacks proper parental care by reason of the inadequacy of any parent whose custody or right to custody might be affected, so that both parents may understand that the litigation concerns their respective rights. Under the circumstances of this case, the petition is so fundamentally inadequate that it could not be the basis of the juvenile court's jurisdiction.

3 Neb. App. at 262-63, 526 N.W.2d at 447.

In re Interest of Constance G., 247 Neb. 629, 529 N.W.2d 534 (1995), holds that the dual purpose of proceedings brought under § 43-247(3)(a) which allege that the juvenile is homeless, destitute, or without proper support through no fault of the parent, guardian, or custodian is to protect the welfare of the child and to safeguard the parent's right to properly raise his or her own child. Thus, a petition thereunder is brought on behalf of the child, not to punish the parents. *Id.*

[4] The same is true in the instant case, even though the allegations are under the portion of § 43-247(3)(a) where the child

“lacks proper parental care by reason of the fault or habits of his or her parent.” The specific claim here is the sexual abuse of the girls by William. Section 43-247 provides that the “juvenile court shall have exclusive original jurisdiction as to any juvenile defined in . . . subdivision (3) of this section.” The jurisdiction of the State in juvenile cases arises out of the power every sovereignty possesses as *parens patriae* to every child within its borders to determine the status and custody that will best meet the child’s needs and wants. *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

From the foregoing authority, we reject Elizabeth’s contention that our previous decision in *In re Interest of Kelly D.*, 3 Neb. App. 251, 526 N.W.2d 439 (1994), mandates a finding that the juvenile court lacked jurisdiction to make any orders with respect to the three children. Section 43-247 gives the juvenile court exclusive original jurisdiction of the allegations made under subsection (3)(a), as they were here. And the Department must obviously have an opportunity to prove its allegations. The difference between *In re Interest of Kelly D.* and the instant case is that in *In re Interest of Kelly D.*, the risk of harm was posed by the noncustodial mother and there were no allegations of a lack of proper parental care by the custodial father. Plus, in *In re Interest of Kelly D.*, the State had already put on its case, and an adjudication had occurred.

In the instant case, assuming the truth of the allegations of William’s sexual abuse of the girls for purposes of analysis, the juvenile court would obviously have jurisdiction to remove the children from his custody. The filing of the petition on July 23, 2001, making those allegations against William gives the juvenile court jurisdiction to adjudicate the children.

While Elizabeth makes additional jurisdictional arguments relying on cases which exclude a noncustodial parent from neglect proceedings, such as *In re Interest of Amanda H.*, 4 Neb. App. 293, 542 N.W.2d 79 (1996), the record does not show that Elizabeth was excluded because she was allowed to intervene on August 8, 2001, and was then a party to the action.

[5] Elizabeth also claims error because the juvenile court failed to defer to the district court’s order of August 8, 2001. The order entered by the district court for Douglas County recites a hearing

upon the “ex parte motion of [Elizabeth] for custody of the parties’ three (3) minor children,” which was granted. We note that Neb. Rev. Stat. § 43-245(5) (Cum. Supp. 2000) provides in part: “Nothing in the Nebraska Juvenile Code shall be construed to deprive the district courts of their habeas corpus, common-law, or chancery jurisdiction or the county courts and district courts of jurisdiction of domestic relations matters as defined in section 25-2740.” Neb. Rev. Stat. § 25-2740 (Cum. Supp. 2000) includes “custody” within the definition of the term “domestic relations matters.” Notwithstanding this statutory provision giving the district court jurisdiction over custody in a domestic relations matter, the jurisdiction of the State in juvenile cases arises out of the power every sovereignty possesses as *parens patriae* to every child within its borders to determine the status and custody that will best meet the child’s needs and wants. *In re Interest of M.B. and A.B.*, *supra*. Therefore, the district court’s grant of custody to Elizabeth was important and should have been considered by the juvenile court in ruling on her motion for placement of the children with her, because the district court order negated Crouch’s affidavit to the extent that it claimed that Elizabeth had no right of custody. However, the juvenile court was not bound to give the district court order preclusive effect, because the sovereign exercises its *parens patriae* power primarily through the juvenile courts, which do not need to defer to prior district court orders. See *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979) (juvenile court still has jurisdiction to determine custody of minor child whose custody was subject to preexisting district court custody order when county attorney proceeds under juvenile code with filing allegation child falls with § 43-247(3)).

Ex Parte Detention Order and Misleading Affidavit.

[6] Elizabeth claims that the State gained temporary emergency custody of her children by using a false and misleading affidavit from Crouch. Clearly, ex parte temporary custody of an endangered juvenile by a law enforcement officer is statutorily authorized. See Neb. Rev. Stat. § 43-248 (Reissue 1998). The grounds for an ex parte detention order from the juvenile court are to be contained in an affidavit of one having knowledge of the relevant facts to be presented to the juvenile court and made a part

of the record of the proceedings. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). The record in this case reveals that these procedural steps were followed, and we reject Elizabeth's contention that as a legal matter, the juvenile court was without authority to enter an ex parte temporary detention order.

Elizabeth also contends that Crouch's affidavit was false in its assertion that "there was no appropriate person for the undersigned to release said child(ren) which could provide for said child(ren)'s temporary care and safety." Crouch's affidavit also stated that Elizabeth "does not have any legal custody rights at the time of th[is] report." No factual basis for either of these conclusions is found in the affidavit. Moreover, this same police officer testified at the first detention hearing on July 30, 2001, when asked about her awareness of Elizabeth's living situation: "I did not get into detail on her living situation." Crouch's sworn statement that there was "no appropriate person" to whom she could release the children, remembering that Elizabeth had brought the children to the police, suggests that after appropriate investigation, Elizabeth has been determined by Crouch to be an inappropriate temporary custodian of her own children. The fact of the matter, as revealed by Crouch's testimonial admission, is that she did nothing to determine the appropriateness of temporary placement of the children with Elizabeth.

When Crouch represented that Elizabeth "does not have any legal custody right," no factual basis for that statement was provided in the affidavit, and as discussed above, by August 8, 2001, Elizabeth was given custody by the district court order which negated Crouch's earlier statement. The affidavit was inaccurate to the extent that it implied that Crouch had investigated whether placement with Elizabeth was appropriate. But in any event, it had been negated by the district court's order. In conclusion, the affidavit, while providing the basis for the juvenile court to initially enter an order of temporary custody, provided no basis on August 8 for the juvenile court to deny Elizabeth's motion that the children be placed with her.

*Deprivation of Custody Without Evidence of
Unfitness or Inability to Protect Children.*

Elizabeth's brief uses a variety of assignments of error to argue that she was wrongfully denied custody of her children

when the allegations of their endangerment by William's sexual abuse of the girls came to light.

We begin with Elizabeth's contention that the juvenile court wrongfully placed the burden of proof upon her in the detention review hearing of August 8, 2001. In that proceeding, the juvenile court asked counsel for Elizabeth if he was asking that the children be placed with her. Upon being advised in the affirmative, the court asked if there was "objection to that." The attorneys for the State and the Department both objected without stating any basis, nor did the court require them to articulate any reason for their objections. The court then informed Elizabeth's counsel: "All right. So then you need to present evidence." At that point, Elizabeth testified, and we have recounted the substance of her testimony in the factual background portion of this opinion.

[7] We hold that the burden is upon the State to allege and prove in a detention hearing that the juvenile court should not place children with their other natural parent after the expiration of the first 48 hours of emergency detention under Neb. Rev. Stat. § 43-250(4) (Cum. Supp. 2000) during a period of temporary detention pending adjudication spawned by allegations under § 43-247(3)(a) against their custodial parent. The rationale for our holding begins with *In re Interest of Borius H. et al.*, 251 Neb. 397, 402, 558 N.W.2d 31, 35 (1997), which holds that parents have a recognized liberty interest in raising their children and the removal of a child "from his or her parent without any evidence whatsoever is clearly violative of this liberty interest and will not be tolerated." In *In re Interest of Borius H. et al.*, the children were removed from their mother's possession solely on the filing of a petition without an affidavit, and 2 weeks later, the juvenile court continued the detention of the children, still without receiving any evidence to support the allegations against the mother. This was found to be a denial of due process. In *In re Interest of Borius H. et al.*, there were at least allegations against the mother—but in the present case, the juvenile court did not even require the State or the Department to state a reason for their objection to Elizabeth's having custody before wrongfully imposing the burden of proof on her.

[8] Additionally, as part of our rationale, we recall that the parent-child relationship is afforded due process protection. *In*

re Interest of L.V., 240 Neb. 404, 482 N.W.2d 250 (1992). The U.S. Supreme Court in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), has said that due process has not been and perhaps can never be precisely defined as it does not have a fixed content unrelated to time, place, and circumstance, but, rather, it expresses the requirement of "fundamental fairness." *In re Interest of L.V., supra*, teaches that when a person has a right to be heard, procedural due process includes notice reasonably calculated to inform the person of the subject and issues involved in the proceeding, a reasonable opportunity to refute or defend against the charge or accusation, and a reasonable opportunity to confront and cross-examine adverse witnesses. Due process is a flexible notion which calls for such procedural protections as the particular situation demands. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

In short, due process is contextual. The context revealed by the record before us is of a mother who was informed that her two minor daughters were being sexually abused by her ex-husband, the custodian of their three children. She immediately contacted police and took them to a place where they could be interviewed by an officer. That officer admitted to making no investigation to determine whether the mother was a suitable person with a suitable place for the children to be in temporary detention, even though she knew that the mother was having visitation when the children made the disclosure of sexual abuse by the girls' custodial father, which triggered these proceedings. A juvenile petition was filed seeking adjudication of the children, and an order of emergency detention was entered on July 23, 2001. The petition made no allegations against the mother. The juvenile court had a detention hearing on July 30 and then again on August 8, this time upon the mother's motion seeking to gain custody of her children, and the district court had made her the custodial parent by that point. The juvenile court wrongfully imposed the burden of proof upon the mother, when neither the State nor the Department had made any allegation whatsoever that the mother was unfit to have custody of her children or could not protect them from her ex-husband. Fundamental fairness demands that in a situation such as this, the mother be given prompt notice of

any allegations against her which the State or the Department contends make placement of her children with her contrary to the children's best interests. And, the burden of proof of such allegations is upon the State.

The State, while paying lip service in its brief to Elizabeth's constitutional right to the companionship, care, custody, and management of her children, claims as apparent justification for its denial of Elizabeth's right to due process, that Elizabeth was "ignorantly and recklessly living with a man whom she admitted she'd only known for 6 months and who had a criminal record." Brief for appellee at 15. The State proved nothing about the man with whom Elizabeth was living, including nothing that would allow a reasonable inference that the children should not be around him.

The State's position, revealed by the above quote and its cross-examination of Elizabeth, seems to be that the juvenile court, as well as this court, should take some sort of "judicial notice" that a man on work release is dangerous to children, and a woman is ignorant for living with him, even though the State offered no evidence of what it was about this man that would make these statements true. Due process requires more. In this case, due process requires notice of specific allegations against Elizabeth with proof thereof by the State. Both things are missing from this record.

[9] Our third rationale for our holding is that the placement of a child in the custody of one parent as opposed to the other in a divorce action does not extinguish the noncustodial parent's right to custody, nor does it constitute an adverse determination of the fitness of the noncustodial parent in that or other proceedings. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). *In re Interest of Amber G. et al.* explains that a petition under § 43-247(3)(a) is brought on behalf of the child and that the purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child, whereas the purpose of the dispositional phase is to determine placement and the rights of the parties in the action. The *In re Interest of Amber G. et al.* court said that in the adjudication phase, the question was whether the children lacked proper parental care while in the custody of their mother and that the "question of whether the

father was fit or unfit to have custody did not arise and *should not have arisen until the dispositional phase.*" (Emphasis supplied.) 250 Neb. at 981, 554 N.W.2d at 148. This statement is dicta given that the issue of placement with the father had not been raised until the dispositional phase and that thus, whether placement with a noncustodial parent could be raised preadjudication was not necessary to the court's decision.

Nonetheless, our opinion here would not be complete without acknowledging that some might read *In re Interest of Amber G. et al.* as authority for the proposition that Elizabeth's request for custody is premature because she seeks custody of her children before there has been an adjudication. But we find that the statement under discussion from *In re Interest of Amber G. et al.*, which was repeated in *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999), is not determinative in this appeal because it is dicta made in a completely different factual context from here. In *In re Interest of Kantril P. & Chenelle P.*, the custodial mother attacked the juvenile court's jurisdiction on the ground that the petition contained no allegations against the noncustodial father, but the father was not a litigant actively seeking custody. And, the *In re Interest of Kantril P. & Chenelle P.* court noted that the father played "no role in [the children's] living situation at the time they were taken into foster care." 257 Neb. at 458, 598 N.W.2d at 736. The record in the instant case shows that Elizabeth was involved with her children, that she actively exercised visitation, and that she had been given custody by the district court on August 8, 2001, all of which make for a markedly different situation from *In re Interest of Kantril P. & Chenelle P.*

Returning to *In re Interest of Amber G. et al.*, *supra*, we note that it was an appeal after disposition where the appealing father was arguing that the juvenile court lacked jurisdiction for the adjudication of the children, given that there was no allegation that the factual basis which justified removal from the mother also justified the refusal to place the children with him. The court rejected that assignment, finding that the juvenile court properly took jurisdiction at the adjudication phase of the case. The father also contended that the dispositional phase of the proceedings involving abused or neglected juveniles under § 43-247(3)(a)

was unconstitutional because it did not require a determination of whether placement with the noncustodial parent is proper when return to the home of the custodial parent is contrary to the welfare of the child. He further argued that his due process rights were violated because the statute did not require the court to consider the homes of both parents in its placement decision.

[10,11] The court in *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996), rejected these claims of unconstitutionality, noting that the juvenile court has broad jurisdiction under Neb. Rev. Stat. § 43-284 (Reissue 1993) to commit the juvenile to a suitable institution, to the care of a reputable citizen, to the care of a suitable family, or to the care and custody of the Department. See § 43-284 (Supp. 2001) (current version). However, in reasoning which is applicable to the instant case, the *In re Interest of Amber G. et al.* court noted that the discretion found in § 43-284 is not without limitation because of the parental preference doctrine which holds that in a child custody controversy between a biological parent and one who is neither a biological nor adoptive parent, the former has a superior right to custody of the child, citing *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992). The *In re Interest of Amber G. et al.* court then said:

A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is *affirmatively shown* that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.

(Emphasis supplied.) 250 Neb. at 982, 554 N.W.2d at 149.

[12,13] The phrase "affirmatively shown" from *In re Interest of Amber G. et al.* is important, because in the instant case, there is absolutely nothing in this record remotely resembling an affirmative showing by the State that Elizabeth was not a fit parent or that she had forfeited her rights as a parent. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997), holds that in order to demonstrate that a preadjudication detention should continue, the State must prove by a preponderance of the evidence that the custody of a juvenile should remain in the care

of the Department pending adjudication. Here, the State neither alleged nor proved that Elizabeth should not have custody of her own children pending adjudication because placement with Elizabeth was "contrary to [the children's] welfare." See *id.* at 622, 558 N.W.2d at 555. See, also, *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998) (holding that preadjudication detention orders are dispositional in nature and that § 43-254 requires State to prove by preponderance of evidence that custody should remain with Department pending adjudication). Here, the State offered nothing to support its unspecified "objections" to Elizabeth's having custody of her own children.

[14] Finally, while we do not think that *In re Interest of Amber G. et al.*, *supra*, and *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999), hold that Elizabeth cannot assert her right to custody of her own children until after the allegations against William have been adjudicated, we find that the law has changed somewhat since those decisions. The 1998 Nebraska Legislature made changes to the Nebraska Juvenile Code by passing 1998 Neb. Laws, L.B. 1041, which included the enactment of Neb. Rev. Stat. § 43-283.01 (Reissue 1998), using new language expressly directed at foster placement: "[R]easonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care." The court in *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002), observed that reasonable efforts to reunify the family have been an integral part of the juvenile code since 1981. However, it was not until L.B. 1041 in 1998 that the Legislature expressly put into law the requirement quoted above from § 43-283.01(2) specifically mentioning foster care. Prior thereto, the Legislature in 1981 Neb. Laws, L.B. 346, had used language directing the construction of the juvenile code to accomplish certain purposes including a "safe and stable living environment . . . in the juvenile's own home whenever possible, separating the juvenile from his or her parent when necessary for his or her welfare." Neb. Rev. Stat. § 43-246(1) and (5) (Reissue 1998). At the very least, we believe that L.B. 1041 reaffirms the Legislature's view that children should not be put in foster care unless it is necessary to separate child and parent for the welfare of the child. The necessity of separating

Elizabeth from her children and placing them in foster care preadjudication was never alleged or proved.

The Legislature's mandate in § 43-283.01 that families be preserved and reunified before children are placed in foster care is at odds with any reading of *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996), that a noncustodial parent must wait until after an adjudication before he or she may seek custody of his or her children and that such parent must stand idly by while the children are placed in foster care pending an adjudication. In saying this, we cannot help but ask what better and more straightforward method of preserving families could there be, in circumstances such as this, than placement of the children with a fit and willing parent, even if that parent had previously been a noncustodial parent in a divorce. The procedures employed in the instant case are clearly at odds with the Legislature's most recent mandate found in § 43-283.01 as well as its mandate from 1981 found in § 43-246, all of which require reasonable efforts to maintain family integrity. This was not done here.

RESOLUTION

Finding a denial of due process and no allegations or proof by the State that Elizabeth should not have custody of her children, we reverse the order of August 9, 2001, continuing placement of the children with the Department, and we direct the juvenile court to place the children with Elizabeth, pending adjudication of the allegations against William in the juvenile petition. Our decision and directions, however, do not preclude the State from coming forward, once the juvenile court reacquires jurisdiction of this cause upon receipt of our mandate, with allegations and proof that Elizabeth is not a fit custodial parent of her children.

REVERSED AND REMANDED WITH DIRECTIONS.

DODGE COUNTY BOARD OF EQUALIZATION, COUNTY OF DODGE,
A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA,
APPELLANT, v. NEBRASKA TAX EQUALIZATION AND
REVIEW COMMISSION, APPELLEE.

639 N.W.2d 683

Filed February 26, 2002. No. A-01-600.

1. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. ____: _____. In instances where an appellate court is required to review cases for error appearing on the record, questions of law are reviewed de novo on the record.
3. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial tribunal.
4. **Constitutional Law: Counties.** A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person. Accordingly, a county cannot invoke the protection of the 14th Amendment against the State.

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

Joe Stecher, Dodge County Attorney, and Cynthia Schuele for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee.

HANNON, INBODY, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

The Dodge County Board of Equalization (Board) appeals from an order of the Nebraska Tax Equalization and Review Commission (TERC) increasing unimproved agricultural land values in Dodge County by 5 percent. For the reasons set forth fully below, we affirm.

BACKGROUND

In 2000, the agricultural property in Dodge County was divided into four market areas. Market area 1 is in the northwest corner of Dodge County, market area 2 is in the southeast section, market area 3 is in the northeast section, and market area 4 is in the southwest quarter. A portion of market area 3, referred

to in this opinion as "market area 3A," is situated on the Elkhorn River, adjacent to U.S. Highway 275.

On April 12, 2001, TERC issued an order to show cause, ordering the Board to appear and show cause as to why the value of agricultural land in Dodge County or its subclasses should not be corrected or adjusted as follows: "Increase by 6% the entire Agricultural Class of property, or increase by 15% the subclass Market Area 3 of the Agricultural Class of property, or such other adjustment as may promote uniform and proportionate assessments consistent with the Constitution and the laws of the State of Nebraska."

TERC stated that according to filings by the property tax administrator, Dodge County was currently outside the statutory range of value for agricultural land at 73 percent. The acceptable range of assessment for agricultural land is from 74 to 80 percent of the actual value. See Neb. Rev. Stat. §§ 77-201 and 77-5023 (Cum. Supp. 2000).

A hearing was held on April 24, 2001. At that hearing, Kathleen Reeves, the state assessing officer in Dodge County, acknowledged that some adjustment to the agricultural land values in Dodge County was required. Reeves testified that after reviewing the valuation information for all four market areas of Dodge County, she noticed that the median level of value for agricultural property in market area 3, at 65.9 percent, was significantly lower than the other three market areas. Reeves testified that she then reviewed the 24 property sales that had taken place in market area 3 during 2000.

Reeves testified that she identified 9 sales out of the 24 in which she believed the land purchased was being used for recreational, not agricultural, purposes. Reeves testified that within these nine parcels, the land was valued at \$150 per acre, but had sold for an average of \$770 per acre. At the hearing, Reeves requested that TERC carve out an area in which these nine sales occurred and designate this area as market area 3A. Reeves also requested that TERC increase this market-area value by 214 percent. Reeves testified that this adjustment would bring the median level of value in market area 3A to 76.84 percent and that the median level of value in market area 3 would rise to 70.05 percent. The record shows that a 214-percent increase in

market area 3A would bring the median level of value county-wide to 75 percent.

Reeves testified that besides creating a new market area 3A and increasing its value by 214 percent, TERC had other options, including the following: increasing the value of all agricultural land in Dodge County by 5 percent, which would increase the median level of value countywide to 77 percent; increasing the value of all agricultural land in Dodge County by 6 percent, which would increase the median level of value countywide to 78 percent; increasing the value of all agricultural land in market area 3 of Dodge County by 15 percent, which would increase the median level of value countywide to 75.88 percent; or increasing the value of all agricultural land in market area 3 of Dodge County by 16 percent, which would increase the median level of value countywide to 76.54 percent.

At the hearing, the Dodge County Attorney advocated that TERC not order an adjustment to the entire class of unimproved agricultural land in Dodge County, but, rather, either increase agricultural land values in market area 3 by 16 percent or create a new market area, 3A, and increase the value in that area by 214 percent.

After the hearing, TERC issued its written findings and order. TERC ordered that the value of all unimproved agricultural property in Dodge County be increased by 5 percent, bringing the median level of value to 77 percent, the midpoint of the acceptable range under the applicable statutes.

The Board appeals.

ASSIGNMENTS OF ERROR

On appeal, the Board argues that TERC erred in (1) relying upon statistics prepared by the property tax administrator, which included sales that should not be considered as "comparable sales" for the purpose of determining current market values; (2) adjusting the entire agricultural class of property in Dodge County by 5 percent, which decision does not conform to law, is not supported by competent evidence, and is arbitrary, capricious, and unreasonable; and (3) conducting a further hearing on April 25, 2001, and admitting further evidence into the record, where the Board was not present as a party and at which the

Board was not offered the opportunity to review or object to admitted evidence.

STANDARD OF REVIEW

[1,2] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2000) provides that appellate review of a decision by TERC shall be conducted for error on the record of TERC. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *County of Douglas v. Nebraska Tax Equal. & Review Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001). However, in instances where an appellate court is required to review cases for error appearing on the record, questions of law are reviewed de novo on the record. *Id.*

ANALYSIS

Comparable Sales.

On appeal, the Board argues that TERC erred in relying upon statistics prepared by the property tax assessor, which included sales that should not be considered as “comparable sales” for the purpose of determining current market values. Specifically, the Board contends that “[t]he evidence presented to TERC demonstrated that there were nine sales in Market Area 3-A that were unique and should not have been considered in the valuation because the land was acquired for recreational rather than agricultural purposes.” Brief for appellant at 11.

TERC argues that we cannot consider the issue of the nine sales as comparable sales because this issue was not presented at the hearing. The record shows that the Board did not object when evidence of the nine sales was entered into evidence as comparable sales.

[3] We note that “an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial tribunal.” *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 447, 550 N.W.2d 907, 911 (1996).

The Board argues that this court may remand this cause for further proceedings pursuant to § 77-5019(5), which states, “If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the commission,

the court may remand the case to the commission for further proceedings." We determine that the interest of justice would not be served by remanding the cause to TERC for further proceedings. Although the exact issue of the nine sales as comparable sales was not addressed at the hearing below, there was a tremendous amount of evidence presented at the hearing regarding those nine sales and their effect on the valuation of agricultural land in Dodge County. Therefore, TERC clearly considered this issue below, and it is unnecessary to remand the issue for further consideration.

Five-Percent Adjustment.

On appeal, the Board argues that TERC erred in adjusting the entire agricultural class of property in Dodge County by 5 percent, which decision does not conform to law, is not supported by competent evidence, and is arbitrary, capricious, and unreasonable.

Specifically, the Board argues that TERC erred in failing to adopt Reeve's recommendation to designate a special market area as "market area 3A" and increase the value of this particular market area by 214 percent. The Board argues that "TERC disregarded this proposal which was supported by all the evidence in the record, was uniformly supported by all the parties at the hearing, and which went unchallenged." Brief for appellant at 16. We disagree.

Section 77-5023 states:

(1) Pursuant to section 77-5022, the commission shall have the power to increase or decrease the value of a class or subclass of real property of any county or tax district or real property valued by the state so that all classes or subclasses of real property in all counties fall within the acceptable range.

....
(3) For agricultural land, the acceptable range shall be from seventy-four percent to eighty percent of actual value of agricultural land

It is uncontested on appeal that the agricultural land in Dodge County did not fall within the acceptable statutory range and that a change had to be made to bring Dodge County in accordance

with § 77-5023. At the hearing, Reeves and her counsel proposed that TERC create a new market area designated "market area 3A" and order an increase of 214 percent to the agricultural land values in this new market area. The Board requested the same adjustment.

On appeal, TERC argues that it lacked the authority to create the new market area 3A as requested by Reeves and the Board. As noted in § 77-5023(1) above, TERC has the power to "increase or decrease the value of a class or subclass of real property." TERC argues, and we agree, that TERC's authority does not extend to granting TERC power to create market areas in exercising its statewide equalization function.

Additionally, even if TERC had the authority to create market area 3A and increase land values by 214 percent within this area, this proposal was not supported by competent evidence. At the hearing, Reeves testified that if market area 3A was created, the area would include 200 parcels of land. Reeves also testified that although most of the property owners in that area would be farmers, not recreational users, each property would be subject to the 214-percent increase unless the farmers applied for "green belting." The record shows that green belting is a special assessment procedure in which the agricultural landowners could have applied for a special valuation and not been subjected to the 214-percent increase. At the hearing, TERC expressed concern over whether farmers in market area 3A could apply for green belting before the June 30 deadline and whether such an increase was necessary solely because of the nine sales which had sold at an average of \$770 per acre. Although the sales prices of those nine lots were well above the expected value of the land, \$150 per acre, Reeves testified that the sales were unusual. Given these facts, the record shows that TERC's reasons for failing to create market area 3A and increase land values by 214 percent within this area were valid.

Instead of creating a new area within a market area, and increasing land values within the new area by 214 percent, TERC increased agricultural property values in Dodge County across the board by 5 percent. This 5-percent across-the-board increase resulted in a median level countywide of 77 percent. The adjustment ordered by TERC conforms to law, as it falls at the midpoint

of the acceptable range as required by § 77-5023(2). Therefore, we conclude that TERC did not err in adjusting the entire agricultural class of property in Dodge County by 5 percent. TERC's decision conforms to law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

Due Process.

On appeal, the Board contends that TERC erred in conducting a further hearing on April 25, 2001, and admitting further evidence into the record, where the Board was not present as a party and was given no opportunity to review or object to the admitted evidence. The Board argues that its due process rights were violated by the April 25 hearing.

At the close of the hearing on April 24, 2001, TERC recessed until the following day in order to issue its findings and an order. At that time, the parties were excused, but told that they were entitled to come back the next day. On April 25, TERC reconvened the hearing to issue its order. The Board failed to appear, but the attorney for Reeves, who in effect represented the Board's position at the original hearing, was present at the April 25 hearing. That attorney did not object when TERC entered into evidence two documents, forming the basis of its decision.

[4] Additionally, we note that the Nebraska Supreme Court has held that "[a] county, as a creature and political subdivision of the State, is neither a natural nor an artificial person. . . . Accordingly, a county cannot invoke the protection of the 14th amendment against the State." *Rock Cty. v. Spire*, 235 Neb. 434, 447-48, 455 N.W.2d 763, 771 (1990).

For the above reasons, we conclude that TERC's proceedings on April 25, 2001, did not deprive the Board of due process.

CONCLUSION

After reviewing the record before us, we conclude that TERC did not err in relying upon statistics prepared by the property tax administrator, which included nine sales in which the land appeared to be used for recreational and not agricultural purposes, in adjusting the entire agricultural class of property in Dodge County by 5 percent, or by conducting a further hearing on April 25, 2001, and admitting further evidence into the record.

TERC's decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.

AFFIRMED.

BRUCE D. LIVINGSTON, APPELLANT, V. JEFFERSON COUNTY
BOARD OF EQUALIZATION, APPELLEE.

640 N.W.2d 426

Filed February 26, 2002. No. A-01-762.

1. **Judgments: Appeal and Error.** When reviewing a decision for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Taxation: Valuation: Presumptions: Evidence.** Neb. Rev. Stat. § 77-1511 (Reissue 1996), which requires the Tax Equalization and Review Commission to affirm a county board of equalization's action, unless evidence indicates that the board's action was unreasonable or arbitrary or that the property is assessed too low, creates a presumption that the board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.
3. **Taxation: Valuation: Presumptions: Evidence: Appeal and Error.** A presumption remains under Neb. Rev. Stat. § 77-1511 (Reissue 1996) until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of a valuation fixed by a board of equalization becomes one of fact based upon all the evidence presented.
4. **Taxation: Valuation: Proof: Appeal and Error.** The burden of showing a valuation to be unreasonable rests upon the taxpayer on appeal from the action of a board of equalization.
5. **Real Estate: Taxation: Valuation: Words and Phrases.** Under Neb. Rev. Stat. § 77-112 (Cum. Supp. 2000), the actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, taking into account factors such as location, zoning, and current functional use; (2) income approach; and (3) cost approach. Section 77-112 requires use of applicable statutory factors, individually or in combination, to determine the actual value of real estate for tax purposes.
6. **Taxation: Valuation: Words and Phrases.** Functional depreciation or obsolescence results from lack of market acceptance due to the obsolete nature of improvements, inability to recover the cost of unique features of a building suited to one business but unusable if the building is sold to another type of business, and decreased value caused by an improvement that is "overbuilt" in relation to the locale or community where the structure is situated. Economic depreciation results from external economic forces which depress the value of the property.
7. **_____: _____. For purposes of taxation, the terms "actual value," "market value," and "fair market value" mean exactly the same thing.**

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

Gregory C. Damman, of Blevens & Damman, for appellant.

Linda A. Bauer, Jefferson County Attorney, for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

In this property tax appeal, the taxpayer, Bruce D. Livingston, contends that the taxing authorities overvalued his house for tax year 2000 by failing to consider that the house is located in a remote area of Jefferson County, Nebraska, and less than 1 mile from a hog farrowing facility housing 5,200 hogs. Livingston unsuccessfully appealed the valuation of the Jefferson County Board of Equalization (Board) to the Tax Equalization and Review Commission (TERC). Livingston now appeals to this court.

FACTUAL AND PROCEDURAL BACKGROUND

Livingston started a hog farrowing facility, State Line Swine, in 1990. In 1999, Livingston began to build a house near the facility so that he and his family could live nearby and participate in the business. The house is located in Jefferson County, more than 4 miles from a blacktop road and 14 miles from the nearest town with commercial businesses, Fairbury, Nebraska. He had to put in his own road from his house out to the county road. The road he built is not maintained by the county and at times can be traversed only with a four-wheel-drive vehicle.

Livingston served as the general contractor for the construction of his house, and his record of bills and receipts shows that he spent a total of \$328,649.01 on construction. This amount excludes the \$540 he spent for blueprints and the costs for his efforts as his own general contractor, and the grade work he did for landscaping. The Board calculated the actual cost of construction as \$346,593.29. In 2000, the Jefferson County assessor valued the house at \$540,205. Livingston filed a property valuation protest on August 24, 2000, claiming that an appraiser he had hired valued the house and land at \$325,000. In response, the Board corrected an error in the measurement of the square footage

on the house's second story, reapplied its cost approach analysis, and reduced the valuation of the house to \$399,321. The land was valued at \$70,701, for a total property valuation of \$470,022.

Livingston appealed the Board's decision to TERC, which held a hearing on June 6, 2001. At the hearing, Livingston, representing himself, presented the testimony of Ray Shinn, a general appraiser certified in Kansas and Nebraska. Shinn has been an appraiser since 1987 and worked as a county assessor for 3 years in Kansas. Shinn now works for a farm credit service based in Marysville, Kansas, where he has worked for approximately 9 years. Shinn testified that he has performed approximately 20 appraisals in Nebraska per year and about 1,500 total appraisals during his career, which appraisals have been 75 percent agricultural and 25 percent residential.

Shinn testified that in determining the square footage of the house, he first measured several walls on the outside of the house, and after comparing the measurements to the blueprints and determining that they were correct, he relied upon the house's blueprints in his calculations, which stated that the house had 3,456 square feet.

Shinn considered the "sales comparison approach" in valuing the house by choosing two sales in Jefferson County and two sales in Kansas—his "comparables"—to determine the market value of Livingston's house. The Nebraska comparables were located in Fairbury, and the Kansas houses were located in Washington County, approximately 15 to 20 miles from Livingston's house. Shinn testified that in choosing comparables, he attempted to find houses similar in size and age to Livingston's house which had sold within the last 2 years.

In addition, Shinn used the "cost approach" by determining the cost of construction (calculated using Livingston's figures) and comparing his figures to the 1999 Marshall and Swift cost estimating system for accuracy. Shinn testified that he did not use the income approach in valuing the house because a house of that type would not typically be purchased for rental use so as to produce income.

Relying on both the cost and sales comparison approaches, Shinn valued the land at \$100,000, the house at \$215,000, and the exterior site improvements at \$10,000, for a total of

\$325,000 for the entire property. In reaching his opinion of value, Shinn considered that a potential buyer would take into account the odor produced by the hog farrowing facility, as well as by Livingston's easement to spread hog manure on neighboring property across the road to the south (manure easement), plus the house's rural location. He could not testify to an exact dollar amount of these factors without an actual sale of the property, but gave his opinion that the hog farrowing facility and manure easement would require at least a 30-percent reduction and the rural location a 10-percent reduction in value, both of which are reflected in his valuation of \$325,000. Shinn referred to such adjustments as "external depreciation."

On cross-examination, Shinn admitted that his comparables were ranch-style houses, not two-story houses like Livingston's. Shinn testified that he settled for the ranch-style houses as comparables because he was unaware of any two-story houses in the area which had sold within the previous 2 years. Shinn testified that he would not normally make any adjustments for the difference between a ranch-style house and a two-story house, except for adjustments for square footage. However, Shinn indicated that the sales comparison approach may not be the most reliable approach in valuing Livingston's house due to a scarcity of houses in the area of the same quality, size, and age as Livingston's. Thus, Shinn testified that as a result, he relied primarily on the cost approach and the 40-percent external depreciation as described above. Shinn testified that there were no real standards for determining the depreciation factor for external obsolescence such as the hog facility or manure easement; instead, he determines such "for that area, by looking at sales and things." Shinn took into consideration in determining the depreciation that the hog facility was roughly three-fourths of a mile from the house and that the manure easement was "right across the road." In addition, he considered "three or four" previous appraisals of properties with a house and a hog facility. Shinn conceded that his figures for external depreciation were subjective.

Finally, Shinn testified on cross-examination that his valuation, performed on June 21, 2000, probably would not have been affected by the real estate market had it been performed on January 1, 2000, the Board's assessment date, and that he

“would have came [sic] up with the same number” if his appraisal was on January 1.

Livingston testified that he is the only owner of the hog facility, which he built before building the house, and that he obviously intentionally built the house in close proximity to the hog facility and manure easement. Livingston testified that he was “pretty certain” that his house was insured for \$325,000, which he said was the cost of replacement. When asked his opinion of the house’s value, he testified that he would be “lucky” to sell the house for \$200,000.

Arliss Brown, who has worked in the Board office for 31 years and has been the Jefferson County assessor for 7 years, but who is not a licensed appraiser, testified that it was difficult to get an exact square footage measurement of Livingston’s house because it contained many different angles. She testified that she used a computer program to calculate the square footage of the house, which calculates more accurately than hand measurements. Shinn had used the blueprint square footage of 3,456, but Brown calculated it at 5,650 square feet. That number was reduced to 4,041 square feet after Livingston filed his protest with the Board, as Brown admitted that her first calculation was incorrect because on her first visit, she was unable to go upstairs and thus “assumed that that middle portion was all second story,” which was not true. In addition, the figures entered in the computer had contained an extra “10 or 12 foot, on the north side of the house, that shouldn’t have been there.” Brown remeasured the house on the second visit, taking along a friend, who happened to be a county commissioner. TERC’s decision found that the house had 3,456 square feet, the figure from the blueprints, which Shinn used.

TERC’S DECISION

At the outset, we note that the value of the land upon which the house sits is not disputed and is not part of this appeal. In TERC’s “Substantive Findings and Factual Conclusions,” it accepted Livingston’s calculation of total cost, \$328,649.01, but noted that “[v]alue and price are *not* synonymous,” saying that value is “‘the monetary worth of [the] personal property to buyers and sellers.’”

TERC found that Shinn had failed to make adjustments to account for the differences in architectural style and cost of construction between ranch-style and two-story houses. TERC rejected one of Shinn's comparables as not truly comparable under professionally accepted mass appraisal methods. Further, TERC noted that two of Shinn's comparables sold 18 and 12 months before the appraisal and that Shinn had made no adjustment for time, which TERC said was one of the three most important adjustments under the sales comparison approach.

TERC further noted that Shinn's 30-percent external depreciation factor for the hog facility and 10 percent for the rural location were subjective and that Shinn had offered "no documentation to support these external depreciation factors." TERC also pointed out that Shinn described the house as being in "good" condition in one section of his appraisal and "very good" condition in another section. In addition, while Shinn described that the house's construction quality was "very good," Brown had determined that the quality of the house was "[e]xcellent." TERC noted that "the difference between the two grades of construction can have a substantial impact on the determination of value under the Cost Approach."

TERC further found that "conditions and trends may substantially affect value over a short period of time" (without any finding that there were any such trends or conditions operating between the date of Shinn's appraisal and the date of the Board's assessment), but that Shinn had been unable to correlate his June 21, 2000, opinion of value with the assessment date of January 1, 2000.

As we read TERC's decision, it rejected any external depreciation because it found that "the hog farrowing facility complained of is owned by the Taxpayer, and existed prior to the construction of the improvements" and that "the 'manure' easement was negotiated by the Taxpayer and was also in existence prior to the construction of the residential improvements." TERC seemed to find it important that Shinn had not considered "ownership of the operation, as required by the *Uniform Standards of Professional Appraisal Practice*." In addition, TERC found it relevant that Shinn had not mentioned in his appraisal that Livingston sells the offspring of sows when they

are between 11 and 14 pounds in weight and between 14 and 21 days in age.

TERC noted that Shinn's cost approach failed to consider the cost of finishing "the 1,864 square feet of living area in the basement," which included a second kitchen, a bathroom, a bedroom, and an office space. Further, TERC found that Shinn's opinion of value for improvements not credible because it was "based on a subjective opinion which the Appraiser was unable to support" and that Shinn's "errors of omission and mathematical inconsistencies" result in a misleading opinion of value.

TERC found that Livingston's opinion that the property would not sell for \$200,000 was "not credible" because Livingston paid more than \$300,000 for the improvements.

TERC found that there was only an 8-percent difference in value for the house between Shinn's appraisal (without any external depreciation) and the Board's assessment. TERC said that therefore, there was only a "'mere difference of opinion'" and that the Board's cost approach was the most appropriate appraisal method for the house, citing the method's usefulness for newer properties and where sales data is scarce.

TERC ultimately found that the house was not overvalued, that nothing in the record demonstrates that the Board failed to faithfully perform its official duties or act upon sufficient competent evidence, and that there was no indication that the house's assessed value was grossly excessive or a systematic exercise of intentional will. According to TERC, Livingston failed to adduce clear and convincing evidence to overcome the statutory presumption in favor of the Board, and TERC found that the Board's valuation was neither unreasonable nor arbitrary and was supported by the evidence. TERC affirmed the Board's assessed value of \$70,701 for the land and \$399,321 for the house, for a total of \$470,022. This assessed value is \$145,022 more than Shinn's valuation of \$325,000 for the entire property.

ASSIGNMENTS OF ERROR

Livingston claims (1) that TERC erred in failing to give proper weight to his uncontroverted evidence regarding the value of his house and that TERC's decision was not supported by competent evidence; (2) that TERC erred in failing to consider the remote

location of his house and its proximity to a hog facility and manure easement, and (3) that TERC erred in failing to consider the actual square footage of his house in determining its value. The third assignment of error is not argued, and thus, we do not consider it. See *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

STANDARD OF REVIEW

Appellate review of TERC's decision is for error on the record of TERC, and we may affirm, reverse, or modify the decision of TERC or remand the cause for further proceedings. Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2000).

[1] When reviewing a decision for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000); *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb. App. 10, 624 N.W.2d 63 (2001). In instances where an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000).

ANALYSIS

Introduction.

[2,3] Neb. Rev. Stat. § 77-1511 (Reissue 1996), which requires TERC to affirm a county board of equalization's action, unless evidence indicates that the board's action was unreasonable or arbitrary or that the property is assessed too low, creates a presumption that the board has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. *Firethorn Invest. v. Lancaster Cty. Bd. of Equal.*, 261 Neb. 231, 622 N.W.2d 605 (2001). That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Garvey Elevators v. Adams Cty. Bd. of Equal.*, 261 Neb. 130, 621 N.W.2d 518 (2001). From that point forward, the reasonableness of the valuation fixed by the board of equalization

becomes one of fact based upon all the evidence presented. *Constructors, Inc. v. Cass Cty. Bd. of Equal., supra.*

[4] The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Garvey Elevators v. Adams Cty. Bd. of Equal., supra.* Based upon the applicable law, a county board of equalization need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the board's valuation was unreasonable or arbitrary. *Id.*

Livingston's Opinion of Value.

Livingston's first assignment of error contends that TERC failed to give proper weight to his uncontroverted evidence regarding the value of his house and that TERC's decision was not supported by competent evidence. As is evident from our summary of the evidence, the claim that Livingston's evidence of value was uncontroverted is not accurate.

A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation. *Schmidt v. Thayer Cty. Bd. of Equal., supra.* Livingston's opinion of value was conveyed by his testimony that he would be "lucky" to get \$200,000 for the house. TERC found this opinion of value not credible in light of Livingston's testimony that the house cost over \$328,000 to build. However, when a county board of equalization has determined the value of property, uniformly and impartially assessed through a formula in substantial compliance with statutes governing taxation, for reversal of the board's action, a taxpayer must show more than a difference of opinion concerning the assessed value of the taxpayer's real estate. *Cabela's, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999).

Shinn's valuation was disputed. TERC pointed out that Shinn and the Board used different ratings for construction quality and different dates of valuation. Further, TERC noted that Shinn failed to consider the cost of finishing the basement. TERC found that Shinn's "errors of omission and mathematical inconsistencies result in an opinion of value which is misleading," and we cannot say that this portion of TERC's decision was arbitrary, capricious, or unreasonable, as the record supports these

observations about Shinn's appraisal. A reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001). Therefore, neither Livingston's nor Shinn's valuations were undisputed, and the law is clear that we will not reverse merely if opinions on the value of the property at issue are different. We reject Livingston's first assignment of error.

*Effect of Hog Facility, Manure Easement,
and Remote Location.*

TERC's findings and reasoning concerning the hog facility, manure easement, and remote location are more troublesome. As we understand TERC's decision, any external depreciation for these factors was rejected because "the hog farrowing facility complained of is owned by the Taxpayer, and existed prior to the construction of the improvements" and "the 'manure' easement was negotiated by the Taxpayer and was also in existence prior to the construction of the residential improvements." TERC further reasons:

The Taxpayer's hog farrowing operation is a "breed to wean" operation which the Taxpayer started in 1990. That the taxpayer testified that as of the assessment date his policy was to sell the offspring of sows when they are between 11 and 14 pounds in size and between 14 and 21-days in age.

. . . That the Taxpayer's Appraiser made no mention of these facts in his appraisal, particularly the ownership of the operation as required by the *Uniform Standards of Professional Appraisal Practice*.

TERC's written decision does not explain why Livingston's ownership of the adjoining hog facility and manure easement or the fact that he built the house after the hog facility was operational are valid reasons (factually, legally, or logically) to reject the proposition that the value of Livingston's house is affected by being very close to a large hog operation in a rural location accessible only by a county road and then a primitive road or lane to the house. TERC's reasoning strikes us as

something akin to “estoppel” or perhaps “assumption of the risk.” There is no authority to support this reasoning, and we find that it is fundamentally illogical. Moreover, why TERC considered the age and weight at which Livingston sells his young pigs important is unexplained by TERC’s decision, nor is it apparent to us. The property being valued in this case is separate and distinct from the properties where the hog facility and the manure easement are located. Thus, the mere fact that Livingston owns the hog facility and did so when he built his house has nothing to do with whether external depreciation should be used because the house is very close to a hog facility, a separately valued and taxed piece of property. Perhaps TERC’s decision to reject any external depreciation comes from the fact that Livingston derives economic benefit from owning the hog facility. But the income derived from the hog facility would not affect the value of the house, because the house and hog facility are separate and distinct properties for valuation and taxation purposes, and presumably, the hog facility’s income is considered in some way in the valuation of that property.

[5] The law is that under Neb. Rev. Stat. § 77-112 (Cum. Supp. 2000), the actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, taking into account factors such as location, zoning, and current functional use; (2) income approach; and (3) cost approach. Section 77-112 requires use of applicable statutory factors, individually or in combination, to determine the actual value of real estate for tax purposes. *Cabela’s, Inc. v. Cheyenne Cty. Bd. of Equal.*, 8 Neb. App. 582, 597 N.W.2d 623 (1999). Here, because there are no real comparables, and the property is new, residential, and non-income producing, the cost approach is clearly the most appropriate method, as Shinn testified.

[6] But, TERC’s decision about Livingston’s house, including the rejection of Livingston’s \$200,000 valuation for the house because it cost over \$300,000 to build, ignores the concept of “overbuilding,” which can be important in setting market value.

This concept has been explained by the Nebraska Supreme Court in *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 414, 445 N.W.2d 880, 882 (1989), as follows:

Physical depreciation results from deterioration of the improvements over time. Functional depreciation or obsolescence results from lack of market acceptance due to the obsolete nature of improvements, inability to recover the cost of unique features of a building suited to one business but unusable if the building is sold to another type of business, and decreased value caused by an improvement that is "overbuilt" in relation to the locale or community where the structure is situated. Economic depreciation results from external economic forces which depress the value of the property.

Justice Boslaugh's dissent in *First Nat. Bank v. Otoe Cty.* provides an excellent discussion of the concept of overbuilding and how it impacts valuation for tax purposes:

"This issue can also arise where a private landowner, for personal reasons or simple improvidence, overbuilds for the neighborhood. He constructs a house that costs \$150,000 in a neighborhood where all the other houses are worth about \$75,000. In the relevant market, the house costing \$150,000 may be worth \$125,000 or \$100,000, but not \$150,000. Because it is an overimprovement for the neighborhood, the house, although brand new, should be valued at the market value, not at what it cost.

"Merely because the owner may have constructed an improvement that cost more than the improvement is worth on the market should not subject the owner to a higher ad valorem tax.

"Even if the structure is not an overimprovement, expenditures on it do not necessarily enhance its value dollar-for-dollar. A greenhouse, a gazebo, a tennis court, or a hot tub, while of value to the owner, do not necessarily add dollar-for-dollar to the usual selling price."

Id. at 425, 445 N.W.2d at 888, quoting *First Fed S & L Ass'n v Flint*, 415 Mich. 702, 329 N.W.2d 755 (1982).

Shinn's opinion on value reflected his opinion that the property was overbuilt, although he did not use that exact term. As

suggested by Justice Boslaugh's dissent, even though Livingston chose to locate his expensive house next to a hog facility for his own reasons and paid over \$325,000 to do so, it is doubtful that he will get his costs back if he sells his house because it is unlikely that some buyer will find the house, at that location, as desirable as did Livingston, given the obvious negatives inherent in its location.

In a similar vein, we note *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999), where the fact that the owner had paid a large premium over going market real estate values to acquire a site for a nuclear waste dump, did not determine the site's present actual value for property tax purposes when the necessary licenses for the dump had not been granted and there was no imminent likelihood of the licenses being granted, despite the property owner's expenditure of many times the purchase price to get the facility licensed. Thus, in *US Ecology* (perhaps an "overpaid" rather than an "overbuilt" case), the decision of TERC to rely on the premium price originally paid for valuation purposes was found to be arbitrary.

In the instant case, the Board introduced no evidence to dispute Livingston's evidence that the house was "overbuilt" for its location or that the hog facility would not affect its value. The Board, and in turn TERC, refused, without offering any justification, to consider external depreciation as a factor in valuing this house. While some might see overbuilding as a poor use of money, the property owner is nonetheless entitled to have his property valued with consideration of the fact that it is overbuilt for its location, just as *US Ecology* was not bound, for valuation purposes, by its premium purchase price.

An administrative agency's decision is "arbitrary" when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb. 810, 606 N.W.2d 736 (2000). To the extent that the Board and TERC refused to consider the impact of the hog facility and the house's remote and difficult-to-access location on the value of the house because Livingston owned both, that decision is unreasonable and arbitrary. Neither the Board nor TERC realistically consid-

ered the effect of the house's location next to a hog facility and manure easement and in an isolated location. For the Board and TERC to conclude that such facts are not important is arbitrary and unreasonable.

[7] The whole concept of determining value must assume both a willing buyer and seller. *Forney v. Box Butte Cty. Bd. of Equal.*, 7 Neb. App. 417, 582 N.W.2d 631 (1998). The court in *Richards v. Board of Equalization*, 178 Neb. 537, 540, 134 N.W.2d 56, 58 (1965), said: "For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing." In the context of negotiations between a willing buyer and seller to arrive at fair market value, the neighboring hog facility and the house's location would unquestionably affect the market value of Livingston's house. Any other conclusion would mean that two identical houses, one located next to the railroad switching yard and the other next to the country club golf course, have identical values—an obviously arbitrary and illogical conclusion that no reasonable person would reach. See *Phelps Cty. Bd. of Equal. v. Graf*, *supra*.

Fair market value is at the heart of assessment for tax purposes. That many potential buyers would not look favorably upon the hog facility, and judge the home's value with reference thereto, is demonstrated by some well-known Nebraska cases in which homeowners have successfully sued hog facility owners for damages caused by interference with the use of their nearby homes. See, *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994) (flies and odor interfered with use of home, and homeowners' children forced to stay inside); *Flansburgh v. Coffey*, 220 Neb. 381, 386, 370 N.W.2d 127, 131 (1985) (flies, rats, and odors from hog confinement facility described by court as "more than offensive").

It was arbitrary for the Board and TERC to ignore the effect that the nearby hog facility would have on the house's fair market value in the ordinary course of trade. No reasonable fact finder could conclude that in the real estate marketplace, a potential buyer would not notice, and react economically, to having a large hog facility very nearby while living in a remote location. Thus, the Board's valuation, and TERC's decision upholding that valuation, was arbitrary and capricious.

CONCLUSION

We find that Livingston's evidence overcomes the presumption that the Board acted on competent evidence, because the record shows, by a qualified appraiser's opinion as well as the owner's opinion, neither of which was rebutted, that this house, while costing nearly \$330,000 to build, was in effect "overbuilt for its location." Once the presumption is overcome, as here, from that point forward, the reasonableness of the valuation fixed by the Board becomes one of fact based upon all the evidence presented. See *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). Therefore, we reverse, and remand with directions for TERC to consider Livingston's appeal from the Board anew on the record already created, but with specific consideration of the impact on the fair market value of the house because of the nearby hog facility, manure easement, and isolated location, irrespective of the fact that Livingston also owns the hog facility and irrespective of the fact that he chose to build in this location.

REVERSED AND REMANDED WITH DIRECTIONS.

LEE SAPP LEASING, INC., APPELLEE, V. CIAO CAFFE &
ESPRESSO, INC., AND MARCO BALDIERI, APPELLEES, AND
MERRILL LYNCH & CO., INC., GARNISHEE-APPELLANT.

640 N.W.2d 677

Filed March 5, 2002. No. A-00-897.

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 from the lower court's decision.
2. **Judgments: Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Default Judgments: Motions to Vacate: Appeal and Error.** In reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

5. **Pleadings.** The character of a pleading is determined by its content, not by its caption.
6. **Courts: Pleadings: Judgments: Appeal and Error.** The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.
7. **Courts: Motions to Vacate: Time.** A district court has the inherent authority to vacate or modify its decisions within the same term that the initial decision was rendered. The decision to vacate an order is within the discretion of the court.
8. **Courts: Pleadings.** It is the policy of the law to give a litigant full opportunity to present his or her contention in court and for this purpose to give full relief against slight and technical omissions.
9. **Courts: Pleadings: Proof: Judgments: Time.** Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
10. **Courts.** It is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice.
11. **Courts: Laches: Attorneys at Law.** It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his or her case in court, and courts will never deny such right except for the fault or gross laches of such party or his or her authorized attorney.
12. **Garnishment: Presumptions.** If the garnishee fails to answer interrogatories, as required by Neb. Rev. Stat. § 25-1026 (Reissue 1995), he or she shall be presumed to be indebted to the defendant in the full amount of the claim of the plaintiff.
13. **Garnishment: Notice: Time: Judgments.** Upon notice to the garnishee given within such time and in such manner as the court shall direct, judgment may be entered for such amount as the court may find due from the garnishee.
14. **Garnishment: Liability.** A garnishee is not liable to the plaintiff unless the judgment debtor had a right of action against the garnishee for a legal demand due or to become due.
15. **Garnishment: Liability: Service of Process: Time.** In determining the liability of a garnishee to a garnishor, the test is whether, as of the time the summons and garnishment were served, the facts would support a recovery by the garnishor's judgment debtor against the garnishee.
16. **Pleadings: Words and Phrases.** A meritorious defense is one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.
17. **Garnishment: Pleadings: Liability.** In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue.

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

Patrick B. Griffin and Julie M. Cornwell, of Kutak Rock L.L.P., for appellant.

Jeanelle R. Lust, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee Lee Sapp Leasing, Inc.

HANNON, INBODY, and CARLSON, Judges.

HANNON, Judge.

INTRODUCTION

Merrill Lynch & Co., Inc. (Merrill Lynch), garnishee, appeals from the denial of its motion for relief from default judgment that had been entered against it in favor of Lee Sapp Leasing, Inc. (Lee Sapp), the garnishor, after Merrill Lynch failed to answer garnishment interrogatories within the statutory period set forth in Neb. Rev. Stat. § 25-1010(2) (Reissue 1995). We conclude the district court abused its discretion in denying the motion for relief from judgment, because Merrill Lynch filed the motion in term, promptly, with a showing of a meritorious defense. Therefore, we reverse, and remand with directions to vacate the default judgment.

BACKGROUND

Lee Sapp recovered a judgment against Ciao Caffè & Espresso, Inc., and Marco Baldieri (collectively judgment debtor) on January 25, 2000, in the amount of \$75,000 plus interest. Lee Sapp filed an affidavit and praecipe in garnishment on May 23, and the clerk of the Douglas County District Court issued the order of garnishment on that date. The summons and order of garnishment and interrogatories were served on Merrill Lynch as garnishee by certified mail return receipt requested on May 25. The summons notified Merrill Lynch it was required to answer the interrogatories within 10 days of the service of the summons as required by statute. It failed to do so.

On June 14, 2000, Lee Sapp filed an application for judgment against Merrill Lynch. The trial court set the hearing for June 30 at 8:30 a.m. An affidavit of service shows that a copy of the order for hearing was mailed to Merrill Lynch at an Omaha address on June 19. On June 30, Merrill Lynch filed an answer to the garnishment summons on the form provided and a "Garnishment Answer." Lee Sapp's attorney received a copy the same day.

No one representing Merrill Lynch appeared at court on June 30, 2000, but attorneys representing Lee Sapp appeared. The court advised them that it would grant default judgment and

made a trial docket entry to that effect, and Lee Sapp's counsel was to prepare the judgment document. On June 30, answers to the garnishment interrogatories were received by the court, and Lee Sapp's counsel learned that her office had received a copy of these documents on that date. Counsel prepared a judgment document, and the judgment was rendered by the court on July 3 and filed by the clerk on July 5. The judgment was in the amount of \$75,000 plus interest of \$12,280.68 with per diem interest thereafter at \$24.66. A copy was served on Merrill Lynch by Lee Sapp's counsel on July 5.

On August 11, 2000, Merrill Lynch filed a motion entitled "Motion for Stay of Execution and Relief From Judgment." The relevant contents of the motion will be set forth later. At the hearing on the motion, Merrill Lynch offered exhibit 1, which was an affidavit of Alec Setten, an employee of Merrill Lynch's New York office, who received the various documents served on Merrill Lynch in its Omaha office. Setten admitted to having received a copy of the summons on May 25, the order for the June 30 hearing on June 14, and the judgment on July 7. He stated that he mailed the garnishment answers to Lee Sapp's counsel on June 23 and that he contacted Lee Sapp's attorney on July 5. Setten did not notify his supervisor about the matters until August 10, when the sheriff tried to execute on the judgment. He also stated that Merrill Lynch did not owe the judgment debtor anything or hold property of the judgment debtor and in effect, that he failed to act through "mistake, inadvertence and neglect." Copies of documents of the judgment debtor's account with Merrill Lynch showing a negative balance at the applicable time were attached to the affidavit.

Lee Sapp's attorney also offered an affidavit which established that the attorney did various acts in regard to the judgment. The affidavit stated that the default judgment hearing was held on June 30, 2000; that Merrill Lynch did not appear; that after the hearing, the attorney returned to the office to prepare the judgment document; and that at that time, she learned that she had received Setten's correspondence of June 23, which included a copy of the answer to the garnishment summons. Tracing by Lee Sapp's attorney established the document had been mailed on June 29 by overnight mail.

Merrill Lynch also offered exhibit 3, the affidavit of Daniel R. Spector, senior counsel for "Merrill Lynch & Co., Inc.," who stated that "Merrill Lynch Pierce Fenner & Smith Incorporated" was not authorized to accept service of process for "Merrill Lynch & Co., Inc."; that the two are separate entities operated independently from one another; and that the address in Omaha was the office of Merrill Lynch Pierce Fenner & Smith. Apparently, the point of this affidavit is that all of the documents served on Merrill Lynch were served at the Omaha office of Merrill Lynch Pierce Fenner & Smith. The district court excluded Spector's affidavit and overruled Merrill Lynch's motion.

The trial judge stated on the record that he believed that a failure to answer garnishment interrogatories that results in a judgment is "immutable" and that the court did not have the authority to vacate and set aside the judgment. The judge also stated that there was a procedural difficulty in that there was not an express motion to vacate the judgment, but that it was not necessarily fatal to the proceedings, and that he did not consider the distinction between "Merrill Lynch, Inc.," and "Merrill Lynch, Pierce, Fenner & Smith" all that determinative in his decision not to vacate, because "Merrill Lynch themselves seem haphazard in maintaining the distinction." The court found that it was not abusing its discretion in not setting aside the default judgment. Merrill Lynch appealed from that order.

ASSIGNMENTS OF ERROR

Merrill Lynch alleges the trial court erred in (1) denying Merrill Lynch's motion and (2) refusing to receive into evidence the affidavit of Spector, which evidenced a meritorious defense for Merrill Lynch. In addition, Lee Sapp argues that this court does not have jurisdiction because Merrill Lynch did not file an appropriate pleading in the district court.

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 from the lower court's decision. *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

[2] To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995).

[3] In reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion. *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996). See, also, *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

[4] An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Talkington v. Womens Servs.*, *supra*.

ANALYSIS

Jurisdictional Question.

Lee Sapp argues that this court does not have jurisdiction over this appeal because Merrill Lynch did not file a motion to vacate the default judgment, but "a non-existent motion for an order 'staying the execution of the judgment . . .'" Brief for appellee Lee Sapp at 3. In support of Lee Sapp's position, it cites *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983) (holding that motion to dismiss cannot be treated as summary judgment), and *Anderson v. Matthis*, 246 Neb. 215, 518 N.W.2d 94 (1994) (court will not consider appeals from procedures that do not exist under Nebraska law).

[5] Lee Sapp also cites to cases where review was undertaken, but argues these were minor errors in pleading and do not apply here. These cases stand for the proposition that the character of a pleading is determined by its content, not by its caption. See, *In re Estate of Krueger*, 235 Neb. 518, 455 N.W.2d 809 (1990); *Stigge v. Graves*, 213 Neb. 847, 332 N.W.2d 49 (1983); *Walkenhorst v. Apolius*, 172 Neb. 830, 112 N.W.2d 31 (1961). See, also, *From v. Sutton*, 156 Neb. 411, 56 N.W.2d 441 (1953) (where documents captioned "petition on appeal," "notice of appeal," and "certified copy of the commissioners' appraisal filed with the county treasurer" were held effective for appeal by petition in error by showing intent to perfect appeal and because

filed documents contained what statutes required for appeal by petition in error). We believe these cases supply the rule which is applicable in this case. We therefore shall determine the character of Merrill Lynch's "Motion for Stay of Execution and Relief From Judgment" by a review of its contents.

The motion filed by Merrill Lynch alleges the chronology of the proceedings by which Lee Sapp obtained a judgment against Merrill Lynch; the judgment was obtained by default; the facts of its conduct both before and after entry of the judgment, which it claimed entitled it to relief from the judgment, and a prayer for relief from that judgment; and other and further relief as the court deemed fair and equitable. It also alleged some facts which were irrelevant, and it asks for some relief unknown at Nebraska law, such as relief under "Neb. Rule Civ. Proc. 60(b)." The record of the hearing on the motion reflected that Merrill Lynch argued for the judgment to be set aside. The attorney for Merrill Lynch argued cases that allow a default judgment to be set aside in the term where the defaulted party has made a showing of a meritorious defense. The trial court also recognized this motion as a motion to set aside the judgment. Specifically, the trial court stated:

[F]irst of all, we have a procedural difficulty here in that there is no express request to vacate and set aside the judgment entered against Merrill Lynch which in state court practice would be the customary kind of a request to make. But I don't think that that is necessarily fatal to these proceedings.

Clearly, at the hearing on Merrill Lynch's motion, both parties and the court knew they were litigating whether the default judgment should be set aside.

[6] Neb. Rev. Stat. § 25-853 (Reissue 1995) states: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Here, the trial court disregarded the defect in the pleadings filed by Merrill Lynch and went on to decide the issue on what it regarded as the merits.

We find nothing indicating that irrelevant allegations or a request for additional inappropriate relief prevents a pleading

from being appropriate to raise issues otherwise pled. We conclude that the motion contained the allegations necessary to raise the question of Merrill Lynch's right to a motion to vacate the judgment and that it contained a prayer for relief from the judgment. The motion gave Lee Sapp and the court reasonable notice of the relief it sought and the facts upon which it claimed that relief. As such, we conclude the character of this pleading when judged by its contents served as a motion to vacate the judgment, which judgment was entered by default. We shall therefore call it a motion to vacate, notwithstanding the name put on its caption. We conclude that the district court had jurisdiction of this issue and that this court has jurisdiction.

Trial Court's Power to Set Aside Judgment.

[7] A district court has the inherent authority to vacate or modify its decisions within the same term that the initial decision was rendered. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). The decision to vacate an order is within the discretion of the court. *Id.* The district court for Douglas County has a term coextensive with the calendar year. See Rules of Dist. Ct. of 4th Jud. Dist. 4-1C (1995). Merrill Lynch clearly sought to have the judgment set aside in the same term it was entered.

The parties disagree on the standard that controls the district court's discretion to set aside a judgment in term.

Lee Sapp relies upon such cases as *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987), and *Commercial Sav. & Loan Assn. v. Holly Development, Inc.*, 182 Neb. 335, 154 N.W.2d 510 (1967). *Fredericks* states:

"A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests.

Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation."

225 Neb. at 217, 403 N.W.2d at 382, quoting *Commercial Sav. & Loan Assn. v. Holly Development, Inc.*, *supra*. The *Fredericks* case was a replevin case, where the party who later sought relief from the default judgment had made appearances during the course of the litigation, both personally and by counsel. In the course of the litigation, he was twice ordered to answer, but failed

to do so, and the court heard evidence before entering the default judgment. The default judgment debtor did not claim a meritorious defense, but clearly wanted to litigate the case when he had an opportunity to do so before the default judgment was entered.

The *Commercial Sav. & Loan Assn.* case was a mortgage foreclosure case, where the issues were litigated over a period of time. The person who sought to have the default judgment against her vacated knew about the litigation, and her argument to vacate judgment was based on neglect over a long period of time by a relative in whom she mistakenly placed faith. She did not claim that the plaintiff was not entitled to foreclose the mortgage, but, rather, that her interests were not protected. The court disagreed.

[8] Merrill Lynch argues that “[i]t is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions.” Brief for appellant at 10, quoting *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970).

[9] The Nebraska Supreme Court has stated:

Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.

Steinberg v. Stahlnecker, 200 Neb. 466, 467, 263 N.W.2d 861, 862 (1978), citing *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977).

In the *Steinberg* case, default judgment had been entered against an unrepresented defendant, who failed to appear on the date set for trial. Later, he appeared with counsel and moved to vacate the default judgment. The trial judge refused to vacate the judgment, which was affirmed on appeal for the stated reason that the defendant failed to disclose a meritorious defense. The affidavit of the defendant’s attorney stated only that the defendant possessed a good and sufficient defense, and the Nebraska Supreme Court held it to be nothing more than a cursory statement of counsel.

[10] In *Beliveau v. Goodrich*, *supra*, there was conversation between counsel before the judgment was entered, but a dispute

arose about the effect of that conversation. The conversation was held to be not controlling. The *Beliveau* court looked at the competing considerations and said:

It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. Consequently this court has long held that a district court has inherent power to vacate or modify its own judgment any time during the term in which it is rendered. *Jones v. Nebraska Blue Cross Hospital Service Assn.*, 175 Neb. 101, 120 N.W.2d 557 [(1963)]; *Barney v. Platte Valley Public Power [and Irrigation District]*, 147 Neb. 375, 23 N.W.2d 335 [(1946)]; and most recently in *Urwin v. Dickerson*, [185 Neb.] 86, 173 N.W.2d 874 [(1970)].

185 Neb. at 100, 173 N.W.2d at 879.

[11] The cases cited in the above quote involve failure to appear on the date appointed with an appearance shortly thereafter. In *Jones v. Nebraska Blue Cross Hospital Service Assn.*, 175 Neb. 101, 120 N.W.2d 557 (1963), a default judgment was entered when no answer was filed, and a motion to vacate was filed 2 days after the judgment was entered. In *Barney v. Platte Valley Public Power and Irrigation District*, 147 Neb. 375, 23 N.W.2d 335 (1946), answer day was June 18, and no answer was filed. On June 29, after evidence was offered, default judgment was taken for money and equitable relief. On July 13, the defendant filed a motion to vacate the judgment, and then shortly thereafter, affidavits showing a meritorious defense were produced. In *Barney*, the president of the defendant's board of directors was served, but he thought the general manager was advised of the suit so he did nothing. The defendant's regular counsel did not learn of the suit until after judgment was taken. The trial court overruled the motion to vacate, which was reversed by the Nebraska Supreme Court. In so doing, the *Barney* court stated: "It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will never deny such right except for the

fault or gross laches of such party or his authorized attorney.'” 147 Neb. at 380, 23 N.W.2d at 338, quoting *Clutz v. Carter*, 12 Neb. 113, 10 N.W. 541 (1881). The court concluded that the action of the president of the board of directors and the superintendent of power and irrigation in failing to advise those who handle such matters was not so inexcusable that it should affect the defendant’s right to trial. The case seems to hold that neglect is excusable unless it is “gross laches.”

In the case at hand, Setten, the person working for Merrill Lynch who received the summons in garnishment, was employed in the Merrill Lynch litigation department, but he did not inform his superiors or counsel of the proceedings against Merrill Lynch until August 10, 2000. The motion to vacate was filed on August 11. However, before that date, Setten had informed Lee Sapp’s counsel and filed with the court Merrill Lynch’s claim that it owed the judgment debtor nothing. The trial docket note the court entered on June 30 was not a judgment. See Neb. Rev. Stat. § 25-1301 (Cum. Supp. 2000). Therefore, a few days before the default judgment was actually rendered or entered, an answer and answers to the interrogatory of garnishment showing a meritorious defense were filed with the court, and Lee Sapp’s counsel knew of the same and apparently did not inform the court.

[12,13] A review of the document served on Merrill Lynch gives us further consideration. As a result of a combination of this state’s garnishment statutes and the forms used by the court in this case, the notice given to Merrill Lynch before judgment was entered was very poor. Neb. Rev. Stat. § 25-1028 (Reissue 1995) provides that “[i]f the garnishee fails to answer, as required by section 25-1026, he shall be presumed to be indebted to the defendant in the full amount of the claim of plaintiff.” Pursuant to that statute, the garnishment form served on Merrill Lynch states: “If you do not answer the attached interrogatories, you will be presumed to owe the judgment debtor the full amount of the claim of the judgment creditor, and upon further notice to you for such amount as the court may find due.” Section 25-1028 further provides, “Upon notice to the garnishee given within such time and in such manner as the court shall direct, judgment may be entered for such amount as the court may find due from the garnishee.” The order the court entered, which was intended to give Merrill

Lynch notice of the application for default judgment (and insofar as we know, the only notice given to Merrill Lynch), was captioned with the names of Lee Sapp, Ciao Caffe & Espresso, Inc., and Marco Baldieri, but not Merrill Lynch's name, and it stated:

This matter came on to be heard on the application of the Plaintiff herein for an order requiring the Garnishee Merrill Lynch & Co. to appear and make disclosure concerning the garnishment and order issued hereon and served on said Garnishee and the Court being fully advised in the premise.

IT IS THEREFORE ORDERED that Garnishee Merrill Lynch & Co. appear before this Court on Friday, June 30 at 8:30 a.m. for the purpose of making such disclosures and answers as are pertinent to the said garnishment and to show cause why judgment should not be entered against the Garnishee and for such further relief as the Court deems equitable.

This notice does not advise Merrill Lynch that if it fails to appear, default judgment will be taken against it.

Establishing Meritorious Defense.

[14] Lee Sapp argues that Merrill Lynch lacks a meritorious defense because it could not offer proof of the assets (or lack thereof) of the judgment debtor on the date of service. Neb. Rev. Stat. § 25-1030.02 (Reissue 1995) provides that the garnishee shall be liable to the plaintiff who has recovered a judgment against the defendant if the garnishee was "(1) indebted to the defendant, or (2) had any property or credits of the defendant, in his possession or under his control at the time of being served with the notice of garnishment." See *Gerdes v. Klindt*, 253 Neb. 260, 570 N.W.2d 336 (1997). A garnishee is not liable to the plaintiff unless the judgment debtor had a right of action against the garnishee for a legal demand due or to become due. See *Chicago, B. & Q.R. Co. v. Van Cleave*, 52 Neb. 67, 71 N.W. 971 (1897).

[15] Lee Sapp correctly cites to *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995) (in determining liability of garnishee to garnishor, test is whether, as of time summons and garnishment were served, facts would support recovery

by garnishor's judgment debtor against garnishee). The affidavit of Setten states: "Merrill Lynch does not and has not, at anytime relevant to this proceeding, held any assets of the [judgment debtor]." In answer to the interrogatory: "Do you have any property belonging to the judgment debtor, or credits or monies owed to the judgment debtor, whether due or not, other than earnings [wages] described above?" Merrill Lynch answered no. A negative answer to this question would necessarily mean that Merrill Lynch had no property of the judgment debtor and did not owe the judgment debtor anything on the day that the interrogatories were served on Merrill Lynch.

[16,17] A meritorious defense is "'one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.'" *Steinberg v. Stahlnecker*, 200 Neb. 466, 468, 263 N.W.2d 861, 863 (1978), quoting *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977). In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue. *Gerdas v. Klindt, supra*. It is clear that a garnishee has a meritorious defense when it does not owe the judgment debtor anything and is not holding property of the judgment debtor. We therefore conclude that Merrill Lynch offered a meritorious defense which both parties are entitled to litigate.

Did Trial Court Abuse Its Discretion?

The record of this case contains an affidavit of a reputable attorney who had reason to believe and did believe that Merrill Lynch had property of and was indebted to the judgment debtor. The record contains an answer, answers to interrogatories, and an affidavit from an employee of a reputable corporation that it did not have such property or indebtedness, and this oath is supported by photographic copies of records of that corporation showing the judgment debtor was indebted to the corporation. To allow a final judgment for more than \$85,000 upon the basis of this record would clearly be a great injustice. The question is whether such an injustice should be perpetrated in the interest of judicial efficiency. We believe the cases we have cited, discussed,

and quoted from above clearly hold such an injustice is not necessary in the interest of judicial efficiency. There is no other basis to support such a judgment. In announcing his decision, the trial judge stated that the failure to answer the garnishment interrogatories resulted in a judgment that was immutable. The definition of immutable is "not mutable; unchangeable; unalterable; changeless." Webster's Encyclopedic Unabridged Dictionary of the English Language 713 (1989). The trial judge was mistaken, as the court clearly had the power to change the judgment in term. We conclude that to not set aside such a judgment is an abuse of discretion. We are of course merely returning the cause so the question of whether Merrill Lynch had property of or owes the judgment debtor anything may be litigated.

CONCLUSION

Merrill Lynch argues that the trial court erred in not admitting the affidavit of Spector. The court refused to receive it. Apparently, this affidavit attempts to add the additional defense that the wrong corporation was served. Since we are holding that Merrill Lynch has the right to have the judgment set aside and to litigate the matter, we need not consider that argument. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001); *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

We reverse, and remand with directions to vacate the default judgment and for such further proceedings as are necessary to determine the issues.

REVERSED AND REMANDED WITH DIRECTIONS.

McCOMBS REALTY, INC., A NEBRASKA CORPORATION, APPELLANT,
v. WESTERN AUTO SUPPLY COMPANY, DOING BUSINESS AS
PARTS AMERICA, A CORPORATION, APPELLEE.

641 N.W.2d 77

Filed March 12, 2002. No. A-00-1140.

1. **Contracts: Notice: Equity.** When the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument; the courts, when called upon, will enforce it, unless to do so would be manifestly contrary to equity and good conscience.
2. **Equity: Landlord and Tenant: Forcible Entry and Detainer: Penalties and Forfeitures: Leases.** The forcible entry and detainer statutes, Neb. Rev. Stat. §§ 25-21,219 to 25-21,235 (Reissue 1995), and the general stipulations for forfeiture in a lease are considered in equity for securing the rent, and not for forfeiting the lease, when the tenant acts in good faith and pays promptly on demand.
3. **Equity: Landlord and Tenant: Forcible Entry and Detainer: Penalties and Forfeitures.** The defense in forcible entry and detainer actions may be equitable as well as legal, and the tenant will be relieved from the technical forfeiture when absolute good faith is shown and the circumstances call for the exercise of equitable principles in his or her behalf to prevent gross injustice.
4. **Equity: Penalties and Forfeitures: Leases.** Equity has the power to relieve against a forfeiture of a lease for nonpayment of rent on the day stipulated, and such power should be exercised when the circumstances are such as to call for the exercise of equitable principles and where if withheld, gross injustice will follow when the failure to pay was not willful or the result of such culpable neglect as to amount to the same thing.

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

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Katt, for appellant.

Rodney M. Confer and Corey L. Stull, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

HANNON, INBODY, and CARLSON, Judges.

INBODY, Judge.

INTRODUCTION

McCombs Realty, Inc., a Nebraska corporation, appeals from the Lancaster County District Court's dismissing this action for forcible entry and detainer and denying its motion for new trial. For the reasons stated herein, we affirm.

STATEMENT OF FACTS

On June 6, 2000, a bench hearing was held in the Lancaster County District Court concerning McCombs Realty's action in forfeiture and detainer. In March 1993, Western Auto Supply Company (Western Auto), a wholly owned subsidiary of Sears, Roebuck and Co. (Sears), entered into a contract with PST Partnership (PST) for the purchase of the subject property in Lincoln, Nebraska, for \$494,730. After the sales contract was signed and upon determining that the property could not be subdivided, Western Auto decided that it did not want to purchase the property. The agreement was revised, wherein Western Auto and PST entered into a 50-year ground lease on May 12, 1993, for a parcel of land described as "[a] tract of land 159 feet fronting on 48th Street by a depth of 270 feet."

The lease agreement was to begin on May 1, 1993, and end April 20, 2043. Under the terms of the lease, Western Auto was required to make rental payments of \$4,125 per month beginning November 1, 1993, and ending December 31, 1994, or until Western Auto opened its store for business, whichever came first. The lease also provided that on or about January 1, 1995, Western Auto was to pay PST the sum of \$494,730 for the term of January 1, 1995, through April 20, 2043. Western Auto was also required to make a \$100 annual payment on the first business day of each year to PST.

In 1994, Western Auto finished construction of a building upon the property at a cost of approximately \$533,868. From November 1, 1993, until the time Western Auto's store opened for business, March 1994, Western Auto paid \$20,625 in rental payments to PST. On or before January 1, 1995, Western Auto paid a lump sum of \$494,730 to PST for the lease term to 2043. The parties stipulated that as of April 1998, the value of the real estate was \$610,000 and the improvements made to the property by Western Auto were valued at \$518,000.

In 1996, McCombs Realty bought the property from PST for \$1,500. In June 1997, many of the real estate functions of Western Auto's real estate administrative offices were transferred from Kansas City to the offices of its parent company, Sears, in Hoffman Estates, Illinois. Western Auto attempted to notify each of its landlords that its property management functions were

being transferred to Sears' office in Hoffman Estates. Bennie McCombs, president of McCombs Realty, testified that he never received such notice.

The first \$100 annual payment to McCombs Realty administered by Sears should have been made on the first business day of 1998. However, when McCombs did not receive this payment by February 17, he sent a letter to the real estate department in Kansas City notifying them that the payment was past due. The letter was sent to the Kansas City office even though McCombs knew, through a conversation with the Kansas City real estate representatives, that the Kansas City real estate department had moved the previous June to Hoffman Estates. McCombs acknowledged that he sent the letter by regular mail and that he did not intend the letter to be the official notice of default.

According to McCombs, he did not receive any response from Western Auto until mid-March 1998, when he received a telephone call from Michelle Green, a billing analyst from Sears' office in Hoffman Estates. McCombs testified that pursuant to his telephone conversation with Green, on March 19, 1998, he sent Green a copy of the February 17 letter, lease, and other information by Federal Express, next-day delivery. McCombs testified that this packet was intended to be the official notice of default and was sent to both the Kansas City office and the Hoffman Estates office. McCombs stated that the lease required official notices to be sent to the real estate department in Kansas City and that he had never received notification from Western Auto that notices were no longer to be sent to the Kansas City office. Since he still had not received payment, McCombs sent a notice to vacate the premises to Western Auto on April 7. McCombs received an envelope from Western Auto on April 16 and, by shining a flashlight through it, ascertained that it contained the \$100 payment. Because he had already filed notice to vacate the premises, he returned the envelope unopened.

Green testified that in February 1998, she was a billing analyst for Sears and was responsible for ensuring that all lease payments were made to all Western Auto landlords. According to Green, at that time, she was responsible for making payments on approximately 800 Western Auto leases, of which approximately 10 required annual, rather than monthly, payments.

When the property management functions for Western Auto were transferred from Kansas City to Hoffman Estates, these few annual payments were not placed on the computerized "rent roll" of Western Auto leased properties whose payments were automatically paid when due. Green was not aware that these payments, including the \$100 annual payment due McCombs Realty, were not on the rent roll until it was brought to her attention by McCombs' letter.

According to Green, approximately 3 weeks after McCombs sent the February 17, 1998, letter to Kansas City, she received it in the mail from the Kansas City office. After attempting to locate both a payment file and a lease file on Western Auto, she called McCombs and asked for a copy of the lease. Green gave the lease to a real estate manager for Sears, who read the lease and told Green that under the terms of the lease, McCombs Realty was due a \$100 annual payment. Green overnighted a check request to the Kansas City office, and a check was made out to McCombs Realty on April 1. Green called McCombs to confirm that he received the check and discovered that for some reason he never received the check. A second check was issued to McCombs Realty, which McCombs returned unopened because he had already terminated the lease.

On September 28, 2000, the district court dismissed McCombs Realty's action and denied its request for possession of the property. The court stated:

It would be absurd to require forfeiture of over a million dollars in prepayments and improvements because of defendant's negligent late payment of the \$100 annual payment, which it cured within 30 days. Since the Ground Lease does not refer to the annual \$100 payment as "rent," the Court concludes that the 15 day period to cure a default in payment of "rent" was not intended by the parties to apply to this situation where the \$100 annual payment was tardy.

. . . Even if the parties intended that failure to make a \$100 annual payment within the fifteen day period allowed to cure default in non-payment of "rent" would give lessor the right to terminate the lease, this Court refuses to enforce such a result as a matter of equity.

McCombs Realty moved for a new trial on October 9, 2000, which motion was denied. McCombs Realty has timely appealed to this court.

ASSIGNMENT OF ERROR

The assignments of error on appeal can be consolidated into the following issue: The district court erred in dismissing the action and failing to order restitution of possession to McCombs Realty.

STANDARD OF REVIEW

In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Newman v. Rehr*, 10 Neb. App. 356, 630 N.W.2d 19 (2001).

ANALYSIS

McCombs Realty contends that the district court erred in dismissing its action and failing to order repossession of the property.

[1,2] When the right to terminate a contract on notice is reserved without any fraud or mistake, but with the actual knowledge and consent of all parties to the agreement, it is as valid in law as any other clause of the instrument; the courts, when called upon, will enforce it, unless to do so would be manifestly contrary to equity and good conscience. *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998). The forcible entry and detainer statutes, Neb. Rev. Stat. §§ 25-21,219 to 25-21,235 (Reissue 1995), and the general stipulations for forfeiture in a lease are considered in equity for securing the rent, and not for forfeiting the lease, when the tenant acts in good faith and pays promptly on demand. See *Farmer v. Pitts*, 108 Neb. 9, 187 N.W. 95 (1922).

[3,4] The defense in forcible entry and detainer actions may be equitable as well as legal, and the tenant will be relieved from the technical forfeiture when absolute good faith is shown and the circumstances call for the exercise of equitable principles in his

or her behalf to prevent gross injustice. *Id.* Equity has the power to relieve against a forfeiture of a lease for nonpayment of rent on the day stipulated, and such power should be exercised when the circumstances are such as to call for the exercise of equitable principles and where if withheld, gross injustice will follow when the failure to pay was not willful or the result of such culpable neglect as to amount to the same thing. *Ostenberg v. Scottsbluff Investment Co.*, 106 Neb. 143, 183 N.W. 95 (1921).

The record establishes that the \$100 annual payment was not paid to McCombs Realty as a result of a clerical error causing annual payments to be left off the rent roll made during the period in which Western Auto's real estate functions were being transferred to Sears. Upon learning that McCombs Realty had not received the annual payment, Sears made a good faith attempt to correct the problem expeditiously. The evidence establishes that a check was made out to McCombs Realty on April 1, 1998, but was not received by McCombs Realty. When Green called McCombs to confirm that he had received the April 1 check and upon learning that he had not, another check was promptly issued and received by McCombs on April 16. McCombs returned the envelope containing the check unopened. Nothing in the record suggests that Western Auto's failure to pay the annual payment was willful or a result of culpable neglect.

Assuming without deciding that the \$100 annual payment was rent, that McCombs' March 19, 1998, letter complied with the notice provision, and that he was thus entitled to terminate the lease, it would be manifestly contrary to equity and good conscience to enforce the lease's forfeiture provision and require Western Auto to forfeit over \$1 million simply for failure to pay a \$100 annual payment. Therefore, this court affirms the judgment of the district court.

CONCLUSION

For the reasons stated above, we find that it would be manifestly contrary to equity and good conscience to enforce the lease's forfeiture provision. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

NATHANIEL ROBINSON, APPELLANT, v.
NABCO, INC., APPELLEE.

641 N.W.2d 401

Filed March 12, 2002. No. A-00-1146.

1. **Pretrial Procedure: Evidence: Records: Appeal and Error.** A hearing must be recorded if it is an evidentiary proceeding so that a bill of exceptions is available for appellate review. A hearing that does not include the offering of evidence need not be recorded, unless a party requests it.
2. **Pretrial Procedure: Evidence: Records: Affidavits.** A court reporter's affidavit stating that no record of a hearing was made compels an inference that no evidence was offered or that no request that the hearing be recorded was made.
3. **Pleadings: Jurisdiction.** Before filing any other pleading or motion, one may file a special appearance under Neb. Rev. Stat. § 25-516.01 (Reissue 1995) for the sole purpose of objecting to a court's assertion or the exercise of personal jurisdiction over the objector.
4. **Final Orders: Dismissal and Nonsuit: Appeal and Error.** An order is final and appealable if it dismisses an action with prejudice.
5. **Judgments: Jurisdiction: States.** In order to subject a nonresident defendant to a judgment in personam, the nonresident defendant must have established minimum contacts with the forum state such that maintenance of a lawsuit there does not offend traditional notions of fair play and substantial justice.
6. **Jurisdiction: States.** Under the concept of general jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, provided that the defendant has engaged in continuous and systematic general business contacts with the forum state.
7. **Pleadings: Jurisdiction: Affidavits: Proof.** In a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over the defendant.
8. **Pleadings: Jurisdiction: Proof.** Upon the filing of a special appearance, the plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant.
9. **Actions: Jurisdiction: States.** If a defendant's contacts with a forum state are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum state, a court may assert specific jurisdiction over the defendant depending on the quality and nature of such contact.
10. **Jurisdiction: States: Words and Phrases.** Purposeful availment means that the defendant's connection with the forum state must be deliberate and substantial, involving significant activities or continuing obligations.
11. **Jurisdiction: Products Liability: States.** The stream of commerce theory of personal jurisdiction in a products liability action applies when a defendant knows that its products, traveling through interstate commerce, will reach an ultimate consumer in a particular state of the United States, regardless of whether direct contact with that state occurred.
12. **Jurisdiction.** Unilateral contact initiated by a third party normally is simply too remote to invoke personal jurisdiction over a defendant.

13. **Jurisdiction: States.** Placement of a product into the stream of commerce, without more, generally is not proof of purposefully directed conduct toward the forum state.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Phillip G. Wright and Sean C. Bradley, of Quinn & Wright, for appellant.

Nora M. Kane, of Domina Law, P.C., for appellee.

IRWIN, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

In this products liability action, the Douglas County District Court determined that Nebraska lacks personal jurisdiction over NABCO, Inc., a Michigan company which remanufactures electrical automotive parts. Nathaniel Robinson, a Nebraska citizen, alleged he was injured by a defective alternator in his car. Robinson alleged that he purchased the alternator from a Western Auto Supply Company (Western Auto) retail store in Omaha, which had received the alternator from Western Auto/Advanced Automotive Supply Company in Missouri, which purchased the alternator from NABCO. NABCO's special appearance challenged Nebraska's personal jurisdiction. The trial court sustained the special appearance and dismissed the action. Robinson appealed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robinson bought a Sentry Gold alternator, a part remanufactured by NABCO, for his automobile in March 1996 from Western Auto. About 1 month later, Robinson was driving the vehicle when the "check engine" light alerted him to a problem. He stopped the automobile and opened the hood. The top of the battery flew off, striking him in the head. Robinson alleges that the incident occurred due to overcharging of the alternator, caused by defective manufacturing, and that as a result, he sustained significant acid burns and other injuries.

Robinson filed a petition in the Douglas County District Court against NABCO, a Michigan corporation, alleging that Nebraska has personal jurisdiction over NABCO pursuant to Neb. Rev. Stat. § 25-536 (Reissue 1995), the long-arm statute. He stated in his

petition that sufficient contacts exist because NABCO marketed, sold, and distributed the alternator in Nebraska. NABCO filed a special appearance pursuant to Neb. Rev. Stat. § 25-516.01 (Reissue 1995), objecting that the trial court did not have personal jurisdiction over it.

On June 22, 2000, the court held a hearing on NABCO's special appearance, and that bill of exceptions is in our record. Included therein is exhibit 1, the affidavit of Patrick E. Young, NABCO's director of product reliability. In an order entered June 30, the trial court found that "pursuant to *International Shoe Company v. Washington*, 326 US 310, 66 S Ct 154, 90 LEd 95 (1945), and its progeny, and *Neb Rev Stat* § 25-536," Nebraska lacked personal jurisdiction over NABCO.

Robinson filed an amended petition in which he added the allegation: "Defendant knowingly placed its product known as a Sentry Gold Alternator in the stream of commerce so that it would reach an ultimate consumer, such as the Plaintiff in the State of Nebraska." NABCO responded with another special appearance, which the trial court sustained, and the court dismissed the action with prejudice on October 12, 2000, citing only the reasoning we quoted above from its ruling on the first special appearance.

Robinson appealed and requested a record of the second special appearance hearing. However, our transcript includes a November 22, 2000, affidavit from the trial judge's reporter averring that "she made no record in connection with the case on September 21, 2000."

II. ASSIGNMENTS OF ERROR

Robinson assigned two errors which he also argued and which we therefore consider: The trial court erred in failing to produce a record of the proceedings held on the second special appearance on September 21, 2000, and finding that Nebraska lacked personal jurisdiction over NABCO. See *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000) (appellate court considers only assignments of error which are both assigned and argued).

III. STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law,

which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the jurisdictional issue. *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998).

IV. ANALYSIS

1. LACK OF BILL OF EXCEPTIONS FOR HEARING

HELD SEPTEMBER 21, 2000

Robinson argues that it was the trial court's responsibility to ensure that all testimony or other oral proceedings were recorded by a court reporter. This statement is overly broad as explained by a close reading of the court rules quoted below. Robinson reasons that the court's failure to make a verbatim record of NABCO's special appearance on September 21, 2000, prevents this court from reviewing the trial court's decision, necessitating a remand for preparation of a record of the hearing. The request for a remand, given there is no showing that an evidentiary proceeding occurred on September 21, is inappropriate.

Neb. Ct. R. of Prac. 5A(1) (rev. 2000) provides: "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." (Emphasis supplied.)

In *Norwest Bank Neb. v. Bellevue Bridge Comm.*, 7 Neb. App. 750, 585 N.W.2d 505 (1998), no bill of exceptions was made. In *Norwest Bank Neb.*, we quoted *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995), a case in which a trial court failed to make a transcript of an evidentiary hearing, for this proposition:

"'Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.'"

Norwest Bank Neb., 7 Neb. App. at 754-55, 585 N.W.2d at 509. See, also, *Jacob v. Schlichtman*, 8 Neb. App. 439, 594 N.W.2d 691 (1999) (upon proper request for bill of exceptions, preparation

thereof becomes internal court matter and it is court reporter's duty to fulfill request); *Lockenour v. Sculley*, 8 Neb. App. 254, 592 N.W.2d 161 (1999) (there can no longer be any dispute that it is trial court's responsibility to preserve and produce evidentiary record); *Sindelar v. Hanel Oil, Inc.*, 6 Neb. App. 349, 573 N.W.2d 782 (1998) (trial court's order showed that evidence was received at summary judgment hearing, but court reporter did not record proceedings, resulting in remand for failure of court official to perform duties).

[1] Robinson appears not to appreciate that a different rule obtains depending on whether the proceeding is an evidentiary proceeding. The trial judge and his or her reporter must record the hearing if it is an evidentiary proceeding so that a bill of exceptions is available for appellate review of the evidence. See rule 5A(1). A hearing that does not include the offering of evidence need not be recorded, unless a party requests it. See rule 5A(2). These rules are simple and straightforward.

[2] We have no indication that evidence was offered at the hearing on NABCO's special appearance held September 21, 2000. The court reporter's affidavit stating that no record of the special appearance was made, under the law as outlined above, compels an inference that not only was no evidence offered, but no party requested that the hearing be reported, even though no evidence was offered. No filing in the district court (made part of this record) from Robinson disputes the court reporter's affidavit, and in this regard, we note that our rules provide a procedure for the trial court to resolve, if the parties cannot agree, what shall be in the bill of exceptions. See rule 5B(5).

Moreover, rule 5B(3)c allows for the preparation of a bill of exceptions, if the court reporter cannot prepare it, under the direction, supervision, and certification of the trial court. We read this rule as applying only when there was an evidentiary hearing. The obvious problem here is that Robinson did not avail himself of this rule, did not make any showing that there had in fact been evidence offered on September 21, 2000, making a bill of exceptions mandatory, or make a request that this hearing be recorded—also making the recording of a nonevidentiary proceeding mandatory. Absent such showing, we presume compliance with the law by the trial court and the court

reporter—meaning that there was no evidence adduced on September 21 and no request that a nonevidentiary proceeding be recorded. As a result, we have no basis to order a remand to prepare a record that Robinson has not shown should exist. This assignment of error and suggestion for remand lacks merit.

2. DOES RECORD SHOW NEBRASKA HAS PERSONAL JURISDICTION OVER NABCO?

[3] Failing a remand, Robinson contends that the record, which includes his amended petition and Young's affidavit, is sufficient to show that the trial court erred by finding that Nebraska lacked personal jurisdiction over NABCO. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Higgins v. Rausch Herefords*, 9 Neb. App. 212, 609 N.W.2d 712 (2000). Before filing any other pleading or motion, one may file a special appearance under § 25-516.01 for the sole purpose of objecting to a court's assertion or the exercise of personal jurisdiction over the objector. *Id.*

[4] The trial court's October 12, 2000, order finding that Nebraska lacked personal jurisdiction over NABCO is a final, appealable order because it dismissed Robinson's action with prejudice. An order is final and appealable if it dismisses an action with prejudice. See *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965) (when special appearance is sustained, it becomes final order when plaintiff elects to stand on it and brings about dismissal).

Before a court can exercise personal jurisdiction over a non-resident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *Higgins v. Rausch Herefords*, *supra*.

Nebraska's long-arm statute, § 25-536, provides in pertinent part:

A court may exercise personal jurisdiction over a person:

(1) Who acts directly or by an agent, as to a cause of action arising from the person:

- (a) Transacting any business in this state;
- (b) Contracting to supply services or things in this state;
- (c) Causing tortious injury by an act or omission in this state;
- (d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

....
(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

The Due Process Clause of the 14th Amendment operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant. *Higgins v. Rausch Herefords*, *supra*; *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994).

[5] The trial court did not cite to a particular subsection of this statute in its October 12, 2000, order sustaining the special appearance, but it relied upon *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). In *Internat. Shoe Co.*, the U.S. Supreme Court wrote that in order to subject a nonresident defendant to a judgment in personam, the nonresident defendant must have established minimum contacts with the forum state such that maintenance of a lawsuit there does not offend traditional notions of fair play and substantial justice. See, *Holste v. Burlington Northern RR. Co.*, *supra*; *Higgins v. Rausch Herefords*, *supra*.

(a) General Jurisdiction, Aspect of Personal Jurisdiction

[6] Determining whether Nebraska can exercise personal jurisdiction over a nonresident defendant requires that we review the issue in terms of both general and specific jurisdiction. See, *Higgins v. Rausch Herefords*, 9 Neb. App. 212, 609 N.W.2d 712 (2000); *Dunham v. Hunt Midwest Entertainment*, *supra*. Under the concept of general jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the

forum state, provided that the defendant has engaged in continuous and systematic general business contacts with the forum state. *Id.* In both *Higgins* and *Dunham*, the determination of whether the defendant's general business contacts qualified as "continuous and systematic" or "substantial" to satisfy general jurisdiction was made by examining all the defendant's activities that impacted the forum state, "including whether the defendant makes sales, solicits or engages in business, serves the state's markets, designates an agent for service of process, holds a license, has employees, or is incorporated there.'" *Higgins v. Rausch Herefords*, 9 Neb. App. at 219, 609 N.W.2d at 718, quoting *Dunham v. Hunt Midwest Entertainment*, *supra*.

[7] In a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). In the instant case, Young's affidavit alleges that NABCO does not sell its products to retail consumers in Nebraska or any other state. Young further alleged in the affidavit that NABCO sent the alternator ultimately sold to Robinson to an independent distributor in Kansas City, Missouri, named Western Auto/Advanced Automotive Supply Company, and that NABCO does not employ anyone in Nebraska, including an agent in Nebraska; does not maintain an office, place of business, inventory, or bank accounts in this state; does not own or rent real or personal property here; does not pay taxes to Nebraska; and is not incorporated in Nebraska or registered as a foreign corporation authorized to conduct business in this state. Young's un rebutted affidavit proves that NABCO has no "continuous and systematic" or "substantial" general business contacts with Nebraska.

[8] Upon the filing of a special appearance, the plaintiff has the burden to establish facts which demonstrate the court's personal jurisdiction over the defendant. *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994). Here, Robinson clearly failed to carry his burden with respect to proving general personal jurisdiction over NABCO because he offered no evidence that NABCO has "continuous and systematic" or "substantial" general business contacts with Nebraska; Young's affidavit proves the opposite proposition.

(b) Specific Jurisdiction, Another Aspect
of Personal Jurisdiction

[9] If a defendant's contacts with a forum state are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum state, a court may assert specific jurisdiction over the defendant depending on the quality and nature of such contact. *Higgins v. Rausch Herefords, supra*; *Dunham v. Hunt Midwest Entertainment, supra*. In *Higgins*, we quoted *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987), which provided the following analysis to determine whether specific jurisdiction over a nonresident defendant exists:

"(1) [T]he nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

9 Neb. App. 212, 220, 609 N.W.2d 712, 719 (2000).

[10] "Purposeful availment" means that the defendant's connection with the forum state must be deliberate and substantial, involving significant activities or continuing obligations. *Id.* The connection cannot be random, fortuitous, attenuated, or the result of another party's unilateral activities. *Id.*, citing *Dunham v. Hunt Midwest Entertainment, supra*. The foreseeability which is crucial to due process is that the defendant's conduct in connection with the forum state is such that he or she should reasonably anticipate being haled into court there. *Dunham v. Hunt Midwest Entertainment, supra*.

In both *Higgins* and *Dunham*, there was an issue as to whether advertising within the forum state established sufficient minimum contacts for Nebraska's exercise of personal jurisdiction, general and specific, over the nonresident defendants. Here, there is no evidence whatsoever in the record that NABCO advertises in Nebraska; plus, Young states in his affidavit that

NABCO does not sell to retail customers. We simply cannot find any purposeful directing of its business activities toward Nebraska, or purposeful availment of the benefits and protections of Nebraska law, sufficient to support a finding of specific jurisdiction on the record before us. But Robinson presents another legal theory to argue that Nebraska has specific personal jurisdiction over NABCO.

(c) "Stream of Commerce" Theory of
Specific Personal Jurisdiction

[11] Robinson argues that his amended petition, alleging that NABCO "knowingly placed its . . . Sentry Gold Alternator in the stream of commerce so that it would reach an ultimate consumer, such as the Plaintiff" in Nebraska, states sufficient facts to show that Nebraska may subject NABCO to its jurisdiction. He cites *Hetrick v. American Honda Motor Co., Inc.*, 429 F. Supp. 116 (D. Neb. 1976), where a Nebraska federal district court held that the "stream of commerce" proposition established sufficient contacts by a nonresident company with Nebraska to permit the exercise of personal jurisdiction over the company. Hetrick filed a tort action against Honda Motor Company, Ltd. (Honda), a corporation organized and existing under Japan's laws, and American Honda Motor Company, Inc., the exclusive distributor within the United States of products manufactured by Honda. The court denied Honda's motion to dismiss the action for lack of personal jurisdiction because it found due process concerns were satisfied as Honda had "reason to know that its products, traveling through interstate commerce, will reach an ultimate consumer in any state of the United States." *Id.* at 118. In so finding, the *Hetrick* court cited to another Nebraska federal district court decision, *Blum v. Kawaguchi, Ltd.*, 331 F. Supp. 216 (D. Neb. 1971). The *Hetrick* court noted that the *Blum* court said that the long-arm statute does not require direct contacts, and that "'it does not follow that an indirect sale would necessarily alter the nature of the transaction. It might be a different situation had the defendant made a sale elsewhere with the expectation that it was to be a final sale (that is, not for resale).'" 429 F. Supp. at 118. The stream of commerce theory of personal jurisdiction in a products liability action applies when a defendant knows that its products, traveling

through interstate commerce, will reach an ultimate consumer in a particular state of the United States, regardless of whether direct contact with that state occurred.

[12,13] Robinson argues that because NABCO intended to place the alternator in the "stream of commerce," NABCO must have expected the alternator would be installed in a vehicle in Nebraska owned by a Nebraska resident, making the company subject to the personal jurisdiction of Nebraska. But a more recent product liability case decided by the Nebraska Supreme Court extends the *Hetrick* analysis. In *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995), the court determined whether Nebraska had personal jurisdiction over the Illinois polyester rope manufacturer, Unicord Corporation, which sold its product to a Florida company, which delivered the product to Precision Sewing Company in Iowa. Unbeknownst to Unicord, the Iowa company sold three spools of rope to Wagner's employer to secure tarps to truck trailers before transporting freight. Wagner fractured a wrist when he fell backward after the rope broke during his attempt to secure a tarp, and he brought a products liability action against Unicord in Nebraska. The only proven contact with Nebraska was that several libraries in different Nebraska towns subscribed to the Chicago yellow pages telephone book, in which Unicord was listed. The court described this as "unilateral contact" by library personnel and found that "unilateral contact" initiated by a third party normally is simply too remote to invoke personal jurisdiction over a defendant. *Id.* at 223, 526 N.W.2d at 78. The court wrote that placement of a product into the stream of commerce, without more, generally is not proof of purposefully directed conduct toward the forum state. *Id.*, citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

There was no evidence that NABCO manufactured products with knowledge or the intent that they be sold in Nebraska. Young's affidavit shows that NABCO delivered goods to Western Auto/Advanced Automotive distribution centers in Kansas, North Carolina, Ohio, Texas, and Missouri—but not to Nebraska. However, in *Wagner*, the Nebraska Supreme Court noted that the plaintiff had failed to establish that Unicord had any expectation that the Iowa delivery was not a final sale. In the

instant case, Young's affidavit stated that NABCO does not control how Western Auto/Advanced Automotive distributes its products after receiving them from NABCO. Nonetheless, it is reasonable to assume that NABCO knew its remanufactured electrical automobile parts would be sold by the independent distributors including the Western Auto/Advanced Automotive in Missouri to an end user who could be a Nebraska resident, such as Robinson.

Thus, we turn to *Asahi Metal Industry Co. v. Superior Court*, *supra*, where an individual sued Asahi Metal Industry Co., Ltd. (Asahi), a Japanese manufacturer of motorcycle tire tube assemblies, for an accident in California which killed his wife and injured him when the rear tire of his motorcycle exploded. The individual's claims against the Taiwanese tire manufacturer, who had received valve stem assemblies from Asahi, and all other defendants were settled. The Taiwanese tire manufacturer filed a cross-complaint seeking indemnification from Asahi. The U.S. Supreme Court found that California lacked personal jurisdiction over Asahi, although a manager of the Taiwanese company averred that Asahi "“was fully aware that valve stem assemblies sold to [the Taiwanese company] and to others would end up throughout the United States and in California.”" *Id.* at 107. The Court premised its decision on the idea that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112.

The Supreme Court noted that Asahi did not conduct business in California; lacked an office, agents, employees, or property in the state; did not advertise or solicit business in California; and did not create, control, or employ the distribution system that brought its tire valve stems to the state. *Id.* The Court also based its decision on the idea that California's exercise of personal jurisdiction over a foreign company would be "unreasonable and unfair" because Asahi would have to defend itself in a foreign legal system—and because Asahi's dispute with the Taiwanese company, an indemnity action, would be submitted to California's judicial system when the state and individual plaintiff had "slight interests" in the outcome of the dispute. *Id.* at 116.

Although NABCO is not a foreign corporation for whom appearance in Nebraska courts would be similarly burdensome, under *Asahi Metal Industry Co.*, *supra*, and *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995), subjecting NABCO to personal jurisdiction in Nebraska's courts is not justified by Robinson's "stream of commerce" theory, at least on this record. Merely placing the alternator in the "stream of commerce" by distributing it to Western Auto/Advanced Automotive in Missouri does not constitute an act purposefully directed toward Nebraska. In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), the U.S. Supreme Court referred to the lack of evidence that Asahi "purposefully avail[ed]" itself of the California market by establishing a presence there, controlling the distribution system for its products there, or advertising in California. While it is not for us to say in this case how "purposeful availment" would be proved, we note that in *Dunham v. Hunt Midwest Entertainment*, 2 Neb. App. 969, 520 N.W.2d 216 (1994), substantial advertising in the Omaha area by a Missouri amusement park to lure Nebraska customers was found to be an insufficient basis for personal jurisdiction when Nebraska visitors to this park were injured in Missouri. See, also, *Higgins v. Rausch Herefords*, 9 Neb. App. 212, 609 N.W.2d 712 (2000) (lack of evidence of other sales of cattle in Nebraska by South Dakota ranchers advertising in national directories and publishing 800 numbers prevents finding of purposeful availment to Nebraska).

V. CONCLUSION

In view of the foregoing authority, when all is said and done, it is Robinson's failure to carry his burden to establish facts demonstrating personal jurisdiction over NABCO which mandates a finding that there is no general or specific jurisdiction in the Nebraska courts over NABCO. Thus, we are required to uphold the trial court's sustaining of the special appearance and its dismissal of this action.

AFFIRMED.

FRANKIE LEVI COLE, APPELLANT, v.
HAROLD CLARKE ET AL., APPELLEES.
641 N.W.2d 412

Filed March 12, 2002. No. A-00-1295.

1. **Res Judicata: Judgments.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
2. **Res Judicata.** The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause of action.
3. _____. The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts.
4. **Res Judicata: Judgments.** For purposes of res judicata, a judgment on the merits is one which is based on legal rights, as distinguished from mere matters of practice, procedure, jurisdiction, or form.
5. **Res Judicata: Judgments: Dismissal and Nonsuit.** Summary judgments, judgments on directed verdict, judgments after trial, default judgments, and consent judgments are all generally considered to be on the merits for purposes of res judicata, while dismissals on technical procedural grounds are generally not on the merits.
6. **Judgments: Dismissal and Nonsuit.** A judgment of dismissal based on the failure of a claimant to state a cause of action is considered a judgment on the merits, even where by amendments a good cause of action might be stated.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Frankie Levi Cole, pro se.

Don Stenberg, Attorney General, and Jennifer M. Amen for appellees.

IRWIN, Chief Judge, and INBODY and CARLSON, Judges.

IRWIN, Chief Judge.

I. INTRODUCTION

Frankie Levi Cole appeals from an order of the district court granting a demurrer in favor of Harold Clarke, Frank Delgado, Frank X. Hopkins, Donald McCall, and Donald E. Endacott (collectively Appellees). Clarke was the director of the Department of Correctional Services, Hopkins was the warden at the Nebraska State Penitentiary, Delgado was the head records officer at the penitentiary, McCall was the acting chair of the

Nebraska Board of Parole, and Judge Endacott was a district court judge. Cole was a prisoner committed to the Nebraska Department of Correctional Services. On appeal, Cole challenges the district court's ruling that his petition was barred by res judicata and refusing to use equitable estoppel to grant him relief. We find Cole's appeal to be meritless, and we affirm the judgment of the district court in all respects.

II. BACKGROUND

Cole filed a petition on March 27, 2000, alleging that Appellees had committed a "breach of their official bonds" pursuant to, inter alia, Neb. Rev. Stat. §§ 11-112 (Reissue 1997) and 25-2101 (Reissue 1995). Cole named Appellees as defendants, as well as Northland Insurance Company. On April 4, a demurrer was filed on behalf of Appellees. The district court sustained the demurrer on July 26, finding that the case was barred by res judicata as to Clarke, Delgado, Hopkins, and McCall because the matter arose out of the same factual scenario as *Cole v. Clarke*, 8 Neb. App. 614, 598 N.W.2d 768 (1999) (*Cole I*), and finding that the "official bonds" statutes did not apply to Judge Endacott.

Cole appealed from the court's July 26, 2000, order. On September 29, this court dismissed Cole's appeal, based on Neb. Rev. Stat. § 25-705(6) (Supp. 1999). See *Cole v. Clarke*, 9 Neb. App. 1vi (case No. A-00-885, Sept. 29, 2000). The portion of § 25-705(6) relied upon provided, in pertinent part, that a final judgment could be rendered as to fewer than all of the parties involved in an action with multiple defendants only upon an express determination that there existed no just reason for delay and an express direction for entry of final judgment. Because the court's order did not dispose of the action against Northland Insurance Company, this court concluded that there was no final order. As such, we dismissed the appeal.

On November 13, 2000, the district court entered an order dismissing the action against the final defendant, Northland Insurance Company. Cole has once again appealed from the district court's dismissal of his action against Appellees.

III. ASSIGNMENTS OF ERROR

On appeal, Cole has assigned two errors. First, Cole asserts that the district court erred in finding that the issues in this case

are barred by the doctrine of res judicata. Second, Cole asserts that the district court erred in refusing to recognize equitable estoppel principles to grant him relief.

IV. ANALYSIS

As noted, this is an action by Cole against Appellees alleging a "breach of their official bonds." Cole cites §§ 11-112 and 25-2101 as the statutory basis for his present action. Despite the fact that he is alleging a different statutory basis for this action, the current action is based on exactly the same operative facts as Cole's action in *Cole I*. The present action is against the exact same individual defendants as *Cole I*, except that the trial judge from *Cole I*, Judge Endacott, is also named in the present action.

In granting Appellees' demurrer, the district court ruled that as to Clarke, Hopkins, Delgado, and McCall, the decision of this court rejecting Cole's appeal in *Cole I* was res judicata. As to Judge Endacott, the court ruled that the official bonds statute cited by Cole, Neb. Rev. Stat. § 11-101 (Reissue 1997), specifically does not apply to Judge Endacott. Accordingly, the court dismissed Cole's petition. We conclude that the district court ruled correctly on these issues.

1. RES JUDICATA ISSUE CONCERNING CLARKE, HOPKINS, DELGADO, AND MCCALL

The first issue before us is whether, as the district court concluded, Cole's petition against Clarke, Hopkins, Delgado, and McCall is barred by the doctrine of res judicata and this court's holding in *Cole I*. After carefully reviewing the decision in *Cole I* and the operative petition in the present case, it is apparent that res judicata does bar Cole's present claim against these defendants.

[1,2] The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001). The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause of action. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

[3] The doctrine of res judicata applies when the same cause of action is sought to be litigated a second time. *Graham v.*

Waggener, 219 Neb. 907, 367 N.W.2d 707 (1985). See, also, *In re Interest of Jaden H.*, 10 Neb. App. 87, 625 N.W.2d 218 (2001) (comparing res judicata, or claim preclusion, and collateral estoppel, or issue preclusion), *rev'd on other grounds* 263 Neb. 129, 638 N.W.2d 867 (2002). Whether the subsequent suit alleges the same cause of action as the prior suit is determined by whether the right sought to be vindicated rests upon the same operative facts. *Graham v. Waggener*, *supra*. If so, the same cause of action has been alleged, even if different theories of recovery are relied upon. *Id.*

It is apparent that the present case is premised on the same cause of action as *Cole I*. A review of the operative petition in the present case reveals that it is based on precisely the same operative facts as we outlined in our opinion in *Cole I*. As such, we are not persuaded by Cole's assertion that the present case is premised on a different cause of action simply because he has specified a different statutory basis for the current action. This amounts to alleging a different theory of recovery, but the operative facts and the alleged legal right to be vindicated is exactly the same as in *Cole I*. As such, this is a subsequent suit on the same cause of action as *Cole I*.

[4,5] The real issue before us is whether our decision in *Cole I* amounted to a judgment "on the merits" such that it precludes Cole from again seeking redress on this cause of action. For purposes of res judicata, a judgment on the merits is one which is based on legal rights, as distinguished from mere matters of practice, procedure, jurisdiction, or form. See *DeVaux v. DeVaux*, *supra*. As such, summary judgments, judgments on directed verdict, judgments after trial, default judgments, and consent judgments are all generally considered to be on the merits for purposes of res judicata, while dismissals on technical procedural grounds are generally not on the merits. See *id.*

Cole argues that our decision in *Cole I* was not a decision on the merits, because that "appeal was dismissed on procedural grounds only after this court found that the district court lacked jurisdiction to hear any of the claims." However, our review of *Cole I* indicates that as to the individual defendants, we concluded that Cole "failed to state a cause of action." 8 Neb. App. at 620, 598 N.W.2d at 772. We did not find that the district court

lacked jurisdiction. Even concerning Cole's claim in *Cole I* against the State, we did not find a lack of jurisdiction, but, rather, we found that his claim was barred by the Political Subdivisions Tort Claims Act. See *Cole I*. See, also, *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988) (holding that claim being barred by act is not conclusion that court lacks jurisdiction).

[6] A judgment of dismissal based on the failure of a claimant to state a cause of action is considered a judgment on the merits, even where by amendments a good cause of action might be stated. See, *Swift v. Dairyland Ins. Co.*, 250 Neb. 31, 547 N.W.2d 147 (1996); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993). As noted above, our decision in *Cole I* was premised on the fact that Cole had failed to state a cause of action against Clarke, Hopkins, Delgado, and McCall concerning the same operative facts at issue in the present case. As such, the decision of this court in *Cole I* constituted a final judgment on the merits concerning this cause of action.

In the present action, Cole is attempting to relitigate the same cause of action as in *Cole I*, albeit through a different theory of recovery. Cole has named as defendants in this action Clarke, Hopkins, Delgado, and McCall, just as he did in *Cole I*. In *Cole I*, this court rendered a final judgment on the merits concerning this cause of action. Accordingly, the district court did not err in finding that res judicata bars Cole's present petition against these individuals. This assigned error is without merit.

2. EQUITABLE ESTOPPEL

Cole also assigns as error the district court's refusal to invoke principles of equitable estoppel or constructive notice concerning the insurance company which issued the bonds relative to Clarke, Hopkins, Delgado, and McCall. Inasmuch as we have concluded that Cole cannot seek his cause of action against the individual defendants, Cole's cause of action against the insurance company acting as surety for the individuals is no longer at issue either. This assigned error is without merit.

3. CONCERNING JUDGE ENDACOTT

Cole has not assigned or argued any error concerning the district court's finding that the official bond statute referenced by

Cole specifically does not apply to Judge Endacott. Inasmuch as Cole has not assigned or argued this finding as error, we will not further discuss it.

4. CONTINUING LITIGATION

In *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001), this court noted that the state's interest in not allowing frivolous or malicious litigation in its courts is constitutionally paramount to the plaintiff's desire to pursue such litigation. See, also, *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998). Pursuant to the appellate courts' interest in not allowing frivolous or malicious litigation, the appellate courts have previously limited Billy Roy Tyler to filing only one lawsuit per month when proceeding in forma pauperis in Douglas County and have ordered that the present claimant, Frankie Levi Cole, be prohibited from filing further litigation against his former attorney, Andrew Wilson, concerning the adequacy of Wilson's representation of Cole between February 13 and April 9, 1996. *Cole v. Wilson, supra*. Similarly, we further order that Cole is prohibited against filing suit against Clarke, Hopkins, Delgado, and McCall based upon the following facts: Cole was improperly held beyond his originally scheduled release date because of Clarke, Hopkins, Delgado, and McCall's actions concerning computation of his release date pursuant to Neb. Rev. Stat. § 83-1,123 (Reissue 1987) for his conviction for burglary and theft as discussed in *Cole I*.

V. CONCLUSION

Cole's appeal is meritless. Additionally, we specifically direct that Cole is prohibited from filing suit against Clarke, Hopkins, Delgado, and McCall based upon his allegedly being improperly held beyond his originally scheduled release date because of Clarke, Hopkins, Delgado, and McCall's actions concerning computation of his release date pursuant to § 83-1,123 for his conviction for burglary and theft as discussed in *Cole I*. The judgment of the district court is affirmed.

AFFIRMED.

LORENA HERRERA, APPELLANT, v. FLEMING COMPANIES, INC.,
A FOREIGN CORPORATION FROM THE STATE OF OKLAHOMA
LICENSED TO DO BUSINESS IN THE STATE OF NEBRASKA,
DOING BUSINESS AS FESTIVAL FOODS, APPELLEE.

641 N.W.2d 417

Filed March 19, 2002. No. A-01-008.

1. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the possessor should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the possessor should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the possessor failed to use reasonable care to protect a business invitee against danger; and (5) the condition was the proximate cause of damage to the plaintiff.
2. **Summary Judgment.** A summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** The party moving for a summary judgment must make a prima facie showing that if the evidence were uncontroverted at trial, he or she would be entitled to judgment as a matter of law.
4. ____: ____: A prima facie showing in a motion for summary judgment shifts the burden of producing evidence as to a factual issue to the party opposing the motion.
5. **Negligence.** The duty of care owed a lawful entrant upon land by the landowner or occupier is that of reasonable care.
6. ____: ____: Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.
7. **Trial: Negligence.** It is for the fact finder to determine on the facts of each individual case whether or not the factors enunciated in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), establish a breach of the duty of reasonable care.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for further proceedings.

Todd V. Elsbernd, of Bradley, Maser, Kneale, Elsbernd & Emerton, P.C., for appellant.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellee.

HANNON, INBODY, and CARLSON, Judges.

INBODY, Judge.

INTRODUCTION

Lorena Herrera appeals from the December 1, 2000, order of the Hall County District Court granting a motion for summary judgment by Fleming Companies, Inc. (Fleming). For the reasons stated herein, we reverse, and remand for further proceedings.

STATEMENT OF FACTS

Sometime after 5 p.m. on December 18, 1998, Herrera went to the Festival Foods grocery store located in Grand Island, Nebraska, with her companion, Arturo Pimitel, and their two children. While in the grocery store, Herrera went to the back storage room of the store in order to use the restroom. The light was off in the restroom, and as Herrera stepped inside and turned the light on, she slipped and fell on the floor.

A grocery store employee found Herrera on the floor and called the store manager, Fred Groenke, who called the paramedics. Groenke stated in his affidavit that he was notified that a woman had fallen in the restroom and that he went back to investigate. According to Groenke, there were a few drops of water on the restroom floor, as if someone had dripped water from his or her hands after washing them. Groenke stated that on that particular day, no one had reported that there was water on the restroom floor, nor did he know how long the water was on the floor prior to Herrera's fall. He also stated that it was store policy to keep the floors clean; that store employees regularly inspect store floors, including the restroom, for spills; and that if any spills are located, they are cleaned up immediately.

Herrera stated that she did not notice that the floor was wet prior to her fall. After the fall, however, she noticed that the restroom floor was wet and that her clothes were wet from lying on the floor. Herrera had no idea how the floor came to be wet

or how long it had been wet. Pimitel and Herrera and Pimitel's daughter, Erika Pimitel, corroborated Herrera's testimony.

Brad Jerman stated that on the day in question, he was one of the paramedics who was called to a slip-and-fall accident at Festival Foods. Jerman entered the restroom at Festival Foods and noticed a woman, later identified as Herrera, lying on the floor and stated that there was water underneath and around Herrera. While assisting and treating Herrera, he squatted next to her rather than kneel on the floor in order to avoid getting his pants wet.

On November 1, 2000, Fleming filed a motion for summary judgment. A hearing was held on November 28. Fleming offered the depositions of Herrera and Pimitel and the affidavit of Groenke. Herrera also offered those exhibits as well as the affidavits of Erika Pimitel and Jerman. The court, on December 1, granted Fleming's motion for summary judgment, stating:

In a business invitee/premises liability case there must be evidence of how the condition that created the accident occurred or evidence that the Defendant knew of the condition or by the exercise of reasonable care should have discovered or known of the condition. There is no evidence as to this burden from which liability may be inferred.

Herrera has timely appealed to this court.

ASSIGNMENTS OF ERROR

Herrera assigns on appeal, as consolidated and restated, that the district court erred by granting Fleming's motion for summary judgment based upon a finding that there must be evidence of how the condition which caused the accident occurred or evidence that the premises owner knew of the condition or by the exercise of reasonable care should have discovered or known of the condition.

ANALYSIS

Herrera contends that the district court erred by granting Fleming's motion for summary judgment based upon a finding that there must be evidence of how the condition which caused the accident occurred or evidence that the premises owner knew of the condition or by the exercise of reasonable care should have discovered or known of the condition.

[1] In the present case, the district court and parties proceeded under the theory that the correct test to apply in determining whether to impose liability upon a landowner or occupier for injuries sustained by a business invitee or licensee was the test enunciated in *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998). Under the test enunciated in *Chelberg*, a possessor of land was subject to liability for injury caused to a business invitee by a condition on the land if (1) the possessor either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the possessor should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the possessor should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the possessor failed to use reasonable care to protect a business invitee against danger; and (5) the condition was the proximate cause of damage to the plaintiff.

However, in 1996, the Nebraska Supreme Court abrogated the common-law distinction between business invitees and licensees with respect to the duty of care owed them by the landowner or occupier of land and held that a standard of reasonable care was required for all lawful visitors. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). The *Heins* decision is prospective in nature and intended to apply only to those accidents which occurred after the decision.

Because the accident giving rise to the lawsuit in *Chelberg*, *supra*, occurred prior to the court's decision in *Heins*, the old test was used. Since the accident involved in the instant case occurred after the *Heins* decision, the *Heins* standard is applicable. Thus, using the *Heins* standard, we proceed to consider whether the district court erred in granting Fleming's motion for summary judgment.

[2-4] A summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb.

129, 629 N.W.2d 534 (2001). The moving party must make a prima facie showing that if the evidence were uncontroverted at trial, he or she would be entitled to judgment as a matter of law. *Marshall v. Radiology Assoc.*, 225 Neb. 75, 402 N.W.2d 855 (1987); *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986). Such a showing shifts the burden of producing evidence as to a factual issue to the party opposing the motion. *Id.*

[5,6] The duty of care owed a lawful entrant upon land by the landowner or occupier is that of reasonable care. *Heins, supra*. Among the factors to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors will be (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection. *Id.*

Herrera and her family entered the premises of Festival Foods during business hours for the purpose of buying groceries. Thus, she was a lawful entrant, and under *Heins, supra*, Fleming owed her a duty of reasonable care.

The Festival Foods grocery store is a place of business. The restroom located in the backroom of the store is a public restroom open to use by employees and store patrons. Herrera was a store patron who was attempting to use the restroom in the normal manner in which it was intended to be used.

As a public restroom in a grocery store, it is foreseeable that patrons, adults and children alike, will use the facility. The very nature and use to which a restroom is put also makes it foreseeable that the floor may get wet. Thus, it is foreseeable that someone may slip and fall because the restroom floor is wet.

The parties do not disagree that the restroom floor was wet, but, rather, disagree as to the extent. Herrera stated that her clothes and hair became wet from the water on the floor. Jerman stated that while assisting Herrera, he did not kneel on the floor

next to her in order to avoid getting his pants wet. However, Groenke stated that when he went to the restroom to investigate, he "saw a few tiny drops of water on the floor which looked like they had dripped from a person's hands after washing."

Groenke stated that it is store policy for the employees to regularly inspect all store floors, including the restroom, for spills and water and, if any are located, to clean the floor immediately. There was no evidence as to when the floors had last been inspected, nor was there a sign on the restroom door warning that the floor may be wet. Fleming did not establish the standard of care used by similar facilities nor did it establish what the term "regularly inspected" means. All the evidence indicates that no one knew how the water came to be on the restroom floor or how long it had been there. Therefore, Fleming did not present sufficient evidence to make a prima facie showing that it exercised reasonable care thereby requiring Herrera to rebut the evidence.

[7] The amount of water on the restroom floor and the ultimate inferences that may be drawn from the conflicting evidence create an issue of material fact as to whether Fleming breached its duty of reasonable care. It is for the fact finder to determine on the facts of each individual case whether or not the factors enunciated in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), establish a breach of the duty of reasonable care. Because Fleming did not make a prima facie showing, Herrera was not required to rebut the evidence, and therefore, we find that the district court erred in sustaining Fleming's motion as a matter of law because there is an issue of material fact.

CONCLUSION

For the above-stated reasons, we find that the district court erred in granting Fleming's motion for summary judgment. Therefore, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

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