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REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 25, 1996 and MARCH 13, 1997

IN THE

Supreme Court of Nebraska

VOLUME CCLI

PEGGY POLACEK

OFFICIAL REPORTER

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BY PEGGY POLACEK, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

C. THOMAS WHITE, Chief Justice
D. NICK CAPORALE, Associate Justice
DALE E. FAHRNBRUCH, Associate Justice[1]
DAVID J. LANPHIER, Associate Justice
JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice[2]

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

LINDSEY MILLER-LERMAN, Chief Judge
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
WESLEY C. MUES, Associate Judge
EVERETT O. INBODY, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JOSEPH C. STEELE . . . . . State Court Administrator

[1] Retired December 31, 1996
[2] Appointed March 10, 1997

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Robert T. Finn	Auburn
		Orville L. Coady	Hebron
		William B. Rist	Beatrice
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
Fourth	Douglas	James A. Buckley	Omaha
		James M. Murphy	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Michael McGill	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Michael W. Amdor	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk Saunders, Seward, and York	Robert R. Steinke	Columbus
		John C. Whitehead	Columbus
		Alan G. Gless	Wahoo
		Michael Owens	York

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Mark J. Fuhrman Darvid D. Quist Maurice Redmond	Fremont Blair Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden Robert B. Ensz	Norfolk Wayne
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William Cassel Ronald D. Olberding	Ainsworth Burwell
Ninth	Buffalo and Hall	John P. Icenogle James Livingston Teresa K. Luther	Kearney Grand Island Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell John P. Murphy Donald E. Rowlands II	McCook North Platte North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson Robert O. Hippe John D. Knapp Brian Silverman	Chadron Gering Kimball Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		John V. Hendry	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		John J. McGrath	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Mary C. Gilbride	Wahoo
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary R. Hatfield	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		F.A. Gossett III	Blair
		Patrick G. Rogers	Dakota City
		Paul R. Robinson	Hartington
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn	Neligh
		Philip R. Riley	Creighton
		Richard W. Krepela	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Harry C. Haverly	Hastings
		Jack Robert Ott	Hastings
		Daniel Bryan, Jr.	Geneva
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Lloyd G. Kaufman	Lexington
		Kristine R. Cecava	Ogallala
		Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C.G. Wallace	Kimball

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Paul E. LeClair	Omaha
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Joseph S. Ramirez	Lincoln
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 250

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WESTON R. MOORE
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HARRY M. STERLING
MICHAEL JOE TYE
BRUCE LELAND WENDEL
NANCY L. WILLIAMS

TABLE OF CASES REPORTED

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-94-608: **Sandoval v. O'Neal**. Affirmed. White, C.J.

No. S-95-076: **Magrath v. Springer**. Appeal dismissed. White, C.J.

No. S-95-1256: **State v. Alexander**. Affirmed as modified. Per Curiam.

No. S-96-112: **State v. Rust**. Affirmed. Connolly, J.

No. S-96-201: **State v. Frank**. Affirmed. Gerrard, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-95-135: **In re SID No. 157**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. S-95-185: **Schaffer v. Chimney Rock Pub. Power Dist**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-95-206: **Hobbs v. Continental Cas. Co**. Stipulation allowed; appeal dismissed.

No. S-95-371: **Anderson v. Anderson**. Stipulation allowed; appeal dismissed.

No. S-95-388: **Brandenburgh v. City of Seward**. Motion of appellant to dismiss appeal sustained; appeal dismissed as moot.

No. S-95-404: **AMISUB v. Metropolitan Util. Dist**. Stipulation allowed; appeal dismissed.

No. S-95-789: **Dilly v. Omaha Public Sch. Dist**. Stipulation allowed; appeal and cross-appeal dismissed.

No. S-95-892: **City of Omaha v. Liquor Control Comm**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-96-489: **State ex rel. NSBA v. Malcom**. Cause having not been shown, Terrence D. Malcom suspended from the practice of law in Nebraska until further order of the court.

No. S-96-523: **State ex rel. FirsTier Bank v. McGill**. Motion to dismiss original action considered; original action dismissed.

No. S-96-824: **The Growing Place v. County Bd. of Equal. of Seward Cty**. Stipulation allowed; appeal dismissed.

No. S-96-836: **Horvath v. M.S.P. Resources**. By order of the court, appeal dismissed for failure to file briefs.

No. S-96-859: **State v. Scheffler**. Appeal dismissed. See rule 7A(2).

No. S-96-911: **State v. Massey**. By order of the court, appeal dismissed for failure to file briefs.

No. S-96-921: **State v. Malcom**. Motion of appellee for summary dismissal sustained; appeal dismissed for lack of jurisdiction.

No. S-96-936: **Christiansen v. Moore**. Stipulation allowed; appeal dismissed.

No. S-96-965: **State v. Sims**. Appeal dismissed. See rule 7A(2).

No. S-96-1006: **State v. McDonald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-96-1159: **State v. Belmarez**. Stipulation allowed; appeal dismissed.

No. S-96-1290: **State ex rel. NSBA v. Mellor**. Application for temporary suspension sustained.

No. S-97-172: **State ex rel. NSBA v. Schatz**. Respondent suspended from the practice of law until further order of the court.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-94-591: **State v. Taylor**. Petition of appellant for further review overruled on December 11, 1996.

No. A-94-1253: **Joseph v. Dahm**. Petition of appellant for further review overruled on November 27, 1996.

No. A-95-081: **Juhl v. Tumblin**. Petition of appellant for further review overruled on December 11, 1996.

No. S-95-118: **Northern Bank v. Pefferoni Pizza Co.**, 5 Neb. App. 50 (1996). Petition of appellee for further review sustained on January 23, 1997.

No. A-95-200: **Hroch v. Borton, Inc**. Petition of appellee for further review overruled on November 20, 1996.

No. A-95-245: **Kagy v. Jurgensmeier**. Petition of appellant for further review overruled on October 17, 1996.

No. S-95-371: **Anderson v. Anderson**, 5 Neb. App. 22 (1996). Petition of appellee for further review sustained on November 20, 1996.

No. S-95-376: **Smith v. Papio-Missouri River NRD**, 96 NCA No. 34. Petition of appellees for further review sustained on October 30, 1996.

No. S-95-418: **Blose v. Mactier**. Petition of appellant for further review sustained on January 23, 1997.

No. A-95-422: **In re Interest of Rynell H. et al**. Petition of appellant for further review overruled on October 30, 1996.

No. A-95-422: **In re Interest of Rynell H. et al**. Petition of appellee Charlotte H. for further review overruled on October 30, 1996.

No. A-95-436: **Kilbourn v. Lehr**, 96 NCA No. 40. Petition of appellee for further review overruled on December 11, 1996.

No. S-95-469: **Mapes Indus. v. United States F. & G. Co**. Petition of appellant for further review sustained on November 14, 1996.

No. A-95-516: **Barthel v. Liermann**. Petition of appellant for further review overruled on January 23, 1997.

No. A-95-516: **Barthel v. Liermann**. Petition of appellee for further review overruled on January 23, 1997.

No. A-95-557: **In re Estate of Paxton**, 96 NCA No. 44. Petition of appellant for further review overruled on January 15, 1997.

No. A-95-566: **Simonsen v. Hendricks Sodding & Landscaping**, 5 Neb. App. 263 (1997). Petition of appellant for further review overruled on February 12, 1997.

No. A-95-570: **Edlund v. Bamford**. Petition of appellant for further review overruled on December 18, 1996.

No. A-95-583: **Forrest v. Eilenstine**, 5 Neb. App. 77 (1996). Petition of appellant for further review overruled on February 26, 1997.

No. A-95-596: **Austin v. Severa**. Petition of appellee for further review overruled on February 20, 1997.

Nos. A-95-611, A-95-612: **Sass v. Hanson**, 5 Neb. App. 28 (1996). Petition of appellant for further review overruled on November 27, 1996.

No. S-95-621: **PLPSO v. Papillion/LaVista School Dist.**, 5 Neb. App. 102 (1996). Petition of appellant for further review sustained on January 3, 1997.

No. A-95-675: **Rasmussen v. Rasmussen**. Petition of appellant for further review overruled on January 23, 1997.

No. A-95-676: **State v. Miller**. Petition of appellant for further review overruled on February 20, 1997.

No. A-95-686: **Vulcraft v. Balka**, 5 Neb. App. 85 (1996). Petition of appellant for further review overruled on January 15, 1997.

No. A-95-724: **Estrada v. Department of Corr. Servs.** Petition of appellant for further review overruled on November 14, 1996.

No. A-95-726: **Lindner v. Taylor**, 96 NCA No. 42. Petition of appellee for further review overruled on December 18, 1996.

No. S-95-800: **State v. Lundahl**, 96 NCA No. 12. Petition for further review dismissed on December 27, 1996, as having been improvidently granted. See S-95-800, *State v. Lundahl*, 4 Neb. App. lxxviii, List of Cases on Petition for Further Review.

No. S-95-813: **State v. Koperski**. Petition of appellant for further review sustained on November 14, 1996.

No. A-95-814: **Abler v. State**, 96 NCA No. 44. Petition of appellant for further review overruled on January 3, 1997.

No. S-95-852: **Rees v. Department of Roads**. Petition of appellant for further review sustained on January 15, 1997.

No. A-95-858: **Colglazier v. Fischer**, 96 NCA No. 43. Petition of appellant for further review overruled on December 27, 1996.

No. S-95-940: **State v. Stubbs**, 5 Neb. App. 38 (1996). Petition of appellee for further review sustained on December 11, 1996.

No. S-95-958: **State v. Champoux**, 5 Neb. App. 68 (1996). Petition of appellant for further review sustained on January 23, 1997.

No. A-95-979: **Bates v. Schrein**. Petition of appellant for further review overruled on December 11, 1996.

No. A-95-991: **State v. Miceli**, 5 Neb. App. 14 (1996). Petition of appellee for further review overruled on January 3, 1997.

No. A-95-1009: **Dunn v. Sheriff of Adams Cty**. Petition of appellant for further review overruled on January 15, 1997.

No. A-95-1037: **State v. Billups**. Petition of appellant for further review overruled on November 20, 1996.

No. A-95-1060: **State v. Murphy**. Petition of appellee for further review overruled on November 20, 1996.

No. A-95-1071: **State ex rel. Biegert v. Nebraska Pub. Power Dist.** Petition of appellant for further review overruled on November 20, 1996.

No. A-95-1118: **State v. Brooks**, 5 Neb. App. 5 (1996). Petition of appellant for further review overruled on November 14, 1996.

No. A-95-1192: **State v. Arruza**. Petition of appellant for further review overruled on November 14, 1996.

No. S-95-1206: **State v. McCleery**. Petition of appellant for further review sustained on October 30, 1996.

No. S-95-1225: **Reutzel v. Reutzel**. Petition of appellant for further review sustained on December 18, 1996.

No. A-95-1314: **State v. Lynch**. Petition of appellant for further review overruled on October 30, 1996.

No. A-95-1359: **Hatt v. Hatt**. Petition of appellant for further review overruled on November 14, 1996.

Nos. A-95-1364, A-95-1365: **In re Interest of Ashley B. & Melissa B.** Petition of appellant for further review overruled on December 11, 1996.

No. A-96-007: **Deans v. State**, 96 NCA No. 49. Petition of appellant for further review overruled on February 12, 1997.

No. A-96-011: **State v. Jones**. Petition of appellant for further review overruled on November 14, 1996.

No. A-96-023: **Smith v. Smith**. Petition of appellant for further review overruled on January 23, 1997.

No. A-96-033: **State v. Magee**. Petition of appellant for further review overruled on October 30, 1996.

No. S-96-038: **Trew v. Trew**, 5 Neb. App. 255 (1996). Petition of appellee for further review sustained on February 12, 1997.

No. A-96-076: **Fritchie v. R & R Plastering, Inc.** Petition of appellant for further review overruled on November 20, 1996.

No. A-96-078: **State v. Riley**. Petition of appellant for further review overruled on December 18, 1996.

No. A-96-084: **Sheldon v. McDermott and Miller, P.C.** Petition of appellant for further review overruled on October 30, 1996.

No. A-96-103: **In re Interest of Chester C.** Petition of appellee guardian ad litem for further review overruled on December 27, 1996.

No. A-96-138: **State v. Connick**, 5 Neb. App. 176 (1996). Petition of appellee for further review overruled on January 23, 1997.

Nos. A-96-141, A-96-492: **Wood v. Wood**. Petition of appellant for further review overruled on December 18, 1996.

No. S-96-161: **Grammer v. Endicott Clay Products**, 96 NCA No. 44. Petition of appellee for further review sustained on January 3, 1997.

No. A-96-170: **Blackwell v. Grisanti, Inc.** Petition of appellant for further review overruled on February 12, 1997.

No. S-96-177: **State v. Adams**. Petition of appellee for further review sustained on December 18, 1996.

No. A-96-204: **In re Interest of Heather T. & Jason T.** Petition of appellant for further review overruled on January 29, 1997.

No. A-96-232: **State v. McGeorge**, 96 NCA No. 48. Petition of appellant for further review overruled on January 3, 1997.

No. A-96-250: **State v. Lewis**, 96 NCA No. 38. Petition of appellee for further review overruled on November 14, 1996.

No. S-96-255: **State v. Yeutter**. Petition of appellant for further review sustained on January 23, 1997.

Nos. A-96-278, A-96-279: **State v. Tyler**. Petitions of appellant for further review overruled on October 30, 1996.

No. A-96-293: **Dahlheimer v. Dahlheimer**, 5 Neb. App. 222 (1996). Petition of appellee for further review overruled on January 29, 1997.

No. A-96-337: **State v. Whitesell**, 97 NCA No. 3. Petition of appellee for further review overruled on February 26, 1997.

No. A-96-340: **State v. Davis**. Petition of appellant for further review overruled on December 11, 1996.

No. A-96-343: **State v. Coulson**. Petition of appellant for further review overruled on November 20, 1996.

No. A-96-348: **In re Interest of Selma B.** Petition of appellant for further review overruled on January 15, 1997.

No. A-96-395: **State v. Dueling**. Petition of appellant for further review overruled on February 26, 1997.

No. A-96-445: **Simpson v. Yellow Freight Sys., Inc.** Petition of appellant for further review overruled on January 15, 1997.

Nos. A-96-457, A-96-468: **State v. Hansen**. Petition of appellant for further review overruled on December 23, 1996, for lack of jurisidiction.

No. A-96-463: **State v. Carney**. Petition of appellant for further review overruled on February 26, 1997.

No. A-96-526: **State v. Beckman**. Petition of appellant for further review overruled on October 30, 1996.

No. A-96-581: **State v. Alderman**. Petition of appellant for further review overruled on February 26, 1997.

No. A-96-585: **Herren v. Board of Parole**. Petition of appellant for further review overruled on February 26, 1997.

No. A-96-593: **Schluntz v. Hess**. Petition of appellant for further review overruled on February 7, 1997.

No. A-96-604: **State v. Hamaker**. Petition of appellant for further review overruled on January 29, 1997.

No. A-96-634: **State v. Burnett**. Petition of appellant for further review overruled on January 29, 1997.

No. A-96-642: **State v. Welk**. Petition of appellant for further review overruled on January 23, 1997.

No. A-96-643: **State v. Burt**. Petition of appellant for further review overruled on February 12, 1997.

No. A-96-657: **State v. Hubka**. Petition of appellant for further review overruled on December 27, 1996.

No. A-96-666: **Alejo v. Beef America, Inc**. Petition of appellant for further review overruled on January 3, 1997.

No. A-96-729: **Nelson v. Douglas Cty. Court ex rel. Barrett**. Petition of appellant for further review overruled on February 12, 1997.

No. A-96-738: **State v. Taylor**. Petition of appellant for further review overruled on December 18, 1996.

No. A-96-756: **In re Estate of Garrett**. Petition of appellant for further review overruled on December 27, 1996.

No. A-96-793: **In re Interest of Hyde**. Petition of appellant for further review overruled on January 15, 1997.

No. A-96-813: **State v. Halouska**. Petition of appellant for further review overruled on February 20, 1997.

No. A-96-921: **State v. Malcom**. Petition of appellant for further review denied on November 15, 1996. See rule 2F(1).

No. A-96-994: **Williams v. Horton**. Petition of appellant for further review overruled on January 23, 1997.

No. A-96-1008: **State v. Torres**. Petition of appellant for further review overruled on January 3, 1997.

No. A-96-1074: **In re Estate of Prokop**. Petition of appellant for further review overruled on February 12, 1997.

No. A-96-1107: **Ryan v. Clarke**. Petition of appellant for further review overruled on February 20, 1997.

No. A-96-1108: **Love v. Clarke**. Petition of appellant for further review overruled on February 20, 1997.

No. A-96-1129: **Nash v. Clarke**. Petition of appellant for further review overruled on February 20, 1997.

No. A-96-1131: **Center v. Lincoln Northeast High School.** Petition of appellant for further review overruled on January 29, 1997.

No. A-96-1221: **Lyman v. Department of Corr. Servs.** Petition of appellant for further review overruled on February 26, 1997.

No. A-96-1231: **Lynch v. Department of Corr. Servs.** Petition of appellant for further review overruled on February 26, 1997.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA ON BEHALF OF MINOR CHILD JOSEPH F., APPELLEE, V. ROGER RIAL, APPELLANT.

554 N.W.2d 769

Filed October 25, 1996. Nos. S-93-1056, S-94-1245.

1. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
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: Child Support: Appeal and Error.** 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 by the trial court.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
5. **Paternity: Proof.** In a civil action, only a preponderance of the evidence is necessary to sustain the establishment of paternity.
6. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
7. ____: ____. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
8. **Paternity: Evidence: Proof.** The State's burden in proving a sufficient chain of custody is only to establish with sufficient evidence the finding that the paternity test results arose from the analysis of the individuals' blood samples submitted in the matter.
9. **Trial: Evidence: Proof.** The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion.
10. **Jurisdiction: Paternity: Child Support: Appeal and Error.** A district court retains jurisdiction for orders regarding child support notwithstanding the fact that a paternity determination is on appeal.
11. **Child Support.** An out-of-wedlock child has the statutory right to be supported to the same extent and in the same manner as a child born in lawful wedlock; the resulting duty of a parent to provide such support may, under appropriate circumstances, require the award of retroactive child support.

12. ____. The requirement of child support begins at the time of the birth of the child, whether the child is born in lawful wedlock or otherwise.
13. **Child Support: Wages.** It is appropriate to consider overtime wages in setting child support if the overtime is a regular part of the employment and the employee can actually expect to regularly earn a certain amount of income for working overtime.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Judgment in No. S-93-1056 affirmed. Judgment in No. S-94-1245 affirmed in part, and in part reversed and remanded.

Elizabeth A. Sterns and, on brief, Shawn Elliott and Gary Zamber, of Mowbray & Walker, P.C., for appellant.

Gary E. Lacey, Lancaster County Attorney, and Andrew R. Jacobsen for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

I. STATEMENT OF CASE

Roger Rial appealed to the Nebraska Court of Appeals a judgment that was entered against him in accordance with a jury verdict finding Rial to be the biological father of the minor child Joseph F. in case No. S-93-1056. While this appeal was pending, the district court referred all collateral matters regarding child support to a referee for hearing and recommendations for disposition. The district court for the most part adopted the recommendations of the referee and issued an order requiring Rial to pay present and past child support, as well as other medical and legal expenses. Rial appealed this order to the Court of Appeals in case No. S-94-1245. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed both matters and joined the two cases for disposition in this court.

II. FACTS

Rial began dating Deborah P. in July 1987. Although Rial lived in Omaha and Deborah in Lincoln, they saw each other regularly until early October 1988. Deborah testified that dur-

ing this period, she would have sexual intercourse with Rial on the average of once or twice a week. Deborah stated that she did not have sexual intercourse with any other man while she was involved with Rial.

Rial claimed that he dated Deborah less than once a month, but admitted that he had sexual intercourse with her every time he saw her. Rial testified that the last time he had sexual intercourse with Deborah was in late July 1988. Deborah suspected she was pregnant in late September 1988. Her suspicion was confirmed by a pregnancy test performed on October 5. On May 30, 1989, Deborah gave birth to a son, the minor at issue, Joseph.

The State filed a second amended petition on December 23, 1991, alleging Rial to be the father of Joseph. Rial answered with a general denial, asserted that he was indigent, and requested appointment of counsel. A hearing was held concerning Rial's motion for appointed counsel before a district court referee on March 23, 1992. The referee reserved ruling on Rial's request for appointed counsel, but granted Rial's request during the course of the hearing to have genetic testing conducted. On April 8, an employee of Roche Biomedical Laboratories in Omaha obtained a sample of Rial's blood for genetic testing at its facility in Burlington, North Carolina. On April 23, employees of Roche Biomedical in Lincoln obtained samples of blood from Deborah and Joseph for genetic testing at this same North Carolina facility.

The district court appointed counsel for Rial on October 16, 1992. On November 6, Rial filed a timely request to have the matter of paternity tried to a jury and to have personal testimony presented with respect to any expert testimony concerning genetic testing and the chain of custody of any blood or tissue specimen used for any genetic testing.

On October 29, 1993, after a 2-day trial concerning the issue of paternity, a jury found Rial to be the father of Joseph. The district court entered judgment against Rial as to paternity and referred all issues collateral to a finding of paternity to the district court referee. Rial timely appealed the district court judgment on November 29.

The referee recommended that Rial pay current child support of $236 per month; pay retroactive child support of $10,126; pay 73 percent of the birthing expenses for both Deborah and Joseph, totaling $2,920; provide health insurance for Joseph if available through employment; and pay the costs of the action, $216, which included the cost of genetic testing. The referee recommended denial of attorney fees.

Rial timely filed exceptions to the referee's recommendations. One exception asserted that the district court was without jurisdiction to enter orders of support during the pendency of Rial's appeal of paternity. The district court accepted Rial's argument and deferred ruling on the referee's recommended order until after resolution of Rial's appeal in case No. S-93-1056. Pursuant to the State's motion, the district court reconsidered its prior ruling concerning jurisdiction and found that it had jurisdiction to enter collateral orders during the pendency of Rial's appeal of paternity. After reviewing the evidence, the district court reduced the birthing expenses to $564.57, but otherwise adopted the recommended order of the referee and entered judgment accordingly. Rial then appealed the judgment of support on a timely basis.

III. SCOPE OF REVIEW

While a paternity action is one at law, the award of child support in such an action is equitable in nature. *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996). 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 by the trial court. *Sylvis v. Walling, supra*; *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994).

IV. ANALYSIS

1. CASE NO. S-93-1056

(a) Determination of Paternity

In his first assignment of error, Rial asserts that the district court erred in failing to instruct the jury that the State must prove paternity by clear and convincing evidence and in failing to instruct the jury that it must disregard paternity testing results if the State does not first establish that Rial had sexual intercourse with Deborah during the time of conception. In addition, Rial asserts that the district court erred in admitting paternity testing results without sufficient evidence of a proper chain of custody and use of proper laboratory testing procedures.

(i) Scope of Review

To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996).

(ii) Jury Instructions

a) Burden of Proof

Rial's proposed jury instructions required the jury to find that Rial was the father of Joseph by clear and convincing evidence. The district court rejected Rial's offered jury instructions and instead instructed the jury that the State's burden of proof was the greater weight of the evidence. Rial objected to the instructions as given.

In a civil action, only a preponderance of the evidence is necessary to sustain the establishment of paternity. *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995); *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 340 N.W.2d 431 (1983); *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983). Rial argues, notwithstanding the state of the law, that because the Legislature has not codified the applicable burden of proof and

because this action is in effect a state action against a citizen, the burden of proof the State must meet should be clear and convincing evidence. This argument is misplaced. Neb. Rev. Stat. § 43-1412 (Reissue 1993) provides, "The method of trial [in an action to establish paternity] shall be the same as that in other civil proceedings . . . ." "In a civil case the burden of proof is on the plaintiff to prove, by a preponderance of the evidence, all facts essential to recovery." *Scoular-Bishop Grain Co. v. Bassett Grain*, 218 Neb. 280, 284, 352 N.W.2d 904, 907 (1984). Thus, contrary to Rial's argument, the Legislature has specified the burden of proof applicable to paternity determinations. Accordingly, the trial court did not err by instructing the jury that the burden of proof was by the greater weight of the evidence.

b) Paternity Test Results

Rial next asserts that the trial court erred in refusing two other proffered jury instructions. Rial's jury instruction No. 4, in pertinent part, stated:

> Evidence of the blood test has been introduced, and based on that evidence an opinion has been expressed concerning the degree of probability that the Defendant is the father of the child. You must bear in mind that the probability of paternity results of this blood test are in part based upon the assumption that there is a fifty (50 %) percent chance that the Defendant is the father of the child.
>
> You must therefore bear in mind that neither the making of such an assumption, nor the probability of paternity results, constitute any evidence that the Defendant had vaginal sexual intercourse with Deborah . . . at or about the time when . . . the child was conceived.
>
> . . . .
>
> If the Plaintiff has failed to prove . . . independent of the probability of paternity results, that the Defendant had vaginal sexual intercourse with Deborah . . . at or about the time when . . . the child was conceived, then regardless of the probability of paternity results, you must find that the Defendant is not the father of the child.

Rial also asked the court to instruct the jury, "If you find that the Defendant had vaginal sexual intercourse with Deborah . . .

at or about the time when . . . the child was conceived, you may then consider the probability of paternity results."

The court refused both requested instructions, but instructed the jury as follows:

> INSTRUCTION NUMBER 6
>
> Evidence of blood testing has been introduced and, based upon that evidence, an opinion has been expressed concerning the degree of probability that the defendant is the father of Joseph . . . . You must bear in mind that the probability of paternity results of these blood tests are, in part, based upon the assumption that there is a fifty percent chance that the defendant is the child's father and a fifty percent chance that he is not the child's father.
>
> You must, therefore, bear in mind that neither the making of such an assumption nor the probability of paternity results, in and of themselves, constitute evidence that the defendant had sexual intercourse with Deborah . . . at or about the time the child was conceived.
>
> INSTRUCTION NUMBER 7
>
> If you find that the defendant had sexual intercourse with Deborah . . . at or about the time when Joseph . . . was conceived, you may then consider the probability of paternity results.
>
> Admitted into evidence is Exhibit Number 3, which shows the results of genetic testing and the statistical probability of paternity. This evidence alone does not establish paternity, but is evidence which may be considered by you, together with all other evidence, facts and circumstances in the case, to determine whether the defendant is the father of the child.

Rial objected to instruction No. 6, but did not object to instruction No. 7. In any event, Rial asked the court to substitute his proposed instructions in place of both instruction No. 6 and instruction No. 7.

It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Postma v. B & R Stores*, 250 Neb. 466, 550 N.W.2d 34 (1996). All of the jury instructions must be read

together. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995). Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

The substance of Rial's proposed instructions is twofold. First, the jury had to find that Rial had sexual intercourse with Deborah during the period of conception before it could consider probability of paternity results. Second, the probability of paternity results are predicated on a 50-percent base presumption of paternity; meaning, either Rial or some random man not excluded by the blood and tissue test results had intercourse with Deborah during her period of conception.

Rial waived any error with respect to instruction No. 7 by his failure to object. Furthermore, the instructions given by the court adequately informed the jury it had to first find Rial engaged in sexual intercourse with Deborah before it could consider the paternity testing results, and the court adequately informed the jury of the so-called 50-percent base presumption of paternity. Because Rial did not assign as error the validity of the 50-percent base presumption, we will not address whether application of such a presumption is appropriate under the circumstances. As such, the court did not err in refusing Rial's proposed jury instructions.

(iii) Resolution

For the foregoing reasons, the assignments of error regarding jury instructions fail.

(b) Admission of Paternity Test Results

Rial next asserts that the district court erred in admitting the paternity test results on two grounds: (1) The State failed to establish a sufficient chain of custody with respect to analysis of the blood samples, and (2) the State did not establish that the testing procedures utilized conformed to appropriate laboratory protocols.

(i) Application of Law to Facts

Neb. Rev. Stat. § 27-901 (Reissue 1995) provides in part: "The requirement of authentication or identification as a condi-

tion precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Thus, the State's burden is only to establish with sufficient evidence the finding that the paternity test results arose from the analysis of the individuals' blood samples submitted in this matter. In this regard, the State has met its burden.

Two Roche Biomedical employees, Patricia Hieb, branch manager of the Lincoln office, and Helen Knaub, senior phlebotomist, testified that they obtained blood samples from Deborah and Joseph on April 23, 1992. Hieb drew the blood sample from Deborah and assisted Knaub in obtaining a blood sample from Joseph. Hieb and Knaub testified that they followed Roche Biomedical's standard procedures in each instance. Those procedures included examining a picture identification card such as a driver's license from the mother, recording its number on Roche Biomedical's client authorization form, and obtaining a Social Security number or date of birth for the child. A Polaroid photograph was taken of Deborah and Joseph and attached to the form. They assisted Deborah in completing her portion of the client authorization form and signed the form themselves as either the phlebotomist or witness to the blood draw.

Hieb and Knaub testified that they obtained three tubes of blood from both Deborah and Joseph. Immediately after filling the tubes, Hieb labeled them in the presence of Deborah. Standard procedures required each label to include the donor's name, the donor's driver's license number if applicable, the date drawn, the phlebotomist's initials, and the signature of the mother. All six tubes are then packaged in a standard Styrofoam container, which is then placed inside a cardboard sleeve. Chain-of-custody tape is used to secure the Styrofoam container inside the cardboard sleeve. The phlebotomist then signs the package so that his or her signature is across both the tape and cardboard sleeve. The person who packaged the specimens then completes a portion of the client authorization form identified as the "chain of custody" by signing in the appropriate space and entering the date and time of completion. The package is transported that same day by Roche Biomedical on its airplane

to its testing facility in Burlington, North Carolina. Hieb and Knaub testified that these procedures were followed in the instant case.

Rial's blood was drawn on April 8, 1992, by a Roche Biomedical phlebotomist in Omaha. The phlebotomist testified that she followed the same procedures outlined by Hieb and Knaub in obtaining Rial's blood specimen. The Roche Biomedical employee testified that blood samples drawn and packaged in Omaha are sent to Lincoln by way of courier that same day. The samples are then transported to Roche Biomedical's North Carolina facility in the same manner as samples drawn in Lincoln.

Roche Biomedical employee Brandi Mahan testified that she received Deborah's and Joseph's blood samples on April 24, 1992, and processed them in accordance with standard procedure. She examined the package when received and found no evidence of tampering, as the chain-of-custody seal was still intact. She then opened the container, discarded the cardboard sleeve and chain-of-custody tape, and after confirming that the paperwork matched the samples, she transferred the blood vials and associated paperwork to the individual who assigns specimen numbers to the vials. Mahan also completed the remainder of the chain-of-custody portion of the client authorization form. Another Roche Biomedical employee testified that he performed the same procedure with respect to Rial's blood sample on April 9.

Dr. George Maha, director of laboratory operations for the paternity evaluation department, testified that Roche Biomedical was accredited for paternity testing by the American Association of Blood Banks and that Roche Biomedical followed the standards and quality control procedures published by this same organization. Maha testified that as part of Roche Biomedical's quality control program, they keep maintenance logs on equipment, perform calibration standards on a routine basis, and participate in outside testing surveys. Roche Biomedical's standard procedure is also to perform duplicate examinations with different technicians. Maha analyzes the laboratory worksheets against the computer-generated reports to protect against transcription errors and to determine

whether the duplicate examinations performed by different technicians indicate a potential sample error. Maha testified that these procedures were followed in the instant case.

Rial argues that a sufficient chain of custody with respect to the blood analysis cannot be established without the testimony of the technicians who performed the specific analytical procedures and the persons who entered data from the examinations into Roche Biomedical's computer system. Rial's argument is without merit. The degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion. See, *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991); *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982). The testimony must be sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated, or tampered with. *In re Paternity of J.S.C.*, 135 Wis. 2d 280, 400 N.W.2d 48 (Wis. App. 1986) (citing McCormick on Evidence § 212 (2d ed. 1972)). See, also, *State v. Green, supra*; *State v. Apker*, 204 Neb. 577, 284 N.W.2d 14 (1979). It is well established that " '[t]here is no rule requiring the prosecution to produce as witnesses all persons who were in a position to come into contact with the article sought to be introduced in evidence.' " 1 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence § 7-3(B) at 203 (2d ed. 1993) (quoting *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960)).

We conclude that there was sufficient foundation for the admission of the paternity test results offered at trial. The procedures for the collection, transportation, and examination of the blood were reliable so as to allow the trial court to find that the test results were what the State claimed, results of parentage tests performed on blood samples drawn from Deborah, Joseph, and Rial. Furthermore, we determine that there was sufficient evidence for the trial court to conclude that the testing procedures utilized by Roche Biomedical were in conformance with appropriate laboratory protocols.

(ii) Resolution

Accordingly, we conclude that the trial court did not err in admitting the paternity test results in the instant case.

2. Case No. S-94-1245

(a) Jurisdiction Regarding Support Order

Rial next assigns as error that the district court was without jurisdiction to enter an order of support or any other financial obligation while an appeal of the judgment finding Rial to be the father of Joseph was pending.

In pertinent part, § 43-1412 provides:

> Should it be determined in [an action to establish paternity] that the alleged father is actually the father of the child, a judgment shall be entered declaring such to be the case. In the event that such a judgment is entered, the court shall retain jurisdiction of the cause and enter such order of support, which order of support shall include the amount, if any, of any court costs and attorney's fees which the court in its discretion deems appropriate to be paid by the father . . . .

Thus, it is clear that the district court retains jurisdiction for orders regarding support notwithstanding the fact that the paternity determination was on appeal. See, e.g., *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994). This assignment of error is without merit.

(b) Determination of Child Support

(i) Retroactive Child Support

Rial asserts that the district court erred in awarding retroactive child support because he was denied the opportunity to present evidence regarding his knowledge of any support obligation prior to the date of service of the petition.

a) Application of Law to Facts

Rial fails to direct us to any part of the record where the district court or the district court referee refused to allow Rial to testify or present evidence in support of this claim. In fact, the record reveals that Rial testified fully and completely at the hearing before the referee to determine his support obligation. We conclude that Rial was given ample opportunity to testify and present evidence on his own behalf in the matter.

An out-of-wedlock child has the statutory right to be supported to the same extent and in the same manner as a child

born in lawful wedlock; the resulting duty of a parent to provide such support may, under appropriate circumstances, require the award of retroactive child support. *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995). The requirement of support begins at the time of the birth of the child, whether the child is born in lawful wedlock or otherwise. *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993).

Rial does not contest the amount of retroactive support ordered, just the court's authority to so order. We determine that the district court did not abuse its discretion in ordering retroactive child support under the circumstances of the instant case.

b) Resolution

Accordingly, this assignment of error is without merit.

(ii) Overtime Pay in Support Calculation

Finally, Rial claims that the district court abused its discretion by including overtime income previously earned in determining his current child support obligation.

a) Application of Law to Facts

It is appropriate to consider overtime wages in setting child support if the overtime is a regular part of the employment and the employee can actually expect to regularly earn a certain amount of income for working overtime. *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991).

At the time of the hearing before the referee, Rial was 48 years old and unemployed, with an inconsistent employment history and with limited prospects for employment in the immediate future. At his last job, Rial repaired jewelry. He testified that he worked 60 to 70 hours a week during the last 7 or 8 months of this employment. However, there is no evidence that Rial had any sort of expectation of overtime income at the time of the hearing. Given Rial's inconsistent employment history and lack of immediate prospects for future employment, we conclude that the district court abused its discretion in attributing overtime income to Rial and including this income in its calculation for the current child support that commenced on January 1, 1994.

b) Resolution

For the foregoing reasons, we reverse that portion of the district court order requiring Rial to pay child support at the rate of $236 per month commencing on January 1, 1994, and remand the cause to the district court for a redetermination of child support consistent with this opinion, with Rial's support obligation as so determined to be retroactive to January 1, 1994.

V. JUDGMENT

Accordingly, the judgment of the district court in case No. S-93-1056 is affirmed. In case No. S-94-1245, the judgment of the district court is reversed, and the cause is remanded with respect to the determination of current child support; in all other respects, the judgment of the district court is affirmed.

JUDGMENT IN NO. S-93-1056 AFFIRMED.
JUDGMENT IN NO. S-94-1245 AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STEVEN G. POLINSKI, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT AND NIELSEN CONSTRUCTION COMPANY, APPELLEES.

554 N.W.2d 636

Filed October 25, 1996. No. S-94-1003.

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. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision.

5. **Political Subdivisions Tort Claims Act: Limitations of Actions.** For purposes of Neb. Rev. Stat. § 13-919(1) (Reissue 1991), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence.
6. **Political Subdivisions Tort Claims Act: Notice.** The filing or presentment of a claim under the Political Subdivisions Tort Claims Act is a condition precedent to commencement of a negligence action against a political subdivision.
7. ____: ____. Noncompliance with the notice requirements of the Political Subdivisions Tort Claims Act is an available defense to a political subdivision, provided it is raised as an affirmative defense.
8. **Workers' Compensation: Actions: Parties.** Neb. Rev. Stat. § 48-118 (Cum. Supp. 1994) does not prevent an injured employee from initiating a negligence action against a third party.
9. **Political Subdivisions Tort Claims Act: Notice: Limitations of Actions.** The express notice requirements of the Political Subdivisions Tort Claims Act leave no room for application of the equitable tolling doctrine.

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

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

John M. Ryan and Lawrence E. Welch, Jr., of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee OPPD.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Appellant, Steven G. Polinski, brought this negligence action against the Omaha Public Power District (OPPD) after he was injured when his jackhammer struck an underground powerline. The district court held that Polinski failed to file his claim with OPPD within 1 year, as required by Neb. Rev. Stat. § 13-919(1) (Reissue 1991), and therefore entered summary judgment in favor of OPPD. Polinski appeals. We affirm.

ASSIGNMENTS OF ERROR

Polinski claims that the district court erred in granting OPPD's motion for summary judgment because (1) Polinski's cause of action against OPPD did not accrue until final disposition of his claim in the Nebraska Workers' Compensation Court,

(2) the proceedings in the Nebraska Workers' Compensation Court equitably tolled the statute of limitations, and (3) this court's decision in *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994), is distinguishable from the present case and therefore not dispositive.

BACKGROUND

On April 2, 1990, Polinski, an employee of Nielsen Construction Company (Nielsen), was injured when the jackhammer he was operating came in contact with underground high-voltage powerlines owned by OPPD. An investigation was conducted by OPPD shortly after the accident.

Polinski filed a workers' compensation claim against Nielsen on July 19, 1990. On January 28, 1991, the Workers' Compensation Court determined that Polinski was entitled to disability benefits. A rehearing before the compensation court was held on May 15, and on September 20, the court affirmed its January 28 award.

On July 12, 1991, Polinski, with newly retained counsel, sent a letter to OPPD advising that Polinski and his counsel were "in the process of gathering the necessary information to submit a demand" for Polinski's injuries suffered on April 2, 1990, and that the letter was to "serve as an attorney's lien in this matter." Polinski sent a second letter to OPPD on December 16 to serve as a "follow up" to the "initial demand and claim for compensation" sent on July 12. On December 19, OPPD sent a letter to Polinski stating that no voluntary settlement would be offered. Upon receipt of this letter, Polinski informed OPPD on January 6 that his claim was being withdrawn and that he would proceed against OPPD judicially. Pursuant to the Political Subdivisions Tort Claims Act (Act), Polinski filed suit against OPPD on March 25, 1992. Nielsen was made a party to the action pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1993).

On July 20, 1992, OPPD filed an amended answer and a motion for summary judgment in the district court, alleging that Polinski had failed to file a written claim with OPPD within 1 year of his alleged injury, as required by the Act at § 13-919(1). The district court overruled this motion on March 5, 1993. Subsequent to that ruling, we issued our decision in

Schoemaker v. Metropolitan Utilities Dist., supra. In light of this decision, OPPD filed a motion to reconsider with the district court. Upon reconsideration, the district court sustained OPPD's motion for summary judgment, finding that Polinski did not comply with the notice of claim requirements set forth in the Act. Polinski appeals.

STANDARD OF REVIEW

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. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996); *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996). 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. *Id.*

The interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995).

ANALYSIS

In this appeal, Polinski contends that his cause of action against OPPD under the Act did not accrue until the final disposition of his workers' compensation claim against Nielsen. Alternatively, Polinski argues that his pending workers' compensation claim against Nielsen equitably tolled the statute of limitations set forth at § 13-919(1).

POLITICAL SUBDIVISIONS TORT CLAIMS ACT

We begin by noting that OPPD is a political subdivision as defined by the Act. See, Neb. Rev. Stat. § 13-903(1) (Reissue 1991); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994). This negligence action against OPPD was therefore correctly initiated pursuant to the Act.

"The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision." *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 366, 417 N.W.2d 757, 764 (1988). At issue in this case are the procedural requirements regarding the filing of a claim with a political subdivision within statutory timeframes. In examining these requirements, we note that whether Polinski's July 12, 1991, letter was sufficient to constitute the filing of a claim in this case is not in question.

Neb. Rev. Stat. § 13-905 (Reissue 1991) of the Act requires all plaintiffs bringing a claim against a political subdivision to submit a written claim to that entity setting forth the time and place of the occurrence giving rise to the claim, along with any other pertinent facts known to the claimant. The time limit for the filing of a tort claim against a political subdivision is set forth at § 13-919(1), which provides, in pertinent part, that "[e]very claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body." For purposes of § 13-919(1), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988).

The filing or presentment of a claim under the Act is a condition precedent to commencement of a negligence action against a political subdivision. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). Noncompliance with the notice requirements is an available defense to a political subdivision, provided it is raised as an affirmative defense. *Id.*

OPPD's amended answer specifically raised as an affirmative defense Polinski's failure to provide written notice of his claim within the timeframes of § 13-919. It was therefore incumbent upon Polinski to prove that he complied with the notice requirements set forth in the Act. See, *Miles v. Box Butte County, supra*; *Millman v. County of Butler, supra.*

The undisputed facts in this case reveal that the first claim letter Polinski sent to OPPD was on July 12, 1991, more than 15 months after Polinski was injured. Thus, Polinski obviously failed to deliver a written claim to OPPD within the 1-year filing requirement set forth in § 13-919(1). Due to this failure to comply with the notice requirements, the district court sustained OPPD's motion for summary judgment.

Effect of Workers' Compensation Claim

Polinski first argues that the district court erred in granting summary judgment because his pending workers' compensation claim against his employer, Nielsen, prohibited him from proceeding with his direct tort claim against OPPD. In support of this contention, Polinski directs our attention to § 48-118, which provides:

> When a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person . . . . *[N]othing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee or of his or her personal representative to bring suit against such third person in his or her own name . . . but in such event an employer having paid or paying compensation to such employee or his or her dependents shall be made a party to the suit* for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid.

(Emphasis supplied.)

According to Polinski, § 48-118 requires him to name his employer, Nielsen, as a party in any action he brings against OPPD in order to protect Nielsen's subrogation rights. Since the amount of compensation Nielsen was required to pay Polinski was not ascertained until the compensation court's award on January 28, 1991, Polinski contends that his cause of action under the Act did not accrue until that date, because it was only then that Nielsen's subrogation interest was quantified. Thus, he argues that the July 12, 1991, claim letter was timely submitted within the requirements of § 13-919(1).

This court has held that § 48-118 is "for the benefit of the employer, so that he might recover from a third party, who negligently injured his employee, the amount he was required to pay by the compensation statute." *Danner v. Walters*, 154 Neb. 506, 519, 48 N.W.2d 635, 642 (1951). Section 48-118 does not, however, prevent an injured employee from initiating a negligence action against a third party. In fact, the statute specifically allows it, with the sole requirement being that an employer "having paid or paying compensation to such employee" must be made a party to the suit. See, *Niemeyer v. Forburger*, 172 Neb. 876, 112 N.W.2d 276 (1961), *Oliver v. Nelson*, 128 Neb. 160, 258 N.W. 69 (1934). Thus, § 48-118 does not control when an employee may file suit against a third party; rather, it sets out how such a claim is to be brought. As made explicit by the plain language employed in § 48-118, an employee can bring a suit against a third party at any time, provided that his or her employer be made a party *if* that employer has paid compensation benefits to the employee. Consequently, Polinski was not prohibited from bringing a negligence claim against OPPD prior to the computation of Nielsen's subrogation interests.

For purposes of the Act, the statute of limitations starts to run when a plaintiff discovers or should have discovered the negligent act of the political subdivision. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988). Because Polinski's injury occurred on April 2, 1990, that is the date on which the 1-year filing requirements set forth in § 13-919(1) started. The fact that the workers' compensation award was not issued until January 28, 1991, is of no consequence, for Polinski was free to simultaneously bring an action against OPPD while seeking compensation from Nielsen in the Workers' Compensation Court.

Polinski alternatively argues that his good faith pursuit of the workers' compensation claim against Nielsen equitably tolled the Act's 1-year filing requirement and that the filing of his notice of claim on July 12, 1991, in no way prejudiced OPPD because it was aware of the underlying accident.

Although this court has never directly addressed the equitable tolling of a claim brought under the Act, we expressly rejected the argument in *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994), that lack of prej-

udice relieves the notice requirements of the Act. In that case, we examined a tort claim brought under the Act against the Metropolitan Utilities District. Employees of the district had knowledge of the accident that injured Schoemaker and the possibility of a claim, although the district did not officially receive a written claim within 1 year of the accident, as required by § 13-919(1). Schoemaker argued that her failure to file a written claim did not cause the district any prejudice because it had knowledge of the accident and had even conducted an investigation. In rejecting this argument, we stated that "Section 13-905 requires notice to a designated individual or entity of a political subdivision in the form of a written claim. It would defeat the purpose of § 13-905 if mere knowledge of an act or omission, by a nondesignated party, was sufficient to satisfy the requirements of that section." *Id.* at 973, 515 N.W.2d at 679. Likewise, if we were to hold that Polinski's failure to file a claim within the required timeframe did not prejudice OPPD and therefore toll the statute of limitations, the notice of claim requirement of the Act would be defeated.

In short, the express notice requirements of the Act leave no room for application of the equitable tolling doctrine. As noted in *Schoemaker*, the failure to file a claim within the 1-year period of limitations terminates that claim regardless of whether the political subdivision was actually made aware of the possibility that a claim would eventually be brought. For these reasons, we conclude that the district court was correct in holding that Polinski's workers' compensation claim did not equitably toll the running of the limitations period set forth at § 13-919(1).

APPLICATION OF *SCHOEMAKER*

As his third assignment of error, Polinski argues that the district court erred in finding the reasoning in *Schoemaker* applicable to the instant case. In particular, Polinski states that unlike the political subdivision in *Schoemaker*, OPPD expressly waived the 1-year claim provision in the Act by rejecting his claim in its December 19, 1991, letter. We disagree and conclude that *Schoemaker* is clearly dispositive of the instant case.

Polinski is correct in noting that the political subdivision in *Schoemaker* did not expressly reject a claim filed by

Schoemaker. In fact, the record in that case indicated that the district was willing to offer a settlement. Much like Polinski, however, Schoemaker argued that the district was estopped from raising the issue of her failure to comply with the notice requirements of the Act. We resolved this waiver argument by noting that while the date of Schoemaker's injury was August 22, 1989, a written claim was not submitted to the district until October 25, 1990. Since Schoemaker failed to file this claim within the 1-year time limit of § 13-919(1), we held that "Schoemaker cannot rely, as an element of estoppel or waiver, on [the district's] actions in communicating with Schoemaker's attorney after the statute of limitations had expired." *Id.* at 974, 515 N.W.2d at 680. In short, we held that once the statute of limitations had run for the filing of the claim, there was no "claim" to waive.

Although OPPD did refuse to settle with Polinski on December 19, 1991, we still find the reasoning of *Schoemaker* to be applicable. The undisputed facts show that Polinski was injured on April 2, 1990, but he did not submit a written claim to OPPD until July 12, 1991, a full 15 months later. Similar to the situation in *Schoemaker*, Polinski's submission of the claim was untimely because it occurred beyond the 1-year limitation set forth in § 13-919(1). For this reason, *any* subsequent action taken by OPPD on the claim, including a rejection, cannot act as a waiver for the notice requirements. Thus, we conclude that the district court was correct in applying our reasoning in *Schoemaker* because OPPD cannot reject a claim that was never properly commenced within the statute of limitations.

CONCLUSION

The undisputed facts in this case establish that Polinski failed to file a claim with OPPD within the 1-year limitation period set forth at § 13-919(1). In light of our decision in *Schoemaker* and our conclusion that Polinski's workers' compensation claim had no effect on his ability to instigate this proceeding within the appropriate timeframes, the district court was correct in granting summary judgment in favor of OPPD.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LOUISE MORRIS, APPELLANT.

554 N.W.2d 627

Filed October 25, 1996. No. S-94-1197.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not by judicial discretion, except in those instances in which the rules make judicial discretion a factor.
2. **Rules of Evidence: Hearsay.** Neb. Evid. R. 801(4)(a)(ii) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.
3. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
4. **Criminal Law: Trial: Juries: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to the substantial right of the defendant.
5. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence properly admitted, or admitted without objection, supports the finding of the trier of fact.
6. **Evidence.** Cumulative evidence means evidence tending to prove the same point to which other evidence has been offered.
7. **Trial: Evidence: Appeal and Error.** If other evidence in the record clearly establishes the facts supported by inadmissible evidence, the court neither abused its discretion nor prejudiced the defendant by receiving inadmissible evidence.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Seward County, BRYCE BARTU, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

Peter K. Blakeslee for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Louise Morris was convicted by a jury of one count of first degree sexual assault on a child and two counts of sexual assault of a child. She appealed to the Nebraska Court of Appeals, which affirmed the convictions and sentences. Morris petitioned for further review, which we granted.

SCOPE OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not by judicial discretion, except in those instances in which the rules make judicial discretion a factor. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

FACTS

In November 1993, Morris was charged with one count of first degree sexual assault on a child and one count of sexual assault of a child for assaults on her daughter, Nicole T., and one count of sexual assault of a child for assaults on her son, Jason T. These assaults allegedly occurred from January 1983 to December 1988, when Nicole was between 4 and 10 years of age and when Jason was between 1 and 7 years of age.

Morris and Gene T. were married in 1978. The family lived in a trailer home near Seward and later moved to a house in Seward, on Eighth Street. Morris left the family in March 1989 and moved to Grand Island, where she remarried. The children remained in the father's home, and in January 1990, he was awarded custody in the final divorce decree. The father remarried in November 1990.

After Jenny B., the stepmother, moved in, the father and stepmother began to have problems with Jason. He became violent, had nightmares, and wet the bed. About the same time, Nicole began losing weight. Both children were taken to Pioneer treatment center for evaluation. In July 1992, Jason was taken to Lincoln General Hospital, where he stayed for approximately 3 months. It was determined that he required additional treatment, and he was admitted to Epworth Village, a residential treatment center for children.

In October 1992, the father and stepmother visited Jason at Epworth Village. It was during this visit that Jason told them he had been sexually abused by Morris. Jason also told them that Nicole knew about the abuse. When the father and stepmother questioned Nicole about the abuse, she ran upstairs and started beating her head on the floor, saying that she wanted to die.

Jason was 12 at the time he testified at trial. He stated that he did not tell anyone about the assaults at the time they happened because Morris told him not to tell. Jason testified that Morris touched his penis. He testified that he touched Morris' private parts because she told him to do so and that this happened both at the trailer and at the house on Eighth Street. He stated that Sandra Kroeker, a clinical social worker, was the first person he told about the abuse.

Nicole was 15 at the time she testified. She had lived with Morris in the trailer, and she testified that while they lived there, Morris would touch her breasts and vagina as often as twice a week. These incidents allegedly happened from about the time Nicole was 4 until she was 10. This alleged touching continued after the family moved to the house on Eighth Street, but was not as frequent. Nicole testified that she had seen her mother have sexual contact with Jason since he was 1 or 2 years old and that Morris threatened to hurt her or her father if she told anyone about the assaults. Nicole did not tell anyone until after Jason told Kroeker about the assaults.

Kroeker testified that during her first session with Jason on October 29, 1992, he told her he had been sexually abused by his mother. Kroeker was told by Jason that his mother would pick him up from school, bring him home, take his pants off, and rub his penis. Jason also watched his mother engage in sexual intercourse with different men. On November 5, Jason told Kroeker that his mother frequently engaged him in sexual contact with her. She would rub his penis and would have him touch her breasts and vagina. Morris also had Jason dress as a girl and then masturbate his sister while Morris watched. On January 15, 1993, Jason completed an anatomical drawing to help identify the parts of his body that were touched and to focus in on what had happened. He continued to relate the sexual abuse at each session Kroeker had with him, and his state-

ments to her regarding the abuse were consistent throughout his reporting. Kroeker testified that it is common for children to delay reporting abuse by a family member.

The children's stepmother testified that Jason told her in October 1992 that Kroeker was counseling him and that he had been sexually assaulted by Morris.

Dr. Kathryn Benes, a psychologist who evaluated Jason at Lincoln General Hospital prior to his counseling with Kroeker, testified that Jason suffered from depression and posttraumatic stress disorder. Benes specifically asked Jason if anyone had touched him in a way that made him feel uncomfortable, and he said no. Benes testified that it is not unusual for a child to not report the abuse to an adult because children who have been sexually abused by adults often do not trust other adults.

Sherry Lave, the police officer who was assigned to interview Nicole at the time the abuse was reported, testified that during her interview with Nicole, she was told that Morris had touched Nicole inappropriately on numerous occasions and that the abuse began when Nicole was 4 or 5 years old. Lave stated that Nicole said she had been touched all over on her breasts, that Morris had inserted her fingers into Nicole's vaginal area, and that Morris had instructed Nicole on various occasions to touch Jason's penis. Nicole indicated to Lave that some of Morris' male acquaintances had sexually assaulted Nicole and that Morris was present when this occurred.

At trial, during cross-examination of the children, it was suggested by the defense that the children had fabricated the allegations and that the children had been subjected to improper influence by the father, the stepmother, Kroeker, and Lave. Morris argues that the alleged improper influence first occurred on October 29, 1992, when Jason first met with Kroeker. The children's statements to these witnesses were all made after Jason was interviewed by Kroeker on October 29 and were consistent with the initial reporting of abuse.

Four witnesses testified at trial over Morris' continuing hearsay objection to what Nicole and Jason had told them. The witnesses were Eunice Williams, the director of therapeutic services and a psychotherapist at Epworth Village; Gordon Hall, the director of life skills training at Epworth Village, who pro-

vided weekly individual therapy for Jason during his 6-month stay at Epworth Village; Christy Weber, a registered nurse employed at Epworth Village as the director of health care services and admissions coordinator; and Karl Hoehler, a deputy sheriff of Seward County who was involved in the investigation of Jason's allegations.

Williams, Hall, Weber, and Hoehler each testified that during the course of his or her respective professional duties, Jason told him or her that he had been sexually abused by Morris. Williams testified that both Nicole and Jason told her that they had been sexually abused by Morris. Hall testified that Jason had told him that Jason had been sexually abused by Morris. Weber testified that after Jason had reported the sexual abuse to Kroeker, he told Weber about the sexual abuse. Hoehler testified that Jason made detailed statements to him about the sexual abuse during his investigation.

Morris was convicted on all three counts. The Court of Appeals affirmed the convictions and sentences. The court stated that if *Tome v. United States*, 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995), controlled this case, the testimony of Williams, Hall, Weber, and Hoehler regarding the children's statements to them would be inadmissible as hearsay. The Court of Appeals concluded that it was bound by the Nebraska Supreme Court's interpretation of Neb. Evid. R. 801(4)(a)(ii), and having found that the statements made to and repeated by Williams, Hall, Weber, and Hoehler were prior consistent statements under *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), the Court of Appeals held that they were admissible under rule 801(4)(a)(ii). The court stated:

> [I]n addition to the four witnesses to whose testimony Morris objected, the children, the father, the stepmother, Kroeker, and another police officer testified to the same or similar instances when the children had made prior statements that were consistent with their in-court testimony. We recognize that the procedure was followed by Morris' counsel in an attempt to create error under the *Tlamka* holding, the only course open to him at the time. However, this tactic had the effect of letting into evidence many prior consistent statements that would have been excluded

> under *Tome*, and thus the testimony of the four witnesses to which Morris did object was cumulative and could not have prejudiced Morris.

State v. Morris, 4 Neb. App. 250, 262-63, 541 N.W.2d 423, 430-31 (1995). The Court of Appeals held that if a victim's statement is challenged at trial as being the product of improper influence or fabrication, then any consistent statement by the victim made prior to the trial testimony is admissible. As noted by the Court of Appeals, this interpretation of rule 801(4)(a)(ii) is contrary to the U.S. Supreme Court's interpretation of Fed. R. Evid. 801(d)(1)(B), as set forth in the Court's opinion in *Tome*.

ASSIGNMENTS OF ERROR

Morris claims the Court of Appeals erred in holding that the prior consistent statements were admissible and in finding that the prior consistent statements, even if inadmissible, were cumulative to other evidence and were therefore not prejudicial.

ANALYSIS

We first consider whether the U.S. Supreme Court's interpretation in *Tome* of Fed. R. Evid. 801(d)(1)(B), which rule is set forth as Neb. Evid. R. 801(4)(a)(ii), should be adopted by this court. Our opinions in *State v. Tlamka, supra*; *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994); *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985); *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985); *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980); and *State v. Pelton*, 197 Neb. 412, 249 N.W.2d 484 (1977), do not give a clear interpretation of the rule and may, in some cases, conflict with the U.S. Supreme Court's interpretation of the rule in *Tome*.

Rule 801(4)(a)(ii) provides:

> A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

In *Tome*, the child victim testified that her father had sexually assaulted her. The father asserted as a defense that the child had been subjected to undue influence, which caused the child to make incriminating statements. The prosecution then called six witnesses who testified as to statements the child made after the time when the father alleged that the child had been subjected to the undue influence. The trial court permitted the testimony, finding that the evidence was admissible pursuant to Fed. R. Evid. 801(d)(1)(B). The U.S. Court of Appeals for the 10th Circuit affirmed, holding that the statements were admissible even though they were made after the alleged motive to fabricate arose.

The U.S. Supreme Court reversed, holding that the rule permitted the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charge of recent fabrication or improper influence or motive. Quoting McCormick and Wigmore, the Court noted: "'[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated.' E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972) . . . ." *Tome v. United States*, 513 U.S. 150, 156, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). The Court stated that if Congress had intended to permit an out-of-court consistent statement regardless of when it was made, Congress could have adopted a rule providing that "'a witness' prior consistent statements are admissible whenever relevant to assess the witness's [sic] truthfulness or accuracy,'" *Tome*, 513 U.S. at 159, but that Congress had not enacted such a rule and that the narrow rule enacted by Congress could not be so applied.

The prevailing common-law rule dealing with prior consistent statements that existed before the adoption of the federal rules of evidence provided that a consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement was made before the alleged fabrication, influence, or motive came into being, but was inadmissible if made afterward. The Court reasoned

that the adoption of Fed. R. Evid. 801(d)(1)(B) did not change this interpretation. "A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. By contrast, prior consistent statements carry little rebuttal force when most other types of impeachment are involved." *Tome*, 513 U.S. at 158. The Court stated that

> [i]f consistent statements are admissible without reference to the time frame we find imbedded in . . . Rule [801(d)(1)(B)], there appears no sound reason not to admit consistent statements to rebut other forms of impeachment as well. Whatever objections can be leveled against limiting the Rule to this designated form of impeachment and confining the rebuttal to those statements made before the fabrication or improper influence or motive arose, it is clear to us that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement.

Tome, 513 U.S. at 159. Recognizing that in certain cases it may be difficult to determine when the alleged fabrication, influence, or motive occurred, the Court pointed out that a majority of the common-law courts had been performing this task for over a century. "[T]he thing to be rebutted must be identified, so the date of its origin cannot be that much more difficult to ascertain." *Tome*, 513 U.S. at 166.

A brief discussion of our prior decisions involving rule 801(4)(a)(ii) is necessary for our present consideration of the rule. One critical distinction between some of the prior Nebraska cases addressing rule 801(4)(a)(ii) and the case at bar is the time when the improper influence took place. In *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), and *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), the defendants failed to specify when the witnesses were improperly influenced. In these cases, the defendants made general allegations that the victims' testimony had been improperly influenced or recently fabricated, but did not direct the court to the specific time of the improper influence. In the case at bar, the challenged statements were made after the initial interview by Kroeker in October 1992.

In *Tlamka*, the defendant was convicted of first degree sexual assault on a child. He appealed, and the Court of Appeals

affirmed the conviction. We granted further review, but limited our review to the admissibility of the victim's statement made to an investigating officer 3 days after the assault. At trial, over Tlamka's hearsay objections, the investigating officer stated that he asked the victim what happened and had her use dolls to show him what occurred. The officer testified that the victim told him that vaginal penetration occurred and that Tlamka had placed his penis in her mouth. This statement to the officer was consistent with what the child had earlier told the parents. At trial, the victim testified on direct examination that Tlamka had sexual contact with her. On cross-examination, Tlamka's counsel questioned the victim concerning statements she had made in a pretrial deposition, the implication being that someone had coached the victim in articulating the assault. Defense counsel implied with this questioning that the victim's testimony was the product of improper influence. We found that the victim's statement at trial was consistent with what she told the officer, and therefore, the statement to the officer could properly have been admitted under rule 801(4)(a)(ii). Our opinion in *Tlamka* did not establish when the improper influence was to have occurred. Tlamka's counsel focused on the victim's statements made in a pretrial deposition taken after the statement made to the officer. We did not address whether the alleged improper influence occurred prior to the statement to the officer.

In *Huebner*, we held that the trial court did not abuse its discretion in admitting the testimony of a social worker and a counselor regarding details of the sexual assault as prior consistent statements. The incident which led to Huebner's conviction occurred in December 1989. It was not reported until July 1990, and the complaint was not filed until November 1991. At trial, a social worker and a counselor testified about the details of the assault, and another social worker testified as an expert regarding reasons why child victims delay reporting sexual assaults. Huebner asserted that the State intended to gain a tactical advantage by providing the victim with counseling in order to use her as a credible witness at trial. Huebner produced no evidence showing that the State had attempted to manipulate the counseling sessions in order to improperly mold the victim's

testimony and, more importantly, did not allege when the improper influence took place.

Huebner claimed that the trial court had erred in admitting the testimony of the social worker and the counselor as to the details of the assault. The victim testified prior to such testimony, and during her cross-examination, it was suggested that she had fabricated the story because she did not like the relationship between Huebner and her mother.

In *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985), Gregory contended that the trial court erred in receiving the rebuttal testimony of Sgt. Walter Cooper, because it was improper rebuttal and hearsay. Cooper testified that he interviewed the shooting victim's son, Scott Drickey, and Scott's friend, Charlie Murrin, on the day of the shooting, and at that time, the boys said they had gone to Gregory's house to get some additional newspapers for their route and waited outside the door. They told Cooper that the victim was shot while he was standing outside the house and fell into the house after he was shot. Gregory had previously testified that the two boys waited inside his house to receive the newspapers and that at the time he was shot, the victim was inside the house charging at Gregory. Gregory expressly charged that the boys had recently fabricated their trial testimony. The date of any improper influence or motive was not set forth in our opinion. We found that under the circumstances, it was clear that the statements about which the police sergeant testified were not hearsay, citing *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985).

In *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980), there was no contention that the witnesses' testimony was the result of recent fabrication or improper influence, and therefore, rule 801(4)(a)(ii) was not a factor in the court's ruling denying the admission of the tape-recorded statement.

In *State v. Pelton*, 197 Neb. 412, 249 N.W.2d 484 (1977), before Pelton took the stand, he sought to have introduced on cross-examination of one of the police officers the statement which Pelton had given to the officer the morning following his arrest. Pelton had not yet testified at the time the offer was made, and no express or implied charge of recent fabrication had been made by the State in any evidence offered by the State.

In *State v. Austin*, 1 Neb. App. 716, 510 N.W.2d 375 (1993), Austin argued that it was prejudicial error for the trial court to have excluded a prior consistent statement by a witness that Austin was plainly wearing a gun in the courtroom. On cross-examination, the State implied that the witness' trial testimony had been recently fabricated. The Court of Appeals concluded that the prior consistent statement need predate only the trial testimony with which it is consistent. The trial court had determined that although all the statutory requirements for admission of the prior consistent statement were met, the proffered statement was inadmissible because it was a " 'statement *subsequent* to any implied plan or contrivance.' " See *Austin*, 1 Neb. App. at 723, 510 N.W.2d at 379. The trial court had relied upon our decision in *Johnson*, in which we stated:

> If an attack on a witness' credibility through use of an inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends "strongly to disprove that the testimony was the result of contrivance. . . ."

220 Neb. at 400-01, 370 N.W.2d at 142. In *Austin*, the Court of Appeals did not interpret *Johnson* as requiring the prior consistent statement to predate the impeaching statement, but that such statement need predate only the trial testimony with which it is consistent.

Morris argues that the Court of Appeals erred in not following the U.S. Supreme Court's decision in *Tome v. United States*, 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). As pointed out above, Fed. R. Evid. 801(d)(1)(B) is set forth as Neb. Evid. R. 801(4)(a)(ii). In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not by judicial discretion, except in those instances in which the rules make judicial discretion a factor. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

In order to minimize the amount of judicial discretion and therefore control the admissibility of evidence by rule as much as possible, we interpret rule 801(4)(a)(ii) to permit the introduction of a declarant's consistent out-of-court statements to

rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive. See *Tome v. U.S., supra.* To the extent that our decisions in *Tlamka*, *Huebner*, *Gregory*, *Johnson*, *Packett*, and *Pelton* may be inconsistent with this interpretation of rule 801(4)(a)(ii), they are not authority for an interpretation of the rule that is inconsistent with this opinion. Therefore, under our interpretation of rule 801(4)(a)(ii), the testimony of Williams, Hall, Weber, and Hoehler regarding what Jason told them was erroneously admitted.

We next address whether the testimony of Williams, Hall, Weber, and Hoehler was cumulative and therefore harmless error. In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to the substantial right of the defendant. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence properly admitted, or admitted without objection, supports the finding of the trier of fact. *State v. Hernandez, supra*; *State v. Coleman, supra.* Cumulative evidence means evidence tending to prove the same point to which other evidence has been offered. *Id.* If other evidence in the record clearly establishes the facts supported by inadmissible evidence, the court neither abused its discretion nor prejudiced the defendant by receiving inadmissible evidence. See *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988).

Williams testified that after Jason told Kroeker the details of the abuse, Jason told Williams that Jason's biological mother had abused him, but Jason did not give Williams specific details. Over Morris' hearsay objection, Hall was asked whether Jason told him that Jason had been sexually abused by his mother. Hall replied yes. Hall further testified that Jason had

told him that Jason had been abused by his biological mother and that he was angry because of the abuse. Weber testified that after Jason was placed at Epworth Village, she had verbal contact with him in preparing him for consultation services for medical problems relating to abuse. When asked whether Jason had made a statement to her regarding whether he had been sexually abused, she responded yes. Over Morris' hearsay objection, Weber testified that Jason said that his mother had sexually abused him, that she had touched his penis, and that she had made him touch his sister. Over Morris' hearsay objection, Hoehler testified that Jason told him that when Jason was in kindergarten, he had "relations" with Morris which occurred about twice a week. She would take him into the bedroom, take his clothes off, and rub his penis. She would take her clothes off and make Jason touch her breasts and vagina.

Although similar testimony from the victims, the father, the stepmother, Kroeker, and Lave was admitted without objection, we conclude that the testimony of Williams, Hall, Weber, and Hoehler was prejudicial and could have materially influenced the jury.

We cannot say beyond a reasonable doubt that the erroneously admitted evidence did not prejudice Morris or that the State has demonstrated beyond a reasonable doubt that the erroneous admission of evidence in this case was harmless. We therefore reverse the judgment of conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, C.J., dissenting.

The majority in its opinion expressly adopts the bright-line rule of *Tome v. United States*, 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995), and interprets Neb. Evid. R. 801(4)(a)(ii) to allow the introduction of a declarant's consistent out-of-court statements to rebut charges of improper influence or recent fabrication only when those consistent statements were made prior to the alleged act of improper influence or recent fabrication. I disagree.

According to the Nebraska Evidence Rules, a prior consistent statement is not hearsay if (1) the declarant testifies at trial, (2) the declarant is subject to cross-examination concerning the

statement, and (3) the statement is consistent with the declarant's testimony and is offered to rebut a charge of recent fabrication or improper influence. See Neb. Evid. R. 801(4)(a)(ii). The plain language of the statute requires only these elements in order to admit a prior consistent statement and does not limit the admission of the statement based on the timing of the utterance.

The majority applies the U.S. Supreme Court's holding in *Tome* to exclude all prior consistent statements made after the charge of recent fabrication because Nebraska's rule 801(4)(a)(ii) is patterned after Fed. R. Evid. 801(d)(1)(B). I disagree with this extension of the plain language of the Nebraska rule.

In matters involving the interpretation of state law, we are bound to consider only our own decisions and are not required to apply U.S. Supreme Court decisions. *Patteson v. Johnson*, 219 Neb. 852, 367 N.W.2d 123 (1985). When interpreting a state statute, the U.S. Supreme Court is also bound to consider the interpretation of the statute by the state's highest court. *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993).

In the interpretation of the Nebraska rule of evidence at issue in this instance, our cases have consistently held that rule 801(4)(a)(ii) allows for the admission of prior consistent statements when an opponent implies that a declarant's testimony is false. See, *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994); *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993); *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992). Prior consistent statements are not rendered inadmissible simply because they were made after the charge of recent fabrication or improper influence.

In the instant case, the adoption of the bright-line rule set forth in *Tome* results in the exclusion of all prior consistent statements made by Jason and Nicole to Williams, Hall, Weber, and Hoehler. The majority in its decision excludes these prior statements despite the fact that all of the statements were essentially consistent with the children's in-court testimony and despite the fact that the charge of recent fabrication was not made until the cross-examination of Jason. See *State v.*

Roenfeldt, 241 Neb. 30, 486 N.W.2d 197 (1992) (holding that prior statements are consistent when additional details are not contradictory or collateral to victim's testimony).

The majority's decision in this case is violative of the plain meaning of Neb. Evid. R. 801(4)(a)(ii), our own precedent, and common sense. As the dissenting Justices stated in *Tome*, "[T]he effect of admission on the trial will be minimal because the prior consistent statements will (by their nature) do no more than repeat in-court testimony." 513 U.S. at 176.

To add the timing requirement set forth in the majority's opinion to Neb. Evid. R. 801(4)(a)(ii) allows a defendant to eliminate prior consistent statements by the imaginative use of the charge of recent fabrication. In this case, Morris alleged for the first time at trial that Jason's statements to the social worker on October 29, 1992—the first disclosure by Jason of the abuse—were the product of improper influence. Thus, Morris succeeded in relating the allegation back to the first disclosure of the abuse and in so doing prevented the jury from hearing the prior consistent statements made by Jason to others when the social worker was not present to allegedly influence his statements.

For the foregoing reasons, I would hold that, when the charge of recent fabrication or improper influence is made at trial, all consistent statements made prior to trial are admissible. I would, therefore, affirm the trial court's admission of the prior consistent statements made to Williams, Hall, Weber, and Hoehler.

FAHRNBRUCH and LANPHIER, JJ., join in this dissent

GUY C. HALE, APPELLANT AND CROSS-APPELLEE, V. STANDARD MEAT COMPANY AND ALLIED MUTUAL INSURANCE COMPANY, APPELLEES AND CROSS-APPELLANTS, AND HOME INSURANCE COMPANY ET AL., APPELLEES.

554 N.W.2d 422

Filed October 25, 1996. No. S-95-1231.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong.

2. ____: ____. Under the provisions of Workers' Comp. Ct. R. of Prac. 11 (rev. 1995), all parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached; the rule further requires a specification of the evidence upon which the judge relies and that the decision provide the basis for a meaningful appellate review.

Appeal from the Nebraska Workers' Compensation Court. Judgment vacated, and cause remanded with directions.

Mark J. Peterson, of Erickson & Sederstrom, P.C., for appellant.

James J. DeMars, of DeMars, Gordon, Olson, Recknor & Shively, for appellees Standard Meat Co. and Allied Mutual Insurance Co.

Paul F. Prentiss, of Timmermier, Gross & Burns, for appellee Home Insurance Co.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Aetna Casualty and Surety Co.

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellee Employers Fire Insurance Co.

Julie A. Moran and, on brief, Robert V. Roach, of Hansen, Engles & Locher, P.C., for appellee Royal Insurance Co.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

In this workers' compensation case, the plaintiff-appellant, Guy C. Hale, urges that he is entitled to benefits because of an infection resulting from an occupational disease contracted in accidents arising out of and in the course of his employment with the defendant-appellee Standard Meat Company. The dismissal of his petition on original hearing was affirmed by a review panel of the Nebraska Workers' Compensation Court, whereupon Hale appealed to the Nebraska Court of Appeals. He there asserted, in summary, that the compensation court erred in failing to (1) make adequate findings of fact and conclusions of

law, and (2) find that he suffers compensable permanent total disability. Standard Meat and one of its insurers, Allied Mutual Insurance Company, assert by cross-appeal that the action is time barred. Standard Meat's other insurers are the remaining defendants-appellees. On our own motion, we removed this matter to our docket in order to regulate the caseloads of the Court of Appeals and this court. We now vacate the compensation court's judgment of dismissal and remand the cause with directions.

Hale was born on March 8, 1925, and worked for 20 years as a Navy cook cutting meat and vegetables and as a meatcutter for Standard Meat from 1965 to August 1990, before he retired. During the course of that latter employment, Hale suffered frequent cuts and puncture wounds and began in 1967 to experience abscesses, which continued to occur at irregular intervals, sometimes but not always following cuts. On one occasion, he also experienced lymphangitic streaking of an arm.

On April 8, 1993, Hale's wife discovered him crawling in the hallway of their house and took him to a hospital. Shortly after Hale was admitted, abscesses appeared over his entire body. He was in severe pain and was sweating, and his blood pressure was low. An abscess on Hale's back was surgically removed because of its proximity to the spine. He was diagnosed as suffering from a chronic blood infection due to the presence of the Staphylococcus aureus bacterium in his vertebrae. In addition to the surgical removal of the abscess, Hale suffered heart problems, pneumonia, kidney failure requiring dialysis, skin infections, abscesses in the skin and joints, respiratory failure requiring a ventilator, and a fall due to his weakened state. The infection also aggravated Hale's rheumatoid arthritis.

Hale had not experienced any abscesses from the date of his retirement from Standard Meat until his admittance to the hospital on April 8, 1993. But he had suffered occasional cuts, puncture wounds, and scrapes outside of his employment with Standard Meat.

There is conflicting medical evidence as to whether the Staphylococcus aureus bacterium may lie dormant for long periods; whether meatcutters have a greater risk of infection by the organism than does the general population; and whether,

based on a reasonable degree of medical certainty or probability, Hale's 1993 episode is causally related to his employment at Standard Meat.

In the first assignment of error, Hale urges that the findings of fact and conclusions of law made by the compensation court judge on original hearing are inadequate to provide a basis for meaningful appellate review.

The order of dismissal on original hearing recognizes Hale's allegation that he sustained "injuries in accidents"; reviews Hale's employment history and the course of the 1993 episode, together with his condition at the time of the hearing; and notes the time-bar claims and the conflicts in the medical evidence with respect to the nature, sources, and cause of Hale's 1993 episode. The order then observes that in a workers' compensation case, "the burden is on the plaintiff to establish that the injury sustained was caused by, or related to, his employment," and that such burden must be established by "a preponderance or the greater weight of the evidence." The order concludes by declaring that "the evidence does not preponderate in favor of a finding for the plaintiff" and makes no finding with respect to the time-bar claims.

The findings of fact made by the workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong. See *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996). However, while we can infer from the language of the order that the judge on initial hearing concluded that ruling on the time-bar issues was not necessary, it is not possible to determine whether the judge concluded that the evidence does not establish that Hale's 1993 episode is an occupational disease, or that while the 1993 episode is, or is assumed to be, an occupational disease, Hale nonetheless failed to establish that it arose out of and in the course of his employment with Standard Meat.

The order of dismissal on original hearing thus fails to satisfy the requirements of Workers' Comp. Ct. R. of Prac. 11 (rev. 1995), which reads:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and

> explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

In the absence of being advised as to what, in the view of such judge, Hale failed to prove by a preponderance of the evidence, we can make no meaningful review; neither do we understand how the compensation court review panel could have done so.

Accordingly, we vacate the compensation court's judgment of dismissal and remand the cause to the compensation court with the direction that the judge conducting the initial hearing enter an order on the evidence adduced which complies with the requirements of rule 11, and for such further review thereof as the parties may institute under law.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. J. DAVID GREGORY, RESPONDENT.

554 N.W.2d 422

Filed October 25, 1996. No. S-96-795.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed, the following factors are considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law.
2. ____. Misappropriation of client funds, as one of the most serious violations of duty an attorney owes to clients, the public, and the courts, typically warrants disbarment.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Formal charges were filed by the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar

Association, relator, against respondent, J. David Gregory, who was admitted to the practice of law in the State of Nebraska on April 14, 1994. The charges were filed pursuant to two separate complaints lodged against Gregory by former clients. The substance of both complaints was that Gregory continually neglected legal matters entrusted to him, failed to carry out his contract of employment for professional services, engaged in conduct involving dishonesty and misrepresentation, and misused client funds.

Both complainants testified at the April 24, 1996, hearing on this matter held before the committee. Steven F. Turner testified that he retained the services of Gregory for a variety of legal matters beginning in November 1994. Those services included the preparation of a will, preparation of documents to incorporate Turner's business, and filing an application for trademark protection. Turner paid attorney fees to Gregory for the provision of these services. However, Gregory failed to see each of these matters through to completion.

Turner said that as part of the preparation of his will, Gregory was to contact Turner's former lawyer in California and instruct him to destroy all copies of Turner's prior will. Gregory informed Turner that he had contacted Turner's former lawyer, when, in fact, he had not. Despite repeated assurances by Gregory that all necessary steps had been taken to properly incorporate Turner's business, Turner later discovered otherwise. Gregory failed to publish public notice of the incorporation of Turner's business, failed to secure a federal employer identification number, and failed to timely file a subchapter S election with the Internal Revenue Service, even though he assured Turner that each of those tasks had been accomplished. Gregory agreed to process a trademark application for Turner, for which Turner paid to Gregory a trademark application filing fee. Turner later discovered that his application was not filed. Gregory has not returned Turner's application filing fee. Furthermore, despite repeated requests by Turner, Gregory has failed to return Turner's papers and corporate records.

Larry A. Bond appeared before the committee and testified that in December 1993, he was experiencing business and personal financial problems precipitated by his poor health and

hired Gregory to file personal and corporate bankruptcy petitions on his behalf. He also hired Gregory to pursue a tort claim on his behalf. During this time, Bond was frequently hospitalized and underwent two major surgeries.

Bond said that he paid the necessary fees to Gregory for the bankruptcy filings. At some point, Gregory contacted Bond and informed him that Gregory had appeared on Bond's behalf at a meeting of creditors and that no creditors had appeared to contest Bond's bankruptcy. In late June 1995, Bond was notified by the court that his personal bankruptcy petition had been dismissed because of Gregory's failure to appear. When Bond contacted Gregory to inform him of this dismissal, Gregory assured Bond that the dismissal was the result of some confusion and that he would take care of the matter by filing a motion to place Bond's bankruptcy back on the docket. This was never done. Despite repeated attempts, Bond has been unable to reach Gregory, since Gregory has failed to return telephone calls and answer correspondence. Gregory is still in possession of Bond's medical, personal, and corporate records.

Notice of the complaints filed against Gregory was mailed to him. Moreover, due and proper notice of the time and place of the hearing before the committee was given to Gregory at the address which Gregory maintained with the Nebraska State Bar Association. However, Gregory failed to appear at the hearing or otherwise respond to the complaints.

The Disciplinary Review Board reviewed the evidence received at the committee hearing, found that the complaints were established by clear and convincing evidence, and affirmed the actions of the committee. The committee formally charged Gregory with the following violations of the Code of Professional Responsibility: Canon 1, DR 1-102, misconduct; Canon 6, DR 6-101, failing to act competently; and Canon 7, DR 7-101, failing to represent a client zealously. Further, the review board found Gregory in violation of Canon 9, DR 9-102, failing to preserve the identity of funds and property of a client.

Formal charges were filed with this court on July 23, 1996. Personal service of the charges was had on Gregory on August 9. Gregory has not responded to the formal charges. Relator now moves for judgment on the pleadings, pursuant to Neb. Ct.

R. of Discipline 10(I) (rev. 1996). A copy of this motion was served on Gregory on September 10.

We determine that the requirements of rule 10(I) have been satisfied, and having reviewed the record de novo, we conclude that the allegations contained in the formal charges have been established by clear and convincing evidence. Thus, the Association's motion for judgment on the pleadings should be and is hereby granted.

To determine whether and to what extent discipline should be imposed, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law. See, *State ex rel. NSBA v. Ramacciotti*, 250 Neb. 893, 553 N.W.2d 467 (1996); *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996); *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996).

Gregory has repeatedly promised to perform a legal service for a client; accepted a retainer, attorney fees, or payment toward a filing fee and converted it to his own benefit; failed to perform or inadequately performed the promised service; and then lied to the client about his failure. Furthermore, Gregory has failed to respond to all inquiries and charges. We have said before and will say again that such neglectful and uncooperative practices will not be tolerated. See, *State ex rel. NSBA v. Ramacciotti, supra*; *State ex rel. NSBA v. Johnson, supra.* In light of his repeated lack of professionalism, it is clear that Gregory is unfit to practice law.

Further, misappropriation of client funds, as one of the most serious violations of duty an attorney owes to clients, the public, and the courts, typically warrants disbarment. *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996); *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995).

For these reasons, we conclude that disbarment is the only sanction which will adequately protect the public as well as the reputation of the bar. It is therefore the judgment of this court that J. David Gregory be disbarred from the practice of law in

Nebraska effective immediately. Gregory is further ordered to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1991).

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

SEDLAK AERIAL SPRAY, LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLANT, V. KENNETH MILLER, JR., APPELLEE.

555 N.W.2d 32

Filed November 1, 1996. No. S-94-609.

1. **Jury Instructions: Appeal and Error.** Jury instructions are subject to harmless error analysis; thus, an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
2. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.
3. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
4. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
5. **Directed Verdict.** In ruling on a motion for directed verdict, the trial court resolves the controversy as a matter of law and may grant the motion only when the facts are such that reasonable minds can draw but one conclusion from the evidence.
6. ____. The party against whom a motion for directed verdict was granted is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
7. **Statutes.** There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions.
8. **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.
9. **Trial: Courts: Juries.** Whether to recall a jury after it has retired for deliberations is a matter entrusted to the discretion of the trial court.

10. **Trial: Courts: Juries: Appeal and Error.** Whether to answer a question of law posed by a jury which has retired for deliberations is a matter entrusted to the discretion of the trial court, and in the absence of an abuse of that discretion, its action will not be disturbed on appeal.

Appeal from the District Court for Butler County: EVERETT O. INBODY, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer, Egley, Fullner & Warnemunde for appellant.

Ray C. Simmons, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff-appellant, Sedlak Aerial Spray, Ltd., alleges that the negligence of the defendant-appellee, Kenneth Miller, Jr., proximately caused damage to one of its airplanes. The district court entered judgment for Miller in accordance with the verdict, and Sedlak appealed the dismissal of its action to the Nebraska Court of Appeals, asserting that the district court erred in (1) preliminarily instructing the jury, (2) receiving certain evidence, (3) submitting certain issues to the jury, and (4) responding to a question posed by the jury during its deliberations. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed the matter to this court. We now affirm.

II. FACTS

Sedlak is a Nebraska limited partnership in the business of aerially applying agricultural chemicals to growing crops. Sedlak conducted its operations from leased land by engaging various pilots to fly the airplanes from which the chemicals were sprayed. While the pilots did not share in Sedlak's profits, they were in charge of the airplanes they flew and determined when and how to fly. The pilots were paid by the number of acres they sprayed, and Sedlak did not withhold any federal income or Social Security taxes and provided no unemployment

or workers' compensation insurance. Sedlak furnished the chemicals, fuel, and oil, and owned the airplane being flown at the time in question.

The land Sedlak leased consisted of soil pushed together to form a crown 6 to 10 inches higher at the center than the sides, but it otherwise followed the natural contour of the ground. Part of the land was covered with crushed rock and part was seeded with a combination of grasses.

Miller was a tenant in possession of and who farmed the land surrounding Sedlak's land. On August 9, 1990, Miller irrigated his land, and waste irrigation water ran onto the north end of Sedlak's land from Miller's cornfield adjacent to the west side of the Sedlak land.

At approximately 4:30 p.m. on that day, a 1978 Grumman Ag-Cat airplane owned by Sedlak and piloted by Dana Anderson was damaged when, according to Anderson, the airplane touched down at a point approximately 200 feet south of Miller's plowed field at the north end of Sedlak's landing area. Water went over the top of the wings and the tail came up, completely flipping the airplane. As a result, the engine and propeller dug into the ground and tore off, damaging the airplane and leaving it upside down lying on its top. The National Transportation Safety Board determined that the probable cause of the crash was "standing water on the approach end of the runway." This was the seventh landing Anderson had made at the subject landing area that day.

Anderson testified that the airplane he was flying was so constructed that the pilot could not "look straight down below" and that although the pilot looked "straight forward" when spraying, one had to "look out the sides . . . off to an angle" when landing. Not only was he not specifically looking for water or its reflection, he may have been looking into the sun through a bug-spattered windshield. Moreover, the neighboring 60- to 80-foot-tall shelterbelt may have blocked his view, and there were many other variables.

Much of the evidence is in conflict, including where the airplane first touched the ground on landing. There is testimony that this point was anywhere from 50 to 200 feet south of the

plowed cropland field, and testimony that the airplane crashed 100 yards from the north end of the plowed field.

There is also disagreement as to the nature of the north end of Sedlak's land. In registering the flight operation in 1968 with the state and federal government, the original builder, Alvin G. Gruenewald, represented the "airstrip" or "runway" as having a length of 2,600 feet starting from the south property line and running north. However, some evidence suggests that the area had been lengthened over the years and that by 1987, it was approximately 2,930 feet long. Whereas Sedlak contends that the landing area encompassed all of its land from the south fence line to the cropland 2,900 feet north, there was other testimony that the landing area extended from the south fence line to a point only 2,600 feet north, with the remaining 300 to 350 feet at the north end consisting of tall grass and a mudhole.

Gruenewald testified that the mudhole was a natural drainage area for the ground in that the water would flow from the south and from the north, congregate or pool in the hole area, and then eventually travel from west to east via the culvert under the county road. According to him, the water would then run north down the road ditch. However, Bernadette Richards, a Sedlak partner, testified that there was no marshy area on the "runway" and that in the 5 years Sedlak leased the land, she never saw water running across Sedlak's "airstrip" and into the culvert. According to Richards, there were never any occasions when Sedlak could not use an area at the very north end of the land. She did, however, later testify that "[t]here apparently was some low ground there on the north — clear north, north of the north end . . . [o]f the runway," but denied that rainwater ever accumulated there.

A videotape of takeoffs and landings which had occurred prior to the crash shows that during a landing at 6:34 p.m. on June 23, 1990, someone stated, "[D]on't set it down there in the mud." Another voice responded, "I told him."

Joseph Proskovec, a soil conservation contractor, was hired by the landowners after the lease to Sedlak expired to level the land so that the ground could be used for farming. He testified on behalf of Sedlak that a federal geological survey map, his topographic survey, and subsequent land filling all showed "a

low spot or a dip or something like that, a void . . . [a] sinkhole or something like that" beginning 2,300 feet north of the south fence line and ending at the lowest elevation 2,900 feet north of the south fence line.

The evidence as to the height of the grass and the depth of the water in the area is also in conflict. In some testimony, the grass is described as tall and marshy in the area of the mudhole; other testimony puts the height at various levels ranging from 2 to 8 inches. There is also testimony that the grass was longer at the north end of Sedlak's land than at the middle, as the middle grass was abused by propeller wash and tire tracks. Testimony regarding the water estimates its depth at anywhere from 3 to 6 inches.

Whether Sedlak had notice that Miller was to irrigate the field next to Sedlak's land on the day of the accident is also in dispute. Richards and her husband claimed that Sedlak had found irrigation water from Miller's field on its land in 1989 and 1990, that they had on more than one occasion talked with Miller about irrigation water running onto the landing area, and that it could cause an accident. Richards specifically recalled one occasion in 1989 where one of Sedlak's airplanes had taxied down to the north end of its land to take off and had gotten stuck in some water while turning around. Miller, however, claimed that Sedlak never complained about the way he irrigated or told him that it was using the tall grass area for takeoffs, landings, or turnarounds. Miller also testified that on the morning of the day of the accident, he had told Richards that he would be irrigating in the vicinity of Sedlak's land and that water would be flowing down to the north. In addition, he instructed her to be careful so that the airplanes did not get too far down. According to Miller, Richards remarked that there would not be a problem because airplanes did not go that far north or use that area.

Charles Yager, a seed company representative, testified that 1 or 2 days after the accident, Richards told him that Miller had notified her about irrigation being started on the morning of the accident. However, Richards claimed that she had spoken to Miller the morning of the accident only with regard to spraying a field. She also testified that she had never seen Yager before

the trial and had never been told by Miller to stay out of the north end.

III. ANALYSIS

1. Preliminary Instructions

In the first assignment of error, Sedlak claims the district court erred in three respects by improperly instructing the jury before any evidence was received, as set forth hereinafter.

At this point, we remind ourselves that jury instructions are subject to harmless error analysis; thus, an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. See, *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

(a) Identity of Lessors

In challenging the preliminary instructions, Sedlak first urges that although the district court initially advised the jury that Miller leased to Sedlak the land it used for its flight operations, following the close of the evidence the district court informed the jury that while Sedlak alleged Miller was a lessor, Miller denied such status.

Although Sedlak sued Miller solely, it alleged that the "defendants leased" land to Sedlak, and Miller's various answers admitted that allegation. (Emphasis supplied.) However, during the course of trial, Miller, without objection, was permitted to amend his operative answer to conform to the proof by denying that he was a lessor. The lease was not offered in evidence, and Sedlak concedes in its brief that Miller was not a lessor.

A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Farmers & Merchants Bank, supra; Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). Thus, the preliminary instruction in this regard was unquestionably wrong, for it proved not to be supported by the evidence.

However, since Sedlak admits Miller was not a lessor, the district court's preliminary instruction in this regard worked to Miller's prejudice, not to Sedlak's.

(b) Nature of Danger

Sedlak also complains that in its preliminary instructions, the district court informed the jury that Miller claimed not only that Sedlak had been negligent in failing to keep a proper lookout, but that the danger "was open and obvious." Sedlak urges that the preliminary instruction concerning the obviousness of the danger was improvident, as, in accordance with Sedlak's motion for a directed verdict on that issue, the instructions following the evidence informed the jury only that Miller claimed that Sedlak had been negligent in failing to maintain a proper lookout.

But in the context of this case, the concept of lookout is inextricably intertwined with the obviousness of the condition for which the lookout was to be maintained. Thus, the preliminary instructions in this regard were not in conflict with those given at the close of the evidence. Rather, the preliminary instructions expressed the same concept in more than one way.

While duplication might in some instances in and of itself prejudice a party, it cannot be said to have done so in this case, for there is nothing in the duplication which misled the jury. The controlling rule is that all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995); *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

(c) Status of Pilots

Sedlak further complains that the preliminary instructions were silent as to the issue of whether Anderson was an independent contractor or Sedlak's agent. But the instructions following the evidence did advise the jury that one of its tasks was

to determine Anderson's status, and further informed the jury that Sedlak was responsible for Anderson's negligence if he was Sedlak's agent, but not if Anderson was an independent contractor. As Sedlak does not contend that the matter should have been decided as a matter of law or that the instruction given was erroneous, there is no issue for us to consider in this respect.

(d) Resolution

Indeed, the foregoing analysis demonstrates the risk inherent in undertaking to preliminarily instruct a jury other than to briefly, and in very general terms, state the nature of the case and describe the manner in which the trial will proceed. One cannot know what allegations will be supported by the evidence until the parties have rested.

Although there were errors in the preliminary instructions, since it cannot be said that they prejudiced any of Sedlak's substantial rights, this assignment of error fails.

2. Receipt of Evidence

In the second assignment of error, Sedlak contends the district court erred in permitting Gruenewald to testify.

Gruenewald is an experienced licensed pilot who built the flight area in question and flew from and into it for 20 years. He had also flown the type of airplane involved here once for "[p]robably 30 minutes." He testified that it was "very easy" for the pilot of such an airplane to see water "in [the] grass area, corn fields and so on." He also answered affirmatively to questions which asked whether, if he "were flying over the actual airstrip," he would be able to see water 6 inches deep in grass 6 inches tall and 2 or 3 inches of water in grass 4 or 5 inches tall.

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by those rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995).

Sedlak's position is that the testimony was not admissible because it did not relate to the circumstances and conditions which existed when Anderson was landing; specifically, that there was no testimony that Anderson had flown "over the actual airstrip" prior to landing on this occasion. See *In re Estate of Kinsey*, 152 Neb. 95, 40 N.W.2d 526 (1949). But although some of Gruenewald's testimony in this connection was characterized as opinion evidence, in reality he was testifying not to opinions based upon his expertise, but as to his personal knowledge gained from having flown into and from the landing area, from having visited the area on a yearly basis, and from having piloted the type of airplane involved. In this regard, he was testifying not as an expert witness, but as to matters within his personal knowledge. A witness may testify as to matters within the witness' personal knowledge. See, *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993); Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 1995). Whether the testimony was to be believed and the weight to be given it were matters for the jury.

Consequently, neither is there any merit to the second assignment of error.

3. Submission to Jury

In the third assignment of error, Sedlak asserts the district court erred in not granting it a directed verdict on the issues of whether its pilot maintained a proper lookout and proper control of the airplane.

In ruling on a motion for directed verdict, the trial court resolves the controversy as a matter of law and may grant the motion only when the facts are such that reasonable minds can draw but one conclusion from the evidence. The party against whom the motion was granted is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Nickell v. Russell*, 247 Neb. 112, 525

N.W.2d 203 (1995); *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994).

The evidence concerning the issues of lookout and control detailed in parts II and III(2) above was such that reasonable minds could find that Sedlak's pilot should have seen and avoided the water.

Therefore, the third assignment of error is also without merit.

4. Response to Jury Question

In the fourth and last assignment of error, Sedlak claims the district court responded improperly to an inquiry the jury made after retiring for deliberations.

The jury asked: "According to the law does an airfield need to be certified to be a legal airfield?" The district court responded, in relevant part: "All of the law applicable to this case was included in the original jury instructions given to you . . . ."

Sedlak urges that, instead, the district court should have answered the question either with a simple no, or by advising the jury that "[a]n airfield is an area of land used, or intended to be used, for landing and take-off of aircraft. Registration of an airfield is for informational purposes only. Registration of an airfield is optional in Nebraska."

Sedlak also contends that as the question sought information on the law, the district court was obligated to answer the question. In doing so, it points to Neb. Rev. Stat. § 25-1116 (Reissue 1995), which reads:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the *information upon the point of law shall be given*, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

(Emphasis supplied.)

But it is well established that there is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Anderson v. Board of*

Educational Lands & Funds, 198 Neb. 793, 256 N.W.2d 318 (1977). Consequently, 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. *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *State ex rel. Grape, supra*; *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977). Given the separation of powers concerns in statutes which undertake to prescribe how the judicial department shall conduct judicial business, we have in a number of instances ruled, stating a variety of reasons, that the use of the word "shall" in such statutes was permissive rather than mandatory. E.g., *State ex rel. Grape, supra* (ex parte investigations); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990) (hearing to be held within specified time); *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. 109, 242 N.W. 278 (1932) (appointment of receiver); *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, 85 N.W. 67 (1901) (construction of contracts).

While we have not heretofore considered the precise issue presented by Sedlak, we have long held that whether to recall a jury after it has retired for deliberations is a matter entrusted to the discretion of the trial court. See, *Shiers v. Cowgill*, 157 Neb. 265, 59 N.W.2d 407 (1953); *Hardesty v. State*, 95 Neb. 839, 146 N.W. 1007 (1914); *McClary v. Stull*, 44 Neb. 175, 62 N.W. 501 (1895). We now hold that whether to answer a question of law posed by a jury which has retired for deliberations is likewise a matter entrusted to the discretion of the trial court and that in the absence of an abuse of that discretion, its action will not be disturbed on appeal.

With that determination having been made, we assume, without deciding, that Sedlak's representation to the district court of the law on the issue in question is correct, and examine whether the district court abused its discretion in refusing to instruct in accordance with Sedlak's desires.

Sedlak points out that when the jury's question in this regard is considered in the context of an earlier unanswered question it posed, whether the lease covering the Sedlak land specified the length of the "airstrip," it becomes obvious that the jury was

focusing on whether Sedlak was limited to landing on a "2,600 foot runway" registered by Gruenewald or whether Sedlak "could conduct flight operations on the runway as it existed . . . in 1990."

But that is not at all clear; even if we treat the word "runway" to be synonymous with "airstrip," the jury did not refer to the same items in the two questions. In the first, the jury was concerned with the airstrip, and in the second, with the airfield. Airfield would seem to be a broader term than airstrip, so what was in the jury's mind is unknown. Even more importantly, without further explanation, what the jury meant by the word "airfield" cannot be known. On that ground alone, the district court did not abuse its discretion in refusing to answer other than as it did.

Moreover, although Gruenewald testified as to the length of the airstrip or runway when he registered the operation, neither party made registration an issue in the lawsuit, and registration was not relevant to the negligence of either party. The simple question was whether, under the conditions then and there existing, Anderson should have seen the water on the ground and avoided it.

As a result, this assignment of error is as meritless as the previous three.

IV. JUDGMENT

Being correct, the judgment of the district court is affirmed.

AFFIRMED.

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

554 N.W.2d 782

Filed November 1, 1996. No. S-94-912.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error because of a trial court's refusal to give a requested instruction, an appellant has the burden to show that the tendered instruction correctly states the law, that it is warranted by the evidence, and that the appellant was prejudiced as a result of the refusal.
2. **Negligence: Damages: Liability.** Where there is evidence that a plaintiff had a preexisting condition prior to an accident, the defendant is liable only for any damages found to be proximately caused by the accident; however, if the evidence does not per-

mit the trier of fact to separate the damages caused by the preexisting condition from those caused by the accident, then the defendant is liable for all of those damages.

3. **Jury Instructions.** Since an instruction which misstates the burden of proof has a tendency to mislead the jury, it is prejudicially erroneous.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for a new trial on the issue of damages.

James E. Harris and Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellant.

Michael F. Coyle and James A. Mullen, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

This is a negligence action in which the vehicle operated by the defendant-appellee, Larry J. Wilson, collided with the rear of the automobile operated by the plaintiff-appellant, Leroy Kirchner. The district court determined as a matter of law that Wilson was negligent, that such negligence was the proximate cause of the collision, and that Wilson was liable for any damages Kirchner sustained as a proximate result of said collision. The jury thereafter returned a verdict in favor of Kirchner, and the district court entered judgment thereon. Being dissatisfied with the amount of the judgment, Kirchner appealed to the Nebraska Court of Appeals, asserting that the district court erred in, among other things, instructing the jury. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed the matter to this court. Kirchner's assignment of error having merit, we now reverse, and remand for a new trial on the issue of damages.

At the scene of the collision on November 25, 1990, Kirchner told an investigating police officer that his "back and neck hurt," but elected not to go to a hospital. After finishing at the scene, he continued on the trip to a department store he and his passenger wife had begun. However, as the evening progressed, Kirchner started to feel worse and reported to a hospital emer-

gency room with primary complaints of posterior headaches, neck pain, and pain radiating into his right arm.

Kirchner saw his family physician, Dr. Gilbert Head, on November 29, 1990, and an x ray of the neck was taken, which showed some early degenerative changes in the cervical spine. No other significant abnormalities were found. Because of continued pain in Kirchner's right arm, Head referred Kirchner to a neurologist, Dr. Daniel L. McKinney. Further study of the cervical spine showed a small bulge into the spinal fluid at the fifth cervical disk level. Sometime after December 27, 1990, the right-arm pain seemed to switch to the left arm.

Kirchner returned to work on February 1, 1991, and saw Head on March 11 after Kirchner caught his left finger in a machine. Kirchner attributed this occurrence to the fact that his arm and hand would go numb, causing him to have trouble picking up things.

After other measures failed to alleviate Kirchner's neck and hand complaints, McKinney performed surgery on Kirchner's neck, which relieved the neck pain but did not completely alleviate the numbness in his hand. After the neck surgery, Kirchner again returned to work.

Kirchner also testified that after the collision, he experienced pain in his lower back and legs, and while he had told Head that he was feeling better in that regard, he meant only that he was not in as much pain as he had been in earlier, but that the pain, which would come and go, persisted. Although he had experienced back pain prior to the collision, that pain was slight and across his beltline and felt like a pulled muscle, whereas after the collision, the pain radiated down into his left leg and felt like a hot poker.

Kirchner consulted McKinney about low-back pain on August 19, 1992, and in the course of performing a myelogram the next day, McKinney noted Kirchner's statement that his low-back pain had started about a year earlier and had gradually become worse. On August 26, 1992, McKinney performed a laminectomy, a surgical procedure designed to correct a herniated lumbar, or low-back, disk. In the almost 53 years Kirchner had lived prior to the collision, he had undergone four prior laminectomies, all performed by McKinney. These prior surg-

eries produced scar tissue, degenerative changes, and inflammation of the spinal cord membrane.

McKinney was unable to say with reasonable medical certainty that the trauma of the collision caused the actual herniation of the lumbar disk and the subsequent surgery. Neither could he say whether the collision aggravated the inflammation of the spinal membrane. However, McKinney stated with reasonable medical certainty that the collision aggravated Kirchner's preexisting degenerative and weakened lumbar spine conditions. McKinney also testified that it was not possible to determine how much of Kirchner's 1992 lumbar disk herniation was contributed to by his preexisting problems and how much was caused by the aggravation.

The district court instructed the jury that there "is evidence that [Kirchner] had a low back condition prior to the [collision. Wilson] is liable only for any damage that you find to be proximately caused by the [collision]." Kirchner urges that the district court erred in rejecting his request that the jury also be informed that if it could not "separate [the] damages caused by the preexisting condition from those caused by the [collision], then [Wilson] is liable for all of those damages."

To establish reversible error because of a trial court's refusal to give a requested instruction, the appellant has the burden to show that the tendered instruction correctly states the law, that it is warranted by the evidence, and that the appellant was prejudiced as a result of the refusal. See, *State on behalf of Joseph F. v. Rial, ante* p. 1, 554 N.W.2d 769 (1996); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996); *Klawitter v. Lampert*, 248 Neb. 231, 533 N.W.2d 896 (1995); *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994).

The issue is controlled by *David, supra*, decided after the trial before us was concluded. The medical evidence therein was that the plaintiff's preexisting medical conditions were aggravated by the occurrence there in question. The plaintiff made no effort to apportion how much of his total postoccurrence medical impairment was attributable to the aggravations caused by the occurrence. The defendant's medical expert was unable to make such a determination, but agreed that "some part" thereof was "indeed causally linked." *Id.* at 115, 547

N.W.2d at 730. We ruled that under such a record, the trial court correctly instructed the jury:

> "There is evidence that the plaintiff had pre-existing back and joint conditions prior to the date of the accident. The defendant is liable only for any damages found to be proximately caused by the accident.
>
> "If you cannot separate damages caused by the pre-existing conditions from those caused by the accident, then the defendant is liable for all of those damages."

Id. at 113, 547 N.W.2d at 729. See, also, *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969) (negligent defendant liable for entire damages resulting from unapportioned aggravation of preexisting condition).

Because in the present case there is evidence that the collision aggravated the preexisting degenerative and weakened condition of Kirchner's lumbar spine and that the degree to which said preexisting condition was aggravated could not be determined, Kirchner's requested instruction correctly stated the law and was warranted by the evidence.

The only question remaining is whether the district court's failure to give the requested instruction prejudiced Kirchner. *David* observes that an instruction which misstates the burden of proof has a tendency to mislead the jury and is erroneous. In *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995), we stated the same rule and remanded for a new trial that aspect of the case in which the trial court had misstated the burden of proof to the defendant's prejudice. See, also, *Kaspar v. Schack*, 195 Neb. 215, 237 N.W.2d 414 (1976) (instruction placing burden on wrong party reversible error). We thus now specifically rule that since an instruction which misstates the burden of proof has a tendency to mislead the jury, it is prejudicially erroneous. Because the failure of the district court to charge the jury as requested by Kirchner had a tendency to mislead the jury as to which party had the burden of apportioning the degree to which Kirchner's preexisting low-back condition contributed to the herniation of the lumbar disk and resultant surgery, the district court's failure prejudiced Kirchner.

Accordingly, as noted in the first paragraph of this opinion, we reverse the judgment of the district court and remand the cause for a new trial on the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

GRAND ISLAND LATIN CLUB, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT, AND CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, APPELLEE.

554 N.W.2d 778

Filed November 1, 1996. No. S-94-1048.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** On appeal, decisions of the Nebraska Liquor Control Commission are reviewed by an appellate court de novo on the record.
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. **Administrative Law: Liquor Licenses.** An order to show cause is a proper method for the Nebraska Liquor Control Commission to initiate a hearing on whether a licensee's liquor license should be suspended, canceled, or revoked.
4. **Administrative Law: Statutes.** Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.
5. **Administrative Law: Liquor Licenses.** Neb. Rev. Stat. § 53-132(2)(a), (b), and (c) (Reissue 1984) does not grant the Nebraska Liquor Control Commission authority to cancel an existing liquor license.

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

Don Stenberg, Attorney General, and Marie C. Pawol for appellant.

Terry R. Schaaf for appellee Grand Island Latin Club.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and REAGAN, D.J.

WRIGHT, J.

The Nebraska Liquor Control Commission (Commission) appeals from the district court's order reversing the Commis-

sion's denial of the renewal of a liquor license held by the Grand Island Latin Club, Inc. (Latin Club).

SCOPE OF REVIEW

On appeal, decisions of the Nebraska Liquor Control Commission are reviewed by an appellate court de novo on the record. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996); *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995).

FACTS

The Latin Club has possessed a liquor license for approximately 30 years. Other than one citation in 1975 for selling liquor to nonmembers and another in 1980 for serving after hours, the Latin Club has not been cited with any violation relating to its liquor license.

The Latin Club's annual liquor license was scheduled to expire on October 31, 1993. On October 25, the Grand Island City Council (City Council) objected to automatic renewal of the license. The City Council adopted the position that the Latin Club should file a long-form liquor license application, rather than receiving an automatic renewal. Nevertheless, it appears from the record that the Latin Club continued to possess a license after the October 31 expiration date.

Subsequently, on December 6, 1993, the Commission ordered the Latin Club to file a long-form application. On December 9, the Commission ordered the Latin Club to show cause why its license should not be suspended, canceled, or revoked for failure to have a valid corporation to do business in Nebraska for the previous 2 years and to show cause that circumstances had not changed from those existing at the time of the original application and initially issued license. The portion of the order to show cause relating to the existence of a valid corporation was dismissed by the Commission on January 25, 1994.

As directed by the Commission, the Latin Club filed a long-form application. The parties have agreed that the Latin Club

submitted the long-form application under protest to satisfy the Commission's order and did not do so voluntarily.

After reviewing the long-form application and holding a public hearing, the City Council recommended that the application be denied. This recommendation was based upon the existence of citizen protests and a determination that the license was not compatible with the neighborhood. Based on the City Council's recommendation, the Commission scheduled a hearing on the show cause matter and the long-form application.

On March 18, 1994, the Commission issued an order denying the Latin Club's application on the bases that (1) the Latin Club was not fit, willing, or able to provide the proposed services; (2) the Latin Club could not conform to all provisions, requirements, rules, and regulations found in the Nebraska Liquor Control Act (Act) and the rules of the Commission; (3) the Latin Club had failed to demonstrate that the type of management and control exercised over the proposed licensed premises would be sufficient to ensure that the proposed licensed business would conform to all provisions, requirements, rules, and regulations found in the Act; and (4) the issuance of the license was not required by the present or future public convenience and necessity, based on the recommendation of the local governing body. With respect to the order to show cause, the Commission found that circumstances had changed from the original application and initially issued license and that under Neb. Rev. Stat. § 53-132(2)(a), (b), and (c) (Reissue 1984), the currently issued license should be canceled.

The Latin Club appealed to the district court, which reversed the Commission's March 18, 1994, order and remanded the case to the Commission with directions to renew the Latin Club's class C liquor license, provided that the Latin Club then met all of the requirements for the issuance of such a license. The Commission timely appealed.

ASSIGNMENTS OF ERROR

The Commission alleges that the district court erred (1) in determining that the Commission lacked authority to require the Latin Club to submit a long-form application, as opposed to automatically renewing the license; (2) in determining that the

Commission lacked authority to issue an order to show cause to the Latin Club; and (3) in reversing the Commission's order, which denied renewal of the Latin Club's license.

ANALYSIS

Long-Form Application

The application and renewal process for liquor licenses is governed by the Act. The sections within the Act which are relevant to the present case are Neb. Rev. Stat. §§ 53-135 and 53-135.02 (Reissue 1993). Section 53-135 sets forth the manner of application for renewal as follows:

> A retail or bottle club license issued by the commission and outstanding may be automatically renewed by the commission without formal application upon payment of the state registration fee and license fee if payable to the commission. The payment shall be an affirmative representation and certification by the licensee that all answers contained in an application, if submitted, would be the same in all material respects as the answers contained in the last previous application. The commission may at any time require a licensee to submit an application, and the commission shall at any time require a licensee to submit an application if requested in writing to do so by the local governing body.

Section 53-135.02 states as follows:

> Any licensee may renew his, her, or its license at the expiration thereof in the manner set forth in section 53-135 if the licensee is then qualified to receive a license and the premises for which such renewal license is sought are the same premises licensed under the license to be renewed and are suitable for such purpose. The renewal privilege provided for in this section shall not be construed as a vested right which shall in any case prevent the commission from decreasing the number of licenses to be issued within its jurisdiction.

The Commission required the Latin Club to file a long-form application and, eventually, denied the application. On appeal, decisions of the Nebraska Liquor Control Commission are reviewed by an appellate court de novo on the record. *No Frills*

Supermarket v. Nebraska Liq. Control Comm., 246 Neb. 822, 523 N.W.2d 528 (1994). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996).

With regard to an appeal brought under the Act, we stated in *R.D.B., Inc. v. Nebraska Liquor Control Comm.*, 229 Neb. 178, 182, 425 N.W.2d 884, 887 (1988), that "the district court may not disturb the decision of the commission unless it was arbitrary and unreasonable." In the case at bar, the district court reversed the order of the Commission, holding that as a renewal applicant, the Latin Club should not have been required to file a long-form application. The court concluded that since the record did not reflect any basis for the Commission to require the long-form application, the Commission's action was arbitrary and unreasonable.

In so doing, the district court relied upon our decision in *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989). In *Pump & Pantry, Inc.*, we held that § 53-135 (Reissue 1984) and Neb. Rev. Stat. § 53-150 (Reissue 1988) (§ 53-150 now codified at § 53-135.02) established a formal distinction between a first-time applicant for a liquor license and a renewal applicant. The plaintiffs brought an action for declaratory judgment in the district court for Lancaster County against the Commission and the City of Grand Island. The plaintiffs sought a declaration that the provisions of the Act authorized and required only a limited inquiry for renewal of a liquor license.

In *Pump & Pantry, Inc.*, the City of Grand Island requested that the Commission require a licensed retailer to submit a long-form application for renewal of an existing license. At issue were the requirements that a liquor licensee had to satisfy before a license was renewed pursuant to §§ 53-135 and 53-150. The plaintiffs claimed that for renewal of a liquor license, the Act permitted only a limited inquiry regarding whether the renewal applicant had satisfied the liquor license requirements existing when the liquor license was initially issued. The City of Grand Island argued that since the requirements for issuance of a liquor license might change after initial issuance, a renewal

applicant had to meet the current statutory standards for issuance of a renewal license. The district court granted summary judgment to the plaintiffs.

On appeal, we held that the phrase "renewal privilege" in § 53-150 was a right or benefit granted in favor of a licensee seeking an extension or continuation of a previously issued license. We again recognized that a holder of a liquor license has a constitutionally protected interest in obtaining renewal of an existing license. See, also, *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988). We concluded that the legislative history and the language of §§ 53-135 and 53-150 disclosed a legislative intent to codify a practice of approving an application for continuation of an existing liquor license in the absence of a change of circumstances indicated on the licensee's renewal application. We held that under this codified practice, a licensee may renew a liquor license provided (1) the licensee is then qualified to receive a license, (2) the premises for which such renewal license is sought are the same premises designated in the initial license, and (3) the premises are suitable for the sale of alcoholic beverages in accordance with the initially issued license.

An administrative agency is limited in authority to those powers granted to it by statute. See *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982). Thus, in the present case, without a showing by the City of Grand Island or the Commission that the Latin Club did not meet one of the renewal requirements set forth in §§ 53-135 and 53-135.02 (Reissue 1993), the Commission could not demand that the Latin Club submit a long-form application. The district court correctly determined that the Commission did not have authority to require the Latin Club to submit a long-form application in order to renew its liquor license.

Order to Show Cause

The Commission argues that even if it was not proper to require the Latin Club to submit a long-form application, the Commission had authority to revoke or cancel the Latin Club's license pursuant to its December 9, 1993, order to show cause. Although we have never specifically addressed whether the

Commission has power to issue orders to show cause under its statutory authority, we have implied that the Commission has such power in *Jetter v. Nebraska Liquor Control Commission*, 204 Neb. 431, 283 N.W.2d 5 (1979).

In *Jetter*, we reviewed whether the Commission had provided a licensee sufficient notice of issues that would be raised against the licensee at the hearing such that the Commission's denial of the application did not violate the licensee's right to procedural due process. The Commission had given notice of a hearing and the challenge to the license in an order to show cause as to why the licensee's license should not be canceled "'for failure to operate the business.'" *Id.* at 432, 283 N.W.2d at 5. We held that the only issues that could properly be considered by the Commission as a basis for canceling the license were those explicitly listed in the notice provision of the order to show cause. In doing so, however, we implicitly held that the order to show cause was a proper basis for initiating a hearing on whether a license should be suspended, canceled, or revoked. We now expressly hold that an order to show cause is a proper method for the Commission to initiate a hearing on whether a licensee's liquor license should be suspended, canceled, or revoked.

Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995). The authority of the Commission to cancel a license is set forth in Neb. Rev. Stat. §§ 53-116.01 and 53-117.08 (Reissue 1993). Each of these sections gives the Commission authority to revoke, cancel, or suspend a liquor license where, after a proper hearing, the licensee has been found to have violated a provision of the Act, a regulation adopted pursuant to the Act, or a lawful ordinance of a local governing body.

The only remaining basis for cancellation that was challenged in the Commission's order to show cause was whether the Latin Club met the requirements of § 53-132(2)(a), (b), and (c) (Reissue 1984). Thus, the validity of the Commission's denial of the application depends upon whether § 53-132(2)(a),

(b), and (c) is an appropriate ground for cancellation of a license.

Section 53-132(2)(a), (b), and (c) states:

> A retail license or bottle club license shall be issued to any qualified applicant if it is found by the commission that (a) the applicant is fit, willing, and able to properly provide the service proposed within the city, village, or county where the premises described in the application are located, (b) the applicant can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to insure that the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska Liquor Control Act . . . .

Section 53-132(2) clearly describes the general standards by which initial applicants are judged to be fit to obtain a liquor license and to follow the rules and regulations that bear on license holders. This statute, however, is not itself a rule or regulation which can be violated by a current licensee and subject the licensee to cancellation under the power given to the Commission by §§ 53-116.01 and 53-117.08. We therefore conclude that the Commission could not cancel the Latin Club's liquor license under the provisions of § 53-132(2)(a), (b), and (c).

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

TED ALLEMANG, APPELLANT AND CROSS-APPELLEE, V. KEARNEY FARM CENTER, INC., DOING BUSINESS AS KEARNEY AG CENTER, APPELLEE AND CROSS-APPELLANT.
554 N.W.2d 785

Filed November 1, 1996. No. S-94-1198.

1. **Replevin: Judgments: Appeal and Error.** Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a verdict and will not be disturbed unless clearly wrong.

2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Replevin: Interest.** Ordinarily, the plaintiff in a replevin action may recover the interest on the value of the property during the period it was wrongfully detained; however, where the value of the loss of use of the property during such period exceeds the amount of such interest, then, instead of interest, the plaintiff may recover the value of the loss of use of the property.
4. **Damages.** The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status that the loser occupied just preceding the loss.
5. **Damages: Interest.** Where special damages are not shown, damages for wrongful detention are limited to the extent of interest on the value of the property during the time it was wrongfully detained.
6. **Replevin: Time.** The rights of the parties in a replevin action are to be determined as of the time the replevin action was filed, and what takes place thereafter is immaterial in the consideration and determination of the case.
7. **Replevin: Damages.** The owner of personal property in a replevin action has the duty to mitigate damages the same as any other litigant.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals affirmed.

Patrick J. Nelson, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Kent A. Schroeder and Vikki S. Stamm, of Ross, Schroeder, & Romatzke, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In this replevin action, the district court found that the defendant-appellee, Kearney Farm Center, Inc., doing business as Kearney Ag Center, hereinafter referred to as Kearney Center, had wrongfully detained possession of equipment that the plaintiff-appellant, Ted Allemang, was entitled to possess, and entered judgment in the sum of $8,685.37 in his favor. Claiming that he was entitled to greater damages, Allemang appealed to the Nebraska Court of Appeals; Kearney Center

cross-appealed, also asserting that the district court had miscalculated the damages. The Court of Appeals affirmed the judgment of the district court, but modified it by reducing it to $6,393.40. See *Allemang v. Kearney Farm Ctr.*, 96 NCA No. 17, case No. A-94-1198) (not designated for permanent publication). Allemang then successfully sought further review by this court, asserting, in summary, that the Court of Appeals erred in determining (1) the proper measure of damages and (2) the period of wrongful detention. We affirm.

II. SCOPES OF REVIEW

Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a verdict and will not be disturbed unless clearly wrong. *Packett v. Lincolnland Towing*, 227 Neb. 595, 419 N.W.2d 149 (1988); *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985). However, to the extent questions of law are involved, we have an obligation to reach our own conclusions independent of those reached by the lower courts. See, *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996); *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996).

III. FACTS

On or about August 31, 1991, Allemang purchased the used equipment in question, a forage harvester and corn head, from Kearney Center for $98,600, financing a portion of the purchase price with John Deere Company at 11.9 percent interest. Because he was retiring as a farmer, Allemang, sometime between February 5 and March 9, 1992, hired Wegener Auction Company to sell the equipment at auction on March 10. On that date, Kearney Center took possession of the equipment, which was then in good field-ready condition and which, in Allemang's opinion, had a value on said date of $85,000 to $100,000.

The loan agreement between Allemang and John Deere required Allemang to keep the equipment insured at all times, and Allemang had it insured for $85,000. However, after Kearney Center took possession, Allemang canceled the insur-

ance. On October 8, 1992, the district court, in granting Allemang a partial summary judgment, ruled that he could regain possession of the equipment only after he demonstrated proof of insurance. Allemang reinsured the equipment "[s]ometime in December of 1992," and the equipment "was delivered to" him on December 23, 1992.

Witness Ray Hunt is familiar with the type of equipment in question and has performed custom silage work since 1981 or 1982. Such work entails a contractor cutting somebody else's crops for silage and putting it in that customer's pit for a fee. According to Hunt, the corn silage season generally runs from the first week of September until the middle of October, depending on the weather, and in 1992, Hunt cut corn for silage from August 25 until October 15.

Hunt was of the view that the reasonable net rental value of the equipment between March 10 and December 23, 1992, for cutting crops for both "haylage" and silage was $80,000. The reasonable value of the equipment for cutting only corn for silage between August 25 and October 15, 1992, was $52,000. These amounts are based on the absolute optimum that the equipment could run per day: that is, continually for 20 hours, the remaining 4 hours being allocated for maintenance. Cutting hay requires the use of a hay head, and Hunt's opinion as to the rental value of the equipment includes consideration for rental cost for a hay head. Although Hunt spoke in terms of "rental value," his testimony deals rather with the value of the lost use of the equipment.

Allemang did not recall if he actually performed any custom harvesting work in 1992 and did not recall renting or hiring a forage harvester or corn head in 1992 to do any silage work. He had no contracts to do any custom silage work in 1992 and has never charged rent to anyone for using the equipment. Allemang admitted that he suffered no personal income loss as a result of not having the equipment in 1992 and has not used the equipment since it was returned.

The district court found that Kearney Center wrongfully took possession of the equipment on March 10, 1992, and had wrongfully retained it until December 23, a period of 288 days; that the equipment had a value of $92,500; that the interest rate

to be applied was 11.9 percent; and that Allemang had not suffered any special use damages. In so ruling, the district court noted that Allemang offered only evidence concerning the maximum potential use for the equipment without offering any supporting evidence that such use would have occurred.

IV. ANALYSIS

1. Measure of Damages

In the first summarized assignment of error to the Court of Appeals, Allemang asserts he is entitled to damages based on the value of the special use of the equipment rather than the interest on the value of the equipment accumulated during the period of wrongful detention.

Neb. Rev. Stat. § 25-10,105 (Reissue 1995) provides that in a replevin action "when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined . . . they shall assess adequate damages to the plaintiff for the illegal detention of the property . . . ."

The commissioner writing in *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901), observed that although in a replevin action the measure of damages ordinarily is the interest on the value of the property during the period it was wrongfully detained, where the use of the property is valuable and the value of the use exceeds the amount of interest on the value, interest often does not afford adequate compensation. Thus, according to *Schrandt*, the plaintiff may recover "(1) if there is no special value attaching to use of the property, interest; (2) if the value of use of the property exceeds the interest, then such value, without regard to whether the property is returned, but, in such case, no interest . . . ." *Id.* at 263, 86 N.W. at 1088. In other words, ordinarily, the plaintiff in a replevin action may recover the interest on the value of the property during the period it was wrongfully detained; however, where the value of the loss of use of the property during such period exceeds the amount of such interest, then, instead of interest, the plaintiff may recover the value of the loss of use of the property.

We have most recently reiterated the *Schrandt* rule in *Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984). The plaintiffs therein brought a replevin action against the

defendant towing service, which was found to have wrongfully detained the plaintiffs' automobile for 957 days. Quoting the test set forth in *Schrandt*, we noted that calculating damages would not be difficult, since the parties stipulated that the fair and reasonable rental value of the automobile at all times would be $10 per day. Thus, we upheld the trial court's award of $9,570, which was clearly based on the value of the plaintiffs' loss of use of the vehicle. Allemang correctly points out that there was no indication that the *Morfeld* plaintiffs were required to show that they would have driven the automobile had the defendant not wrongfully detained it, or that they had to prove that they rented a replacement automobile. But neither does it appear that those issues were in dispute. Thus, *Morfeld* does not stand, as Allemang urges, for the proposition that damages in a replevin action may be based on hypothetical lost profits.

Indeed, in *"L" Investments, Ltd. v. Lynch*, 212 Neb. 319, 327, 322 N.W.2d 651, 656 (1982), we wrote:

> "The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status as he occupied just preceding the loss."
>
> . . . "[T]he principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the injury actually sustained . . . ."

While Allemang attempted to establish the use value of the equipment, he completely failed to show that he would have used it but for Kearney Center's wrongful detention. On the contrary, Allemang testified that he could not recall renting or hiring a forage harvester and corn head in 1992, that he had no contracts to do custom work in 1992, and that he never charged rent when others used his forage harvester and corn head. In fact, as he was retiring from farming, Allemang intended to sell the equipment at auction before the silage-cutting season even began and admitted that he sustained no personal income loss as a result of not having the equipment in 1992. Under that state of the record, the district court's finding that Allemang failed to prove special use damages cannot be said to be clearly wrong.

In a replevin action, a successful plaintiff "ought to recover 'all damages which he has actually sustained by reason of the unlawful detention of the property in controversy.' " *Schrandt v. Young*, 62 Neb. 254, 263, 86 N.W. 1085, 1088 (1901), quoting *Teel v. Miles*, 51 Neb. 542, 71 N.W. 296 (1897). Where special damages are not shown, damages for wrongful detention are limited to the extent of interest on the value of the property during the time it was wrongfully detained. *North American Acceptance Corporation v. Meeks*, 146 Neb. 546, 20 N.W.2d 504 (1945); *Stull v. Taylor*, 121 Neb. 200, 236 N.W. 442 (1931).

Accordingly, Allemang's recovery is limited to the extent of interest on the value of the property during the time it was wrongfully detained. Kearney Center's assertion on cross-appeal that there is no evidence to support the district court's valuation of the equipment at $92,500 overlooks that the figure falls within the range of Allemang's opinion as to the value at the time it was taken. See *Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995) (verdict in conversion action within range of evidence adequately supported).

2. Period of Detention

In the second and final summarized assignment of error, Allemang contends that the Court of Appeals erred in reducing the period of wrongful detention as determined by the district court.

This issue is controlled by the rule that the rights of the parties in a replevin action are to be determined as of the time the replevin action was filed, and what takes place thereafter is immaterial in the consideration and determination of the case. *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

In its cross-appeal, Kearney Center argues that the district court's award for interest damages should not have been based on a 288-day detention because the district court held on October 8, 1992, that Kearney Center could retain possession of the equipment until Allemang provided proof of insurance. Claiming that Allemang did not provide such proof of insurance until December 23, 1992, Kearney Center argues that the detention during the 76 days intervening between October 8 and

December 23 was not wrongful; rather, it was court authorized and approved, and thus lawful. We agree.

In *Schneider v. Daily*, 148 Neb. 413, 416, 27 N.W.2d 550, 552 (1947), we imposed upon the owner of personal property in a replevin action the duty "to mitigate his damage the same as any other litigant." The *Schneider* plaintiff received an order directing the sheriff to release, return, and restore the plaintiff's attached property. The evidence showed that the sheriff left the property where he had found it, on the plaintiff's neighbor's farm. The plaintiff claimed that the sheriff never released the property. We held that the property was released when the sheriff's deputy notified the plaintiff of the release and that the plaintiff could not claim damages merely because the plaintiff would not pick up and deliver the property to his own home. In like fashion, we held in *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975), that a property owner's duty of mitigation included the duty to file legal action to secure return of the property he alleged was illegally detained by the defendants, noting that " 'the rules for awarding damages should be such as to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts . . . .' " *Id.* at 170, 231 N.W.2d at 317, quoting Charles T. McCormick, Handbook on the Law of Damages § 33 (1935).

Even if the district court wrongly imposed the insurance condition, because it ruled that Kearney Center could retain possession of the equipment until Allemang provided such proof, the district court improvidently assessed damages against Kearney Center for the period from the October 8, 1992, date of its order until the date Allemang finally provided such proof. If Allemang wished to claim that the district court was wrong in imposing the condition, his remedy was to assign error to such on his appeal to the Court of Appeals; that he did not do.

While the evidence suggests that Allemang obtained insurance some days prior to December 23, 1992, it was his burden under the district court's order to establish when he did so. Having failed to adduce more precise evidence on the matter, he cannot complain of the use of December 23, 1992, as such date.

V. JUDGMENT

Accordingly, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

LEANNA FAYE PRIEST, APPELLEE, V. RONALD EDWARD PRIEST, APPELLANT.

554 N.W.2d 792

Filed November 8, 1996. No. S-94-222.

1. **Divorce: Appeal and Error.** In the Supreme Court's further review of dissolution of marriage actions, our review is de novo on the record to determine if there was an abuse of discretion by the trial judge or the Nebraska Court of Appeals on the issues contained in the parties' assignments of error in this court.
2. **Appeal and Error.** An appellate court has the inherent power to consider plain error.
3. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial or before the Nebraska Court of Appeals, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Divorce: Alimony: Property Division.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate. Neb. Rev. Stat. § 42-365 (Reissue 1993).
5. **Alimony: Appeal and Error.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness, and this is initially entrusted to the discretion of the trial judge. An appellate court is not inclined to disturb the trial court's award unless it is patently unfair on the record.
6. **Property Division: Interest: Appeal and Error.** Nebraska's statute providing for interest on judgments does not require interest to be charged on a marital deferred property distribution. However, it is within the discretionary power of the district court to award interest on deferred installments payable as part of a marital property distribution, and those decisions will be upheld absent an abuse of discretion.
7. **Debtors and Creditors: Interest.** In the absence of a contract or statute, compensation in the form of compound interest is not permitted to be computed on a debt.

8. **Divorce: Attorney Fees: Appeal and Error.** The awarding of attorney fees in a dissolution proceeding is initially entrusted to the discretion of the trial court and, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion.
9. **Divorce: Attorney Fees.** The award of attorney fees in a dissolution proceeding depends on multiple factors that include the nature of the case, the amount of property divided and alimony awarded, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.
10. **Property Division: Pensions.** In a marriage dissolution, the marital estate includes only that portion of the pensions earned during the marriage.
11. ____: ____. Contributions to pensions before marriage or after dissolution are not assets of the marital estate and not subject to a division.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge. Remanded with directions.

Chris Abboud for appellant.

Mark A. Klinker for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

This is a further review of the decision of the Nebraska Court of Appeals in a marriage dissolution proceeding involving LeAnna Faye Priest and Ronald Edward Priest.

ASSIGNMENTS OF ERROR

Restated, the wife claims the Court of Appeals erred in (1) eliminating the alimony awarded her by the trial court; (2) providing that her husband's lien on the family home should bear interest of 8 percent, compounded annually; and (3) failing to award her attorney fees in the Court of Appeals.

We hold that the Court of Appeals erred in eliminating the wife's alimony award and in allowing compound interest on the husband's lien on the family home. In all other respects, we affirm the Court of Appeals' determinations.

FACTS

After a trial, the district court for Sarpy County granted a dissolution of the parties' marriage and awarded the wife (1) alimony of $250 a month for 154 months, terminable upon the death of either party, the remarriage of the wife, or the retirement of both parties; (2) the family home, subject to a commercial mortgage and subject to a $20,144 non-interest-bearing lien in favor of the husband, both of which, under the decree, the wife is required to pay; (3) attorney fees; and (4) 50 percent of the husband's pension payments when he begins receiving those payments. The husband was awarded 50 percent of the wife's pension payments when she begins receiving her payments. Certain other personal property was set over unto each party, and certain debts were allocated to each party for payment. Neither party, on the appeal to the Court of Appeals or in this court, has contested such distribution of personal property or allocation of debts, and those items will not be discussed further.

Additional facts necessary for the disposition of this further review will be set forth in our analysis of this cause.

APPEAL TO COURT OF APPEALS

The husband appealed certain of the trial court's determinations to the Court of Appeals. Changes made by the Court of Appeals to the trial court's decree included (1) elimination of the wife's alimony award and (2) that the husband's $20,144 lien on the couple's home should bear interest at 8 percent, compounded annually. The Court of Appeals affirmed the trial court's award of attorney fees to the wife, but denied her request for attorney fees for the appeal to the Court of Appeals. Although the issue was not raised by the parties, the Court of Appeals, citing plain error, reversed the trial court's distribution of the parties' pension benefits, and that issue was remanded to the trial court for further proceedings. See *Priest v. Priest*, 96 NCA No. 4, case No. A-94-222 (not designated for permanent publication). Neither party has claimed there was error with the Court of Appeals' treatment of the parties' pension benefits.

We granted the wife's petition for further review to consider the wife's three assigned errors and the Court of Appeals' granting of compound interest.

STANDARD OF REVIEW

In our further review of dissolution of marriage actions, our review is de novo on the record to determine if there was an abuse of discretion by the trial judge or the Court of Appeals on the issues contained in the parties' assignments of error in this court. See, *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992). The Supreme Court also has the inherent power to consider plain error. Plain error exists where there is error, plainly evident from the record but not complained of at trial or before the Court of Appeals, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. See, *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996); *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995); *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995); *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994).

ANALYSIS

ALIMONY

In this case, the trial court ordered the husband to pay the wife $250 per month alimony for 154 months, terminable upon the death of either party, the remarriage of the wife, or the retirement of both parties. We find that the Court of Appeals erred in eliminating the wife's alimony award, because the trial court did not abuse its discretion in awarding the wife alimony.

Neb. Rev. Stat. § 42-365 (Reissue 1993) provides in relevant part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities . . . .

> . . . The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness, and this is initially entrusted to the discretion of the trial judge. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991). An appellate court is not inclined to disturb the trial court's award unless it is patently unfair on the record. See, *Koubek v. Koubek*, 212 Neb. 2, 321 N.W.2d 55 (1982); *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981).

In applying the criteria of § 42-365 to determine whether the trial court abused its discretion in awarding alimony to the wife, we note that the duration of the marriage in this case was more than 31 years. The history of that period reflects that the wife's contributions to the marriage were not only her employment outside the home in later years because her husband said, "[W]e could use the extra money," but also her raising of four children, all of whom at the time of trial were adults.

The record reflects that for approximately 2 months after the parties were married, the wife worked outside the home. Soon after, she became sick due to her pregnancy and could no longer work outside the home. It was from a time within a couple of months after her marriage in 1962 until 1978 that the wife was not employed outside the home. She testified without contradiction that during that interim, there were minors in the home and that it was her responsibility as part of the marital agreement to take care of the children. The wife testified that when the youngest child was almost 3 years old, the husband wanted her to become employed outside the home because, he said, "[W]e could use the extra money." In 1978, she went to work part time at Baker's Supermarket and remained a part-time employee for about 8 years before she became a full-time employee. She was still a full-time Baker's Supermarket employee at the time of trial.

Since the filing of the dissolution petition, the wife "sold back" to Baker's her vacation time. She testified additionally of the "necessity" for her to work overtime to meet her financial obligations.

Based upon a review of the facts and circumstances in this case and the criteria set forth in § 42-365, we hold that the trial court's award of alimony in this case was not "patently unfair," and therefore, it cannot be said that the trial court abused its discretion in awarding the wife alimony. As a result, the Court of Appeals' elimination of the trial court's allowance of alimony to the wife is reversed, and the trial court's allowance of alimony should be reinstated as of the date of the trial court's decree.

HUSBAND'S LIEN ON HOME

The parties in this case were married on December 15, 1962. In its January 31, 1994, decree, the trial court ordered the marriage dissolved. In its decree, the trial court equally divided the parties' equity in the family home by awarding the wife the home subject to the unpaid balance of a commercial mortgage and subject to a non-interest-bearing $20,144 lien in favor of the husband, both of which the wife was ordered to pay. Under the trial court's decree, the wife could pay the lien at any time, but no later than when the house is sold, the wife retires, or December 26, 2006, whichever first occurs.

As previously stated, on appeal the Court of Appeals ordered the wife to pay the husband 8 percent interest, compounded annually, on the unpaid balance of his lien. This type of lien on the family home is part of a deferred property distribution. The wife complains that the Court of Appeals erred in requiring her to pay interest on the husband's lien against the family home.

It has been well established that Neb. Rev. Stat. § 45-103 (Reissue 1993), Nebraska's statute providing for interest on judgments, does not require interest to be charged on a marital deferred property distribution. See, *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Dryden v. Dryden*, 205 Neb. 666, 289 N.W.2d 525 (1980). However, it is within the discretionary power of the district court to award interest on deferred installments payable as part of a marital property distribution, and those decisions will be upheld absent an abuse of discre-

tion. See, *Thiltges, supra*; *Seemann v. Seemann*, 225 Neb. 116, 402 N.W.2d 883 (1987); *Nickel v. Nickel*, 201 Neb. 267, 267 N.W.2d 190 (1978). When utilizing this discretionary power, a factor the district court or the Court of Appeals should take into consideration is the burden on the payor spouse. See, *Thiltges, supra*; *Nickel, supra.*

In the case under consideration, the trial court abused its discretion in not awarding interest on the husband's lien. A de novo review of the record reflects that the payment of simple interest on the unpaid balance of the lien will not be an intolerable burden upon the wife, the payor spouse. Further, because deferred awards lose value over time, interest payments may be added to reflect the actual value of the award. An interest-free deferred property award, such as a husband's lien on the family home, is the kind of asset most vulnerable to the ravages of inflation. See *Thiltges, supra.* Under the circumstances of this case and taking into consideration our reinstatement of the wife's $250-per-month alimony award, a reasonable division of the equity in the parties' home can result only if the husband's lien bears a reasonable rate of interest.

The Court of Appeals' decision to award the husband interest at the annual rate of 8 percent on his lien on the family home was proper under the facts of this case. However, the Court of Appeals committed error when it ordered that the interest be *compounded* annually. In the absence of a contract or statute, compensation in the form of compound interest is not permitted to be computed on a debt. *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994). Because no compound interest contract or statute is involved in the present case, compound interest is not authorized and will not be permitted.

We modify the decision of the Court of Appeals and order the wife to pay on the husband's lien on the family home simple interest at the rate of 8 percent per annum from the date of the trial court's decree. Such interest may be paid by the wife monthly, semiannually, or annually on the principal balance of the husband's lien from time to time remaining unpaid, as determined by the trial court on remand.

ATTORNEY FEES

The awarding of attorney fees in a dissolution proceeding is initially entrusted to the discretion of the trial court, and, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). Under the circumstances, it cannot be said that the trial court abused its discretion in granting the wife attorney fees in the amount of $900. We agree with the Court of Appeals' holding affirming the award of attorney fees of $900 in the trial court.

The wife requests attorney fees for services of her counsel for the appeals to the Court of Appeals and this court. The award of attorney fees depends on multiple factors that include

> "the nature of the case, the amount of property divided and alimony awarded, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case."

Ritter, 234 Neb. at 209, 450 N.W.2d at 210. See *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996). Considering each of these factors, we conclude that each party shall pay her and his own attorney fees for services in both appellate courts.

PENSIONS

The trial court's division of the parties' pension benefits was not challenged by either party on appeal to the Court of Appeals. We agree with the Court of Appeals that the trial court's allocation of these pension benefits was plain error. The pensions of both parties are to be included in the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 1993). However, in a marriage dissolution, the marital estate includes only that portion of the pensions earned during the marriage. See *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). In the present case, the trial court awarded each party 50 percent of the other's pension payments as soon as the pension payments are made. The effect of this order would permit each party to receive the

benefit of money placed into the other's pension fund after the divorce. Contributions to pensions before marriage or after dissolution are not assets of the marital estate and not subject to a division. See, *Reichert, supra*; *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991). Thus, we agree with the Court of Appeals' decision to remand the pension issue to the trial court with instructions to divide only the pension benefits accumulated during the course of the marriage.

CONCLUSION

We remand the cause to the Court of Appeals with directions to remand the cause to the district court for further proceedings and for the entry of a decree in accordance with this opinion.

REMANDED WITH DIRECTIONS.

JANICE H. MENKENS, APPELLANT, V. JAMES T. FINLEY AND ARRON W. FINLEY, APPELLEES.

555 N.W.2d 47

Filed November 8, 1996. No. S-94-832.

1. **Trial: Witnesses: Testimony: Appeal and Error.** The determination of whether a witness is unavailable to appear at trial and give testimony is within the discretion of the trial court, whose ruling will be upheld on appeal in the absence of an abuse of that discretion.
2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion.
4. **Depositions: Hearsay.** Depositions are hearsay and, as such, are only admissible if they fit within a hearsay exception.
5. **Rules of Evidence: Depositions: Hearsay.** The exception to the hearsay rule contained in Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995) does not exclude depositions taken in compliance with law if the declarant is unavailable as a witness.
6. **Rules of the Supreme Court: Depositions.** Neb. Ct. R. of Discovery 32(a)(3)(E) (rev. 1996) provides that the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

7. **Rules of the Supreme Court: Depositions: Hearsay.** The Nebraska discovery rules regarding depositions do not provide an additional exception to the hearsay rule.
8. **Rules of Evidence: Rules of the Supreme Court: Hearsay.** The unavailability requirement of Neb. Rev. Stat. § 27-804 (Reissue 1995) must be read into Neb. Ct. R. of Discovery 32 (rev. 1996) so the Nebraska discovery rules do not create an additional exception to the hearsay rule.
9. **Rules of Evidence: Testimony.** The importance of live testimony has long been recognized by the courts and commentators. The unavailability requirement itself is a result of a strong policy favoring live testimony.
10. **Expert Witnesses: Physicians and Surgeons.** The mere threat of an emergency or something unexpected or unforeseeable, such as a sudden summons to the hospital, does not automatically render a doctor unavailable to testify in court.
11. **Appeal and Error.** An issue not presented to the trial court may not be raised on appeal.
12. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
13. **Evidence: Expert Witnesses.** Expert testimony should not be received into evidence if it is evident that the witness does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess. Without an adequate basis of facts, the witness should not be allowed to give an opinion.
14. ____: ____. Where an expert's opinion testimony does not have a sound and reasonable basis, it should be stricken.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

Thomas J. Young, of Young & LaPuzza, for appellant.

David G. Hartmann, of Schneider & Hartmann, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

In this personal injury negligence appeal, plaintiff-appellant Janice H. Menkens, now known as Janice H. Lameo, claims the trial court erred when it permitted the medical witness for defendants-appellees James T. Finley and Arron W. Finley to testify by videotape deposition rather than requiring the witness to personally appear and testify before the jury.

Menkens also claims the trial court erred in overruling her objections to certain testimony of the Finleys' medical witness, Dr. Duane W. Krause.

We reverse the trial court's judgment and remand the cause to the district court for a new trial, except as to Ann L. Finley, who, by summary judgment, was dismissed as a defendant, and she is not involved in this appeal.

This appeal was originally filed in the Nebraska Court of Appeals. We transferred it to this court's docket pursuant to Neb. Rev. Stat. § 24-1106 (Reissue 1995), which permits us to regulate the appellate courts' dockets.

ASSIGNMENTS OF ERROR

Restated, Menkens claims the trial court erred in (1) admitting into evidence the videotape deposition of Dr. Krause without a proper showing of his unavailability to appear personally in court and testify; (2) overruling Menkens' objections to foundation, form, and relevancy to certain testimony of Dr. Krause; and (3) overruling her motion for a new trial.

STANDARD OF REVIEW

The determination of whether a witness is unavailable to appear at trial and give testimony is within the discretion of the trial court, whose ruling will be upheld on appeal in the absence of an abuse of that discretion. See, *State v. McHenry,* 250 Neb. 614, 550 N.W.2d 364 (1996); *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995); *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995).

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion. *Farmers & Merchants Bank v. Grams,* 250 Neb. 191, 548 N.W.2d 764 (1996); *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993).

FACTS

On November 11, 1988, Aaron Finley, the 16-year-old son of James and Ann Finley, while driving his family's automobile, rear-ended a motor vehicle operated by Menkens. Following the collision, Menkens declined ambulance service and drove herself to the emergency room of Dodge County Memorial Hospital in Fremont, Nebraska. There, Menkens was examined by an emergency room physician, and x rays were taken of her lumbar spine. The record reflects that after the accident, to and including the middle of March 1994, Menkens saw various doctors for back pain that she claimed was a result of the 1988 rear-end collision.

In early March 1994, Menkens was referred by her then treating physician to Dr. Krause, medical director of Memorial Hospital's radiology department. Dr. Krause performed a CAT, computerized axial tomography, scan of Menkens' lower lumbar spine and an MRI, magnetic resonance imaging, of her cervical spine. Dr. Krause also reviewed x rays of Menkens taken by his medical partner on November 11, 1988, the day of the rear-end collision, as well as his partner's report on those x rays.

After a pretrial hearing, the trial court sustained the Finleys' motion to take a videotape deposition of Dr. Krause and ruled that it could be used at trial in the absence of Dr. Krause. At a later hearing, the trial court overruled Menkens' form, foundation, and relevancy objections to certain testimony contained in Dr. Krause's deposition.

The Finleys admitted that the sole proximate cause of the accident was the negligence of Aaron Finley and that such negligence was imputed to Aaron's father, James Finley. Therefore, the only issue submitted to the jury was the extent and amount of damages. The jury awarded Menkens damages of $7,864.40. The trial court decreased the judgment to $5,931.50. The lower amount was a result of the court's charging Menkens with certain costs incurred by the Finleys after Menkens rejected the Finleys' offer to confess judgment in Menkens' favor for $10,000, all as provided in Neb. Rev. Stat. § 25-901 (Reissue 1995). Menkens' motion for a new trial was overruled by the trial court. This appeal followed.

ANALYSIS

AVAILABILITY OF DR. KRAUSE AS WITNESS

Menkens claims the trial court erred in admitting into evidence the videotape deposition of Dr. Krause without a proper showing of his unavailability.

This court has determined depositions are hearsay and, as such, are only admissible if they fit within a hearsay exception. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). The exception to the hearsay rule contained in Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995) does not exclude depositions taken in compliance with law if the declarant is unavailable as a witness. Unavailability includes situations outlined in § 27-804(1).

In permitting the taking and using of Dr. Krause's deposition, the trial court relied on Neb. Ct. R. of Discovery 32(a)(3)(E) (rev. 1996), which provides:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
>
> . . . .
>
> (E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used[.]

We have previously held that the Nebraska discovery rules do not provide an additional exception to the hearsay rule. *Maresh, supra*. We have also determined that the unavailability requirement of § 27-804 must be read into rule 32 so that the Nebraska discovery rules do not create an additional exception to the hearsay rule. *Maresh, supra* (stating that to be admissible, deposition must satisfy unavailability requirements of § 27-804(2)(a)). See *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991) (determining witness is unavailable authorizes use of witness' deposition pursuant to rule 32(a)(3)(E)). Consequently, the question before this court is whether Dr. Krause was unavailable, thus satisfying the hearsay exception and thereby allowing his deposition to be used in lieu of his live testimony.

This court has previously addressed the question of a doctor's unavailability as a witness. In *Sikyta, supra,* we reviewed a decision involving the unavailability of a doctor due to his surgery schedule. The attorneys in *Sikyta* met with the trial judge the morning of trial and discussed the use of a videotape deposition of the doctor. The deposition was taken that same evening at the doctor's office. When the deposition was introduced at trial, opposing counsel objected, stating it had not been shown that the doctor was unavailable. The trial court determined that because the doctor was in surgery, he was unavailable to testify and his unavailability constituted an "exceptional circumstance" under rule 32(a)(3)(E). On appeal, opposing counsel argued there was an insufficient showing that the doctor was unavailable. This court noted that determination that a witness is unavailable authorizes the use of the witness' deposition pursuant to rule 32(a)(3)(E). *Sikyta, supra.* However, the specific question of whether the doctor was unavailable under those circumstances was not addressed.

There are few decisions from other jurisdictions dealing with the unavailability of doctors to personally give testimony at trial. The trial court in *Rubel v. Eli Lilly and Co*, 160 F.R.D. 28 (S.D.N.Y. 1995), determined a doctor was unavailable to testify because he was in a practice with three other doctors who were all gone, leaving him to manage the entire practice alone. Within the 2 weeks before the trial, one colleague retired for physical reasons, one left for maternity leave, and one was hospitalized for an undiagnosed illness. The court found these facts created specific and unusual circumstances that rendered the doctor unavailable. However, the court did not find the doctor too busy to make any time available for the case and granted the parties leave to take his depositions after business hours at his office.

In *Reber v. General Motors Corp.*, 669 F. Supp. 717 (E.D. Pa. 1987), the trial court allowed a doctor's deposition to be admitted in evidence, after the doctor claimed his heavy surgical schedule prohibited him from attending the trial. However, the deposition was permitted principally because it had been taken with both sides expecting its use at trial.

In *Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957 (10th Cir. 1993), the court did not permit a physician's deposition to be admitted in evidence. The physician stated he was unable to appear in court because he was "'extremely busy'" during the time scheduled for his testimony. *Id.* at 963. His office was close to the courthouse, and the court offered to accommodate his schedule. Counsel could not persuade the doctor to testify and did not subpoena him. The court found that counsel's inability to get the doctor to testify did not justify the deposition being received into evidence.

In this case, Dr. Krause was not in surgery when his testimony was required. The record reflects no specific and unusual circumstances that show Dr. Krause was unavailable. The parties here did not agree to use the deposition at trial, and Dr. Krause was within the subpoena power of the court.

Trial courts may be guided in their determination of whether a witness is unavailable by examples set forth in *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). A witness may be unavailable when the facts show

> the witness' attendance is obtainable only through financial hardship on the proponent, that the expense to produce the witness may be prohibitive, that hostility or animosity on the part of the witness may prevent attendance at trial, or that other circumstances may demonstrate that the proponent lacks "reasonable means" to produce or compel the witness' attendance at trial.

Id. at 507, 489 N.W.2d at 308.

Upon examination of all the aforementioned factors, we conclude from the record that Dr. Krause was not unavailable to testify. The Finleys made no showing that they lacked reasonable means to produce Dr. Krause's attendance at trial. The fact that it was "really difficult" for Dr. Krause to testify because he was required to be at the hospital for emergencies is not persuasive. In a letter to the Finleys' attorney, Dr. Krause stated that while his partner was gone, he was "committed to providing continuous 7:30 AM - 5:30 PM Monday through Friday coverage at the radiology department at Memorial Hospital" and that "except for occasionally over a noon hour, we have a commitment to the Hospital and its medical staff to always have

a radiologist available during working hours and on-call 24 hours a day, 7 days a week." (Emphasis supplied.)

Dr. Krause could have testified prior to his shift, during the noon hour, or after the completion of his shift. While testifying early in the morning, over the noon hour, or at 5:30 p.m. may be an inconvenience, it does not render a witness unavailable. Dr. Krause was not unique in that he had a job which he could not leave during the workday. An inconvenience does not justify the use of a deposition over live testimony.

The importance of live testimony has long been recognized by the courts and commentators. See, *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 800[01] (1992). The unavailability requirement itself is a result of a strong policy favoring live testimony. *Maresh v. State, supra*; 2 McCormick on Evidence § 31 at 301 (John W. Strong 4th ed. 1992).

Dr. Krause's being on call at the hospital does not establish unavailability. That he *might* have had to leave the proceedings if an emergency arose also does not constitute unavailability. Had Dr. Krause testified at the trial and an emergency arose, he certainly could have been excused and could have returned to the hospital. The mere threat of an emergency or something unexpected or unforeseeable, such as a sudden summons to the hospital, does not automatically render a doctor unavailable to testify in court. Use of rule 32(a)(3)(E) requires a showing that the witness is unavailable in order to use the witness' deposition in court. We conclude from the record that the trial court abused its discretion in finding Dr. Krause was unavailable and in admitting his deposition.

RULE 32(a)(3)(F)

The Finleys argue that Dr. Krause's deposition should have been admitted pursuant to rule 32(a)(3)(F), which states:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
>
> . . . .
>
> (F) Upon application and notice prior to the taking of the deposition, that circumstances exist such as to make it

> desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

We have clearly stated that unavailability must be read into rule 32 so as to avoid a judicially created exception to the hearsay rule. See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Therefore, it follows that unavailability must be read into the requirements of rule 32(a)(3)(F).

Comments to the rule make clear that rule 32(a)(3)(F) authorizes the court to make "use of the deposition in the absence of exceptional circumstances if the application is made before the deposition is taken." Therefore, while rule 32(a)(3)(F) does not require "exceptional circumstances" to be present before a deposition is admitted, it still requires a showing of the witness' unavailability. The record reflects that the Finleys' counsel (1) made application and (2) gave notice prior to the taking of the deposition, both of which are requirements under the rule. However, advance application and notice do not negate the unavailability requirement. Because we find that Dr. Krause was not unavailable, we hold admission of his deposition was an abuse of discretion.

Neb. Rev. Stat. § 27-803(22) (Reissue 1995)

The Finleys urge that Dr. Krause's deposition is admissible under § 27-803(22), the residual hearsay exception. This issue was not presented in the trial court. An issue not presented to the trial court may not be raised on appeal. *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995). Therefore, we decline to address it.

Plaintiff's Objections to Dr. Krause's Testimony

Menkens also assigns as error the trial court's overruling of her foundation, form, and relevancy objections to certain testimony of Dr. Krause. The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995).

During his deposition, on direct examination by the Finleys' lawyer, Dr. Krause stated there was nothing in the November 11, 1988, x rays that he could relate to an accident. He further stated there was nothing in these x rays that he could attribute to trauma, which he described as an injury resulting from an accident.

In answer to a question on cross-examination, Dr. Krause asked, "Was this patient [Menkens] injured in that [November 11, 1988,] car accident?" He replied to his own question, "I can't offer an opinion." Thereafter, Menkens' lawyer asked the following questions, and Dr. Krause gave the following answers:

> Q. You can't offer an opinion because you don't have the underlying clinical history; is that correct?
>
> A. That's correct. I have never examined the patient. I don't have the clinical history in detail. I have never examined the patient.
>
> Q. So, in order to proffer an opinion with regard to whether or not she sustained any injury, by reason of the trauma of the accident, you would have had to have a physical examination and obtain clinical history from this patient; is that correct?
>
> A. Someone would have to.
>
> Q. Someone would. But you have not; is that correct?
>
> A. No, I have not. I have not.

Later, Dr. Krause testified, "I cannot offer an opinion as to whether or not any pain this patient [Menkens] has is or is not related to that [1988] car accident."

Expert testimony should not be received into evidence if it is evident that the witness does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess. Without an adequate basis of facts, the witness should not be allowed to give an opinion. *Hoegerl v. Burt*, 215 Neb. 752, 340 N.W.2d 428 (1983); *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 277 N.W.2d 236 (1979).

Dr. Krause testified that there was nothing in the x rays or CAT scan that he could relate to any trauma of the November 11, 1988, accident. Menkens objected to this testimony, claiming that it lacked foundation and was irrelevant. We agree with

Menkens that any opinion by Dr. Krause as to whether or not Menkens' condition was caused by the collision was without foundation and lacked relevance.

Dr. Krause testified that everything he saw on Menkens' x rays, CAT scan, and MRI exams he could have seen in a person who had never been in a car accident. He testified that to give an opinion in Menkens' case, a clinical history and a physical exam were required. Dr. Krause testified he had neither obtained a clinical history of Menkens nor had he physically examined her.

Dr. Krause's own statements reveal he was not in possession of the facts necessary to testify to the effect the collision had on Menkens. Where an expert's opinion testimony does not have a sound and reasonable basis, it should be stricken. *Wentling v. Jenny*, 206 Neb. 335, 293 N.W.2d 76 (1980); *Clearwater Corp., supra*. Dr. Krause's opinion had no adequate, sound, or reasonable basis; therefore, it lacked foundation, and its admission was an abuse of discretion on the part of the trial court.

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). Evidence is probative if it tends in any degree to alter the probability of a material fact. *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988). Dr. Krause's opinion had no adequate, sound, or reasonable basis and was, therefore, unreliable. An unreliable opinion does not tend to alter the probability of a material fact and, hence, is irrelevant.

Additionally, Dr. Krause's testimony lacked certainty. Dr. Krause testified he could not offer an opinion regarding whether Menkens was injured in the November collision. Lack of certainty in an expert's opinion is a problem of relevance. See, *McWhirt v. Heavey,* 250 Neb. 536, 550 N.W.2d 327 (1996); *Paulsen v. State,* 249 Neb. 112, 541 N.W.2d 636 (1996).

It is clear from Dr. Krause's testimony that his opinion regarding the effect of the November 11, 1988, collision on Menkens was without foundation and relevance.

CONCLUSION

We conclude that the trial court abused its discretion by admitting into evidence Dr. Krause's deposition testimony. We vacate the jury's verdict, reverse the judgment of the trial court, and remand the cause to the district court for a new trial. Because we find that a new trial is necessary, we need not reach Menkens' remaining assigned error.

REVERSED AND REMANDED FOR A NEW TRIAL.

LANPHIER, J., participating on briefs.

RICHARD E. MOULTON, APPELLEE, V. BOARD OF ZONING APPEALS FOR THE CITY OF LINCOLN, NEBRASKA, APPELLANT.

555 N.W.2d 39

Filed November 8, 1996. No. S-94-1061.

1. **Zoning: Appeal and Error.** A zoning board of appeals is vested with discretion to dispose of matters within its province, but its acts are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary.
2. **Final Orders: Appeal and Error.** An appellate court first must address whether or not a final order exists so that an appeal can be made.
3. **Final Orders: Words and Phrases.** An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in Neb. Rev. Stat. § 25-1902 (Reissue 1995).
4. **Final Orders: Words and Phrases: Appeal and Error.** To be a "final order" that determines the action and prevents a judgment, the order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory. If the party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final for purposes of appeal.
5. **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.
6. **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.

7. **Summary Judgment: Final Orders: Appeal and Error.** The denial of a motion for summary judgment is not a final order and therefore is not appealable.
8. **Claims: Res Judicata: Appeal and Error.** A claim before a tribunal, be it an administrative agency or a municipal board, is res judicata and may not, as a general rule, be relitigated once there has been a petition for judicial review and the petition has been dismissed.
9. **Res Judicata: Judgments.** The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication 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.
10. **Res Judicata: Public Policy.** There are at least two exceptions to the general rule of res judicata, which include an intervening change in facts or circumstances and an announced public policy by the legislative branch of government that the preclusion issues do not apply.
11. **Ordinances.** A court will give the language of a city ordinance its plain and ordinary meaning.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

William F. Austin, Lincoln City Attorney, and Dana W. Roper for appellant.

Richard E. Moulton, pro se.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and REAGAN, D.J.

PER CURIAM.

Appellee Richard E. Moulton, seeking a zoning variance, appeared before appellant Board of Zoning Appeals (Board) for the city of Lincoln, Nebraska, which held a hearing on June 25, 1993, on Moulton's application dated June 1, 1993. The Board subsequently ruled that res judicata prevented it from ruling on the merits of this sixth application for variance, the previous five nearly identical applications having been denied. The last application immediately before the June 1, 1993, application was submitted by Moulton on September 7, 1990. Moulton appealed the denial of his June 1, 1993, application to the Lancaster County District Court pursuant to Neb. Rev. Stat.

§ 15-1201 (Reissue 1991), which provides that a person aggrieved by a decision of the Board may appeal to the district court. The Board filed a motion for summary judgment in the district court, which was denied. In that same order, the district court remanded the matter to the Board for further hearing, finding that res judicata did not apply because of a city ordinance. The Board appealed that order, stating (1) that res judicata applies to the Board and applies pursuant to the ordinance of the city of Lincoln and (2) that the district court erred in entering an order pursuant to the Board's motion for summary judgment or partial summary judgment as being contrary to the law and the facts of this case. We affirm the judgment of the district court.

BACKGROUND

Moulton, a landowner, applied to the Board for variance of the minimum lot size. Since 1983, the same, or substantially the same, request had been denied at five previous hearings. Before a hearing was held on this most recent application, the Board inquired of Moulton as to whether a material change in circumstances had taken place as to the zoning, parking requirements, or open space requirements, or in the neighborhood.

The resolution of the Board stated:

> Specifically, the Board finds that the parties are bound by the previous ruling(s) on the merits of the application by the doctrine of res judicata, because the application is substantially similar to previously denied applications for the same property, and there has been no material change in circumstances affecting this property since the previous denials. The Board has heard and denied substantially similar applications on five previous occasions. The Board finds that there has not been a material change in the circumstances. There has been no change in the zoning laws affecting the property, no change in the parking requirements, no change in the density requirements, no change in the open space requirements, and there has been no change in the neighborhood which would eliminate the need for the above requirements. Therefore, for all of the

above reasons the Board of Zoning Appeals refuses to reach the merits of the application for variance.

The foregoing res judicata analysis presumes the validity of the rulings in the previous hearings without relitigating what was at issue in those prior hearings. The focus was on a "change in circumstances." The Board refused to "reach the merits of the application for variance."

Moulton appealed the refusal to the district court. The Board filed a motion for summary judgment.

During the hearing on the Board's motion for summary judgment, the following exchange took place:

> The Court: So I assume that from the standpoint of your motion for summary judgment, if I conclude that the res judicata applies, depending upon — I haven't looked at everything, I suppose that — on the other hand — then I suppose I could grant the summary judgment. I suppose, on the other hand, though, to try to save everybody some time, if I conclude that res judicata does not apply, it is not applicable to a Board such as the Board of Zoning Appeals, I suppose even though Mr. Moulton hasn't asked for it, I could almost overrule your motion, find they applied the wrong thing and remand the matter back to them to give a hearing so there is record to review.
>
> [The Board's attorney]: Yes.

In denying the motion for summary judgment, the district court stated:

> Section 83 (4) of the Restatement provides that a prior decision of the tribunal is not conclusive if such result would be contrary to the legislative policy of the entity in question. Such is the case here. Section 27.75.050 of the Lincoln Municipal Code provides: "In the event that the proposed variance or exception is denied by the Board of Zoning Appeals, no new request shall be made of the same or a substantially similar variance or exception within one year of said denial thereof." It is obvious that the only restriction is that the new application be filed at least one year following the prior denial of a similar application. Res judicata does not apply and the Board was in error in

refusing to hear such appeal since more than one year had elapsed from the date of the prior denial.

IT IS ORDERED that the Motion for Summary Judgment be denied. It is further ordered that these matters be remanded to the Board of Zoning Appeals of the City of Lincoln, Nebraska for a hearing on the merits of the appellant's applications. All costs are taxed to the City of Lincoln.

The Board appealed the order.

ASSIGNMENTS OF ERROR

The Board assigns as error:

1. That res judicata applies to the Board of Zoning Appeals and applies under the ordinance of the City of Lincoln.

2. The District Court erred in entering an Order pursuant to the Appellant's Motion for Summary Judgment or Partial Summary Judgment as being contrary to the law and facts of this case.

STANDARD OF REVIEW

A zoning board of appeals is vested with discretion to dispose of matters within its province, but its acts are judicial in nature and are subject to review and reversal when they constitute an abuse of discretion and are arbitrary. *McClelland v. Zoning Bd. of Appeals*, 232 Neb. 711, 441 N.W.2d 893 (1989); *Alumni Control Board v. City of Lincoln*, 179 Neb. 194, 137 N.W.2d 800 (1965); *Peterson v. Vasak*, 162 Neb. 498, 76 N.W.2d 420 (1956).

Neb. Rev. Stat. § 15-1205 (Reissue 1991) does not limit review to illegality, but provides that appeals from various organs of a city of the primary class shall be considered as in equity. Thus, such decisions are quasi-judicial in nature and reviewable under § 15-1201 as in equity in both the trial and appellate courts. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994).

In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court;

however, where credible evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Whitehead Oil Co., supra.* See, *Rigel Corp. v. Cutchall*, 245 Neb. 118, 511 N.W.2d 519 (1994); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993).

ANALYSIS

FINAL ORDER

We first must address whether or not a final order exists so that an appeal can be made. See *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994).

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in Neb. Rev. Stat. § 25-1902 (Reissue 1995).

To be a "final order" that determines the action and prevents a judgment, the order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory. If the party's substantial rights are not determined by the court's order and the cause is retained for further action, the order is not final for purposes of appeal. *Rohde, supra*; *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960).

The order in this case is a denial of a motion for summary judgment and a remand. 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. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996); *Boyd v.*

Chakraborty, 250 Neb. 575, 550 N.W.2d 44 (1996); *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996).

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. *Bruning, supra*; *Harrison, supra*; *Continental Mortgage v. Johnson*, 250 Neb. 484, 549 N.W.2d 640 (1996).

Standing alone, the denial of a motion for summary judgment is not a final order and therefore is not appealable. See *Farmers & Merchants Bank v. Grams,* 250 Neb. 191, 548 N.W.2d 764 (1996). In this case, the sole ground for the motion for summary judgment was that the determination by the Board based on res judicata was correct. The district court denied the motion and ruled that res judicata did not apply. Alone, this denial would not be appealable. However, the court further found that the Board was in error in refusing to hear the merits of the appeal and remanded the appeal to the Board. The district court's denial of the motion for summary judgment and the remand affected a substantial right of the Board, that is, to deny a hearing on the merits. Further, the court's order disposed of the whole merits of the case and left nothing for further consideration, and no further action of the court was required to dispose of the pending cause. Also, the district court did not retain jurisdiction for further action. We therefore hold, pursuant to the *Rohde* analysis, that denial of the motion for summary judgment and remand was a final order. In *Rohde*, we held that a final order existed because no further action was required and a substantial right of the appellant was affected. The trial court had granted a directed verdict to the appellant. The district court's order reversing the judgment of the trial court and remanding the case for a trial on the merits took away the judgment that had been rendered in the appellant's favor.

RES JUDICATA

A claim before a tribunal, be it an administrative agency or a municipal board, is res judicata and may not, as a general rule, be relitigated once there has been a petition for judicial review and the petition has been dismissed. *Kirkland v. Abramson*, 248

Neb. 675, 538 N.W.2d 752 (1995); *L.J. Vontz Constr. Co. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993).

Therefore, the Board, in the absence of other authority, could make use of the doctrine of res judicata. In this case, however, there is an ordinance which was entered into evidence and argued by both parties.

The ordinance provides in part: "In the event that the proposed variance or exception is denied by the Board of Zoning Appeals, no new request shall be made for the same or a substantially similar variance or exception within one year of said denial thereof." Lincoln Mun. Code § 27.75.050 (1994).

To understand the effect of this ordinance, it is necessary to first discuss the common-law doctrine of res judicata. The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication 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. *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996); *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995).

There are at least two exceptions to the general rule of res judicata, both of which merit some discussion in this opinion.

The first exception to the general rule is when there has been an intervening change in facts or circumstances. The second exception is when there has been an announced public policy by the legislative branch of government that the preclusion issues do not apply. See *Scott v. Mattingly,* 241 Neb. 276, 488 N.W.2d 349 (1992).

In the instant case, the Board properly concluded that the first exception, regarding an intervening change in facts or circumstances, did not apply. However, the Board did not consider the second exception to res judicata stated in *Scott*. Here, the announced public policy by the legislative branch of government is the city ordinance.

To interpret the effect the ordinance has on the common-law doctrine of res judicata, it is necessary to look at the ordinance's

plain meaning. This court will give the language of a city ordinance its plain and ordinary meaning. *Shamberg v. City of Lincoln*, 174 Neb. 146, 116 N.W.2d 18 (1962).

The plain meaning of municipal ordinance § 27.75.050 is that the general rules of exclusion apply, but only for a 1-year period of time. This is, in effect, a codification by municipal ordinance of the doctrine of res judicata. The ordinance on its face provides for a specific finite time during which res judicata will bar reapplication to the board. The ordinance provides that a person must wait for a year. Implicitly, after 1 year, a new request for the same or substantially the same variance as that previously requested can be made.

We note that the Board cites cases from other jurisdictions in order to persuade this court that ordinances have been interpreted to not abrogate the doctrine of res judicata. See, *Rhema Christian Ctr. v. Bd. of Zoning Adj.*, 515 A.2d 189 (D.C. App. 1986); *Root v. Zoning Bd. of Appeals*, 41 Conn. Supp. 218, 565 A.2d 14 (Conn. Super. 1989). These cases are not persuasive. Although similar language was at issue in *Rhema Christian Ctr.*, the court was considering a federal regulation, not a municipal ordinance. In *Root*, 41 Conn. Supp. at 221, 565 A.2d at 16, the court was faced with a statute which stated, " 'No such board shall be required to hear any application for the same variance . . . ,' " and interpreted that the word "required" allowed the board discretion regarding res judicata. No such language appears in § 27.75.050.

We hold that municipal ordinance § 27.75.050, by its plain language, allows for the Board to use res judicata to avoid hearing repeat applications for a 1-year time period only. The request for variance in this case was made more than 1 year after the previous request for variance. The ruling of the district court was correct.

CONCLUSION

We hold that the Board could not apply res judicata in the present case. Over 1 year had elapsed since the previous application. The district court order is hereby affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

GERRARD, J., dissenting.

I disagree with the majority holding that the common-law doctrine of res judicata is abrogated by the municipal ordinance at issue. I agree with the proposition that to interpret the effect of the ordinance on the common-law doctrine of res judicata, it is necessary to look at the ordinance's plain language and give such language its plain and ordinary meaning. However, we must also be mindful of the well-settled rule that legislative enactments which effect a change in the common law or take away a common-law right should be strictly construed. See, *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989).

The ordinance at issue provides that following the denial of a requested zoning variance, no new *request* shall be made for the same or substantially similar variance within 1 year of said denial. Strictly construed, the ordinance only precludes an individual from making a new request for a variance when the same or substantially similar request was denied within the previous 12-month period. Strictly construed, the ordinance is silent as to whether a board must redetermine the merits of such request every 12 months.

In my view, the ordinance represents a legislative attempt to prevent the zoning docket from being cluttered with successive applications by applicants previously denied relief. It does not evince a legislative intent to permit such an applicant to force the redetermination of the identical issue every 12 months. See *Marks v. Zoning Bd. of Providence*, 98 R.I. 405, 203 A.2d 761 (1964).

When a material change of circumstances affecting the merits of an application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, there is no need for the board of adjustment to reach the merits of the application.

Traditional zoning law itself has long recognized the quasi-judicial function of zoning boards and incorporated the concept of claim preclusion or res judicata. As a general proposition, when a special exception or variance is denied and the applicant, after a required waiting period, resubmits the same or a substantially similar application, the applicant must demon-

strate that conditions have changed such that the reasons for the previous denial no longer apply. *Rhema Christian Ctr. v. Bd. of Zoning Adj.*, 515 A.2d 189 (D.C. App. 1986); *Bright v. Zoning Board of Appeals*, 149 Conn. 698, 705, 183 A.2d 603, 606 (1962) (on reapplication after board denied variance, board may not "revoke its former action" without "change in conditions or new considerations materially affecting the merits"); *Marks v. Zoning Bd. of Providence*, 98 R.I. at 406, 203 A.2d at 763 (on reapplication 18 months after board denied variance, board may not reverse decision without "substantial or material change in circumstances" between the two decisions). See *First Baptist Church v. District of Columbia*, 432 A.2d 695, 701 (D.C. App. 1981), quoting *Spencer v. Board of Zoning Appeals*, 141 Conn. 155, 104 A.2d 373 (1954) (opponent to reissuance of permit extending special exception must show " 'change of conditions [or] other considerations materially affecting the merits . . .' "). See, generally, 4 Robert M. Anderson, American Law of Zoning §§ 22.53 and 22.54 (3d ed. 1986).

In the instant case, the same, or substantially the same, request for a variance had been denied at five previous hearings since 1983. The board inquired of the applicant as to whether a material change in circumstances had taken place as to the zoning, parking requirements, or open space requirements, or in the neighborhood, and it was determined that no changes had occurred since the last hearing. To hold that the ordinance at issue compels the board to redetermine the merits of an applicant's petition without a scintilla of evidence that a change in circumstances has taken place eliminates finality in proceedings before the board, threatens the integrity of the zoning plan, and places an undue burden on property owners and city officials seeking to uphold an established zoning plan. See *Fisher v. City of Dover*, 120 N.H. 187, 412 A.2d 1024 (1980). As a practical matter, the majority's holding also effects a substantial waste of valuable governmental and human resources.

The municipal board correctly applied the doctrine of res judicata in the instant case. Therefore, I respectfully dissent.

REAGAN, D.J., joins in this dissent.

RICHARD HAUSERMAN ET AL., APPELLEES, V. CONNIE STADLER, AN INDIVIDUAL, APPELLANT, AND BRENT LEWIS, CITY ZONING INSPECTOR OF THE CITY OF MINDEN, KEARNEY COUNTY, NEBRASKA, ET AL., APPELLEES.

554 N.W.2d 798

Filed November 8, 1996. No. S-94-1149.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Declaratory Judgments.** A declaratory judgment is by definition forward-looking, for it provides "preemptive justice" designed to relieve a party of uncertainty before the wrong has actually been committed or the damage suffered.
3. ____. The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.
4. ____. A declaratory judgment action should not be entertained where another equally serviceable remedy is available.

Appeal from the District Court for Kearney County: BERNARD SPRAGUE, Judge. Reversed and dismissed.

Kent A. Schroeder, of Ross, Schroeder, Brauer, & Romatzke, for appellant.

Bradley J. White, of Helmann Sullivan & White, P.C., for appellees Richard Hauserman et al.

Kent A. Hadenfeldt, of Luebs, Leininger, Smith, Busick & Johnson, for appellees Brent Lewis et al.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CONNOLLY, J.

The appellant, Connie Stadler, built a fence around her yard in Minden, Nebraska. Stadler's neighbors successfully sought a declaratory judgment in which the district court determined that a fence is a "structure" as defined by the Minden city code and that Stadler was therefore required to obtain a zoning certificate authorizing the construction. Stadler appeals, contending that a declaratory judgment is an inappropriate remedy and that a zon-

ing certificate is not required for constructing a fence. We conclude that a declaratory judgment was not appropriate in this case because a declaratory judgment is preemptive in nature and other serviceable remedies existed.

BACKGROUND

Stadler, a resident of Minden, decided to build a privacy fence around her yard in July 1992. Before the building commenced, Stadler asked city officials if she would need a permit for the fence. Stadler was informed by Brent Lewis, the city zoning inspector, that the City of Minden had no ordinance dealing with fences and that she therefore did not need a building permit or zoning certificate prior to building. Because Stadler's house is located on a state highway, however, Lewis suggested that Stadler contact state officials regarding possible restrictions on building her fence. Stadler then contacted the Nebraska Department of Roads office in Holdrege, Nebraska, and was informed that the state could not restrict the building of her fence, provided it did not cross the sidewalk.

In September 1992, Stadler's general contractor began to drill the holes where the fenceposts would be. Before the actual construction began, Stadler once again approached Lewis to determine if a building permit or zoning certificate was needed. This time, Lewis visited the site of the fence and once again assured Stadler that the building of the fence would not be contrary to any city ordinance. Lewis also informed Stadler's contractor that no building permit or zoning certificate was needed for the fence.

The fence was completed at the end of October 1992. The fence consists of double boarding, a concrete curb around the base, and posts set in concrete. The approximate height of the fence is 6 feet.

Richard Hauserman lives next door to Stadler. Hauserman testified that he observed the construction taking place and was able to determine that a fence would ultimately be built. Upset with the prospect of having "a fence for a neighbor," Hauserman contacted city officials to determine if a zoning certificate or building permit was required for the building of the fence and was told there was no such requirement.

After the fence was completed, Hauserman, along with Donald Berndt and Austin Dodge, also neighbors of Stadler, all three hereinafter collectively referred to as "the appellees," complained to members of the city council at its December 7, 1992, meeting. Pursuant to the request of the council, the appellees made a written request to the city that some action be taken regarding Stadler's building of her fence without a permit. In response to this request, Lewis issued an opinion that Stadler did not need a building permit or zoning certificate for her fence.

Pursuant to city ordinance, the appellees filed an appeal of Lewis' opinion to the planning and zoning commission of the City of Minden, sitting as the board of adjustment. The commission sustained the appeal and determined that Stadler was required to obtain a zoning certificate prior to constructing her fence. Stadler successfully appealed this decision to the city council, sitting as the "Official Board of Adjustment." The council affirmed the decision of Lewis, finding that there was no city ordinance dealing with fences and that Stadler was therefore not required to obtain a zoning certificate.

The appellees, apparently in an effort to cover all bases, appealed the city council decision to the district court for Kearney County in three separate actions: a petition in error, a petition on direct appeal, and a declaratory judgment action. The district court dismissed, without explanation, the first two causes of action for want of jurisdiction, but allowed the declaratory judgment action to proceed to trial. The appellees did not appeal the dismissals of the petition in error or the petition on direct appeal.

In their amended petition for a declaratory judgment, the appellees sought a judgment from the district court, declaring the following:

> (1) That the fence constructed by Defendant Stadler is a "structure" under the provision[s] of §15-202.02 and/or §15-202.28 of the Zoning Code of the City of Minden . . . .
>
> (2) That as a "structure", the construction of said fence is subject to the restrictions and requirements of said zoning code . . . .

(3) That the decision of Defendant Lewis that Defendant Stadler need not file an application for said permit and said certificate was contrary to the relevant provisions of said code;

(4) That the provision[s] of [N]eb. Rev. Stat. §19-901 et seq. (reissue 1991) were violated by the Defendant City Council when it "acted" as the "Official Board of Adjustment of the City of Minden";

(5) That the Construction of said fence by Defendant Stadler was illegal for the reason that it violated the relevant cited provisions of said code; and

(6) That said fence having been constructed illegally, the City of Minden shall cause the fence to be removed.

Stadler responded to the petition by filing a demurrer, alleging among other things, that a declaratory judgment is improper because there is another pending action between the same parties for the same cause.

The district court overruled the demurrer and allowed the declaratory judgment action to proceed to trial. Upon conclusion of trial, the district court issued a declaratory judgment, stating that a fence is a structure as defined by the city ordinances of Minden and that a zoning permit must be obtained to properly authorize the construction of a fence. The court therefore ordered Stadler to apply for a zoning permit for her completed fence.

The appellees subsequently filed a motion to reconsider and/or for a new trial. In this motion, the appellees requested the district court to reconsider its findings and issue new findings stating that the court's order requiring a "zoning permit" to authorize construction be changed to require either a "zoning certificate" or a "building permit," in that there is no such thing as a "zoning permit" under the Minden city code. The appellees also requested that the findings of the court be modified to provide that the fence, having been built without the appropriate certificates and permits, constitutes a continuing violation and that as a continuing violation should be removed by the City of Minden.

This motion was denied, except that the court did make a nunc pro tunc entry modifying the findings to state that the

structure required a zoning certificate and that Stadler was therefore required to make application for a zoning certificate and not a zoning permit.

Stadler appeals the declaratory judgment order.

ASSIGNMENTS OF ERROR

Stadler asserts that the district court erred (1) in finding that a declaratory judgment was an appropriate remedy in this case, (2) in determining that a fence is a structure within the meaning of the Minden city code, and (3) in finding that Stadler should be required to obtain a zoning certificate for the fence she built.

STANDARD OF REVIEW

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996); *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 315 (1996); *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

ANALYSIS

Resolving the appeal before us necessarily requires us to first address Stadler's contention that a declaratory judgment is not an appropriate remedy in this case, because it is a threshold issue that may be determinative in this appeal.

This declaratory judgment action was initiated pursuant to Neb. Rev. Stat. § 25-21,150 (Reissue 1995), which provides:

> Any person interested under a deed . . . or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

A declaratory judgment is by definition forward-looking, for it provides " 'preemptive justice' designed to relieve a party of uncertainty before the wrong has actually been committed or the damage suffered." *Barelmann v. Fox*, 239 Neb. 771, 788,

478 N.W.2d 548, 559 (1992). In addition, "[t]he function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies." *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 257, 518 N.W.2d 124, 128 (1994). In harmony are our repeated statements that a declaratory judgment action should not be entertained where another equally serviceable remedy is available. *Ryder Truck Rental v. Rollins, supra*; *Zarybnicky v. County of Gage*, 196 Neb. 210, 241 N.W.2d 834 (1976).

In addressing the appropriateness of the use of a declaratory judgment in this case, we must ascertain the precise relief sought by the appellees. Although the appellees claim they are simply trying to enforce the Minden zoning ordinances, an examination of their amended petition for declaratory judgment and motion to reconsider shows that the appellees ultimately want to have the fence removed. It is undisputed that the fence was completed prior to the filing of this action.

In *Barelmann v. Fox, supra*, we examined the appropriate use of a declaratory judgment in a situation analogous to the instant case. At issue in that case was whether the Barelmanns could seek a declaratory judgment regarding whether or not the sheriff conducted a replevin of goods in violation of state laws. Of particular importance was the fact that the replevied property had already been turned over to the bank by the time the declaratory action was brought. Keeping in mind that a declaratory judgment provides "preemptive justice," we held that this fact precluded the use of a declaratory judgment because the alleged harm, namely the wrongful replevin of goods, had already occurred. In addition, a declaratory judgment was also held to be inappropriate because the Barelmanns had other, equally serviceable remedies available to them. In light of these other remedies, we stated that "the Barelmanns cannot be allowed to bring an action for declaratory judgment simply because their other remedies, for one reason or another, failed or were not pursued." *Id.* at 789, 478 N.W.2d at 560.

Applying these principles to the instant case leads us to conclude that the district court was incorrect in issuing a declara-

tory judgment. Similar to the situation in *Barelmann*, the alleged harm in the instant case, namely the building of the fence without a zoning certificate, had already occurred by the time the appellees brought this declaratory judgment action. Thus, a declaratory judgment requiring Stadler to obtain a certificate to "authorize" construction of her fence *after* it was completed is necessarily retroactive in nature and therefore fails to provide "preemptive justice." Moreover, the appellees had other, equally serviceable remedies available to them, as evidenced by the simultaneous filing of a petition in error and a petition on direct appeal from the decision of the city council, acting as the board of adjustment. In accordance with our reasoning in *Barelmann*, the dismissal of these other remedies in no way facilitates the use of a declaratory judgment. Accordingly, we hold that a declaratory judgment is inappropriate in this case and should not have been issued.

CONCLUSION

The district court erred in issuing a declaratory judgment in this matter. This determination makes it unnecessary for us to address the remaining assigned errors.

REVERSED AND DISMISSED.

GERRARD, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. STEVEN B. GREEN, RESPONDENT.

554 N.W.2d 790

Filed November 8, 1996. No. S-96-794.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Steven B. Green was admitted to the practice of law in Nebraska on October 9, 1985.

On July 23, 1996, a two-count complaint was filed against Green in this court by the Nebraska State Bar Association Committee on Inquiry of the Second Disciplinary District. Count I alleged that on or about March 1, 1995, Green agreed to represent a client in a domestic dissolution proceeding and the client paid Green a $500 retainer, plus an $84 filing fee. The complaint further charged that Green failed to file the dissolution proceeding for the client, failed to communicate with the client, failed to refund the fees and expenses paid by the client to him, and failed to deposit the money he received in a separate attorney trust account. Count II of the complaint alleged that Green failed to pay for court reporter services for which he had contracted. It is also alleged that Green failed to respond to inquiries by the Nebraska State Bar Association's Counsel for Discipline concerning the claim of nonpayment, even though the allegations of nonpayment were made known to him, and that such failure to respond violated a disciplinary rule of this court.

On July 24, 1996, an additional charge against Green was filed in this court by the Nebraska State Bar Association's Counsel for Discipline. Count III alleged that another client, on or about November 20, 1994, retained Green's services to represent her in a divorce proceeding; that the client gave Green a check for $610; that Green cashed the client's check; and that Green failed to place the proceeds in a separate attorney trust account, failed to file the divorce proceeding, failed to communicate with his client, and failed to refund the fees and expenses paid by the client to him; all in violation of the disciplinary rules of this court.

On October 17, 1996, Green filed a written voluntary surrender of his license to practice law in this state. In that document, Green admits the factual allegations in Counts I and III of the charges. As to Count II of the charges, Green admits that he failed to pay for court reporting services for which he had contracted.

Green also admits that his conduct violated the following provisions of the Code of Professional Responsibility as adopted by this court: Canon 1, DR 1-102 (A) (1), (4), (5), and (6); Canon 6, DR 6-101 (A) (3); Canon 7, DR 7-101 (A) (2);

and Canon 9, DR 9-102 (A) (1) and (2) and (B)(4), which provide:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> . . . .
>
> (3) Neglect a legal matter entrusted to him or her.
>
> . . . .
>
> DR 7-101 Representing a Client Zealously.
>
> (A) A lawyer shall not intentionally:
>
> . . . .
>
> (2) Fail to carry out a contract of employment entered into with a client for professional services . . . .
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the

client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

. . . .

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

In the written voluntary surrender of his license to practice law in this state, Green freely and voluntarily consented to the entry of an order of disbarment and freely and voluntarily waived his rights to notice, appearance, or hearing prior to the entry of the disbarment order.

We accept Green's surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately. We further order Green to comply with this court's Neb. Ct. R. of Discipline 16 (rev. 1996), and in the event of his failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KENT F. JACOBS, RESPONDENT.

555 N.W.2d 54

Filed November 8, 1996. No. S-96-1035.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Kent F. Jacobs was admitted to the practice of law in the State of Nebraska on June 22, 1970. Jacobs was thereafter engaged in the private practice of law in Seward, Nebraska.

On October 18, 1996, Jacobs filed a voluntary surrender of his license to practice law in Nebraska. In voluntarily surrendering his license, Jacobs admitted that he borrowed $260,000 on an unsecured promissory note from a client while representing that client in a different matter. Jacobs also admitted that he did not advise the client to require collateral for the note or to obtain independent legal advice.

In his surrender of license, Jacobs stated that his failure to advise his client regarding the lack of collateral on the note and the need for independent legal advice constituted a violation of Canon 5, DR 5-104(A), of the Code of Professional Responsibility adopted by the Nebraska Supreme Court. DR 5-104(A) provides that "[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

Jacobs admits in his filing that he knowingly and voluntarily surrenders his license to practice law and consents to the entry of an order of disbarment. Jacobs also freely, knowingly, and voluntarily waives his right to notice, appearance, or hearing prior to the entry of such order.

We accept Jacobs' surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

BLUFF'S VISION CLINIC, P.C., APPELLEE, V.
SUSAN KRZYZANOWSKI, APPELLANT.
555 N.W.2d 556

Filed November 15, 1996. No. S-94-787.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a matter of law; therefore, an appellate court reaches a conclusion independent from that of the trial court.
2. **Federal Acts: Civil Rights: Fair Employment Practices.** Because the Nebraska Fair Employment Practice Act is patterned after title VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000e et seq. (1994), it is appropriate to consider federal court decisions construing similar federal legislation.

3. **Fair Employment Practices.** In determining whether an entity has the requisite number of employees to qualify as an employer, federal courts have looked to (1) the actual number of employees the entity has for the time period in question and (2) whether the entity is sufficiently related to another entity so that combining the two would result in the requisite number of employees.
4. ____. Before reaching the issue of whether to combine entities for identifying the number of employees to qualify as an employer, a determination must be made as to whether the entity in question has enough employees to meet the statutory requirement in and of itself. In making this determination, federal courts have generally agreed that part-time employees may be counted.
5. **Fair Employment Practices: Words and Phrases.** The payroll method of identifying the number of employees to qualify an as employer counts an employee on a given day if he or she was on the payroll that day. An employee does not have to physically report to work each day in order to be counted toward the jurisdictional prerequisite.
6. ____: ____. The workplace method of identifying the number of employees to qualify as an employer focuses on the statutory language "for each working day." Under this method, an employee is only counted toward the jurisdictional prerequisite if he or she physically reported to work that day or was on paid leave from work.
7. **Federal Acts: Civil Rights: Fair Employment Practices.** The payroll method of identifying the number of employees to qualify as an employer is considered to be more consistent with the remedial purpose of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994).

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge. Judgment of Court of Appeals affirmed.

Tylor J. Petitt, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

James M. Worden and Howard W. Olsen, Jr., of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and RIST, D.J.

LANPHIER, J.

Appellant Susan Krzyzanowski filed a complaint against her employer, appellee Bluff's Vision Clinic, P.C. (Bluff's), for employment discrimination pursuant to the Nebraska Fair

Employment Practice Act (Act), Neb. Rev. Stat. § 48-1101 et seq. (Reissue 1993). After a hearing, the Nebraska Equal Opportunity Commission (NEOC) found that Bluff's was an "employer" as defined in the Act, because it and a "related" entity, The Meat Shoppe, Inc., together employed the statutory requisite of 15 or more people each week during the time period in question. Bluff's appealed to the district court, which found that Bluff's was not an "employer" because it did not employ 15 people and that combining it with the other entity was improper. At issue is the method of counting employees: the "payroll" method, the count of those on the payroll each day, or the "workplace" method, the count of those who actually show up to work each day. Krzyzanowski appealed to the Nebraska Court of Appeals, which found that by using the payroll method, Bluff's did meet the statutory definition of "employer." *Bluff's Vision Clinic v. Krzyzanowski*, 4 Neb. App. 380, 543 N.W.2d 761 (1996). Bluff's petitioned for further review of that order. We conclude, by also using the payroll method, that Bluff's is an employer under the Act and thus the NEOC had jurisdiction. The judgment of the Court of Appeals is therefore affirmed.

BACKGROUND

On June 21, 1993, Krzyzanowski filed a complaint with the NEOC, charging Bluff's with employment discrimination on the basis of gender and with retaliation. Bluff's moved to dismiss the complaint for lack of jurisdiction, stating that they were not an "employer" as defined in the Act.

A hearing was held on the motion. On October 27, 1993, the NEOC hearing examiner denied Bluff's motion to dismiss. The NEOC hearing examiner then held a public hearing, and on February 25, 1994, the examiner ruled that the NEOC had jurisdiction because Bluff's met the statutory definition of employer under the Act. The Act defines employer in part as "a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." § 48-1102(2). Bluff's employed 15 or more people each week during the time period in question, but some of the employees were only part-time workers.

During the first quarter of 1991, Bluff's employed 11 full-time employees and 5 part-time employees. However, at least three part-time employees did not work 2 days of each week. Thus, even though Bluff's paid more than 15 people for each of these weeks, Bluff's did not have 15 people working on at least 2 days of these weeks. The same type of result occurs for the remaining quarters of 1991 and 1992. *Bluff's Vision Clinic v. Krzyzanowski, supra.*

The NEOC hearing examiner did not specifically address the method of counting part-time workers, but held that Bluff's did not employ the requisite 15 employees. However, the examiner held that Bluff's could be consolidated with another entity, The Meat Shoppe, and that by counting the employees of both entities, there was jurisdiction. The examiner for the NEOC further held that Bluff's had intentionally discriminated against Krzyzanowski. On March 4, 1994, the NEOC ordered that the hearing examiner's findings and conclusions be entered as the official final order of the NEOC.

On April 1, 1994, Bluff's filed an appeal of the NEOC's decision to the district court for Scotts Bluff County. One of the issues on appeal was the conclusion by the NEOC that it had jurisdiction over the parties. On July 27, the district court for Scotts Bluff County reversed the NEOC's decision and dismissed Krzyzanowski's complaint, stating that there was not sufficient evidence to indicate Bluff's was an employer so as to obtain jurisdiction in the NEOC and that the combination of entities was not proper.

Krzyzanowski appealed the district court's decision on jurisdiction to the Court of Appeals. The Court of Appeals applied the payroll theory of counting part-time employees, and reversed the decision of the district court and remanded the matter for further proceedings. *Bluff's Vision Clinic v. Krzyzanowski, supra.* It is from this order that Bluff's petitions for further review.

ASSIGNMENTS OF ERROR

Krzyzanowski asserts that the district court erred in its determination that the NEOC lacked jurisdiction to resolve the parties' dispute.

In its petition for further review, Bluff's asserts that (1) the Court of Appeals erred in applying the payroll theory of counting employees because that issue was not argued before the district court and (2) the Court of Appeals erred in adopting the payroll theory for counting part-time employees.

STANDARD OF REVIEW

A jurisdictional question that does not involve a factual dispute is a matter of law; therefore, an appellate court reaches a conclusion independent from that of the trial court. *In re Interest of Krystal P. et al.*, 248 Neb. 905, 540 N.W.2d 316 (1995); *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995); *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995).

ANALYSIS

Bluff's denies that the NEOC has jurisdiction because Bluff's does not qualify as an "employer" as defined in § 48-1102. Bluff's further argues that it does not meet the definition of "employer" because it does not employ the requisite number of employees. Krzyzanowski, however, argues that Bluff's does meet the definition of "employer" because (1) part-time employees should be counted toward the jurisdictional prerequisite or, alternatively, (2) The Meat Shoppe should be combined with Bluff's because the two entities are sufficiently interrelated.

Bluff's argues that the Court of Appeals erred in applying the payroll theory to determine whether it was an "employer" because the only issue before that court was whether combining the entities was proper. However, the determination of "employer" for purposes of the Act is a jurisdictional question and thus a matter of law. In deciding a matter of law, we reach a conclusion independent from that of the trial court on the jurisdictional issue. *In re Interest of Krystal P. et al., supra*; *In re Interest of Alex T. et al., supra*; *Jones v. State, supra.*

In order for the NEOC to have jurisdiction, Bluff's must meet the definition of "employer" under the Act. Employer is defined as "a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

§ 48-1102. Because the Act is patterned after title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994), it is appropriate to consider federal court decisions construing similar federal legislation. *City of Fort Calhoun v. Collins*, 243 Neb. 528, 500 N.W.2d 822 (1993); *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

In determining whether an entity has the requisite number of employees to qualify as an employer, federal courts have looked to (1) the actual number of employees the entity has for the time period in question and (2) whether the entity is sufficiently related to another entity so that combining the two would result in the requisite number of employees. See, e.g., *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983), *cert. denied* 466 U.S. 904, 104 S. Ct. 1678, 80 L. Ed. 2d 153 (1984); *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327 (N.D. Ind. 1992).

Before reaching the issue of whether to combine entities however, a determination must be made as to whether the entity in question has enough employees to meet the statutory requirement in and of itself. In making this determination, federal courts have generally agreed that part-time employees may be counted. See, e.g., *Thurber v. Jack Reilly's, Inc., supra*; *Zimmerman v. North American Signal Co., supra*; *Dumas v. Town of Mount Vernon, Ala.*, 612 F.2d 974 (5th Cir. 1980); *Wright v. Kosciusko Medical Clinic, Inc., supra*; *Musser v. Mountain View Broadcasting, Inc.*, 578 F. Supp. 229 (E.D. Tenn. 1984). Other courts have disagreed on the method to be used for counting these employees. See *Reith v. Swenson*, 63 Fair Emp. Prac. Cas. (BNA) 885 (D. Kan. 1993) (discussing the payroll and workplace methods).

Two methods of counting employees have developed. The first method, the "payroll" method, counts an employee on a given day if he or she was on the payroll on that day. An employee does not have to physically report to work each day in order to be counted toward the jurisdictional prerequisite.

See, *Thurber v. Jack Reilly's, Inc., supra*; *Pedreyra v. Cornell Prescription Pharmacies*, 465 F. Supp 936 (D. Colo. 1979); *Reith v. Swenson, supra*; *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Emp. Prac. Cas. (BNA) 1325 (D. Minn. 1975). Under the second method, the "workplace" method, the focus is on the statutory language "for each working day." Under this method, an employee is only counted toward the jurisdictional prerequisite if he or she physically reported to work that day or was on paid leave from work. See, *E.E.O.C. v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225 (7th Cir. 1995), *cert. granted* ___ U.S. ___, 116 S. Ct. 1260, 134 L. Ed. 2d 209 (1996); *E.E.O.C. v. Garden and Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992); *Zimmerman v. North American Signal Co., supra.*

The issue of which method to use to count these employees is one of first impression in Nebraska. Krzyzanowski contends that the payroll method should be applied and relies on the leading case following that method, *Thurber v. Jack Reilly's, Inc., supra.* In *Thurber*, a waitress brought an employment discrimination suit against her employer, a bar. The bar had approximately 9 employees working each day, but employed and paid over 15 employees in total for the weeks in question. Some of the employees were full-time workers and some were part-time workers. The bar alleged that it did not have enough employees to meet the statutory requirement because the language "for each working day" limited employees to those persons actually reporting for work each day.

The U.S. Court of Appeals for the First Circuit discarded the employer's argument, finding that a strict interpretation of the language "for each working day" was inconsistent with the remedial purposes of title VII. The court further held that the payroll method was more consistent with the remedial purpose of title VII. The remedial purpose of title VII is to eliminate the "inconvenience, unfairness and humiliation of discrimination." *Pedreyra v. Cornell Prescription Pharmacies*, 465 F. Supp. at 941. Krzyzanowski also relies on the policy statement of the Equal Employment Opportunity Commission (EEOC), 8 Fair Emp. Prac. Man. (BNA) 405:6857 (April 10, 1990), which rejects the workplace method. In this policy statement, the

EEOC states that under title VII, "an employer who has fifteen employees on the payroll for twenty weeks of the year meets the statutory definition of employer . . . . The Commission's position is that all regular part-time employees are counted whether they work part of each day or part of each week." *Id.* at 405:6860.

We determine that Krzyzanowski's position is the more persuasive, and we therefore adopt the payroll method. First, the payroll method is considered to be more consistent with the remedial purpose of the statute. See, *Pedreyra v. Cornell Prescription Pharmacies, supra*; *Pascutoi v. Washburn-McReavy Mortuary, supra.* Such an interpretation of the employee number requirement would allow a greater number of employers to be affected by the statute, advancing the purpose of eliminating discrimination.

Second, the language of the statute is consistent with the payroll method. Instead of focusing on the words "each working day," we interpret that phrase in the context of the entire sentence. Thus, the requirement that the employer "have" the requisite number of employees for each working day goes to whether the employee has a working relationship with the employer for the time in question, not whether the employee physically reported to work each day. As long as the worker is regularly and routinely expected to return to the job, attendance at the job may not be required each working day. *Reith v. Swenson*, 63 Fair Emp. Prac. Cas. (BNA) 885 (D. Kan. 1993). As the U.S. District Court for the District of Indiana stated in *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1331-32 (N.D. Ind. 1992):

> [T]he far sounder interpretation of these statutes is that an employer "has" an employee not only if he or she works on a particular day, but rather if he or she is on the company's payroll. During all of 1988 and 1989, more than twenty persons, if asked for whom they worked, would have identified Kosciusko Medical Clinic as their "employer". . . .
>
> . . . .
>
> . . . It is certainly not inconsistent with these definitional provisions to conclude that an employer "has" an

> employee on a working day, even if that employee is not physically present on that day—especially if he or she was there the day before and is expected to show up for work on the next day. *Zimmerman* gave some recognition to that fact, by allowing inclusion of workers on vacation or sick leave in the total. It is not obvious why those categories of absent present workers should be counted, but one who works four or five days a week, instead of seven, should not be counted on those other days.

An employer " 'has' an employee 'for each working day' of a week if that employee is on the payroll[;] an 'employee-employer' relationship exists with reciprocal duties and benefits, and the employee is subject to the types of employment discrimination the statute is designed to prevent." *Reith v. Swenson*, 63 Fair Emp. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993).

This interpretation does not render the phrase superfluous, but, rather, places emphasis on both "having" an employee, as well as having that employee "for each working day." To give particular emphasis to the "each working day" language of the Act would only defeat its purpose of preventing unfair employment practices. That interpretation would require that employees who work 2 hours every day must be counted, but would not require counting another employee who works 10-hour shifts 4 out of 5 days of the workweek, thus allowing employers to circumvent the Act. The very nature of today's changing work force makes it impossible for the court to say that a person must work 40 hours or more every week to be considered a full-time employee and thus subject to calculation for purposes of the Act. See *Pascutoi v. Washburn-McReavy Mortuary*, 11 Fair Emp. Prac. Cas. (BNA) 1325 (D. Minn. 1975). Any burden placed on small business by the Act is greatly outweighed by the benefit to be served. The Act does not put a weighty burden on small employers, but, rather, imposes the relatively small burden of forbearance from discrimination in employment. *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st cir. 1983), *cert. denied* 466 U.S. 904, 104 S. Ct. 1678, 80 L. Ed. 2d 153 (1984).

Finally, use of the payroll method simplifies the calculation of employees for the statutory requirement. One need only look

to see whether the employee is on the payroll on any given week, not whether or not the employee physically reported for work each day.

We conclude that the payroll method is the better method for counting employees and more appropriate for calculating the number of employees pursuant to § 48-1102(2). Thus, Bluff's, by definition, did employ 15 employees for each week in question and qualifies as an employer for purposes of the Act. Therefore, we need not reach the issue of whether or not the NEOC properly combined the two entities for calculating the number of employees.

CONCLUSION

Bluff's was an employer as defined in § 48-1102(2) because application of the payroll method of counting employees indicates Bluff's employed the requisite number of employees for the time in question. Thus, we conclude that the Court of Appeals was correct in its application of the payroll method for counting employees and its determination that the NEOC had jurisdiction.

AFFIRMED.

FAHRNBRUCH, J., not participating.

CAPORALE, J., dissenting.

I disagree. The majority rests its decision of first impression under the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 through 48-1126 (Reissue 1993), on ill-reasoned federal cases because it considers them to be "more consistent with the remedial purpose of the statute." This, I regretfully suggest, begs the question of what the Nebraska Legislature sought to remedy.

The express purpose of our act is to "foster the employment of all employable persons . . . on the basis of merit regardless of their race, color, religion, sex, disability, or national origin and to safeguard their right to obtain and hold employment without discrimination . . . ." § 48-1101. To accomplish that purpose, and apparently more, the act prohibits "an employer" from engaging in certain discriminatory acts based upon "race, color, religion, sex, disability, *marital status*, or national origin."

(Emphasis supplied.) § 48-1104. It defines employer, in pertinent part, as one "engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." § 48-1102(2).

Thus, for whatever reason our Legislature deemed good and sufficient, the act does not undertake to end all employment discrimination, but merely to end such discrimination by those who are "engaged in an industry" and employ at least 15 workers "each working day." Leaving aside the question of what an industry might be, the majority, by counting all who are on the payroll on a given day irrespective of whether they are required to work that day, effectively reads the phrase "each working day" out of the statute and substitutes in its place and stead the phrase "on its payroll." As a result, § 48-1102(2) now operates as if it defined employer not as it does, but as one "engaged in an industry who has fifteen or more employees on its payroll in each of twenty or more calendar weeks in the current or preceding calendar year." I respectfully suggest that if that was what the Legislature had meant, it was fully capable of having said so.

Except when dealing with an ambiguous statute, *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995), or a constitutionally suspect one, *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994), our task is not to improve legislative language, but to apply it as written. See *Garza v. City of Omaha*, 215 Neb. 714, 340 N.W.2d 409 (1983) (court not permitted to read words into statute which are not there). See, also, *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995); *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483 (1972) (courts do not substitute their social and economic beliefs for judgment of legislative bodies).

Having come to the conclusion that Bluff's Vision Clinic, P.C., does not itself employ the requisite number of workers, I must consider an issue the majority found unnecessary to reach, namely, whether, as Susan Krzyzanowski posits, the eye-care operations of Bluff's Vision, a professional corporation, are so interrelated with the food catering operations of The Meat Shoppe, Inc., a business corporation, that the employees of the latter must be considered to be the employees of the former as

well. In this regard, both Bluff's Vision and Krzyzanowski cite us to *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977), which holds that there are circumstances whereunder it is appropriate to treat two allegedly separate business enterprises as a single entity for the purpose of determining whether there exists the requisite number of workers to bring one of the entities under the definition of "employers" for the purposes of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994). According to *Baker*, the factors to consider in making such a determination include the interrelation of the operations, the existence of common management, the existence of centralized controls, and the existence of common ownership or financial control. While Krzyzanowski urges that the requisite factors exist here, Bluff's Vision predictably argues otherwise.

I need not, and therefore do not, consider whether I accept the existence of these factors as an adequate basis upon which to pierce the corporate veil in cases of this type, for even if that were to prove to be the situation, the *Baker* factors are not present in this case.

The evidence demonstrates only that the president of one entity is also the president of the other; that he is a 50-percent shareholder of Bluff's Vision and, together with his wife, a 50-percent shareholder of Meat Shoppe; that he is one of two members of the board of directors of Bluff's Vision; and that he and his wife comprise two of the four members of the board of directors of Meat Shoppe. While it is true that the articles of incorporation and bylaws of Meat Shoppe give general control over its affairs to its board of directors and president, those circumstances do not, in and of themselves, establish that there is sufficient common ownership or financial control to warrant treating one entity as the alter ego of the other. Neither is there any evidence that the diverse business operations of the two entities are in any way interrelated, or that there is any centralized control of labor relations.

Accordingly, I would reverse the judgment of the Nebraska Court of Appeals and remand the cause thereto with the direction that it affirm the judgment of the district court.

THE FIRST NATIONAL BANK OF YORK, YORK, NEBRASKA, APPELLEE, V. BOYD L. CRITEL AND RITA L. CRITEL, HUSBAND AND WIFE, APPELLANTS, AND BO-RIT ENTERPRISE, A TRUST, BOYD L. CRITEL AND RITA L. CRITEL, COTRUSTEES, ET AL., APPELLEES.

555 N.W.2d 773

Filed November 22, 1996. No. S-94-698.

1. **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.
2. **Judicial Sales: Appeal and Error.** The confirmation of judicial sales rests largely within the discretion of the trial court. Therefore, the trial court's determination will not be disturbed on review except for an abuse of such discretion.
3. **Taxation: Valuation: Evidence.** The assessed value of property for tax purposes, in and of itself, is generally not admissible as direct evidence of value for purposes other than taxation.
4. **Judicial Sales: Foreclosure: Appeal and Error.** An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.
5. **Judicial Sales: Appeal and Error.** When there is no evidence that others are willing to pay more, a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the court.
6. **Courts: Judicial Sales.** Where the evidence establishes that the sale price was inadequate, it is the duty of the court to deny confirmation of a judicial sale.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for York County, BRYCE BARTU, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed and remanded with directions.

Boyd L. Critel and Rita L. Critel, pro se.

Kelly M. Thomas, of Svehla, Barrows & Thomas, for appellee Bank.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Boyd L. Critel and Rita L. Critel appeal the judgment of the district court which granted a decree of foreclosure of a mortgage given by the Critels to The First National Bank of York, York, Nebraska (First National). The Critels also appeal the confirmation of a court-ordered sale of the real estate held in connection with the foreclosure. The Nebraska Court of Appeals affirmed the judgment of the district court, *First Nat. Bank of York v. Critel*, 95 NCA No. 51, case No. A-94-698 (not designated for permanent publication), and we granted further review.

SCOPE 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 Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991).

The confirmation of judicial sales rests largely within the discretion of the trial court. *Sherman v. Schulz*, 220 Neb. 375, 370 N.W.2d 123 (1985); *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982). Therefore, the trial court's determination will not be disturbed on review except for an abuse of such discretion. *Sherman v. Schulz, supra.*

FACTS

On September 15, 1993, First National filed a petition in York County District Court, alleging that the Critels had defaulted on two mortgage notes to First National: one with a balance, including interest, of $228.98 and the other with a balance, including interest, of $16,355.35. As security, the Critels had executed two mortgages which covered the same land in York County. Proper summons was had upon the Critels, and they failed to answer or otherwise appear. Despite being given proper notice of the hearing on the motion for default judgment and summary judgment, the Critels failed to appear, and the court entered a default judgment in favor of First National.

The court subsequently entered a decree of foreclosure. Notice was given to the Critels of the amount due under the

judgment, and an order of sale was entered directing the sheriff of York County to sell the real estate. Notice of the sale was published and was also mailed to the Critels. The property was sold as follows:

> [Parcel 1] Lots One (1) and Two (2) in Block One Hundred Eight (108), Original Town, now the City of York to Florence Charlton . . . for $850.00[.]
>
> [Parcel 2] Irregular Tract Lot No[.] Seventy-eight (78) in Section Six (6), Township Ten (10) North, Range Two (2) West of the 6th P.M., a party [sic] of the City of York to Florence Charlton . . . for $1050.00[.]
>
> [Parcel 3] Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), and Seven (7) in Block One (1), Mead's Addition to the City of York, EXCEPT that part of the Southwest corner of said Lot Seven (7) conveyed to the City of York, Nebraska . . . to Florence Charlton . . . for $2100.00.

At a June 28, 1994, hearing on the Critels' motion to vacate the decree of foreclosure and on First National's motion to confirm the sale, the Critels appeared pro se. The Critels argued that they had relevant evidence regarding the amount paid to First National, denied receiving notice of the default hearing, and denied ever being served or receiving notice that a decree of foreclosure had been entered.

On the Critels' motion to vacate the decree of foreclosure, the court found that they had received notice of all matters in question, that they had received a copy of the decree of foreclosure, and that upon receipt of the decree, they had 10 days to file a motion for new trial or 30 days to file an appeal. The court found that the decree of foreclosure was final, as no appeal from the decree had been filed.

The Critels objected to confirmation of the sale on the basis that the sale of the property, which brought $4,000, did not bring the actual value of the property. They offered into evidence 1993 real estate tax statements which listed the taxable value of the property at $12,879 for parcel 1, $3,440 for parcel 2, and $13,490 for parcel 3. The statements were received without objection. The court confirmed the sale, finding as follows: "[T]he sale has in all respects been made in conformity to law

and . . . the property was sold for fair value under the circumstances and conditions of such sale."

The Court of Appeals affirmed the decision of the district court, finding that the court did not abuse its discretion by refusing to vacate the default judgment. Regarding confirmation of the sale, the Court of Appeals determined that the assessed value of the Critels' land for tax purposes was not relevant to show inadequacy of the sale price and that it is incumbent upon the party challenging the sale to provide some evidence as to the inadequacy of the price or as to a higher bid being obtained on resale. The Court of Appeals found that the district court did not abuse its discretion in confirming the sale. We granted further review.

ASSIGNMENTS OF ERROR

The Critels assert that the Court of Appeals erred in not vacating the decree of foreclosure and erred in not finding that the sale price was inadequate and, as a result, not setting aside the confirmation of the sale.

ANALYSIS

DEFAULT JUDGMENT

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 Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991).

The record reflects that the Critels chose not to answer the petition, did not appear at the default hearing, and did not file a motion to vacate the judgment until 3 days before the sale. Although the Critels claimed they did not receive notice of the default judgment, the clerk of the district court for York County certified that a copy of the order had been sent to the Critels on April 5, 1994, and Rita Critel testified that they had received a letter about 2 weeks after the judgment which stated that there had been a hearing. The district court found that the Critels had in fact received notice of the default judgment, and we find that there was no abuse of discretion in the court's refusal to set aside the default judgment.

CONFIRMATION OF SALE

Neb. Rev. Stat. § 25-1531 (Reissue 1995) sets forth the requirements for confirmation of a sale:

> If the court, upon the return of any writ of execution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this chapter and that the said property was sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make the purchaser a deed of such lands and tenements. . . . If such sale pertains to mortgaged premises being sold under foreclosure proceedings and the amount of such sale is less than the amount of the decree rendered in such proceedings, the court may refuse to confirm such sale, if, in its opinion, such mortgaged premises have a fair and reasonable value equal to or greater than the amount of the decree. The court shall in any case condition the confirmation of such sale upon such terms or under such conditions as may be just and equitable.

The Critels objected to the confirmation because the sale did not bring the actual value of the property. In support of their position, the Critels offered into evidence 1993 real estate tax statements which listed the taxable value of the property, and the tax statements were admitted without objection.

The Court of Appeals affirmed the sale, finding that "in light of the Nebraska Supreme Court's previous holdings, as well as the decisions of the majority of other jurisdictions, the assessed value of the Critels' land for tax purposes is not relevant to show the inadequacy of the sale's price." *First Nat. Bank of York v. Critel*, 95 NCA No. 51 at 36, case No. A-94-698 (not designated for permanent publication). The Court of Appeals stated: "Even assuming, arguendo, that there is an inadequacy of price, this would not be, in and of itself, sufficient to warrant a resale

unless it appeared that such a resale would probably produce a higher price." *Id.*

Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 1994) provides in part: "[A]ll real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value." Neb. Rev. Stat. § 77-112(1) (Cum. Supp. 1994) provides in part: "Actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade." The term "actual value" has been held many times to mean exactly the same as "market value" or "fair market value." *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992); *Equitable Life v. Lincoln Cty. Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988).

Although differing factors may cause the appraised value of property to be less than its actual value, some relationship exists between appraised and actual value such that the appraised value can properly be said to constitute relevant evidence of at least the minimum value of the land. See *Louisiana Ry. & Navigation Co. v. Morere*, 116 La. 997, 41 So. 236 (1906). Therefore, we cannot say that, having been admitted without objection, the assessed value of the real property for tax purposes was not relevant to the determination of whether the sale price of the land was fair and reasonable. At the confirmation hearing, no evidence was offered by First National showing that the property was sold for a fair value under the terms and conditions of the sale.

The next issue is whether the Critels were required to show that a resale would produce a higher price. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale. See, *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (1984); *Nebraska Federal Savings & Loan Assn. v. Patterson*, 212 Neb. 29, 321 N.W.2d 71 (1982); *Central Savings Bank v. First Cadco Corp.*, 186 Neb. 112, 181 N.W.2d 261 (1970). Thus, when there is no evidence that others are willing to pay more, a judicial sale will not be set aside on account of

mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the court. *County of Dakota v. Mallett*, 235 Neb. 82, 453 N.W.2d 594 (1990); *Home Owners' Loan Corporation v. Smith*, 135 Neb. 618, 283 N.W. 371 (1939); *Conservative Savings & Loan Ass'n v. Mancuso*, 134 Neb. 779, 279 N.W. 725 (1938).

The foreclosure decree shows that there existed a first lien in favor of York County for 1990, 1991, and 1992 taxes, plus accrued interest, in the amount of $2,179.68. The remaining liens of the other parties to the foreclosure were found to be junior and inferior to the liens of York County and First National. At the sale, the purchaser bought the property subject only to the real estate taxes due York County. A comparison of the sale price of $4,000 to the assessed value of $29,809 establishes that the sale price was inadequate. First National offered no evidence to rebut this comparison, nor did First National object to the tax assessment offered as to the value of the real estate.

Although there was no evidence that others were willing to pay more, there is a significant difference between the sale price of $4,000 and the $29,809 shown on the tax assessment. Where the evidence establishes that the sale price was inadequate, it is the duty of the court to deny confirmation of the judicial sale. See, *County of Scotts Bluff v. Bristol*, 159 Neb. 634, 68 N.W.2d 197 (1955); *Ehlers v. Campbell*, 147 Neb. 572, 23 N.W.2d 727 (1946). For this reason, the district court abused its discretion in confirming the sale.

CONCLUSION

We affirm the portion of the Court of Appeals' decision which affirmed the district court's refusal to vacate the foreclosure decree. We reverse the portion of the Court of Appeals' decision regarding confirmation of the sale, and we remand the cause to the Court of Appeals with directions to instruct the district court to order another sale of the real estate as provided by law.

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

LANPHIER, J., participating on briefs.

WHITE, C.J., concurs.

WILLIAM A. RAUERT, APPELLANT, V. SCHOOL DISTRICT 1-R OF HALL COUNTY, NEBRASKA, ALSO KNOWN AS SCHOOL DISTRICT NO. 501 OF HALL COUNTY, NEBRASKA, APPELLEE.

555 N.W.2d 763

Filed November 22, 1996. No. S-94-1010.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **Schools and School Districts: Statutes: Legislature.** The school district is a creature of statute and possesses no other powers than those granted by the Legislature.
4. **Schools and School Districts: Legislature: Improvements.** The Legislature has provided the exclusive method of raising funds for schoolhouses, school buildings, and additions.
5. **Schools and School Districts: Taxation: Improvements.** In Class I school districts, propositions to raise money through a special annual tax for the purpose of making additions and improvements to an existing schoolhouse must be voted on and approved by the electors of the school district at the district's annual or special meeting.
6. **Taxation: Claims: Time.** If a taxpayer claims that a tax levied is illegal for any reason other than the valuation of the property, that taxpayer may make a written claim for a refund of the tax within 30 days of the payment of the tax.
7. ____: ____: ____. When a taxpayer fails to substantially comply with the 30-day claim requirement and has voluntarily paid the tax, that taxpayer will not be allowed to complain about the tax at a later point in time.
8. **Public Meetings: Schools and School Districts: Notice.** The public meetings law requires that public bodies such as school boards must give reasonable advance publicized notice of the time and place of their meetings, in part so that the public may attend and speak at those meetings.
9. **Public Meetings: Statutes.** Public meetings laws are broadly construed so as to obtain the objective of openness in favor of the public.
10. **Courts: Costs.** Taxation of costs is a matter resting in the discretion of the trial court.

Appeal from the District Court for Hall County: JOHN C. WHITEHEAD, Judge. Affirmed.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick & Johnson, and John Wagoner, of Wagoner Law Offices, for appellant.

Daniel J. Alberts, of DeMars, Gordon, Olson, Recknor & Shively, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

William A. Rauert brought this action in the district court for Hall County, alleging that School District 1-R of Hall County, Nebraska (school district), violated the Nebraska Budget Act and the Nebraska statutes regarding public meetings (Nebraska Public Meetings Law) and exceeded its authority when it authorized certain renovations to school property without voter approval. The district court found generally in favor of the school district and dismissed the action at Rauert's cost. We affirm.

The school district is a Class I school district. In 1983, at the school district's annual meeting, a special building fund (1983 building fund) with a levy in the amount of $35,000 was approved and established for the purpose of possible future construction. This special levy was made in each fiscal year from 1983 through 1991, with the proceeds going into the 1983 building fund. In 1992, the 1983 building fund had a balance of $177,705.

In 1991, the school district's school board (board) proposed a bond issue for $950,000 to fund the construction of a gymnasium and other renovations to the existing school building. The entire project would have cost $1,086,000. The bond issue was placed on the October 22, 1992, ballot, and the school district's voters refused to authorize the issuance of the bonds.

During this same period, the State Fire Marshal inspected the school district's existing building and ordered 23 building corrections, including the installation of proper electrical receptacles and the removal of a classroom from the corridors. The State Fire Marshal permitted the school district to continue use of the corridor space as a classroom until the bond issue was approved or until the end of the school year if the bond issue was defeated.

Following the defeat of the bond issue, the board began to consider other means by which to make repairs and improve-

ments to the existing building. At the board's August 10, 1992, budget meeting, the board approved the expenditure of $341,336 to make repairs to the existing building site and to build on two additional classrooms. The parties to this lawsuit have stipulated that $169,188 was paid out of the school district's general fund, and $172,148 was paid out of the 1983 building fund. The parties have also stipulated that no vote of the school district's electors occurred regarding the need for or the extent of the repairs and construction, nor was a vote taken to approve the renovations at issue in this case, although those electors opposing the construction voiced their disapproval and desire to vote at the August 10, 1992, budget hearing, annual meeting, and regular meeting.

Rauert, as a taxpayer and resident of Hall County, filed a petition in this action, alleging violations of the Nebraska Budget Act, the Nebraska Public Meetings Law, and Neb. Rev. Stat. § 79-422 (Reissue 1994), which requires that propositions for a special tax be submitted to the district's voters at the board's annual or special meeting. Rauert alleged that members of the board met privately and without proper notice to discuss the transfer of money between funds, and with the further intent to deprive members of the public of an opportunity to be fully informed and to ask questions. Rauert also alleged that the board failed to fully divulge the specifics of the 1991-92 budget, improperly moved funds between the general fund and the building fund, and failed to submit to the electors the proposition to expend money for renovation. During the course of this lawsuit, the renovations to the school building were completed.

The matter was submitted to the district court on stipulated evidence. In an order dated July 15, 1994, the trial court found generally for the school district and against Rauert and dismissed the lawsuit at Rauert's cost.

Rauert timely appealed the trial court's decision to the Nebraska Court of Appeals. We removed this matter pursuant to our power to regulate the docket of the Court of Appeals.

On appeal, Rauert assigns a number of errors which may be summarized as follows: Rauert alleges that the district court erred in failing (1) to find that the school district taxpayers and electors were the only parties who could decide whether to

build an addition or improvements on an existing school building and in failing to find that the board exceeded its authority when it authorized the work at issue without submitting it to a vote of the electors in 1992; (2) to find that the board violated the Nebraska Public Meetings Law at its August 10, 1992, meeting and during the 120 days preceding that meeting; and (3) to provide Rauert with the remedies he requested, and in awarding attorney fees to the school district.

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996). In construing a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

In Rauert's first assignment of error, he alleges that the school district electors and taxpayers were the only individuals authorized by statute to approve the expenditure of school district funds for the repair and renovation at issue in this case. In addressing this assignment of error, we first note that the school district is a creature of statute and possesses no other powers than those granted by the Legislature. *State ex rel. School Dist. v. Board of Equalization*, 166 Neb. 785, 90 N.W.2d 421 (1958). See *School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993). The Legislature has provided the exclusive method of raising funds for schoolhouses, school buildings, and additions. *State ex rel. School Dist. v. Board of Equalization, supra.*

The statutes particularly relevant to Rauert's claims in this case are § 79-422 and Neb. Rev. Stat. §§ 79-423 and 79-607 (Reissue 1994). Section 79-423 states:

> In all Class I school districts, the proposition [to vote a special annual tax for additions and improvements to a school building] shall be submitted at any annual or special meeting of the electors of the school district. In all other districts the manner of submission shall be governed in substance by section 23-126.

Section 79-607 states in pertinent part:

> A tax to establish a special fund for the purpose of erection or repair of a schoolhouse . . . in any Class I school district may be levied when authorized by fifty-five percent of the qualified electors voting on the proposition. The notice of the proposal to establish the special fund shall include the sum to be raised or the amount of the tax to be levied, the period of years, and the time of its taking effect. The tax shall be subject to the restrictions of section 79-422 as to maximum amount and term.

Section 79-422 mandates that this type of special tax shall not exceed a term of 10 years.

Clearly, both § 79-423 and § 79-607, in conjunction with § 79-422, mandate that in Class I school districts, propositions to raise money through a special annual tax for the purpose of making additions and improvements to an existing schoolhouse must be voted on and approved by the electors of the school district at the district's annual or special meeting. In this regard, Rauert's contention that the voters of the school district have the right to approve the proposition to levy a special tax for such expenditures is correct. However, Rauert's argument that this right applies to the business conducted by the board at its August 10, 1992, budget hearing and regular meeting is incorrect.

The stipulated evidence in this case indicates that a special building fund was approved by the voters of the school district and established at the annual meeting in 1983 for the purpose of paying for possible future construction. The evidence also demonstrates that this fund was maintained and the special tax levied for the next 9 years, well within the 10-year statutory time limit of § 79-422. At all times relevant to this case, the money in the 1983 building fund was kept separate from the school district's other funds and was designated as a building fund. The evidence also demonstrates that the school district's general fund had at all relevant times an allocation designated "Building and Building Improvements."

Neb. Rev. Stat. § 79-440 (Reissue 1994) requires that "[t]he school board or board of education shall (1) provide the necessary appendages for the schoolhouse, (2) keep the same in good condition and repair during the time school shall be taught in

the schoolhouse, and (3) keep an accurate account of all expenses incurred." See Neb. Rev. Stat. §§ 79-441 and 79-443 (Reissue 1994). In accordance with the orders of the State Fire Marshal, the board in 1992 approved renovations to the existing building, approved an addition to the existing building, and authorized the expenditure of money from the 1983 building fund and the "Building and Building Improvements" allocation of the general fund.

The parties argue at great length as to whether the addition of two rooms to the existing structure was merely maintenance and repair or was actually new construction. It is quite clear that the room additions were new construction and fall within the language of § 79-422, which expressly covers "additions" to a schoolhouse. However, identifying the additions as falling within §§ 79-422 and 79-423 is not dispositive of the issues in this case. The relevant statutes in this case allow taxpayers to approve the levy; the statutes do not permit the taxpayers to determine *when* those funds will be spent. The only limitation pertinent to this case with regard to special funds is that the funds must be used for the purpose designated when the fund was established. Neb. Rev. Stat. § 79-425(2) (Reissue 1994). The school district's counsel stated during oral argument that the new construction was paid for solely from the 1983 building fund, established for just such a purpose and approved by the voters at the 1983 meeting, and that the other repairs were paid for from the general fund's "Building and Building Improvements" allocation. Neither Rauert's counsel nor the evidence disputes this.

Rauert does argue that the 1983 building fund was a one-time levy only and was improperly levied against the taxpayers of the school district for the next 8 years. However, the time has long since passed for Rauert to protest the levy of this special tax. Neb. Rev. Stat. § 77-1735 (Reissue 1990) states that if a taxpayer claims that a tax levied is illegal for any reason other than the valuation of the property, that taxpayer may make a written claim for a refund of the tax within 30 days of the payment of the tax. We have held that, as in this case, when a taxpayer fails to substantially comply with this 30-day claim requirement and has voluntarily paid the tax, that taxpayer will

not be allowed to complain about the tax at a later point in time. See, *Satterfield v. Britton*, 163 Neb. 161, 78 N.W.2d 817 (1956); *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N.W. 661 (1933). The last levy for the 1983 building fund occurred in 1991, Rauert voluntarily paid the tax, and no complaint was filed regarding the propriety of the tax until late in 1992. Given that Rauert did not comply with the statutory mandates in this regard, he cannot now complain that the continued levy for the 1983 building fund was improper.

While we agree that the Legislature requires that special taxes levied for the purpose of additions in Class I school districts must be approved by the electors of the district, we also find that this requirement was met when the 1983 building fund was established. We hold, therefore, that the board in this case did not exceed its authority when it authorized the work at issue without submitting it to a second vote of the electors in 1992.

Rauert next assigns as error the district court's failure to find that the board violated the Nebraska Public Meetings Law. The Public Meetings Law requires that public bodies such as school boards must give reasonable advance publicized notice of the time and place of their meetings, in part so that the public may attend and speak at those meetings. Neb. Rev. Stat. §§ 84-1411(1) (Reissue 1987) and 84-1412(1) (Reissue 1994).

Rauert alleges that a quorum of the board met in the office of the superintendent of schools on a regular basis before the beginning of most board meetings, discussed and decided business at these "clandestine" meetings, signed checks to pay claims before those claims were approved at the public meeting, and moved and voted on business at the public meeting with little or no discussion in order to deprive the public of the right to be fully informed as to the exact nature of the business before the board.

While public meetings laws are broadly construed so as to obtain the objective of openness in favor of the public, *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984), neither Rauert nor the other witnesses alleging these violations could provide specific dates on which they observed a quorum of the board members meeting, nor could they indicate whether any discussion of business occurred at these alleged meetings.

We hold that the trial court did not err in failing to find violations of the Nebraska Public Meetings Law based on the evidence, or lack thereof, in this case.

Rauert's final assignment of error involves the taxation of the school district's costs to Rauert, and the trial court's refusal to order any of the remedies sought by Rauert. In a somewhat unusual request, Rauert asked the trial court to submit the question of the completed renovations to the voters for their post-renovation approval or disapproval with the provision that a subsequent approval would validate the renovations and a disapproval would lead to further action against the school district. Rauert also asked the court to declare the school district's actions improper, to forever enjoin the school district from violating the appropriate statutory provisions, and to require the school district to pay Rauert's costs and attorney fees.

As indicated above, we find that the voters in this case had no statutory right to vote in 1992 to authorize the expenditure of the 1983 building fund money, and therefore, Rauert's assigned error as to remedies must fail.

As to the issue of taxation of costs, this is a matter resting in the discretion of the trial court. *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979). We will not, in this case, disturb the trial court's taxation of costs to Rauert.

Since we find that the school district properly submitted the proposed levy for the special building fund to the voters in 1983, the voters at that time approved the levy, and the board in 1992 used the general fund and 1983 building fund money for their designated purpose, and because we find no evidence of a violation of the Nebraska Public Meetings Law, we affirm the trial court's decision.

AFFIRMED.

GERRARD, J., not participating.

GERALD H. TRAPHAGAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHY JO TRAPHAGAN, DECEASED, APPELLEE AND CROSS-APPELLANT, V. MID-AMERICA TRAFFIC MARKING, AN IOWA CORPORATION, APPELLANT AND CROSS-APPELLEE.

555 N.W.2d 778

Filed November 22, 1996. No. S-94-1032.

1. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
3. **Motor Vehicles: Negligence.** A motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision.
4. **Trial: Negligence: Evidence.** Where reasonable minds may draw different conclusions and inferences regarding the negligence of the plaintiff and the negligence of the defendant such that the plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom recovery is sought, the apportionment of fault must be submitted to the jury. Only where the evidence and the reasonable inferences therefrom are such that a reasonable person could reach only one conclusion, that the plaintiff's negligence equaled or exceeded the defendant's, does the apportionment of negligence become a question of law for the court.
5. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
6. **Negligence: Words and Phrases.** Ordinary negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.
7. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
8. **Jury Instructions.** An instruction on a matter not an issue in the litigation distracts the jury from its effort to answer legitimate, factual questions raised during the trial.

9. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
10. **Negligence.** For purposes of a physical disability, the generally accepted standard of care is, as for any other person, ordinary care under the circumstances. However, a person's disability is one of the circumstances to be considered in determining whether such person exercised ordinary care.
11. ____. One who is ill must conform to the standard of a reasonably careful person under a like disability.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Affirmed.

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellant.

Patrick M. Connealy and Laurice M. Margheim for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Kathy Jo Traphagan was killed when the car she was driving struck the rear of a Mid-America Traffic Marking (Mid-America) truck. The personal representative of Traphagan's estate sued Mid-America. The trial court overruled Mid-America's motion for directed verdict; however, the court held that Traphagan was contributorily negligent as a matter of law in violating Nebraska's "range of vision" rule. The court submitted the issue of Mid-America's negligence to the jury. The jury found that the accident was caused 75 percent by Mid-America's negligence and 25 percent by Traphagan's negligence, and the court entered a judgment against Mid-America in the amount of $750,000. Mid-America appealed, and the personal representative filed a cross-appeal. We affirm the judgment of $750,000 and dismiss the cross-appeal.

SCOPE OF REVIEW

Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *New Light Co. v. Wells Fargo*

Alarm Servs., 247 Neb. 57, 525 N.W.2d 25 (1994); *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996).

FACTS

Western Engineering was the primary contractor with the State of Nebraska under a contract to lay new asphalt on U.S. Highway 20. Mid-America had been contracted by Western Engineering to apply and maintain temporary pavement markings during the construction process. On September 21, 1992, at approximately 5 p.m., Traphagan was traveling east in a Pontiac on Highway 20 when she collided with the right rear of a 1-ton truck owned and operated by Mid-America.

At the time of the collision, the Mid-America truck was stopped in the middle of the eastbound lane of Highway 20, which was newly resurfaced. Members of the crew were in the process of removing centerline tape which consisted of a series of 2-foot long strips. As the truck stopped, the crew used a torch attached to the truck to heat a strip and then scrape it off. Once one strip was removed, the Mid-America truck would move 4 feet to the next strip.

Prior to the accident, Traphagan was driving east on Highway 20 at approximately 55 m.p.h. The collision occurred approximately 430 feet from the crest of a hill. An orange sign stating "Road Construction Next 11 Miles" was located 7½ miles from the scene of the accident, but there were no other advance warning signs, orange cones, or flaggers warning that a stopped vehicle was blocking the lane ahead. Testimony adduced at trial indicated that Mid-America's employees were not wearing the orange vests required for road work. There was conflicting evidence as to whether the hazard lights on the Mid-America truck were flashing. The Mid-America truck was

equipped with a flashing amber beacon on the top of its cab, and the evidence indicates that the beacon was on at the time of the accident. There were no other flags or signs that highlighted the truck's presence.

Traphagan's Pontiac struck the right rear corner of the truck in such a manner that the left corner pillar of the Pontiac was severed and the top was torn off the car. Traphagan died as a result of this collision.

Traphagan's personal representative brought this action against Mid-America alleging, inter alia, that Mid-America was negligent in failing to properly warn of its presence blocking the eastbound lane, failing to properly train its employees in principles of safe traffic control, and failing to heed the express verbal warnings of other motorists regarding the danger that the Mid-America truck presented. The trial court directed a verdict that Traphagan was contributorily negligent as a matter of law, but allowed the jury to determine the percentage of Traphagan's negligence as compared to Mid-America's. The jury awarded damages of $1,000,000 and assigned 25 percent of the negligence to Traphagan and 75 percent to Mid-America. As a result, the court entered a judgment of $750,000 in favor of Traphagan.

ASSIGNMENTS OF ERROR

Mid-America assigns five errors: The trial court erred (1) in failing to apply Nebraska's range of vision rule and in submitting the issue of Traphagan's negligence to the jury, (2) in failing to give Mid-America's requested instruction No. 7, (3) in giving instruction No. 10 and in failing to give Mid-America's requested instruction No. 3, (4) in giving instruction No. 13, and (5) in giving instruction No. 14.

The personal representative has cross-appealed, asserting that the trial court erred in submitting the issue of Traphagan's negligence to the jury and erred in finding Traphagan contributorily negligent.

ANALYSIS

Mid-America argues that a directed verdict should have been granted against Traphagan because she was negligent as a matter of law in operating her vehicle at such a speed that she could

not stop within her range of vision and that Traphagan did not make a prima facie case with respect to Mid-America's negligence. The range of vision rule states that "a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision." *Nickell v. Russell*, 247 Neb. 112, 120-21, 525 N.W.2d 203, 208 (1995). Accord *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991).

Mid-America contends that the range of vision rule required the trial court to find as a matter of law that Traphagan's negligence equaled or exceeded Mid-America's negligence. Under the applicable contributory negligence standard, if the claimant's contributory negligence is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

The enactment of § 25-21,185.09 eliminated the prior slight-gross standard for causes of action for negligence. Under the prior slight-gross standard, found in Neb. Rev. Stat. § 25-21,185 (Reissue 1995), a plaintiff could recover only if his or her negligence was slight in comparison to the defendant's, which was gross. See *Krepcik v. Interstate Transit Lines*, 152 Neb. 39, 40 N.W.2d 252 (1949). In arguing that a directed verdict should have been granted in its favor, Mid-America relies solely on range of vision cases decided under the slight-gross standard.

We begin by noting that we have not held under the slight-gross standard that a violation of the range of vision rule bars the plaintiff's recovery as a matter of law in every circumstance. In *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 748, 255 N.W.2d 272, 277 (1977), we stated:

> The range of vision rule was never intended to be arbitrary. [Citations omitted.] Although in some circumstances it may be proper for the trial court to determine as a matter of law that a person violating the range of vision rule is guilty of negligence more than slight, so as to prevent recovery, such as where the other party was not negligent in any respect, yet we have never held that a driver violating that rule is guilty of negligence more than slight

in every circumstance, regardless of the actions or negligence of the person with whom he collides.

Neither have we, heretofore, addressed the relationship between case law finding the plaintiff guilty of negligence more than slight under the old standard and cases arising under the new comparative negligence statute, § 25-21,185.09. We now hold that such cases decided under the slight-gross standard are not dispositive of whether a plaintiff's contributory negligence bars recovery as a matter of law under the new standard.

Other jurisdictions that have addressed this issue have generally left the apportionment of negligence to the jury. In *McKinney v. Public Service Co.*, 597 N.E.2d 1001 (Ind. App. 1992), the court stated that although at some point, the apportionment of fault may become a question of law for the court, fault apportionment under the Indiana Comparative Fault Act was uniquely a question of fact for the jury. See, also, *T.M. Doyle Teaming Co., Inc. v. Freels*, 735 F. Supp. 777 (N.D. Ill. 1990). The court in *Bruno v. Biesecker*, 40 Wis. 2d 305, 162 N.W.2d 135 (1968), held that a driver's negligence in turning left in front of an automobile approaching from the opposite direction was not as a matter of law at least 50 percent of the total negligence. In so holding, the court reiterated that the apportionment of negligence was peculiarly within the province of the jury. See, also, *Wroblewski v. Exchange Insurance Ass'n of Chicago*, 273 F.2d 158 (7th Cir. 1959) (holding that although plaintiff was clearly negligent in some degree, under Wisconsin law, apportionment of negligence is almost always for jury). In *Alexander v. Yellow Cab Co.*, 241 Ill. App. 3d 1049, 609 N.E.2d 921 (1993), a pedestrian stepped out, midblock, from between two parked cars onto the street. In permitting the jury to decide the negligence of the parties, the court stated that only in the clearest of cases where the facts are undisputed should relative degrees of fault be determined as a matter of law. See, also, *Lyons v. Nasby*, 770 P.2d 1250 (Colo. 1989); *Robinson v. Westover*, 101 Idaho 766, 620 P.2d 1096 (1980). In *Lillemoen v. Gregorich*, 256 N.W.2d 628 (Minn. 1977), there was evidence of the possible negligence of the defendant. The court stated that the evidence clearly supported the conclusion that the plaintiff, who failed to avoid or take proper precautions on steps

he knew were icy, was negligent. The court held that in such circumstances, the jury should be permitted to apportion the negligence between the plaintiff and the defendant. See, also, *Winge v. Minnesota Transfer Railway Co.*, 294 Minn. 399, 201 N.W.2d 259 (1972).

We find the reasoning and the holdings in the above cases applicable to the case before us. The fact that a plaintiff's negligence may have been more than slight as a matter of law under the slight-gross contributory negligence standard does not automatically equate with negligence that equals or exceeds the defendant's. We now hold that where reasonable minds may draw different conclusions and inferences regarding the negligence of the plaintiff and the negligence of the defendant such that the plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom recovery is sought, the apportionment of fault must be submitted to the jury. Only where the evidence and the reasonable inferences therefrom are such that a reasonable person could reach only one conclusion, that the plaintiff's negligence equaled or exceeded the defendant's, does the apportionment of negligence become a question of law for the court.

Having adopted this rule, we next examine the evidence regarding the negligence of both Traphagan and Mid-America. The trial court refused to grant a directed verdict for either party, and the issue of Mid-America's negligence was submitted to the jury to compare the negligence of Traphagan and Mid-America.

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996). In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party

against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Ochs v. Makousky,* 249 Neb. 960, 547 N.W.2d 136 (1996); *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995). We first review the evidence of Mid-America's negligence in this light and give Traphagan the benefit of every inference which can reasonably be deduced.

Daniel Staton, an expert witness for Traphagan, classified the Mid-America operation as "mobile" and stated that Mid-America was required by due care and under the Uniform Traffic Control Devices manual and the project plans to place a series of advance warning signs and channelizing cones and to use flaggers for the purpose of notifying the traveling public of the obstruction and to guide vehicles around it. The area of signs and cones, Staton explained, should have been set up for 1 to 1½ miles, wherein the Mid-America crew would work until it became necessary to "leapfrog" to another 1- to 1½-mile section. Mid-America failed to follow any of these procedures.

Mid-America's expert, Darrell Deering, classified its operation as "moving," and his report stated that warning signs, flashing vehicle lights, and/or trailing devices should have been used. Staton testified that even if Mid-America's operation was classified as "moving," rather than "mobile," Mid-America failed to comply with the prescribed safety precautions. Staton stated that for a moving operation, a shadow vehicle advising of the lane being blocked ahead would be required.

On the day of the accident, Mid-America did not use a shadow vehicle. Other than one orange road sign stating "Road Construction Next 11 Miles," which was located 7½ miles from the scene of the accident, there were no other advance warning signs, cones, or flaggers warning that a stopped vehicle was blocking the lane ahead. The record indicates that Mid-America's employees were not wearing the orange vests required for road work and that there were no other flags or signs which would indicate the truck's presence.

Although the flashing beacon was operating on top of Mid-America's truck, Dr. Freeman Hall, Jr., an expert witness for Traphagan, testified that to a person traveling east toward the

beacon, the light would not be very effective because the beacon would be "front lit." Hall further testified concerning visual perception problems presented by the Mid-America truck on the afternoon of September 21, 1992. He described what he considered to be two separate and distinct problems: (1) It would be difficult to recognize that there was a truck on the highway, and (2) it would be difficult to recognize that the truck was stopped. He considered it significant that the new pavement on the highway was black and that the undercarriage of the truck was also black. He opined that because of this, there would be no discernible shadow moving down the highway. Hall also testified that there was a "jumble" of objects in the back of the truck which would constitute a "dazzle camouflage," inhibiting recognition of the truck.

Gary Burke testified that he encountered the Mid-America truck on the day of the accident approximately 2 miles west of where Traphagan later collided with it. When Burke first saw the truck, he thought it was moving. It was not until he was 400 to 500 feet away that he realized the truck was not moving. Burke had to brake hard, but he was able to pass the truck on the left. Burke testified that he did not see the flashing amber beacon until after he had passed the truck and looked in his rearview mirror.

Ralph Rhoads, who lives less than a mile from the accident scene, testified that prior to the accident, he had watched the Mid-America truck for 12 to 15 minutes as Mid-America employees removed centerline tape from the road. He testified that he observed several vehicles approaching the truck too fast and having to brake quickly to avoid it. Harley Putzke, an employee working in a Mid-America truck east of the accident, testified that earlier in the day, a trucker who encountered the Mid-America truck in question complained to Putzke that he had "damn near run over" one of the workers at the Mid-America truck.

John Wendell, president of Mid-America, sent three employees and two trucks to remove the centerline tape on that particular portion of Highway 20. Of those three employees, two were new and had never received training concerning traffic safety other than some general directions to use safety equip-

ment and to use common sense to protect the motoring public. The evidence further showed that the two newer employees had no experience in removing centerline tape and that even the senior employee, Putzke, denied having experience in pulling centerline tape.

Ordinary negligence is defined as doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances. *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995). Therefore, it is clear from the record that there is evidence of Mid-America's negligence. We find that a reasonably careful person would not have failed to take the necessary precautions to warn oncoming motorists of the vehicle in the eastbound lane of traffic and that, therefore, the evidence was sufficient for a jury to find that Mid-America was negligent.

The trial court found that Traphagan was negligent as a matter of law. In finding that Traphagan was negligent as a matter of law for operating her vehicle at such a speed that she could not stop within the range of her vision, the court noted that it was "absolutely plain that she violated Nebraska law on the range of vision rule and that's a matter for the Court to decide that she was . . . guilty of negligence." Under the range of vision rule, a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995); *Horst v. Johnson*, 237 Neb. 155, 465 N.W.2d 461 (1991).

There was evidence presented at trial that the Mid-America truck was discernible within Traphagan's range of vision. Bridget Turman, who was following Traphagan shortly before the accident, testified that the Mid-America truck was visible at least for a time from about 1 mile away. Turman stated that the weather was sunny and the sky was clear. As Turman was traveling behind Traphagan's vehicle, she noticed a white flatbed truck on the highway. She saw a yellow flashing light on the cab of the truck. There were two people standing next to the driver's side door of the truck. Turman knew that the truck was not mov-

ing. She then saw Traphagan's car get closer and closer to the truck and saw the car hit the rear end of the truck.

Hall, Traphagan's expert witness, testified that as Traphagan approached the truck, she was presented with two visual perception problems: (1) She had to recognize that there was a truck on the highway, and (2) she had to recognize that it was stopped. Hall then proceeded to explain what, in his opinion, would have affected Traphagan's ability to perceive the truck as she approached it on the highway.

An exception to the range of vision rule exists when a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and relatively indiscernible. *Nickell v. Russell, supra.* Hall's testimony does not rebut the undisputed evidence that Turman, who was following Traphagan, observed the truck from about 1 mile away. Therefore, we find that the personal representative did not establish any exception to the range of vision rule and that the trial court correctly determined that Traphagan was negligent as a matter of law.

However, from our review of the record we cannot say as a matter of law that Traphagan's negligence equaled or exceeded Mid-America's negligence. The trial court properly submitted the negligence issue to the jury in order to have it compare Traphagan's negligence to the negligence of Mid-America. We cannot say that the jury was clearly wrong in the determination that it made.

Mid-America's remaining assignments of error relate to the jury instructions requested and given during the trial. Mid-America claims it was prejudicial error for the trial court to refuse its requested instruction No. 7, which stated: "The Nebraska Statute that applies to this case provides as follows: Except as not relevant to this case the Nebraska 'Rules of the Road' do not apply to persons, motor vehicles and other equipment while actually engaged in work upon the surface of a highway." Mid-America's proposed instruction was based upon Neb. Rev. Stat. § 39-606 (Reissue 1988) (now codified at Neb. Rev. Stat. § 60-6,112 (Reissue 1993)).

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996). Although the instruction requested by Mid-America is a correct statement of the law, it was not error for the trial court to refuse such an instruction.

Instruction No. 8, given by the court, which set forth the statement of the personal representative's case and the issues, provided in part as follows:

> 1. Plaintiff's Claims
>
> A. Issues
>
> 1. [The personal representative] claims that Mid-America was negligent in one or more of the following ways:
>
> A. In stopping the pickup in the eastbound lane of traffic.
>
> B. In failing to properly warn Kathy Traphagan by setting out advance warning signs and/or flaggers to warn of the stopped pickup.
>
> C. In failing to provide proper channelization of the traffic around the stopped pickup.
>
> D. In failing to properly train, monitor and supervise its employees in the principles of safe traffic control.
>
> 2. [The personal representative] also claims that the negligence was the proximate cause of the accident and the death of Kathy Traphagan and seeks a judgment against Mid-America for the damage to her next of kin.

Instruction No. 11 further instructed the jury that "[o]ne who places an obstruction upon a highway in such a manner that it is dangerous to others using the highway has a duty to use due care to warn others upon the highway of the danger incident to the obstruction."

Although allegations relating to the Nebraska Rules of the Road did initially appear in the personal representative's petition, it is apparent that this issue was not submitted to the jury for its consideration. No reference to these rules was found in

the evidence, argument, or instructions presented to the jury. An instruction on a matter not an issue in the litigation distracts the jury from its effort to answer legitimate, factual questions raised during the trial. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Mid-America has therefore failed to show that the tendered instruction was warranted by the evidence or by the pleadings.

Next, Mid-America asserts that the trial court erred in giving instruction No. 10, a negligence standard measured by a reasonably careful person with physical abilities identical to the person accused of negligence. Mid-America argues that it was prejudicial error for the court to refuse to submit instead the standard "reasonably careful person under similar circumstances" instruction (NJI2d Civ. 3.02).

All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995). Instruction No. 10 stated in relevant part as follows:

> Negligence is doing something that a reasonably careful person with physical abilities identical to those of the person accused of negligence would not do under similar circumstances, or failing to do something that a reasonably careful person with physical abilities identical to those of the person accused of negligence would do under similar circumstances.
>
> . . . .
>
> Drivers are negligent if they do something a reasonably careful driver in the same situation would not have done or failed to do something a reasonably careful driver in the same situation would have done.

Mid-America claims that this instruction was not supported by the evidence and, therefore, confused and misled the jury. We find that it was proper for the trial court to give such instruction and that the instruction is a correct statement of the law.

For purposes of a physical disability, the generally accepted standard of care is, as for any other person, ordinary care under the circumstances. However, a person's disability is one of the

circumstances to be considered in determining whether such person exercised ordinary care. Thus, in *Storjohn v. Fay*, 246 Neb. 454, 466, 519 N.W.2d 521, 530 (1994), we stated: "One who is ill must conform to the standard of a reasonable person under a like disability . . . ." Depending on the circumstances, a reasonably careful person with a like disability may be required to put forth a greater degree of effort than would be necessary by others in order to exercise ordinary care under the circumstances. Clearly, instruction No. 10 was a correct statement of the law and was not misleading.

Moreover, instruction No. 10 covered issues supported by the pleadings and the evidence. The issue of Traphagan's physical disability was raised by Mid-America in its answer to the second amended petition. Mid-America alleged that Traphagan was contributorily negligent in operating her motor vehicle with inadequate vision and that she assumed the risk of her injuries by operating a motor vehicle with her visual disability. At trial, the personal representative's evidence showed that Traphagan's physical disability required her to wear special glasses and to have mirrors on both doors of her vehicle. Evidence was further adduced indicating that Traphagan was, in fact, wearing such glasses at the time of the accident and that mirrors were on both doors of her vehicle.

Mid-America's requested instruction No. 3 stated: "Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances." We further find that it was not error for the trial court to refuse to give such an instruction, since the substance of Mid-America's proposed instruction was contained in the instructions actually given. See *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

Mid-America also asserts that the trial court erred in giving instruction No. 13, which provided: "One who enters into a contractual relationship is charged with knowledge of the contents of the contract and is bound thereby." It is clear, and Mid-America does not dispute, that instruction No. 13 is a correct statement of the law. See, e.g., *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989), *overruled on other grounds, Anderson*

v. Service Merchandise Co., 240 Neb. 873, 485 N.W.2d 170 (1992). Mid-America argues, however, that there was no issue as to whether Mid-America knew or did not know what was in the contract and that, therefore, the instruction was unnecessary and served only to confuse and mislead the jury into thinking that there was an issue as to Mid-America's knowledge regarding the contract.

Contrary to Mid-America's contention, instruction No. 13 does not indicate to the jury that there is an issue as to whether or not Mid-America knew what was in the contract. Rather, instruction No. 13 explicitly makes such actual knowledge irrelevant. The relevance of instruction No. 13 to the evidence presented was the fact that the safety measures required under the contract by which Mid-America was bound helped to establish Mid-America's duty of care. The specifications in the subcontract are the Nebraska Department of Roads' 1985 Standard Specifications for Highway Construction. Section 937.01 of the specifications states:

> The contractor shall provide, erect, and maintain all necessary barricades, suitable and sufficient lights, hazard beacons, other signs, provide a sufficient number of watchmen, and take all necessary precautions for the protection of the work and the safety of the public. . . .
>
> . . . The contractor shall erect warning signs in advance of any place on the project where operations interfere with the use of the road by traffic . . . .

Section 937.03 provides in part: "It shall be the responsibility of the contractor to furnish flagger(s) to direct traffic when his equipment is operating over or adjacent to the roadbed being used by the traveling public." Section 937 provides that the failure to exert and maintain traffic protective devices shall be reason to temporarily suspend work.

The contracts and the specifications contained therein are relevant to the duty of care that would be foreseeable to a reasonably careful person in similar circumstances. As such, we find it was not error for the trial court to submit instruction No. 13.

We next address instruction No. 14, which stated: "Inconvenience or the cost of compliance cannot excuse a party from the performance of an absolute and unqualified undertaking to

do a thing that is required, possible, and lawful." The personal representative's petition alleged that Mid-America was negligent in failing to place signs and use flaggers to warn Traphagan of the hazard on the highway created by Mid-America. The contract documents required Mid-America to comply with the specifications and the Manual on Uniform Traffic Control Devices. Included within such specifications were the above requirements for signs and flaggers.

While always forming his testimony in terms of concern for the workers' safety, Mid-America's president, Wendell, presented testimony from which a jury could reasonably infer that inconvenience or cost of compliance was a factor in his decision not to provide warning signs. Wendell described in detail how the placing of such signs was dangerous for the workers and required extra work. The testimony presented an issue as to whether Mid-America could be excused from the safety requirements for any of the reasons given by Wendell. It was not error for the trial court to submit instruction No. 14.

Finally, we address the personal representative's cross-appeal, in which he assigns two errors: (1) the trial court's submission of Traphagan's negligence to the jury and (2) the trial court's directing a verdict finding Traphagan contributorily negligent.

We have already held that the Mid-America truck was discernible within Traphagan's range of vision and that the personal representative failed to show that Traphagan fell within any exception to the range of vision rule. As such, the trial court did not err in directing a verdict finding Traphagan contributorily negligent. Therefore, it was correct for the trial court to leave to the jury the apportionment of negligence. Therefore, the personal representative's cross-appeal is without merit.

For the reasons set forth in this opinion, the judgment of the district court is affirmed and the cross-appeal is dismissed.

AFFIRMED.

GERRARD, J., concurring.

I agree with the rule announced by the majority regarding the circumstances under which apportionment of fault must be submitted to the jury, and I concur in the result of the instant case.

However, I write separately to address the propriety and effect of the trial court's directed verdict of Traphagan's negligence.

This court has long held that a motorist is deemed negligent as a matter of law if he or she operates a motor vehicle in such a manner as to be unable to stop or turn aside without colliding with an object or obstruction in the motorist's path within his or her range of vision. *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996); *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995). However, as the majority notes, we have established an exception to the general rule where a motorist, otherwise exercising reasonable care, does not see an object or obstruction sufficiently in advance to avoid colliding with it because it is similar in color to the road surface and relatively indiscernible. *Nickell v. Russell, supra*. When the facts of a case fall within the exception to the range of vision rule, then the determination of negligence becomes a question for the jury. *Id.*

In the present case, the evidence as to the discernibility of the Mid-America truck was disputed. On the one hand, Bridget Turman, who was traveling behind Traphagan, testified that she was able to discern the truck from about 1 mile away and observed that it was not moving. On the other hand, Dr. Freeman Hall, Jr., testified that (1) Turman had the benefit of Traphagan's car juxtaposed between her position and the Mid-America truck by which to gauge the movement of the truck and (2) two visual perception problems could have interfered with Traphagan's ability to perceive the truck, specifically the lack of a discernible shadow moving down the highway and the camouflage effect of the "jumble" of objects in the back of the truck. Ralph Rhoads testified that prior to the accident, he observed several vehicles approaching the truck too fast and having to brake quickly to avoid it.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996). There was a question presented as to whether or not Traphagan was able to discern the truck and, consequently, a question presented as to whether or not the facts of this case fall within the exception to the range of vision rule. Accordingly, the directed verdict

against the personal representative was erroneous, and the question of Traphagan's negligence ought to have been submitted to the jury.

However, we have held that error without prejudice provides no ground for appellate relief. *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993); *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). The issue, thus, is whether the personal representative was prejudiced by the directed verdict. We have not, heretofore, addressed the effect of an erroneous directed verdict against one of the parties when a jury ultimately compares relative degrees of negligence and apportions damages under the new comparative negligence statute. Other jurisdictions have considered the adequacy of jury instructions and the record as a whole in determining whether a party is prejudiced by the granting of an erroneous directed verdict in a comparative negligence case. See, e.g., *Ricklin v. Smith*, 670 P.2d 1239 (Colo. App. 1983); *Niedbalski v. Cuchna*, 13 Wis. 2d 308, 108 N.W.2d 576 (1961).

In essence, comparative negligence "abrogates the common-law concept of contributory negligence, thus relieving both parties of an all-or-nothing situation, and substitutes apportionment of the damages by fault." John J. Palmer & Stephen M. Flanagan, Heft & Heft's Comparative Negligence Manual § 1.10 at 3 (rev. ed. 1986). Because its purpose is to allow juries to compare relative negligence and to apportion damages on that basis, the court in *Ricklin v. Smith, supra*, held that it was error for the trial court to fail to tell the jury what conduct of a party prompted the trial court to enter a directed verdict. The court reasoned that "[t]he jury needed to know the [trial] court's reason for the directed verdict in order to make a comparison of the relative fault of each party." *Id.* at 1241. The reasoning of the court is persuasive.

In considering the record and the jury instructions in the instant case, the jury was told what conduct of Traphagan prompted the trial court to enter a directed verdict against the personal representative, and what specific conduct of Mid-America potentially violated its duty of reasonable care. Thus, the jury had access to the applicable law to determine both parties' comparative negligence. See *Watson v. Regional*

Transp. Dist., 729 P.2d 988 (Colo. App. 1986). The jury was also instructed to "not consider the ruling of the Court concerning contributory negligence in deciding the issue of Mid-America's negligence or in deciding how the negligence of Kathy Traphagan compares in degree to any negligence [attributable] to Mid-America." The jury was told that it may attribute "any amount" less than 100 percent of the negligence to Mid-America.

Thus, even though the trial court erroneously directed a verdict regarding Traphagan's negligence, the jury was properly instructed to weigh the relative contributions of the parties' negligence under the comparative negligence statute. Apportioning the relative negligence of the parties required the jury to evaluate Traphagan's negligence, as well as the negligence of Mid-America. It was within the jury's province to assign as little as 1 percent of the negligence to Traphagan; they did not do so. Instead, the jury not only found Traphagan negligent as instructed, but assigned 25 percent of the comparative negligence to Traphagan and 75 percent to Mid-America.

I cannot conclude that the personal representative was prejudiced in the instant case when utilizing the standards enunciated herein. The record as a whole supported a finding that both Traphagan and Mid-America were negligent and supported the apportionment made by the jury. Furthermore, the jury was told what specific conduct on the part of each party potentially constituted negligence so that they could make an informed comparison of the relative fault of each party. See *Ricklin v. Smith, supra.* The jury was also properly cautioned not to give greater importance to the negligence found by the trial court than that found by the jury. See *Niedbalski v. Cuchna, supra.*

For these reasons, the personal representative's cross-appeal is properly dismissed, and I concur in the result reached by the majority.

WHITE, C.J., and CAPORALE and FAHRNBRUCH, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE,
V. CAREY DEAN MOORE, APPELLANT.
553 N.W.2d 120

Filed November 22, 1996. No. S-95-485.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, WILLIAM B. RIST, and DARVID D. QUIST, Judges. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

The motion for rehearing filed by the appellee, State of Nebraska, is overruled; however, the opinion previously adopted by this court, *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), is hereby modified by striking the fifth sentence of the last paragraph of the subsection entitled "*Overbreadth*" of the section entitled "AGGRAVATING CIRCUMSTANCE § 29-2523(1)(b)," which sentence reads: "The reach of this aggravating circumstance is even further circumscribed by the requirement that the murder be committed in an apparent effort to conceal the identity of the perpetrator." 250 Neb. at 814, 553 N.W.2d at 129.

Further, the opinion is hereby modified by striking from the third sentence of the third paragraph of the subsection entitled "*Constitutionality of Resentencing Panel's Definition*" of the section entitled "AGGRAVATING CIRCUMSTANCE § 29-2523(1)(d)" the language reading "Under the panel's definition," 250 Neb. at 820, 553 N.W.2d at 132, and substituting therefor the words "Under the facts before the panel," so that said sentence now reads:

Under the facts before the panel, this aspect of exceptional depravity is restricted to just two situations: (1) where the defendant experimented with the method of causing the victim's death or (2) where the defendant purposefully selected a particular victim on the basis of specific characteristics such as race, gender, creed, sexual orientation, disability, or age.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

IN RE GUARDIANSHIP OF TRAVIS ALEXANDER ZYLA, A MINOR. CURTIS R. KNIGHT AND THERESA A. KNIGHT, APPELLEES, V. KELLY J. KNIGHT, APPELLANT, AND CHRISTOPHER A. KNIGHT, APPELLEE.

555 N.W.2d 768

Filed November 22, 1996. No. S-96-227.

1. **Guardians and Conservators.** A proceeding for the appointment of a guardian is a probate matter.
2. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995), are reviewed for error on the record.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
4. **Constitutional Law: Guardians and Conservators: Child Custody: Parental Rights.** A guardianship proceeding is not the proper means to terminate a parent's constitutional right to the custody of her or his children.
5. **Guardians and Conservators: Child Custody: Parental Rights.** The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights.
6. **Guardians and Conservators: Child Custody.** Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time.
7. **Guardians and Conservators.** Guardianships are temporary and depend upon the circumstances existing at the time.
8. **Guardians and Conservators: Divorce: Child Custody: Jurisdiction.** While a county court has exclusive original jurisdiction over guardianships, the district court in which a dissolution action is filed has jurisdiction over matters concerning the temporary and permanent custody of the minor children of the parties to the marriage.

9. **Divorce: Child Custody: Child Support: Jurisdiction.** Where the dissolution of a marriage is sought, the general jurisdiction over the marital relationship and all related matters, including child custody and support, is vested in the district court in which the petition for dissolution is properly filed.
10. **Guardians and Conservators: Divorce: Child Custody: Jurisdiction.** During the pendency of a dissolution action, a county court's exclusive original jurisdiction in guardianship matters touching upon the custody of a minor must yield to the jurisdiction of the district court in which the dissolution petition is filed.

Appeal from the County Court for Douglas County: ROBERT C. VONDRASEK, Judge. Remanded with direction.

Jeffrey A. Wagner, of Legal Aid Society, Inc., for appellant.

Diane B. Metz for appellees Curtis R. Knight and Theresa A. Knight.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

The county court appointed the petitioners-appellees, Curtis R. Knight and his wife, Theresa A. Knight, coguardians of Travis Alexander Zyla, the minor grandson of said Curtis R. Knight. The minor was born on May 25, 1995, unto the grandfather's son, the appellee Christopher A. Knight, and his son's wife, the objector-appellant, Kelly J. Knight. The minor's mother appealed to the Nebraska Court of Appeals, asserting, among other things, that as she had been granted temporary custody of the minor in the dissolution action she had filed in the district court against the minor's father, the county court lacked jurisdiction to appoint coguardians for the minor. On our own motion, we removed this matter to our docket in order to regulate the caseloads of the two appellate courts. We now remand with direction.

A proceeding for the appointment of a guardian is a probate matter. *Workman v. Workman*, 171 Neb. 554, 106 N.W.2d 722 (1960). Although guardianship proceedings were once reviewed de novo, *Workman, supra*, now appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995), are reviewed for error on the record, *In re Conservatorship of Estate of Martin*, 228 Neb. 103, 421

N.W.2d 463 (1988). See Neb. Rev. Stat. §§ 25-2728 and 25-2733 (Reissue 1995). However, on questions of law, we, as an appellate court, have an obligation to reach our own conclusions independent of those reached by the lower courts. See, *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996); *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996).

Because at the time the minor was born the mother was contemplating the dissolution of her marriage to the father, the minor was given as his surname the mother's maiden surname. After the minor's birth, she filed such action in the district court, which, after finding that the minor's mother was "a fit and proper person to be awarded the temporary care, custody and control of the minor" and that it was in the minor's best interests that such be done, awarded his "temporary care, custody and control" to the mother "until further order of this court." Shortly thereafter, the grandfather and his wife petitioned the county court for appointment as coguardians of the minor, alleging that he had been abandoned by his parents. The minor's mother filed an objection, but the father, who was then under a sentence of incarceration, testimonially consented to the coguardianship.

There is evidence in the county court that the minor's mother had neither stable employment nor living arrangements; that she took poor care of the minor; that she engaged in drug use prior to, during, and after her pregnancy; and that she supported her drug habit with her welfare check and by stealing and prostituting herself. Indeed, at the time of the county court proceedings, she was on probation and had on at least one occasion tested positive for methamphetamine use. The minor's guardian ad litem was of the opinion that the minor's mother probably possessed the basic ability to properly care for the minor, but that, although he did not think the mother was an "unfit" parent, the minor would nonetheless be "probably better off" in the home of his grandfather and his wife because of the stability that home provided. There is also evidence that the minor's mother shows signs and symptoms of posttraumatic stress disorder.

Finding that the minor's mother was personally deficient and lacked the capacity to parent and that her "rights of custody to [the minor] have been suspended by circumstances, thereby necessitating the appointment" of the grandfather and his wife as coguardians, the county court so ordered. In the interest of accuracy, we note that although the county court appointment refers to the coguardians as the minor's "grandparents," the fact is that the grandfather's wife is not the mother of the minor's father. In any event, after the coguardians accepted the appointment, the county court issued them letters of coguardianship.

At the time of the county court hearings, Neb. Rev. Stat. § 24-517(2) (Reissue 1995) gave the county court, as it does presently, the "[e]xclusive original jurisdiction of all matters relating to guardianship . . . of any person . . . ." Section 30-2602 further grants the county court "jurisdiction over . . . guardianship proceedings."

Section 30-2608 provides, in relevant parts, that the

> father and mother are the natural guardians of their minor children and are duly entitled to their custody . . . being themselves . . . not otherwise unsuitable. . . .
>
> . . . .
>
> The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by prior or current circumstances or prior court order.

We agree with the observation in *In the Matter of Aschenbrenner*, 182 Mont. 540, 597 P.2d 1156 (1979), that a guardianship proceeding is not the proper means to terminate a parent's constitutional right to the custody of her or his children. But, as we recently noted, the appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights. In contrast, granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time. *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). In that sense, guardianships are temporary and depend upon the circumstances existing at the time. See *In re Guardianship of Copenhaver*, 124 Idaho 888, 865 P.2d 979 (1993).

In view of the evidence, we have no difficulty concluding that the county court's finding that the parental rights of the minor's mother have been suspended by the then current circumstances is not erroneous. See *Stansell v. Superior Ct. In and For Cty., etc.*, 125 Ariz. 82, 607 P.2d 959 (1980) (mother's parental rights suspended as to 14-year-old daughter whose father had died and who had conflicts with stepfather, who was not welcome in mother's home, and whose mother consented to guardianship by maternal grandparents).

The difficulty is that throughout the county court proceedings, there was pending in the district court the dissolution action the minor's mother had instituted against the minor's father. The relevant jurisdiction of the district court is defined in Neb. Rev. Stat. § 42-351(1) (Reissue 1993), which provides that in dissolution proceedings, the district court "shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning . . . the custody and support of minor children . . . ." The district court's power to make orders concerning custody also extends to placing the minor child in the custody of third parties. Neb. Rev. Stat. § 42-364(1) (Cum. Supp. 1994). Further, the district court has the power during the pendency of a dissolution proceeding to "issue ex parte orders . . . determining the temporary custody of any minor children of the marriage . . . ." Neb. Rev. Stat. § 42-357 (Reissue 1993).

Thus, while a county court has exclusive original jurisdiction over guardianships, the district court in which a dissolution action is filed has jurisdiction over matters concerning the temporary and permanent custody of the minor children of the parties to the marriage. In this latter regard, we have written that where the dissolution of a marriage is sought, the general jurisdiction over the marital relationship and all related matters, including child custody and support, is vested in the district court in which the petition for dissolution is properly filed. *State ex rel. Storz v. Storz*, 235 Neb. 368, 455 N.W.2d 182 (1990); *Nemec v. Nemec*, 219 Neb. 891, 367 N.W.2d 705 (1985); *Robbins v. Robbins*, 219 Neb. 151, 361 N.W.2d 519 (1985).

Indeed, in *Storz*, we held that inasmuch as the marital relationship continued during the 6 months immediately following the entry of the decree of dissolution, a child conceived during that period was begotten during the marriage, and, thus, issues concerning such child's custody and support were to be determined through a proceeding to modify the dissolution decree, rather than through a paternity action.

Although not directly in point, the interplay of the jurisdictions of a county court and district court is further illustrated by *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993), wherein the natural mother's new husband sought to adopt her children. Pursuant to the provisions of Neb. Rev. Stat. § 43-104 (Reissue 1988), which required the consent of the district court having jurisdiction of the children, the natural mother moved for the consent of the district court dissolving her marriage to the children's natural father. Concluding that the natural father had not abandoned the children, the district court overruled the motion. In reversing and remanding that decision, we wrote that as § 24-517(8) (Reissue 1989) gave the county court exclusive original jurisdiction over all adoption matters, it was inappropriate for the district court to have concerned itself with the issue of abandonment. However, we also noted that the consent statute gave the district court two opportunities to influence an adoption proceeding. We observed first that while a determination of custody is not, on its face, determinative as to later petitions for adoption made by either the custodial or noncustodial parent, the district court might nonetheless have made determinations within the dissolution proceedings which would be decisive on the issue of adoption or the fitness of a parent, and it would therefore be unnecessary for the county court to rehear these issues. Second, the district court might be in a position to make nonbinding recommendations to the county court based on the former court's experience from the parties' dissolution proceedings.

Given that history, we conclude that during the pendency of a dissolution action, a county court's exclusive original jurisdiction in guardianship matters touching upon the custody of a minor must yield to the jurisdiction of the district court in which the dissolution petition is filed. It was accordingly an

abuse of discretion as a matter of law for the county court to have exercised its jurisdiction over the within petition for the appointment of coguardians. Cf. *In re Interest of Goldfaden*, 208 Neb. 93, 302 N.W.2d 368 (1981) (exclusive original jurisdiction of county court sitting as juvenile court not diminished by preexisting custody order in district court dissolution decree).

Accordingly, we remand the matter to the county court and direct that it vacate its appointment of the coguardians.

REMANDED WITH DIRECTION.

WHITE, C.J., and FAHRNBRUCH, J., dissent.

MICHAEL F. LARKIN, APPELLANT, V.
ETHICON, INC., A FOREIGN CORPORATION, APPELLEE.
556 N.W.2d 44

Filed December 6, 1996. No. S-94-349.

1. **Verdicts: Evidence: Appeal and Error.** Recommended factual findings of a special master are given the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence.
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. **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.
4. **Pretrial Procedure.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party.
5. ____. Regarding discovery, a party is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which (1) he or she knows that the response was incorrect when made, or (2) he or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
6. ____. A litigant has the right to have interrogatories answered, and the duty to supplement answers previously given in response to an adversary's interrogatories is a continuing duty.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

James R. Place, of Place Law Office, and, on brief, Gregory A. Pivovar for appellant.

Joseph E. Jones, Mary Kay Frank, and Roger L. Shiffermiller, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Plaintiff, Michael F. Larkin, appeals the Douglas County District Court's grant of summary judgment in favor of defendant, Ethicon, Inc. Prior to oral argument, we appointed a special master for the purpose of taking evidence on the issue of Ethicon's conduct during discovery and making recommended findings of fact. We adopt the recommended factual findings of the special master, reverse the district court's grant of summary judgment, and remand the cause for further proceedings.

On September 21, 1988, Larkin, who suffered from acromioclavicular joint separation, underwent surgery for shoulder repair. During the course of the surgical procedure, Dr. David Clough moved Larkin's distal clavicle back to its normal relationship with the shoulder joint and then tied down the clavicle with Mersilene surgical tape, a 5-millimeter-wide strand of polyester fiber. Ethicon manufactures Mersilene tape.

Two weeks after this surgery, the injury recurred, and Dr. Clough performed the surgery again on October 11, 1988. During the course of this second surgery, Dr. Clough discovered that the Mersilene tape had ruptured transversely, causing the reinjury. The ruptured tape was not saved following the surgery.

On January 17, 1991, Larkin brought this action against Ethicon, alleging negligence, strict liability, and breach of warranty. Larkin filed an amended petition based on the theory of res ipsa loquitur on January 12, 1993.

During discovery, Larkin served Ethicon with multiple sets of interrogatories. Two of these interrogatories are at issue in

this case. One interrogatory asked Ethicon to state whether it had received any complaints regarding Mersilene tape; Ethicon never answered this interrogatory. The second interrogatory asked Ethicon to state the nature of any lawsuits in which Ethicon was named. Ethicon denied the existence of any such lawsuits.

Ethicon filed a motion for summary judgment on November 12, 1993. The matter was taken under advisement until March 7, 1994, when the district court granted the motion.

Larkin timely appealed this decision, and briefs were filed in September and October 1994. We removed the case to this court pursuant to our power to regulate the docket of the Nebraska Court of Appeals. Following the scheduling of oral arguments in this court, Larkin filed a motion to stay proceedings and a motion to remand for an evidentiary hearing to address certain issues involving Ethicon's conduct during discovery. In particular, Larkin alleged that Ethicon knew of the existence of three other complaints or lawsuits filed with the Federal Drug Administration (FDA) involving instances in which Mersilene tape failed, and yet Ethicon did not answer one interrogatory and failed to answer the other interrogatory truthfully. Larkin also alleged that the provision of this information would have led to other discoverable information and thus would have affected the district court's grant of summary judgment. We appointed Judge Mary C. Gilbride as special master to take evidence on this issue and to make recommended findings of fact. The special master filed her report on June 11, 1996.

In her recommended findings of fact, the special master noted that Larkin filed a Freedom of Information Act request with the FDA, asking about any complaints or lawsuits on record involving Ethicon and Mersilene tape. On February 2, 1994, over a month before the grant of summary judgment in this case, Larkin received a response from the FDA indicating that four reports involving Ethicon and Mersilene tape had been filed. The dates of these reports were March 3, 1989; January 25, 1991 (the complaint in the instant case); November 6, 1991; and April 16, 1992. This initial response from the FDA did not reveal the names of the injured parties, the nature of the cases, or the locations of the incidents, due to confidentiality issues.

The special master further found that Ethicon itself provided the information about the three other complaints to the FDA.

The special master also found that Ethicon had specific knowledge of these additional complaints prior to the entry of summary judgment in this case, that the interrogatories at issue specifically requested this information, that Ethicon failed to comply with its discovery obligation by not providing the information it had at the time of service of the interrogatories and by not updating those answers as to the later complaints, and that Ethicon withheld information that was material to Larkin and would have affected the outcome of the summary judgment motion because it would likely have opened avenues for further discovery and would have created issues sufficient to survive the motion for summary judgment.

However, the special master also found that Larkin knew of the existence of other complaints as of February 2, 1994, but did not bring that information to the attention of the trial court. The special master noted that Larkin did not file a motion to compel discovery, did not serve additional discovery requests on Ethicon following receipt of the FDA information, did not request a continuance to pursue additional discovery, did not make a motion for new trial, and did not file a motion to vacate the judgment. The special master also found that Larkin filed the motion to stay proceedings and the motion to remand on March 8, 1996, more than 2 years after Larkin received the initial report from the FDA. The parties conceded at oral argument before this court that Larkin did not have full information regarding the FDA report until November 1994 and that Ethicon initially represented to Larkin that the information in the FDA report dealt only with Larkin's own case.

Following the filing of the special master's report, we again scheduled this case for oral argument. On appeal, we must determine whether this matter should be remanded to the district court for further proceedings because the information Ethicon failed to disclose would have made the grant of summary judgment improper in this case, or whether Larkin waived any right of recourse he may have had because he failed to take any action as to the information in his possession prior to the grant of summary judgment.

We give recommended factual findings of a special master the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence. *Brown v. O'Brien*, 4 Neb. 195 (1876). See Neb. Rev. Stat. § 25-1131 (Reissue 1995). 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. *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996). 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. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996).

We determine that the factual findings of the special master are not clearly against the weight of the evidence. Therefore, we adopt the factual findings of the special master as set forth above and in the following pages.

Larkin alleges first that this matter should be remanded because the information Ethicon failed to disclose during discovery concerning other complaints and lawsuits would have made the grant of summary judgment improper. In evaluating this assignment of error, we note first that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party. Neb. Ct. R. of Discovery 26(b)(1) (rev. 1996). See *Walls v. Horbach*, 189 Neb. 479, 203 N.W.2d 490 (1973). The Nebraska Discovery Rules state:

> A party is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which
>
> (A) he or she knows that the response was incorrect when made,
>
> or
>
> (B) he or she knows that the response though correct when made is no longer true and the circumstances are

> such that a failure to amend the response is in substance a knowing concealment.

Rule 26(e)(2).

In the instant case, Larkin propounded interrogatories specifically requesting information about any other lawsuits or complaints filed against Ethicon involving Mersilene tape. Ethicon stated that no lawsuits existed and also failed to answer regarding any existing complaints. Ethicon's attempted explanation to this court for this behavior is that the answer to the lawsuit interrogatory was accurate when made and that the other lawsuits postdate this case. Ethicon also suggests that its failure to answer the complaints interrogatory is excused or explained because this set of interrogatories accompanied a duplicate of another discovery request (creating the inference that this set of interrogatories was also a duplicate) and because Larkin did not file a motion to compel the answer.

A litigant has the right to have interrogatories answered, and the duty to supplement answers previously given in response to an adversary's interrogatories is a continuing duty. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). Further, this court has taken the position that

> "[f]or a party to sit idly by, knowing that a previous answer he has given in response to discovery is no longer truthful in the light of his present information, is intolerable. It is inconsistent with the purpose of the rules to avoid surprise and it is inconsistent with the standards of conduct that one expects in a learned and honorable profession."

Norquay, 225 Neb. at 538, 407 N.W.2d at 154.

Ethicon argues that Larkin has waived any right or recourse he may have because he failed to file a motion to compel, did not bring the FDA information to the attention of the district court at the summary judgment hearing, and filed an appeal rather than other procedural devices. To support this position, Ethicon relies on our decision in *Hansl v. Creighton Univ.*, 243 Neb. 21, 497 N.W.2d 63 (1993). In *Hansl*, we denied a motion for new trial on the basis of newly discovered evidence because we found that the movant had knowledge of the newly discovered evidence prior to summary judgment. We noted that the "newly discovered evidence" was correspondence between the

plaintiff and the defendant and found that the movant failed to show any reason why this evidence was not produced at the hearing on summary judgment.

The instant case is clearly distinguishable from *Hansl.* Larkin argues, and Ethicon does not dispute, that Larkin did not know the names of the parties involved in the other lawsuits and complaints, the nature of the other cases, or the locations of these incidents prior to the summary judgment hearing. Absent Ethicon's cooperation, Larkin had no means by which to determine the missing information. Ethicon admitted during oral argument that it represented to Larkin that all of the information in the FDA report concerned Larkin's own complaint. Yet, in an exhibit presented before the special master, Ethicon's employee Edward Block stated that Ethicon itself provided this information to the FDA. Due to confidentiality issues with the FDA and Ethicon's lack of cooperation, Larkin did not have full access to this information until November 1994, 8 months after the grant of summary judgment, 1 month after briefs were submitted to the Court of Appeals, and well past the time that Larkin had to perfect his appeal from the grant of summary judgment.

In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted, and we give that party the benefit of all reasonable inferences deducible from the evidence. *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996). In the instant case, Larkin clearly explained why the information he did possess at summary judgment was not presented to the court at that time. A review of the evidence in a light most favorable to Larkin demonstrates that Larkin did not possess any useful information as to other complaints and lawsuits prior to the hearing on the motion for summary judgment, was told by Ethicon that the information he possessed involved only his own case, and did not receive any additional information until months later. The evidence also indicates that Larkin did not waive any right or recourse available to him in this case.

There is simply no excuse for Ethicon's behavior during the discovery process in this case, and this court will not give credence to any of the excuses Ethicon proposes. Because we find that Ethicon had a continuing duty to supplement its responses

to Larkin's interrogatories and to provide answers to all interrogatories propounded, and because we find that Larkin did not waive any recourse available to him by not bringing the FDA report to the attention of the district court at summary judgment, we reverse the district court's grant of summary judgment and remand the cause for further proceedings in conformity with this opinion. We also direct that Larkin be given the opportunity to amend his pleadings following the completion of discovery if such amendment is appropriate.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., participating on briefs.

RONALD D. KUHLMANN, APPELLANT, V. CITY OF OMAHA AND CITY OF OMAHA ZONING BOARD OF APPEALS, APPELLEES.

556 N.W.2d 15

Filed December 6, 1996. No. S-94-883.

1. **Zoning: Appeal and Error.** An appellate court reviews the decision of a district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a zoning board of appeals, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court.
2. ____: ____. Decisions of a zoning board of appeals are reviewable by a district court pursuant to Neb. Rev. Stat. §§ 14-413 and 14-414 (Reissue 1991).
3. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Zoning: Appeal and Error.** Neb. Rev. Stat. § 14-413 (Reissue 1991) provides that a decision of a zoning board of appeals may be reviewed by a district court, but the scope of the district court's review is limited to the legality or illegality of the board's decision.
5. ____: ____. Neb. Rev. Stat. § 14-414 (Reissue 1991) provides that a district court may reverse or affirm, wholly or partly, or may modify a decision of a zoning board of appeals brought up for review. Pursuant to § 14-414, the district court is given only the power to reverse, modify, or affirm the decision brought up for review.
6. **Jurisdiction: Words and Phrases.** Jurisdiction is defined as a court's power or authority to hear a case.

7. **Courts: Zoning: Jurisdiction: Appeal and Error.** A district court's power in a review of a decision of a zoning board of appeals extends only to reviewing issues which are brought up for review from the board. The district court lacks the power to hear a counterclaim which was never before the board.
8. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
9. **Judgments: Jurisdiction: Collateral Attack.** A judgment entered by a court which lacks subject matter jurisdiction is void. It is a longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding.
10. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. In addition, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
11. **Injunction: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 14-415 (Reissue 1991), injunctive relief may not be requested for the first time in a district court by way of a counterclaim in an appeal pursuant to Neb. Rev. Stat. § 14-413 (Reissue 1991). The party requesting injunctive relief must institute the action.

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

John M. Vodra and Victor J. Lich, Jr., of Lich, Herold & Mackiewicz, for appellant.

Alan M. Thelen, Assistant Omaha City Attorney, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Appellant, Ronald D. Kuhlmann, sold property located at 6015 South 30th Street to C.M.T. Enterprises (C.M.T.) and its president, Michael Christensen, after obtaining a 1-year use waiver on the property from the City of Omaha Zoning Board of Appeals (Board). This 1-year waiver allowed C.M.T. to operate a recycling business within 300 feet of a residential zone. After the year had expired, the Board did not renew the waiver.

Upon the failure of the Board to renew the waiver, Kuhlmann filed a petition in Douglas County District Court pursuant to Neb. Rev. Stat. § 14-413 (Reissue 1991) for review of the Board's decision. The City of Omaha (City) filed a counterclaim to Kuhlmann's action, stating that Kuhlmann was violat-

ing the city municipal code and requesting injunctive relief to stop the operation of the business and to clear the property. The district court granted the temporary injunction.

Prior to the trial to make the temporary injunction permanent, Kuhlmann voluntarily dismissed his petition. The City proceeded with its counterclaim. The district court for Douglas County then found for the City and ordered a permanent injunction against Kuhlmann. This appeal follows. We removed the case from the Nebraska Court of Appeals docket pursuant to our power to regulate the dockets of the appellate courts. We conclude that pursuant to § 14-413 and Neb. Rev. Stat. § 14-414 (Reissue 1991), the district court did not have subject matter jurisdiction to hear the City's counterclaim or to order injunctions against Kuhlmann. The judgment of the district court is therefore reversed.

BACKGROUND

In March 1991, Kuhlmann entered into a land contract to sell the subject property to C.M.T. and Christensen, with a closing date of May 1, 1991. This sale was conditioned upon a use waiver being obtained from the City to allow C.M.T. to run a recycling business within 300 feet of the existing residential zone.

On March 28, 1991, the Board granted a 1-year waiver of the 300-foot setback, subject to the landscaping plan submitted to the Board. After a year, on April 23, 1992, the Board denied a motion for an additional waiver on a 2-to-2 vote. On May 22, Kuhlmann filed a petition in Douglas County District Court against the City and the Board for review of the denial of the variance request pursuant to § 14-413. Kuhlmann claimed the denial was arbitrary and illegal, and asked for reinstatement of the waiver.

The City answered Kuhlmann's action, stating that the landscaping conditions had not been met, and counterclaimed, alleging that Kuhlmann "has operated, or has allowed to operate, a landfill operation on the subject property" in violation of § 55-767(b) of the Omaha Municipal Code. The City sought both a temporary and a permanent injunction pursuant to Neb. Rev. Stat. § 14-415 (Reissue 1991) to enjoin Kuhlmann from

the illegal uses of the subject property and to remove the materials from it. Kuhlmann replied that the variance was not temporary and, in regard to the counterclaim, stated that § 14-415 does not authorize equitable relief to force the removal of material from the subject property. The City then filed for a temporary injunction.

On October 30, 1992, a hearing was held on the temporary injunction. On December 4, the court issued an order finding Kuhlmann was occupying and using the building on the property without a "Certificate of Occupancy" and ordered Kuhlmann not to operate a recycling business, landfill, or scrap or salvage operation on the property in violation of the city ordinance. The court enjoined Kuhlmann from operating said activities and ordered him to remove scrap materials listed in the order.

The City filed a "Motion for Finding of Contempt of Court" against Kuhlmann, C.M.T., and Christensen on March 3, 1993, for violation of the December 4, 1992, order. Kuhlmann, C.M.T., and Christensen were issued an "Order to Show Cause." On April 9 and 26, 1993, the district court held hearings on the motion. On June 4, the district court entered an order finding Kuhlmann in contempt of court for "aiding and abetting a business operation not in compliance with the Ordinances of the City of Omaha." The district court also found that Kuhlmann was in privity of contract with both C.M.T. and Christensen, and that in a land contract, the vendor "retains legal title to the property as security for payment of contract price."

On June 19, 1993, a sentencing hearing was held. Kuhlmann, C.M.T., and Christensen were ordered to have the property cleaned and all junk removed before July 26 or they would be fined $500 per day until the property was clear. On August 11, the City filed a "Motion for Sanctions for Contempt" against Kuhlmann, C.M.T., and Christensen. On August 31, a hearing was held on the motion. On September 1, the City filed a "Motion for Increased Sanctions for Contempt" and a second "Order to Show Cause" was issued.

On December 30, 1993, Kuhlmann filed a motion for the dissolution or modification of the temporary injunction and vaca-

tion of the judgment of contempt. Kuhlmann requested the court to dissolve the December 4, 1992, temporary injunction and to vacate the June 4, 1993, contempt judgment. The district court denied the motion on February 18, 1994. The district court stated that once the use waiver was denied, C.M.T. was in default of the land contract by its continual operation of the salvage yard in violation of Omaha city ordinances. The district court stated that once Kuhlmann notified C.M.T. of the default and C.M.T. did not effect a cure or obtain a variance, Kuhlmann had 10 months to bring a foreclosure action. The court stated that by his inactivity, Kuhlmann allowed the illegal operation of a salvage yard to continue on the subject property. On March 10, Kuhlmann was fined $1,000 for contempt, with $500 of the fine to be purged by his foreclosure action on the property.

Final trial was held on June 27, 1994. Kuhlmann voluntarily dismissed his cause of action regarding the petition for a variance of the subject property. On July 28, the district court found in favor of the City on its counterclaim and entered a permanent injunction along the lines of the temporary injunction enjoining Kuhlmann from using the property or allowing the property to be used for the purpose of operating a recycling business, scrap and salvage yard, or landfill. Kuhlmann was instructed to remove any and all scrap materials and garbage from the property.

Kuhlmann motioned for a new trial on August 5, 1994. The district court denied this motion on August 25. This appeal followed.

ASSIGNMENTS OF ERROR

Summarized and restated, Kuhlmann assigns first as error the district court's lack of jurisdiction regarding the City's counterclaim, the application for temporary injunction, and the motions relating to the contempt action.

Second, Kuhlmann asserts that the district court erred in its orders and findings with regard to both the injunctions and the contempt actions because Kuhlmann had sold the subject property to C.M.T., was no longer using the property, and was not in privity with C.M.T. or Christensen, and because the district court had no right to exert dominion or control over the property or the business being conducted thereon.

STANDARD OF REVIEW

An appellate court reviews the decision of a district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a zoning board of appeals, the district court abused its discretion or made an error of law. Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court. *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993).

ANALYSIS

Decisions of a zoning board of appeals are reviewable by a district court pursuant to §§ 14-413 and 14-414. Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996); *In re Interest of Aaron K.*, 250 Neb. 489, 550 N.W.2d 13 (1996); *Buffalo County v. Kizzier*, 250 Neb. 247, 548 N.W.2d 753 (1996); *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996); *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996); *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996).

Section 14-413 provides that a zoning board of appeals' decision may be reviewed by a district court, but the scope of the district court's review is limited to the legality or illegality of the board's decision. We explained the scope of the court's authority regarding § 14-413 in *Roncka v. Fogarty*, 152 Neb. 467, 471, 41 N.W.2d 745, 748 (1950):

> It is apparent that the plaintiffs' action in the district court is one for trial de novo within the limitations of the pleadings and the evidence taken before the court, and constitutes an attack upon the action of the board of appeals as to whether such board acted within the scope of its authority under the city charter, or whether such action on the part of the board of appeals was illegal.

Section 14-414 provides that the district court "may reverse or affirm, wholly or partly, or may modify the decision brought

up for review." Pursuant to § 14-414, the district court is given only the power to reverse, modify, or affirm "the decision brought up for review." The City's counterclaim was not the subject of any appeal to the Board and thus was not brought up for review. Therefore, the district court had no authority to deal with the counterclaim or to issue injunctions. See *Stratbucker Children's Trust v. Zoning Bd. of Appeals, supra.* The district court was acting as an appellate court to review the proceedings before the Board. It was without authority in this action to expand the issues and therefore made an error of law by hearing the counterclaim and ordering injunctive relief.

The City argues that because Kuhlmann failed to make a motion to strike the counterclaim, the current challenge to the counterclaim is without merit. We disagree. Jurisdiction is defined as a court's power or authority to hear a case. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). The district court's power in this case extends only to reviewing issues which were brought up for review from the Board. Because the counterclaim was never before the Board, the district court lacked the power to hear the case and was without subject matter jurisdiction over the counterclaim. Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996); *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). A judgment entered by a court which lacks subject matter jurisdiction is void. It is a longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994); *Vonseggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993). Because the court lacked subject matter jurisdiction over the counterclaim, Kuhlmann could raise his objection at any time during the proceeding and was not required to make a motion to strike.

The City also argues that it may be granted an injunction pursuant to § 14-415 and that Neb. Rev. Stat. § 25-813 (Reissue 1995) allows such relief to be requested by way of permissive

counterclaim. We do not agree. The City does have the authority to request injunctive relief pursuant to § 14-415. Section 14-415 provides:

> The city, in addition to other remedies, may institute any appropriate action or proceedings to prevent an unlawful . . . use of any building or structure in violation of any ordinance or regulations enacted or issued pursuant to sections 14-401 to 14-418, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises.

Although a city may request injunctive relief pursuant to § 14-415, the statute specifically provides that the city may institute any appropriate action in order to receive this relief. Statutory language is to be given its plain and ordinary meaning. In addition, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The plain meaning of the word "institute" is to start or initiate. In the present case, the City could not initiate the action. The district court, sitting as an appellate court, had only the jurisdiction to review proceedings below. Pursuant to § 14-415, injunctive relief may not be requested for the first time in the district court by way of a counterclaim in an appeal pursuant to § 14-413. The party requesting injunctive relief must institute the action. Thus, because the City did not initiate the action, it may not request an injunction pursuant to § 14-415.

The City further argues that injunctive relief is possible in this action based on our holding in *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992). *Bowman*, however, dealt with an appeal under Neb. Rev. Stat. §§ 19-910 and 19-912 (Reissue 1991), which concern appeals from a board of adjustment. Furthermore, § 19-912 specifically authorizes the district court to grant a restraining order. This is not the case with § 14-413. Thus, we do not find *Bowman* to be persuasive.

CONCLUSION

The district court erred in hearing the City's counterclaim and awarding injunctive relief because it did not have subject

matter jurisdiction over the counterclaim. Because we find that jurisdiction did not exist in the district court, we do not reach the issue of whether Kuhlmann was a proper party to the suit.

REVERSED.

"JANE DOE," APPELLANT, V. JAN J. GOLNICK, M.D., AND JAN J. GOLNICK, M.D., P.C., APPELLEES.

556 N.W.2d 20

Filed December 6, 1996. No. S-94-913.

1. **Summary Judgment: Appeal and Error.** 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. A reviewing court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Releases: Rescission: Restitution.** When a person seeks to avoid the effect of a release because it is either void or voidable, he or she must first restore or offer to restore whatever he or she has received for executing the release.
3. **Rescission: Restitution: Equity.** Restoration is a condition precedent in a case where rescission is by act of the party or a legal rescission. Restoration is not a condition precedent, however, in a case involving equitable rescission; that is, an action to obtain a decree of rescission.
4. **Compromise and Settlement: Claims: Equity: Tender.** The tender rule requires that whenever a legal claim is raised in contravention of a settlement agreement, even if joined with an equitable claim, tender is a precondition.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Sarpy County, RONALD E. REAGAN, Judge. Judgment of Court of Appeals reversed.

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

Gregory M. Thomas and Kelly K. Brandon, of Sodoro, Daly & Sodoro, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Plaintiff, "Jane Doe," filed a malpractice action against defendants, Jan J. Golnick, M.D., and Jan J. Golnick, M.D., P.C., for monetary and emotional damages she allegedly suffered as a result of Golnick's unprofessional conduct while she was Golnick's patient. Defendants moved for summary judgment. The district court granted summary judgment in defendants' favor and ordered plaintiff's amended petition dismissed with prejudice. Plaintiff appealed the decision to the Nebraska Court of Appeals, which reversed the district court's decision. Defendants petitioned this court for further review.

On December 7, 1993, plaintiff, by amended petition, commenced a malpractice action against defendants in the district court for Sarpy County. Plaintiff had been a patient of Golnick's from July 1990 to November 1992. Golnick allegedly initiated a sexual relationship with plaintiff during this time. Plaintiff alleged that Golnick prescribed and administrated mind-altering drugs to her, which diminished her mental capacity and compelled her to be completely dependent upon him. Plaintiff further alleged that as a result of Golnick's medical negligence, she had twice become pregnant, sustained physical and emotional pain, suffered lost earnings and loss of earning capacity, and suffered a loss of enjoyment of life. Plaintiff claimed that Jan J. Golnick, M.D., P.C., was liable for the negligence of its employee, Golnick, under the doctrine of respondeat superior.

In their answer, defendants denied plaintiff's allegations of malpractice. In addition, defendants affirmatively alleged that Golnick followed the proper standard of care when dealing with plaintiff, that plaintiff's claim was barred by the doctrine of accord and satisfaction, and that plaintiff waived any claims she may have had against defendants when she signed an "Agreement And Mutual Release" on February 5, 1993. As stated in the agreement, it was the intent of the parties, through the release, to "include, settle, and release any claim whatsoever, regardless of whether denominated personal or profes-

sional, between the parties." Plaintiff received $75,000 for releasing defendants of all claims.

Plaintiff filed a reply, in which she denied the allegations and affirmative defenses in the answer. Plaintiff also alleged that the release was void, and thus unenforceable, because it was procured as a result of undue influence, duress, and fraud; it violated federal law; plaintiff was incompetent at the time the agreement was executed; and there was a lack of adequate consideration. Plaintiff argued alternatively that if the release was not void, it extended only to claims arising from the personal and social relationship of plaintiff and Golnick.

Defendants requested that plaintiff return the $75,000 she had received. However, plaintiff failed to comply with the request and stated in her deposition, which was submitted during the summary judgment hearing, that the money had already been spent.

Defendants moved for summary judgment, arguing that there was no factual dispute as to whether their affirmative defenses of accord and satisfaction and execution of a release prohibited plaintiff from pursuing her malpractice action. A hearing was held and evidence was offered. On September 22, 1994, the district court found in favor of defendants and ordered the amended petition dismissed with prejudice. The court found that (1) the release constituted an accord and satisfaction of all claims plaintiff may have had against defendants; (2) it was not void or violative of public policy; (3) it was not procured by fraud; (4) it was not the product of duress, threats, or undue influence; and (5) plaintiff was competent to execute the release. The court also found that plaintiff failed to tender the $75,000 and, therefore, was further barred from maintaining her action. Plaintiff appealed to the Court of Appeals.

The Court of Appeals disagreed with the district court's findings. According to the Court of Appeals, there existed material disputed facts as to plaintiff's mental capacity to contract, the existence of duress at the time the release was executed, and the propriety and timing of tender of the $75,000 by plaintiff. In a memorandum opinion and judgment on appeal filed March 29, 1996, the Court of Appeals reversed the district court's decision

and remanded the cause for further proceedings. Defendants filed a petition for further review on April 29, 1996.

Defendants contend that the Court of Appeals erred in (1) holding that there was a genuine issue as to any material fact with regard to whether plaintiff was barred by the doctrine of accord and satisfaction from bringing the suit and (2) reversing the trial court's grant of summary judgment in favor of defendants.

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. A reviewing court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Polinski v. Omaha Pub. Power Dist., ante* p. 14, 554 N.W.2d 636 (1996).

We find particularly troublesome in this case that plaintiff has failed to tender the $75,000 she received under the release. When a person seeks to avoid the effect of a release because it is either void or voidable, he or she must first restore or offer to restore whatever he or she has received for executing the release. See, *Davy v. School Dist. of Columbus*, 192 Neb. 468, 222 N.W.2d 562 (1974); *Aron v. Mid-Continent Co.*, 143 Neb. 87, 8 N.W.2d 682 (1943). In other words, the person must place the parties in the positions they were in prior to the execution of the release.

This rule is not absolute. Restoration is a condition precedent in a case where rescission is by act of the party or a legal rescission. Restoration is not a condition precedent, however, in a case involving equitable rescission; that is, an action to obtain a decree of rescission. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

In the instant case, plaintiff brought an action at law for damages incurred as a result of defendants' alleged negligence. Plaintiff's equitable claim, namely that the release must be rescinded because it is void, did not arise until after defendants

had alleged in their answer that plaintiff's action was barred by the release.

A similar situation has been addressed by the Michigan Supreme Court. In *Stefanac v Cranbrook Ed Comm*, 435 Mich. 155, 458 N.W.2d 56 (1990), plaintiff filed suit against her previous employer alleging wrongful discharge, sex discrimination, and termination in violation of public policy. Subsequently, defendant filed a motion for accelerated judgment and an answer arguing that a release signed by plaintiff barred her claims. In response to defendant's motion, plaintiff filed an affidavit challenging the validity of the release.

Upon review, the Michigan Supreme Court addressed the issue of whether plaintiff, before commencing a suit which disregards the terms of a release, must tender consideration recited in the release. The Michigan Supreme Court held that "the tender rule . . . requires that whenever a legal claim is raised in contravention of a settlement agreement, even if joined with an equitable claim, tender is a precondition." *Id.* at 170, 458 N.W.2d at 63.

We adopt the rule as set out in *Stefanac* and hold that in the instant case, prior to filing her action, plaintiff was required to tender to defendants the $75,000 she received for signing the release. The evidence demonstrates that plaintiff not only failed to tender the $75,000 after being requested by defendants to do so, but also demonstrates that plaintiff has given no indication whether such a tender could be made due to the fact that the money has already been spent. Thus, as a matter of law, plaintiff is barred from maintaining a negligence claim against defendants.

The judgment of the Court of Appeals is reversed, and the judgment of the district court is reinstated.

REVERSED.

LANPHIER, J., participating on briefs.

TARSHA HULETT, APPELLANT, V. RANCH BOWL OF OMAHA, INC., A NEBRASKA CORPORATION, APPELLEE.

556 N.W.2d 23

Filed December 6, 1996. No. S-95-014.

1. **Judgments: Verdicts.** On a motion for judgment non obstante veredicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the evidence.
2. ____: ____. In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
3. **Negligence: Invitor-Invitee.** A business owes a duty of reasonable care to a patron.
4. **Negligence: Invitor-Invitee: Liability.** The proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
5. ____: ____: ____. Whether a business proprietor is liable for the adverse actions of a third party against an invitee depends primarily upon whether those actions were reasonably foreseeable to the proprietor.
6. **Negligence: Assault.** Whether a history of criminal activity makes an assault foreseeable is a question of fact.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, P.C., for appellant.

Brian D. Nolan and Michael T. Findley, of Hansen, Engles & Locher, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

The appellant, Tarsha Hulett, was attacked with a glass beer mug by another patron in the women's restroom at the Ranch Bowl in Omaha, Nebraska, while attending an after-hours

dance. Hulett commenced this action against the Ranch Bowl, asserting that its negligence was the proximate cause of injuries she sustained in the attack. A jury entered a verdict in favor of Hulett for $25,000. In setting aside this verdict, the district court held that the attack of Hulett was sudden and unexpected and was therefore unforeseeable. We reverse, because we conclude that the evidence and proper inferences adduced therefrom were sufficient to allow a jury to conclude that the attack of Hulett was foreseeable and could have been prevented by the Ranch Bowl.

BACKGROUND

On May 17, 1992, at approximately 1 a.m., Hulett went to the Ranch Bowl for an after-hours dance party for persons over the age of 18. While in the women's restroom, Hulett was assaulted by Trina Wells with a glass beer mug. As a result, Hulett suffered multiple lacerations to nerves in her face and a tendon in her hand, requiring surgical repair.

In her amended petition, Hulett alleged that the Ranch Bowl's negligence was the proximate cause of these injuries. In particular, Hulett claimed the Ranch Bowl negligently failed to provide adequate security personnel and safety procedures and failed to clean up all glassware in the women's restrooms. It was also alleged that the Ranch Bowl knew, or should have known, that Hulett could be assaulted by another patron.

At trial, Hulett offered the testimony of Damien Turner, a former employee of the Ranch Bowl. Although not employed at the Ranch Bowl on May 17, 1992, Turner had worked the after-hours dance parties on several occasions. Turner was hired to work these dances because of his past work with gang members in the Omaha area, as well as his familiarity with violent criminal cases gained while employed by the county attorney's office. These experiences allowed him to act as a peacemaker or go-between for any potential fights between patrons. According to Turner, approximately three fights would occur each night he worked at the Ranch Bowl.

The usual security routine for after-hours dances consisted of a check of identification at the door as well as a pat down for any weapons or contraband. Approximately 15 security person-

nel, including police officers, private security, or civilian officers, would then patrol around inside the establishment during the actual dance. Turner testified that Ranch Bowl policy required him to check the men's restrooms for fights, drugs, alcohol, and gambling. While making these checks, Turner would routinely find alcohol bottles and glassware in the restrooms that had not been removed prior to the beginning of the dance. Turner stated that he specifically requested his supervisors to hire more female security personnel to check the women's restrooms for the same problems. In Turner's opinion, the Ranch Bowl simply did not employ enough female security personnel to adequately pat down incoming female patrons while simultaneously checking the women's restrooms.

Hulett testified that there was a "whole bunch" of glassware on the counter and on the floor in the women's restroom. According to Hulett, she received no warning of the ensuing attack against her with a glass beer mug because it "came out of the blue." When asked, Hulett said she could not pinpoint anything specific that would have alerted the Ranch Bowl that she was about to be attacked.

Ed George, a retired police officer and present security officer at the Ranch Bowl, testified that adequate security personnel were "scattered" all over the establishment on May 17. George also stated that he was unaware of any glassware in the restrooms that evening and that in his 6 years of working at the Ranch Bowl, he has never been aware of an attack in the women's restrooms. Based upon this experience, George did not consider glassware to pose a security hazard.

Similar testimony was offered by George DeWitt, an Omaha police officer who was the security manager at the Ranch Bowl on May 17. DeWitt stated that prior to Hulett's attack, glassware was not considered a safety issue. Although arguments had taken place in the restrooms on prior occasions, DeWitt testified that no fights or injuries had occurred. DeWitt further acknowledged that it was the policy of the Ranch Bowl to have security personnel check the restrooms for problems but not to specifically pick up glassware, although common sense would tell one to pick up glasses sitting on the counters. In DeWitt's opinion, a glass could constitute a dangerous weapon or instrument.

Ranch Bowl's final witness was its general manager, Ross Olsbo. According to Olsbo, some glassware was in the women's restrooms that night. Olsbo also asserted that there had never been a fight or altercation in a Ranch Bowl restroom prior to the attack of Hulett. Ranch Bowl moved for a directed verdict at the end of Hulett's case and once again at the close of the evidence. These motions were denied, and the case was submitted to the jury. A $25,000 verdict in favor of Hulett was returned. Subsequent to this verdict, the Ranch Bowl timely moved for a judgment notwithstanding the verdict. In granting this motion, the district court wrote:

> Upon a thorough review of this case, it is apparent from the evidence that both the altercation and resulting injury to the plaintiff all happened suddenly and unexpectedly, without any warning, and by the exercise of reasonable care could not have been foreseeable, anticipated, discovered, or prevented by the defendant. . . . Further, the defendant had no chance to intervene.

Hulett appeals.

ASSIGNMENT OF ERROR

Hulett's sole assignment of error is that the district court incorrectly sustained Ranch Bowl's motion for judgment notwithstanding the verdict.

STANDARD OF REVIEW

On a motion for judgment non obstante veredicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the evidence. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Farmers & Merchants Bank v. Grams,* 250 Neb. 191, 548 N.W.2d 764 (1996). In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

ANALYSIS

Hulett argues that a judgment notwithstanding the verdict should not have been entered in this case because a jury could reasonably have concluded, in light of the evidence produced at trial, that the attack in the restroom was foreseeable and could have been prevented by the Ranch Bowl.

We begin by noting that an owner of property is not an insurer of the land or the visitor's safety while on it. However, a business does owe a duty of reasonable care to a patron. This duty was first enunciated by this court in *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946). In adopting the business invitee duty rule set forth in the Restatement of Torts § 348 (1934), now Restatement (Second) of Torts § 344 (1965), the *Hughes* court stated:

> The modern general rule, summarized in its simplest terms, is that the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.

147 Neb. at 833, 25 N.W.2d at 408.

Whether a business proprietor is liable for the adverse actions of a third party against an invitee depends primarily upon whether those actions were reasonably foreseeable to the proprietor. In the *Hughes* case, the facts established that a minor was injured in a restaurant as a result of two patrons' fighting. This court upheld the dismissal of the claim after noting that the restaurant was not a place known for fights or disorderly conduct. As such, the injury to the patron was sudden and unexpected and could not, by the exercise of reasonable care, have been predicted or prevented by the restaurant owner. In reaching this conclusion, the court stated that "the standard of care required [by a business proprietor] is graduated according to the

danger attendant upon the activities of the business pursued and depends upon the facts and circumstances surrounding each particular case." 147 Neb. at 832-33, 25 N.W.2d at 408.

A similar analysis was employed in *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994), wherein we held that a supermarket could be liable for injuries a customer received in the parking lot after being attacked, beaten, and robbed by a purse snatcher. The plaintiff in that case pled facts alleging 10 incidents of similar criminal activity in the parking lot and surrounding premises during the 16-month period prior to the assault. In reversing the sustaining of No-Frills' demurrer, we held such previous criminal activity constituted sufficient notice to No-Frills that criminal acts upon its customers were reasonably foreseeable.

Foreseeability was also an issue in *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994), where this court held the Cutlers, owners of a building, were liable to a person assaulted in the elevator. After recognizing that prior acts or events may establish whether the acts of third parties are foreseeable, we noted that other business invitees had been assaulted on previous occasions. Furthermore, complaints about the assailant had been made to the Cutlers prior to the assault of the plaintiff. We held these facts imposed a duty on the Cutlers to take reasonable precautions to protect business invitees on their premises. See, also, *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987) (whether history of criminal activity at leased premises makes assault on tenant foreseeable is question for trier of fact).

Unlike at the restaurant in *Hughes v. Coniglio, supra*, the evidence in the instant case establishes that altercations occur on a regular basis at the Ranch Bowl during the after-hours dances. Turner testified that an average of three fights occurred every night he worked. In fact, Turner was specifically hired to work at the Ranch Bowl because of his expertise in acting as a peacemaker in preventing fights among patrons. The Ranch Bowl acknowledged the potential for fights, as reflected by its policy of having security personnel periodically check the restrooms for fights. Indeed, the abundance of security personnel and pat-

down checks for weapons at the door were indicative of what could be described as a war zone.

The district court entered a judgment notwithstanding the verdict, apparently focusing on the fact that the attack on Hulett was sudden and came without warning. The specific attack in question may have occurred suddenly and unexpectedly as to Hulett. However, whether the Ranch Bowl is liable depends upon whether the attack was reasonably foreseeable by the Ranch Bowl. As made apparent by the cases cited above, the previous acts of third parties are to be examined in determining whether an injury to a patron was foreseeable. This point was made clear in *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 241, 518 N.W.2d 116, 119 (1994), which states that a possessor of land may

> "know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford reasonable protection."

(Emphasis omitted.) (Quoting Restatement (Second) of Torts § 344, comment *f.* (1965).)

The fact that Hulett and the Ranch Bowl were not expecting Wells to attack Hulett makes little difference, for the existence of "many occasions of 'similar' criminal activity in one fairly contiguous area in a limited timespan may make further such acts sufficiently foreseeable to create a duty to a business invitee." *Erichsen v. No-Frills Supermarkets*, 246 Neb. at 243, 518 N.W.2d at 120.

Whether a history of criminal activity makes an assault foreseeable is a question of fact. *K.S.R. v. Novak & Sons, Inc., supra.* Giving Hulett the benefit of all proper inferences adduced from the evidence, we cannot say that the attack on Hulett was unforeseeable as a matter of law. The evidence

adduced at trial clearly supports a jury verdict against the Ranch Bowl for failure to use reasonable care to protect Hulett. The Ranch Bowl recognized the importance of checking the restrooms for altercations or fights. Furthermore, DeWitt, Ranch Bowl's security manager, acknowledged that glassware can be used as a dangerous weapon. This, coupled with the evidence establishing the routine existence of fights during the after-hours dances, was sufficient to allow a jury to conclude that the attack on Hulett was, in fact, foreseeable and that the Ranch Bowl failed to effectively prevent it by either removing the glassware from the restrooms or providing adequate security personnel to patrol the restrooms for fights or altercations between patrons.

CONCLUSION

Under the facts of this case, whether the assault of Hulett was foreseeable and could have been prevented by the Ranch Bowl was a question of fact for the jury. Because the evidence and the proper inferences adduced therefrom clearly support the jury verdict against the Ranch Bowl, the district court erred in entering a judgment notwithstanding the verdict. Accordingly, the judgment of the district court is reversed, and this cause is remanded with directions to reinstate the jury verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

FAHRNBRUCH, J., concurs in the result.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. VESTER L. VAN, RESPONDENT.

556 N.W.2d 39

Filed December 6, 1996. No. S-95-154.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Disciplinary Proceedings: States: Proof.** In the context of reciprocal disciplinary proceedings, a judicial determination of attorney misconduct in one state is generally conclusive proof of guilt and is not subject to relitigation in the second state; however, the judicial determination of misconduct in the first state need not be accepted as conclusive proof of guilt if the offender demonstrates to the court in the second state that the procedure in the first state was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process or that there was such an infirmity of proof concerning the misconduct as to give rise to the clear conviction that the final finding of the court in the first state as to the offender's misconduct cannot be accepted.
3. ____: ____: ____. Even if in a reciprocal disciplinary proceeding the first state's judicial determination of misconduct is accepted as conclusive proof of guilt, it does not necessarily follow that the offender must be disciplined in the same manner by the second state; the second state is entitled to make an independent assessment of the facts and an independent determination of the offender's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state.
4. **Disciplinary Proceedings.** A lawyer who neglects an entrusted matter has failed to act competently and is guilty of unprofessional conduct.
5. **Disciplinary Proceedings: States: Proof.** In a reciprocal disciplinary proceeding, the respondent bears the burden of showing that the discipline to be imposed should be less severe than that imposed in the first state.
6. **Disciplinary Proceedings.** Multiple acts of misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.
7. ____. To determine whether and to what extent discipline should be imposed in an attorney disciplinary proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law.

Original action. Judgment of disbarment.

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

No appearance for respondent.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, and CONNOLLY, JJ.

PER CURIAM.

This is an attorney reciprocal discipline case in which the relator, Nebraska State Bar Association, seeks to have this court discipline the respondent, Vester L. Van, a member of the relator association, on the ground that he was disciplined in Illinois for attorney misconduct in that state.

SCOPE OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996); *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996); *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995).

FACTS

Van was admitted to practice law in Nebraska on January 22, 1973, and on May 1, 1980, was admitted to and began to practice law in Illinois, where the events at issue took place.

White Matter

Michael White was involved in an automobile accident in which he incurred medical bills in the sum of $2,300. Approximately 2 weeks after the accident, he hired Van to represent him for any claims resulting from the accident, and 2 years later Van filed an action. Some 10 months after the action was filed, Van indicated that the case was still pending, when in fact it had been dismissed approximately 6 months earlier for want of prosecution.

After White made a complaint to the Illinois disciplinary commission, Van initiated and scheduled a meeting with White to discuss settlement. At that meeting, Van told White that his case had been dismissed and that Van had waited so long to inform White because Van had no indication that the case had been closed. Van offered White a $750 settlement, which White accepted. White signed a release, which recited a consideration of $4,450.30. Van told White that the figure represented Van's original payment of $2,300 for White's medical bills and the $750, but Van did not explain the source of the additional money, nor did he produce any receipts or invoices evidencing the additional money. In addition to the release, Van drafted and White signed a letter withdrawing White's complaint.

JONES MATTER

Wayne Jones was involved in an automobile accident which resulted in a claim against him. His insurance company did not acknowledge coverage, and Jones and his wife, Doris, hired Van to assist them in resolving that dispute.

At their first meeting, Van suggested that he would dispose of the case rather quickly by filing an inquiry with the Illinois insurance board. His fee was $700 and was to be paid by the Joneses in two installments. They then issued a $300 check to Van. However, Van claimed he never received the check, so the Joneses issued another check and issued a stop-payment order on the first check. At a meeting wherein the Joneses personally delivered the replacement check to Van, Van told them he had filed a claim in writing with the Illinois insurance board and that he was waiting to hear a response. Upon inquiring of the Illinois insurance department as to Van's efforts on their behalf, the Joneses were told that the department had not received anything from Van.

The replacement check was paid by the Joneses' bank, and the Joneses later paid the balance of the fee. Doris Jones later discovered that the check claimed to have been lost had been cashed by Van or someone in his office. Van stated that he would refund the money, but when the Joneses went to Van's office, he was not present, nor had he left a check for them or instructions to his secretary regarding a refund.

Eventually, another member of Van's office refunded the Joneses' $700, but the $300 representing the cashed first-installment check that had been presumed lost was never refunded.

MCGHEE MATTER

Joyce McGhee's son, Craig Boyd, was arrested on an alleged residential burglary charge. McGhee hired Van to represent her son, and Van met with Boyd. Van's fee for representing Boyd was $2,500, of which Boyd and McGhee paid Van $1,000 prior to the arraignment. Van failed to appear for the arraignment, and McGhee could not locate him. Boyd's arraignment was continued for 3 days, and McGhee hired another attorney to represent Boyd.

Van telephoned McGhee at 7 a.m. the day of the continued arraignment and stated he had been in an automobile accident. McGhee requested that Van refund her the $1,000 she and Boyd had paid him, but Van stated he had done some work on her account, so McGhee agreed to pay Van for 2 hours of consultation, totaling $250, and Van was to refund her the other $750. Van never refunded the $750 to McGhee or Boyd.

Britton Matter

After being charged with driving under the influence and other traffic violations, Kenzie Britton retained Van by meeting with and paying $500 to a representative of Van's office, who agreed that Van would defend Britton. Van failed to appear at Britton's arraignment and later refunded Britton $400, keeping the remaining $100 as a retainer fee.

Illinois Proceedings

Van was less than cooperative in the Illinois proceedings; he failed to appear at two of the three pretrial conferences, postponed the first date of his deposition because he had not yet retained counsel, subsequently failed to appear at either of two later deposition times, and did not comply with any of the discovery requests. As a consequence, an order was entered which prohibited Van from calling witnesses on his own behalf and barred him from testifying and producing documents. Van did not appear at the Illinois hearing.

The Illinois Supreme Court suspended Van "from the practice of law for one year and until further order," with the condition that he pay $300 restitution to the Joneses, $1,000 to McGhee, and $100 to Britton.

Nebraska Proceedings

The relator filed a motion for judgment on the pleadings. After Van entered his appearance but failed to respond to our show cause order, we granted the relator's motion to the extent that we ordered Van temporarily suspended from the practice of law in this state pending our further order, and appointed a referee to conduct proceedings "leading to a recommendation to this Court as to the appropriate ultimate sanction to be imposed upon respondent." Van did not appear for the scheduled hear-

ing before the referee and has filed no brief in this court. In keeping with his position of ignoring the rules of his profession, neither has Van complied with the provisions of Neb. Ct. R. of Discipline 16 (rev. 1996) requiring him to file with us an affidavit that he notified his clients of his temporary suspension from the bar of this state.

In addition to receiving evidence of Van's Illinois conduct, the referee was informed by the Assistant Counsel for Discipline that Van had not paid his last year's bar association dues. The referee recommends that we impose the same sanction as imposed by the Illinois Supreme Court.

ANALYSIS

In the context of reciprocal disciplinary proceedings, a judicial determination of attorney misconduct in one state is generally conclusive proof of guilt and is not subject to relitigation in the second state. However, the judicial determination of misconduct in the first state need not be accepted as conclusive proof of guilt if the offender demonstrates to the court in the second state that the procedure in the first state was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process or that there was such an infirmity of proof concerning the misconduct as to give rise to the clear conviction that the final finding of the court in the first state as to the offender's misconduct cannot be accepted. *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995); *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990). Here, there is no claim that Van was deprived of any due process right in Illinois or that there is an infirmity of proof.

However, even if the first state's judicial determination of misconduct is accepted as conclusive proof of guilt, it does not necessarily follow that the offender must be disciplined in the same manner by the second state. The second state is entitled to make an independent assessment of the facts and an independent determination of the offender's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state. *State ex rel. NSBA v. Woodard, supra*; *State ex rel. NSBA v. Ogborn, supra*; *State ex rel. NSBA v.*

Radosevich, 243 Neb. 625, 501 N.W.2d 308 (1993); *State ex rel. NSBA v. Dineen, supra.*

We do not concern ourselves with whether Van's handling of the White matter violated Canon 6, DR 6-102, of our Code of Professional Responsibility, which prohibits a lawyer from attempting to exonerate oneself from or limit one's liability to a client for one's personal malpractice. Neither do we consider whether Van misappropriated client funds in violation of Canon 9, DR 9-102, in the sense that he failed to preserve the identity of client funds.

However, from our de novo review, we nonetheless find that the evidence clearly and convincingly establishes that Van violated Canon 1 (lawyer should assist in maintaining integrity and competence of legal profession) and DR 1-102(A)(5) and (6) thereunder, requiring a lawyer not to engage in conduct prejudicial to the administration of justice or in any other conduct adversely reflecting on the lawyer's fitness to practice law; Canon 6 (lawyer should represent client competently) and DR 6-101(A)(3) thereunder, requiring that a lawyer not neglect a legal matter entrusted to the lawyer; and Canon 9 (lawyer should avoid even appearance of professional impropriety) and DR 9-102(B)(3) thereunder, requiring a lawyer to maintain complete records of all funds coming into the lawyer's possession and to render to the client appropriate accounts thereof.

We have consistently held that a lawyer who neglects an entrusted matter has failed to act competently and is guilty of unprofessional conduct. *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996); *State ex rel. NSBA v. Carper*, 246 Neb. 407, 518 N.W.2d 656 (1994); *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993); *State ex rel. NSBA v. Copple*, 232 Neb. 736, 441 N.W.2d 894 (1989); *State ex rel. NSBA v. Doerr*, 216 Neb. 504, 344 N.W.2d 464 (1984); *State ex rel. Nebraska State Bar Assn. v. Divis*, 212 Neb. 699, 325 N.W.2d 652 (1982).

In a very similar case, *State ex rel. NSBA v. Johnson, supra*, we disbarred an attorney who was charged in Colorado with neglecting duties and failing to cooperate with the disciplinary investigation. Johnson failed to render appropriate accounts to clients, neglected legal matters by failing to file petitions in a

timely manner, failed to communicate with clients regarding their cases, and failed to promptly return funds owed to clients. We found that the Colorado Supreme Court's discipline of a 3-year suspension was not sufficient considering Johnson's failure to respond to this state's disciplinary proceedings. We observed that Johnson's inaction in this state compounded what transpired in Colorado and that this court should not allow such present neglectful and uncooperative practices to possibly harm the public in this state in the future.

Likewise, in *State ex rel. NSBA v. Copple, supra*, we disbarred an attorney who had been retained and paid legal fees in advance by two clients, but who neglected to perform the work for which he was employed. Copple was also charged with neglecting legal matters entrusted to him by three other clients. Finally, he was charged with failure to file appropriate written responses with the Counsel for Discipline concerning the complaints of the clients.

A respondent bears the burden of showing that the discipline to be imposed should be less severe than that imposed in the first state. *State ex rel. NSBA v. Johnson, supra*; *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990). Clearly, Van has not satisfied his burden of showing that the discipline imposed in Nebraska should be less severe than that imposed in Illinois. Aside from entering an appearance in these proceedings and filing a motion for additional time within which to file his answer on the show cause order, Van has all but ignored these proceedings, and, like the situations in *Johnson* and *Copple*, his inaction herein compounds what transpired in Illinois. See, also, *State ex rel. NSBA v. Gregory, ante* p. 41, 554 N.W.2d 422 (1996).

Moreover, it is axiomatic that multiple acts of misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995); *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

To determine whether and to what extent discipline should be imposed, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the pro-

protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Gregory, supra*; *State ex rel. NSBA v. Ramacciotti,* 250 Neb. 893, 553 N.W.2d 467 (1996); *State ex rel. NSBA v. Johnson, supra.*

Under the circumstances, we consider the referee's recommendation not to be commensurate with the seriousness of Van's misconduct.

CONCLUSION

We grant the relator's motion for judgment on the pleadings and order Van disbarred in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH and GERRARD, JJ., not participating.

STATE OF NEBRASKA, APPELLEE,
V. ROBERT E. SWIFT, APPELLANT.
556 N.W.2d 243

Filed December 6, 1996. No. S-95-853.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous; in making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach conclusions independent of the decisions reached by the courts below.
3. **Search Warrants: Probable Cause: Appeal and Error.** In evaluating the validity of a search warrant, the duty of a reviewing court is to ensure that the magistrate issuing the warrant had a substantial basis for determining that probable cause existed.
4. **Probable Cause: Words and Phrases.** Probable cause means a fair probability that contraband or evidence of a crime will be found.
5. **Search Warrants: Probable Cause.** In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.
6. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In determining the sufficiency of an affidavit to show probable cause for the issuance of a search warrant, an appellate court looks to all the circumstances; this means that if the

circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.

7. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
8. ____: ____. Generally, when preparing an affidavit in support of the issuance of a search warrant, there are four methods of establishing the reliability of an informant: (1) The informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. ____: ____. Where an affidavit in support of the issuance of a search warrant is supported by citizen-provided information, reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known.
10. **Search Warrants: Probable Cause: Appeal and Error.** A magistrate's determination of probable cause for the issuance of a search warrant should be paid great deference by reviewing courts.
11. **Search Warrants: Affidavits: Appeal and Error.** While in determining the validity of a search warrant the reviewing court may consider only information brought to the attention of the issuing magistrate, warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner.
12. **Constitutional Law: Search and Seizure.** The general proscription of the Fourth Amendment to the U.S. Constitution is against unreasonable, not warrantless, searches.
13. **Constitutional Law: Search Warrants: Probable Cause.** The execution of a search warrant without probable cause is unreasonable and violates U.S. Const. amend. IV and Neb. Const. art. I, § 7.
14. **Search Warrants: Probable Cause: Time.** A search pursuant to a "stale" warrant is invalid, but the timeliness of execution is not to be determined by means of a mechanical test with regard to the number of days from issuance, nor whether any cause for delay was per se reasonable or unreasonable; rather, it is to be functionally measured in terms of whether probable cause still existed at the time the warrant was executed.
15. **Search and Seizure: Search Warrants: Probable Cause: Police Officers and Sheriffs: Proof.** Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable; consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable.

Petition for further review from the Nebraska Court of Appeals, HANNON and MUES, Judges, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Douglas County, JOSEPH S. TROIA, Judge. Judgment of Court of Appeals affirmed.

Adam J. Sipple and Casey J. Quinn, of Quinn & Wright, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

Following a bench trial, the district court adjudged the defendant-appellant, Robert E. Swift, guilty of being a felon in possession of a deadly weapon, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1989), and of possessing with the intent to deliver a controlled substance, namely cocaine, in violation of Neb. Rev. Stat. §§ 28-405(a)(4) [Schedule II] (Cum. Supp. 1992) and 28-416 (Cum. Supp. 1994). Swift thereupon appealed to the Nebraska Court of Appeals, asserting, among other things, that the district court erred in overruling his suppression motion. The Court of Appeals affirmed. *State v. Swift*, 96 NCA No. 17, case No. A-95-853 (not designated for permanent publication). Swift thereafter successfully moved this court for further review, urging, in summary, that the Court of Appeals erred in upholding the aforesaid ruling of the district court. We now affirm the judgment of the Court of Appeals.

II. SCOPES OF REVIEW

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but,

rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Konfrst, post* p. 214, 556 N.W.2d 250 (1996). See *Ornelas v. U.S.*, ___ U.S. ___, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). However, to the extent questions of law are involved, we as an appellate court have an obligation to reach conclusions independent of the decisions reached by the courts below. See, *State v. Severin,* 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

III. FACTS

On April 5, 1994, while investigating a complaint at 5045 Mary Plaza, apartment D, Jody Larson, a Nebraska Department of Social Services worker, smelled marijuana and saw marijuana leaves and seeds on a table. Larson also saw a "skinny" black male, 6 feet 2 inches tall, who gave the name Robert Swift, and a thin white female with bleached blond hair, identified as Tammy Hartman. On April 6, Larson informed Omaha police officer James Haiar of her observations. Mary Plaza "apartment management" told Haiar that Hartman was in control of the apartment and that she had a boyfriend living with her, described as a slender black male, 6 feet 3 inches tall, who had just been released from prison. Apartment management also told Haiar that it had received complaints of possible drug dealing and frequent foot traffic in and out of the apartment. The Douglas County computer data base showed that Swift was using 5045 Mary Plaza, apartment D, as his address, and that Swift had been convicted for controlled substance (marijuana) delivery, "concealed weapons," and assault and battery.

On April 7, 1994, Haiar and Omaha police officer James Morgan filed an affidavit and application for issuance of a search warrant, alleging the foregoing paraphrased facts. On the same day, the Douglas County Court issued a search warrant which ordered the officers to enter the apartment "without knocking or announcing their authority" and to seize marijuana "and its derivatives, . . . [m]onies and records pertaining to an illegal narcotics operation," and venue items, such as keys. Notwithstanding the "no knock" provision of the warrant, the Omaha police waited to execute it until April 13, 1994. They

then found, among other things, a crack pipe (with cocaine residue); a bag of crack cocaine; a sweatsuit containing Swift's driver's license and money; two plastic bags of marijuana, each containing a gram; a hand gram scale; and in Swift's hand, a defaced, loaded .38-caliber revolver pointed at officers upon entry. The warrant was returned on April 14, 1994.

Swift claimed that the drugs and the gun belonged to Hartman. Haiar admitted that he did not expect to find the exact marijuana seen by Larson on April 5, but that he "was looking for marijuana, any marijuana that was illegal there." He also confirmed at the suppression hearing that Swift had recently been released from prison.

IV. ANALYSIS

In urging that the Court of Appeals erred in upholding the district court's overruling of his suppression motion, Swift claims that it wrongly (1) credited hearsay information transmitted to government agents by apartment management personnel and (2) ruled that the warrant was not stale when executed.

1. Hearsay Information

In evaluating the validity of a search warrant, the duty of a reviewing court is to ensure that the magistrate issuing the warrant had a substantial basis for determining that probable cause existed. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

Probable cause means a fair probability that contraband or evidence of a crime will be found. *State v. Konfrst, post* p. 214, 556 N.W.2d 250 (1996). In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required. *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989).

In determining the sufficiency of an affidavit to show probable cause for the issuance of a search warrant, an appellate court looks to all the circumstances. This means that if the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate there is a fair probability that evidence of a crime may be

found at the place described, the affidavit is sufficient. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994).

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996); *Flores, supra*. Generally, there are four methods of establishing the reliability of an informant: (1) The informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996); *Reeder, supra*.

Swift contends that the information from apartment management concerning drug activity was not corroborated by any independent investigation. In *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), the affidavit only corroborated that the defendant lived at the described address and that defendant's physical description matched that given by the informant. The *Utterback* court thus held that the veracity of the informant's information was not established by corroboration because nothing in the affidavit corroborated the reliability of the informant regarding the alleged criminal activities.

In the instant case, however, not only did the affidavit establish that the unidentified apartment management described the resident of the apartment almost exactly the way Larson described Swift, but Larson had smelled and seen marijuana and marijuana seeds in the apartment, thus corroborating apartment management's claim that it had received complaints about frequent foot traffic and drug dealing from the apartment. The affidavit also establishes the basis for Larson's knowledge, reciting that she was in the apartment and that because of the nature of her job, she was familiar with the smell and appearance of marijuana. Additionally, as the affidavit recites that

Larson observed a crime and reported it to the police, she is presumptively reliable. See *Detweiler, supra*. As noted in *State v. King*, 207 Neb. 270, 275, 298 N.W.2d 168, 171 (1980), where an affidavit is supported by citizen-provided information,

> "[r]eliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause."

As we have previously observed, the after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause for the issuance of a search warrant should be paid great deference by reviewing courts. *Detweiler, supra*. While in determining the validity of a search warrant the reviewing court may consider only information brought to the attention of the issuing magistrate, *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), warrants should not be invalidated by interpreting the supporting affidavit in a hypertechnical, rather than a commonsense, manner, *State v. Cullen*, 231 Neb. 57, 434 N.W.2d 546 (1989).

Although apartment management's comments to Haiar, standing alone, might not rise to the level of probable cause needed to obtain a search warrant, the comments, when viewed in the context of all the circumstances, make apparent that the magistrate had a substantial basis for determining that probable cause existed to believe that evidence of criminal activity would be found in the apartment.

2. Staleness of Warrant

Swift next contends that in any event, his suppression motion should have been sustained because the information contained in the affidavit presented to the issuing magistrate had become stale by the time the warrant was executed.

Calling our attention to 2 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 4.7(a) at 588 (3d ed. 1996), Swift argues that probable cause must exist both at the time the magistrate issues a warrant and when the police execute it. That reference reads:

> If the period of delay in execution has been such that the information supplied to the magistrate no longer shows probable cause, then the search is being made upon the judgment of the police officer rather than a neutral and detached magistrate, contrary to the requirement of the Fourth Amendment.

See, also, *U.S. v. Bowling*, 900 F.2d 926 (6th Cir. 1990), *cert. denied* 498 U.S. 837, 111 S. Ct. 109, 112 L. Ed. 2d 79. More specifically, Swift urges that as Haiar admitted that he did not expect to find the very marijuana that was seen at the apartment on April 5, no probable cause for the search existed when the warrant was executed on April 13.

Neb. Rev. Stat. § 29-815 (Reissue 1995) requires that a warrant "be executed and returned within ten days after its date." The warrant in question was executed within 6 days and returned within 7 days of its April 7 date. Notwithstanding that statutory provision, the defendant in *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), argued that since the warrant to search his home was not executed until 9 days after it was issued, the search was unconstitutional because the information on which it was issued had become stale. *Groves* concluded that "the facts justifying the *issuance* of the warrant were sufficiently closely related to the time of the *issuance* of the warrant to justify the [required] finding of probable cause," and held that because the warrant was executed and returned within the statutory 10-day limit, the defendant's argument was without merit. (Emphasis supplied.) *Id.* at 672, 477 N.W.2d at 798.

It would appear *Groves* intended to observe that the facts justifying the *issuance* of the warrant were sufficiently related to the time of its *execution* as to justify the finding of probable cause at the latter time. It then concluded that under such a circumstance, execution and return of the warrant within the statutorily allowed 10 days resulted in a valid search.

However, it does not follow that compliance with the legislatively imposed time limit will in every instance result in a valid search. As noted in *Sgro v. United States*, 287 U.S. 206, 210, 53 S. Ct. 138, 77 L. Ed. 260 (1932), "[t]he proceeding by search warrant is a drastic one. Its abuse led to the adoption of the

Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual." Both U.S. Const. amend. IV and Neb. Const. art. I, § 7, protect against unreasonable searches and seizures by the government. *State v. Newman,* 250 Neb. 226, 548 N.W.2d 739 (1996). The general proscription of the Fourth Amendment is against unreasonable, not warrantless, searches. *State v. Donald*, 199 Neb. 70, 256 N.W.2d 107 (1977). "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the [U.S. Supreme] Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). Thus, the execution of a search warrant without probable cause is unreasonable and violates the Fourth Amendment and Neb. Const. art. I, § 7.

As explained in *United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975), *cert. denied* 424 U.S. 917, 96 S. Ct. 1120, 47 L. Ed. 2d 323 (1976):

> Since it is upon allegation of presently existing facts that a warrant is issued, it is essential that it be executed promptly, "in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated. Thus, a search pursuant to a "stale" warrant is invalid.
>
> . . . Timeliness of execution should not be determined by means of a mechanical test with regard to the number of days from issuance, nor whether any cause for delay was per se reasonable or unreasonable. Rather it should be functionally measured in terms of whether probable cause still existed at the time the warrant was executed.

In *State v. Yaritz*, 287 N.W.2d 13, 16 (Minn. 1979), the Minnesota Supreme Court, after finding that the statute requiring that a warrant be executed within 10 days had been complied with, observed that "[a] related but more important issue is whether the [6-day] delay in the execution of the warrant con-

stituted a constitutional violation." According to the *Yaritz* court:

> Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of execution of the warrant—that is, whether it is still likely that the items sought will be found in the place to be searched.

Id. In making that determination, the *Yaritz* court gave weight to LaFave's position that "the continuity of the crime is the most important factor in determining the staleness issue. 1 LaFave, Search and Seizure, § 3.7(a), p. 686." 287 N.W.2d at 17. The court reasoned that as the defendant was in the business of selling drugs and had been doing so on a continuing basis, it was reasonable to conclude that the probable cause which existed when the warrant was issued still existed 6 days later, when the warrant was executed.

The Supreme Court of Tennessee, in *State v. Evans*, 815 S.W.2d 503, 504 (Tenn. 1991), wrote that "probable cause must exist at the time of the execution of a search warrant just as it must at the time of its issuance." It also observed that "[i]n determining the question of staleness at the time of execution of a warrant, courts must consider the evidence on the basis of whether there is a violation of the Fourth Amendment and not simply a violation of the rule or statute." *Id.* at 505.

In *State v. Edwards*, 98 Wis. 2d 367, 372, 297 N.W.2d 12, 14-15 (1980), the Supreme Court of Wisconsin wrote that "[i]rrespective of compliance with a rule or statutory time limit within which a search must be executed, a delay in the execution of a warrant may be constitutionally impermissible under the Fourth Amendment." The court rejected any "test" that considers the reasonableness of the delay, stating that "the reasonableness of the searching officers' conduct is not material to the existence of probable cause, since the probable cause will either continue or dissipate regardless of how reasonable or unreasonable the police conduct involved." *Id.* at 373, 297 N.W.2d at 15. According to the *Edwards* court, the proper test for timeliness of execution of a search warrant is "(1) whether the warrant was executed in compliance with [the statutory period], and (2) if such compliance is found, whether the probable cause which existed at the

time of the issuance of the warrant still continued at the time of its execution." *Id.* at 376, 297 N.W.2d at 16.

Searches conducted pursuant to a warrant supported by probable cause are generally considered to be reasonable, *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); consequently, if the police act pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable, *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994).

Swift argues that because Haiar no longer expected to find the marijuana that Larson observed on April 5, 1994, probable cause no longer existed when the warrant was executed on April 13. But the affidavit on which the magistrate relied recited not only the existence of marijuana but complaints concerning frequent foot traffic and possible drug dealing, as well as that Swift had been convicted previously of distributing marijuana. In addition, the warrant ordered the seizure not only of marijuana "and its derivatives," but "[m]onies and records pertaining to an illegal narcotics operation," together with venue items, such as keys. The affidavit therefore provided probable cause to believe that Swift was continually dealing drugs out of the apartment. That being so, there was probable cause to believe that evidence of criminal activity existed at the apartment as of the time the warrant was executed. Such probable cause being present and the warrant being further both executed and returned within the statutorily limited time, the search was reasonable.

V. JUDGMENT

Accordingly, the judgment of the Court of Appeals is, as noted in the first part of this opinion, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
V. WAYNE L. KONFRST, APPELLANT.
556 N.W.2d 250

Filed December 6, 1996. No. S-95-964.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In light of the U.S. Supreme Court's decision in *Ornelas v. U.S.*, ___ U.S. ___, 116

S. Ct. 1657, 134 L. Ed. 2d 911 (1996), the traditional clearly erroneous standard of review of a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search is no longer applicable. The clearly erroneous standard has now been supplanted by a two-stage standard in which the ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.

2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable searches and seizures by the government.
4. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.
5. **Constitutional Law: Search and Seizure.** The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a "legitimate expectation of privacy in the premises."
6. **Search and Seizure: Waiver.** The right to be free from unreasonable searches and seizures may be waived by the consent of the citizen.
7. **Warrantless Searches: Proof.** When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.
8. **Warrantless Searches: Police Officers and Sheriffs.** A warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the premises, even if it is later demonstrated that the individual did not possess such authority.
9. **Search and Seizure: Proof.** The State must prove that the consent to search was freely and voluntarily given.
10. **Search and Seizure: Duress.** In order for consent to search to be valid, it must be the result of a free and unconstrained choice and not the product of the will overborne. It cannot be the result of duress or coercion, whether express, implied, physical, or psychological.
11. **Search and Seizure: Intoxication.** The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. A defendant must be so intoxicated that he is unable to understand the meaning of his statements.

12. **Search and Seizure.** Consent may be withdrawn or limited at any time prior to the completion of a search.
13. **Constitutional Law: Warrantless Searches: Police Officers and Sheriffs: Probable Cause: Motor Vehicles.** A warrantless search of an automobile by police officers with probable cause to believe the vehicle contains contraband is permissible under the Fourth Amendment.
14. **Probable Cause: Words and Phrases.** Probable cause means a fair probability that contraband or evidence of a crime will be found.
15. **Search and Seizure: Police Officers and Sheriffs: Probable Cause: Motor Vehicles: Controlled Substances.** The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle.
16. **Search and Seizure: Police Officers and Sheriffs: Probable Cause: Motor Vehicles.** When the police have probable cause prior to instituting any search, they may search the entire vehicle (interior compartments and trunk), including any package, luggage, or container that might reasonably hold the item for which they had probable cause to search.
17. **Controlled Substances: Intent: Circumstantial Evidence: Proof.** Circumstantial evidence to establish possession of a controlled substance with intent to deliver may consist of the quantity of the substance, the equipment and supplies found with it, the place it was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Washington County, DARVID D. QUIST, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Nile K. Johnson, of Johnson & Mock, for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

While Wayne L. Konfrst was being taken from the scene for a driving while under the influence of alcohol (DUI) arrest, he advised one of the arresting officers that his passenger, David

Uehling, was in charge of the vehicle. Uehling gave consent to search the vehicle. The officers found a wad of money and plastic baggies containing marijuana and methamphetamine. In a further search of a duffelbag in the vehicle, the officers found a scale and empty baggies.

Konfrst was convicted in a bench trial before the district court for Washington County of possession of a controlled substance with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1994). The Nebraska Court of Appeals reversed Konfrst's conviction and remanded the cause with directions to dismiss, concluding that the evidence admitted against Konfrst at trial was seized in violation of his right to be free from unreasonable searches and seizures. *State v. Konfrst*, 4 Neb. App. 517, 546 N.W.2d 67 (1996). We granted the State's petition for further review.

We conclude that the search of the vehicle was consented to by one who had authority to consent and that the resulting search of the duffelbag was based on probable cause. We therefore reverse the judgment of the Court of Appeals and remand the cause with directions to reinstate the district court's judgment.

I. BACKGROUND

At approximately 1:30 a.m. on June 25, 1994, Officer Larry Sanchez of the Blair Police Department was on patrol in downtown Blair, Nebraska. While he was stopped at a flashing red light, his attention was drawn to the loud sound of a motor vehicle starting. He looked in the direction of the sound and saw a gray Chevy Blazer jump the curb in front of Blue Ribbon Bar and drive down the sidewalk in front of four or five business establishments. Sanchez activated his lights and pursued the Blazer, which went down over the curb, onto the street, and turned into an alley behind the bar. The Blazer eventually came to a stop halfway down the alley and parked in a marked stall.

Three occupants were riding in the vehicle: Konfrst, Uehling, and Amy Goldyn. Sanchez approached Konfrst, whom he had observed driving the Blazer; asked for Konfrst's driver's license and registration; smelled alcohol on his breath; and then administered several field sobriety tests. The tests included the walk-

and-turn test, the one-legged stand, the finger-to-nose test, and recitation of the alphabet. After Konfrst failed all of these tests, Sanchez arrested him for DUI, placed him in the patrol car, and took him to a law enforcement facility.

1. Determination of Authority to Consent

Backup officer Jim Murcek arrived at the scene while Sanchez was administering the field sobriety tests to Konfrst. Murcek testified at trial that while standing next to Uehling, approximately 25 feet away from Konfrst, he heard Konfrst say that Konfrst "wanted his vehicle released to Dave Uehling."

Cpl. Joseph Lager arrived at the scene after Murcek, but prior to Sanchez' removal of Konfrst from the scene. At the suppression hearing, Lager testified that he asked Konfrst if the Blazer was his vehicle, and Konfrst stated that "it was his aunt's and his aunt gave control of the vehicle to David Uehling." At trial, Lager testified that he asked Konfrst if he was the person in charge of the vehicle, and Konfrst stated that "he wasn't . . . the vehicle was his aunt's and that David Uehling was actually in charge of the vehicle." Lager also testified at both the hearing and trial that he heard Konfrst yell to Uehling to get Konfrst's money out of the Blazer and bail him out of jail.

Sanchez testified on cross-examination at the suppression hearing that Lager asked Konfrst what he wanted to do with the vehicle and that Konfrst responded "the vehicle was in Dave Uehling's possession." However, at trial, during direct examination, Sanchez testified that he did not hear Konfrst say "anything to anybody" prior to leaving the scene. On cross-examination, Sanchez was asked whether Konfrst ever said that he wanted anyone else to have control of the vehicle. Sanchez responded, "Not to me, sir."

Although unknown to the officers at the time, the registered owner of the vehicle, Mary Jo Harris, was in fact the mother, rather than the aunt, of Konfrst. The parties stipulated to the testimony of Harris in an exhibit received into evidence at trial. The parties stipulated that if Harris were called, she would state that she is the mother of Konfrst, that the Blazer was registered in her name, and that Konfrst was the purchaser of the Blazer and its principal driver.

Lager testified at both the suppression hearing and the trial that the Blair Police Department has a standard written policy that if there is a licensed operator who is competent to drive, the officer in charge may release the vehicle to that person with the permission of the arrestee, but that the policy does not require the officer to release the vehicle.

Murcek testified that Uehling appeared to have been drinking and that it was his opinion that Uehling would not be able to operate a motor vehicle safely. Murcek further testified that Uehling stated that "it would be better if Amy Goldyn took the vehicle." Lager testified that he told Uehling that "I don't think you can drive, therefore, I'm not going to let you drive away," and that Uehling stated that he "didn't want to drive." Murcek and Lager each testified that they did not believe that Goldyn had been drinking.

At the suppression hearing, Lager testified that because of "the operator, being Mr. Konfrst, and my knowledge of Mr. Konfrst . . . from previous contacts, I would have impounded that vehicle anyway." At trial, Lager testified that "since the driver was arrested for D[U]I, [the vehicle] would have been impounded any way."

It is undisputed that prior to the time Konfrst was transported from the parking lot, no search of the Blazer had been requested of him or performed. After Konfrst was removed from the scene, Lager approached Uehling and told him that Konfrst had told Lager that Uehling had control of the Blazer. Lager then asked Uehling if this was so. Uehling responded by saying, "'I guess so.'" Lager then asked if he could search the vehicle. Uehling responded "go ahead."

2. The Search

Lager then opened the passenger door of the Blazer and moved the backrest of the passenger seat forward, which caused the entire passenger seat to slide forward. He then saw a wad of cash on the passenger side floorboard, lying directly on top of two plastic baggies. The money, which was later determined to total exactly $600, and the baggies were not visible until after the seat was moved forward.

Uehling reached into the vehicle, picked up the money, and placed it in his right front pocket. After Uehling picked up the money, Lager then looked back inside the vehicle where the cash was taken and examined the plastic baggies. Lager discovered that one of the baggies contained a green leafy substance which smelled like marijuana and that the other baggie contained six individually wrapped plastic containers, each containing a brown granular substance. Lager suspected that the items were controlled substances. At that point, Lager requested Uehling to give him the money, and Uehling complied. Lager then arrested and searched Uehling and Goldyn.

While Uehling and Lager were searching the passenger side of the vehicle, Murcek went to the driver's side of the vehicle. Between the door and the driver's seat, Murcek found a flashlight that "rattled and made a funny noise," "felt funny," and would not turn on, so he opened it and found a baggie containing a whitish-tan powdery substance.

Once Uehling and Goldyn were arrested and taken to the law enforcement facility by Lager, Murcek proceeded to perform a complete inventory of the vehicle at the scene. Besides the items already mentioned, Murcek located an orange duffelbag in the rear cargo area of the Blazer, which duffelbag contained sandwich baggies and a large triple-beam scale. He also discovered a small white pipe behind the passenger's seat on the floorboard.

A chemical analysis confirmed that one of the baggies found under the wad of cash contained marijuana, as did the pipe. The chemical analysis further confirmed that the contents of the large plastic bag discovered inside the flashlight and of the six smaller baggies found under the wad of money were methamphetamine. As a result, Konfrst was charged with possession of a controlled substance with intent to deliver.

3. Suppression Hearing and Trial

Prior to trial, Konfrst filed a motion to suppress any evidence found as a result of the search of his vehicle. The district court denied the motion without stating its findings of fact. Konfrst properly objected to the admission of the challenged evidence at trial, which the district court likewise overruled.

The State called Investigator Darwin Shaw at trial for the purpose of proving intent to deliver. Shaw testified that he has been a police officer for 18 years and an investigator for 11 years, that he has received training and education with respect to the investigation of illegal drug cases, and that he has investigated "hundreds" of illegal drug cases.

Shaw stated that of the six individual baggies found under the wad of money, four of them weighed approximately 1 gram, one weighed about 1.5 grams, and one weighed approximately 3.4 grams, which Shaw said is commonly known as an eight ball. The large baggie found inside the flashlight weighed approximately 1 ounce. Shaw further testified, based on his training and experience, that the individually wrapped baggies of methamphetamine contained quantities commonly sold on the street, that the quantity of methamphetamine discovered was more than is commonly kept for personal use, that cash is the common mode of payment in drug cases, that the triple-beam scale discovered is a type of scale commonly used to weigh drugs such as methamphetamine, and that the empty baggies discovered appeared to be the same type as those used to hold the methamphetamine. Thus, Shaw stated that based on the amounts of controlled substances found, the weighing scale, the baggies, and the cash, his opinion was that these "constitute the possibility that somebody is dealing drugs."

At the close of the State's case, Konfrst made a motion for a directed verdict on the grounds that the State had insufficient evidence with regard to intent to deliver. The district court overruled Konfrst's motion. Konfrst did not present any evidence. The district court held that

> having considered all of the evidence presented and the various factors, the scale, the money, the individual baggies, and all of the circumstances of the case, I find that there is proof beyond a reasonable doubt that the defendant did as charged on June 25th, 1994, in Washington County, Nebraska, did then and there unlawfully, knowingly or intentionally possess with the intent to distribute, deliver, or dispense a controlled substance, to-wit: . . . methamphetamine . . . .

Konfrst was sentenced to a term of not less than 30 months nor more than 5 years in the custody of the Nebraska Department of Correctional Services. The Court of Appeals reversed Konfrst's conviction and remanded the cause with directions to dismiss, concluding that the evidence admitted against Konfrst at trial was seized in violation of his right to be free from unreasonable searches and seizures. See, U.S. Const. amends. IV and XIV; Neb. Const. art. I, § 7. We granted the State's petition for further review.

II. ASSIGNMENTS OF ERROR

In its petition for further review, the State asserts that the Court of Appeals erred in concluding that the law enforcement officers illegally searched the vehicle and seized the items found therein.

In his appeal to the Court of Appeals, Konfrst asserted that the district court erred (1) when it overruled his motion to suppress, because none of the exceptions to the search warrant requirement existed; (2) when it overruled his motion to suppress, because, assuming that consent for the search of the vehicle was properly given, the consent did not extend to the duffelbag found inside the vehicle; (3) when it admitted evidence at trial that was obtained though an unlawful search of the vehicle and duffelbag found inside of the vehicle; and (4) when it overruled his motion for directed verdict, because there was insufficient evidence to prove beyond a reasonable doubt that he intended to deliver or distribute methamphetamine.

III. STANDARDS OF REVIEW

In light of the U.S. Supreme Court's decision in *Ornelas v. U.S.*, ___ U.S. ___, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), the traditional clearly erroneous standard of review of a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search is no longer applicable. The clearly erroneous standard has now been supplanted by a two-stage standard in which the ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed

for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.*

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. See, *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). 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. *Id.*

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996); *State v. Brozovsky*, 249 Neb. 723, 545 N.W.2d 98 (1996).

IV. ANALYSIS

1. Whether evidence Admitted at Trial Was Illegally Seized

The State asserts that the Court of Appeals erred in concluding that law enforcement officers illegally searched Konfrst's vehicle and seized the items found therein. Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable searches and seizures by the government. *State v. Newman, supra.*

Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. *Id.* Less rigorous requirements govern searches of automobiles, not only because of the element of mobility, but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. *State v. Hill*, 214 Neb. 865,

336 N.W.2d 325 (1983). One has a lesser expectation of privacy in a motor vehicle because its function is for transportation purposes and it seldom serves as one's residence or as the repository of personal effects. *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977); *Cardwell v. Lewis*, 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974); *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981). As such, the recognized exceptions to the Fourth Amendment's warrant requirement as applied to automobiles include probable cause, exigent circumstances, consent, search incident to arrest, inventory search, and plain view. See, generally, 68 Am. Jur. 2d *Searches and Seizures* §§ 61 and 62 (1993).

(a) Consent to Search

(i) Standing

As a preliminary matter, the State argues that Konfrst lacks standing to challenge the validity of the search of the vehicle based on the claim that Uehling did not have the authority to give consent to search. A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). See, also, Neb. Rev. Stat. § 29-822 (Reissue 1995). The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a "legitimate expectation of privacy in the premises." *State v. Conklin*, 249 Neb. 727, 731, 545 N.W.2d 101, 105 (1996). Because the record shows that Konfrst had a possessory interest in the vehicle and duffelbag, we determine that he had a legitimate expectation of privacy in the vehicle and duffelbag and, thus, standing to challenge the search thereof. See, *Brown v. United States*, 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973); *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975).

(ii) Authority to Consent

The right to be free from unreasonable searches and seizures may be waived by the consent of the citizen. *State v. Graham*, 241 Neb. 995, 492 N.W.2d 845 (1992). When the prosecution

seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981). See, also, *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990). Furthermore, a warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the premises, even if it is later demonstrated that the individual did not possess such authority. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).

In his appeal to the Court of Appeals, Konfrst asserted that Uehling did not have the authority to consent to a search of the vehicle and that the officers did not have an objectively reasonable belief that such authority existed. The Court of Appeals held that

> it was apparent that the driver of the Blazer was Konfrst, who was being arrested for DUI. None of the officers asked Konfrst, the individual obviously in physical control of the vehicle, for permission to search. Lager waited until after Konfrst was removed from the scene before asking for Uehling's consent. Uehling was known not to be the driver. . . .
>
> . . . .
>
> Based on an objective assessment of the facts, the officers did not have a reasonable belief that Uehling had common authority over the vehicle at the time they sought Uehling's consent, and it was subsequently shown at trial that he had no authority over the vehicle. Thus, the search of the vehicle was not justified under the common authority and consent exception. The admission of the evidence, if grounded on the basis of common authority, was improper.

State v. Konfrst, 4 Neb. App. 517, 528-29, 546 N.W.2d 67, 74-75 (1996).

The facts show that Harris was the registered owner of the vehicle. Because Harris was not present in the vehicle, and because her last name is different from that of any of the three occupants of the vehicle, it would have been reasonable for the officers to look to Konfrst, the driver, for consent to search. See *People v. Harris*, 199 Ill. App. 3d 1008, 557 N.E.2d 1277 (1990). See, also, *U.S. v. Dunkley*, 911 F.2d 522 (11th Cir. 1990).

However, when Lager asked Konfrst if the Blazer was his vehicle, Konfrst stated that the vehicle was his aunt's and that Uehling was in control of the vehicle. Moreover, when Lager asked Uehling whether it was true that Uehling was in charge of the vehicle, Uehling responded, "'I guess so.'" Thus, both Konfrst and Uehling stated that Uehling was in control of the vehicle before any of the officers asked anyone for consent to search the vehicle. We are unaware of any case law holding that when the driver of a vehicle specifically disavows control of the vehicle, stating that a passenger possesses control, and the passenger affirms that statement, the police must nonetheless ask the driver, and not the passenger, for consent to search the vehicle. As a result of what the officers were told by both Konfrst and Uehling, we conclude that it was objectively reasonable for the officers to believe that Uehling possessed authority to consent to a search of the vehicle.

(iii) Whether Consent Was Freely and Voluntarily Given

The State must prove that the consent to search was freely and voluntarily given. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). See, also, *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989). In order for consent to search to be valid, it must be the result of a free and unconstrained choice and not the product of the will overborne. *State v. Graham*, 241 Neb. 995, 492 N.W.2d 845 (1992); *State v. Juhl, supra*. It cannot be the result of duress or coercion, whether express, implied, physical, or psychological. *Id.* See, also, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). This determination is based on the totality of the circumstances. *Id.*; *State v. Graham, supra*; *State v. Juhl, supra*. While knowledge of the right to withhold consent is a factor to be considered, it is not a

prerequisite to establishing a voluntary and intelligent consent. *Schneckloth v. Bustamonte, supra*; *State v. Wood*, 195 Neb. 353, 238 N.W.2d 226 (1976).

Lager testified that when he asked Uehling if he could search the vehicle, Uehling responded "go ahead." The Court of Appeals held:

> The undisputed testimony is that Uehling was drunk and in no condition to drive and that Uehling never had physical control of the vehicle. Intoxication is a factor relevant to assessing the validity of consent. *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992). So too, Uehling's consent to search articulated as "go ahead" approaches mere submission to authority.

State v. Konfrst, 4 Neb. App. at 528, 546 N.W.2d at 74.

Konfrst never asserted that Uehling did not say "go ahead" when asked by Lager whether he could search the vehicle. Furthermore, there is no evidence in the record, nor is there any contention by Konfrst, that Uehling's consent was involuntarily given or the product of duress or coercion. Thus, we fail to see how the response "go ahead" approaches mere submission to authority.

There is evidence that the officers believed that Uehling had been drinking alcohol and that he would not be able to operate a vehicle safely. The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341 (1992). A defendant must be so intoxicated that he is unable to understand the meaning of his statements. *Id.*

In *Melton*, the defendant gave a statement to police officers that he had discharged his firearm at an automobile or residence of another police officer, and he also gave consent for the officers to search his home for the purpose of finding and removing the firearm. The court held that the defendant's statement and consent were knowingly, voluntarily, and intelligently given, even though his blood alcohol level at that time was .158 percent. The court reasoned that the defendant was able to understand the meaning of his statements because he was able to accurately relate events and circumstances surrounding the shooting; volunteered information regarding the gun he had

used, including its caliber and type; and knew that he had the right to remain silent in the presence of police officers.

In the instant case, the record does not support a finding that Uehling was so intoxicated that he was unable to understand the meaning of his statement "go ahead," in response to Lager's request for consent to search the vehicle. In fact, the record shows that Uehling was able to answer the officers' questions and respond to their commands, that Uehling understood and responded to Konfrst's command to get Konfrst's money out of the Blazer in order to bail him out of jail, and that Uehling had the presence of mind to state that he "didn't want to drive" and that "it would be better if Amy Goldyn took the vehicle." Thus, the evidence in the record leads us to conclude that Uehling's consent was the result of a free and unconstrained choice, and not the product of the will overborne. See, *State v. Graham*, 241 Neb. 995, 492 N.W.2d 845 (1992); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. See, *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). In the instant case, Konfrst's motion to suppress essentially asserted that no exceptions to the Fourth Amendment's warrant requirement were applicable. However, the district court did not make any specific findings of fact, in writing or from the bench, when it overruled the motion.

In *State v. Osborn*, 250 Neb. 57, 67, 547 N.W.2d 139, 145 (1996), after discussing how essential findings of fact are to proper appellate review, this court held that "[h]enceforth, district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress." It is noted that Konfrst's motion to suppress was denied by the district court before *Osborn* was released.

In other cases, we determined that certain findings of fact were implicit in the lower court's decision. See, e.g., *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993) (although no specific finding was made regarding location of controlled sub-

stance in relationship to defendant, such finding was unimportant because alternative findings supported conclusion that defendant was in possession of controlled substance); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993) (implicit in trial court's denial of motion to suppress is that court would have had to find certain fact); *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993) (stating that district court must not have believed defendant's testimony).

We determine that implicit in the trial court's decision in the instant case is the finding that Uehling possessed the authority to, and did in fact, consent to a search of the vehicle. As a result, we conclude that the Court of Appeals erred in determining that the district court's decision to overrule Konfrst's motion to suppress the contraband discovered underneath the wad of money was clearly erroneous.

(b) Probable Cause

Before the Court of Appeals, Konfrst asserted that the district court erred when it overruled his motion to suppress, because, assuming that consent for the search of the vehicle was properly given, the consent did not extend to the duffelbag found inside the vehicle. Consent may be withdrawn or limited at any time prior to the completion of a search. *State v. French*, 203 Neb. 435, 279 N.W.2d 116 (1979). Because Uehling was arrested and removed from the scene prior to the time Murcek searched the duffelbag, Uehling did not have the opportunity to revoke his consent. As a result, we determine that Uehling's consent to search did not extend to the search of the duffelbag.

However, the U.S. Supreme Court held long ago in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), that a warrantless search of an automobile by police officers with probable cause to believe the vehicle contains contraband is permissible under the Fourth Amendment. See, also, *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992); *State v. Gerjevic*, 236 Neb. 793, 463 N.W.2d 914 (1990). Probable cause means " 'a fair probability that contraband or evidence of a crime will be found.' " *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).

Once again, the district court did not make any specific findings of fact when it overruled Konfrst's motion to suppress. However, we determine that implicit in the trial court's decision is the finding that the officers had probable cause to search the duffelbag located in the cargo area of the vehicle.

In light of the Supreme Court's decision in *Ornelas v. U.S.*, ___ U.S. ___, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), the traditional clearly erroneous standard of review of a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search is no longer applicable. The clearly erroneous standard has now been supplanted by a two-stage standard in which the ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.*

In *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981), this court held that the finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. The court reasoned, "Having found a quantity of illicit drugs in one part of the automobile does not sensibly suggest the probability that no more such substance is present." *Id.* at 374, 307 N.W.2d at 819.

In the instant case, the officers lawfully discovered items believed to be methamphetamine and marijuana in the vehicle prior to searching the duffelbag. These discoveries inevitably led the officers to conclude that there was a fair probability that other contraband or evidence of a crime would be found in the vehicle. Thus, we determine based on our de novo review that probable cause to search the vehicle for further contraband attached at the moment Lager and Murcek discovered contraband under the wad of money and in the flashlight. This probable cause obviated the need for the officers' reliance on Uehling's consent in order to continue the search.

Both this court and the U.S. Supreme Court have relied on the automobile exception to a search warrant requirement in upholding searches of containers found during a probable cause

search of a vehicle. When the police have probable cause prior to instituting any search, they may search the entire vehicle (interior compartments and trunk), including any package, luggage, or container that might reasonably hold the item for which they had probable cause to search. See *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). See, also, *California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991); *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

In *State v. Vermuele, supra*, police officers, with probable cause to search an automobile for narcotics, searched inside a wallet found on the dashboard of the vehicle. This court held that the scope of a warrantless search authorized by the automobile exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. *Id.*, citing *United States v. Ross, supra*. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *Id.* Thus, the scope of a warrantless search of an automobile is not defined by the nature of the container in which the contraband is secreted, but is defined by the object of the search and the places in which there is probable cause to believe that it may be found. *Id.* See, also, *State v. Hansen*, 221 Neb. 103, 375 N.W.2d 605 (1985); *State v. McGuire, supra*.

In the instant case, the officers' search of the duffelbag was reasonable because controlled substances, for which the officers had probable cause to search, could easily have been hidden in the duffelbag. Furthermore, neither the passage of several hours between an arrest and search nor the immobilization of a vehicle by placing it in police custody invalidates a probable cause basis for conducting a warrantless automobile search. *State v. Gerjevic*, 236 Neb. 793, 463 N.W.2d 914 (1990).

Thus, in the instant case, we determine that the methamphetamine seized during the warrantless search of the vehicle was the product of a reasonable search conducted pursuant to Uehling's consent to search, which ultimately led to the establishment of probable cause to further search the vehicle, including the duffelbag discovered in the rear cargo area. As a result,

we conclude the Court of Appeals erred in determining that the district court erred in overruling Konfrst's motion to suppress.

2. Whether Sufficient Evidence Existed to Support Conviction

Finally, Konfrst asserted before the Court of Appeals that the district court erred when it overruled his motion for directed verdict, because there was insufficient evidence to prove beyond a reasonable doubt that he intended to deliver or distribute methamphetamine. In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

In *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992), this court held that circumstantial evidence to establish possession of a controlled substance with intent to deliver may consist of the quantity of the substance, the equipment and supplies found with it, the place it was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.

In the instant case, the State called Shaw as a witness for the purpose of proving intent to deliver. Shaw testified, based on his considerable training and experience, that the individually wrapped baggies of methamphetamine contained quantities commonly sold on the street, that the quantity of methamphetamine discovered was more than is commonly kept for personal use, that cash is the common mode of payment in drug cases, that the triple-beam scale discovered is a type of scale commonly used to weigh drugs such as methamphetamine, and that the empty baggies discovered appeared to be the same type as those used to hold the methamphetamine. Shaw then offered the opinion that based on the amounts of controlled substances found, the weighing scale, the baggies, and the cash, these "constitute the possibility that somebody is dealing drugs." Thus, based on the properly admitted evidence, when viewed and construed most favorably to the State, we conclude that

there existed sufficient evidence to support the conviction. See, *State v. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996); *State v. Brozovsky*, 249 Neb. 723, 545 N.W.2d 98 (1996).

V. CONCLUSION

We conclude that the district court did not err in overruling Konfrst's motion to suppress and that there was sufficient evidence to support the conviction. As a result, we reverse the judgment of the Court of Appeals and remand the cause with directions to reinstate the district court's judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE,
v. CLIFFORD A. PRIVAT, APPELLANT.
556 N.W.2d 29

Filed December 6, 1996. No. S-95-1241.

1. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
2. ____: ____. On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
3. **Trial: Proof: Appeal and Error.** To establish reversible error, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
4. **Trial: Judges: Witnesses: Testimony.** Improper comments by the trial judge may be prejudicially erroneous when they tend to discredit a witness and his testimony, or when they tend to enhance a witness' credibility.
5. **Trial: Judges: Witnesses.** When the trial judge affects the credibility of a witness, either negatively or positively, the judge invades the province of the jury.
6. **Trial: Judges: Evidence.** A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial.
7. **Trial: Judges.** A trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial.
8. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have

received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.

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

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

I. STATEMENT OF CASE

Clifford A. Privat appeals his convictions, following a jury trial, for first degree murder and use of a weapon in the commission of a felony. Privat was sentenced to life imprisonment for the murder conviction and from 6⅔ to 20 years' imprisonment for the use of a weapon conviction, to be served consecutively. We determine that all of Privat's assigned errors are without merit. As a result, we affirm the judgment of the district court.

II. FACTS

Privat and his friend, Eldon Troy LeGer, along with LeGer's girl friend, decided to come to Lincoln, Nebraska, sometime in either late July or early August 1993 to look for employment. Instead of finding jobs, they spent their time partying and drinking with friends. Running low on money, Privat and LeGer hatched a plan to find somebody to "roll"—that is, someone they could beat up and rob. In furtherance of this plan, on the evening of August 3, 1993, Privat, LeGer, and another friend, Jessie Farnan, visited two Lincoln nightclubs, the Panic and the 2001 Club, searching for a victim.

Kelly Erisman, the owner of the Panic, testified that she remembered seeing LeGer and Privat at her bar on the night of August 3. She testified that LeGer did not appear to be of legal age, so she asked to see his identification and requested that he sign the "Nebraska ID book"—a book maintained by the bar to

verify identifications. After LeGer signed the ID book, Erisman said she asked him to show her his identification. LeGer produced a driver's license which obviously did not belong to LeGer. Erisman testified she remembered that the name on the license produced by LeGer was something like "Private" with the first name of Clifford.

In any event, the identification produced by LeGer indicated this person was just 19 years old, and Erisman asked the group to leave. Erisman said approximately a half hour later, around 12 to 12:15 a.m., Privat returned to her bar and again tried to gain entry. Erisman continued to refuse admission to Privat. Erisman said, after turning Privat away on this second occasion, he specifically asked her the location of a "gay bar." Erisman refused to tell Privat anything, and Privat left.

After leaving the Panic, Privat, LeGer, and Farnan found their way to the 2001 Club. It was at this bar that Privat encountered the victim, Harold Grover, while LeGer and Farnan played pool. Privat introduced Grover to LeGer and invited Grover to join them at their motel. Upon arriving at the motel, the group went upstairs to their room and began drinking beer.

After about 20 minutes, Privat noticed Grover was no longer in the motel room. Privat and LeGer left to find Grover and located him standing next to the road outside the motel. They drove up to Grover in Privat's car and offered him a ride back to his car at the 2001 Club. LeGer said that at this time, Grover got into the front seat and LeGer got into the back seat, directly behind Grover. Instead of taking Grover to his car, they took him first to a truckstop to get cigarettes and beer, and then to a parking lot at Branched Oak Lake.

Once at the lake, Privat started talking to Grover. During this conversation, Privat took off his belt and gave it to LeGer. LeGer then took the belt, put it around Grover's neck, and pulled back. The two demanded Grover's money, to which Grover at first did not respond. LeGer began to release the belt and laugh when Privat told him, "This ain't fuckin' funny" and to grab the belt tighter as "[w]e're takin' him out."

Privat began beating Grover while LeGer grabbed Grover's wallet. Privat then dragged Grover from the car, beat and kicked him, and eventually jumped on his throat. When LeGer asked

Privat what they were going to do, Privat said he was going to kill Grover and took out his pocketknife and slashed Grover's throat. LeGer then took the knife and stabbed Grover in the stomach. The two carried Grover's body into the woods and left Lincoln the next day.

Acting on a report of a missing person, the Lincoln Police Department discovered witnesses who saw Grover leave the 2001 Club with Privat and LeGer and who saw Privat and LeGer's encounter with the manager of the Panic. Det. Elgin Kuhlman contacted LeGer's mother in Kansas on a number of occasions attempting to learn of LeGer's whereabouts. LeGer eventually contacted Detective Kuhlman and agreed to return to Lincoln.

On August 26, 1993, Detective Kuhlman and Sgt. Robert Marker of the Lancaster County sheriff's office met LeGer and his girl friend as they arrived at Eppley Airfield in Omaha. LeGer agreed to show Detective Kuhlman and Sergeant Marker the location of Grover's body and to cooperate in the investigation and prosecution of Privat. As part of this cooperation, LeGer agreed to call Privat that night. This telephone conversation occurred around 4 a.m. on August 27. During this conversation, Privat made several statements implicating himself in Grover's murder.

1. In-Court Identification

At trial, five witnesses identified Privat as the subject of their testimony and, for the record, described his appearance and where he was seated in the courtroom. First to testify was Christal Marie Pringle. Pringle said that she and a friend were in the parking lot of the 2001 Club shortly after closing time in the early morning hours of August 4, 1993. Pringle testified that a young man who identified himself as Troy approached them and asked directions back to his motel. After describing the person who joined the conversation, the following exchange occurred between the prosecutor and the witness: "Q. Is that person here in the courtroom today? A. Yes, he is. Q. Can you tell me where he's seated and what he's wearing? A. He's sitting right over there (indicating), he's got a gray blazer on, blue striped tie, blue jeans." Pringle eventually testified that she saw

Grover in the back seat of Privat's car and that Grover was in the car as it drove away.

Tom Hall, a childhood friend of LeGer's, testified that on the evening of August 3, 1993, he had a brief conversation with LeGer outside Hall's apartment, when LeGer and two other young men unexpectedly stopped by. Hall described both men and was asked if one of them was in the courtroom, to which Hall answered, "Yes." When asked to describe where this person was sitting and what he was wearing, Hall said, "He's seated by the two attorneys, wearing a blue tie, blue jeans, white shirt, glasses."

Thomas Hamm, an investigator for the Lincoln Police Department, identified Privat as the possessor of a pocketknife taken from Privat by the Topeka Police Department when he was arrested. Hamm was asked if Privat was present in the courtroom, to which he said yes and described Privat as "seated at the defendant's table to the left of Mr. Gooch, wearing a coat and tie, blue jeans."

Erisman, owner of the Panic, was asked to tell the jury where the man who attempted to enter her bar with LeGer was seated and what he was wearing. She answered, "He's seated in that chair (pointing) right there and he's wearing a grayish suit and blue jeans and a tie." At a later side-bar discussion concerning Privat's hearsay objection to the content of the identification LeGer presented to Erisman, the following exchange occurred:

> [THE COURT:] Let me touch on something different. Mr. Kelly, what good does it do to have a witness, when you ask them to see that person in the courtroom for them to respond: Yes, I do. He's wearing a gray jacket and white shirt, sitting over there. What good does that do? What relevance does that have to do with anything?
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> MR. KELLY: Well, Judge, in my career I've had five or six different court judges tell me five or six different ways that I'm to identify the defendant. I've had several judges specifically tell me that I'm not to comment on the record or to ask that the record will reflect the defendant as being identified. And, so, for that — I do not ask that question. . . .
>
> THE COURT: Well, be that as it may. When she says he's sitting over there, how do I know that he isn't sitting

back in the spectator gallery as a spectator? That doesn't help the appellate court at all. You don't even have her — have him sitting at counsel table, your counsel table, theirs, or anywhere else. It doesn't mean anything.

That's completely aside from whether you ask the Court to — to have the record reflect that she's identified the defendant. If you ask me to have the record reflect that, I will do that.

But completely aside from that, her response is he's sitting over there in a gray jacket. Doesn't mean anything.

MR. KELLY: I understand. And I'll ask the question. But, I think it does have meaning on the trial level, because the triers of fact are there to make the observations. Whether or not it gets to the appellate level, I suppose I leave up to the defense attorneys.

THE COURT: Well, but it may have some relevance here.

MR. KELLY: Yes, sir.

THE COURT: You have to keep in mind the record.

MR. HAYS: I might add something, Judge. If Mr. Kelly asked that the record reflect that she's identified the defendant, I would object to that because I think that's the jury's decision to make.

THE COURT: Well, the objection is noted. It's premature at this point. So, it's overruled.

Taking his cue from the court, when the prosecutor resumed his direct examination of Erisman, the following occurred:

[Q.] I'll ask you again, can you tell me if that second individual is here in the courtroom?

A. Yes, he is.

Q. Can you tell me where he is seated?

A. He's seated right there, the third person over on the right. (Pointing).

Q. Is that at the Defense counsel table?

A. Uhm-hum; yes.

Q. Can you tell me what he is wearing?

A. He's wearing a gray jacket with blue jeans and a tie.

MR. KELLY: I'd ask the record to reflect that the witness has identified the defendant.

MR. HAYS: And I would object. I think that's a jury question.

THE COURT: The record will so reflect.

Finally, when LeGer testified, he was asked if Privat was in the courtroom today—to which he answered yes. When asked to identify him, LeGer said:

A. He's sitting over there with his attorney.

Q. What's he wearing?

A. Suit and a tie.

Q. And is he the person on the extreme right-hand side of that table?

A. Yeah.

MR. JAUDZEMIS: The record should reflect the witness has identified the defendant.

MR. HAYS: I would object.

THE COURT: The record will so reflect.

2. Cross-Examination of Codefendant

The direct evidence introduced as proof of Privat's culpability was offered solely by his codefendant, LeGer. Privat's counsel aggressively cross-examined LeGer concerning his possible mendacity.

The evidence reflected that LeGer left Kansas and went to Salt Lake City, Utah, to avoid talking to the police about the disappearance of Grover. When in Salt Lake City, he asked his mother to call the shelter at which he was staying and tell them that she was LeGer's grandmother in Phoenix and that LeGer was authorized to come to Phoenix and stay with her. LeGer said the purpose of this fraud was to get the shelter to pay for his transportation to Phoenix.

LeGer admitted that on three occasions while in Salt Lake City, he had telephone conversations with his mother in Kansas, where, when she asked if he had killed a man, he lied to his mother and told her no. LeGer agreed that his motivation for contacting the Lincoln Police Department was to give them his side of the story before Privat gave them his.

LeGer admitted that the first time he talked to the Lincoln police, he did not tell them he had put Privat's belt around Grover's neck and choked him. Privat's counsel also questioned

LeGer about lying to the Lincoln police when asked whether he had gotten into trouble while working on a seismic crew with Privat in Texas. LeGer admitted to misleading the police, but denied that he had once beaten and robbed a man who was leaving a bar in Lubbock, Texas, even after being confronted by Privat's counsel with LeGer's deposition in which he admitted beating and robbing a man in Lubbock.

LeGer admitted that he did not tell the Lincoln police the first time he talked to them that it was always their plan to go to a bar to find someone to rob, and that in his deposition, he likewise denied this fact. LeGer admitted that he lied to the police when he initially told them he had no idea why Privat had asked Grover to come back to their motel or why they decided to take Grover to Branched Oak Lake. Furthermore, LeGer admitted he initially minimized the extent of his participation and overstated the extent of Privat's participation in the actual murder.

Finally, Privat's counsel attempted to question LeGer about his transfer from jail to the Lincoln Regional Center. At this point, the prosecutor asked for a sidebar and reminded the court of its motion in limine, which precluded the introduction of any evidence concerning LeGer's mental condition. This motion in limine does not appear in the record. Privat's counsel told the court that he intended to offer evidence to show that LeGer had feigned a suicide on three occasions in order to be placed in the regional center, and that he would not go into any diagnosis of LeGer's mental condition.

The prosecution then claimed any allegation of feigned suicide was unsubstantiated and demanded to know the basis for such an accusation. In response, Privat's counsel offered a letter written by LeGer to his physician at the regional center. When asked by the court whether he had seen this letter before, the prosecutor stated that he had. The letter reads as follows:

> 2/17/94
>
> Dr. Martin,
>
> The game playing is over. I've been taking up bed space and toying with my life. The suicidal acts I've already made have been made to draw attention to myself. I'm no

more suicidal than you might be and I feel the hospital is set up to help the mentally insane not someone who's facing time in the penetary [sic]. This is just a way to stay out of jail for me and I feel that I am ready to go back to jail and get on with my time. If I really wanted to kill myself I could have done it numerous other ways. So use your good judgment and figure it out.

I'm giving you my 48 hour notice to be discharged.

Let's get it on jails not going anywhere, we can't stop the inevitable.

Sincerly [sic]
Troy LeGer

2-17-94
2:33 pm

The State then attempted to claim that Privat was in wrongful possession of the letter and that receiving the letter in evidence would be a violation of the physician-patient privilege. The trial court found that the prosecutor was without authority to assert such privilege for the witness and asked both counsel if they would reserve the remainder of the cross-examination until LeGer's attorney could be contacted, so that the court could ascertain whether he wished to assert the privilege for his client. In any event, the court received the letter in evidence, but only for the purpose of showing the good faith basis of Privat's line of cross-examination.

Once LeGer's attorney was contacted, he stated his client did not waive any privileges that he may have. After further argument by counsel, the court sustained the State's objection to the receipt in evidence of LeGer's letter to his doctor, based on the fact that the trial court was of the opinion that Privat did not have a right to be in possession of LeGer's medical record and that LeGer had not waived his physician-patient privilege. Privat's counsel then made a motion to strike LeGer's testimony absent a waiver of the privilege, which the court immediately overruled.

III. SCOPE OF REVIEW

A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is suf-

ficient to support that verdict. On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

IV. ASSIGNMENTS OF ERROR

Privat assigns eight errors which may be consolidated into three: (1) The trial court erred in ordering the record to reflect witnesses Erisman and LeGer identified Privat in court; (2) the trial court erred in sustaining the State's objection to Privat's cross-examination of LeGer concerning LeGer's letter to his treating physician and in overruling Privat's subsequent motion to strike LeGer's testimony because Privat's right to confront a witness against him had been impaired; and (3) the trial court erred in overruling Privat's motions for mistrial and for directed verdict at the close of the State's evidence, and the verdict is not sustained by the evidence and is contrary to law.

V. ANALYSIS

1. Improper Comment by Trial Court

Privat contends that the trial judge either expressed an opinion about the evidence or that the trial judge testified as a witness when he directed the record to reflect that two witnesses described Privat when asked whether the subject of their testimony was present in the courtroom. The prejudice, Privat argues, is that the credibility of each witness is at issue and when a trial judge, in front of the jury, directs the record to reflect a witness' testimony in a certain manner, the judge has effectively removed the issue of this witness' credibility from the jury. In addition, Privat claims directing the record to reflect a fact which constitutes an element of the crime implicates his right to have each element of the crime decided by the jury.

The State counters by arguing that no error exists because the trial court did not comment on a controverted fact. Thus, the trial court did not remove from the jury's consideration an issue of fact, nor did it resolve an issue of witness credibility. Instead, the trial court simply clarified the record for the purpose of appellate review.

To establish reversible error, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). Improper comments by the trial judge may be prejudicially erroneous when they tend to discredit a witness and his testimony, or when they tend to enhance a witness' credibility. *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993).

> As a general rule, "It is the duty of the court to abstain carefully from any expression of opinion or comment on the facts or evidence, not only in its charge to the jury . . . but also on the examination of witnesses and otherwise during the course of the trial. The trial judge should not deny the existence of any fact bearing on the innocence of accused, or make any remark or inquiry in the presence of the jury concerning matters of fact at issue which indicates his opinion as to such facts."

Hansen v. State, 141 Neb. 278, 286, 3 N.W.2d 441, 446 (1942). When the trial judge affects the credibility of a witness, either negatively or positively, the judge invades the province of the jury. *State v. Rodriguez, supra.*

We reject Privat's assertion that the trial court made an improper comment in front of the jury. The discussion in which the trial court suggested to the prosecutor that he should make a better record for the purposes of review was held at side-bar, outside the presence of the jurors. Before the jury, the court merely ruled on the State's request that the record should reflect the witness identified Privat by stating, "The record shall so reflect."

As a general rule, a remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. 75 Am. Jur. 2d *Trial* § 284 (1991). " '[A] trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial.' " *State v. Corbett*, 339 N.C. 313, 330, 451 S.E.2d 252, 261 (1994) (quoting *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988)).

This court has consistently followed the same general rule. In *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985), the defendant objected to the State's closing argument, asserting that the evidence did not reflect the State's argument. In ruling on the objection, the trial court stated, "'I think the evidence does reflect it, counsel.'" *Id.* at 723, 365 N.W.2d at 834. We held the statement by the trial court to be tantamount to merely saying "overruled," and therefore it was not prejudicial to the defendant.

In contrast, in *State v. Rodriguez, supra*, during cross-examination of the only witness who could connect the defendant to the crime, defense counsel objected that a detective seated at the prosecution table was coaching the witness. The trial judge responded by stating, "'No, he wasn't. I was watching him.'" *Id.* at 709, 509 N.W.2d at 3. We held this statement was not only an improper comment as it enhanced the witness' credibility, but it also had the effect of making the judge a witness in the trial.

The instant case is much like *Bideaux*. Here, the trial court did not comment on any fact in controversy, offer its opinion concerning the significance of the witnesses' testimony or their credibility, nor did it interject information extraneous to the witnesses' testimony in an effort to impeach or bolster their credibility.

We also reject Privat's contention that the action of the trial court affected his substantial right to have each element of the crime charged determined by the jury. This is so because Privat never claimed the witnesses' in-court identifications were of someone else or incorrect in any other way.

Five witnesses described Privat as the subject of their testimony. Four of which, Pringle, Hall, Hamm, and Erisman, used substantially the same terms to describe Privat. Three said he was wearing blue jeans and a coat and tie, and one said he was wearing blue jeans and a shirt and tie. Three also said Privat was seated at defense counsel table, and the record shows the fourth said he was sitting over there and pointed. In the instant case, the prosecutor's request that the record should reflect the in-court identification of Privat was an articulation of the obvious for purposes of appellate review.

Accordingly, we conclude that the trial court, in ruling on the State's request, neither expressed an opinion about the evidence, nor testified as a witness, under the circumstances of the instant case.

2. Exclusion of Evidence/Opportunity to Cross-Examine

We initially note that Privat does not assign as error the trial court's refusal to receive into evidence LeGer's letter to his treating physician. Thus, for the purpose of disposing of this appeal, we assume, without deciding, that the trial court correctly excluded from evidence the letter that LeGer wrote to his doctor while confined in the Lincoln Regional Center.

However, Privat asserts that it was error to deny him a full and fair opportunity to cross-examine LeGer about the topic of the letter (i.e., feigning suicidal thoughts to stay out of jail) in order to demonstrate LeGer's propensity to lie. Privat argues that when a witness refuses to waive the physician-patient privilege in such instance, the accused is denied the opportunity for meaningful cross-examination of a witness against him. Further, Privat contends that the only remedy in such case is to exclude in its entirety the witness' testimony pursuant to our rule in *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989).

In *Trammell*, we held that where the physician-patient privilege protects from disclosure the confidential communication of a witness, and "where the witness refuses to waive the privilege, the result is that the testimony of the witness is inadmissible because the defendant is prevented from full and, perhaps, effective cross-examination of the witness." *Id.* at 142, 435 N.W.2d at 201.

However, when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, the scope of such inquiry is ordinarily subject to the discretion of the trial court, and, unless abused, its exercise is not reversible error. *State v. Ballard*, 237 Neb. 729, 467 N.W.2d 662 (1991).

Thus, the issue as framed by Privat is not whether the trial court erred by excluding LeGer's letter, but, rather, whether the trial court abused its discretion in cutting off cross-examination

regarding the topic of the letter, thereby denying Privat the opportunity for meaningful cross-examination of a witness against him; if so, what remedy is then required.

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution, as well as article I, § 11, of the Nebraska Constitution, guarantees one accused in a criminal prosecution the right to confront those witnesses against him. *State v. Hartmann*, 239 Neb. 300, 476 N.W.2d 209 (1991). This right of confrontation means more than merely being allowed to confront the witness physically. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). However, the right to confront witnesses only " 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis in original.) *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (per curiam)).

In *Van Arsdall, supra*, the Court held that a defendant's rights secured by the Confrontation Clause were violated when the trial court prohibited *all* inquiry into the possibility that a witness would be biased as a result of obtaining favorable treatment from the state in regard to a different criminal matter in exchange for his testimony. The Court stated:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska*, *supra*, at 318. Respondent has met that burden here: A reasonable jury might have received a significantly different impression of Fleetwood's credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

475 U.S. at 680.

Similarly, in *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988) (per curiam), the Court held that the

trial court violated the accused's right of confrontation when it kept all evidence of a rape victim's possible reason to lie from the jury. Quoting *Van Arsdall*, the Court concluded that had a reasonable jury been informed of this reason to lie, it might have received a significantly different impression of the witness' credibility.

This court has also considered this issue. In *State v. Hartmann, supra*, we held that denying a criminal defendant all opportunity to cross-examine an adverse witness in regard to that witness' pending civil lawsuit against the defendant was an abuse of discretion and violative of the defendant's confrontation right. See, also, *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

The common thread which runs through *Van Arsdall, Olden,* and *Hartmann* is that the accused was denied *all* opportunity to cross-examine an adverse witness in regard to a specific, prototypical form of bias. Other jurisdictions have had the occasion to consider cases where, like in the instant case, the trial court merely limited the extent to which cross-examination would be allowed in regard to the general credibility or bias of a witness on a collateral matter.

In *State v. Bogenreif*, 465 N.W.2d 777 (S.D. 1991), the defendant, an inmate in the South Dakota State Penitentiary, was convicted of aggravated assault stemming from an altercation with another inmate. At trial, the victim testified on either direct or cross-examination that he was an inmate at the penitentiary, that he was serving a sentence for grand theft, and that at the time of trial, he was a trustee assigned to a detachment unit in Yankton. On both direct and cross-examination, the victim was questioned about several letters he had written to the penitentiary authorities disclaiming responsibility for fights with other inmates, including the defendant, he predicted would occur unless he were moved. When defendant's counsel began questioning the victim in an attempt to suggest that his transfer from the penitentiary to the trustee unit was in exchange for his testimony, the court, on its own motion, overruled that particular line of cross-examination.

The South Dakota Supreme Court concluded that defense counsel had been permitted to expose to the jury facts from

which they could judge the victim's credibility. The mere fact that the defendant was not allowed to pursue a line of questioning suggesting that the altercation was initiated by the victim so that he could secure better treatment did not violate the defendant's right of confrontation. "Here, a reasonable jury probably would not have had a significantly different impression of [the victim's] credibility if the proposed line of cross-examination had been permitted." *Id.* at 782.

Likewise, in *People v Canter*, 197 Mich. App. 550, 496 N.W.2d 336 (1992), the Michigan Court of Appeals concluded a defendant's confrontation rights were not violated when the trial court allowed the defendant to inquire into many different collateral matters on cross-examination in order to challenge the witness' general credibility, but foreclosed other areas of inquiry when it involved nothing more than additional collateral matters challenging the witness' general credibility.

We are persuaded by the reasoning in the above cases and hold that an accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. In the instant case, Privat's counsel was not absolutely prohibited from engaging in appropriate cross-examination designed to show a lack of credibility on the part of LeGer; in fact, counsel was properly granted significant latitude in challenging LeGer's general credibility.

Through effective cross-examination, Privat exposed the fact that LeGer asked his mother to lie to the people in charge of the Salt Lake City shelter at which LeGer was staying, so that the shelter would provide LeGer with busfare to Phoenix. LeGer also admitted on cross-examination that he contacted the Lincoln police in order to tell his side of the story before Privat could do so. Furthermore, cross-examination revealed that LeGer's side of the story continually evolved, at first maximizing Privat's involvement while minimizing his own. LeGer admitted, on cross-examination, lying to his mother and the

Lincoln police investigators over and over again during the course of the investigation as set forth in part II(2) above. Inquiry into LeGer's letter to his physician regarding feigned suicidal tendencies would do nothing more than incrementally cast further doubt about LeGer's general credibility based on a collateral issue.

Accordingly, we conclude that Privat's constitutional right of confrontation was not violated in the instant case, as he was not absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of LeGer. We further conclude, beyond a reasonable doubt, that a reasonable jury would not have received a significantly different impression of LeGer's credibility had Privat's counsel been permitted to pursue cross-examination on the collateral matter of LeGer's letter to his physician.

3. Sufficiency of Evidence

Privat assigned as error that the verdict is not sustained by sufficient evidence and is contrary to law. However, the only argument offered with respect to this assignment is if LeGer's testimony is stricken, then there is insufficient evidence to sustain Privat's conviction. Absent plain error, assignments of error not discussed in the briefs will not be addressed by this court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). Errors assigned but not argued will not be addressed. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996). Accordingly, having determined that LeGer's testimony should not be stricken, coupled with the fact that there is other properly admitted evidence supporting the guilty verdict, we find there is no merit to Privat's sufficiency of the evidence claim. See *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

VI. CONCLUSION

Because we conclude that all of Privat's assigned errors are without merit, as first noted in part I above, we affirm the judgment of the district court.

Affirmed.

IN RE INTEREST OF JEFFREY R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DAVE R. AND CHRISTINE R., APPELLEES, AND NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

557 N.W.2d 220

Filed December 6, 1996. No. S-95-1258.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Appeal and Error.** Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1993 & Cum. Supp. 1994) provide the sole method of reviewing juvenile court dispositional orders falling within the ambit of the expedited appeal process therein specified.
4. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
5. **Statutes: Intent.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
6. **Juvenile Courts: Appeal and Error.** A two-part, disjunctive test must be applied to determine whether an expedited review under Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1993 & Cum. Supp. 1994) is required. First, the order must implement a different plan than that proposed by the Department of Social Services. Second, there must exist a belief in the department that the court-ordered plan is not in the best interests of the juvenile.
7. ____: ____. Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the County Court for York County, CURTIS H. EVANS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Don Stenberg, Attorney General, Royce N. Harper, and Beth Tallon, Special Assistant Attorney General, for appellant.

D. Matthew Dreesen, Deputy York County Attorney, for appellee State.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

The county court for York County, sitting as a juvenile court, adjudicated Jeffrey R. to be a minor falling within the provisions of Neb. Rev. Stat. § 43-247(3)(b) (Reissue 1993) and placed him in the custody of the Nebraska Department of Social Services for an out-of-home placement pending disposition. The department appealed the juvenile court's order to the Nebraska Court of Appeals, asserting that reasonable efforts were not made to maintain Jeffrey in the home prior to ordering his placement out of the home pending a dispositional hearing. The Court of Appeals dismissed the appeal for lack of jurisdiction because the department did not seek review of the case by a juvenile review panel within 10 days as required by Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1993 & Cum. Supp. 1994). The department successfully petitioned this court for further review. We determine that jurisdiction was proper and, further, conclude that the juvenile court did not err in ordering that the juvenile be placed in the custody of the department for foster care placement pending disposition.

FACTUAL BACKGROUND

On October 9, 1995, Jeffrey R. was detained by the York Police Department following an altercation with his parents, Dave R. and Christine R., at the family home. At a detention hearing on October 11, the juvenile court appointed the public defender to represent Jeffrey and set the next hearing date for October 18. Pending the next hearing, the court placed Jeffrey in the custody of his parents, with restrictions on his behavior and orders to follow reasonable rules set by his parents.

At the hearing on October 18, 1995, Jeffrey admitted the allegation that "he, by reason of being wayward or habitually dis-

obedient is uncontrolled by his parent, guardian, or custodian." Accordingly, he was adjudicated as a minor falling within the provisions of § 43-247(3)(b). A dispositional hearing was set for December 7.

The juvenile court then addressed the placement of Jeffrey pending the December 7 hearing. Jeffrey, his mother, and his father each testified that Jeffrey had been unable to abide by the household rules during the preceding week. Further, all three testified that they would prefer that Jeffrey be placed outside the family home.

The juvenile court found that reasonable efforts had been made to keep Jeffrey at home with his parents and that these efforts had failed. Accordingly, the court ordered that Jeffrey be placed in the custody of the department for foster care placement and ordered the department to conduct a home study and to prepare a case plan prior to the dispositional hearing on December 7.

The department filed a notice of appeal to the Court of Appeals on November 17, 1995. The York County Attorney and Jeffrey's guardian ad litem filed motions to dismiss the appeal based on the fact that the department had not sought a review of the juvenile court's order by a juvenile review panel within 10 days, as required by §§ 43-287.01 through 43-287.06. The Court of Appeals sustained these motions and dismissed the appeal. This petition for further review followed.

ASSIGNMENTS OF ERROR

The department assigns that the Court of Appeals erred in dismissing the appeal for lack of jurisdiction based on §§ 43-287.01 through 43-287.06. Further, the department asserts that the juvenile court erred in finding that reasonable efforts had been made to keep Jeffrey in the home prior to ordering an out-of-home placement.

ANALYSIS

JURISDICTION

York County contends that the department's appeal to the Court of Appeals was not proper because §§ 43-287.01 through

43-287.06 require review by a juvenile review panel within 10 days of the disposition.

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). In addition, statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *In re Interest of Aaron K.*, 250 Neb. 489, 550 N.W.2d 13 (1996).

Section 43-287.03 provides for the review of contested dispositional plans by a juvenile review panel as follows:

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

Moreover, § 43-287.04 provides in part the procedural requirements for obtaining the review of the juvenile review panel: "If the Department of Social Services or any other party desires to have a disposition described in section 43-287.03 reviewed, the department or other party shall have ten days after disposition by the court to file a request for review by a juvenile review panel."

We have held that §§ 43-287.01 through 43-287.06 provide the sole method of reviewing juvenile court dispositional orders falling within the ambit of the expedited appeal process therein specified. *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995); *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993). Thus, the issue to be decided is whether an appeal must be taken to a juvenile review panel in cases in which the department has not yet presented a dispositional plan to the court.

In construing these statutes, we are bound by the rule that in discerning the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996); *In re Interest of M.J.B., supra*. In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995); *In re Interest of M.J.B., supra*.

Based on the provisions of § 43-287.03, we have held that a two-part, conjunctive test must be applied to determine whether an expedited review is required. First, the order must implement a different plan than that proposed by the department. Second, there must exist a belief in the department that the court-ordered plan is not in the best interests of the juvenile. See *In re Interest of M.J.B., supra*. In the instant case, the juvenile court had simply placed Jeffrey in the custody of the department for foster care placement pending a dispositional hearing and ordered the department to prepare a case plan prior to the dispositional hearing. We obviously conclude that because the department had not yet presented a plan to the juvenile court, the juvenile court's order could not have implemented a different plan. Thus, the first prong of the test is not met. Consequently, we conclude that the provisions for expedited review by a juvenile review panel were not triggered, and the Court of Appeals had jurisdiction to determine the appeal.

Placement Pending Disposition

The only matter left for determination is the placement of Jeffrey prior to the time of the dispositional hearing. The department asserts that the juvenile court erroneously found that reasonable efforts had been made to keep Jeffrey in the home prior to ordering an out-of-home placement.

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996); *In re Interest of Todd T.*, 249 Neb. 738, 545 N.W.2d 711 (1996).

Jeffrey was properly adjudicated under § 43-247(3)(b). The evidence revealed that Jeffrey, his mother, and his father all testified that Jeffrey had been unable to abide by the family rules between the October 11, 1995, detention hearing and the October 18 adjudication hearing. Further, all three individuals testified that Jeffrey was not likely to abide by the household rules, that he was disruptive to the entire family, and that an out-of-home placement was in his best interests pending disposition.

In the absence of evidence to the contrary, we conclude that reasonable efforts were made to keep the juvenile in his home prior to ordering an out-of-home placement and that the juvenile court did not err in ordering that the juvenile be placed in the custody of the department for temporary foster care placement pending disposition.

CONCLUSION

Because we conclude that the juvenile court did not err in ordering that the juvenile be placed in the custody of the department for temporary foster care placement pending disposition, we reverse the decision of and remand this matter to the Court of Appeals, with directions to remand the cause to the juvenile court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE,
V. DANIEL RICHARD LUJANO, APPELLANT.
557 N.W.2d 217

Filed December 6, 1996. No. S-95-1336.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
2. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury.
3. **Judgments: Appeal and Error.** The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the the County Court for Sarpy County, LARRY F. FUGIT, Judge. Judgment of District Court affirmed.

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

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Daniel Richard Lujano appeals his conviction for driving while under the influence of alcohol. He claims:

(1) The trial court committed plain error by receiving into evidence a stipulation containing a breath test reflecting that Lujano's breath alcohol content was beyond the legal limit to drive, and

(2) on appeal, the district court for Sarpy County erred in affirming the decision of the trial court finding there was sufficient evidence to support Lujano's conviction.

This appeal was originally filed in the Nebraska Court of Appeals. We authorized the appeal to be transferred to our docket.

We affirm Lujano's conviction for driving while under the influence of alcohol.

STANDARD OF REVIEW

Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessry for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury. *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991). See, also, *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992).

The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. See, *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

FACTS

On February 20, 1995, a city of Bellevue police officer was dispatched to an address where a man was reported pounding on the entrance door of an apartment. Upon arriving at the address, the officer discovered that it was Lujano who had been pounding on the apartment door. The apartment was occupied by Lujano's ex-girl friend, the mother of his 2-year-old daughter. The child lived with her mother.

Lujano's ex-girl friend did not want Lujano arrested, but wanted him to leave the area. The police officer told Lujano to leave the area and advised Lujano's ex-girl friend to seek a protective order. While at the disturbance site, the officer detected

an odor of alcohol emanating from Lujano and noticed that Lujano had difficulty maintaining his balance while standing in one spot. The officer also observed that Lujano was "obviously too intoxicated to drive" and advised him to walk to an Albertson's store or to the Southroads Mall and summon someone by telephone for a ride to his home. The officer also told Lujano that if he was seen driving, he would probably be arrested for driving while under the influence of alcohol. Lujano did not heed the officer's warning about driving.

After the police officer's warning about driving, Lujano obtained the officer's permission to roll up the windows of the automobile he had driven to the scene. While the officer was in his police cruiser logging his investigation, Lujano started the vehicle he had driven to the scene and drove to Albertson's parking lot, where he parked. When the officer observed Lujano driving, he immediately turned on his police cruiser's emergency lights and followed Lujano to the parking lot.

At the parking lot, the officer physically stopped Lujano from entering Albertson's. Pursuant to the officer's request, Lujano recited a portion of the alphabet twice but each time slurred some of the letters. Because Lujano claimed he was disabled, the officer did not ask Lujano to perform the usual physical field sobriety tests. A preliminary breath test given Lujano at the parking lot showed Lujano's breath alcohol content to be .256, well over the legal limit for driving a motor vehicle. At that point, the officer arrested Lujano for driving while under the influence of alcohol.

Lujano was then taken to the Sarpy County jail, where he was given an Intoxilyzer test. That test reflected that Lujano had a concentration of .245 of 1 gram of alcohol per 210 liters of his breath—again, well over the .10 legal limit. See Neb. Rev. Stat. § 60-6,196(1)(c) (Reissue 1993). On his "Operation of Motor Vehicle Intoxication Report," the arresting officer reported that the effect of alcoholic beverage on Lujano was "[o]bvious" and that his attitude was "[u]ncooperative" and "[t]hreatening." The report reflects that Lujano admitted that he had been drinking beer on the day of his arrest.

Lujano was charged in the Sarpy County Court with violating § 60-6,196, which provides in relevant part:

> 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.

Of relevancy here, in the Sarpy County Court, Lujano entered a plea of not guilty, and the case was submitted for determination to the judge sitting without a jury, on stipulated facts and the officer's written report. By agreement, excluded from consideration by the court were the results of a horizontal gaze nystagmus test and the preliminary breath test. There was no objection by Lujano to the introduction into evidence of the result of his Intoxilyzer breath test. The trial court found, beyond a reasonable doubt, that Lujano was guilty of driving while under the influence of alcohol. Subsequently, Lujano was sentenced to probation for 9 months, fined $50, and ordered not to drive a motor vehicle for 60 days.

Lujano appealed his conviction to the district court for Sarpy County. Restated and summarized, Lujano's claims were that the trial court (1) erred in denying his plea in bar with regard to driving under the influence, (2) erred because his conviction was barred based upon double jeopardy, (3) committed plain error in allowing the Intoxilyzer test of Lujano's breath into evidence, and (4) erred in finding there was sufficient evidence to convict him.

The district court found that Lujano's first two assignments or error were without merit. They revolved around the administrative revocation of Lujano's driving privileges following his arrest. Lujano did not preserve his first two district court assignments of error for consideration by this court, and they, therefore, require no further discussion.

In his third assignment of error to the district court, Lujano claimed that the trial court committed plain error in allowing the result of his Intoxilyzer test into evidence. It appears from the record that the district court erroneously determined that Lujano's objection to the Intoxilyzer test was sustained by the

county judge. The county court record reflects that Lujano made no objection to receiving into evidence the Intoxilyzer breath test he took at the Sarpy County jail. The result of that test was included in the police report which was received in evidence without objection at the trial court level. It was Lujano's objection to the preliminary breath test result obtained in Albertson's parking lot that was sustained.

The district court correctly found that the trial court record fails to reflect that the county judge considered Lujano's Intoxilyzer breath test in adjudicating Lujano's guilt on the charge in this case. The district court held that even without considering the Intoxilyzer test result, there was sufficient evidence to convict Lujano of driving while under the influence of alcohol. The district court affirmed Lujano's conviction because "[t]he observations of the officers [sic] are contained in a written report received in evidence and the observations justify the opinions and conclusions that the defendant was intoxicated and drove an automobile in that condition." While a second officer was at the disturbance scene, the report presented to the county judge contained no observations by him.

ANALYSIS

In his first assignment of error to this court, Lujano contends that the trial court committed plain error by receiving into evidence a stipulation which contained the result of a breath test which reflects that the alcohol content of his breath was above the legal limit to drive a motor vehicle. In his second assignment of error to this court, Lujano claims there was insufficient evidence to convict him of driving while under the influence of alcohol. In this analysis, we consider both of Lujano's assignments of error and find that neither has merit.

In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted

evidence in a case tried without a jury. *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991).

For the purpose of disposing of this appeal, we assume arguendo that the trial court committed plain error in admitting the result of Lujano's Intoxilyzer test into evidence. Lujano has not shown that the trial court, sitting without a jury, actually made a factual determination of Lujano's guilt through the use of the allegedly erroneously admitted evidence. After a careful review of the record, we affirm the district court's holding, that without considering Lujano's Intoxilyzer breath test result, there is sufficient other relevant stipulated and uncontroverted evidence in the record for the trial court to have found Lujano guilty of driving while under the influence of alcohol. We further affirm the district court's determination that the observations of the investigating officer are contained in a written report received in evidence, and his observations justify the opinions and conclusions that Lujano was intoxicated and drove an automobile in that condition.

The trial court was not clearly wrong in finding Lujano guilty of driving while under the influence of alcohol.

CONCLUSION

We affirm the judgment of the district court for Sarpy County.

AFFIRMED.

WORLD RADIO LABORATORIES, INC., A NEBRASKA CORPORATION, APPELLEE, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLANT.

557 N.W.2d 1

Filed December 13, 1996. No. S-93-739.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
2. **Damages: Appeal and Error.** As to the issue of damages, the amount awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

3. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
4. **Malpractice: Negligence: Limitations of Actions.** An action based on professional negligence must be brought within 2 years next after the alleged act or omission in rendering or failure to render professional services.
5. **Accounting: Malpractice: Negligence: Limitations of Actions.** In cases involving negligently prepared audits, the statute of limitations begins to run when the audit report is delivered to the client.
6. **Malpractice: Limitations of Actions.** The 2-year filing limitation may be extended if facts constituting the basis of the malpractice action are not discovered and could not reasonably be discovered within 2 years of the alleged negligent conduct.
7. **Accounting: Malpractice: Negligence: Proximate Cause: Proof.** Before a plaintiff may recover for accounting malpractice, the essential elements of any negligence action must be proved, namely, (1) duty, (2) breach, (3) causation, and (4) resulting damages.
8. **Negligence: Proximate Cause: Proof.** There are three basic requirements that must be met to establish causation: (1) that "but for" the defendant's negligence, the injury would not have occurred; (2) that the injury is the natural and probable result of the negligence; and (3) that there is no efficient intervening cause.
9. **Trial: Negligence: Proximate Cause.** Determination of causation is ordinarily a matter for the trier of fact.
10. **Trial: Negligence: Juries: Proof.** A plaintiff is not bound to exclude the possibility that the event might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that the injury occurred in the manner claimed.
11. **Trial: Proximate Cause: Evidence.** The issue of proximate cause, in the face of conflicting evidence, is ordinarily a question for the trier of fact.
12. **Negligence: Damages.** The proper measure of damages in a negligence action is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence.
13. **Damages: Proof.** The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.
14. ____: ____. A plaintiff must prove damages with reasonable certainty.
15. ____: ____. A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.
16. ____: ____. Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.
17. ____: ____. Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both its occurrence and the extent thereof.
18. **Accountants: Malpractice: Negligence: Damages: Proof.** While minor inaccuracies in an audit or report may be overlooked, where by reason of the accountant's negligence, inaccuracies and failure to report facts of serious character appear, he or she is not entitled to compensation. And when compensation is paid to an accountant

in reliance upon his or her report, it may be recovered, upon proof that through the accountant's negligence, the audit was, in substance, false.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MUES, Judges, on appeal thereto from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge. Judgment of Court of Appeals affirmed as modified, and cause remanded for further proceedings.

Philip A. Lacovara and Lynne M. Raimondo, of Mayer, Brown & Platt; Jeff A. Anderson, of Kutak Rock; William G. Campbell, of Rogers & Wells; and Maureen E. McGrath for appellant.

Joseph E. Jones, Michael L. Schleich, and Lon A. Licata, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On May 20, 1986, World Radio Laboratories, Inc., brought an accounting malpractice action against Coopers & Lybrand. In its petition, World Radio claimed that Coopers & Lybrand negligently prepared World Radio's financial statements for fiscal years 1981 through 1984 and negligently failed to advise World Radio as to the inadequacy of its internal accounting controls.

The jury entered a verdict for World Radio and awarded damages of $0 for 1981, $10,300 for 1982, $12,000 for 1983, and $17,018,000 for 1984. Coopers & Lybrand filed a timely appeal. The Nebraska Court of Appeals affirmed the verdict of liability on the part of Coopers & Lybrand but concluded that the evidence was insufficient to support a damage award based on lost profits or a decrease in the value of World Radio. Concluding that the evidence did support an award for accounting expenses incurred to both Coopers & Lybrand and the successor accounting firm, Arthur Young, the court remanded the cause for determination of those fees. The court also held that

the statute of limitations and the doctrine of contributory negligence did not bar recovery by World Radio. *World Radio Labs. v. Coopers & Lybrand*, 4 Neb. App. 34, 538 N.W.2d 501 (1995).

The Court of Appeals subsequently modified its opinion and held that World Radio failed to bring its negligence action for 1983 within the 2-year period prescribed by Neb. Rev. Stat. § 25-222 (Reissue 1995). Therefore, the court held, World Radio was prohibited from recovering any damages incurred for 1983. *World Radio Labs. v. Coopers & Lybrand*, 4 Neb. App. 264, 542 N.W.2d 78 (1996).

Both Coopers & Lybrand and World Radio have petitioned this court for further review. We agree with the Court of Appeals' determination that Coopers & Lybrand was negligent in auditing World Radio for the years in question and that the evidence is insufficient as a matter of law to sustain a damage award for lost profits or a decrease in World Radio's value. We also agree with that portion of the court's opinion remanding this cause for a determination of fees paid to Arthur Young as a result of Coopers & Lybrand's negligence. However, we modify that portion of the court's opinion remanding this cause for a determination of the fees paid to Coopers & Lybrand for negligent work insofar as we determine the amount of those damages to be set at $42,000.

I. ASSIGNMENTS OF ERROR

On petition for further review, Coopers & Lybrand assigns numerous errors. In summary, Coopers & Lybrand argues that the trial court erred by (1) failing to grant Coopers & Lybrand's motion for a directed verdict on World Radio's claim that its alleged negligence caused World Radio's damages, (2) failing to grant Coopers & Lybrand's motion for a directed verdict on the issue of damages, and (3) failing to grant Coopers & Lybrand judgment on the issue of whether the statute of limitations barred recovery for 1981, 1982, and 1983.

In addition, Coopers & Lybrand argues that the Court of Appeals erred by (1) affirming liability for accounting malpractice on the theory that the negligent acts of World Radio's chief financial officer could not be attributed to World Radio; (2) failing to grant Coopers & Lybrand's motions for directed verdict

and judgment notwithstanding the verdict, considering that the evidence offered to prove causation and damages was insufficient; and (3) remanding the cause for retrial on the issue of damages instead of reducing damages to the amount of the auditing fees.

In its petition for further review, World Radio also assigns numerous errors. In summary, World Radio argues that the Court of Appeals erred by (1) ruling that World Radio's experts were insufficient as a matter of law, (2) disregarding precedent as to the issue of to what degree of certainty World Radio was required to prove its damages, (3) improperly instructing the jury on World Radio's theory of damages, and (4) improperly overruling the district court's decision that the statute of limitations did not bar World Radio's claims for 1983.

II. BACKGROUND

1. World Radio in 1935 through 1979

World Radio was founded in 1935 when Leo Meyerson began selling radio parts out of his car to amateur and ham radio operators. After a brief interruption during World War II, World Radio reopened and began selling radio equipment and associated electronics by mail order on a worldwide basis.

Leo Meyerson's son, Larry (Meyerson), joined the company in 1961. With the addition of Meyerson, World Radio quickly responded to the changing trends in the radio market. It was Meyerson that decided to enter the retail consumer electronic business by opening a retail store in Omaha, Nebraska, in 1967. In addition to selling radio equipment, this store also specialized in records, tapes, and stereo equipment.

The retail operations of World Radio expanded steadily throughout the 1970's. Selling mostly stereo and hi-fi equipment, World Radio increased its sales from $1.4 million in 1971 to over $7 million in 1979. By 1979, World Radio was operating 10 retail stores in two states.

In response to this rapid growth, Meyerson, as president and majority shareholder, sought to "professionalize" the company by hiring new management members. One such member was Joseph Riha, a certified public accountant and former auditor with Coopers & Lybrand. Hired in 1979, Riha served as World

Radio's chief financial officer and remained in charge of the accounting department until June 1985.

2. WORLD RADIO IN 1980 THROUGH 1985

The success of World Radio continued into the early 1980's. Once again responding to changes in industry trends, the company expanded into television and video retail. This expansion proved to be quite successful, as evidenced by sales of $10,955,186 and $19,187,170 in 1982 and 1983, respectively. In addition, the number of retail stores in 1984 had increased to 24, with sales in that year totaling $34,223,889. It was Meyerson's goal, as president of World Radio, to have 50 stores in operation by 1987.

In light of this success, Meyerson dreamed of "going public," whereby shares of World Radio stock would be sold to the public. The funds raised by a public offering of World Radio stock would be used to help the company grow further. Meyerson discussed this "dream" with his auditors, Coopers & Lybrand, in 1983. While Coopers & Lybrand accountants advised Meyerson that such an offering could not be made until World Radio acquired $2 million in net profits, Meyerson remained hopeful because World Radio was expected to reap profits in the amount of $2 million by 1985. Despite his initial enthusiasm, Meyerson never drew up formal plans for a public offering or took any other steps in furtherance of his dream.

One of Riha's first projects upon being hired as chief financial officer was the installment of a "sophisticated" computer system. Upon installation of this new system, World Radio's cash registers at each retail location were tied to a mainframe in the company's Council Bluffs, Iowa, headquarters. As a result, the system automatically recorded every sale that took place at each store. Once these were recorded, the computer system would generate a gross margin report that showed each item sold, the cost of merchandise sold, and the gross margin realized. Total figures of the gross margin for the sales of each store were then produced on a daily basis. This information was then interfaced with the general ledger in the computer to show the overall gross margin figures for the entire company. The system was also designed to offset all financial statements by the

amount of World Radio's outstanding debts or accounts payable.

World Radio often financed inventory purchases. Due to the large amount of inventory World Radio was purchasing during the early 1980's, the company often financed its inventory from outside sources using a "floor plan." Under this approach, World Radio would enter into an agreement with a finance company whereby any goods purchased from a supplier would be delivered to World Radio but charged to the finance company. The finance company would pay the supplier, receiving a cash discount. World Radio would then pay the finance company according to the terms provided in the agreement between the parties. By using such a plan, World Radio received goods at a cheaper rate than if purchased directly from the supplier.

In January 1984, World Radio floor planned its inventory and entered into an unsecured inventory agreement with Westinghouse Credit Corporation (Westinghouse). Under this agreement, Westinghouse paid World Radio's suppliers for purchased inventory, and Westinghouse, not World Radio, received the cash discount offered by the supplier. Westinghouse then billed World Radio for the full purchase price, to be paid in three equal installments.

Due to the use of installment payments, Riha claimed World Radio's sophisticated computer system could not keep track of the debt owed to Westinghouse. Thus, World Radio kept track of the Westinghouse account payable in a rudimentary fashion, by simply putting the unpaid invoices in a special drawer in an accounting clerk's desk. An accounting clerk would then manually keep track of the payment dates and prepare a check payable to Westinghouse. This check would then be signed by Meyerson or Riha.

Unlike other accounts payable, the Westinghouse payable was never entered into the computer system. Instead, the debt would be reflected only if it were manually added to the balance sheet generated by the computer. However, this was never done. This omission resulted in incorrect financial statements which showed liabilities to be too low and the profits for each year to be too high by the amount of the Westinghouse payable. Because the unrecorded Westinghouse payable was $890,111 as

of June 2, 1984, World Radio's financial statements, as generated by the computer system, were extremely inaccurate.

Coopers & Lybrand, World Radio's independent accountants and auditors since 1970, failed to locate the missing Westinghouse payable. It was not until May 21, 1985, that Riha discovered that the June 2, 1984, audited financial statements may not have included the outstanding debt owed to Westinghouse. Upon making this discovery, Riha immediately informed Meyerson, who, shortly thereafter, terminated Riha and extinguished all relations between World Radio and Coopers & Lybrand.

Meyerson then engaged Arthur Young, another national accounting firm, to audit World Radio's financial records as of June 1, 1985. In addition to the missing Westinghouse payable, Arthur Young discovered material weaknesses in World Radio's system of internal accounting controls. As a result, Arthur Young was unable to prepare an income statement or other financial statements for the fiscal year ending June 1, 1985.

The particular weaknesses discovered by Arthur Young were formally relayed to World Radio stockholders in a letter dated March 10, 1986. In this letter, Arthur Young stated that World Radio's accounting system in place on June 1, 1985, and for several years prior thereto, was inadequate because it failed to protect assets and to ensure that transactions had been authorized. In addition, Arthur Young concluded that the financial statements prepared under the system did not adhere to generally accepted accounting principles.

Stanley Scott, a certified public accountant, testified that an auditor has a duty to advise a company of any deficiencies in its accounting system. According to Scott, a failure to discover a material deficiency would affect a company's financial statements. In Scott's opinion, the failure to discover deficiencies present in World Radio's internal accounting controls was a result of Coopers & Lybrand's failure to follow generally accepted accounting principles.

At trial, World Radio offered evidence that Arthur Young's inability to prepare financial statements created problems. For instance, World Radio's relationship with its primary lender, Omaha National Bank, changed dramatically. During 1983,

World Radio's credit line with the bank was increased from $600,000 to $1.2 million and in 1984 from $1.2 million to $3 million. Without a financial statement in 1985, however, the bank refused to increase World Radio's credit line to allow for further expansion. In fact, Meyerson was forced to sign a personal guarantee with the bank to keep World Radio's revolving credit line.

Meyerson and Luke Northwall, the successor to Riha as chief financial officer, testified that the lack of financial statements also prevented World Radio from purchasing new products and inventory lines, because new suppliers would not sell products and open new credit lines to a company without financial statements. Northwall also opined that World Radio's accounting system prior to June 1, 1985, was insufficient in that it did not prevent employee theft or protect company assets. Furthermore, in Northwall's view, the lack of financial statements resulted in World Radio's experiencing problems with funds, advertising, and layaway and loaner policies.

Malcolm Ballinger, World Radio's vice president of merchandising, testified that the inability to purchase new product lines in 1985 was especially damaging because the technology in television and video was changing dramatically during this period.

According to Meyerson, the lack of financial statements also prevented the opening of any new stores, because landlords would not be willing to negotiate without such statements. Meyerson also stated that had Coopers & Lybrand informed him that better accounting controls were needed, he would have incorporated them "immediately," and that had he known of the missing Westinghouse payable, he would not have paid substantial employee bonuses or made profit-sharing contributions. In Meyerson's words, World Radio "made decisions all the time based on what we believed to be accurate financial statements."

3. World Radio in 1985 through 1989

Since World Radio had no financial statements, Northwall initiated a "survival plan" to keep World Radio operating through the 1985 Christmas season. This plan called for the liquidation and overall reduction of inventory, including the carry-

ing of fewer items in the product line. The conversion of inventory into cash would provide the needed funds to operate the company. Northwall testified that this generation of operating cash necessarily reduced sales.

In addition to reducing inventory, World Radio also changed its fiscal year to end in February 1986, rather than June 1986. As such, financial statements were prepared for a "stub year," representing the 36-week period of June 2, 1985, through February 1, 1986. World Radio opted for this approach because it would be too expensive to have Arthur Young reconstruct the records and prepare an income statement for 1985. According to Northwall, the creation of these short-term financial statements was necessary for World Radio's survival.

The income statement generated for the stub period showed a net income of $1,224,663, with equity increasing to $934,482. These figures differ drastically from the balance sheet prepared by Arthur Young in March 1986, which showed World Radio as having a negative worth of $248,164 as of June 1, 1985. With a positive net income statement for the stub year, World Radio was once again able to represent to the bank and other creditors its ability to make profits.

Despite previous problems, World Radio remained in business after discovering the missing Westinghouse payable and inadequate accounting controls. The evidence adduced at trial showed that World Radio's creditors continued to do business with World Radio. In response to the newly prepared financial statements for the stub year, the bank was once again willing to increase World Radio's credit line. World Radio continued to expand its business operations by opening seven new stores in 1986 and 1987. Throughout this time period, World Radio was also engaging in several new markets.

The accounting firm of Peat Marwick prepared World Radio's audit report for the fiscal year ending January 31, 1987. According to this report, World Radio had earned a net income of $1,229,782 during the 1986 fiscal year. During the same period, World Radio's equity rose to $2,157,594, an increase of more than $2 million over the negative equity shown on World Radio's June 1, 1985, balance sheet prepared by Arthur Young. Gross sales for the 1987 fiscal year were $40,562,746.

This upward swing came to a halt in 1988. An audit report prepared for the fiscal year ending January 31, 1988, showed that World Radio had incurred a loss of $1,529,659, with a decrease in its equity to $346,809. In March 1988, World Radio stock owned by Meyerson was redeemed, and Ballinger and Northwall became the owners of World Radio. Ballinger and Northwall continued to operate World Radio for another year until operations were ceased on March 29, 1989, when World Radio filed bankruptcy.

4. Evidence of World Radio's Damages

World Radio filed its original petition against Coopers & Lybrand for professional malpractice on May 20, 1986. The petition was later amended, on February 25, 1987. Pursuant to its amended petition, World Radio alleged damages in the following particulars: inability to obtain or raise equity capital for expansion; inability to expand its business by opening new stores and increasing credit lines; the making of operating decisions based on false financial information; inability to conduct normal business operations; lost revenues; lost discounts, rebates, and advertising allowances and participation; inventory losses; decrease in employee morale; attorney, accounting, and polygraph fees; overtime expenses; entering into business dealings it would not otherwise have entered into; granting of benefits and bonuses it would not otherwise have given; decrease in the value of the company; and inadequate capital to operate its business as configured. World Radio concluded its petition by requesting a judgment against Coopers & Lybrand in the amount of $18,151,945.

At trial, World Radio relied upon the testimony of Northwall and Laurie Shahon, an investment banker in New York, as well as exhibit 180, to establish the nature and scope of these damages. In particular, World Radio claimed that Coopers & Lybrand's negligence caused World Radio to lose profits and drastically decreased the value of the company.

(a) Exhibit 180 and Lost Profits

Exhibit 180 represents Northwall's calculations of what World Radio's profits would have been between 1981 and 1985

if proper internal accounting controls had been employed by Coopers & Lybrand. In arriving at these figures, Northwall examined World Radio financial statements prepared after the internal control problems had been fixed. In particular, Northwall considered the balance sheet prepared by Arthur Young for June 1, 1985; the earnings statement for the stub year (June 2, 1985, through February 1, 1986); and the earnings statement prepared by Peat Marwick for the fiscal year ending January 31, 1987. Northwall then determined the percentage of expenses to gross sales during this period (hereafter, 1986-87 period).

Using the computer-generated gross margin reports, Northwall determined the baseline or actual profit figures for 1981 through 1985. These profit figures were adjusted to reflect the same profitability ratio of the 1986-87 period. To obtain these figures, Northwall took World Radio's actual revenue and cost figures for 1981 through 1985 (as reflected in the gross margin reports) and increased them according to the ratio of expenses to gross sales of World Radio during the 1986-87 period. In so doing, Northwall assumed that the direct operating expenses and various costs, expenses, and rebates for each year would be the same percentage of gross sales. Northwall then added the net-income-after-taxes figure for each year to the stockholders' equity as shown on World Radio's May 31, 1980, balance sheet prepared by Coopers & Lybrand. By this method, Northwall determined what he believed to be the stockholders' equity in World Radio at the end of each fiscal year from 1982 through 1985.

(b) Shahon's Testimony on Loss of Value

In addition to exhibit 180 and Northwall's corresponding foundational testimony, World Radio also offered the testimony of Shahon. Having considerable experience in dealing with electronic retail businesses "going public," Shahon testified as to the value of World Radio as of June 1985.

Before arriving at her opinion of World Radio's value in June 1985, Shahon first examined information on seven consumer electronics companies that had "gone public." Shahon determined that five of these seven companies were relevant to a

determination of the price/earnings ratios of World Radio. A price/earnings ratio represents the price a company is selling for in the marketplace divided by its earnings per share. In other words, the marketplace value of a company can be determined by multiplying that company's price/earnings ratio by its earnings.

According to Shahon, the price/earnings ratios of the five pertinent companies for the first 5 months of 1985 varied from as high as 20.38 to as low as 11.11. For Shahon's evaluation of World Radio, she selected a narrower and more "conservative" range of price/earnings ratios of 11 to 16. Therefore, Shahon multiplied World Radio's 1985 earnings, as shown on exhibit 180, by these ratios. As such, Shahon testified that "assuming the numbers contained on Exhibit 180" had been the case, World Radio was worth between $8 million and $11 million on June 1, 1985. Shahon also testified that World Radio's negative actual worth of $248,164, as disclosed by its June 1, 1985, balance sheet, made World Radio "virtually worthless."

In addition to evidence on the issues of lost profits and loss of value, evidence was also presented showing that World Radio had paid Coopers & Lybrand accounting fees in the amounts of $13,000, $14,000, and $15,000 for 1982, 1983, and 1984, respectively.

5. Jury Instructions

The district court gave only two instructions on damages. Instruction No. 18 instructed the jury to "fix the amount of money which will fairly and fully compensate the plaintiff for its loss proximately caused by the alleged negligence of the defendant." The instruction went on to state that the jury verdict must be based on evidence and not on speculation, guess, or conjecture.

Instruction No. 19 dealt specifically with World Radio's claim for lost profits and stated:

> The plaintiff seeks damages in the form of lost profits by claiming that the negligent conduct of the defendant prevented its established business from earning profits. In order to do so, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that it is reasonably

certain that such profits would have been realized except for the negligence, and (2) that the lost profits can be ascertained and measured from the evidence with reasonable certainty.

While lost profits need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. The evidence must show with reasonable certainty both that such damages did, in fact, occur and the extent of those damages.

III. STANDARD OF REVIEW

A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party. *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996); *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996).

The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

With regard to the overruling of a motion for directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

IV. ANALYSIS

1. Statute of Limitations

At trial, the jury did not award World Radio any damages for 1981. However, the jury did award damages against Coopers & Lybrand for negligence for 1982 through 1984. Coopers & Lybrand argues that the trial court erred by failing to find that recovery by World Radio for 1982 and 1983 was barred by the statute of limitations.

The Court of Appeals, in its initial opinion, disagreed with Coopers & Lybrand and upheld the trial court's decision. Coopers & Lybrand subsequently filed a motion for rehearing following the issuance of the court's opinion. Coopers & Lybrand asked the court to reconsider whether recovery by World Radio for malpractice occurring during 1983 was barred by the statute of limitations. While the Court of Appeals overruled Coopers & Lybrand's motion, it modified its initial opinion to reflect that World Radio's claims arising out of events in 1983 were barred by the statute of limitations.

Pursuant to § 25-222, an action based on professional negligence must be brought within "two years next after the alleged act or omission in rendering or failure to render professional services." In cases involving negligently prepared audits, the statute begins to run when the audit report is delivered to the client. *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983).

The 2-year limitation may be extended if facts constituting the basis of the malpractice action are not discovered and could not reasonably be discovered within 2 years of the alleged negligent conduct. See *Lindsay Mfg. Co. v. Universal Surety Co., supra.* Under such circumstances, § 25-222 allows a malpractice action to be brought within 1 year from the date of discovery or within 1 year from the date the plaintiff acquires facts that would lead to such discovery.

On October 5, 1982, Coopers & Lybrand mailed the audit report to World Radio for the fiscal year ending in 1982. On May 21, 1985, Riha and Meyerson discovered that the Westinghouse payable had not been considered in the 1984 audit and possibly earlier audits. Because they did not discover facts that could legitimately serve as a basis for a malpractice action within 2 years of Coopers & Lybrand's mailing of the October 5, 1982, audit report, the 1-year discovery exception applied to damages sustained in 1982. More specifically, World Radio could file its negligence action based on the 1982 audit as late as May 21, 1986. Because the action was filed on May 20, 1986, World Radio's negligence action for 1982 was not barred.

The evidence also demonstrates that Coopers & Lybrand mailed the 1983 audit report to World Radio on August 5, 1983. Because World Radio did discover facts within 2 years of Coopers & Lybrand's mailing of the audit report, World Radio was required to file its petition as to any damages incurred in 1983 by August 5, 1985. Since World Radio filed its action on May 20, 1986, its claim for malpractice arising out of the 1983 audit report was barred by the 2-year statute of limitations.

We therefore hold, as did the Court of Appeals, that the statute of limitations did not bar World Radio's action for 1982. We also affirm the Court of Appeals' modified decision and hold that the statute of limitations did bar World Radio's action for 1983.

2. Negligence

In its appeal to this court, Coopers & Lybrand does not dispute the correctness of the jury's finding that it was negligent in auditing World Radio. Instead, the main thrust of Coopers & Lybrand's argument before this court is twofold: (1) that the evidence was insufficient to establish that Coopers & Lybrand's failure to discover the missing Westinghouse payable and problems with World Radio's internal control systems constituted the actual and proximate cause of the damages alleged by World Radio, and (2) that even if the issue of proximate cause was properly submitted to the jury in this case, the evidence offered by World Radio to prove its damages was speculative and conjectural as a matter of law.

As a general matter, we note that before a plaintiff may recover for accounting malpractice, the essential elements of any negligence action must be proved, namely, (1) duty, (2) breach, (3) causation, and (4) resulting damages. See *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). At issue in the instant case are the elements of causation and damages.

(a) Causation

There are three basic requirements that must be met to establish causation: (1) that "but for" the defendant's negligence, the injury would not have occurred; (2) that the injury is the natu-

ral and probable result of the negligence; and (3) that there is no efficient intervening cause. *Saporta v. State*, 220 Neb. 142, 368 N.W.2d 783 (1985). Determination of causation is ordinarily a matter for the trier of fact. *Dolberg v. Paltani,* 250 Neb. 297, 549 N.W.2d 635 (1996); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

(i) Failure to Discover Missing Westinghouse Payable

There was considerable evidence offered at trial that Coopers & Lybrand failed to find the missing Westinghouse payable on World Radio's financial statements. In fact, as noted above, Coopers & Lybrand does not dispute the jury's finding of negligence. What Coopers & Lybrand does dispute, however, is whether its failure to detect the missing payable caused the damage alleged by World Radio.

According to Coopers & Lybrand, it was the *existence* of the $890,111 account payable to Westinghouse that created financial difficulties for World Radio and not the *discovery* of it. In Coopers & Lybrand's view, the failure to detect the payable actually helped World Radio because it overstated World Radio's actual financial position by the amount of the payable, thereby enabling World Radio to receive credit it would not otherwise have been able to get. Coopers & Lybrand asserts that the failure to discover the missing Westinghouse payable in 1984, at most, delayed the adverse consequences of being indebted in the amount of $890,111. Coopers & Lybrand therefore contends that World Radio failed, as a matter of law, to establish the required element of proximate causation.

Coopers & Lybrand is correct in asserting that it was not responsible for the creation of the Westinghouse payable. This fact alone, however, does not mean that the failure to find the payable did not cause World Radio damage. At trial, Meyerson specifically testified that World Radio "made decisions all the time based on what we believed to be accurate financial statements." Furthermore, the evidence offered at trial shows that World Radio continued to expand and incur more debt in 1984 and 1985 believing its financial status was sound, as reported by the incorrect financial statements. Meyerson also testified that had Coopers & Lybrand discovered the missing payable earlier

and relayed this information to World Radio, World Radio would have immediately made any changes necessary in its internal accounting controls. This evidence was sufficient to allow the jury to conclude that World Radio's reliance on the incorrect financial statements prepared by Coopers & Lybrand caused World Radio to make business decisions it might not otherwise have made, thereby causing financial damage in the form of lost profits and a loss in the value of the company. For this reason, whether Coopers & Lybrand's incorrect auditing practices caused World Radio financial harm damage was a factual question for the jury. See *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

(ii) Failure to Discover Inadequate Internal Accounting Controls

In a similar manner, Coopers & Lybrand also argues that its failure to detect weaknesses in World Radio's internal accounting controls was not the proximate cause of World Radio's alleged damages. Coopers & Lybrand contends that it was World Radio's actual financial condition in 1984 and 1985, along with other multiple intervening causes, that led to its demise and eventual bankruptcy.

In support for its position, Coopers & Lybrand points out that World Radio rebounded from any adverse consequences flowing from the failure to discover World Radio's inadequate internal accounting controls, as evidenced by increased sales in the 1986-87 period. In addition, Coopers & Lybrand asserts that World Radio, as well as the electronics industry in general, changed dramatically in the mid to late 1980's. The evidence adduced at trial demonstrates that World Radio made significant changes in its management team after the termination of Riha. In 1984, Ballinger was hired as World Radio's vice president of merchandising. At Ballinger's request, World Radio reduced prices, increased sales commissions, and introduced an entirely new product line in the form of extended warranty contracts. Ballinger also changed World Radio's product mix from 10 percent video and 90 percent audio to 46 percent video and 54 percent audio.

At the same time, the electronics industry experienced an overall increase in competition. This increase in competition infiltrated several of World Radio's markets in Iowa and the Kansas City area. As a result, World Radio eventually closed its stores in Kansas City, suffering a loss of $575,000. In a management memorandum dated March 29, 1988, Northwall and Ballinger wrote that the fiscal losses of 1988 "can be directly attributed to operating in unprofitable markets, excessive compensation for selected employees, and disagreements over strategic plans for the future." According to Coopers & Lybrand, it was these events and occurrences, and not Coopers & Lybrand's failure to detect World Radio's inadequate internal accounting controls, that led to World Radio's financial ruin.

Concerning issues of proximate cause, we have stated that "[a] plaintiff is not bound to exclude the possibility that the [event] might have happened in some other way, but is only required to satisfy the jury, by a preponderance of the evidence, that the injury occurred in the manner claimed." *Vredeveld v. Clark*, 244 Neb. 46, 51, 504 N.W.2d 292, 296 (1993). As set out extensively in section II(2), World Radio offered evidence that Coopers & Lybrand's failure to discover World Radio's inadequate internal accounting controls prohibited Arthur Young from preparing an income statement for World Radio as of June 1, 1985. This, in turn, prohibited World Radio from obtaining credit from its bank and suppliers, resulting in World Radio's inability to purchase additional inventory and new product lines. The testimony also showed that World Radio's lack of financial statements during this period hindered its ability to open new retail locations. Ballinger testified that these problems persisted as long as World Radio was in business and that World Radio was never able to recover. Finally, World Radio presented evidence that had Coopers & Lybrand informed it of inadequate internal accounting controls at any time after 1982, those problems would have been corrected.

The issue of proximate cause, in the face of conflicting evidence, is ordinarily a question for the trier of fact. *Mid Century Ins. Co. v. City of Omaha*, 242 Neb. 126, 494 N.W.2d 320 (1992). The record before us clearly contains conflicting evidence regarding proximate causation. Whereas some evidence

and testimony indicated that World Radio's financial problems were caused by an increase in competition and bad managerial decisions, other testimony stated that Coopers & Lybrand's failure to detect the weaknesses in World Radio's internal accounting controls caused an irreparable decrease in World Radio's profits and value. Accordingly, the trial court correctly submitted the issue of proximate cause to the jury.

(b) Damages

Our determination that the proximate cause issue was properly submitted to the jury does not end our inquiry. We must now examine the appropriateness of submitting to the jury the damage claim for lost profits and loss of value. In particular, we must determine whether World Radio's evidence concerning damages was speculative and conjectural as a matter of law.

As a general matter, the proper measure of damages in a negligence action is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991). The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. *Bakody Homes & Dev. v. City of Omaha*, 246 Neb. 1, 516 N.W.2d 244 (1994). In addition, a plaintiff must prove damages with reasonable certainty. *Patterson v. Swarr, May, Smith & Anderson, supra.*

(i) Lost Profits

At trial, Northwall testified as to what he thought World Radio's profits would have been had Coopers & Lybrand not been negligent in the auditing of World Radio. As noted previously, the testimony offered by World Radio in support of this contention revolved around the validity of exhibit 180. We must therefore determine the accuracy and legitimacy of exhibit 180.

In examining exhibit 180, we note that a claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness. *Evergreen Farms v. First Nat. Bank & Trust*, 250 Neb. 860, 553 N.W.2d 728 (1996). Uncertainty as to the fact of

whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss. *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991). Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both its occurrence and the extent thereof. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988).

Exhibit 180 represents Northwall's opinion as to what World Radio's profits would have been in 1981 through 1984 had proper internal accounting controls been used by Coopers & Lybrand. As noted above, Northwall's conclusions were based upon profits World Radio made during the 1986-87 period, when all internal control problems had been cured. Assuming this same profitability ratio would have been experienced in 1981 through 1984 had proper controls been in place, Northwall simply upgraded the actual profits during this time period by the expenses/gross sales percentage obtained in the 1986-87 period.

Coopers & Lybrand objected to the admission of exhibit 180 at trial and in its motion for directed verdict, alleging that there was insufficient support for the accuracy of the exhibit and that the exhibit was based on speculation and conjecture. We agree.

Northwall's estimation of lost profits relies exclusively on a comparison of World Radio's profits in 1981 through 1984 with those generated in the 1986-87 period. In making this comparison, however, Northwall failed to account for the many differences in the business between these time periods. For example, in 1986 and 1987, World Radio operated more stores in different markets and utilized greater space than it had in 1984 and 1985. In 1986 and 1987, World Radio sold a significantly different product mix (46 percent video/54 percent audio) than the product mix it promoted in 1981 through 1985 (10 percent video/90 percent audio). This increase into the video arena involved products with a greater profitability and also yielded World Radio's offer of extended warranty contracts to its customers. Furthermore, in 1986 and 1987 World Radio had a new management team with a different vision and management style

that was instrumental in negotiating a variety of revenue-producing contracts. In failing to take these significant changes into account, Northwall was, almost literally, comparing apples to oranges.

We have recently examined the requirements for recovery of lost profits, in *Evergreen Farms v. First Nat. Bank & Trust, supra*. At issue in that case was the ability of Evergreen Farms, a partnership engaged in the custom cattle feeding business, to recover damages for lost profits that resulted from its bank's refusal to loan Evergreen $100,000 pursuant to previous loan agreements. It was alleged that the failure to receive these funds prohibited Evergreen from making advance purchases of corn at a favorable market rate. This, in turn, prevented Evergreen from guaranteeing a set cost for its services, ultimately resulting in the loss of customers.

In support of the claim for lost profits, an owner of Evergreen opined that Evergreen made a net profit of 10 cents per head of cattle per day. The witness then assumed that Evergreen would have fed 2,000 head of cattle more for a 2-year period if it had been able to guarantee a set cost to customers. However, we noted that Evergreen offered no quantifiable business records for the 2 years in question that would substantiate the testimony. In particular, Evergreen's tax returns for the years 1986 through 1990 failed to adequately reflect the profits and losses of the partnership. In light of this failure to provide any reliable financial data, we held that the testimony alone was insufficient to establish lost profits with reasonable certitude. In *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991), we examined a situation involving the alleged breach of the obligations of a lessor to offer a right of first refusal to a lessee. In seeking damages for lost profits, the lessee offered testimony from an expert who had compared the lessee's profits at the new location with the lessee's profits at the former location. In examining this testimony, we noted that the expert assumed the only difference between the locations was square footage and that the lost profit figures were arrived at by using sales figures from a different time period. We also noted that the expert failed to study what effect other external factors, such as a change in the customer base or relevant market, may have had

on the diminution in profit figures. Without such studies, we held, the evidence concerning lost profits was too speculative and conjectural to warrant recovery.

In the instant case, World Radio offered no conclusive financial data supporting its claim for lost profits other than Northwall's composition of exhibit 180. Similar to the situation in *Katskee*, Northwall's preparation of exhibit 180 did not involve any studies as to how the relevant changes between the time periods would affect his computations. This failure leads us to conclude that exhibit 180 is speculative and conjectural as a matter of law. Thus, the district court erred in submitting the issue of lost profits to the jury.

(ii) Loss of Value

Shahon's testimony regarding World Radio's loss of value necessarily suffers from the same infirmities. As noted above, Shahon computed the value of World Radio as of June 1, 1985, "assuming the numbers contained on Exhibit 180" had been the case. In light of our conclusion that exhibit 180 is speculative and conjectural as a matter of law, Shahon's testimony regarding loss of value fails for the same reason. Accordingly, Shahon's testimony is also insufficient to support an award of damages.

(c) Other Damages

Remaining is the ability of World Radio to recover the accounting fees paid to Coopers & Lybrand for 1982 through 1984. The jury's verdict finding Coopers & Lybrand negligent in preparing the audit reports for World Radio during this period is undisputed. In addition, the parties stipulated that World Radio had paid fees in the amounts of $13,000, $14,000, and $15,000 for 1982, 1983, and 1984, respectively.

Although this court has not specifically addressed the issue, we believe that an accountant is not entitled to fees for preparing false financial statements. In reaching this conclusion, we adopt the rule as set out in the Court of Appeals' opinion in this case and as set out at 1 Am. Jur. 2d *Accountants* § 13 at 537 (1994):

> While minor inaccuracies in an audit or report may be overlooked, where by reason of the accountant's negligence, inaccuracies and failure to report facts of serious character appear, he or she is not entitled to compensation. And when compensation is paid to an accountant in reliance upon his or her report, it may be recovered, upon proof that through the accountant's negligence, the audit was in substance, false.

See, also, *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969); *Allen County Comm'rs v. Baker*, 152 Kan. 164, 102 P.2d 1006 (1940).

The evidence adduced at trial establishes that Coopers & Lybrand charged World Radio $42,000 for the preparation of inaccurate financial reports for the period of 1982 through 1984. In accordance with the rule set forth above, Coopers & Lybrand should not have been compensated for its negligent work in preparing the inaccurate reports. Thus, we conclude that World Radio is entitled to an award of $42,000.

In addition to these fees, the Court of Appeals concluded that there was sufficient evidence in the record that World Radio also paid large accounting fees to Arthur Young as a result of Coopers & Lybrand's negligence but that the jury was not properly instructed on the issue. We agree. Unlike the fees paid to Coopers & Lybrand, however, the precise amount of the fees paid to Arthur Young as a result of Coopers & Lybrand's negligence cannot be ascertained from the record before us. For that reason, this cause must be remanded on this issue.

V. ADDITIONAL ASSIGNMENTS OF ERROR

The parties have raised numerous assignments of error involving the jury instructions tendered by the district court as well as the issue of contributory negligence. In light of our holding that World Radio failed to prove its damages for lost profits and loss of value with the required degree of certainty and reliability, we need not, and therefore decline to, address those additional assignments of error.

VI. CONCLUSION

In summary, we conclude that the issue of proximate cause in this case involved a question of fact and was therefore properly

submitted to the jury. We hold, however, that World Radio's evidence concerning lost profits and loss of value is speculative and conjectural as a matter of law. For this reason, we affirm that portion of the Court of Appeals' decision affirming the liability verdict against Coopers & Lybrand and dismissing the damage award for lost profits and loss of value. Furthermore, we conclude that World Radio is entitled to recover the $42,000 in fees it paid to Coopers & Lybrand for negligent audits, as well as the fees World Radio paid to Arthur Young as a result of Coopers & Lybrand's negligence. Because the amount of fees paid to Arthur Young cannot be ascertained from the record, we remand this cause for determination of those fees.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

LANPHIER, J., not participating in the decision.

WHITE, C.J., concurring.

I agree with the result reached by the majority; however, since the record clearly establishes that only one inference could have been drawn based on the evidence produced at trial, i.e., that the trial court should not have submitted the issue of proximate cause to the jury, I write separately.

The majority holds that "whether Coopers & Lybrand's incorrect auditing practices caused World Radio financial harm damage was a factual question for the jury" and that "the trial court correctly submitted the issue of proximate cause to the jury."

The majority relies on testimony that World Radio (WR) believed its financial status was sound (although both the chief executive officer and the chief financial officer knew of the missing payable and of the strange method used to account for that payable) and on WR's assertion that it would have corrected the problems with its internal controls had it known of those problems. The majority also relies on "other testimony . . . that Coopers & Lybrand's failure to detect the weaknesses in [WR's] internal accounting controls caused an irreparable decrease in [WR's] profits and value."

The conclusion is not justified by the evidence and is at best hopeful. An examination of the record reveals that WR, as a

business, recovered from the effects of any negligence attributable to Coopers & Lybrand (C&L). The majority opinion disregards this evidence. Although WR was unwilling to pay its new auditors the additional costs involved in constructing full financial statements for 1985, WR's creditors and other vendors continued to do business with WR. Its bank increased WR's credit line once the financial statements were reconstructed. WR continued to expand its business, opening seven new stores in 1986 and 1987 and reaching several new markets. In 1986 and 1987, WR posted pretax earnings of over $1 million, with gross sales exceeding $40 million in 1987. Significantly, WR's equity increased by over $2 million in 1986, just 1 year after the discovery of the defect in the financial statements.

Additionally, the evidence clearly shows that many factors other than C&L's actions resulted in WR's bankruptcy. After dismissing C&L in 1985, WR made significant changes in its management team, hiring a new chief financial officer and other personnel. WR's new vice president of merchandising, Malcolm Ballinger, implemented significant changes in WR's operations—he pushed for the liquidation of old, outdated inventory, reduced prices, increased sales commissions, introduced an entirely new product line in the form of extended warranty contracts, changed WR's product mix from 10 percent video and 90 percent audio to 46 percent video and 54 percent audio, and created and staffed a new inventory control board that allowed WR to operate at lower inventory levels while still achieving desired sales and profit margins. In 1986, WR began to experience significant competition in several of its markets. WR also stated during its bankruptcy proceedings that a structured buyout of all of Larry Meyerson's stock in 1988 rendered WR insolvent.

All of these changes occurred during the interim between the termination of C&L and WR's eventual bankruptcy. By WR's own admission, these *were* the factors that led to its demise. In a management memorandum dated March 29, 1988, nearly 3 years after WR dismissed C&L for failing to discover the payable, Luke Northwall and Ballinger blamed WR's financial problems on market conditions: "[WR's loss in fiscal 1988] can

be directly attributed to operating in unprofitable markets, excessive compensation for selected employees, and disagreements over strategic plans for the future. . . . The Company is a viable entity if certain markets are closed."

Although the question of proximate cause is ordinarily a determination for the jury, when, upon the evidence produced, only one inference can be drawn, it is for the court to decide whether a given act or series of acts is the proximate cause of the injury. *Starlin v. Burlington Northern, Inc.*, 193 Neb. 619, 228 N.W.2d 597 (1975). An injury that could not have been foreseen or reasonably anticipated as a probable result of the negligence is not actionable, nor is an injury that is not a natural consequence of the negligence complained of, and would not have resulted from it but for the interposition of some new, independent cause that could not have been anticipated. *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992).

Upon the evidence produced at trial, only one inference could have been drawn—WR rebounded from any impact caused by the inaccuracies in its financial statements to generate record profits in 1986 and 1987 and to expand its business over the next several years. Five years later, WR simply fell prey to the highly competitive market in which it operated.

FAHRNBRUCH, J., joins in this concurrence.

MARILYN A. KETTELER, APPELLANT,
v. CARL J. DANIEL, APPELLEE.
556 N.W.2d 623

Filed December 13, 1996. No. S-94-990.

1. **Trial: Expert Witnesses.** The trial court initially determines whether expert testimony will assist the trier of fact.
2. ____: ____. The decision of whether expert testimony will assist the trier of fact depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.
3. ____: ____. Expert opinion should not be admitted if the expert does not possess sufficient facts to enable him to express a reasonably accurate conclusion.

4. **Witnesses: Testimony.** When a party, acting as a witness, changes his testimony without offering a reasonable explanation, the altered testimony is discredited and disregarded as a matter of law.
5. **Witnesses: Testimony: Juries.** An inconsistent statement by a nonparty witness is a factor to be considered by the jury when determining the weight and credibility to be given the witness' testimony.
6. **Hearsay.** Learned writings regarding specialized areas of knowledge are clearly hearsay.
7. **Trial: Appeal and Error.** Where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review.
8. **Jury Instructions.** A trial judge has a duty to correctly instruct jurors on the law.
9. ____. While proposed jury instructions submitted by either party assist the court in assessing the soundness of its instructions, submission of proposed instructions does not relieve a party from indicating to the court at that time whether any omission has been made in the instructions.
10. ____. Failure to object to jury instructions during the instruction conference prohibits counsel from objecting at a later time.
11. **Negligence: Damages.** A person injured as a result of another person's negligent acts is entitled to recover all damages which proximately resulted from those acts, including damages resulting from aggravation of a preexisting condition.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for a new trial on the issue of damages.

Michael F. Coyle and Michael J. Mooney, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

David M. Woodke and Francie C. Riedmann, of Gross & Welch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Appellant, Marilyn A. Ketteler, filed suit against appellee, Carl J. Daniel, for injuries sustained in a collision on April 26, 1991. Liability was admitted, and trial to a jury was limited to the question of damages. The jury returned a verdict in favor of Ketteler of $42,875.94. The amount was subsequently reduced to $35,541.41 when credit for advance payment was made.

Beginning in 1974, Ketteler noticed lumps in her breast, which she had removed by Dr. John Gatewood. The problem

reoccurred in 1977, at which time Dr. Gatewood removed the tissue from both of Ketteler's breasts for the purpose of decreasing her heightened risk of cancer. At that same time, Ketteler's breasts were reconstructed with silicone gel implants.

On April 26, 1991, Ketteler and Daniel were involved in an automobile accident at an intersection in Norfolk, Madison County, Nebraska. Daniel ran a stop sign, causing Ketteler to broadside Daniel's vehicle. During the initial impact, Ketteler's car spun, her shoulder restraint tightened, and her body slammed into the restraint. The initial collision caused Ketteler's car to spin counterclockwise, which caused the vehicles to collide a second time. As the vehicle spun, Ketteler's body continued to go forward, and as described by Ketteler, the "seat belt raked across, clear across, my chest."

Ketteler alleged that she suffered physical injuries as a result of the accident, including the rupture of her silicone breast implants. Although she did not seek immediate medical attention, she went to the Antelope Memorial Hospital emergency room to see her family physician, Dr. Dwaine Peetz, 3 days later. According to Dr. Peetz' records dated April 29, 1991, Ketteler's seatbelt had squeezed her right implant, the area of the right implant was tender, and she had bruising in her right knee.

Ketteler continued to see Dr. Peetz for several months after the accident because she had been suffering from neck pain and flulike symptoms. In December 1991, Ketteler went to Dr. Peetz' office, insisting that she be scheduled for a mammogram. Due to scheduling conflicts, Ketteler went to the University of Nebraska hospital in Omaha on January 22, 1992, to have a mammogram. The mammogram revealed that Ketteler's implants had ruptured, so Dr. Peetz advised her to see a plastic surgeon.

On January 30, 1992, Ketteler saw Dr. David Finkle. During the examination, Dr. Finkle observed that the implants were in a position higher than normal and that the left implant was soft, while the right implant was hard. At that time, Ketteler reported pain under her arm. Dr. Finkle also reviewed the mammogram results. These observances led Dr. Finkle to conclude that both implants had ruptured as a result of the automobile accident on

April 26, 1991, and had to be removed. The implants were removed on April 10, 1992.

Dr. Finkle testified concerning the examination and surgery. He testified that the implant and body capsule around the implant (capsule) were "totally disrupted and unorganized." Dr. Finkle also testified that while he observed tears in the implants, he did not observe tears in the capsules. Dr. Finkle observed that there was free-floating gel outside of the implant, but he did not discover any gel outside of the capsule. Finally, Dr. Finkle stated that he did not see any hemosiderin, which is a deposit present in tissues when there has been recent bleeding.

Dr. Edward Baccari, a plastic surgeon retained by Daniel, testified that Ketteler's implants failed due to time-related deterioration. His opinion was based in part on discovery documents, depositions of Dr. Finkle, letters, photographs, and medical records. Dr. Baccari's opinion as to causation was the subject of foundational objections and motions to strike by Ketteler.

Dr. William Palmer, a rheumatologist who also testified on behalf of Daniel, gave his opinion as to Ketteler's rheumatological status. On February 28, 1994, Dr. Palmer examined Ketteler. At that time, Ketteler complained that she had a lot of pain in her neck and back, that she was stiff, and that she was suffering from severe fatigue. Ketteler informed Dr. Palmer that the pain in her joints and throughout her body had interfered with her ability to do housework and participate in athletics. Ketteler also stated that prior to the accident she had suffered from neck, low-back, and other joint pain.

As part of Dr. Palmer's examination, he examined Ketteler's musculoskeletal system. More specifically, Dr. Palmer looked for trigger points, or areas of tenderness, at the base of Ketteler's skull, on her spine, at the top of and in between her shoulder blades, over her hips, at the inner aspects of her knees, and at the outer aspects of her elbows. He discovered approximately 12 trigger points. In addition to examining Ketteler, Dr. Palmer reviewed the medical records of a Lincoln physician, Dr. David Cooley, which were received into evidence.

Dr. Palmer testified that in his opinion Ketteler was suffering from fibromyalgia on the date of her examination. Fibromyalgia

is a soft-tissue pain syndrome which causes patients to experience generalized musculoskeletal pain in the neck, back, and joints. Dr. Palmer stated that Ketteler's fibromyalgia was not caused by the accident. To the contrary, it was Dr. Palmer's opinion that the condition existed long before the accident. He based his opinion on the fact that Dr. Cooley diagnosed Ketteler with fibrositis (i.e., fibromyalgia) in 1980 and that musculoskeletal complaints were recorded throughout the preaccident medical summaries prepared by Daniel's counsel.

Ketteler raised a foundational objection to Dr. Palmer's testimony because his testimony was contradictory to statements he had made in a medical report prior to trial. In the report, Dr. Palmer stated that he was unable to confirm Dr. Cooley's examination and, consequently, was unable to determine the date of the onset of Ketteler's condition.

At trial, Ketteler argued that there may be a link between autoimmune disease and silicone poisoning, and testified that she feared that she had acquired or may acquire in the future an autoimmune disease as a result of her implant ruptures.

Dr. John Hurley, a rheumatologist, testified on behalf of Ketteler. Dr. Hurley stated that he could not tell Ketteler with a reasonable degree of medical certainty that she would not get an autoimmune disease in the future. On cross-examination, Daniel attempted to impeach Dr. Hurley by questioning him about an article in The New England Journal of Medicine which concluded that there is no association between breast implants and connective-tissue diseases. On direct examination, Dr. Palmer also testified as to the conclusion reached by the article in the journal. Ketteler objected to Dr. Palmer's testimony on the basis of foundation.

At the conclusion of the trial, an instruction conference was held. Ketteler objected to jury instruction No. 6, which stated that "[t]here is evidence that the plaintiff had a neck, back and hip condition prior to the accident of April 26, 1991. The defendant is liable only for any damage that you find to be proximately caused by the accident of April 26, 1991." Ketteler argued that the instruction only partially stated the law and that her proffered instruction more aptly reflected Nebraska law. More specifically, the proffered instruction recognized

Ketteler's preexisting problems, as well as instructed the jury that Daniel may be liable for harm to Ketteler even though the injury was greater than usual due to the physical condition which predisposed Ketteler to the injury.

On August 18, 1994, the jury returned a verdict in favor of Ketteler in the amount of $42,875.94. Daniel filed a motion to modify judgment and motion for further proceedings to determine setoff. Daniel contended that he was entitled to a setoff and modification of judgment because the sum of $7,334.53 had been paid for the property damage prior to trial. On September 15, the court sustained Daniel's motion, and the verdict was reduced to $35,541.41. Ketteler's motion for new trial was also overruled at that time. Ketteler's notice of appeal was filed on October 14.

Ketteler assigns five errors which can be summarized as follows: The trial court erred (1) in allowing the opinion of Dr. Baccari regarding the cause of Ketteler's breast implant ruptures to be considered by the jury over Ketteler's foundational objections and motions to strike, (2) in failing to discredit and disregard Dr. Palmer's testimony as a matter of law, (3) in allowing Dr. Palmer to read a medical treatise to the jury as independent evidence of the opinions contained therein, and (4) in submitting to the jury its instruction regarding Ketteler's preexisting conditions rather than submitting Ketteler's proffered instruction.

Where the Nebraska Evidence Rules apply, the rules, as opposed to judicial discretion, govern whether evidence will be admitted unless the rules make judicial discretion a factor in determining admissibility. The trial court's ruling in receiving an expert's testimony will be reversed where there has been an abuse of discretion. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). The trial court's ruling in receiving evidence will be reversed where there has been an abuse of discretion. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995).

To establish error based on the trial court's refusal to give a requested instruction, an appellant must show that (1) the given instruction was prejudicial or otherwise adversely affected a substantial right of the appellant, (2) the proffered instruction is

a correct statement of the law, and (3) the proffered instruction is warranted by the evidence. *Klawitter v. Lampert*, 248 Neb. 231, 533 N.W.2d 896 (1995). A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded evidence or rules of law. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994). An appellate court shall reach conclusions on questions of law independent of the trial court's conclusions on questions of law. *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995).

Ketteler first contends that the trial court erred in receiving into evidence the testimony of Daniel's expert witness, Dr. Baccari. Pursuant to Neb. Rev. Stat. § 27-702 (Reissue 1995), "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The trial court initially determines whether expert testimony will assist the trier of fact. *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). The soundness of such a decision depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. Furthermore, expert opinion should not be admitted if the expert does not possess sufficient facts to enable him to express a reasonably accurate conclusion. *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995).

At trial, the following facts were testified to and were submitted to the jury for their consideration: (1) Ketteler underwent a bilateral mastectomy and reconstructive surgery on March 17, 1977; (2) Ketteler testified that she did not remember hitting the steering wheel during the collision; (3) Dr. Peetz' records, which were dated April 29, 1991, indicated that Ketteler's seatbelt had squeezed her right implant, the area of the right implant was tender, and her right knee was bruised; (4) none of the Antelope Memorial Hospital emergency room records indicate that Ketteler's chest was bruised; (5) Ketteler underwent a

mammogram on January 22, 1992; (6) Dr. Peetz, after reviewing the mammogram, reported findings consistent with focal rupture of the right implant and elongation of the left implant consistent with rupture; (7) Dr. Finkle, while examining Ketteler, observed that her right implant was very firm, her left implant was soft, and both implants were in a more superior position than usual; (8) Dr. Finkle testified that when he operated on Ketteler, "it looked like a grenade had gone off in her chest. The implants were totally disrupted"; and (9) during the operation, Dr. Finkle did not observe a tear in the capsule, free-floating silicone outside of the capsule, or hemosiderin.

While Drs. Finkle and Baccari do not disagree with the preceding facts, they do disagree as to what conclusion or opinion should be drawn from such facts. In Dr. Finkle's opinion, the mammogram report, Ketteler's prior history, her physical examination, and his observations made during surgery indicated that Ketteler's implants had ruptured and had ruptured as a result of the automobile accident on April 26, 1991. In Dr. Baccari's opinion, the length of time Ketteler had had implants, the inability of Ketteler to establish whether she hit the steering wheel during the accident, the absence of complaints about chest pains in Dr. Peetz' records, the tearing of the implant but not the capsule, the absence of free-floating gel outside the capsule, and the absence of hemosiderin indicated that Ketteler's implants had not ruptured as a result of the accident, but had deteriorated.

It appears from the record that Dr. Baccari did not disregard facts but, to the contrary, accepted the facts presented to the jury and simply disregarded Dr. Finkle's opinion as to causation. The trial court correctly submitted both opinions to the jury because it is the job of the fact finder, and not the court, to determine the weight and credibility of evidence. *Beauford v. Father Flanagan's Boys' Home*, 241 Neb. 16, 486 N.W.2d 854 (1992).

Ketteler's second contention is that the trial court erred in failing to discredit Dr. Palmer's changed testimony.

This court has held that when a party, acting as a witness, changes his testimony without offering a reasonable explanation, the altered testimony is discredited and disregarded as a

matter of law. *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992). In *Osborn*, we did not extend the rule to nonparty witnesses, nor will we extend the rule today. An inconsistent statement by a nonparty witness is a factor to be considered by the jury when determining the weight and credibility to be given the witness' testimony. It is evident that Dr. Palmer is not a party in this case. The assigned error is not meritorious.

Ketteler assigns as her third error that the trial court improperly allowed Ketteler's expert witness, Dr. Palmer, to testify as to statements contained in The New England Journal of Medicine. This error had not been properly preserved for this court's review.

Learned writings regarding specialized areas of knowledge are clearly hearsay. *Stang-Starr v. Byington*, 248 Neb. 103, 532 N.W.2d 26 (1995). Moreover, Nebraska Evidence Rules do not contain an exception to this hearsay rule. See Neb. Rev. Stat. §§ 27-801, 27-803, and 27-804 (Reissue 1995).

It appears from the record that Daniel had Dr. Palmer testify about a conclusion reached in an article in The New England Journal of Medicine to establish the absence of a link between autoimmune disease and silicone poisoning. Since the journal was used as independent evidence, the only proper objection in this case was hearsay and not foundation. Ketteler, however, failed to raise such an objection at trial. As previously held by this court, "where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for this court to review." *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 845, 491 N.W.2d 334, 340 (1992).

Ketteler assigns as her last error the trial court's submission of instruction No. 6 to the jury. We hold that the trial court erred in refusing to submit Ketteler's proffered instruction.

Instruction No. 6, which was submitted to the jury, states: "There is evidence that the plaintiff had a neck, back and hip condition prior to the accident of April 26, 1991. The defendant is liable only for any damage that you find to be proximately caused by the accident of April 26, 1991." The instruction proposed by appellant provides:

> There is evidence that Marilyn Ketteler had a pre-existing neck and back condition prior to the date of this colli-

> sion. The Defendant is liable only for any damages that you find to be proximately caused by the collision of April 26, 1991.
>
> If you cannot separate damages caused by the pre-existing condition from those caused by the accident, then the Defendant is liable for all of those damages.
>
> The Defendant may be liable for bodily harm to Marilyn Ketteler even though the injury is greater than usual due to the physical condition which predisposed Marilyn Ketteler to the injury. In short, the Defendant takes the Plaintiff as he finds her.

A trial judge has a duty to correctly instruct jurors on the law. *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987). Instruction conferences provide a trial court the opportunity to correct mistakes apparent in the jury instructions. While proposed instructions submitted by either party assist the court in assessing the soundness of its instructions, submission of proposed instructions does not relieve a party from indicating to the court at that time whether any omission has been made in the instructions. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). Most importantly, failure to object to instructions during the conference prohibits counsel from objecting at a later time. *Omaha Mining Co., supra.*

Ketteler argues that instruction No. 6 failed to provide a complete list of her preexisting conditions. More specifically, Ketteler alleges that the list should have included her breast implants. Curiously, breast implants were not included as a preexisting condition in Ketteler's proffered instruction. Moreover, during the instruction conference, counsel for Ketteler objected to instruction No. 6 and submitted the proposed instruction, but never argued that either the court's instruction or the proposed instruction failed to include breast implants. For these reasons, Ketteler was not entitled to an instruction which classified breast implants as a preexisting condition.

Ketteler also argues that the court erred when it eliminated paragraphs 2 and 3 of her proffered jury instruction from the instruction submitted to the jury. We reverse the lower court's decision regarding this matter.

We recently addressed this issue in *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). See, also, *Kirchner v. Wilson, ante* p. 56, 554 N.W.2d 782 (1996) (relying on *David* to establish that defendant is liable for all damages resulting from his negligent acts, including damages resulting from aggravation of preexisting condition). *David* involved an automobile accident between plaintiff and defendant at the intersection of 29th Street and St. Mary's Avenue in Omaha. The trial court directed a verdict on the issue of liability in favor of plaintiff and submitted the issue of damages to the jury. The jury then returned a verdict for plaintiff.

Prior to the accident, plaintiff suffered from arthritis in his back and knees. Defendant proposed a jury instruction which stated:

> "There is evidence that the plaintiff had degenerative disc disease of the cervical spine (also called spondylosis), spinal stenosis of the lumbar spine, and degenerative arthritic changes in the knees prior to the date of the accident. The defendant is liable only for any damages that you find to be proximately caused by the accident."

David, 250 Neb. at 113, 547 N.W.2d at 729.

The trial court rejected defendant's instruction and instead submitted plaintiff's proposed instruction, which represented the entire instruction as set out in NJI2d Civ. 4.09:

> "There is evidence that the plaintiff had pre-existing back and joint conditions prior to the date of the accident. The defendant is liable only for any damages found to be proximately caused by the accident.
>
> "If you cannot separate damages caused by the pre-existing conditions from those caused by the accident, then the defendant is liable for all of those damages."

Id. at 113, 547 N.W.2d at 729.

On appeal, defendant argued that she was prejudiced by the lower court's refusal to submit her proffered instruction. We affirmed.

In reaching our decision in *David*, we relied on *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969). In *McCall*, we adopted the "eggshell-skull" theory. We also held that a person injured as a result of another person's negligent acts is entitled

to recover all damages which proximately resulted from those acts, including damages resulting from aggravation of a preexisting condition. The ruling in *McCall* justified the trial court's decision to issue its instruction in *David*.

Consistent with our previous decisions in *David* and *McCall*, we hold that Ketteler's entire proffered instruction should have been submitted. First, the proffered instruction correctly stated the law. Second, the instruction was warranted by the evidence offered by Dr. Palmer, who testified that Ketteler suffered from fibromyalgia prior to the accident, and by Dr. Peetz, who testified by deposition that Ketteler had suffered from back and neck conditions prior to the accident which were aggravated by the accident. Finally, refusal by the trial court to submit the entire proposed instruction was prejudicial to Ketteler.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

JAMES DAEHNKE, APPELLANT, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES AND THE STATE OF NEBRASKA, APPELLEES.

557 N.W.2d 17

Filed December 13, 1996. No. S-94-1155.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
3. **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.
4. **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.
5. ____. A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
6. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
7. ____. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.

8. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellant.

Don Stenberg, Attorney General, and Lisa D. Martin-Price for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

We are asked to interpret a labor contract between the appellant, James Daehnke, and his employer, the appellees, Nebraska Department of Social Services (DSS) and the State of Nebraska. The issue is whether a provision in the contract that places a 30-workday time limitation on the employer for initiating disciplinary action against an employee is applicable to all disciplinary actions or only in those instances where the employee has been reassigned or suspended pending an internal investigation.

Daehnke filed a grievance with DSS, asserting that DSS took disciplinary action against him in an untimely manner as prohibited by the contract. After DSS denied his grievance, Daehnke presented his grievance to the Nebraska State Personnel Board (Board). Following an evidentiary hearing, the Board likewise denied Daehnke's grievance. Daehnke then appealed the Board's decision to the district court for Lancaster County pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1994) of the Administrative Procedure Act. The district court affirmed the Board's decision, and Daehnke appeals.

We conclude that DSS was not subject to the contract's "30-workday rule" when initiating disciplinary action, because Daehnke was not reassigned or suspended pending an internal investigation. We therefore affirm.

BACKGROUND

The facts in this case are not disputed by the parties. Daehnke is employed by DSS in a position covered by article

10 of the 1991-93 collective bargaining agreement between the Nebraska Association of Public Employees Local 61 of the American Federation of State, County and Municipal Employees (NAPE/AFSCME) and the State of Nebraska. Sections 10.1 and 10.2 of the labor contract provide as follows:

ARTICLE 10 - DISCIPLINE OR
INVESTIGATORY SUSPENSION

10.1 An employee shall be disciplined in accordance with this labor contract. Discipline will be based upon just cause and will in no case be effective until the employee has received written notice of the allegations describing in detail the issue involved, the date the alleged violation took place, the specific section or sections of the contract or work rules involved, except in emergency or critical situations where oral notice shall suffice, and has had an opportunity to present justification of their actions at a prediscipline meeting. Any disciplinary action or measure imposed upon an employee may be processed as a grievance through the grievance procedure when it is in violation of the terms of this contract. The level of discipline imposed shall be based on the nature and severity of the infraction. The Employer shall not discipline an employee without just cause, recognizing and considering progressive discipline.

10.2 When the Employer determines that an employee must be removed from a current work assignment pending the completion of an investigation by the Employer to determine if disciplinary action is warranted, the Employer may:

a. reassign the employee to another work assignment at their current rate of pay until the investigation is completed.

b. suspend the employee from work without pay until the investigation is completed.

The Employer shall have thirty work days from the date of discovery of an infraction to initiate disciplinary action except when the Employer is awaiting the results of an outside investigation. If no action is taken, disciplinary action is barred for that particular incident.

On December 3, 1992, Daehnke's supervisor received a client complaint regarding alleged behavior of Daehnke. On January 21, 1993, 32 workdays after DSS received the client complaint, DSS initiated disciplinary action against Daehnke through a predisciplinary letter notifying him of a meeting to discuss the client complaint. Daehnke was not reassigned to another work assignment or suspended without pay, and no outside investigation was in progress. On April 23, Daehnke received a written disciplinary warning from DSS regarding the client complaint.

After Daehnke received the disciplinary warning, he filed a grievance with DSS asserting that the agency violated § 10.2 of the labor contract by initiating disciplinary action against him more than 30 workdays after it received the client complaint. In his grievance, Daehnke sought to have "[a]ll disciplinary action stopped, all information regarding [the] incident [and] subsequent proceedings removed from [his] personnel file [and] any other relief to make [him] whole." After DSS denied his grievance, Daehnke presented his grievance to the Board. The Board, by agreement of the parties, appointed a hearing officer. Following an evidentiary hearing, the hearing officer issued a written recommendation to the Board stating:

> I find that this issue was recently resolved . . . in the District Court of Lancaster County, Nebraska, in the case of NEBRASKA DEPARTMENT OF HEALTH -VS- LORENZ, Docket 487, Page 3, wherein the court held: ". . . *the so called '30 day work rule' is applicable to investigatory suspensions only, that is, for instances where the employee has been suspended or reassigned pending the results of an in-house investigation. It does not apply to disciplinary actions where the employee has not been suspended or reassigned.*". . . [T]herefor[e] the language in question only applies to those disciplinary actions contemplated under §10.2 of the Labor Contract. When the entire §10 is read as a whole it then becomes clear and unambiguous that the language in question applies only to those matters covered in §10.2 of the Labor Contract[.]

The Board voted to adopt the hearing officer's recommended decision as its official decision. Daehnke appealed the Board's

decision to the district court for Lancaster County pursuant to § 84-917(5)(a) of the Administrative Procedure Act. The district court affirmed the Board's decision, finding that the "'30 work day rule' applies only to investigatory suspensions where the employee has been suspended or reassigned." Daehnke appeals.

ASSIGNMENTS OF ERROR

Daehnke alleges the district court erred in determining that the relevant portion of § 10.2 of the labor contract applies only in cases of investigatory suspensions when employees have been suspended or reassigned and not to all disciplinary actions contemplated by state employers.

STANDARD OF REVIEW

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. *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).

ANALYSIS

Article 10 of the labor contract sets forth those provisions agreed to by NAPE/AFSCME and the State of Nebraska concerning discipline and investigatory suspensions taken against state employees. Section 10.1 outlines the general provisions applicable to all disciplinary actions taken against state employees. Section 10.2 outlines the provisions applicable when an employer determines that the allegations of wrongdoing warrant the removal of the employee from his or her current work assignment pending an internal investigation to determine if disciplinary action should be taken. Section 10.2 provides an employer with two options in the event the employer chooses to remove the employee pending an investigation: "a. reassign the employee to another work assignment at their current rate of pay until the investigation is completed. b. suspend the employee from work without pay until the investigation is completed."

The disputed 30-workday rule appears in § 10.2 immediately following the investigatory reassignment and suspension provisions. The rule states: "The Employer shall have thirty work

days from the date of discovery of an infraction to initiate disciplinary action except when the Employer is awaiting the results of an outside investigation. If no action is taken, disciplinary action is barred for that particular incident."

Daehnke asserts that the district court erred in failing to find that the 30-workday rule applies to all disciplinary actions contemplated by state employers. Conversely, DSS asserts that the district court correctly determined that the 30-workday rule applies only in cases where an employee has been suspended or reassigned to a different position pending the completion of an internal investigation. The parties do not dispute that Daehnke was not reassigned or suspended.

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996); *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994); *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). 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. *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995); *Union Ins. Co. v. Land and Sky, Inc.*, 247 Neb. 696, 529 N.W.2d 773 (1995). This determination 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. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994); *Baker's Supermarkets v. Feldman, supra.*

Daehnke would have us construe the 30-workday rule without looking to the rest of § 10.2 and the rest of the contract as well. However, a contract must be construed as a whole, and if possible, effect must be given to every part thereof. *C.S.B. Co. v. Isham, supra*; *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994); *Baker's Supermarkets v. Feldman, supra.* In other words, a party may not pick and choose among the clauses of a contract, accepting only those that advantage it. *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988);

Fisbeck v. Scherbarth, Inc., 229 Neb. 453, 428 N.W.2d 141 (1988).

Upon reading the contract as a whole, we determine that it is not capable of being understood in more senses than one. See, *Bedrosky v. Hiner, supra*; *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). As a result, we conclude as a matter of law that the contract is not ambiguous.

A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *C.S.B. Co. v. Isham, supra*; *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995). The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Rains v. Becton, Dickinson & Co., supra*; *Murphy v. City of Lincoln, supra.*

Giving the terms of the contract their plain and ordinary meaning, it is clear that the 30-workday rule was designed to prevent the employer from creating lengthy delays in taking disciplinary action while an employee is suspended without pay or reassigned to another work assignment pending an internal investigation. However, this concern is not present absent suspension or reassignment.

Thus, we determine that the 30-workday rule clearly and unambiguously modifies only the contract provisions relating to investigatory reassignments and suspensions and does not pertain to the initiation of discipline in general. As a result, we conclude that the manner in which DSS took disciplinary action against Daehnke was not subject to the 30-workday rule.

Finally, Daehnke argues in his brief that certain evidence submitted at the Board hearing concerning the intended applicability of the 30-workday rule violated the parol evidence rule. However, Daehnke did not state this argument as an assigned error in his brief. Errors which are argued but not assigned will not be considered by an appellate court. *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995); *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995). As a result, we do not address this argument.

CONCLUSION

We conclude that DSS was not subject to the contract's 30-workday rule when initiating disciplinary action, because Daehnke was not reassigned or suspended pending an internal investigation. We therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONALD HAWES, APPELLEE, AND ROBERT G. HAYS, APPELLANT.
556 N.W.2d 634

Filed December 13, 1996. No. S-95-1165.

1. **Contempt: Final Orders: Appeal and Error.** A final judgment or order in a contempt proceeding is reviewed in the same manner as in a criminal case.
2. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Attorney and Client.** A communication concerning the date, time, and place of a scheduled trial is not confidential in nature and is not protected from disclosure by Neb. Rev. Stat. § 27-503 (Reissue 1995), Neb. Rev. Stat. § 7-105(4) (Reissue 1991), or Canon 4, DR 4-101(B), of the Code of Professional Responsibility.
4. ____. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him or her.
5. **Prosecuting Attorneys: Attorney and Client: Evidence.** A prosecutorial subpoena served on an accused's attorney can withstand a motion to quash only if the prosecution demonstrates on the record that the defense attorney's testimony will actually be adverse to the accused, that the evidence sought to be elicited from the attorney will likely be admissible at trial under the controlling rules of evidence, and that there is a compelling need for such evidence which cannot be satisfied by some other source.
6. **Courts: Attorney and Client.** Courts have a duty to maintain public confidence in the legal system and to protect and enhance the lawyer-client relationship in all its dimensions.

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

John Wesley Hall, Jr., and Andrew Dean Strotman for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee State.

Michael D. Gooch, Deputy Lancaster County Public Defender, for amici curiae National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, and Nebraska Criminal Defense Attorneys Association.

Rodney J. Rehm for amicus curiae Nebraska Association of Trial Attorneys.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Robert G. Hays, a Lancaster County deputy public defender and a witness in this proceeding, appeals his conviction for criminal contempt which resulted from his refusal to testify concerning information he claims as confidential and privileged regarding the defendant-appellee, Donald Hawes, a former client. For the reasons that follow, we reverse, and dismiss the contempt citation.

FACTUAL BACKGROUND

Hawes was charged with driving while his driver's license was under suspension, and Hays was appointed as his counsel. Because Hawes failed to appear at the scheduled trial on that charge, he was charged with failure to appear. The district court appointed Hays as his counsel with respect to the latter charge, notwithstanding having been informed that the county attorney intended to call Hays as a witness against Hawes.

The plaintiff-appellee, State of Nebraska, served Hays with a subpoena directing him to appear and testify at Hawes' preliminary hearing on the failure to appear charge. Asserting, among other things, that his testimony would violate the lawyer-client privilege and his duties as a lawyer, Hays filed on Hawes' behalf a motion to quash the subpoena. Following a hearing, the district court overruled the motion.

At the preliminary hearing which followed, the State then called Hays as a witness and asked whether he had instructed his client to appear for the scheduled trial on the driving charge. Asserting the lawyer-client privilege, Hays objected to the question and declined to answer. The district court overruled Hays' objection and directed him to answer. Hays again declined, and the preliminary hearing was continued.

Prior to the resumption of the hearing, the State filed a motion to disqualify Hays as counsel for Hawes because of the conflict of interest created by Hays' compelled testimony against his client. This motion was sustained, and substitute counsel was appointed.

At the resumption of the preliminary hearing, Hays again invoked his former client's privilege, explaining that he had a statutory obligation to maintain client confidences and secrets at any peril to himself and, further, that he had an obligation under the Nebraska Code of Professional Responsibility to not reveal any client confidences or secrets. Unpersuaded, the district court again ordered Hays to answer. When he again declined, he was found to be in criminal contempt of court and was fined.

SCOPE OF REVIEW

A final judgment or order in a contempt proceeding is reviewed in the same manner as in a criminal case, *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994); however, regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review, *State v. Swift, ante* p. 204, 556 N.W.2d 243 (1996); *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1966).

ASSIGNMENTS OF ERROR

Hays' 12 assignments of error can be summarized as claiming that on evidential, ethical, and constitutional grounds, the district court erred in overruling Hawes' motion to quash the subpoena and holding Hays in criminal contempt of court for refusing to answer the State's question.

ANALYSIS

In addition to the privilege granted a client by Neb. Rev. Stat. § 27-503(2) (Reissue 1995) to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and his or her lawyer made for the purpose of facilitating the rendition of professional legal services, Neb. Rev. Stat. § 7-105(4) (Reissue 1991) imposes upon a lawyer a duty "to maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets" of his or her clients. Moreover, Canon 4, DR 4-101(B), of the Code of Professional Responsibility imposes upon a lawyer an ethical duty to not knowingly reveal or use to the disadvantage of the client without consent a confidence or secret of the client, except when required by law or court order.

Here, Hays was ordered to disclose whether he communicated to his former client the date, time, and place of the trial scheduled on the driving charge; the ultimate question is whether the order was lawful. Other state courts which have considered the matter have concluded that as the date, time, and place of trial is not confidential in character, a communication concerning the same does not come within the ambit of the lawyer-client privilege conferred by provisions similar to those contained in § 27-503 or the duties imposed on lawyers under provisions similar to those contained in § 7-105(4) and DR 4-101(B). See, e.g., *Korff v. State*, 567 N.E.2d 1146 (Ind. 1991), *cert. denied* 502 U.S. 871, 112 S. Ct. 206, 116 L. Ed. 2d 164; *State v. Ogle*, 297 Or. 84, 682 P.2d 267 (1984); *City of Wichita v. Chapman*, 214 Kan. 575, 521 P.2d 589 (1974); *Downie v. Superior Court*, 888 P.2d 1306 (Alaska App. 1995); *People v. Williamson*, 839 P.2d 519 (Colo. App. 1992); *Watkins v. State*, 516 So. 2d 1043 (Fla. App. 1987); *State v. Breazeale*, 11 Kan. App. 2d 103, 713 P.2d 973 (1986).

Although we have not had prior occasion to pass upon the precise question presented here, in *Castle v. Richards*, 169 Neb. 339, 343, 99 N.W.2d 473, 476 (1959), we recognized in dictum that "not every communication of a client to his attorney . . . is accorded the privilege of confidentiality . . . ." The statutes then in effect rendered an attorney incompetent to testify "concerning any communication made to him by his client in that

relation or his advice thereon, without the client's consent," Neb. Rev. Stat. § 25-1201 (Reissue 1964), and prevented any attorney from disclosing "any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline," Neb. Rev. Stat. § 25-1206 (Reissue 1964). We held the statement in question admissible, as it had been made to one who was not serving as the declarant's attorney at the time the statement was made. Although the holding was based on the lack of a lawyer-client relationship, we wrote that the declaration "was neither professional nor confidential," 169 Neb. at 346, 99 N.W.2d at 477, and quoted cases from other jurisdictions observing that to be protected from disclosure, a communication must be one which is essentially confidential in character and which relates to the subject matter upon which advice was given or sought. Thus, we cannot say that a communication concerning the date, time, and place of a scheduled trial is confidential in nature and protected from disclosure by § 27-503, § 7-105(4), or DR 4-101(B).

But there is a preliminary question, namely, whether under the circumstances it was appropriate for the State to have subpoenaed Hays to appear as a witness against a former client. In that regard, we agree with the observation of the U.S. Court of Appeals for the Fifth Circuit that the practice of calling an attorney to testify against a former client is not to be applauded, for the mere appearance of an attorney testifying against a former client, even as to matters of public record, is distasteful and should only be used in rare instances. *United States v. Cochran*, 546 F.2d 27 (5th Cir. 1977).

The evidential lawyer-client privilege is an old one in the common law, going back to at least 1577, 8 John Henry Wigmore, Evidence in Trials at Common Law § 2290 (1961), and exists through the present day to promote the freedom of consultation of legal advisers by clients, *id.*, § 2291. In the words of Canon 4, EC 4-1, of the Code of Professional Responsibility:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system

> require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him or her. A client must feel free to discuss whatever the client wishes with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client.

Accordingly, we agree with, and adopt, the rule set forth in *Williams v. District Court, El Paso County*, 700 P.2d 549 (Colo. 1985), that a prosecutorial subpoena served on an accused's attorney can withstand a motion to quash only if the prosecution demonstrates on the record that the defense attorney's testimony will actually be adverse to the accused, that the evidence sought to be elicited from the attorney will likely be admissible at trial under the controlling rules of evidence, and that there is a compelling need for such evidence which cannot be satisfied by some other source. See, also, *Ullmann v. State*, 230 Conn. 698, 647 A.2d 324 (1994) (in criminal case, compelling need test applies to call attorney professionally involved in case); *Shelton v. State*, 206 Ga. App. 579, 426 S.E.2d 69 (1992); *Perez v. State*, 474 So. 2d 398 (Fla. App. 1985).

Although the record contains self-serving statements by the prosecuting attorneys involved in these proceedings that "it is necessary" to make inquiry of defense counsel and that, otherwise, there would be "no way," or at least it would be "very, very difficult for the State" to prove its case, there is no evidential showing that any effort other than subpoenaing Hays was made. Under that state of the record, it cannot be said that the requirements of the foregoing test have been met.

That being the situation, we need not consider Hays' constitutional arguments. It should, however, be remembered that the "courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions." *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 852, 540 N.W.2d 318, 326 (1995). Accordingly, trial courts have a responsibility to employ procedures which minimize, if not eliminate, in cases of this type the need to call defense attorneys to testify against their clients or former clients.

Therefore, for the above-stated reasons, we reverse, and dismiss the contempt citation.

REVERSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE,
v. KEVIN GOODRO, APPELLANT.
556 N.W.2d 630

Filed December 13, 1996. No. S-96-119.

1. **Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
2. **Judgments: Appeal and Error.** In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Convictions: Corroboration: Testimony.** A corroboration requirement does not operate to exclude testimony which is not corroborated by other evidence; it only requires that such conviction be based on something more than such testimony.
4. **Corroboration: Witnesses: Testimony.** When the law requires corroboration of a witness, the witness' testimony must be accompanied by evidence other than that from the witness.
5. **Criminal Law: Corroboration: Testimony.** The testimony of a corroborating individual need not be corroborated on every element of a crime.
6. **Corroboration: Witnesses: Testimony.** Corroboration is sufficient, for the purposes of Neb. Rev. Stat. § 28-1439.01 (Reissue 1995), if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Following a bench trial, appellant Kevin Goodro was convicted in the district court for Hall County, Nebraska, of three counts of distribution of methamphetamine and one count of possession of methamphetamine, pursuant to Neb. Rev. Stat. § 28-416 (Cum. Supp. 1994). He appealed his convictions to the Nebraska Court of Appeals, assigning as error that there was insufficient evidence to support the convictions. More specifically, Goodro alleges that the convictions were based on the uncorroborated testimony of a cooperating individual, contrary to Neb. Rev. Stat. § 28-1439.01 (Reissue 1995). We granted the State's petition to bypass. We now determine that this assignment of error is without merit, and we affirm the judgment of the district court.

BACKGROUND

In March and April 1995, Christina S. Nyman worked as a confidential informant for Deputy Christopher Rea of the Hall County sheriff's office. Nyman had sold methamphetamine on two occasions and was allowed to obtain dismissal of pending criminal charges by making drug "buys" for law enforcement officers. After all pending charges had been "worked off" and therefore dismissed, Nyman received $50 for each "buy" she made.

As a confidential informant, Nyman arranged to buy methamphetamine from Steve Shum on April 6, 1995. Prior to this controlled buy, officers searched Nyman, her purse, and her car. No controlled substances were found. Nyman was equipped, prior to the purchase, with an audio transmitter ("wire"), which allowed conversations to be overheard and tape-recorded by Deputy Rea.

Nyman then went to a residence at an address provided by Shum. She met Shum at the door when he answered her knock. Nyman was then introduced to Goodro inside the residence. Upon entering, Nyman stated that she wanted to buy an "eight-ball" of methamphetamine. She gave Shum $250. According to Nyman, Shum then gave the money to Goodro. Nyman further testified that Goodro left the residence, returned, and laid the methamphetamine on a table. Shum then picked up the methamphetamine and handed it to Nyman.

Nyman asked to purchase more methamphetamine that same night and arranged an additional buy with Goodro. Nyman left the residence, met with officers, turned over the methamphetamine, and obtained more money for the next buy. Nyman returned to the residence, met Goodro, and gave him the money. Nyman testified that Goodro left the residence, and then she left the residence. Nyman was given the additional methamphetamine upon her return. Nyman then arranged for a buy the next evening, April 7, 1995. Goodro gave her his name and beeper number. After Nyman left the residence, she was searched and "unwired," and she gave the methamphetamine to an officer.

The next day, April 7, 1995, Nyman was again searched, wired, and given money by the police prior to attempting the buy. She returned to the same residence she had gone to the night before. She testified that after entering, she gave Goodro $250. Nyman, and then Goodro, left the residence. Nyman met with officers and then returned to the residence, where Goodro gave her the methamphetamine. Nyman left the residence and was subsequently searched, unwired, and relieved of the methamphetamine by the officers.

The State introduced testimony of Deputy Rea and Det. Elmer Edwards and the tape recordings of the methamphetamine purchases. Deputy Rea testified that he heard via the wire a conversation between two male voices and one female voice. He also testified that he received the methamphetamine from Nyman. The tapes of the conversations of April 6 and 7, 1995, were received into evidence over a foundational objection. Deputy Rea testified that he recognized Goodro's voice on both tapes.

Detective Edwards assisted Deputy Rea with the surveillance operation pertaining to the alleged purchases of methamphetamine. Detective Edwards testified that on both April 6 and 7, 1995, he searched Nyman's car prior to the buy and then followed Nyman to the residence. He testified that he watched Nyman arrive at and enter the residence and that he observed Goodro come out of the residence and leave in a van. Detective Edwards testified that he then observed Goodro returning and watched him exit the van and enter the residence. Detective

Edwards then observed Nyman leaving the residence, getting into her vehicle, and driving away. Detective Edwards then followed Nyman to a predesignated location set up by officers and again searched her car.

On May 21, 1995, Detective Edwards served Goodro with a warrant and advised him that he was under arrest. In response to a question by Detective Edwards, Goodro stated that he had drugs on his person and handed the detective what appeared to be methamphetamine after pulling it out of his left breast pocket.

By an information filed in the district court for Hall County on August 9, 1995, Goodro was criminally charged with three counts of distribution of methamphetamine and one count of possession of methamphetamine, pursuant to § 28-416.

Following a bench trial on October 6, 1995, Goodro was found guilty of all four charges. The court specifically found corroboration from the testimony of both Detective Edwards and Deputy Rea and also from the tapes. Goodro was sentenced to 3 to 4 years' imprisonment on counts I, II, and III (the distribution charges) and to 12 to 14 months' imprisonment on count IV (the possession charge). All sentences were to run concurrently.

ASSIGNMENT OF ERROR

Goodro assigns as error "[t]he sufficiency of the evidence to support the verdict on Counts I, II, and III, all Distributions of a Controlled Substance."

STANDARD OF REVIEW

A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Masters, supra*; *State v. Secret, supra*.

ANALYSIS

Goodro asks us to overturn his convictions of three counts of distribution of methamphetamine due to a lack of corroboration of Nyman's testimony. Goodro cites § 28-1439.01, which provides that "[n]o conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual."

A cooperating individual is defined as "any person, other than a commissioned law enforcement officer, who acts on behalf of, at the request of, or as agent for a law enforcement agency for the purpose of gathering or obtaining evidence of offenses punishable under the Uniform Controlled Substances Act." Neb. Rev. Stat. § 28-401(33) (Reissue 1995). There is no question that Nyman is a cooperating individual. She participated with law enforcement officers in setting up the transaction; she obtained evidence; she was allowed to work off pending charges; and, after the charges were worked off, she was paid compensation for her services.

A corroboration requirement does not operate to exclude testimony which is not corroborated by other evidence; it only requires that such conviction be based on something more than such testimony. *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995).

> " 'A corroboration requirement does not mean that a commissioned law enforcement agent would have to be physically present at the time a drug purchase is made. Corroboration could be supplied, by instance, through the use of electronic surveillance, observations which indicate simply that the meeting between the subject and the cooperating individual actually took place, searches of the cooperating individuals both before and within a reasonable time after the drug purchase is alleged to have taken place, the use of marked buy money, the use of cooperating individuals in teams, the use of fingerprint analysis and numerous other investigative techniques.' "

Id. at 258, 533 N.W.2d at 916 (quoting *State v. Beckner*, 211 Neb. 442, 318 N.W.2d 889 (1982). See, also, *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988).

The principal fact in issue is whether Goodro is the person who sold the methamphetamine to Nyman. Therefore, the essential inquiry is whether Nyman's testimony identifying Goodro as the person who sold her the methamphetamine was corroborated by the audiotapes and the actions and observations of the two officers.

When the law requires corroboration of a witness, the witness' testimony must be accompanied by evidence other than that from the witness. *State v. Jimenez, supra*; *State v. Witmer*, 174 Neb. 449, 118 N.W.2d 510 (1962).

Goodro argues that the evidence was not sufficient to sustain his conviction on the distribution charges because no corroboration existed identifying Goodro as the seller of the methamphetamine. Goodro contends that the tape recording does not corroborate Nyman's testimony because, although Goodro's voice appears on the tape, there is no identification of Goodro as the person who actually gave or sold Nyman the drugs. Here, however, sufficient evidence exists which ties Goodro to the distribution of the methamphetamine, and such evidence does not depend solely on Nyman's testimony.

Nyman and her car were searched both before and within a reasonable time after the purchase; no methamphetamine was found. The use of electronic surveillance provided officers with tapes indicating that a meeting between two males and one female (Nyman) took place. Detective Edwards testified that he watched Nyman arrive at and go inside the residence, saw Goodro leave in his van, and watched him return and enter the residence. Deputy Rea testified that he had become personally familiar with Goodro in the course of the investigation and that Goodro's voice appeared on the tapes. On the tape recordings, a person is heard introducing himself as "Kevin," stating that his last name is "Goodro," and spelling the name. After leaving the residence, Nyman did have the methamphetamine, which was taken from her by the officers. All of this evidence corroborates that Goodro was in the residence with Nyman during the time the drug transaction took place. The physical evidence of the methamphetamine, the tape recordings, and the testimony of the State's witnesses support Nyman's testimony that she purchased the methamphetamine from Goodro.

Goodro argues that the State must provide corroboration as to the principal fact in issue: whether Goodro actually sold or gave the methamphetamine to Nyman. The testimony of a corroborating individual, however, need not be corroborated on every element of the crime. *State v. Kramer*, 238 Neb. 252, 469 N.W.2d 785 (1991). We have held that corroboration is sufficient, for the purposes of § 28-1439.01, if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995); *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986); *State v. Taylor*, 221 Neb. 114, 375 N.W.2d 610 (1985); *State v. Beckner, supra*. Here, the testimony of the two officers and the tape recordings themselves corroborate Nyman's testimony and tend to support the principal fact in issue that Goodro sold or gave Nyman the methamphetamine.

CONCLUSION

Accordingly, there was sufficient evidence to support the convictions, and we therefore affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. J. MARK BARNETT, RESPONDENT.

556 N.W.2d 641

Filed December 20, 1996. Nos. S-92-459, S-96-1196.

Original action. Judgment of disbarment.

Dennis G. Carlson, Counsel for Discipline, for relator.

J. Mark Barnett, pro se.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On April 13, 1989, J. Mark Barnett was licensed to practice law in the State of Nebraska.

On August 28, 1996, a three-count complaint against Barnett was filed with this court by the Nebraska State Bar Association's Committee on Inquiry of the Third Disciplinary District. The complaint charged that on three different occasions in 1994, Barnett had received a $300 check as advance payment of fees for legal services he was to render to each of three different clients; that Barnett did not turn over any of the money he had received on any of the three occasions to the law firm by whom he was employed, nor did he deposit in a trust account any of the $900 in advance payments of fees; and that, instead, he deposited the three checks in his personal account. The complaint acknowledged that on July 14, 1995, Barnett reimbursed the law firm by whom he was employed $300 of the money he had not turned over to the firm.

In 1993, Barnett was placed on probation for failing to perform timely legal services for a client, to communicate with that client, and to timely file a written response to a disciplinary complaint. See *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993). On September 29, 1995, this court suspended Barnett's license to practice law in this state until further order of the court for violating the terms of his probation. See *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

On September 18, 1996, an Assistant Counsel for Discipline charged Barnett with violating Neb. Ct. R. of Discipline 16 (rev. 1996), which provides, in substance, that whenever a member of the bar is suspended from the practice of law in this state, he or she is to notify his or her clients and opposing counsel in writing of such suspension; that he or she is to assist his or her clients in obtaining substitute counsel; and that, within 30 days of the suspension, the suspended attorney is required to file an affidavit with this court, stating full compliance with the requirements of rule 16, and to simultaneously submit to the court evidence of full compliance.

The complaints further charged that Barnett's conduct, as heretofore set forth, constitutes violations of an attorney's oath

of office and certain provisions of the Code of Professional Responsibility, to wit:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.
>
> . . . .
>
> DR 9-102 Preserving Identity of Funds and Property of a Client.
>
> (A) All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

On December 6, 1996, in response to the complaints filed against him, Barnett filed a written voluntary surrender of his license to practice law in this state. In his written surrender, Barnett admitted all of the basic factual allegations in the complaints, that he had violated the foregoing provisions of the Code of Professional Responsibility, and that he had violated his attorney's oath of office.

In surrendering his license to practice law in this state, Barnett stated under oath that he fully and voluntarily consented

to the entry of an order of disbarment and that he fully and voluntarily waived his right to notice, appearance, and a hearing prior to the entry of an order of disbarment.

We accept Barnett's surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately. We further order Barnett to comply with Neb. Ct. R. of Discipline 16, and in the event of his failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

IN RE INTEREST OF KRYSTAL P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T. AND JOHN P., APPELLEES, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.

IN RE INTEREST OF KILE P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T., APPELLEE, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.

IN RE INTEREST OF ALEX T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T. AND ERNEST T., APPELLEES, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.

557 N.W.2d 26

Filed December 20, 1996. Nos. S-95-924, S-95-925, S-95-926.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Attorney Fees.** Attorney fees may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee.
3. **Actions: Immunity.** For purposes of applying the doctrine of sovereign immunity, a suit against an agency of the state is the same as a suit against the state.
4. **Attorney Fees: Proof: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 25-1803 (Reissue 1995), the existence of substantial justification depends upon the circumstances of each case. Substantial justification exists where a party's position has a reasonable basis in both law and fact.

Appeal from the County Courts for Jefferson and Gage Counties: STEVEN BRUCE TIMM, Judge. Affirmed.

Don Stenberg, Attorney General, Royce N. Harper, Douglas Dexter, and, on brief, Shawn Elliott, Special Assistant Attorney General, for appellant.

Gary G. Thompson for intervenors-appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

This matter arose out of proceedings in which three minor children, Krystal P., Kile P., and Alex T., were placed in the custody of the Nebraska Department of Social Services (DSS). On January 9, 1995, the county court ordered that the intervenors, Donald F. and Sheila M. Ebbers, were to have extended, unsupervised visitation with the children. DSS appealed that order to the Nebraska Court of Appeals and a juvenile review panel. Those appeals have been decided by this court in *In re Interest of Alex T. et al.*, 248 Neb. 899, 540 N.W.2d 310 (1995); *In re Interest of Krystal P. et al.*, 248 Neb. 905, 540 N.W.2d 316 (1995); and *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995), and are not the subject of this opinion.

During the appeal process, the Ebberses filed a civil contempt action against DSS for failing to comply with the county court's visitation order. On June 22, 1995, the court found that DSS and two of its employees were in contempt. Following the contempt hearing, the Ebberses filed an application for attorney fees against DSS, and the court ordered DSS to pay attorney fees in the amount of $1,296. DSS has appealed from the order requiring it to pay the Ebberses' attorney fees.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Allemang v. Kearney Farm Ctr., ante* p. 68, 554 N.W.2d 785 (1996);

Grand Island Latin Club v. Nebraska Liq. Cont. Comm., ante p. 61, 554 N.W.2d 778 (1996).

FACTS

DSS was made the custodian of Krystal, Kile, and Alex and was ordered by the county court to allow extended, unsupervised visitation in the home of the Ebberses. DSS appealed this order to both the Court of Appeals and a juvenile review panel. While those appeals were pending, DSS did not comply with the visitation order, and DSS was subsequently found to be in contempt. As part of the contempt action, the county court ordered DSS to pay the Ebberses' attorney fees in the amount of $1,296.

DSS did not deny that it failed to implement the visitation order, but essentially relied upon the defense that its act of seeking appellate review operated as an automatic stay of the order. DSS relied upon Neb. Rev. Stat. § 25-21,213 (Reissue 1995), which provides: "No appeal or supersedeas bond shall be required of the state, and the filing of notice . . . of intention to take such proceedings shall operate as a supersedeas of such judgment until the time that final judgment in the Court of Appeals or Supreme Court is rendered in the cause . . . ."

The county court rejected this defense and determined that DSS and two of its employees were in contempt. The court remanded the employees to the custody of the sheriff until such time as they were willing to abide by the visitation order and fined DSS the sum of $2,500 per day, beginning the following day, for each day DSS failed to abide by the court order. Due to the pending imprisonment of its employees and the pending fine, DSS agreed to abide by the court order, and based upon that representation, the court found that the parties had purged themselves of contempt. There was no appeal by DSS from the finding that DSS and its two employees were in contempt.

On June 23, 1995, an application for attorney fees was filed by counsel for the Ebberses and was set for hearing on July 25. The record reflects that a notice of the hearing was sent to DSS through its attorney, but DSS was not represented at the hearing. At the hearing, counsel for the Ebberses was sworn. He testified that he spent 16.2 hours on the case and that his hourly fee was

$80. The county court found that the hourly fee and the time expended were reasonable and awarded the Ebberses $1,296 in attorney fees.

ASSIGNMENTS OF ERROR

DSS makes the following assignments of error: (1) The county court, sitting as a juvenile court, lacked authority to order DSS to pay attorney fees in connection with a civil contempt proceeding; (2) to the extent such authority is granted to a county court, the court erred in ordering DSS to pay attorney fees in connection with a civil contempt proceeding without determining that DSS' defense was not substantially justified; and (3) the county court erred in ordering DSS to pay attorney fees, because the record indicates that DSS' position was substantially justified.

ANALYSIS

Since no appeal was taken by DSS or its employees from the contempt order, the sole issue on appeal is whether the county court could award attorney fees as a part of the contempt proceedings.

The statutory authority for punishment for contempt is Neb. Rev. Stat. § 25-2121 (Reissue 1995), which states: "Every court of record shall have power to punish by fine and imprisonment, or by either . . . persons guilty of . . . (3) willful disobedience of . . . any . . . order of said court . . . ." A county court is a court of record. See Neb. Rev. Stat. § 24-502 (Reissue 1995). The awarding of attorney fees is not listed as one of the powers given to the court in a contempt action.

DSS acknowledges that the county court had the power, generally, to punish for contempt. However, DSS argues that because there is no statutory language specifically providing for attorney fees, the court lacked the power to award attorney fees in this case. DSS asserts that this lack of power to award attorney fees absent specific statutory authority follows from the fact that a county court can acquire jurisdiction only through legislative enactment. Our review of this issue is a question of law, which requires us to reach a determination independent of the trial court. See, *Allemang v. Kearney Farm Ctr., ante* p. 68, 554

N.W.2d 785 (1996); *Grand Island Latin Club v. Nebraska Liq. Cont. Comm., ante* p. 61, 554 N.W.2d 778 (1996).

We first note that § 25-2121 is a codification of the common law of contempt and does not supplant a court's inherent contempt powers. See, e.g., *State ex rel. Beck v. Frontier Airlines, Inc.*, 174 Neb. 172, 116 N.W.2d 281 (1962); *State ex rel. Beck v. Lush*, 168 Neb. 367, 95 N.W.2d 695 (1959). The fact that § 25-2121 does not list attorney fees as punishment that a court of record may impose in a contempt proceeding does not necessarily prohibit the court from awarding attorney fees under certain circumstances.

Attorney fees may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee. *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995); *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993); *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984). Since there is no provision in § 25-2121 for attorney fees, we must determine whether there is a uniform course of procedure that would permit the county court to award attorney fees in a contempt proceeding.

We find that there is such a uniform course of procedure. For instance, in *Dunning, supra*, we held that costs, including a reasonable attorney fee, may be assessed against the contemnor in a civil contempt proceeding. Likewise, in *Megel v. City of Papillion*, 194 Neb. 819, 235 N.W.2d 876 (1975), we upheld an award of attorney fees in a civil contempt proceeding where the trial court had found the defendants to be in willful contempt for failure to comply with a district court injunctive decree. As such, DSS' argument that the lack of specific statutory authority precludes the county court's award of attorney fees for contempt is without merit.

Having decided that the county court had the general power to award attorney fees in a civil contempt proceeding, we next turn to DSS' contention that the court was precluded by sovereign immunity from ordering DSS to pay attorney fees incurred by the Ebberses in the civil contempt proceeding. We have consistently held, for purposes of applying the doctrine of sovereign immunity, that a suit against an agency of the state is

the same as a suit against the state. See *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995). Therefore, it follows that the award of attorney fees against an agency of the state is the same as an award against the state.

Neb. Const. art. V, § 22, providing that the state may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought, permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). We thus consider whether the State has statutorily waived sovereign immunity.

Neb. Rev. Stat. § 25-1803(1) (Reissue 1995) provides:

> Unless otherwise provided by law, the court having jurisdiction over a civil action brought by the state or an action for judicial review brought against the state pursuant to the Administrative Procedure Act shall award fees and other expenses to the prevailing party unless the prevailing party is the state, except that the court shall not award fees and expenses if it finds that the position of the state was substantially justified.

Pursuant to Neb. Rev. Stat. § 25-2701 (Reissue 1995), which extends the rules of criminal and civil procedure to the county court, the county court is given the authority to assess attorney fees.

Section 25-1803(1) acts as a limited waiver of the state's sovereign immunity in civil actions brought by the state to the extent that fees and expenses shall be awarded except when the court finds that the position of the state was substantially justified. Fees can be awarded in a civil action brought by the state or in an action for judicial review brought against the state pursuant to the Administrative Procedure Act. It is clear that this action was not brought against the State pursuant to the Administrative Procedure Act. Thus, whether § 25-1803(1) applies depends upon our determination of whether the State brought the civil action.

The underlying action in this case was brought by the State under the authority of the Nebraska Juvenile Code and was instituted by the county attorneys of Jefferson and Gage

Counties on behalf of the State. DSS was the custodian of the minor children, and the Ebberses were intervenors in the action. On January 9, 1995, the county court ordered, inter alia, that the children were to have extended, unsupervised visitation in the home of the Ebberses commencing in January 1995. DSS appealed the order to the Court of Appeals and a juvenile review panel.

Pending those appeals, the Ebberses requested visitation pursuant to the county court's order, and DSS refused the request. The Ebberses then instituted contempt proceedings in the county court. Throughout the proceedings, DSS admitted it had failed to comply with the visitation order, but asserted that the appeals operated as a stay of the visitation order. The county court rejected this defense and adjudged DSS and its employees to be in contempt of court.

Upon our review of the record, we find that this action was brought by the State and that, therefore, § 25-1803(1) applies. As a part of the original action, DSS was ordered to comply with a visitation order, which DSS failed to do. The contempt action was related and incidental to the civil action brought by the State, and therefore, the contempt action is within the scope of § 25-1803(1).

DSS argues, however, that even if § 25-1803(1) operates as a limited waiver of sovereign immunity, the county court failed to make a necessary determination as to whether DSS' position was substantially justified. Section 25-1803(1) provides that attorney fees may be awarded in actions brought by the state, "except that the court shall not award fees and expenses if it finds that the position of the state was substantially justified."

In *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988), we stated that the existence of substantial justification depends upon the circumstances of each case. Substantial justification exists where the position has a reasonable basis in both law and fact. *Id.* Here, DSS' position was based upon § 25-21,213, which provides: "[T]he filing of notice . . . shall operate as a supersedeas of such judgment until the time that final judgment . . . is rendered in the cause . . . ." DSS asserts that such language indicates that the supersedeas was automatic and that, therefore, it was not obligated to implement the visitation order.

However, we need not reach the issue of whether DSS' action was substantially justified, since we hold that DSS is precluded from raising that issue because DSS failed to appear, after notice, at the hearing regarding attorney fees. The county court was not obligated to invent arguments as to how DSS' action could have been substantially justified. Therefore, it was proper for the county court to award attorney fees.

We will not address an issue which creates an exception to the statutory waiver of sovereign immunity found in § 25-1803 where the State failed to raise the issue at the hearing regarding attorney fees. See *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994) (issue not presented to or passed upon by trial court generally not appropriate for consideration on appeal).

The judgment of the county court is affirmed.

AFFIRMED.

MEMORIAL HOSPITAL OF DODGE COUNTY, APPELLEE, V. CHERYL L. PORTER, APPELLANT, AND DAN DOLAN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

557 N.W.2d 21

Filed December 20, 1996. No. S-95-1045.

1. **Administrative Law: Courts: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Workers' Compensation.** Temporary partial disability does not mean, nor does it include, temporary total disability.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY,

Judges, on appeal thereto from the District Court for Dodge County, MARK J. FUHRMAN, Judge. Judgment of Court of Appeals affirmed.

Laura A. Lowe, of Cobb, Hallinan, & Ehrlich, P.C., for appellant.

Douglas D. Johnson for appellee Memorial Hospital.

John F. Sheaff and John H. Albin for appellee Dolan.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

In this unemployment benefits action, Memorial Hospital of Dodge County claims the Nebraska Court of Appeals erred in holding that Memorial Hospital's former employee, Cheryl L. Porter, is entitled to receive both temporary total disability workers' compensation benefits and unemployment benefits.

We granted Memorial Hospital's petition for further review and affirm the decision of the Court of Appeals.

ASSIGNMENTS OF ERROR

Restated, Memorial Hospital claims the Court of Appeals erred in (1) construing Neb. Rev. Stat. § 48-628(e)(2) (Cum. Supp. 1994), currently codified as Neb. Rev. Stat. § 48-628(5)(b) (Cum. Supp. 1996), in a manner which leads to an absurd, unjust, and unconscionable result; (2) concluding a claimant is entitled to receive unemployment insurance benefits and temporary total disability workers' compensation benefits at the same time; and (3) failing to follow precedent of the Nebraska Appeal Tribunal.

STANDARD OF REVIEW

In an appeal from the appeal tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appear-

ing on the record. *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995).

FACTS

Porter was a full-time employee of Memorial Hospital and earned $230 per week. Her duties included shampooing and buffing the hospital's floors. In March 1994, Porter sustained an on-the-job injury to her rotator cuff, which required surgery. As a result of her injury, Porter began receiving workers' compensation benefits effective March 22, 1994, in the amount of $153.54 per week for being temporarily totally disabled. On October 18, Porter's doctor released her to light-duty work, but prohibited her from lifting, pulling, or pushing anything over 10 pounds. Memorial Hospital could not accommodate these restrictions and, on November 4, terminated Porter as an employee because she had exceeded the hospital's 6-month medical leave limitation. Thereafter, Porter applied for jobs that were within the physical limitations set by her doctor. She could not find such employment. She then applied for unemployment benefits.

In her application for unemployment benefits, Porter explained to a Nebraska Department of Labor claims deputy that she was receiving temporary total disability workers' com-

pensation benefits. Relying upon § 48-628(e)(2), the department's claims deputy determined that Porter's receipt of workers' compensation for her temporary total disability did not disqualify her from receiving unemployment benefits.

Events that disqualify a claimant from receiving unemployment benefits are set out in § 48-628. Subsection (e)(2) specifically disqualifies an individual from receiving unemployment benefits if the applicant is receiving workers' compensation for temporary *partial* disability.

On December 24, 1994, Porter began receiving $126 per week in unemployment benefits, in addition to the $153.54 workers' compensation benefit she was receiving.

On March 8, 1995, Memorial Hospital asked the department to determine whether Porter was eligible to receive unemployment benefits while she was receiving workers' compensation benefits. The department determined that Porter was unable to work in her previous occupation, but nevertheless was able to work and, therefore, was entitled to unemployment benefits, if benefits were otherwise payable. A short time later, Memorial Hospital asked the department to determine whether Porter's receipt of workers' compensation was a disqualifying event under § 48-628(e), thereby disqualifying Porter from receiving unemployment benefits. A department claims deputy determined that Porter's receipt of workers' compensation for temporary total disability did not disqualify her from receiving unemployment benefits.

Memorial Hospital appealed the claims deputy's determination to the appeal tribunal. The appeal tribunal, following the "plain, clear and unambiguous language of Neb. Rev. Stat., Sec. 48-628(e)(2)," found that workers' compensation payments for temporary total disability do not disqualify an individual from receiving unemployment benefits.

Memorial Hospital filed a "Petition for Review and Praecipe" with the district court for Dodge County. The district court reversed the appeal tribunal's holding. It concluded that a construction based upon the "literal meaning" of § 48-628(e)(2) would defeat the Nebraska Legislature's intent and would lead to an absurd result because receipt of both payments gave Porter more money than she received while employed by the hospital.

Porter timely appealed the district court's ruling to the Court of Appeals. That court determined that under the plain language of § 48-628(e)(2), a person is disqualified from receiving unemployment benefits if he or she is also receiving workers' compensation benefits for temporary *partial* disability. The Court of Appeals held that because Porter was receiving benefits for temporary *total* disability, the disqualifying events specifically stated in § 48-628(e)(2) did not apply to her.

This court granted Memorial Hospital's petition for further review.

ANALYSIS

The issue in this case, a question of first impression before this court, is whether Porter's receipt of workers' compensation benefits for temporary total disability disqualifies her from receiving unemployment benefits. To resolve this issue, it is necessary to examine § 48-628(e)(2), currently codified as § 48-628(5)(b), which provides in relevant part:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> . . . For any week with respect to which he or she is receiving or has received remuneration in the form of . . . compensation for temporary *partial* disability under the workers' compensation law of any state or under a similar law of the United States . . . .

(Emphasis supplied.)

Under the explicit language of this provision, Porter is disqualified from receiving unemployment benefits if she receives temporary *partial* disability payments under the workers' compensation law. Porter does not receive temporary *partial* disability; she receives temporary *total* disability. Both phrases, "temporary partial" and "temporary total," have specific and different meanings under the Nebraska Workers' Compensation Act. See *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990) (discussing difference between total and partial disability). Temporary partial disability does not mean, nor does it include, temporary total disability. The words of § 48-628 are plain, direct, and unambiguous. Therefore, we will not resort to unnecessary interpretation to

ascertain their meaning. See, *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995).

Memorial Hospital contends in its third assignment of error that because the appeal tribunal offset temporary total disability workers' compensation payments against unemployment benefits in In re Franklin, vol. 88, No. 1349 (1988), this court should find that the Legislature did not intend for claimants to simultaneously receive temporary total disability and unemployment benefits. We disagree. In the present case, the appeal tribunal considered In re Franklin and properly rejected it, deciding instead to follow the plain, clear, and unambiguous language of the statute. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by a lower court or tribunal. See, *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

Memorial Hospital also contends that our holding in *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985), prohibits Porter from receiving both workers' compensation and unemployment benefits. Again, we disagree.

In *Sorensen*, we held that the claimant was disqualified from receiving unemployment benefits for any period in which the claimant received severance payments. We held that a lump-sum severance payment must be prorated to determine unemployment benefits. In *Sorensen*, this court compared the statutory provision of Neb. Rev. Stat. § 48-627(e) (Reissue 1984), which was silent on the issue, with § 48-628(e) (Reissue 1984), which mandated that a lump-sum severance payment be prorated when determining disqualification. We then determined that because § 48-628(e) spoke directly to severance payments, they must be included in determining whether a claimant is disqualified from receiving unemployment benefits. In *Sorensen*, this court reviewed the specific language of the applicable statute and found that the statute spoke directly to severance payments.

In the present case, this court has reviewed the specific language of the applicable statute and finds that the Legislature singled out specific events which disqualify an individual from receiving unemployment benefits and that temporary total disability was not included.

We decline to expand the language of the statute in its current form, § 48-628(5)(b), to include temporary total disability as a disqualifying event for receipt of unemployment benefits. The plain language of § 48-628(5)(b) does not provide any basis for disqualifying or prorating the amount of unemployment benefits received by Porter. To adopt Memorial Hospital's arguments would effectively amend the statute, a power properly reserved for the legislative branch of government. We leave any statutory change in Nebraska's unemployment benefits law to the Legislature.

CONCLUSION

We affirm the judgment of the Nebraska Court of Appeals.

AFFIRMED.

WRIGHT, J., not participating.

JIM DOUGHERTY, APPELLEE, V. SWIFT-ECKRICH, INC., APPELLANT.
557 N.W.2d 31

Filed December 20, 1996. No. S-95-1119.

1. **Judgments.** In the absence of an ambiguity, the effect of a judgment must be declared in light of the literal meaning of language used.
2. **Workers' Compensation: Jurisdiction.** The Nebraska Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
3. **Judgments.** Litigation must be put to an end, and it is the function of a final judgment to do just that.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

Upon the petition of the plaintiff-appellee employee, Jim Dougherty, the Nebraska Workers' Compensation Court increased the benefits it had previously awarded him. The defendant-appellant employer, Swift-Eckrich, Inc., thereupon appealed to the Nebraska Court of Appeals. That court determined that the compensation court lacked the authority to modify its earlier award and thus reversed the judgment and vacated the increase. *Dougherty v. Swift-Eckrich, Inc.*, 4 Neb. App. 653, 547 N.W.2d 522 (1996). We thereafter granted Dougherty's petition for further review, and now affirm the judgment of the Court of Appeals.

Our review is governed by the rule that an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996); *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996).

On February 24, 1993, the compensation court entered an award entitling Dougherty to, among other things, vocational rehabilitation under a plan that "began on January 13, 1993 as set forth more particularly in [a certain exhibit] for [Dougherty] to obtain an associates degree as a parts and services technician that will conclude in August of 1994." On October 3, 1994, Dougherty filed in the compensation court, in the same case in which the foregoing award was entered, a "petition" which he ultimately amended to seek an extension of the completion date specified in the February 1993 award. On March 2, 1995, the compensation court judge on the original hearing found that Dougherty had been unable to complete the required course work in the time originally allotted; that he had subsequently done so and had received his degree on December 22, 1994; and

that such was not the result of any "neglect, negligence or inadvertence" on Dougherty's part, but due to his "need for extra remedial work in reading." The judge further found that the original plan was based on the rehabilitation counselor's miscalculation of the time which would be required to complete the course requirements, thinking that the educational institution Dougherty attended was on a quarter system when in fact it was on the longer, semester system. The judge thus entered a "Further Award," extending the completion date to December 22, 1994, and ordering Swift-Eckrich to pay Dougherty benefits accordingly. A review panel of the compensation court subsequently affirmed the March 2, 1995, further award.

The exhibit to which the February 1993 award makes reference describes the training course to be pursued by Dougherty as "Associate of Applied Science Degree in Parts and SErvice [sic] Tech.," sets the starting date as January 1993, and puts the finishing date at August 1994. Thus, the February 1993 award entitled Dougherty to vocational rehabilitation in the form of a course of study ending in August 1994. See *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995) (in absence of ambiguity, effect of judgment declared in light of literal meaning of language used). See, also, *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986). The further award of March 1995 extended the finishing date established in the February 1993 award and thus effectively modified the earlier award.

Dougherty contends that the compensation court was authorized to enter its further award by virtue of the provisions of Neb. Rev. Stat. § 48-162.01(3) (Reissue 1993), which provides that when because of injury a worker is unable to perform suitable work for which the worker has previous training or experience, the worker "shall be entitled to such vocational rehabilitation . . . as may be reasonably necessary to restore" the worker to "suitable employment." But this statute does not provide for the modification of previous awards; it merely defines a benefit available to a class of injured workers.

Neither does Neb. Rev. Stat. § 48-180 (Reissue 1993) apply to the situation at hand. That statute provides that the compen-

sation court "may, on its own motion, modify or change its findings, order, award, or judgment at any time before appeal and within ten days from the date of such findings, order, award, or judgment for the purpose of correcting any ambiguity, clerical error, or patent or obvious error." Not only had more than 10 days elapsed between the entry of the February 1993 award and the entry of the March 1995 further award, the court did not act on its own motion.

Nor, under the situation presented here, does Neb. Rev. Stat. § 48-141 (Reissue 1993) empower the compensation court to modify its February 1993 award. Section 48-141 provides, in relevant part, that the amount of any agreement or award payable periodically may be modified at any time "by agreement of the parties" with the approval of the compensation court, or in the absence of agreement, "at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . ." In *Gomez v. Kenney Deans, Inc.*, 232 Neb. 646, 441 N.W.2d 632 (1989), we wrote that modification for increased incapacity requires the existence of a material and substantial change in the applicant's condition. See, also, *Sidel v. Spencer Foods*, 215 Neb. 325, 338 N.W.2d 616 (1983). Clearly, there was no agreement of the parties here, and there is neither any claim nor evidence of any increase of incapacity due solely to the injury in question.

While it is true that in civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term in which it was rendered, that rule does not apply to statutory tribunals such as the compensation court, for it is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984).

What was involved here was an effort of the compensation court, upon Dougherty's application more than 19 months after the fact, to correct an error in the February 1993 award, which had become final. No statute empowers the compensation court to so do. As we observed in the course of reversing an order of the compensation court undertaking to clarify the rights of the

parties under an award entered more than 4 months earlier, "'[l]itigation must be put to an end, and it is the function of a final judgment to do just that. . . .'. . ." *Black*, 224 Neb. at 828, 401 N.W.2d at 682.

The compensation court acted in excess of its powers, and the Court of Appeals thus correctly reversed and vacated the further award of March 1995. See Neb. Rev. Stat. § 48-185 (Reissue 1993).

Therefore, as noted in the first paragraph hereof, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GREGORY L. KENNEDY, SR., APPELLANT.
557 N.W.2d 33

Filed December 20, 1996. Nos. S-95-1275, S-95-1276.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the courts below.
2. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
3. **Sentences: Prior Convictions: Collateral Attack.** To attack a prior conviction in the context in which that prior conviction is not being used for the purpose of sentence enhancement constitutes an impermissible collateral attack.
4. **Motor Vehicles: Licenses and Permits: Revocation: Proof.** To establish a factual basis for a plea under Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993), the State must show that the defendant (1) operated a motor vehicle (2) while his driver's license had been revoked pursuant to § 60-6,196(2)(c).
5. ____: ____: ____: ____. All that is required to establish the necessary factual basis for the elements of the crime under Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993) is an inquiry of the prosecution, interrogation of the defendant, or examination of the presentence report.
6. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the District Court for Buffalo

County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals reversed.

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On July 4, 1988, Gregory L. Kennedy, Sr., was arrested for a third incident of driving while under the influence of alcohol or drugs (DUI). In accordance with a conviction on November 17, his license was revoked for 15 years.

On August 17, 1995, Kennedy was arraigned on three separate informations: case No. CR 95-55 (possession of a controlled substance); case No. CR 95-57 (count I: driving under revocation imposed for DUI; count II: obstructing a peace officer); and case No. CR 95-105 (driving under revocation imposed for DUI).

Kennedy and his counsel appeared again before the district court on September 1, 1995. Pursuant to a plea agreement, Kennedy pled no contest to the two counts of driving under revocation. In exchange for Kennedy's no-contest pleas on these charges, the State dismissed count II of case No. CR 95-57 and dismissed case No. CR 95-55.

The court advised Kennedy of his rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and established that Kennedy's pleas were voluntarily made. The deputy county attorney then provided the following factual basis for the two charges of driving under revocation:

> In case CR 95-55, if called to testify, members [of] the Buffalo County Sheriff's Office would indicate on June 17, 1995, that he was in contact with another individual who was walking in a ditch in Buffalo County. Upon questioning what he was doing, he said that he was waiting for a ride.

> At that point Mr. Kennedy drove up to the location driving another individual's vehicle. He told the officers that he was there to pick his friend up. At that time the officers ran his driver's abstract and confirmed their suspicions that he was driving under suspension at the time.
>
> The abstract shows a judgment on November 17, 1988, a withdrawal on that same date and Mr. Kennedy is not eligible until November 17th of the year 2003.
>
> All these events occurred in Buffalo County.
>
> And the second case case [sic] number 95-57 if called to testify, members of the Kearney Police Department would state on the date in question which is March 19, 1995, at approximately 1:55 a.m., he was conducting a routine parole [sic] activity when he observed a brown 1978 Pontiac Trans Am, Nebraska license 9 commercial 5666 northbound on Second Avenue in Kearney, Buffalo County, Nebraska. He observed that the vehicle had no—no taillights were illuminated. He then conducted a traffic stop of that vehicle near 32nd Street in Kearney, Buffalo County, Nebraska.
>
> Upon stopping the vehicle, he made contact with the driver—attempted to make contact with the driver and the driver exited the vehicle and began running away. It was a male subject. He pursued, eventually apprehended in the 3200 block of Second Avenue. The subject was identified as Mr. Kennedy, and his abstract was run with the same information that he's not eligible to drive until November 17, 2003, as a result of driving under the influence, third offense, conviction.

Kennedy did not disagree with the factual basis that was provided.

The court found that Kennedy knowingly, voluntarily, and intelligently entered his pleas and that an adequate factual basis had been established. Accordingly, Kennedy was found guilty.

A presentence investigation was then conducted. In a statement incorporated into the presentence investigation report, Kennedy admitted to knowingly driving without a license. The court sentenced Kennedy to 2 to 5 years' imprisonment on count I of case No. CR 95-57 and sentenced Kennedy to 3 to 5

years' imprisonment on case No. CR 95-105. The sentences were to run consecutively. Kennedy was awarded 4 days' credit for time previously served. Kennedy then timely appealed to the Nebraska Court of Appeals.

In a memorandum opinion filed July 24, 1996, the Court of Appeals found that the factual basis provided by the State in each of the cases failed to establish that Kennedy's prior conviction for his third-offense DUI was counseled or that Kennedy waived his right to counsel. In accordance with its findings, the Court of Appeals reversed Kennedy's convictions and remanded for further proceedings.

The State subsequently filed a petition for further review on August 22, 1996. In that petition, the State alleges that the Court of Appeals erred (1) by considering enhancement rules applicable to offenses committed under Neb. Rev. Stat. § 60-6,196(2)(c) (Reissue 1993) and applying them to license revocation offenses committed under § 60-6,196(6), and (2) in determining that the trial court had an insufficient factual basis to support Kennedy's plea and the court's finding of guilt. Pursuant to Neb. Ct. R. of Prac. 11E(5)a (rev. 1996), Kennedy was not entitled to present an oral argument before this court.

Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the courts below. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *State v. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996).

The State alleges, first, that the Court of Appeals erred in taking the enhancement rules applicable to offenses committed under § 60-6,196(2)(c) and applying those rules to license revocation offenses committed under § 60-6,196(6). We agree that the Court of Appeals improperly applied the enhancement rules pertinent to DUI to a case involving driving under revocation.

Kennedy pled no contest to a charge of violating § 60-6,196(6), which states that "[a]ny person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section shall be guilty of a Class IV felony." Section

60-6,196(2)(c) allows a court to revoke a driver's license for 15 years upon a third-offense DUI conviction.

We have recognized that § 60-6,196(2) involves the enhancement of penalties in cases involving DUI. See, generally, *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995); *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994). In the context of sentence enhancement for second- or third-offense DUI, we have specifically held that

> although proof of prior convictions to establish second- or third-offense charges of driving while under the influence of alcohol may be waived by the voluntary and intelligent admission of the defendant, there must nevertheless be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right. . . . *Absent such proof on the record, it is plain error for a court to use a defendant's prior convictions to enhance the defendant's sentence.*

(Emphasis supplied.) *Ristau*, 245 Neb. at 57, 511 N.W.2d at 87. We have specifically limited these provisions concerning the admission of evidence of prior convictions to enhancement proceedings such as those found in § 60-6,196(2).

The Court of Appeals in this case reversed the district court's findings because the factual basis provided by the State did not establish that Kennedy's prior conviction in 1988 for third-offense DUI (the offense that resulted in the 15-year revocation of his license) was counseled or that Kennedy waived his right to counsel at that time. In so holding, the Court of Appeals specifically applied the rules involving the use of prior convictions in enhancement proceedings to find an insufficient factual basis.

We have never extended these rules concerning admission of evidence of prior convictions beyond enhancement proceedings, and we decline to do so in this case. To attack a prior conviction in the context in which that prior conviction is not being used for the purpose of sentence enhancement constitutes an impermissible collateral attack. The Court of Appeals erred in evaluating the sufficiency of the factual basis in this case by

using rules applicable only in enhancement proceedings. This is not an enhancement proceeding, and the rules applicable to enhancement proceedings are not applicable here.

The State's second assignment of error alleges that the district court had a sufficient factual basis upon which to accept Kennedy's plea of no contest. We agree.

The State was required to establish as a factual basis for Kennedy's plea that Kennedy (1) operated a motor vehicle (2) while his driver's license had been revoked pursuant to § 60-6,196(2)(c). See, *State v. Blankenfeld*, 229 Neb. 411, 427 N.W.2d 65 (1988); *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985). All that is required to establish the necessary factual basis for the elements of the crime is an inquiry of the prosecution, interrogation of the defendant, or examination of the presentence report. *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *State v. Jones*, 214 Neb. 145, 332 N.W.2d 702 (1983) (holding that sufficiently detailed complaint; prosecutor's summarized facts accepted as true by defendant; finding that plea was intelligently and voluntarily made; and record at sentencing, including presentence report, supplied sufficient factual basis for judge). To provide constitutionally valid notice to Kennedy, the specific acts constituting the offense had to be set forth with sufficient certainty in the information to inform him of the charges he faced. See *Blankenfeld, supra*.

The record in this case demonstrates a sufficient factual basis. The complaints specified the acts constituting the offense of driving during the period in which Kennedy's license had been revoked pursuant to § 60-6,196(2)(c). The prosecutor summarized the facts involved in each count of driving under revocation, and Kennedy accepted those facts as true. The court made a finding that Kennedy's plea of no contest was entered knowingly, voluntarily, and intelligently. Additionally, the record during sentencing, including the presentence report, demonstrated that Kennedy was aware that his license had been revoked for 15 years pursuant to § 60-6,196(2)(c) and that Kennedy admitted to driving regularly after his license was revoked.

On the basis of this record, it is clear that everyone—Kennedy, Kennedy's counsel, the judge, and the prosecutor—

was aware that Kennedy's license had been revoked pursuant to § 60-6,196(2)(c), that he was charged as having violated § 60-6,196(6), and that there was a sufficient factual basis to support the court's determination in this case. Therefore, we find that the State's second assignment of error is also meritorious.

On appeal to the Court of Appeals, Kennedy also alleged that the sentences imposed by the trial court were excessive, essentially because Kennedy was not intoxicated and because his actions did not result in injury to people or property. The trial court sentenced Kennedy to 2 to 5 years' imprisonment on the first count, and 3 to 5 years' imprisonment on the second count, of driving under revocation. Nebraska statutes provide that the penalty for a Class IV felony is 0 to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105(1) (Reissue 1989).

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993). The record in this case indicates that Kennedy has a history of driving under revocation and that he continually violated court orders in this regard. He was sentenced within the statutory limit, and the record reveals no abuse of discretion.

Because we find that the rules regarding admission of prior convictions as a basis for enhancement do not apply to nonenhancement proceedings, that the record in this case presented a sufficient factual basis to support Kennedy's plea and the trial court's factual findings, and that the sentences imposed by the district court were not excessive, we reverse the decision of the Court of Appeals and affirm the sentence of the district court.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. JUAN TREVINO, APPELLANT.

556 N.W.2d 638

Filed December 20, 1996. No. S-96-322.

1. **Pleadings.** An issue presented regarding a denial of a plea in bar is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Pleadings: Final Orders.** A ruling on a plea in bar is a final order.
4. **Judgments: Final Orders: Records.** The rendition of an order takes place when the trial court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket; failing a notation on the trial docket, an order is rendered when some written notation of it is filed in the records of the court.
5. **Judgments: Records.** When a party knows of a ruling made in open court and noted on the trial docket, the date of the filing of the ruling with the clerk of the court is not material.
6. **Jurisdiction: Final Orders: Time: Appeal and Error.** In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order.
7. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.

Appeal from the District Court for Perkins County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

Michael J. Hansen, of Berry, Kelley, Hansen & Burt, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ., and CASSEL, D.J.

CAPORALE, J.

In *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988), we affirmed the convictions of the defendant-appellant, Juan Trevino, for various crimes, including the second degree murder of Marco Perez and the use of a firearm in the commission thereof. Upon Trevino's subsequent motion, the district court granted Trevino certain postconviction relief, the nature of which is not disclosed by the record. The record does reveal, however, that the plaintiff-appellee, State of Nebraska, then

ultimately recharged Trevino with the crimes specified above and that Trevino responded both by pleading guilty and with a purported plea in bar, all as more particularly set forth hereinafter. The district court overruled the plea in bar and, pursuant to verdict, adjudged Trevino guilty of the recharged crimes and sentenced him. Trevino asserts the district court erred in overruling his plea in bar to the second degree murder charge. We dismiss for lack of jurisdiction.

An issue presented regarding a denial of a plea in bar is a question of law. *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *State v. Swift, ante* p. 204, 556 N.W.2d 243 (1996).

So far as is material to this review, the information filed on August 11, 1995, after postconviction relief was granted, charged Trevino with the first degree murder of Perez and the use of a firearm in the commission thereof. On September 18, 1995, Trevino filed a written plea in bar sworn to before a notary public, asserting that as he had been previously acquitted of the first degree murder of Perez, the State could not recharge him with that offense. The plea in bar further asserted that by virtue of his acquittal of first degree murder, he had necessarily been acquitted of maliciously killing Perez and thus could not be recharged with second degree murder.

The district court's journal entry filed on September 25, 1995, notes that it had, on September 18, 1995, ruled, and the State conceded, that the State could not recharge Trevino with the first degree murder of Perez. The district court further ruled, however, that the State could charge Trevino with second degree murder and ordered it to amend its information to eliminate the charge of first degree murder and to include the charge of second degree murder. Trevino and the State stipulated that if the district court were to overrule the plea in bar, the ruling would be preserved for appeal until after trial.

On September 20, 1995, the State filed its operative amended information, which charged Trevino with the second degree murder of Perez and the use of a firearm in the commission thereof. On November 17, 1995, Trevino pled not guilty to

those charges and on January 9, 1996, orally purported to renew his earlier plea in bar. On the same day and in open court, the district court overruled the renewed plea in bar, and the parties thereupon renewed their stipulation purporting to preserve the ruling for appeal after trial. On the same day, the district court also noted in its trial docket the overruling of the plea, but did not file the notation with its clerk until February 7, 1996.

Because we lack jurisdiction, we do not concern ourselves with whether a criminal defendant may enter a plea in bar while a plea of not guilty remains on the record, *George v. State*, 59 Neb. 163, 80 N.W. 486 (1899), or whether the oral renewed plea in bar made at a time when the subject crime had not yet been charged satisfies the requirement of Neb. Rev. Stat. § 29-1818 (Reissue 1995) that such a plea be in writing and sworn to before some competent officer.

What is clear is that a ruling on a plea in bar is a final order, as such an order is defined in Neb. Rev. Stat. § 25-1902 (Reissue 1995). *Sinsel, supra*; *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995). It is also clear that the rendition of an order takes place when the trial court makes an oral pronouncement and accompanies that pronouncement with a notation on the trial docket; failing a notation on the trial docket, an order is rendered when some written notation of it is filed in the records of the court. See *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). Thus, at the latest, the time for filing a notice of appeal in this case began to run on January 9, 1996, not only because the ruling was made in open court and noted on the trial docket, but because when a party knows of a ruling made in open court and noted on the trial docket, the date of the filing of the ruling with the clerk of the court is not material. See *Sederstrom v. Wrehe*, 215 Neb. 429, 339 N.W.2d 74 (1983).

In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order. *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995); Neb. Rev. Stat. § 25-1912(1) (Reissue 1995). See, also, *State v. Flying Hawk*, 227 Neb. 878, 420 N.W.2d 323 (1988). That requirement was not obviated by the parties' stipulation to do otherwise, for the parties cannot confer subject matter jurisdiction upon a judicial tribunal by

either acquiescence or consent, *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989), nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties, *Kuhlmann v. City of Omaha, ante* p. 176, 556 N.W.2d 15 (1996), and *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996).

Trevino did not file his notice of appeal until March 5, 1996, more than 30 days after the overruling of the renewed plea in bar. We therefore have no jurisdiction in this appeal.

APPEAL DISMISSED.

MARIE SWOBODA, APPELLANT, V. MERCER MANAGEMENT COMPANY AND FIRST NATIONAL BANK OF OMAHA, TRUSTEE, APPELLEES.

557 N.W.2d 629

Filed January 3, 1997. No. S-94-756.

1. **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.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** After the party moving for summary judgment has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
4. **Negligence: Circumstantial Evidence: Proof: Proximate Cause.** While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the plaintiff's injury.
5. **Negligence: Proximate Cause: Juries.** An allegation of negligence is insufficient where the plaintiff asks the jury to guess the cause of an accident.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Douglas County, J. PATRICK

MULLEN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

William R. Johnson, Raymond E. Walden, and Charles F. Maxwell III, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Thomas J. Culhane and Linda W. Rohman, of Erickson & Sederstrom, P.C., for appellee Mercer.

WHITE, C.J., FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Marie Swoboda brought a negligence action against the defendants, Mercer Management Company and First National Bank of Omaha, seeking damages for personal injuries sustained when Swoboda fell while ascending a flight of stairs in a building then owned by First National and managed by Mercer Management. The district court granted summary judgment in favor of the defendants, and Swoboda appealed. The Nebraska Court of Appeals reversed the district court's judgment and remanded the cause. We granted further review.

SCOPE OF REVIEW

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. *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996).

FACTS

On February 2, 1992, Swoboda fell as she reached the top of a flight of stairs inside the Howard Street entrance to the Old Market Passageway in Omaha. At the time of the accident, Swoboda, who was 95 years of age, was accompanied by her granddaughter, Mary Stitt. The accident occurred as Swoboda and Stitt ascended a stairway leading from the lower level of the building to a set of large double doors at the Howard Street entrance. There were handrails on both sides of the stairway, but the handrail on the right side was inaccessible because five

large potted plants had been placed on the steps along the right edge of the stairway. As a result, Swoboda ascended the stairs using the left handrail, and Stitt assisted Swoboda by holding on to Swoboda's right arm.

The stairway and the landing inside the Howard Street entrance were made of the same type of red brick. The double doors leading out to Howard Street were 4 to 5 feet across the landing from the top of the stairway. The brick wall along the left side of the stairway extended 17 inches onto the landing and then gave way to an open corridor with a wooden floor. The wooden floor was elevated a few inches higher than the landing, and a brick ramp extended from the wooden floor down to the landing. This ramp protruded from the edge of the wall onto the landing at an angle perpendicular to the stairway. At the point closest to the stairs, the edge of the ramp began 17 inches from the leading edge of the landing. The ramp was 2½ inches high at the point where the edge of the ramp closest to the stairway began to protrude from the wall. The ramp sloped down until it became flush with the landing at a point 14 inches from the edge of the wall, and the ramp was constructed of the same brick as the landing and the stairway. There were no markings or other safety devices to differentiate the ramp from the landing.

As Swoboda and Stitt approached the last step before arriving at the landing, Stitt left Swoboda to cross the landing and open the door. When Stitt reached the door and looked back, she saw Swoboda sitting on the floor in a position perpendicular to the stairway. Swoboda was sitting on the wooden floor, and her legs extended down the ramp. Swoboda's left leg was broken. Swoboda does not remember the circumstances surrounding the fall, and there were no eyewitnesses. Stitt testified by deposition that prior to the fall, Swoboda appeared to be in relatively good physical health, she had no trouble walking, and she negotiated each step of the staircase without any sign of weakness.

Swoboda sued the defendants, alleging that the ramp extending onto the landing created a dangerous condition and was an unreasonable risk to Swoboda, a business invitee. Swoboda contended that the ramp created a change in floor level on the landing which caused her to trip and fall.

The affidavit of an architectural engineer stated that the ramp which extended onto the landing was in violation of the 1967 National Building Code requirement that the width of a landing shall be no less than the width of the stairs in which they occur. In addition, the stairway violated the code because it did not have an intermediate handrail, which was required for a stairway of that width.

The district court granted summary judgment because it found no nexus between the defendants' possible negligence and Swoboda's fall. The court found that the allegation that the defective ramp was the proximate cause of Swoboda's injuries was based solely on speculation and conjecture and that, therefore, no genuine issue of material fact existed.

The Court of Appeals reversed the district court's judgment, finding that while it was possible that Swoboda tripped over the top step, her path, her physical condition, and the position in which she was seen immediately after the fall supported a reasonable inference that the ramp was the proximate cause of Swoboda's fall. *Swoboda v. Mercer Mgmt. Co.*, 96 NCA No. 10, case No. A-94-756 (not designated for permanent publication). The Court of Appeals concluded that because Swoboda introduced evidence which presented a question of fact concerning the defendants' negligence and a reasonable inference that this negligence was the proximate cause of her injuries, the district court erred in granting summary judgment. *Id.*

ASSIGNMENT OF ERROR

In their petition for further review, the defendants allege that the Court of Appeals erred by reversing the district court's judgment.

ANALYSIS

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. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996); *John Markel Ford v. Auto-Owners Ins. Co.*,

249 Neb. 286, 543 N.W.2d 173 (1996). After the party moving for summary judgment has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Zion Wheel Baptist Church v. Herzog, supra.* 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. *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996).

The question is whether Swoboda has introduced evidence which presents a question of fact as to whether the defendants' negligence was the proximate cause of her injuries. While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendants' negligence was the proximate cause of Swoboda's injury. See *Hahn v. Weber & Sons Co.*, 223 Neb. 426, 390 N.W.2d 503 (1986). Swoboda was not required to eliminate all alternate theories regarding how the accident may have happened, but she was required to establish with a reasonable probability that the accident happened in the manner alleged in her petition. The practical difficulty with Swoboda's theory of how the accident occurred is that no one saw her fall and that Swoboda herself cannot remember how she fell.

We addressed a similar situation in *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989). Shibata's personal representative alleged that College View Properties (College View) was negligent in failing to keep a basement stairway lighted, failing to equip the stairway with a handrail, and other acts of negligence, which were alleged to have proximately caused Shibata's injuries and death. It was alleged that College View's negligence caused Shibata to fall down a flight of stairs and that she died as a result of such fall.

We held that the record failed to establish directly or inferentially that any act of claimed negligence on College View's part was the proximate cause of Shibata's death. A pathologist testified that one of many possible explanations for the incident was that Shibata suffered a pain in her chest, leaned against the

stairway door, and tumbled down the stairs. We concluded that the pathologist's statement was nothing more than conjecture and that it was just as possible that Shibata was going to the basement to retrieve an item and for reasons entirely independent of any one of College View's alleged acts of negligence, lost her balance and fell down the stairs. We held that the jury could only arrive at its conclusion regarding what actually occurred by guess, speculation, conjecture, or choice of possibilities.

An allegation of negligence is insufficient where the plaintiff asks the jury to guess the cause of an accident. See *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995). In *Richardson*, a grocery store customer slipped and fell on liquid soap that had spilled onto a store aisle. The evidence established that store employees were trained and instructed to regularly inspect the aisles for spillage. Nonetheless, the last inspection that could be firmly established occurred at 5:50 p.m. The slip occurred at about 7:30 p.m. The plaintiff insisted that the store was negligent because it failed to clean up a spill which it should have known existed.

We held that the evidence regarding the time the soap was spilled and the time the slip occurred was insufficient to permit the trial court to submit to the jury the question of whether the store was negligent. There was nothing in the record to make it more or less probable that the soap had been on the store floor for almost 2 hours or less than 2 minutes. Therefore, if the trial court in *Richardson* had given the case to the jury, the jury could have been left to merely speculate without any factual basis in the record for when the spill occurred. We concluded that such speculation was unacceptable. The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasonable mind to one conclusion rather than another. See *id.*

In the present case, a jury presented with the question of why Swoboda fell would be faced with at least two possibilities: (1) Swoboda tripped over the top step or (2) Swoboda tripped over the ramp. As in *Richardson*, the evidence in this case leaves the jury with the prospect of guesswork as to which of these possi-

bilities actually caused Swoboda's injuries. Because Swoboda has not produced evidence that the defendants' negligence was the proximate cause of her fall, she cannot recover. Therefore, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

LANPHIER, J., participating on briefs.

CAPORALE, J., not participating.

LANPHIER, J., dissenting.

I respectfully dissent. The two cases cited by the majority, *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989), and *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995), were not matters decided upon a motion for summary judgment. Both cases were decided upon motions for directed verdict after the close of all the evidence. In both *Richardson* and *Shibata*, the plaintiffs had the opportunity to discover and present the totality of evidence at trial. In the instant case, Swoboda's opportunity to have her case fully discovered and litigated is cut off. As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996); *Oliver v. Clark*, 248 Neb. 631, 537 N.W.2d 635 (1995); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988).

I also dissent for the reasons that Chief Justice White and I dissented in *Richardson v. Ames Avenue Corp., supra*. I believe the majority failed to give Swoboda the benefit of all reasonable inferences deducible from the evidence as required by precedent. It is well settled that 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. *Moulton v. Board of Zoning Appeals, ante* p. 95, 555 N.W.2d 39 (1996); *Polinski v. Omaha Pub. Power Dist., ante* p.

14, 554 N.W.2d 636 (1996); *State Farm v. D.F. Lanoha Landscape Nursery*, 250 Neb. 901, 553 N.W.2d 736 (1996); *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996). Swoboda is entitled to have the benefit of every reasonable inference, because the summary judgment was granted against her.

The evidence, with reasonable inferences in Swoboda's favor, showed that Swoboda walked around the Old Market in Omaha for 20 minutes, without incident, before entering the restaurant; that her ability to walk was impeded by neither clothing, dizzy spells, nor a cane; that she needed no assistance in walking; and that she ascended the stairs at the restaurant in a normal fashion.

Further, Swoboda's granddaughter, who accompanied Swoboda at the time of the injury, gave a lay opinion that her grandmother broke her leg when she tripped over the ramp alleged to be the defendants' defective condition. Importantly, it was the defendants' attorney who asked Swoboda's granddaughter for her opinion as to what caused Swoboda's fall. The granddaughter's testimony was unrefuted. Lay opinion testimony is competent evidence when it is rationally based on the witness' perceptions and helpful to a clear understanding of his or her testimony or the determination of a fact in issue. Neb. Evid. R. 701. The granddaughter's lay opinion, as the only evidence of causation in the record, fits these requirements.

Because all reasonable inferences which can be drawn from the evidence must be to the benefit of Swoboda and the majority fails to give Swoboda the benefit of those reasonable inferences, I am compelled to dissent. I would affirm the Court of Appeals' reversal of the district court's order sustaining the defendants' motion for summary judgment.

GERRARD, J., joins in this dissent.

HARRY SHERROD, APPELLEE, V. STATE OF NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

557 N.W.2d 634

Filed January 3, 1997. No. S-94-941.

1. **Tort Claims Act: Appeal and Error.** The trial court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81- 8,209 et seq. (Reissue 1994), will not be set aside unless such findings are clearly incorrect.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Tort Claims Act: Immunity: Waiver: Pleadings: Proof.** The exceptions found in Neb. Rev. Stat. § 81-8,219 (Reissue 1994) to the general waiver of tort immunity provided for in Neb. Rev. Stat. § 81-8,215 (Reissue 1994) are matters of defense which must be pled and proved by the State.
4. **Pleadings: Appeal and Error.** An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal.
5. **Negligence: Prisoners.** A jailer is bound to exercise, in the control and management of the jail, the degree of care required to provide reasonably adequate protection for his inmates.
6. **Presumptions.** A letter properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails.
7. **Trial: Presumptions: Rebuttal Evidence.** The presumption that a letter properly addressed, stamped, and mailed reached the addressee in the usual course of the mails may be rebutted with any relevant evidence; however, positive testimony by the addressee that a letter was not received simply raises a question of fact to be decided by the trier of fact.
8. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
9. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
10. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely the province of the fact finder.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Don Stenberg, Attorney General, and John R. Thompson for appellant.

Michael G. Goodman, of Cannon, Goodman, O'Brien & Grant, P.C., for appellee.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and REAGAN, D.J.

GERRARD, J.

In a suit filed pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994), the district court entered judgment in favor of appellee Harry Sherrod. It is from this judgment that the State of Nebraska appeals. We affirm.

FACTUAL BACKGROUND

While an inmate at the Nebraska State Penitentiary, Sherrod was beaten by his cellmate, Roland Palmer, with a 20-inch-long, 1-inch-diameter solid steel bar. Palmer had complained to Department of Correctional Services (DCS) personnel about how he and Sherrod were unable to get along and that he wanted to be moved to a different housing unit.

Palmer testified that he contacted his housing unit manager to see if he could be moved to a different housing unit. Palmer said he did not fully explain his problems with Sherrod to the unit manager, but, instead, simply let him know that he wanted a change of cellmates. Palmer said the unit manager instructed him to fill out an interview request, known as a kite, and mail it to Fred Britten, supervisor of the housing unit managers. Palmer testified that he completed a kite and mailed it to Britten through the prison mail system. This kite was dated October 19, 1989. In 1989, October 19 fell on Thursday. Palmer stated that he was not good with dates and that the date he actually mailed the kite could have been either October 18 or October 20. Furthermore, Palmer testified that he could not recall the day of the week he wrote and mailed the kite, only that it was toward the end of the week.

Although equivocal, Palmer admitted he put the kite in the mail hoping it would be acted upon during that week, and he knew the kite had to reach Britten by Friday in order for Britten to take any action before the end of the week. Palmer testified that he wrote the kite after talking to the unit manager and that he mailed the kite immediately after writing it. The unit manager testified that Palmer verbally requested a cell change "on or about October 19."

The trial testimony revealed that normally a kite placed in the prison mail system before 9 p.m. would be distributed early the next morning. Moreover, Britten agreed that if Palmer had mailed his kite on Thursday, Britten would have received it Friday morning. However, Britten testified that he did not recall reading Palmer's kite on Friday, October 20, nor did he have a specific recollection of any kites received that day. Britten said he believed he reviewed all distributions received October 20 on that same day. Britten admitted testifying in a deposition that he may have been too busy to have read all distributions received on October 20, if a prison disciplinary hearing was held that day. However, Britten testified at trial that after giving his deposition, he examined his records and found he did not attend a disciplinary hearing that day and therefore likely read all distributions received. Britten testified at trial that he first read Palmer's kite on Monday, October 23, the day after Palmer assaulted Sherrod.

In pertinent part, Palmer's kite stated:

> I would like to move to housing unit 2 with Duane Sanders. My present roomate [sic] (Sherrod) and I do not get along. He always eat [sic] my food and mess [sic] with my belongings without my permission. We are constantly at each others [sic] throats with insults and derogatory statements. *If this keeps up I'll be at his throat with something else.*

(Emphasis supplied.) Britten agreed that the last sentence of this kite constituted a threat to Sherrod and that in response, he would have had his staff locate Palmer, interview him to ascertain the reason for making the threat, and place Palmer in holding until all reports by staff made pursuant to their investigation had been evaluated. Moreover, Harold Clarke, director of the DCS, agreed that Palmer's kite constituted a threat which would require him to be separated and isolated immediately. Clarke testified that assuming Britten received Palmer's kite on Friday, October 20, he would have been negligent in not taking action that day.

On Sunday, October 22, after an early morning argument concerning whose turn it was to clean their cell, Palmer left his housing unit and crossed the prison yard, passing through a

locked gate attended by two guards, to the "weight pile," an area located near a guard tower where inmates lift weights. A video surveillance camera was mounted on the wall next to the tower and was pointed directly at the weight pile. Palmer testified that his sole purpose in going to the weight pile was to get the metal bar he would later use to assault Sherrod.

Palmer knew a certain weight machine had a metal bar which could be removed and said taking this metal bar was the fastest way he could think of to obtain a weapon to use against Sherrod. Upon arrival at the weight pile, Palmer went directly to the weight machine with the unsecured metal bar and pretended to work out, all the time watching the nearby guard tower. When the guards were not looking, he removed the metal bar and hid it under his bulky hooded sweatshirt and coat. Palmer immediately went back across the yard to his housing unit with his hands in his coat pockets, holding the metal bar concealed under his sweatshirt. Palmer said that he occasionally worked out with weights and that his usual workout lasted about 45 minutes; however, on this occasion, he was only at the weight pile for a couple of minutes.

Palmer did not encounter any guards on his way back to his housing unit, and the locked and guarded gate which he passed through going to the weight pile was now open and unguarded. Palmer said that he stood outside his housing unit for about 5 minutes waiting for the guard inside to become distracted or busy before going into the vestibule. Against prison policy, Palmer was allowed to enter his housing unit a short time prior to "doors"—a 10-minute period beginning 5 minutes before the hour when inmates could properly exit and enter their housing units.

Once inside, Palmer requested access to his cell. This whole time, Palmer never removed his hands from his coat pockets. Palmer said that when he entered his cell, Sherrod was sitting down watching television. When Sherrod stood up, Palmer withdrew the metal bar and struck Sherrod across the head, left shoulder, and left leg. Sherrod was able to wrestle Palmer to the ground, and the two were quickly separated by prison personnel.

Sherrod sustained a severe cut to his head, requiring stitches. Following the attack, Sherrod began experiencing severe

headaches and pain radiating down his spine and through his shoulder blades. Sherrod testified that prior to the attack he had headaches; however, these prior headaches were of a different kind, frequency, and quality than the severe headaches he suffered after the attack. Sherrod also stated that after the attack, he suffered from dizziness, blurred and double vision, memory loss, and tingling and loss of feeling in his extremities. Sherrod's headaches and radiating pain continued after his release from prison.

In prison, Sherrod received treatment for his headaches from a neurologist, Dr. Richard Sposato. Dr. Sposato testified that he reviewed cervical and head x rays, as well as an EEG taken of Sherrod, and concluded that all examinations showed no abnormalities. Dr. Sposato opined that Sherrod's headaches were posttraumatic or a continuation of migraine headaches which afflicted Sherrod prior to Palmer's attack.

After release from prison, Sherrod sought further medical treatment for his continuing headaches and was diagnosed as suffering from posttraumatic myofascial pain syndrome, a chronic sleep disorder, and aggravation of a formerly asymptomatic congenital defect, Chiari-1 malformation.

In his deposition offered at trial, Dr. Kip Burkman, a physical medicine and rehabilitation physician, testified that he began treating Sherrod for his headaches and associated pain in December 1992. Dr. Burkman diagnosed Sherrod as suffering from posttraumatic myofascial pain syndrome of the posterior neck and shoulder girdles. It was Dr. Burkman's opinion that the cause of this condition was Palmer's assault on Sherrod. In addition, Dr. Burkman testified that Sherrod's sleep disorder could also be attributed to myofascial pain syndrome.

When Sherrod's headaches and neck pain did not go away after treatment, Dr. Burkman prescribed an MRI. Results of the MRI disclosed the presence of a Chiari-1 malformation. A Chiari-1 malformation is a herniation of the cerebellum into the area of the first cervical vertebra at the end of the skull. This herniation puts pressure on the spinal cord and can cause tingling, numbness, pain in the back of the head and neck, and pain radiating down both arms, as well as other symptoms.

Dr. Charles Taylon, a neurosurgeon, testifying in behalf of Sherrod, agreed that Sherrod had a Chiari-1 malformation. Dr. Taylon offered the opinion that Sherrod's previously asymptomatic Chiari-1 malformation was aggravated and became symptomatic as a result of Palmer's attack. Furthermore, Dr. Taylon opined that a portion of Sherrod's sleep apnea could be attributed to his now symptomatic Chiari-1 malformation.

Pursuant to § 81-8,214, this matter was tried to the district court sitting without a jury. The trial court noted that the State is under a duty to exercise reasonable care to protect inmates from the intentional acts of other inmates and that the State failed in this instance to exercise reasonable care with respect to the assault upon Sherrod. The trial court found that the kite sent by Palmer either was or should have been received and read by Britten on the Friday before the assault and that failure to act in view of the threat contained in the kite constituted negligence.

In addition, the trial court found that the State was negligent in failing to adequately monitor the weight pile area and in failing to monitor Palmer's movements the day of the assault. Finally, the court concluded that the State was negligent in not recognizing the accessibility of a dangerous instrument such as a 20-inch-long, 1-inch-diameter solid steel bar not permanently affixed to weight-lifting equipment accessible to all inmates.

The trial court found Sherrod's injuries to be proximately caused by the State's negligence and entered judgment against the State in the sum of $198,145.38.

ASSIGNMENTS OF ERROR

The State asserts the district court erred in essentially two respects: (1) in not finding the acts or omissions complained of on the part of the DCS were shielded by the discretionary function exception to the State Tort Claims Act and (2) in finding that the State acted negligently and that Sherrod's injuries were proximately caused by the assault.

SCOPE OF REVIEW

The trial court's findings of fact in a proceeding under the State Tort Claims Act, § 81-8,209 et seq., will not be set aside unless such findings are clearly incorrect. *Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994).

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Allemang v. Kearney Farm Ctr., ante* p. 68, 554 N.W.2d 785 (1996).

ANALYSIS

Discretionary Function Exception.

Sherrod filed his negligence action against the DCS pursuant to the State Tort Claims Act, found at § 81-8,209 et seq. Section 81-8,215 provides: "In all suits brought under the State Tort Claims Act, the state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." However, § 81-8,219(1), the discretionary function exception to the act, provides that the act shall not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused . . . ."

Sherrod asserts that the discretionary function exception is an affirmative defense and that because the State did not plead it in its answer, raise it in its pretrial conference memorandum, or present evidence in support of the defense at trial, the State cannot now argue this issue for the first time on appeal. The State argues that the discretionary function exception is not an affirmative defense, but, rather, is an issue of jurisdiction. As such, this issue may be raised at any time in the proceedings. Moreover, the State argues that whether it may avail itself of the discretionary function exception is a question of law and that thus, this court is required to reach a conclusion independent of that of the trial court.

We hold that the exceptions found in § 81-8,219 to the general waiver of tort immunity provided for in § 81-8,215 are matters of defense which must be pled and proved by the State. " 'The essence of affirmative defenses is to concede that while the plaintiff otherwise may have a good cause of action, the cause of action no longer exists because some statute or rule permits defendant to avoid liability for the acts alleged.' " *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 332, 506

N.W.2d 686, 690 (1993) (quoting *Brown v. Ehlert*, 255 Mont. 140, 841 P.2d 510 (1992)).

Subject matter jurisdiction is conferred by the general waiver of tort immunity found in § 81-8,215. It then becomes a matter of defense to plead and prove that the cause of action no longer exists due to the applicability of an exception to the general waiver of immunity found in § 81-8,219. See, *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952); *State v. Zimring*, 52 Haw. 477, 479 P.2d 205 (1970). Cf., *Carlyle v. United States, Dept. of the Army*, 674 F.2d 554, 556 (6th Cir. 1982) ("[o]nly after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted . . . does the burden fall on the government to prove the applicability of a specific [exception]"); *Prescott v. U.S.*, 973 F.2d 696 (9th Cir. 1992) (recognizing that both *Stewart* and *Carlyle* place burden of proving exception to waiver of tort immunity with the government); *Autery v. U.S.*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) ("[a]ll circuits to address the issue have concluded that 'plaintiff bears the burden of persuading the court that it has subject matter jurisdiction under the [Federal Tort Claims Act's] general waiver of immunity,' but 'the burden of proving the . . . exception lies with the government'" (quoting *Prescott v. U.S., supra*)).

An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal. *Nebraska Pub. Emp. v. City of Omaha, supra*. The State failed to raise the issue of discretionary function in its answer or list it as a genuinely controverted issue of law or fact in its pretrial conference memorandum. Furthermore, an examination of the record as a whole does not allow this court to conclude that the State tried the issue of discretionary function to the trial court. Accordingly, the State may not litigate this issue for the first time on appeal.

Trial Court Finding of Negligence.

A jailer is bound to exercise, in the control and management of the jail, the degree of care required to provide reasonably adequate protection for his inmates. *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975); *O'Dell v. Goodsell*, 149 Neb.

261, 30 N.W.2d 906 (1948). The trial court found the DCS breached this duty in five respects.

First, the trial court found that the kite dated October 19, 1989, was or should have been received and read by Britten on Friday, October 20, and that failure to act on the threat contained in the kite constituted negligence. The State argues that there was no evidence presented which would allow the court to conclude that any member of the penitentiary staff actually saw Palmer's kite prior to the incident and that Palmer's testimony concerning when he wrote and mailed the kite is at best equivocal.

The findings of the trial court with respect to this issue are not clearly incorrect. A letter properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails. *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). This presumption may be rebutted with any relevant evidence; however, positive testimony by the addressee that a letter was not received simply raises a question of fact to be decided by the trier of fact. *Waite Lumber Co., Inc. v. Carpenter*, 205 Neb. 860, 290 N.W.2d 655 (1980).

Britten testified that an interview request deposited in the prison mail before 9 p.m. on Thursday would be sorted and distributed to the appropriate department for consideration on Friday. Clarke testified that a kite placed in the mail on Thursday would be distributed for consideration by Friday morning. Clarke conceded that had Britten read Palmer's kite, he would have been in violation of prison rules and procedures for not taking action on the threat.

Furthermore, Britten testified that his normal routine is to read all kites distributed to him in a given day and that on October 20, 1989, he did not recall reading Palmer's kite. Although in his deposition Britten stated he could have been busy on that particular occasion and not read his distributions, he qualified this statement at trial, claiming to have reviewed his records and discovered he was not too busy to read his mail on October 20 and that on that date, he does not recall receiving Palmer's kite.

Palmer's testimony as to when he placed his kite in the prison mail system is equivocal. Palmer admitted that he dated his kite October 19, 1989, but beyond this Palmer claimed to remember little else. Palmer testified that he was not very good with dates and that he could have written and mailed the kite on either October 18 or October 20. Sherrod's counsel confronted Palmer with a statement that he purportedly made in which Palmer claimed he had mailed the kite on Thursday because he wanted the kite to be acted upon before the weekend. Palmer denied having specifically said he mailed the kite on Thursday, but testified that when he mailed the kite, he hoped it would be acted upon before the weekend.

We are mindful that in reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996). Although Palmer did not mail his kite through the U.S. mail, Sherrod produced sufficient evidence in this case with respect to the reliability of the prison mail system to show that it should be accorded the same presumption given a letter properly addressed, stamped, and mailed through the U.S. mail. Britten's bare denial of receipt is insufficient to rebut this presumption as a matter of law.

In addition, notwithstanding Palmer's equivocations, there was sufficient evidence to allow the trial court to conclude that Palmer had properly mailed his kite on October 19, 1989. Moreover, the trial court addressed how it viewed Palmer's equivocations when in its order the court wrote, "Palmer's 'uncertainty' as to dates is unconvincing," and "Although the 'kite' is dated October 19, 1989, Palmer testified that he was 'not sure' whether the date was accurate (apparently having second thoughts with respect to his recollection related to counsel several days previous to the trial) but he did place it in the mail immediately."

The State asserts that even if Britten received Palmer's kite on Friday, he had no duty to read the kite that day and that without Britten's reading the kite, Palmer's attack on Sherrod is not

reasonably foreseeable. However, Britten initially testified that he, in fact, read all of his distributions on October 20, 1989, but did not recall whether Palmer's kite was one of those distributions. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996). Since the trial court resolved the issue of whether Britten received Palmer's kite on Friday against the State, in light of Britten's admission, there was sufficient evidence to support the conclusion that Britten read Palmer's kite on Friday, but failed to act.

Accordingly, the trial court was not clearly incorrect in finding that the State either knew or should have known of Palmer's threat to Sherrod. The State admits that had it known of Palmer's threat to Sherrod, it would have been negligent to not immediately separate the cellmates and begin an investigation. Thus, the finding of negligence on the part of the State in this regard is supported by sufficient competent evidence.

The remaining four findings of negligence by the trial court center on the State's duty of reasonable care with respect to security within the penitentiary. Specifically, the trial court found the State was negligent in (1) failing to adequately monitor the weight pile, (2) failing to adequately monitor Palmer's movements within the yard, (3) allowing Palmer to return to his housing unit outside the "doors" period, and (4) failing to recognize that a 20-inch-long, 1-inch-diameter solid steel bar not permanently affixed to a weight machine would be used as a weapon by an inmate.

Having determined that the district court was not clearly incorrect in finding negligence with respect to the State's failure to act when it knew or should have known of Palmer's threat concerning Sherrod, we conclude that it is unnecessary to determine whether the district court was clearly incorrect with respect to any of its other findings of negligence.

Trial Court Finding of Proximate Cause.

Finally, the State asserts that the injuries Sherrod now complains of were not proximately caused by Palmer's attack. In support of this assertion, the State contends that the record

reflects Sherrod complained of headaches long before Palmer's attack and that the physician who treated Sherrod after his injuries, Dr. Sposato, was of the opinion that Sherrod's current symptoms were not caused by Palmer's attack. Instead, Dr. Sposato opined that Sherrod's current symptoms were caused by his employment in the meatpacking industry subsequent to his release from prison.

On the other hand, Dr. Burkman testified that Sherrod's post-traumatic myofascial pain syndrome resulted from the attack Sherrod suffered in prison. Dr. Taylon was of the opinion that Sherrod's previously asymptomatic Chiari-1 malformation was aggravated and became symptomatic as a result of the prison assault.

In essence, the State asks this court to give less weight to Sherrod's experts, Drs. Burkman and Taylon, and more weight to its expert, Dr. Sposato, than did the trial court. This we will not do. Determining the weight that should be given expert testimony is uniquely the province of the fact finder. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). There was clearly sufficient evidence to support the trial court's finding that Sherrod's injuries now complained of were a result of the assault in prison.

CONCLUSION

Finding no merit in the State's assignments of error, we affirm the judgment of the district court.

AFFIRMED.

FAHRNBRUCH, J., not participating.

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

557 N.W.2d 641

Filed January 3, 1997. No. S-94-988.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Obscenity: Evidence.** While a jury may ascertain the sense of the average person, applying contemporary community standards without the benefit of expert evidence, a defendant in a criminal obscenity case nonetheless has a right to introduce evidence pertaining to the community standard.
3. **Rules of Evidence.** Where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
4. **Trial: Expert Witnesses: Appeal and Error.** There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous.
5. **Expert Witnesses.** Whether one qualifies as an expert depends on the factual basis or reality underlying the witness' title or claim to expertise.
6. **Trial: Evidence: Records: Appeal and Error.** The erroneous admission of evidence in a bench trial of a law action, including a criminal case, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings; in such case, reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.

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

Don Stenberg, Attorney General, and James H. Spears for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

This declaratory judgment action brought by the plaintiff-appellee, Main Street Movies, Inc., against the defendant-appellee, Michael Wellman, County Attorney of Sarpy County, Nebraska, seeks a determination as to whether certain so-called "adult" videotaped movies, explicitly depicting a variety of sexual acts, offered for sale and rental to the public are criminally obscene. The remaining appellees, TV Cats, Inc.; Vichaty, Inc.; and Movietime, Inc., intervened as plaintiffs, and the appellant, State of Nebraska ex rel. Don Stenberg, Attorney General, intervened as a defendant. Following a bench trial, the district court entered a judgment declaring that the six movies here at issue were not criminally obscene. In challenging that ruling before the Nebraska Court of Appeals, the State asserted, among other things, that the district court erred in its evidential rulings. We thereafter granted the State's petition to bypass the Court of Appeals and now reverse the district court's judgment and remand the matter for further proceedings.

An action for declaratory judgment is sui generis, and whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. See *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989). As the issue here is whether the movies in question are obscene in the sense that selling or making them available for rental would violate a criminal statute, we review this matter as a criminal case at law.

The plaintiffs collectively own seven stores in Sarpy County and allege that they are engaged in the sale and rental to the public of sexually explicit, videotaped movies. Neb. Rev. Stat. § 28-813 (Reissue 1995) makes it unlawful and a Class I misdemeanor for one to, among other things, possess "with intent to sell [or] rent . . . any obscene material . . . ." This action was brought under the provisions of Neb. Rev. Stat. § 28-820 (Reissue 1995), which, among other things, permits one having a "genuine doubt" as to the obscenity of material to bring a declaratory judgment action against the chief law enforcement officer of the area in which the material is sold or rented.

In the fall of 1991, the Attorney General's office sent letters to the Sarpy County video stores, stating that the Attorney

General had received a complaint about such stores distributing obscene material and that legal action would be brought against stores that continued to distribute such material. The Attorney General further encouraged Wellman to bring an action against various video stores in Sarpy County. While Wellman chose not to do so, the Attorney General was prepared to prosecute.

Neb. Rev. Stat. § 28-807(10) (Reissue 1995) provides:

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

Neb. Rev. Stat. § 28-814(2) (Reissue 1995) declares that

> the guidelines in determining whether a work, material, conduct, or live exhibition is obscene are: (a) The average person applying contemporary community standards would find the work taken as a whole goes substantially beyond contemporary limits of candor in description or presentation of such matters and predominantly appeals to the prurient, shameful, or morbid interest; (b) the work depicts in a patently offensive way sexual conduct specifically referred to in sections 28-807 to 28-829; (c) the work as a whole lacks serious literary, artistic, political, or scientific value; and (d) in applying these guidelines to the determination of whether or not the work, material, conduct or live exhibition is obscene, each element of each guideline must be established beyond a reasonable doubt.

Called as a witness by the plaintiffs, Wellman testified that he began working in the Sarpy County Attorney's office in 1975, was the chief deputy county attorney from 1977 until 1990, and has been the Sarpy County Attorney since April 1990. Although adult video movies have been available in Omaha since the late 1970's, between 1978 and 1990 the Sarpy County Attorney's

office received only one complaint, which came from an Iowa resident.

Around 1990, Wellman actively sought the views of Sarpy County residents concerning the sale and rental of adult videos and related matters. He talked with people he met and asked them their views regarding the possible prosecution of video stores which sell and rent adult videos, and discussed this issue with people who called his office on other matters. On the basis of those conversations, Wellman testified over objection that a fairly substantial majority of people in Sarpy County believes that the government should not be "sticking its nose" into people's living rooms and that the residents of Sarpy County are opposed to material depicting sexual violence and sex with children, do not want adult material available to children, do not want adult-only bookstores and theaters or other adult-only places, but do not mind if video stores sell or rent adult material as a side business.

Among other claims of evidential error, the State asserts that the district court wrongly received and relied upon Wellman's opinion as to the relevant contemporary community standard. While a jury may ascertain the sense of the average person, applying contemporary community standards without the benefit of expert evidence, *Smith v. United States*, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977), and *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974), we have held that a defendant in a criminal obscenity case nonetheless has a right to introduce evidence pertaining to the community standard, *State v. Little Art Corp.*, 189 Neb. 681, 204 N.W.2d 574 (1973), *vacated on other grounds* 414 U.S. 992, 94 S. Ct. 345, 38 L. Ed. 2d 231.

Where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994). Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact . . . to determine a fact in issue, a witness qualified as an expert

by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). Cf. *Palmer v. Forney*, 230 Neb. 1, 429 N.W.2d 712 (1988) (trial judge's ruling regarding admissibility of expert testimony will not be reversed absent abuse of discretion). However, whether one qualifies as an expert depends on the factual basis or reality underlying the witness' title or claim to expertise. See *Reynolds, supra.*

Under the circumstances, Wellman's testimony does nothing more than explain how he determined in his own mind not to prosecute and constitutes nothing more than an expression of his individual sense of the contemporary community standard. Wellman's knowledge, skill, experience, training, and education as a prosecutor do not qualify him as an expert in determining public opinion. See, *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996) (not error to exclude testimony of witness not shown to be expert in crime scene reconstruction); *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986) (error to admit result of test not shown to demonstrate that which test is claimed to demonstrate). It was therefore clearly erroneous for the district court to have received Wellman's opinion as to the contemporary community standard.

The erroneous admission of evidence in a bench trial of a law action, including a criminal case, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings; in such case, reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992). Here, the district court expressly noted that Wellman's testimony "provided significant insight as to the [contemporary community] standard and [the district court finds] his testimony has substantial probative

value." We can only conclude therefrom that the district court resolved the factual issue of what constitutes the contemporary community standard in at least partial reliance on Wellman's testimony.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

R.H. MELICK, PERSONAL REPRESENTATIVE OF THE ESTATE OF ELVERA LAURSEN, DECEASED, APPELLANT, V. PETE R. SCHMIDT AND UNITED MATERIALS INCORPORATED, A NEBRASKA CORPORATION, APPELLEES.
TRAVIS LEISY, APPELLANT, V. PETE R. SCHMIDT AND UNITED MATERIALS INCORPORATED, A NEBRASKA CORPORATION, APPELLEES.
BECKY LEISY, APPELLANT, V. PETE R. SCHMIDT AND UNITED MATERIALS INCORPORATED, A NEBRASKA CORPORATION, APPELLEES.

557 N.W.2d 645

Filed January 3, 1997. Nos. S-94-1173, S-94-1174, S-94-1175.

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. ____. 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.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Evidence: Proof.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. The opposing

party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.

6. **Summary Judgment: Proof.** In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition.
7. **Motor Vehicles: Negligence.** A left-turning motorist has the duty not to turn unless and until the movement can be made with reasonable safety. One turning left must exercise reasonable care under all of the circumstances.
8. ____: ____. The exercise of reasonable care includes the requirement that a left-turning motorist maintain a proper lookout by looking both to the front and to the rear before executing a left turn between intersections. The observations must be made immediately before the impending movement; otherwise, the observation would be completely ineffective for the accomplishment of the purpose intended.
9. **Motor Vehicles: Highways: Negligence.** If a driver who is turning left across a highway fails to look at a time when looking would have been effective, he or she is negligent as a matter of law. However, if the driver looks but does not see an approaching automobile because of unusual conditions or circumstances, the question of the driver's negligence is usually one for the jury.

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

Terry Curtiss, of Curtiss, Moravek & Curtiss, P.C., for appellants.

James L. Zimmerman, of Sorensen & Zimmerman, P.C., and Stacy C. Nossaman-Petitt, of Nossaman Petitt Law Firm, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Plaintiffs, Travis Leisy, Becky Leisy, and R.H. Melick, the personal representative of the estate of Elvera Laursen, appeal the granting by the Box Butte County District Court of motions for summary judgment in favor of defendants, Pete R. Schmidt and United Materials Incorporated.

In these consolidated proceedings, plaintiffs seek damages sustained in a July 24, 1990, motor vehicle accident. The accident occurred on a highway north of Alliance, Nebraska, and involved a tractor pulling a baler, driven by Travis Leisy, and a semi-trailer truck hauling gravel, driven by Schmidt. Travis

Leisy's tractor was attempting a left turn into a driveway at the Laursen farmstead when it was struck from behind by the semi-trailer truck, which was attempting to pass. Actions were filed by Travis Leisy for personal injuries; by Becky Leisy, the mother of Travis Leisy and the owner of the baler, which was destroyed in the accident; and by Melick, as personal representative of the estate of Elvera Laursen, the owner of the tractor, which was also destroyed in the accident. Elvera Laursen, who was Travis Leisy's grandmother, died after the accident, but before suit was filed for the damages.

Defendants were Schmidt and United Materials, the owner of the semi-trailer truck and employer of Schmidt. Defendants deposed Travis Leisy and moved for summary judgment, arguing that Travis Leisy had demonstrated contributory negligence to a degree greater than slight and was therefore barred from recovery as a matter of law. Defendants further asserted that Travis Leisy's contributory negligence was imputed to the other plaintiffs and also barred them from recovery. The trial court granted the motions. Plaintiffs appealed, alleging that the trial court erred in finding Travis Leisy guilty of contributory negligence greater than slight as a matter of law for turning his vehicle left after duly signaling the turn and checking for traffic to the rear; in finding that Travis Leisy should not have turned left without first pulling his tractor off the road and turning the tractor to get a safe view of the road behind him; in finding that Travis Leisy was the proximate cause of the accident; in finding that there was no genuine issue of material fact given the circumstances of the accident and the inferences drawn from them when considered in the light most favorable to plaintiffs; in imputing the negligence, if such existed, of Travis Leisy to Elvera Laursen, now deceased, since the evidence completely failed to demonstrate an agency relationship, family purpose relationship, or joint venture arrangement. We removed the causes from the Court of Appeals docket pursuant to our power to regulate the dockets of the appellate courts. We reverse the trial court's judgments and remand the causes for a new trial.

BACKGROUND

Travis Leisy, in his deposition and in his affidavit in opposition to defendants' motions for summary judgment, stated that

on July 24, 1990, he was driving an International 1086 tractor that belonged to Elvera Laursen, pulling an International 8460 round baler that belonged to Becky Leisy north on Highway 385 about 3½ miles north of Alliance. He had just completed a custom-baling job and was returning to the Laursen farm. Travis Leisy was paid a percentage of the work actually done in such situations. He was driving the tractor with its signal flashers on, and the baler had a slow-moving-vehicle sign on its rear. Travis Leisy was in the northbound lane on the east side of Highway 385 with the tractor and baler "as far on to the shoulder as [he] could get." Just prior to the turn-in to the Laursen farm, Highway 385 descends into a valley. The turn-in to the Laursen farm is at the crest of the hill ascending out of the valley. Past the turn-in to the Laursen farm, the ground is flat for approximately 2 miles. There is no turnoff of any kind to the right ascending the hill or at the crest of the hill. Travis Leisy stated, "The hill is not marked with a no-passing zone, but should be." Travis Leisy stated that he normally travels on the right shoulder in that area "because people pass the slow moving machinery [he] operate[s] . . . without being able to see the oncoming south bound traffic at and over the crest of the hill."

As Travis Leisy neared the turn-in to the Laursen farm, which was to the west of Highway 385 (a left-hand turn), he turned on the signal for a left-hand turn. He stated that he checked the turn signals before he left the field the day of the accident.

Travis Leisy stated that he checked for traffic behind him as he started his turn. He stated that he saw a small red car behind him and halted his turn to let the car pass. The car then passed him. He did not see any other vehicles, but is unable to recall if he looked to the rear before he started for the second time to make the left-hand turn.

Travis Leisy then began to turn left into the driveway of the Laursen farm. A truck driven by Schmidt, and owned by United Materials, struck the baler and the left rear wheel of the tractor when the front of the tractor crossed onto the west (left) shoulder of the turn-in.

The first time Travis Leisy remembers seeing the truck was when it was about a foot away from hitting him. He does not

recollect the collision; after seeing the front of the truck, his next recollection was of being placed in an ambulance. Travis Leisy stated that the slope of the hill and the baler blocked his vision of the truck coming up the hill. On flat ground, the baler would not have blocked the vision of a semi-trailer truck behind him in his lane.

The trial court examined Travis Leisy's deposition and his affidavit in opposition to the motions for summary judgment to determine if, under the holding of *Petersen v. Schneider*, 153 Neb. 815, 46 N.W.2d 355 (1951), *modified* 154 Neb. 303, 47 N.W.2d 863, Travis Leisy had failed, as a matter of law, to exercise reasonable care for his own safety and that of others by failing to look to the front and rear prior to turning. The court granted defendants' motions for summary judgment as to all of the plaintiffs. It found that Travis Leisy's deposition demonstrated that he did not look to the rear before he made his turn and that if he did so, he looked in a negligent manner. The court stated that Travis Leisy should have pulled off the road and turned his tractor to get a safe view of the road behind him before turning. The court found that Travis Leisy was the proximate cause of the accident and that his failure to see the truck before turning amounted to negligence as a matter of law.

The court also found that Travis Leisy was in the employ of Becky Leisy and that he was in the scope and course of his employment at the time of the accident. The court stated that Travis Leisy's negligence was imputed to Becky Leisy and that there was no genuine issue of material fact in that regard, so that summary judgment as to Becky Leisy was also required.

Finally, the court found as to the estate of Elvera Laursen that Travis Leisy was employed by Richard Laursen, the son of Elvera Laursen; that Richard Laursen was farming Elvera Laursen's farm; and that the tractor, which was owned by Elvera Laursen, was used in the farming operation. Therefore, Travis Leisy was Elvera Laursen's agent, and his negligence was imputed to her and her estate. Again, based on this imputed contributory negligence, the court found that there was no genuine issue of material fact and granted defendants' motions as a matter of law.

ASSIGNMENTS OF ERROR

In their briefs, all of the plaintiffs assigned the following as errors:

1. The District Court erred in finding Plaintiff Travis Leisy guilty of contributory negligence greater than slight as a matter of law for turning his vehicle left after duly signaling the turn and checking for traffic to the rear.

2. The District Court erred in finding that Plaintiff [Travis Leisy] should have not turned left without first pulling his tractor off the road and turning his tractor to get a safe view of the road behind him.

3. The District Court erred in finding that Travis Leisy was the proximate cause of the accident.

4. In granting Defendants' Motion[s] for Summary Judgment the District Court erred in finding there was no genuine issue of material fact given the circumstances of the accident and the inferences drawn from them when considered in the light most favorable to the Plaintiff[s].

Additionally, the personal representative of the estate of Elvera Laursen assigned the following as error:

5. The District Court erred in imputing the negligence, if such existed, of Travis Leisy to Elvera Laursen, now deceased, as the evidence completely failed to demonstrate an agency relationship, family purpose relationship or joint venture arrangement.

STANDARD OF REVIEW

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. *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996); *Lockard v. Nebraska Pub. Power Dist.*, 249 Neb. 971, 546 N.W.2d 824 (1996).

ANALYSIS

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. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

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. *Lockard v. Nebraska Pub. Power Dist., supra.*

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Kocsis v. Harrison, supra.* A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996). The opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996).

In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial to prove the allegations contained in his or her petition. *Roubideaux v. Davenport*, 247 Neb. 746, 530 N.W.2d 232 (1995).

Applying these standards to the facts of this case, we conclude that genuine issues of material fact exist as to the existence of both Travis Leisy's and Schmidt's negligence and the degree of negligence in comparison.

The statute applicable to this cause of action is Neb. Rev. Stat. § 25-21,185 (Reissue 1995), which provides that in a cause of action for negligence accruing before February 8, 1992, the plaintiff's negligence will not bar recovery if his or her negligence is only slight and the defendant's negligence is gross in comparison.

Therefore, in order for defendants to be entitled to summary judgment in this case, they have the burden of proving, under

the facts viewed most favorably to plaintiffs, that (1) Travis Leisy's contributory negligence was more than slight as a matter of law or (2) Schmidt's negligence was not gross in comparison to Travis Leisy's negligence as a matter of law. See *Harrison v. Seagroves, supra.* If reasonable minds might draw different conclusions from the facts thus resolved, the issues of negligence and contributory negligence are for the jury. *Parmenter v. Johnson*, 213 Neb. 725, 331 N.W.2d 263 (1983). We find that several different conclusions can be drawn from the evidence presented in this case.

Regarding Travis Leisy's alleged negligence, he testified that he is not certain whether, after the small red car passed him, he checked to the rear for other vehicles. Yet, he also stated that he saw no other traffic after the small red car passed him. This court has held that a left-turning motorist has the duty not to turn unless and until the movement can be made with reasonable safety. *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). One turning left must exercise reasonable care under all of the circumstances. *Id.*

> The exercise of reasonable care includes the requirement that a left-turning motorist maintain a proper lookout by looking both to the front and to the rear before executing a left turn between intersections. [Citation omitted.] ". . . The observations must be made immediately before the impending movement; otherwise . . . the observation would be completely ineffective for the accomplishment of the purpose intended."

Id. at 188, 525 N.W.2d at 635.

If a driver who is turning left across a highway fails to look at a time when looking would be effective, he or she is negligent as a matter of law. See *id.* However, if the driver looks but does not see an approaching automobile because of unusual conditions or circumstances, the question of the driver's negligence is usually one for the jury. See *id.*

Travis Leisy testified that he looked to his rear and saw a small red car attempting to pass and that he saw no traffic after the small red car. He also testified that he was turning left at the crest of a hill ascending from a valley, a hill which could obstruct his view of traffic approaching in the same lane from

the rear. Finally, he testified that his tractor had reached the other side of the highway and was struck in the rear by the semi-trailer truck.

We find that reasonable minds could draw different conclusions from this evidence. For example, one could conclude that Travis Leisy failed to look when it would have been effective to do so. On the other hand, one could conclude that Travis Leisy's failure to see the truck approaching was due to the obstructed view and that the truck pulled out to pass at the last second.

Defendants' motions for summary judgment, arguing that Travis Leisy demonstrated contributory negligence to a degree greater than slight and was therefore barred from recovery as a matter of law, were incorrectly granted. In so ruling, we need not reach defendants' further assertion that the contributory negligence was imputed to the other plaintiffs and also barred them from recovery.

CONCLUSION

In conclusion, we find that the evidence in this case is such that reasonable minds could draw different conclusions and inferences from the evidence as to the negligence of Schmidt and the contributory negligence of Travis Leisy, and as to the degree thereof, when each is compared with the other. In such a case, the issue must be submitted to the jury. See, *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996); *Schmidt v. Orton*, 190 Neb. 257, 207 N.W.2d 390 (1973).

For the reasons stated above, we reverse the district court's judgments and remand the causes for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

ERIK OLSON, APPELLANT, V. SANITARY & IMPROVEMENT DISTRICT NO. 177, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

557 N.W.2d 651

Filed January 3, 1997. No. S-95-080.

1. **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.

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. **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 causation, and damages.
4. **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.
5. **Negligence: Proof: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must prove that the defendant had actual knowledge that a danger existed and that the defendant had a constructive intention as to the likely consequence.
6. **Negligence: Waters.** A body of water, natural or artificial, does not constitute a concealed, dangerous condition.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge. Judgment of Court of Appeals affirmed.

Timothy K. Kelso, of Rasmussen Mitchell & Kelso, and James E. Harris, of Harris, Feldman, Stumpf Law Offices, for appellant.

Patrick G. Vipond and Raymond E. Walden, of Kennedy Holland DeLacy & Svoboda, for appellee SID No. 177.

Terry K. Gutierrez, of Gast, Ratz & Gutierrez, P.C., for appellee Riverside Lakes Recreational Cooperative Assn.

Milton A. Katskee, of Katskee, Henatsch & Suing, for appellee Larry Tighe.

Thomas A. Otepka and Susan E. Fieber, of Gross & Welch, P.C., for appellee Charles Varvel.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

The plaintiff dove off a dock into shallow water and broke his neck. The trial court entered summary judgment in favor of the

defendants. The Nebraska Court of Appeals affirmed, and we granted the plaintiff's petition for further review.

SCOPE OF REVIEW

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. *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996).

FACTS

On July 4, 1992, the plaintiff, Erik Olson, and his friend Scott Weidner went to Scott's grandparents' house at Riverside Lakes. Weidner's grandparents, Stanley and Myrtle Miller, lived in a townhome consisting of four private units. Each unit had its own section of beach, and every two units shared a stairway to the beach and a boat dock.

The dock located between the Millers and their closest neighbor, Jim Twiss, was for the use of those two units. The defendants Larry Tighe and Charles Varvel owned the two west units, and they, likewise, shared a dock. It was the residents' understanding that these docks were privately owned by the two units to which they corresponded and that one needed explicit permission to use another's dock.

The lake on which the Millers lived was owned by the defendant Sanitary & Improvement District No. 177 (SID 177). The lake was guarded by a gate which had a "no trespassing" sign stating that the lake was for the use of residents only. The residents of the lake were not required to pay a fee for use of the lake, but they paid real estate taxes to SID 177 which were used for the maintenance of the lake. The rules and regulations promulgated by SID 177 provided that persons who were neither residents nor guests of residents were to pay a fee to use the lake.

Olson, who was 21 years old at the time of the accident, had been going to the Millers' townhome since he was about 10

years old. He lived across the street from two of the Millers' grandchildren, Scott and Ted Weidner, and had been at the lake more times than he could count. On July 4, 1992, Olson, the Weidner brothers, and other friends went to the Millers' townhome to eat and enjoy the summer, lake activities.

Throughout the afternoon, Olson and other guests played volleyball, and in between games, Olson and the Weidner brothers dove off the Tighe-Varvel dock. Before doing so, however, Olson and Scott Weidner, in accordance with their customary practice, had tested the depth of the water to see where it was safe for diving. Olson testified he knew that there were some areas around the dock which were unsafe. For instance, Olson was aware that it was unsafe to dive directly off the end of the dock or to dive to the east of the dock.

Olson and Scott Weidner were able to locate a "target area" off the southwest corner of the Tighe-Varvel dock. Olson estimated that this area of greater depth was approximately 8 to 12 feet in diameter, but the precise parameters of the diving area were not clearly defined. Olson attributed this area of greater depth alongside the dock to "propwash," an area where the sand has been moved by a boat starting from a dead stop.

Olson successfully dove off the dock approximately five times that day. On the sixth dive, however, Olson dove somewhat east of the target area in an attempt to miss Scott and Ted Weidner, who had immediately preceded him. Olson hit his head on the bottom of the lake and broke his neck. He now suffers permanent quadriplegia.

At the time of the accident, Tighe was out of town and unaware that the Millers' grandchildren and their guests were planning to use the dock. Although Tighe had once granted permission for the Millers' granddaughters to use the dock for sunbathing, Tighe testified that he had never given the Millers "blanket permission" for their guests to use the dock. Tighe testified at his deposition that he had never seen anyone swimming or diving near his dock.

Varvel had also given the Millers' guests permission, on occasion, to use the Tighe-Varvel dock for sunbathing. However, Varvel did not give anyone blanket permission to use the dock, nor was there any evidence that he had given

the Millers permission to use the dock on the day of the accident. Varvel testified he was unaware that anyone had ever used the dock for diving or jumping. He did not see Olson and the others using the dock on July 4, 1992, because he was inside preparing for his guests, who were to arrive late in the afternoon.

Following the accident, Olson sued the owners of the units corresponding to the Tighe-Varvel dock and, in addition, sued SID 177 and the defendant Riverside Lakes Recreation Association, an unincorporated homeowners' association. Olson alleged that the defendants were, jointly and severally, negligent in failing to ascertain and maintain sufficient and safe water depth; in failing to warn users of the lake, in general, and the dock, in particular, of the dangerous and shallow condition of the lake surrounding the end of the dock; and in constructing or allowing to be constructed a hazardous, dangerous structure on or in the lake in the form of a dock without providing for protection from or warning of the dangers of use thereof.

Olson further alleged that Riverside Lakes Recreation Association, Tighe, and Varvel were jointly and severally negligent (1) in failing to enforce reasonably safe rules and regulations relating to the use of the lake and the docks; (2) in failing to promulgate and publish rules relating to jumping or diving from the docks; (3) in failing to warn users of the docks of the dangers of diving therefrom by conspicuously posting reasonably safe safety rules and regulations pertaining to diving; and (4) in adopting, publishing, and posting safety rules and regulations which did not include warnings for the protection of swimmers and divers.

Summary judgment was granted against Olson as to all of the defendants. The trial court held, inter alia, that at best, Olson had presented evidence that he was a licensee and that the only duty of the occupier to a licensee is to give notice of traps and concealed dangers, which a body of water is not. The trial court also held that Olson's assumption of risk and contributory negligence in the amount of more than 50 percent barred recovery as a matter of law.

ASSIGNMENTS OF ERROR

Olson appealed the trial court's judgment to the Court of Appeals, where he made four assignments of error: The trial court erred (1) in sustaining the defendants' motions for summary judgment, (2) in finding Olson to be a mere licensee, (3) in finding that Olson had assumed the risk of his activities, and (4) in finding that Olson had been contributorily negligent in an amount greater than 50 percent. The Court of Appeals affirmed, and we granted Olson's petition for further review.

In his petition for further review, Olson argues that *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996), in which we held that a student attending a school-sponsored football clinic was an invitee, dictates that Olson be deemed an invitee and not merely a licensee. Therefore, Olson contends that the Court of Appeals necessarily applied the wrong standard of care and did not make a proper determination of comparative fault. In addition, Olson asserts that the Court of Appeals erred in finding that there was no issue of material fact as to whether Olson assumed the risk of diving into the lake.

ANALYSIS

The determination of whether Olson had the status of an invitee or a licensee is governed by our decisions in *McIntosh v. Omaha Public Schools, supra*, and *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). For the reasons stated herein, we hold that Olson was, as a matter of law, no more than a licensee, and we affirm the decision of the Court of Appeals.

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 causation, and damages. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

We first address whether our decision in *Heins* applies to the case at bar. In *Heins*, we abrogated the distinction between a licensee and an invitee. However, we did so only prospectively, stating: "Considering that other litigants may have relied on our

previous rule and incurred time and expense in prosecuting or defending their claims, we conclude, with the exception of the instant case, that the rule announced today shall be applied only to all causes of action arising after this date." *Heins*, 250 Neb. at 762, 552 N.W.2d at 57. Olson's cause of action arose before *Heins*, and thus, *Heins* is without effect in the instant case. See *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996). Therefore, this case is governed by the premise that a landowner's duty of care depends upon whether the plaintiff is classified as a licensee, invitee, or trespasser.

The trial court determined that Olson was at most a licensee. A licensee is 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. *McIntosh v. Omaha Public Schools, supra*. If an invitation to enter onto the premises relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving the invitation is an invitee, but if the invitation is for the convenience, pleasure, or benefit of the person enjoying the privilege, it is only a license, and the person receiving it is a licensee. See *id.*

As to the defendants Tighe, Varvel, and Riverside Lakes Recreation Association, no argument is made, other than the public policy argument adopted by *Heins*, that Olson could be anything more than a licensee. Olson paid no fee. Rather, Olson was a social guest whose presence was in no way related to a business purpose or advantage of his hosts.

However, Olson makes the argument that there is evidence from which a fact finder could determine that he was not a mere licensee, but, rather, was in fact an invitee with regard to SID 177. He argues that such an issue of fact is found in the evidence that the residents of the lake pay an annual real estate tax to SID 177. Residents paying such tax and their guests are entitled to use of the lake free of charge. In contrast, the general public is at least theoretically required to pay a fee for use of the lake.

In making the argument that he was an invitee, Olson relies upon *Ginn v. Lamp*, 234 Neb. 198, 450 N.W.2d 388 (1990); *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495

(1994); and *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996). In *Ginn*, we reversed a directed verdict against the son of a tenant in a lakeshore development who was injured falling into shallow water while water skiing. In so doing, we limited our review to determining whether there was evidence from which a jury could find that the defendant acted as landlord over the property. We held that the evidence of the defendant's control over the property established a prima facie case of liability under a custodial agent theory. In *Ginn*, we did not determine whether the plaintiff was a licensee or an invitee. Therefore, *Ginn* is clearly not applicable to this case.

In *Palmtag*, we upheld the trial court's determination that the plaintiff, who was injured in the course of an arranged meeting with a contractor to review the progress of her house, was an invitee. We noted that the distinction between a licensee and an invitee rested on an "economic benefit" test. Under this test, one who enters upon the land of another is not entitled to the status of an invitee unless the visit is directly or indirectly connected to business dealings between them. We concluded that because the plaintiff had control over the construction work being done, her visit to the jobsite served the defendant's economic interest. Olson would clearly fail to establish an invitee relationship under the *Palmtag* economic benefit test because there were no business dealings between Olson and SID 177. Therefore, *Palmtag* also fails to have any application to the case at bar.

In *McIntosh*, the injured boy was participating in a football clinic on school property when he was hurt allegedly because of the condition of the field. The participants paid no fee and used no school equipment, but school officials admitted that the clinic was run by the school's varsity coaches, was a school-related function of the physical education program, and was a part of its football program. Recognizing that public schools are in the business of providing academic and physical fitness, the injured party was found to be an invitee because the invitation to participate in the clinic was mutually beneficial to both the student and the school.

In this case, Olson did not participate in any program or event offered by SID 177. SID 177, through taxation of real property, constructed and maintained two lakes for the recre-

ational use of the residents. It charged no fee to the residents or their guests for use of the lakes. Olson was a guest of two of the residents, and there is no evidence that SID 177 was even aware of Olson's presence. Olson admitted he did not pay any money to enter the premises, to use the lake, or to use the dock.

It could be argued that SID 177 was in the business of providing recreation to its residents and their guests and that it benefited from Olson's presence through his participation in such recreation and through tax revenues collected from the homeowners. However, we hold that any mutually beneficial relationship of a business nature between Olson and SID 177 is too remote to create an invitor-invitee relationship. We cannot further blur the distinction between invitees and licensees without effectively abrogating the distinction altogether. Such a retroactive abrogation was specifically rejected by this court in *Heins*.

Olson further argues that summary judgment is improper because there exists an issue of fact as to whether Olson was a licensee or a trespasser, because Tighe, Varvel, and Stanley Miller testified that Miller's grandchildren and their guests did not have the requisite permission to use the Tighe-Varvel dock. This may be an issue of fact, but it is not material to the case because the trial court correctly concluded that even if Olson were determined to be a licensee, he could not recover.

Under Nebraska law as it existed at the time of this accident, the owner or occupant of a premises owed only the duty to refrain from injuring a licensee by willful or wanton negligence or designed injury, or to warn the licensee of a hidden danger or peril known to the owner or occupant but unknown or unobservable by the licensee in the exercise of ordinary care. See *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996). In order for an action to be willful or wanton, the evidence must prove that the defendant had actual knowledge that a danger existed and that the defendant had a constructive intention as to the likely consequence. See *Guenther v. Allgire*, 228 Neb. 425, 422 N.W.2d 782 (1988). Olson did not present evidence from which it could be inferred that any of the defendants acted willfully or wantonly.

It is also clear that the danger of missing the target area and diving into shallow water was not a hidden danger of which the

defendants would have a duty to warn. We have repeatedly held that a body of water, natural or artificial, does not constitute a concealed, dangerous condition. See, *Haden v. Hockenberger & Chambers Co.*, 193 Neb. 713, 228 N.W.2d 883 (1975); *Cortes v. State*, 191 Neb. 795, 218 N.W.2d 214 (1974); *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962). In *Cortes*, we noted, "It can be stated as a matter of fact that the public recognizes that bodies of water vary in depth and that sharp changes in the bottom may be expected." 191 Neb. at 799, 218 N.W.2d at 216-17.

Moreover, it is clear that Olson knew the lake varied in depth and was aware of the danger of diving into shallow water. Specifically, Olson knew that there were shallow areas near the Tighe-Varvel dock. However, he proceeded with Scott Weidner to locate a relatively small target area of deeper water. Olson knew that the precise parameters of the target area were not clearly defined. In fact, Olson testified he knew that the area directly south of the dock, toward which he dove on his final dive, was too shallow. As such, SID 177 did not breach its duty to Olson to warn of hidden dangers.

Having determined that *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), and *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996), are not applicable, we affirm the decision of the Court of Appeals.

AFFIRMED.

LANPHIER, J., participating on briefs.
FAHRNBRUCH, J., concurs.

REBECCA DAU McLAUGHLIN, APPELLANT, V.
LESLIE C. HELLBUSCH, M.D., APPELLEE.
557 N.W.2d 657

Filed January 3, 1997. No. S-95-177.

1. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.

2. **Jury Instructions: Pleadings: Evidence.** As a general matter, a litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence.
3. **Negligence: Jury Instructions: Proximate Cause.** Irrespective of the pleadings, if the evidence is such that a jury could find that the separate independent negligent acts of more than one person combined to proximately cause the same injury or damages, the jury is to be instructed that each such act or omission is a proximate cause and that each such person may be held responsible for the entire injury or omission, even though some may have been more negligent than others.
4. **Jury Instructions: Pleadings: Evidence: Appeal and Error.** A trial court has the duty to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error.
5. **Jury Instructions: Case Overruled.** To the extent that *Hopwood v. Voss*, 174 Neb. 304, 117 N.W.2d 778 (1962), may be read to be inconsistent with *Weiseth v. Karlen*, 206 Neb. 724, 295 N.W.2d 103 (1980), with respect to when a trial court must instruct with respect to concurrent causes, it is hereby specifically overruled.
6. **Jury Instructions: Appeal and Error.** It is not error to refuse to give a requested instruction if the substance of the request is included in the instructions given.
7. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
8. **Jurisdiction: Appeal and Error.** As a general matter, after an appeal has been perfected, the trial court is without jurisdiction to hear a case involving the same matter between the same parties.
9. **Jurisdiction: Costs: Appeal and Error.** After an appeal has been perfected, a trial court lacks jurisdiction to enter an order for costs.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL W. AMDOR, Judge. Judgment of Court of Appeals affirmed.

Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellant.

William M. Lamson, Jr., and David J. Schmitt, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LIKES, D.J.

CAPORALE, J.

I. STATEMENT OF CASE

In this medical malpractice action, the district court, pursuant to verdict, entered judgment in favor of the defendant-appellee,

Leslie C. Hellbusch, M.D. The plaintiff-appellant, Rebecca Dau McLaughlin, responded by challenging the judgment in the Nebraska Court of Appeals which, in a memorandum opinion filed July 3, 1996, reversed the district court's judgment and remanded the cause for a new trial. Hellbusch then successfully petitioned for further review by this court, asserting, in summary, that the Court of Appeals wrongly ruled that the district court (1) erred in its instructions to the jury and (2) lacked jurisdiction to award him costs. We now affirm the judgment of the Court of Appeals.

II. BACKGROUND

When McLaughlin did not recover properly from the last of two surgeries performed following two separate knee injuries she sustained a few months apart in her early teens, her then physician, a specialist in sports medicine, referred her to a neurologist, who in turn referred her to Hellbusch, a specialist in neurosurgery. Hellbusch treated McLaughlin from February 15 through August 11, 1988. Upon the initial February 15 consultation, Hellbusch discovered a cyst on McLaughlin's spine and performed surgery, during which he removed some of McLaughlin's backbone in order to drain the cyst. After the cyst recurred a few months later, Hellbusch again performed surgery to remove some of McLaughlin's backbone and the cyst.

McLaughlin, who had a normal spine prior to the surgeries, subsequently developed a progressive kyphosis (an abnormally increased convexity in the curvature of the thoracic spine), a known postsurgical risk in children undergoing the type of surgery Hellbusch performed on McLaughlin. McLaughlin has since undergone corrective surgeries, which have improved but not eliminated the condition.

The evidence as to what McLaughlin and her mother were told about the risks attendant to the Hellbusch surgeries is in conflict, as is the evidence concerning the followup care given and recommended by Hellbusch and other physicians consulted by McLaughlin after the back surgeries. Also in conflict is the extent to which McLaughlin and her mother acted upon the followup care recommended by Hellbusch and other physicians

and whether earlier corrective surgery would have produced a better result.

McLaughlin testified that because of the pain resulting from her condition, she cannot engage in heavy lifting, has resigned from employment as a nurse's aide, and has decided not to continue with her planned course of study in physical therapy. McLaughlin also testified that her condition interferes with her current employment as a hotel employee.

III. ANALYSIS

With that background, we turn our attention to the errors Hellbusch assigns to the Court of Appeals, supplying such additional facts as the analyses of those claims require.

1. Jury Instructions

Hellbusch first claims the Court of Appeals incorrectly ruled that the district court erred in failing to instruct the jury, as requested by McLaughlin, concerning the law of concurrent causes and the loss of future earning capacity. Our review of these claims is controlled by the rule that in reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Sedlak Aerial Spray v. Miller, ante* p. 45, 555 N.W.2d 32 (1996).

(a) Concurrent Causes

As a general matter, a litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence. *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996); *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). Here, McLaughlin alleged that Hellbusch's negligence, including his alleged failure to provide appropriate followup care, "was a substantial factor and/or proximate cause" of her injuries and damages; Hellbusch denied the allegation. Thus, neither party specifically alleged that McLaughlin's injuries and resulting damages were caused by the negligence of a third person.

Nonetheless, McLaughlin asserts that, as she requested, she was entitled to a concurrent causes instruction, because there is evidence that her mother knew of her need for followup x rays, asked Hellbusch if McLaughlin could receive such care from her original physician, and then failed to take McLaughlin to that physician. The evidence also suggests that a physician told McLaughlin and her mother that the original physician should continue followup care. In addition, there is evidence that this physician failed to diagnose McLaughlin's condition.

A concurrent causes instruction advises a jury that where the independent negligent acts or omissions of more than one person combine to proximately cause the same injury or damages, each such act or omission is a proximate cause, and each such person may be held responsible for the entire injury or omission, even though some may have been more negligent than others.

In *Barry v. Moore*, 172 Neb. 57, 108 N.W.2d 401 (1961), Barry, a passenger in an automobile operated by Gitt, pled that Moore's negligence caused a collision between the Gitt and Moore vehicles, and as a result, Barry was injured. Moore pled that he was not negligent and that the collision was caused by Gitt's negligence. Neither party requested an instruction on concurrent causes. We held that " '[t]he trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error,' " *id.* at 64, 108 N.W.2d at 405, and concluded that the trial court should have given the concurrent negligence instruction. In that regard, we wrote:

> [Barry's] claim was based on the broad ground of negligence for which [Moore] was required to respond in damages. If he was guilty of negligence which solely, or in concurrence with Gitt, or which proximately contributed to the accident, [Barry] being in nowise responsible for it, [Barry] was entitled to a recovery of her damages, if any, from him. The jury was entitled to be so informed, and a failure so to do by the court was prejudicial error.

Id.

However, we seem to have confused the issue in *Hopwood v. Voss*, 174 Neb. 304, 117 N.W.2d 778 (1962). Therein, the plain-

tiff argued that the district court erred in failing to give a sufficient concurring causes instruction. The court had instructed that the burden was on the plaintiff to prove that the defendant was guilty of one or more of the acts of negligence alleged by the plaintiff, that such negligence was " 'the proximate cause' " of the plaintiff's injuries, *id.* at 310, 117 N.W.2d at 782, and that if any of the plaintiff's damages were not " 'caused proximately' " by the negligence of the defendant, *id.* at 310, 117 N.W.2d at 783, the plaintiff would not be entitled to recover. The plaintiff argued that the district court should have instructed that if the negligence of the defendant, combined with the negligence of a third party, caused the plaintiff's injury, the jury should find for the plaintiff. We disagreed, holding, in sum, that the plaintiff's pleading did not entitle her to the concurrent causes instruction, but if the defendant's answer alleging that a third party caused the accident and injury entitled the plaintiff to the concurrent causes instruction, the plaintiff was not prejudiced, as the district court had separately instructed on concurrent causes.

But in *Weiseth v. Karlen*, 206 Neb. 724, 295 N.W.2d 103 (1980), we clearly reverted to the principle announced in *Barry*. In *Weiseth*, Karlen alleged that Weiseth's negligence in failing to supervise the feeding of liquid protein to Karlen's cattle resulted in the death of two of Karlen's cows and in 194 calves being aborted or born dead. There was evidence from which the jury could have concluded that a third party, who had the obligation to provide an adequate supply of water to the cattle, was negligent. Karlen argued that the district court erred in instructing on concurrent causes. We disagreed, holding that the district court was correct in submitting the issue to the jury, and adopted the comment to NJI 3.42 that the jury must be instructed upon the rights and liabilities of the parties under the theory of concurrent negligence if the evidence warrants, even though the issue is not pled and no instruction is requested.

Thus, to the extent that *Hopwood, supra*, may be read to be inconsistent with *Weiseth, supra*, it is hereby specifically overruled.

It is true that McLaughlin's requested concurrent causes instruction did not correctly state the law and that to establish

reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. See, *State on behalf of Joseph F. v. Rial, ante* p. 1, 554 N.W.2d 769 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Farmers & Merchants Bank v. Grams,* 250 Neb. 191, 548 N.W.2d 764 (1996). However, it is also true that the trial court, whether requested or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

Under the evidence, the erroneous failure of the district court to inform the jury as to how to treat the separate independent negligent acts of more than one person which combined to proximately cause the same injury, if the jury found such to have been the case, violated the district court's duty and prejudiced McLaughlin.

(b) Loss of Future Earning Capacity

Next, Hellbusch argues that the Court of Appeals incorrectly ruled that the district court erred, although not prejudicially, as the jury did not reach the issue of damages, in failing to submit McLaughlin's detailed proposed jury instruction concerning her loss of future earning capacity. He is correct, because the district court adequately instructed on the matter by advising that if the jury returned a verdict for McLaughlin, then it must decide how much money would fairly compensate her, including, if it should find that such had been proximately caused by Hellbusch's negligence, "[t]he reasonable value of the earning capacity [McLaughlin] is reasonably certain to lose in the future."

It is not error to refuse to give a requested instruction if the substance of the request is included in the instructions given. *Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995); *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526

N.W.2d 436 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

2. Awarding of Costs

Lastly, Hellbusch contends the Court of Appeals erred in suggesting that once McLaughlin perfected her appeal, the district court lost jurisdiction to rule on Hellbusch's pending motion for the taxation of costs. This presents 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 lower courts. *Sherrod v. State, ante* p. 355, 557 N.W.2d 634 (1997).

Hellbusch filed a motion for taxation of costs prior to McLaughlin's filing of her notice of appeal. After McLaughlin perfected her appeal, the district court awarded Hellbusch costs against McLaughlin.

As a general matter, after an appeal has been perfected, the trial court is without jurisdiction to hear a case involving the same matter between the same parties. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). We held therein that the trial court lacked jurisdiction to enter an order for an attorney fee after the opposing party had perfected its appeal. We apprehend no reason for a different rule with respect to a judicial determination and allowance of costs, and thus hold that after an appeal has been perfected, a trial court lacks jurisdiction to enter an order for costs.

IV. JUDGMENT

As first noted in part I above, the judgment of the Court of Appeals is affirmed.

AFFIRMED.

IN RE INTEREST OF BORIUS H. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. THERESA H., APPELLANT.

558 N.W.2d 31

Filed January 3, 1997. No. S-95-745.

1. **Juvenile Courts: Appeal and Error.** Juvenile court cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Juvenile Courts: Parental Rights: Affidavits.** All motions for ex parte temporary detention orders must be accompanied by an affidavit of one who has knowledge of relevant facts warranting temporary detention.
4. **Juvenile Courts: Parental Rights: Final Orders.** Unlike a detention order after a hearing, an ex parte temporary detention order keeping a juvenile from his or her parent for a short period of time pending a hearing as to whether the detention should be continued is not final.
5. **Juvenile Courts: Parental Rights: Proof.** To sustain the continued temporary custody of a child, the State must prove the requirements of Neb. Rev. Stat. § 43-254 (Reissue 1993) by a preponderance of the evidence.
6. **Parental Rights.** Parents have a recognized liberty interest in raising their children.
7. **Juvenile Courts: Parental Rights.** In the absence of evidence warranting the removal of a child from his or her parent, a juvenile court lacks authority to issue an order for continued temporary custody.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and INBODY, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH G. CRNKOVICH, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions to dismiss.

Jeffrey A. Wagner, of Legal Aid Society, Inc., for appellant.

James S. Jansen, Douglas County Attorney, and Vernon Daniels for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Upon appeal of this case from the Douglas County Separate Juvenile Court, the Nebraska Court of Appeals determined that

the State of Nebraska failed to attach an affidavit to its motion for an ex parte order seeking temporary custody of Theresa H.'s children and failed to adduce any evidence at the subsequent hearing to warrant the removal of the children from their mother's home. The Court of Appeals reversed the juvenile court's order giving the Nebraska Department of Social Services (DSS) temporary custody of the children. Instead of dismissing the case, the Court of Appeals remanded this matter to the juvenile court with orders to return the children to their mother unless the State, within 8 days, established facts at a hearing to justify preadjudication removal of the children. Having granted the mother's petition for further review, we affirm in part, and in part reverse and remand the cause with orders to dismiss because the State failed to adduce any evidence at the detention hearing.

BACKGROUND

On June 14, 1995, the Douglas County Attorney filed a petition in juvenile court alleging that by reason of the faults and habits of Theresa H., the natural mother of three minor children, Borius H., age 11; Terrance H., age 7; and Temequa E., age 9, were juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). More specifically, the petition alleged that the children were at risk of harm because the mother had been leaving the children with inappropriate caregivers who were unable to meet their needs. Also alleged was the mother's impaired ability to care for the children because of her use of alcohol and/or drugs. On that same date, the county attorney also filed a motion for temporary custody, without an accompanying affidavit. On an ex parte basis, the juvenile court sustained the motion and issued an order for immediate custody placing the children in the custody of DSS.

A detention hearing was held on June 27, 1995, to determine if the children should remain in the custody of DSS until adjudication. The mother did not appear, and her counsel requested a continuance. The request for a continuance was overruled. The court, without receiving any evidence or hearing any testimony, ordered that DSS should retain custody of the children. The mother appealed to the Court of Appeals, arguing that the

juvenile court lacked jurisdiction to enter the ex parte detention order because no supporting affidavit was attached to the State's motion for custody. She also asserted that the juvenile court erred in ordering continued detention for her children at the June 27 hearing because the State failed to meet its burden of proof. In addition, the mother argued that both the June 14 and the June 27 orders violated her due process rights.

In its review, the Court of Appeals found that the State had failed to attach an affidavit with its request for the ex parte custody order as required by our holding in *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), but that the order itself was not final and therefore not subject to review. See *In re Interest of Borius H. et al.*, 96 NCA No. 21, case No. A-95-745 (not designated for permanent publication). The Court of Appeals also found that the State offered no evidence to warrant the detention of the children at the June 27 detention hearing. Concluding that this order was a final order subject to appeal, the Court of Appeals reversed the order and directed that the children be returned to the mother unless, within 8 days of the Court of Appeals' mandate, the State established facts at a hearing which justified preadjudication removal of the children from the mother's home. We granted the mother's petition for further review.

ASSIGNMENTS OF ERROR

The mother contends the Court of Appeals erred in (1) failing to find the juvenile court's June 14, 1995, ex parte detention order a final, appealable order; (2) failing to reverse the June 14 ex parte order; and (3) allowing the State to present further evidence within 8 days of the court's mandate instead of dismissing the State's petition and returning custody of the children to the mother.

STANDARD OF REVIEW

Juvenile court cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996).

On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996); *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996).

PRACTICE CAUTION

This court, as was the Court of Appeals, is concerned that the State has failed to abide by the dictates of our decision in *In re Interest of R.G., supra*, in seeking an ex parte temporary custody order in this matter. In that case, we stated:

> [T]he practice which shall henceforth be followed, is that the information upon which the State seeks an ex parte temporary detention order be contained in the affidavit of one who has knowledge of the relevant facts and that such affidavit be presented to the juvenile court and be made a part of the record of the proceedings.

238 Neb. at 419-20, 470 N.W.2d at 791. There was no such supporting affidavit in the instant case. The only information before the juvenile court when the ex parte temporary custody order was sought was the State's petition. As noted in *In re Interest of R.G.*, this is simply not enough. Thus, we once again state that *all* motions for ex parte temporary detention orders must be accompanied by an affidavit of one who has knowledge of relevant facts warranting temporary detention.

ANALYSIS

The first and second assigned errors require us to determine whether the June 14 ex parte temporary detention order was a final order for purposes of appeal.

Unlike a detention order after a hearing, an ex parte temporary detention order keeping a juvenile from his or her parent for a short period of time pending a hearing as to whether the detention should be continued is not final. See, *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). This proposition was first set forth in *In re Interest of R.G.*, wherein we explained that for purposes of appellate review of a juvenile detention order, there must be an order affecting a substantial right made

in a special proceeding. After recognizing that a proceeding before a juvenile court is a special proceeding, we discussed the requirement that the order affect a substantial right of the parent. In this regard, we stated:

> [T]he question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

238 Neb. at 415, 470 N.W.2d at 788.

In determining that the ex parte temporary custody order did not affect a substantial right of the mother in *In re Interest of R.G.*, we noted, while undertaking an analysis of due process requirements, that the order was limited to 8 judicial days and that it played no part in determining the propriety of continuing temporary placement until adjudication. Also determinative was the State's recognized interest in protecting the welfare of a child under the doctrine of parens patriae. Accordingly, we held that the ex parte temporary custody order did not substantially interfere with the mother's rights in her infant daughter and was therefore not final for purposes of appeal.

In the instant case, the June 14 order was also limited in its duration. Our examination of the order reveals that DSS was to retain temporary custody of the children under the temporary order only until the June 27 hearing. In accordance with our analysis in *In re Interest of R.G., supra*, we agree with the Court of Appeals that this order, limited as it was in duration, does not constitute a final order. The first two assigned errors are therefore without merit.

Next, we must decide whether the Court of Appeals was correct in its remand order. More specifically, we are required to determine whether it was error to order the children returned to their mother unless the State established facts mandating preadjudication within 8 days of the juvenile court's ruling.

Neb. Rev. Stat. § 43-254 (Reissue 1993) of the juvenile code sets forth the requirements for continuing to withhold a juvenile from his or her parent pending adjudication, and it provides in part as follows:

> If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (3) of sec-

> tion 43-248, the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.

Although the statute is silent as to the burden of proof for sustaining continued temporary custody, this court has pronounced that the State must prove the requirements of § 43-254 by a preponderance of the evidence. *In re Interest of R.G., supra.*

Even a cursory examination of the June 27 hearing reveals that this burden was not met. In fact, a reading of the three pages in the bill of exceptions documenting the hearing shows that *absolutely no evidence* was presented by the State in support of its motion for continued custody. In light of this complete lack of evidence, the juvenile court obviously erred in granting the June 27 detention order, thereby continuing the temporary custody of the children with DSS. See § 43-254 (placement pending adjudication appropriate "if it appears that the need for placement or further detention exists").

Obviously, this total indifference to both the requirements of the juvenile code and our opinions concerning preadjudication detention in this matter is bothersome. We agree with the Court of Appeals that "[i]t should go without saying that the State's conduct in this case was a violation of the mother's due process right." *In re Interest of Borius H. et al.*, 96 NCA No. 21 at 43 (not designated for permanent publication). Parents have "a recognized liberty interest in raising their children." *In re Interest of R.G.*, 238 Neb. 405, 414, 470 N.W.2d 780, 788 (1991) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)). 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.

Although the Court of Appeals reached this same conclusion, it nevertheless allowed DSS to retain temporary custody for a period of up to 8 days or until the State established evidence

warranting continued detention. The State argues this remedy was appropriate, noting that "requiring a hearing recognizes the reality that the State could once again seek an ex parte order for detention thus producing another detention hearing." Brief for appellee in support of resistance to petition for further review at 6. While this may be true, the juvenile code requires that certain procedures be followed before removing a child from the custody of his or her parent.

In the instant case, the State failed to provide any evidence warranting continued custody. As such, the juvenile court lacked the authority to order continued temporary custody. See § 43-254. Moreover, the June 14 ex parte temporary custody order also provides no authority for continued detention because it was superseded by the June 27 order. Considering that the juvenile court lacked authority to order continued detention of the children, it is axiomatic that the Court of Appeals also lacked the authority to order continued custody of the children with DSS for up to 8 days so that the State could follow the law and prove its contentions with actual evidence. See *Matter of Welfare of C. Children*, 348 N.W.2d 94 (Minn. App. 1984) (where evidence did not support finding that children were neglected, order which placed children under protective supervision was required to be vacated).

CONCLUSION

With absolutely no evidence supporting the State's motion for continued custody at the June 27 hearing, the juvenile court erred in granting the detention and thereby continuing temporary custody of the children with DSS pending adjudication. We therefore affirm the Court of Appeals' determination that the juvenile court order continuing detention of the children with DSS must be reversed, but disagree with the Court of Appeals' directions in its order to remand. The State's failure to provide any proof substantiating its petition requires this cause to be remanded with orders to dismiss and to return the children to their mother.

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

EUGENE J. HYNES, APPELLEE, V. KELLY MICHAEL HOGAN, APPELLANT.

558 N.W.2d 35

Filed January 3, 1997. No. S-95-1337.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Demurrer: Pleadings.** Under the provisions of Neb. Rev. Stat. § 25-806 (Reissue 1995), a defendant may demur to the petition only when certain matters appear on the face of the petition.
3. **Demurrer.** The failure to demur does not waive the objection that a cause of action has not been stated, and such objection can be raised at any time.
4. **Demurrer: Pleadings.** As a demurrer goes only to those defects which appear on the face of the petition, in ruling on a demurrer, evidence cannot be considered.
5. **Demurrer: Actions.** Where a demurrer is sustained, the cause of action continues to pend until dismissed.
6. **Demurrer: Pleadings.** Upon the sustainment of a demurrer, the party against whom it is directed must be granted leave to amend, unless it is clear that no reasonable possibility exists that the amendment will correct the defect.
7. **Judgments: Appeal and Error.** One who has sustained the burden and expense of trial and has succeeded in securing a judgment on the facts in issue has a right to keep the benefit of the judgment unless there is prejudicial error in the proceedings in which the judgment was secured.
8. **Trial: Pleadings: Case Overruled.** When no demurrer has been filed and a matter proceeds to trial on the merits under an objection in an answer that a cause of action has not been stated, and it is determined that the objection should have been sustained, the party against whom the objection was directed shall not be granted leave to amend; to the extent the obiter dictum in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), may be read to suggest otherwise, it is overruled.
9. **Quo Warranto: Public Officers and Employees.** One's qualification to hold office may be challenged by an action in quo warranto.
10. **Quo Warranto.** One filing an action in quo warranto under the provisions of Neb. Rev. Stat. § 25-21,121 (Reissue 1995) must file the bond required by Neb. Rev. Stat. § 25-21,122 (Reissue 1995).

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Garden County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed.

Kelly Michael Hogan, pro se.

Edward D. Steenburg for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

This action arises on the complaint of the plaintiff-appellee, Eugene J. Hynes, charging that the defendant-appellant, Kelly Michael Hogan, who had been elected to the office of county attorney for Garden County, engaged in official misconduct by continuing, in violation of statute, to reside in Keith County after his election, and praying that Hogan be removed from office and that the office be declared vacant. The district court granted Hynes' prayer, whereupon Hogan sought review by the Nebraska Court of Appeals, asserting that the district court erred in, among other things, overruling his demurrer. Finding merit in that claim, the Court of Appeals reversed the judgment of the district court and remanded the cause for further proceedings. *Hynes v. Hogan*, 4 Neb. App. 866, 553 N.W.2d 162 (1996). Hynes thereafter successfully petitioned this court for further review, and we now in part affirm and in part reverse the judgment of the Court of Appeals.

II. SCOPE OF REVIEW

The dispositive issues present questions of law, in connection with which we have an obligation to reach our own conclusions independent of those reached by the lower courts. See, *McLaughlin v. Hellbusch, ante* p. 389, 557 N.W.2d 657 (1997); *Olson v. SID No. 177, ante* p. 380, 557 N.W.2d 651 (1997); *State v. Kennedy, ante* p. 337, 557 N.W.2d 33 (1996).

III. FACTS

The transcript from the district court contains an uncertified copy of Hogan's "REQUEST FOR TRANSCRIPT," which directs the clerk thereof to prepare a transcript containing: "All pleadings filed in this action, including Defendant and Appellant's Demurrer . . . Journal Entry dated June 7, 1995 [and] Journal Entry dated November 7, 1995." The clerk has certified that the transcript contains "a full, true and correct copy of those items outlined by index as per Request for Transcript . . . as the same appears [sic] from the records of [that] Court," and lists in the index, among other things,

"Complaint for Removal" and "Defendant's Demurrer." Thus, although the clerk inexpiably failed to stamp the document denominated "DEFENDANT'S DEMURRER" and bearing Hogan's signature block as received and failed to attest to when it was filed, she has nonetheless warranted that at some point the pleading was filed in these proceedings. Hogan represented at oral argument that the pleading was filed before trial was held.

Hynes' complaint alleges that at the time Hogan was elected as county attorney of Garden County on November 8, 1994, he was a resident of Keith County and has continued to reside in that county in violation of statute; concludes that as a result, Hogan is guilty of official misconduct; and prays that Hogan be removed from the office of Garden County Attorney.

Hogan's so-called demurrer is a discursive pleading which in essence denies that Hogan engaged in official misconduct and asserts that Hynes' complaint fails to state a cause of action, in that it does not plead in compliance with the statutory prerequisites to the instituting of an action in quo warranto.

Although neither the June nor the November journal entry makes any reference to Hogan's demurrer, the transcript contains no other pleading by which Hogan addresses the allegations of Hynes' complaint; the June journal entry is the document by which the district court ruled, as described in part I, and the November journal entry overruled Hogan's motion for new trial.

IV. ANALYSIS

At the pertinent time, the relevant portion of Neb. Rev. Stat. § 23-1201.01 (Supp. 1993) provided that a county attorney "need not be a resident of the county" when filing for election, but "shall reside in the county in which he or she holds office." Relying on that provision, Hynes brought this proceeding under the provisions of Neb. Rev. Stat. §§ 23-2001 through 23-2009 (Reissue 1991), which provide for the removal of county officers through judicial proceedings. Under the terms of § 23-2001, county officers "may be charged, tried, and removed from office . . . for . . . official misconduct as defined in section 28-924," and § 23-2002 empowers "[a]ny person" to make the

charge. Neb. Rev. Stat. § 28-924 (Reissue 1995) declares that a "public servant commits official misconduct if he knowingly violates any statute or lawfully adopted rule or regulation relating to his official duties."

For purposes of our analysis, we assume, but do not decide, that Hogan was not residing in Garden County and turn our attention to whether the charge made in the complaint states a cause of action under the provisions of §§ 23-2001 through 23-2009. That is, Does a charge that after his election Hogan failed to move to Garden County, in violation of § 23-1201.01, constitute a charge of official misconduct?

The question is resolved by determining whether Hogan's failure to reside in Garden County relates to his official duties, for under the language of § 28-924, the failure cannot be official misconduct unless it so relates. There is no claim or evidence that Hogan's failure to reside in Garden County renders him incapable of performing, or any claim or evidence that he did not perform, the myriad obligations imposed upon a county attorney by law, such as: the preparation, signing, verification, and filing of complaints and the prosecution and defending of certain suits, as required by Neb. Rev. Stat. § 23-1201 (Reissue 1991); the appearance before grand juries, as permitted by Neb. Rev. Stat. § 29-1408 (Reissue 1995); the certification of certain causes of death, as required by Neb. Rev. Stat. § 71-605 (Cum. Supp. 1994); and the enforcement of tax collections, as required by Neb. Rev. Stat. § 77-2030 (Reissue 1990). It therefore cannot be said that Hogan has engaged in official misconduct. As a consequence, Hogan's objection that the complaint fails to state a cause of action under §§ 23-2001 through 23-2009 is meritorious.

In order to ascertain the consequences of that determination, we next turn our attention to the procedural posture of this case. Section 23-2003 provides that the "proceedings shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in sections 23-2001 to 23-2009."

Section 23-2006 provides:

> No answer or other pleading after the complaint is necessary, but the defendant may move to reject the complaint

> upon any ground rendering such motion proper; and he may answer if he desires, and if he answers the accuser may reply or not. But if there be an answer and reply, the provisions of section 23-2003 relating to pleadings in the action shall apply.

Notwithstanding the unsupported and unfortunate obiter dictum in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), that an answer alleging that a petition fails to state a cause of action is in fact a demurrer, Hogan's pleading was not a demurrer, even though it was denominated as such. Rather, for the reasons which follow, it was an answer which included the objection that the complaint failed to state a cause of action. That being so, we need not, and do not, determine whether a demurrer is a proper pleading in proceedings under the foregoing statutes.

We begin our analysis of the nature of Hogan's pleading by recalling that Neb. Rev. Stat. § 25-806 (Reissue 1995) provides, in relevant part, that a "defendant may demur to the petition only when it appears on its face" that, among other things, "the petition does not state facts sufficient to constitute a cause of action." Neb. Rev. Stat. § 25-808 (Reissue 1995) declares:

> 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, except . . . that the petition does not state facts sufficient to constitute a cause of action.

Accordingly, we have held that the failure to demur does not waive the objection that a cause of action has not been stated and that such objection can be raised at any time. See, *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977); *Gordon v. City of Omaha,* 77 Neb. 556, 110 N.W. 313 (1906).

We have also held that a demurrer goes only to those defects which appear on the face of the petition, and in ruling on a demurrer, evidence cannot be considered. *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992). Inasmuch as Hogan's pleading denied that he had engaged in official misconduct, an allegation which could be adjudicated only upon the receipt and

consideration of evidence, the pleading was necessarily not a demurrer, but an answer. Indeed, the fact that the district court received and considered evidence on the merits suggests that it considered the pleading to be an answer. Its silence on the objection to the adequacy of the complaint further suggests that it found the objection to be groundless.

The difference between a demurrer and an answer containing an objection to the adequacy of the complaint is not an insignificant one. Where a demurrer is sustained, the cause of action continues to pend until dismissed, *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995); thus, the rule is that upon the sustainment of a demurrer, the party against whom it is directed must be granted leave to amend, unless it is clear that no reasonable possibility exists that the amendment will correct the defect, see *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). At that point, no party has sustained the burden and expense of trial, and no party has received an adjudication. The situation is obviously quite different when there has been a trial; in that circumstance, the operative principle is that one who has sustained the burden and expense of trial and has succeeded in securing a judgment on the facts in issue has a right to keep the benefit of the judgment unless there is prejudicial error in the proceedings in which the judgment was secured. See *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996).

We thus hold that when no demurrer has been filed and a matter proceeds to trial on the merits under an objection in an answer that a cause of action has not been stated, and it is determined that the objection should have been sustained, the party against whom the objection was directed shall not be granted leave to amend. Accordingly, Hynes is not now entitled to leave to amend his complaint in an effort to state a cause of action under §§ 23-2001 through 23-2009. To the extent the obiter dictum in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), may be read to suggest otherwise, it is overruled.

However, that does not end our review, for although the requirement of § 23-1201.01 that Hogan reside in Garden County does not relate to his official duties, it nonetheless con-

stitutes a qualification for holding the office of county attorney of that county. See *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979) (suggesting residence is qualification for county commissioner). One's qualification to hold office may be challenged by an action in quo warranto. Neb. Rev. Stat. § 25-21,121 (Reissue 1995) (information may be filed against any person unlawfully holding or exercising any public office); *Jones, supra* (quo warranto action testing right to hold office). See, also, *Shear v. County Board of Commissioners,* 187 Neb. 849, 195 N.W.2d 151 (1972) (quo warranto proper remedy to test right to hold office).

But even if Hynes' complaint states a cause of action in quo warranto, a determination we need not and do not make, he has failed to establish such a case. If for no other reason, this is so because the record does not establish that he met one of the requirements set by Neb. Rev. Stat. § 25-21,122 (Reissue 1995) for such an action. That statute requires one filing an information in quo warranto to file "with such information in the office of the clerk of the district court a bond . . . the amount of which bond shall be not less than five hundred dollars and be fixed by . . . the clerk," conditioned that the action shall be prosecuted "without delay" and that the elector "shall pay the costs of such suit including a reasonable attorney fee to the person against whom such information is filed should the action be unsuccessful." See *State ex rel. Brogan v. Boehner*, 174 Neb. 689, 119 N.W.2d 147 (1963) (distinguishing between quo warranto actions brought under § 25-21,121 and those brought under Neb. Rev. Stat. § 25-21,146 (Reissue 1995) by one claiming right to office, holding bond not required in actions brought under second statute, and noting bond requirement in actions brought under first statute).

V. JUDGMENT

Accordingly, we affirm that part of the judgment of the Court of Appeals which reverses the judgment of the district court, but reverse that part of the judgment which remands the matter to the district court for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED.

FRED IRA, APPELLEE, V. SWIFT-ECKRICH, INC., APPELLANT.

558 N.W.2d 40

Filed January 3, 1997. No. S-96-344.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Workers' Compensation: Jurisdiction.** The compensation court is a tribunal of limited and special jurisdiction, and it possesses only that authority which is conferred upon it by the Nebraska Workers' Compensation Act.
3. **Workers' Compensation.** The compensation court's power to modify is governed by Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1993).
4. **Attorney Fees.** The general rule is that attorney fees may be recovered only when such an award is authorized by statute, or when a recognized and accepted uniform course of procedure allows recovery of attorney fees.

Appeal from the Nebraska Workers' Compensation Court. Reversed.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

James W. Knowles, Jr., of Knowles Law Firm, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

In June 1987, appellee, Fred Ira, developed bilateral carpal tunnel syndrome while working for appellant, Swift-Eckrich, Inc. As a result, appellee incurred medical expenses, suffered temporary total disability, and was subsequently determined to have sustained permanent partial disability to his right and left hands.

The Nebraska Workers' Compensation Court addressed this case on several occasions. The compensation court entered an award on May 7, 1990, ordering that appellant pay appellee compensation payments 52½ weeks for permanent partial disability to his right hand and 31½ weeks for permanent partial disability to his left hand.

In May 1991, appellee and appellant again appeared before the compensation court. The hearing was limited to the issues of whether appellee suffered increased disability and whether vocational rehabilitation was appropriate. The court entered an

award on June 3, 1991, ordering appellant to pay for reexploration surgery and for additional medical expenses. The court also stated that appellee could be evaluated as to his suitability for rehabilitation services if he contacted the rehabilitation specialist of the court within 30 days.

The case came up for rehearing in November 1991, and a modification of award on rehearing was issued on February 19, 1992. A three-judge panel found that appellee had been temporarily totally disabled as of July 1, 1991, and modified the award dated May 7, 1990, to reflect such a finding. The compensation court also found that appellee's surgeries were necessary and that appellant was responsible for all costs related to the surgeries. Appellant was further ordered to pay for future medical care, attorney fees, and costs. Finally, the court denied appellee's request for rehabilitation services because an expert stated that appellee would not likely sustain additional permanent impairment as a result of his surgeries.

In February 1993, appellee filed an application in which he requested the compensation court to adjudicate the rights and liabilities of the parties. Appellee stated that since the award dated February 19, 1992, he had sustained additional permanent partial disability to each hand and was in need of retraining. In its response, appellant denied appellee's statements and argued that the court lacked jurisdiction to address appellee's application.

On August 17, 1993, the compensation court found that appellee was suffering additional permanent impairment. It issued a further award ordering that the vocational rehabilitation plan proposed by appellee be approved and that appellant pay $225 per week to appellee while appellee was engaging in such a plan. According to appellee's plan, appellee was to spend seven quarters obtaining an associate of applied science degree in radiation protection technology.

A plan was approved by a rehabilitation specialist of the court and filed on November 4, 1993. The filed plan, however, did not accurately reflect the plan as approved by the court in its further award. Therefore, the plan was subsequently amended to reflect a starting date of December 1, 1993, and an ending date of August 1995.

Appellee began school at Metropolitan Community College (Metro) on December 1, 1993, but withdrew in August 1994 to undergo surgery. From December 1993 to August 1994, he completed 3 quarters and passed 36 credit hours.

On June 27, 1994, appellee filed a petition requesting the compensation court to determine whether he could change his approved field of study from radiation protection technology to offset-press operation (graphic arts). In support of his petition, appellee stated that (1) the plan granted was to end in August 1995; (2) he had enrolled in the program at Metro on December 1, 1993; and (3) in April 1994, he discovered that Metro was terminating its radiation protection technology program due to the dramatic decrease in the job market for radiation protection technicians. Appellant filed an answer denying that appellee was entitled to a modification of the previous order. Appellee later amended his petition but did not make any substantial changes.

On April 24, 1995, an order was entered by a single judge upon appellee's amended petition. The compensation court found that there was no increase in incapacity, but determined that it could modify a prior award of vocational rehabilitation even though there was no increase in incapacity. The court approved appellee's new plan to pursue a degree in graphic arts for the period of December 1994 to March 1997 and ordered that appellant continue to pay disability compensation.

Appellant filed an application for review, arguing that the compensation court could not modify the award granted on August 17, 1993. On March 1, 1996, a three-judge panel affirmed the order of April 24, 1995, and in addition imposed interest and attorney fees on the award against appellant. One judge dissented, concluding that the court could not modify the rehabilitation award.

On March 22, 1996, appellant filed a timely notice of intention to appeal to the Nebraska Court of Appeals. We removed the case to our docket pursuant to our power to regulate the dockets of appellate courts.

Appellee moved for allowance of attorney fees on August 14, 1996. Ruling on appellee's motion was reserved until after the case was argued before this court.

As summarized, appellant's assigned errors on appeal contend that the Workers' Compensation Court erred in modifying the award entered on August 17, 1993. In addition to addressing appellant's assignments of error, we will address the issue of whether appellee is entitled to reasonable attorney fees.

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Dougherty v. Swift-Eckrich, ante* p. 333, 557 N.W.2d 31 (1996).

Appellant's contention on appeal is controlled by the recently decided case of *Dougherty*. The compensation court is a tribunal of limited and special jurisdiction, and it possesses only that authority which is conferred upon it by the Nebraska Workers' Compensation Act. *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). More specifically, the compensation court's power to modify is governed by Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1993). As in *Dougherty*, the compensation court in this case was not authorized to alter a prior award by virtue of either modification provision. Therefore, the compensation court erred in modifying the August 17, 1993, award entitling appellee to vocational rehabilitation.

In addition to addressing appellant's contention, we must assess whether appellee is entitled to attorney fees. The general rule is that attorney fees may be recovered only when such an award is authorized by statute or when a recognized and accepted uniform course of procedure allows recovery of attorney fees. *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996). Neb. Rev. Stat. § 48-125(1) (Reissue 1993) states in part as follows:

> If the employer files an application for review before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review, and the Court of Appeals or Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Court of Appeals or Supreme Court.

In the instant case, appellant appealed the decision of the compensation court to modify a prior award. Because we reverse the compensation court's decision and hold that appellant is not obligated to pay additional compensation during the extended vocational rehabilitation training, there exists a reduction in appellee's overall award. Therefore, appellee is not entitled to an award of attorney fees by this court.

REVERSED.

DENNIS SNIPES, APPELLANT, V. SPERRY VICKERS, APPELLEE.
557 N.W.2d 662

Filed January 3, 1997. No. S-96-406.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do 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. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Statutes: Legislature: Intent: Appeal and Error.** In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
5. **Workers' Compensation: Limitations of Actions.** When payments of workers' compensation have been made, the statute of limitations will not take effect until the expiration of 2 years from the time of the making of the last payment.
6. ____: ____. There are at least two exceptions that apply to Neb. Rev. Stat. § 48-137 (Reissue 1993). The first is the situation where the injury is "latent and progressive" and is not discovered within 2 years of the accident which caused the injury. The second is when a material change occurs which necessitates additional medical care and from which the employee suffers increased disability.
7. **Workers' Compensation: Limitations of Actions: Pleadings.** When the parties are unable to agree on the workers' compensation owed, the worker's remedy is to file a petition in the compensation court. Such a petition must be filed within 2 years from the time the employee knows or is chargeable with knowledge that the employee's

condition has materially changed and that there has been such a substantial increase in disability as to entitle the employee to additional compensation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas F. Dowd, of Dowd, Dowd & Fahey, for appellant.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On February 2, 1984, plaintiff-appellant, Dennis Snipes, suffered an eye injury in the course of his employment by defendant-appellee, Sperry Vickers. Sperry Vickers paid all medical expenses and all temporary and permanent disability benefits. As a result of his eye injury, Snipes was required to wear glasses. When Snipes so requested, he was examined by an ophthalmologist, who would change his prescription if appropriate. Sperry Vickers paid for all examinations and glasses through August 14, 1992.

On March 9, 1995, Snipes was examined by his ophthalmologist, who changed Snipes' prescription for glasses. It is stipulated that the cost of the examination and the new glasses is a result of the injury at work on February 2, 1984, and that Snipes had no claim against Sperry Vickers between August 14, 1992, and March 9, 1995.

Sperry Vickers refused to pay the cost of the eye examination and the resultant cost of new glasses. It urges that the claim was filed more than 2 years after the last payment and that Neb. Rev. Stat. § 48-137 (Reissue 1993) establishes a 2-year limitation period. Snipes filed an amended petition against Sperry Vickers in the Nebraska Workers' Compensation Court on April 12, 1995. Snipes claims that Sperry Vickers is liable for his medical expenses as and when needed. Snipes further alleges that the statute of limitations could not run until such time as he had a claim, which he did not have until March 9, 1995.

A majority of the review panel confirmed the trial court's finding that the statute of limitations took precedence over the requirement to pay medical expenses. One judge dissented.

Snipes appealed to the Nebraska Court of Appeals, arguing that the statute of limitations had not run because the claim was filed as soon as it occurred. We removed the case to our docket pursuant to our power to regulate the docket of the Court of Appeals. We affirm.

BACKGROUND

The parties stipulated to the following facts:

> On February 2, 1984, [Snipes] was employed by [Sperry Vickers] when he suffered an injury to his right eye arising out of and in the course of his employment . . . .
>
> As a result of the injury, [Snipes'] vision in his right eye was reduced to less than 20/20.
>
> William R. Schlichtemeier, M.D., d/b/a Cornea Associates, P.C., performed surgery in 1984 on [Snipes'] right eye. With the use of glasses, [Snipes] has some, but not all the vision in his right eye.
>
> Since 1984, [Snipes] has been examined by John Fitzpatrick, M.D., W.R. Schlichtemeier, M.D., and Stanley M. Truhlsen, M.D. and glasses were purchased.
>
> [Sperry Vickers] paid all medical expenses, expenses for glasses, temporary disability and permanent disability benefits through August 14, 1992. [Sperry Vickers] made no payments to or on behalf of [Snipes] after August 14, 1992.
>
> After August 14, 1992 and before March 9, 1995, [Snipes] incurred no medical expenses for which [Sperry Vickers] would be liable and [Snipes] had no claim against [Sperry Vickers] for which workman's compensation benefits would be due or owing.
>
> On March 9, 1995, [Snipes'] right eye was examined by W.R. Schlichtemeier, M.D. Dr. Schlichtemeier changed the prescription for [Snipes'] glasses and [Snipes] needs a replacement set of glasses.

> The examination and treatment by W.R. Schlichtemeier, M.D. on March 9, 1995 and the cost of a replacement set of glasses is directly and proximately caused by and arose out of [Snipes'] injury while in the course of his employment by [Sperry Vickers] on February 2, 1984.
>
> The fair and reasonable charge for the examination by W.R. Schlichtemeier, M.D. on March 9, 1995 is $60.00.
>
> The fair and reasonable charge for the glasses ordered by W.R. Schlichtemeier, M.D. is $440.00.
>
> Dr. Schlichtemeier's statement in the amount of $60.00 and the statement of Malbar Vision Center in the amount of $440.00 [were] submitted to [Sperry Vickers].
>
> [Sperry Vickers] refused to pay the statements of Dr. Schlichtemeier and Malbar Vision Center on the grounds that more than two years has passed since August 14, 1992, the date of it's [sic] last compensation payment and as a result, [Snipes'] claim is barred by the statute of limitations, §48-137 R.R.S. 1993.

Snipes alleges that the medical expense is payable as a reasonable and necessary medical expense as provided for in Neb. Rev. Stat. § 48-120 (Reissue 1993) and is not barred by the statute of limitations, since it did not commence because Snipes had no compensable claim to make between August 14, 1992, and March 9, 1995.

ASSIGNMENTS OF ERROR

Snipes assigns as error the following: (1) Errors of law were committed by the trial court; (2) the court's decision was contrary to law; (3) the court's decision was contrary to the facts; (4) the court failed to order Sperry Vickers to pay Snipes' medical bill incurred "as and when needed" as required by § 48-120(1); (5) the court found Snipes' claim for medical expenses which are stipulated to have arisen out of his employment by Sperry Vickers and on which suit was filed within 2 months of the date of medical care was barred by the statute of limitations, § 48-137; (6) the court found the statute of limitations, § 48-137, begins to run before a right to file a claim for medical expenses has arisen; and, finally, (7) the court failed to award Snipes an attorney fee.

STANDARD OF REVIEW

A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996); *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995); *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995).

An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Berggren, supra; Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996); *Scott, supra.*

ANALYSIS

The parties stipulate that the issue for this court to decide is whether or not a claim for medical expenses incurred more than 2 years after the last payment of compensation is barred by the statute of limitations when the employee had no compensable claims to file between August 14, 1992, the date of the last payment of compensation, and March 9, 1995, the date of the examination by Dr. William R. Schlichtemeier. We hold that the claim in this case is barred by the statute of limitations.

The answer to the issue presented by stipulation requires statutory interpretation of various sections of the Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1993 & Cum. Supp. 1994). Statutory interpretation is a matter of law in connection with which we have an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996); *Goolsby v. Anderson,* 250 Neb. 306, 549 N.W.2d 153 (1996). Further, in determining the meaning of a statute, we may conjunctively consider and construe a collection of statutes

which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *McCook Nat. Bank v. Bennett*, 248 Neb. 567, 537 N.W.2d 353 (1995); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

Sperry Vickers correctly states that a claimant has 2 years from the date of the last payment of compensation within which to bring an action under the Worker's Compensation Act, citing § 48-137.

Snipes argues that an employer is liable for all reasonable medical services, including 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, citing § 48-120. He further argues that additional compensation may be awarded when there is an increase in disability. See, § 48-141; *White v. Sears, Roebuck & Co.*, 230 Neb. 369, 431 N.W.2d 641 (1988).

When payments of compensation have been made, as in the instant case, the statute of limitations will not take effect until the expiration of 2 years from the time of the making of the last payment, § 48-137. Snipes' initial argument, relying on § 48-120, is misplaced. We have never held § 48-120 to be an exception to the 2-year limitation in § 48-137, and we refrain from doing so now.

However, there are at least two exceptions that apply to § 48-137. The first, not argued by Snipes, is the situation where the injury is "latent and progressive" and is not discovered within 2 years of the accident which caused the injury. See, *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972); *Williams v. Dobberstein*, 182 Neb. 862, 157 N.W.2d 776 (1968). See, also, *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985); *Novak v. Triangle Steel Co.*, 197 Neb. 783, 251 N.W.2d 158 (1977) (stating that knowledge of compensable disability, and not awareness of full extent thereof, is factor which controls in determining when statute of limitations begins to run).

The second exception to the statute of limitations, argued by Snipes, is articulated in the case of *White, supra*.

In *White*, this court confronted similar facts. The employee, Barbara A. White, injured her back on November 16, 1983, as a result of an accident that occurred during the course of her employment. As a result of her injury, White underwent surgery and did not return to work until August 1984. During the time White was off work, her employer paid compensation to her, the last payment having been made in September 1984.

On February 20, 1987, White filed a petition in the Workers' Compensation Court, alleging that since the spring of 1986, she had suffered a material change in her condition which necessitated additional medical care and for which she had suffered increased disability. Specifically, she had an increase from "'some residual minor back discomfort'" to "between a 5-percent and 12-percent permanent disability to the body as a whole." *Id.* at 371, 431 N.W.2d at 643. Her employer relied on the statute of limitations. Both the single judge and the rehearing panel accepted the employer's argument.

The instant case has facts similar to those in *White*. Snipes' employer, Sperry Vickers, paid all medical expenses, expenses for glasses, and temporary disability and permanent disability benefits through August 14, 1992. Sperry Vickers made no payments to or on behalf of Snipes after that date. After August 14, 1992, and before March 9, 1995, Snipes incurred no medical expenses for which Sperry Vickers would be liable, and Snipes had no claim against Sperry Vickers for which workers' compensation benefits would be due or owing.

On April 12, 1995, Snipes filed an amended petition against Sperry Vickers in the Workers' Compensation Court, claiming in essence, that a material increase in disability occurred to his eye. This increase, resulting from the initial injury, necessitated additional medical care, i.e., examination on March 9, 1995, by Dr. Schlichtemeier, who changed the prescription for Snipes' glasses. Sperry Vickers relied on the statute of limitations. Both the trial judge and the review panel accepted the employer's argument.

In discussing the statute of limitations issue in *White v. Sears, Roebuck & Co.*, 230 Neb. 369, 371-72, 431 N.W.2d 641, 643 (1988), we stated:

> There is no doubt as to the right of an injured worker to receive compensation for an increase in disability that occurs following a compensable injury. Where there has been a proceeding before the compensation court and there has been an award, the procedure is set out in § 48-141. *Where there is no dispute about the compensable nature of the injury which the worker sustained, and the employer has voluntarily paid compensation to the injured worker, the right to receive additional compensation in the event of a material increase in disability resulting from the injury is still available.*

(Emphasis supplied.)

Further:

> "The entire question is the simple one of whether the claimant has any reasonable occasion to file a claim sooner than he did. If voluntary compensation was paid, this cancels out the initial disability as a reason for filing a claim, and the case becomes identical to any other latent-injury situation."

White, 230 Neb. at 372, 431 N.W.2d at 643 (quoting 3 Arthur Larson, The Law of Workmen's Compensation § 78.44 at 15-296 (1988)).

Sperry Vickers paid compensation, thus canceling out the initial disability as a reason for filing a claim. Snipes had no reasonable occasion to file a claim sooner than he did. When the parties are unable to agree on the compensation owed, the worker's remedy is to file a petition in the compensation court. See *White, supra*. Such a petition must be filed within 2 years from the time the employee knows or is chargeable with knowledge that the employee's condition has materially changed and that there has been such a substantial increase in disability as to entitle the employee to additional compensation. § 48-137; *White, supra*. See *Peek v. Ayers Auto Supply*, 157 Neb. 363, 59 N.W.2d 564 (1953).

We note that this case does not present a situation where the glasses were damaged and replacement of the glasses is sought. This is a case where the eye of the employee was damaged. However, this case is distinguished from *White* in one important

area. There is no evidence in the stipulated facts that there has been a material increase in Snipes' disability.

In *White*, the evidence showed a 5- to 12-percent increase in permanent disability to the body as a whole. That was determined to be a "material increase" in the claimant's disability. There is no such evidence in this case.

When payments of compensation have been made, as in the instant case, the statute of limitations will not take effect until the expiration of 2 years from the time of the making of the last payment. § 48-137. The last payment in this case was made on August 14, 1992. Lacking evidence of an exception, the March 9, 1995, claim is barred by the statute of limitations.

Based on the evidence it had before it, the compensation court was correct in its finding that the 2-year statute of limitations contained in § 48-137 had run. We therefore affirm.

Snipes has pointed out that his only other alternative is to incur "phony and/or frivolous" medical expenses and ask the court to order the employer to pay for such medical care in order to repeatedly extend the start date of the statute of limitations. Snipes argues that this would encourage frivolous medical care and litigation over frivolous medical care and would penalize an honest employee who has not abused the system.

Regarding this argument, the compensation court stated, "[Snipes] may very well be correct, but this problem was undoubtedly foreseen by the [L]egislature which chose to make no exceptions." The compensation court was not in error.

CONCLUSION

The petition was filed after the 2-year time period set forth in the applicable statute of limitations. The possible exceptions to the statute of limitations do not apply. The judgment of the compensation court is affirmed.

AFFIRMED.

GERRARD, J., concurring.

Because there was no evidence of a substantial increase in Snipes' disability, I agree that Neb. Rev. Stat. § 48-137 (Reissue 1993) bars recovery of *this particular* $500 claim by Snipes. However, in a case such as this, where there is no dispute about the compensable nature of the injury and the employer has vol-

untarily paid compensation to the injured worker, the right to receive additional compensation *in the event of a material increase in disability* resulting from the injury is available in the future. See *White v. Sears, Roebuck & Co.*, 230 Neb. 369, 431 N.W.2d 641 (1988).

Thus, while § 48-137 barred Snipes' claim based on the evidence before us, the courthouse door is not necessarily forever locked in the event of a material increase in disability resulting from the February 2, 1984, injury.

WHITE, C.J., and FAHRNBRUCH, J., join in this concurrence.

IN RE PETITION OF ANONYMOUS 1, A MINOR.

558 N.W.2d 784

Filed January 10, 1997. No. S-33-960027.

1. **Abortion: Minors: Judgments: Appeal and Error.** In an appeal brought under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 1994), the Nebraska Supreme Court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue; however, it considers, and may give weight to, the fact that the judge below heard and observed the witnesses.
2. **Abortion: Minors: Proof.** In a proceeding brought under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 1994), the burden of proof on all issues rests with the pregnant woman, and such burden must be established by clear and convincing evidence.
3. **Abortion: Minors.** As related to a pregnant woman's abortion decision, maturity is not solely a matter of social skills, level of intelligence, or verbal skills, but, more importantly, a matter of experience, perspective, and judgment; the factors for determining experience include, but are not limited to, a pregnant woman's prior work experience, experience in living away from home, and experience in handling personal finances; the factors for determining perspective include, but are not limited to, a pregnant woman's appreciation and understanding of the relevant gravity and possible detrimental impact of each available option, as well as realistic perception and assessment of possible short-term and long-term consequences of each of those options, particularly the abortion option; the factors for determining good judgment include, but are not limited to, a pregnant woman's past conduct and being fully informed so as to be able to weigh alternatives independently and realistically.
4. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.

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

Judith A. Zitek for petitioner.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

I. INTRODUCTION

This proceeding was instituted under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 1994) by a pregnant 13-year-old minor seeking authorization for her physician to perform upon her an abortion "without prior notification being required or given to her parent(s) . . . ." The judge below entered an order denying such authorization, finding that the petitioner "is not a mature minor and is not capable of giving informed consent to the proposed abortion, and it is not in the best interests of the [p]etitioner for the physician to perform the proposed abortion upon her without prior notification to her parent(s) . . . ." The minor asserts in this court, in essence, that the judge below erred in each of the foregoing findings.

II. DE NOVO REVIEW

Section 71-6904(6) provides that we hear this appeal de novo on the record. Accordingly, we reappraise the evidence as presented by the record and reach our own independent conclusions with respect to the matters at issue. However, we consider, and may give weight to, the fact that the judge below heard and observed the witnesses. See, *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996); *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

The relevant portions of § 71-6902 provide that no "abortion shall be performed upon a pregnant woman until at least forty-eight hours after written notice of the pending abortion has been delivered . . . to the parent . . . ." "Pregnant woman" is defined in pertinent part as "an unemancipated woman under eighteen years of age who is pregnant . . . ." § 71-6901(5). "Parent" means "one parent or guardian of the pregnant woman selected by the

pregnant woman." § 71-6901(3). Furthermore, § 71-6903(1) provides:

> If a pregnant woman elects not to notify her parent, a judge . . . shall, upon petition or motion and after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If the court determines that the pregnant woman is not mature or if the pregnant woman does not claim to be mature, the court shall determine whether the performance of an abortion upon her without notification of her parent would be in her best interests and shall authorize a physician to perform the abortion without such notification if the court concludes that the best interests of the pregnant woman would be served thereby.

The evidence demonstrates that the minor herein is a ninth grade high school student who lives with both of her parents. She suspected she was pregnant after she missed her menstrual period, and she later confirmed her suspicion by taking two pregnancy tests, at least one of which was of the type administered at home.

The minor performs household chores and has saved the money she earned this past summer detasseling corn, putting the money in the bank. She is currently unemployed and testified that she earns A's and B's in school. She hopes to go to college and may possibly become a nurse.

She has not discussed sexual matters with her parents and has not told them of her pregnancy. She testified that she feels pretty close to her mother, but she fights "a lot" with her father. She said that on two separate occasions, her father threatened to kick her out of the house if she got pregnant at a young age. She takes these threats seriously and does not believe her father is merely trying to emphasize his concern or feelings about her becoming pregnant. At one point, the minor testified that she does not confide in either of her parents, but later admitted that she sometimes tells them about her feelings.

She has been advised of and has considered her alternatives, including adoption, testifying:

[COURT]: Have you discussed the procedure with any medical person?

[MINOR]: Well, I went to Planned Parenthood and talked to them about it.

[COURT]: All right. Did they discuss any medical risks that are involved?

[MINOR]: No, but I got booklets on it and read about them.

[COURT]: Okay. But Planned Parenthood didn't discuss it with you?

[MINOR]: ([Minor] nods head in the affirmative.)

[COUNSEL]: Your Honor? Did you speak with Sherry Ham?

[MINOR]: Yeah.

[COUNSEL]: Didn't she go through the procedure you are going to have and tell you what — the possibilities you might suffer?

[MINOR]: Yeah.

[COURT]: What do you understand are any risks that are involved?

[MINOR]: Well, I hear you have bad cramps or you may get something up inside you that could cause risks.

The minor has also discussed her pregnancy with her 25-year-old married sister, who is herself the mother of a young child. The sister assisted the minor in purchasing a home pregnancy test and has discussed with the minor the risks involved in an abortion, as well as alternatives to abortion, testifying that she has given the minor all the information she could so as to assist her in making an informed choice.

The sister also testified that when she lived with her parents, she was afraid of her father and is sure that he would kick the minor out of the house if he discovered that she is pregnant. In fact, the father has told the sister that if the minor becomes pregnant, she will be out of the house. In the sister's view, her father, who is "very firm in his ways," would consider the matter an embarrassment to the family, and the fact that the person who impregnated the minor lives in the neighborhood would make the situation a "neighborhood tragedy." The sister thought her mother would likely go along with her father's decision.

The minor considers herself too young and not responsible enough for childbirth and testified that she "wouldn't be able to go through that." She is of the opinion that it is in her best interests to have an abortion and that she has made a mature decision. The sister also believes that it is in the minor's best interests to have an abortion.

Having reviewed the evidence, the determination to be made at this point is where the burden of proof lies. The U.S. Supreme Court has ruled that the state is not required, in a proceeding to judicially bypass parental notification requirements, to bear the burden of proof on the issues of maturity and best interests. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990).

Therefore, in keeping with our general rule that it is the party asserting the affirmative of an issue that bears the burden of proof on that issue, see *Alliance RR. Comm. Credit Union v. County of Box Butte*, 243 Neb. 840, 503 N.W.2d 191 (1993), we hold that in a proceeding brought under the provision of the statutes here involved, the burden of proof on all issues rests with the pregnant minor. Furthermore, § 71-6903 does not specify the requisite standard of proof. Considering the magnitude of the decision at issue, the fact that the proceedings are ex parte in nature, and recognizing that any evidence will usually satisfy the preponderance of the evidence standard, we think it necessary that the pregnant minor establish, by clear and convincing evidence, her maturity or that the performance of an abortion upon her without parental notification is in her best interests. This heightened evidentiary standard is consonant with those federal constitutional concerns addressed in *Ohio v. Akron Center for Reproductive Health, supra*, and consistent with this court's past decisions where we required a heightened evidentiary standard to protect a constitutional interest when none was specified in the statutory text. *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

Maturity is "difficult to define, let alone determine . . . ." *Bellotti v. Baird*, 443 U.S. 622, 643-44 n.23, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979) (commonly referenced as *Bellotti II*). Notwithstanding, determine it we must. While the U.S. Supreme Court has not explicitly defined "maturity" in the con-

text of parental notification or consent statutes, it has observed that "minors often lack the *experience, perspective, and judgment* to recognize and avoid choices that could be detrimental to them." (Emphasis supplied.) *Id.*, 443 U.S. at 635.

Other courts have likewise concluded that maturity may be measured by examining the minor's experience, perspective, and judgment. Particularly insightful is *H___ B___ v. Wilkinson*, 639 F. Supp. 952, 954 (D. Utah 1986), which states:

> Manifestly, as related to a minor's abortion decision, maturity is not solely a matter of social skills, level of intelligence or verbal skills. More importantly, it calls for experience, perspective and judgment. As to experience, the minor's prior work experience, experience in living away from home, and handling personal finances are some of the pertinent inquiries. Perspective calls for appreciation and understanding of the relative gravity and possible detrimental impact of each available option, as well as realistic perception and assessment of possible short term and long term consequences of each of those options, particularly the abortion option. Judgment is of very great importance in determining maturity. The exercise of good judgment requires being fully informed so as to be able to weigh alternatives independently and realistically. Among other things, the minor's conduct is a measure of good judgment. Factors such as stress and ignorance of alternatives have been recognized as impediments to the exercise of proper judgment by minors, who because of those factors "may not be able intelligently to decide whether to have . . . an abortion." [Citation omitted.] Experience, perspective and judgment are often lacking in unemancipated minors who are wholly dependent and have never lived away from home or had any significant employment experience.

While any list of suggested criteria bearing upon the imponderable matter of defining and determining maturity in minors is not meant to be exhaustive, we conclude that the criteria set forth in *H___ B___ v. Wilkinson, supra*, serve as appropriate guideposts in making such a determination.

With that in mind, we, giving weight to the fact that the judge below saw and heard the witnesses, independently conclude that the minor has failed to sustain her burden of proving by clear and convincing evidence that she is mature within the meaning of § 71-6903(1). The record indicates that the minor lives with her parents, has never lived on her own, and has never handled her personal finances or held employment other than a summer job detasseling corn. The testimony did not indicate that the minor understood and appreciated the gravity and impact of each option before her. Neither did the record indicate that she understood and appreciated the short- and long-term consequences of her desire to seek an abortion. At best, the testimony revealed that the minor was afraid of her father's reaction should he learn of her pregnancy and of the embarrassment her father would suffer if her pregnancy were revealed. Finally, the minor was unable to communicate to the judge a sufficient understanding of the medical procedure involved, the associated risks, or of any alternatives to abortion. Certainly, the 13-year-old minor in the instant case did not demonstrate, by clear and convincing evidence, a level of experience, perspective, or judgment sufficient to allow this court to consider her mature within the meaning of the statute.

Having made that determination, we need not consider whether the minor would otherwise have been capable of giving informed consent to the proposed procedure.

However, we must determine whether, notwithstanding the minor's immaturity, the performance of an abortion without notification of her parent would nonetheless be in her best interests. § 71-6903(1).

Upon our de novo review, we independently conclude that the minor has failed to sustain her burden of proof with respect to this issue as well. The minor testified that she feels close to her mother. As set forth earlier, § 71-6902 requires only that notice be given to "*the parent*" of "a pregnant woman," and § 71-6903(1) empowers a judge to act when "a pregnant woman elects not to notify *her parent*." (Emphasis supplied.) Moreover, § 71-6901(3) defines "parent" as meaning "one parent" and requires the attending physician to "certify in writing in the pregnant woman's medical record the parent . . . selected by the

woman." The minor has not provided a sufficient rationale for us to conclude that notification to at least *one* of her parents would not be in her best interests.

Accordingly, to the extent that the district court order may require that both parents must be notified, it is modified to require that only the minor's mother or father, as selected by the minor, be notified.

III. JURISDICTION

The dissent, sua sponte, asserts that the district court lacked jurisdiction to entertain this matter, and as a result, we lack jurisdiction to review the merits of the instant case. The dissent contends that where Nebraska's judicial bypass statute contemplates that only the minor's interests be presented to the court, there can be no case or controversy sufficient to vest jurisdiction in this court or the lower court. It is the dissent's view that no justiciable issue can be presented to a court in the absence "of anyone designated to represent the parental interest in a confidential manner." The dissent further suggests that, in passing § 71-6903, the Legislature violated Neb. Const. art. II, § 1 (separation of powers), by attempting to confer upon our courts nonjudicial regulatory duties not ordinarily or traditionally held to be within the constitutional powers of the judicial department.

Before addressing either of the above contentions, it is important to note that the U.S. Supreme Court has considered and extensively analyzed the delicate balance of the competing constitutional rights between an unmarried pregnant minor's right of privacy and her parents' right to guide her upbringing. In *Bellotti II*, the Court detailed the guiding role of parents in the upbringing of their children and recognized the parents' claim to authority in their own household to direct the rearing of their children as basic in the structure of our society. In fact, in *Bellotti II*, it was these parental interests, along with the interest of the state in encouraging an unmarried minor to seek the advice of her parents in deciding whether or not to bear a child, that were balanced with the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

The Court, after balancing the above interests, held that if a state decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained. *Bellotti II, supra*. Interestingly, the Court suggested in a footnote that a state could "delegate the alternative procedure to a juvenile court or an administrative agency or officer," and not necessarily to a court of general jurisdiction. 443 U.S. at 643 n.22. However, if a state chooses a court of general jurisdiction as its forum for the alternate adjudicative procedure, the Court was rather clear in its directive:

> [E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

443 U.S. at 647-48.

In addition, the Court held that the bypass procedure must ensure the minor's anonymity and provide for confidentiality and that it must be conducted expeditiously so as to allow an effective opportunity for the minor to obtain an abortion following the decision. *Id.* See, also, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990).

The Nebraska Legislature enacted § 71-6903 to ensure a judicial resolution of the issues when a minor seeks to obtain an abortion without first notifying one of her parents, while also safeguarding the minor's privacy and her interest in a prompt resolution. When the Legislature has expressly chosen a judicial forum for the resolution of these issues, it is not this court's

province to rewrite the statute or suggest alternate or additional procedures to be utilized in this context, unless the judicial bypass statute violates (1) the state Constitution, (2) the federal Constitution (or any federal law made pursuant thereto), or (3) a federal treaty. See U.S. Const. art. VI. See, also, *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994) (finding that it was not office of this court to extend time limitation set by Legislature); *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985) (refusing to rewrite statute and finding that court's role is limited to interpretation and application, so long as questioned statute does not violate a constitutional requirement); *Bowers v. Maire*, 179 Neb. 239, 137 N.W.2d 796 (1965) (Supreme Court will not indulge in judicial legislation).

In that vein, the dissent asserts that the Legislature unconstitutionally conferred upon the judiciary a regulatory duty better suited for some other agency of the state when it passed § 71-6903. Suffice it to say that the U.S. Supreme Court could hardly be clearer in stating that a state's judiciary is a proper forum in which a pregnant minor may seek authorization for an abortion in the absence of parental consent. See, *Bellotti II*; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983); *Ohio v. Akron Center for Reproductive Health, supra*; *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990). We will not conclude, 17 years after *Bellotti II*, that Nebraska's judicial bypass procedure is a mere regulatory duty that may not properly be exercised by the judicial branch. The Legislature stayed within proper constitutional bounds in setting forth the judicial bypass procedure in § 71-6903.

The dissent also contends that there was no case or controversy sufficient to vest jurisdiction in this court or the lower court. Unlike the U.S. Constitution, the Constitution of the State of Nebraska does not require the existence of an actual case or controversy for jurisdiction to vest in the courts of the state (cf. U.S. Const. art. III, § 2). However, our case law has required that for there to be an exercise of judicial power in Nebraska, an actual case or controversy must be presented. *Welch v. Welch*,

246 Neb. 435, 519 N.W.2d 262 (1994); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993); *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting. *Welch v. Welch, supra*; *State v. Baltimore, supra.*

In the present case, there was clearly an actual controversy to be determined. The minor's pregnancy was not hypothetical or speculative. The minor's request for relief from the parental notification requirement of the statute, § 71-6902, did not present an abstract question, but was, rather, a request for a determination of important rights. Under the statute, the minor would not be able to obtain an abortion without notifying a parent unless the court granted her petition.

Even under federal constitutional standards, this case presents an actual case or controversy for resolution. Justice Frankfurter noted that "[w]hether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 156, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring). The issues presented in the judicial bypass context are clearly appropriate for decisions by courts. The determinations of whether a particular minor possesses sufficient maturity and information to make the decision or whether, in any case, an abortion would be in her best interests are the types of questions that courts are uniquely called upon to answer. Moreover, the Court has noted the hardship of denying judicial relief in this context. The need to preserve the constitutional right to seek an abortion; the unique nature of the abortion decision, which "effectively expires in a matter of weeks"; and the far-reaching consequences of the decision were factors that led the Court to require an alternative to a blanket parental notice or consent requirement. *Bellotti II*, 443 U.S. at 642.

In an analogous context, a disbarment action at which the committee did not appear, the Court found that "the consideration of the petition by the Supreme Court, the body which has authority itself by its own act to give the relief sought, makes

the proceeding adversary in the sense of a true case or controversy." *In re Summers*, 325 U.S. 561, 568, 65 S. Ct. 1307, 89 L. Ed. 1795 (1945). The Court continued:

> A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is made by judicial order, it is a case which may be reviewed under Article III of the Constitution . . . .

325 U.S. at 568-69. Similarly, a pregnant minor has a claim of present right to obtain an abortion, and a denial of that right undoubtedly presents a controversy.

In concluding that there is an actual case or controversy in the instant case, we are mindful that the U.S. Supreme Court, in its review of Ohio's judicial bypass procedure 11 years after *Bellotti II*, recognized that the nature of bypass proceedings is such that the opposing side may not be represented. See *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990). "A State, moreover, may require a heightened standard of proof when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony. We find the clear and convincing standard used in [the statute] acceptable." (Emphasis in original.) *Id.*, 497 U.S. at 516.

Accordingly, we determine that the instant case presents an immediate dispute affecting the rights of the pregnant minor, which dispute was brought before the district court pursuant to constitutional procedures provided by statute. Thus, there is an actual controversy in the instant case sufficient to vest jurisdiction in the district court to decide the matter and in this court to review the lower court's decision.

IV. JUDGMENT

Based on the foregoing reasons, we affirm the order of the district court except to the extent that the district court order requires that both parents must be notified, and the order is modified to require that only the minor's mother or father, as selected by the minor, be notified.

AFFIRMED AS MODIFIED.

WHITE, C.J., concurs in the result.

CAPORALE, J., dissenting.

I respectfully dissent. I submit that the judge below had no jurisdiction to entertain this matter under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 1994) and that as a consequence, we have no jurisdiction to review it.

Although jurisdiction was not one of the issues presented by the questions certified to us by the U.S. District Court for the District of Nebraska with regard to a predecessor statute, *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983), and thus not addressed therein, I begin by recalling that an appellate court has both the power and duty to consider on its own motion whether the lower tribunal had, and thus the appellate court has, jurisdiction over the matter then before it. See, *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995); *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995).

As the majority correctly notes, we have held that while not a constitutional prerequisite, the existence of an actual case or controversy nevertheless is necessary for the courts of this state to exercise the judicial power vested in them by Neb. Const. art. V, § 1. *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993). See, also, *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993); *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

In *Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), the U.S. Supreme Court wrote that the case or controversy requirement found in U.S. Const. art. III limits the business of the federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." The U.S. Supreme Court has further explained that the "clash of adverse parties '"sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."'" *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 382-83, 100 S. Ct. 1194, 63 L. Ed. 2d 467 (1980).

As the U.S. Court of Appeals for the Eighth Circuit explained in considering the case or controversy requirement in the con-

text of a complaint seeking a declaratory judgment, the test is whether " 'there is a substantial controversy between the parties having adverse legal interests . . . .' " *Marine Equipment Management Co. v. U.S.*, 4 F.3d 643, 646 (8th Cir. 1993). The test is not satisfied if the court does not have before it "opposing parties that are fairly motivated to diligently and effectively present the merits of all sides of the issues presented, thereby facilitating the court's efforts to reach the correct results." *Financial Guar. Ins. v. City of Fayetteville, Ark.*, 943 F.2d 925, 929 (8th Cir. 1991).

Neb. Const. art. II, § 1, divides the governance of this state among legislative, executive, and judicial departments and provides that "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." In recognition of that constitutional provision, we have held on numerous occasions that the Legislature cannot confer upon the courts nonjudicial duties. See, *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967) (legislative act attempting to confer upon courts power of determining what lands should be annexed to city violated Constitution); *Furstenberg v. Omaha & C. B. Street R. Co.*, 132 Neb. 562, 272 N.W. 756 (1937) (Supreme Court has no power to regulate public utilities); *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464 (1929) (statute requiring court to determine whether power district should be incorporated, what its boundaries should be, et cetera, is invalid, as imposing nonjudicial duties); *State v. Neble*, 82 Neb. 267, 117 N.W. 723 (1908) (statute providing for appointment of municipal park commissioners by judges of district court is void, as violating Constitution); *Tyson v. Washington County*, 78 Neb. 211, 110 N.W. 634 (1907) (statute cannot vest judiciary with legislative functions under subterfuge of giving court jurisdiction over such questions on appeal); *Horbach v. Tyrrell*, 48 Neb. 514, 518, 67 N.W. 485, 486 (1896) (taking of acknowledgment ministerial, not judicial, act, judicial power being "authority of some person or tribunal to hear and determine a controversy and to reduce such determination to a judgment or decree binding the parties thereto").

Accordingly, while duties which are inherently judicial, such as the fixing of qualifications for and admission to the practice of law, do not require the existence of a case or controversy, see *State, ex rel. Wright, v. Hinckle*, 137 Neb. 735, 291 N.W. 68 (1940), disputes involving other branches of government will be decided only where there exists a case or controversy, see *State Securities Co. v. Ley*, 177 Neb. 251, 128 N.W.2d 766 (1964).

In the context presented, there can be no case or controversy where the proceeding contemplates that only the minor's interests be presented to the court. Indeed, we implicitly so recognized in *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956), a case involving the constitutionality of a statute, in which case it became apparent that all the parties were interested in achieving the same result. We thereupon directed the Attorney General to appear and file a brief in order that we might have "a better opportunity of being informed as to the questions involved." *Id.* at 789, 77 N.W.2d at 581. It is no answer to suggest that in a proceeding such as that now before us, protecting the parent's interest is somehow the obligation of the judge initially hearing the matter, for that judge is, as is this court, under a duty to impartially evaluate the evidence presented. A court can neither develop nor present evidence. See, *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); Neb. Code of Jud. Cond., Canon 3 (rev. 1996).

Thus, contrary to our jurisdictional case or controversy requirement, the statutory provisions at issue attempt to confer upon our courts nonjudicial regulatory duties not ordinarily or traditionally held to be within the constitutional powers of the judicial department.

I recognize, of course, that under U.S. Const. art. VI, the provisions of the federal Constitution and the laws of the United States made pursuant thereto are "the supreme Law of the Land" and bind "the Judges in every State," anything in the Constitution or laws of "any State to the Contrary notwithstanding."

I understand, too, that under the Constitution of the United States, if a state requires a pregnant minor to obtain parental consent to an abortion, the state must provide an alternative pro-

cedure whereby authorization may be obtained and that such proceeding must assure anonymous and expeditious resolution of the issue. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990); *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976). However, I find nothing in federal law which dictates that the proceeding must be conducted in the absence of the confidential representation of the parental interest to raise one's children. *Ohio, supra*, merely observes that as the proceeding therein was ex parte, the state could impose upon the minor the heightened clear and convincing standard of proof. We must remember that the U.S. Supreme Court has declared, under the rubric of personal or family privacy and autonomy, that an individual's freedom of personal choice in matters involving family relationships is a fundamental liberty interest protected by U.S. Const. amend. XIV. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The Court has also recognized that the aforementioned liberty interest includes a parent's right to rear or direct the upbringing of one's child. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See, also, *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). Moreover, these are concerns in which the state itself also has a stake. *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990) (rights to conceive and raise one's children are essential, basic civil rights far more precious than property rights, and when parent has assumed primary responsibility for minor's well-being, state may properly enact laws designed to aid discharge of that responsibility).

Therefore, the absence in these proceedings of anyone designated to represent the parental interest in a confidential manner means that under Nebraska law there was before the judge below no case or controversy which presented a justiciable issue. As a consequence, the judge below lacked jurisdiction to entertain the matter. That being so, we lack jurisdiction to

review the merits. *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996) (when lower court lacks jurisdiction to adjudicate merits, appellate court also lacks power to determine merits). See, also, *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996) (although extrajurisdictional act of lower court does not vest appellate court with jurisdiction over merits, appellate court has duty to determine whether lower court possessed subject matter jurisdiction).

I would therefore remand with the direction to dismiss.

FAHRNBRUCH and LANPHIER, JJ., join in this dissent.

JOHN DARRIN SAWYER, APPELLANT, V.
STATE SURETY COMPANY, A CORPORATION, APPELLEE.
558 N.W.2d 43

Filed January 10, 1997. No. S-94-1085.

1. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
3. **Contracts: Principal and Surety: Words and Phrases.** Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal. The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal. It is of the essence of the surety's contract that there be a valid obligation.
4. **Principal and Surety: Liability.** The liability of the surety for the debt to the holder of the obligation is no greater and no less than that of the principal.
5. **Actions: Principal and Surety.** Neb. Rev. Stat. § 30-2641(b) (Reissue 1995) prohibits an action against a surety on a guardian bond if the same action cannot be taken against the primary obligor because of an adjudication or limitation.

Appeal from the District Court for Saunders County: EVERETT O. INBODY, Judge. Affirmed.

James C. Stecker, of Robak and Stecker, for appellant.

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

John Darrin Sawyer (John D.) brought this action against State Surety Company to recover on a $20,000 guardian bond issued to his father, John R. Sawyer (John R.). Because John R. had filed for chapter 13 bankruptcy protection, the parties entered into a stipulation lifting the automatic stay in the bankruptcy court so that John D. could obtain a judgment against John R. in the district court for moneys owed. The stipulation provided that John D. would pursue the judgment against State Surety only. The district court dismissed this cause pursuant to Neb. Rev. Stat. § 30-2641(b) (Reissue 1995). We affirm, concluding that § 30-2641(b) prevents an obligee from pursuing a claim against a surety on a bond when the obligee has stipulated that no enforcement or collection action on the judgment will be taken against the primary obligor.

BACKGROUND

The proceedings in the district court were conducted largely upon a stipulation of the facts. For this reason, the facts underlying the present dispute are essentially undisputed.

John D.'s mother died on October 28, 1981, leaving him the beneficiary of insurance benefits from IBM. To facilitate the payment of these funds, the Saunders County Court appointed John R., John D.'s father, guardian on April 9, 1984. Shortly thereafter, on April 19, John R. filed a bond with the county court in the amount of $20,000, with State Surety being the surety.

Between the years 1984 and 1986 inclusive, John R., as guardian, received moneys belonging to John D. In particular, John R. received $25,585 from insurance proceeds from IBM and $15,786 from Social Security. Despite the fact that these funds were payable directly to his son, John R. failed to pay these sums to John D. when he reached the age of majority on October 11, 1987.

On July 26, 1991, the county court ordered John R. to file a report accounting for all moneys he had received and expended as guardian for John D. An accounting was filed on November 7, 1991, with John D. filing objections on December 12. Before a hearing was held regarding the objections, John R., on April 15, 1992, filed a petition for relief in bankruptcy under chapter 13 of title 11 of the U.S. Code. A suggestion in bankruptcy was then filed by John R. in the county court 4 days later.

Both John D. and State Surety were listed as creditors in the bankruptcy petition. On or about June 9, 1992, John D. filed a proof of claim with the bankruptcy court. This claim was allowed in the sum of $41,370 and was classified as unsecured. Prior to the confirmation of a bankruptcy plan and the entry of any debt discharge, John D. filed a motion for relief from the automatic stay with the bankruptcy court in order to proceed with the accounting of the guardianship in the county court.

There was no contested hearing regarding the motion for relief. Instead, the parties entered into a stipulation whereby John R. agreed to a lifting of the automatic stay for the sole purpose of allowing John D. to obtain a judgment against him in the county court so that he could file an action against State Surety on the $20,000 bond. Paragraph 5 of the stipulation provides:

> That John Darrin Sawyer shall not be permitted to take any action against any property or any part of the estate of John R. Sawyer. That John Darrin Sawyer be granted the necessary authority and permission to proceed on an action against the bonding company, State Surety Company, so that such action and/or proceeding effectively may proceed and that John Darrin Sawyer may take all necessary action to obtain the judgment against John R. Sawyer so that said amount due John Darrin Sawyer may be finally determined in order that an action on the bond of State Surety Company may proceed in the appropriate District Court. *That in consideration for the Stipulation by John R. Sawyer to permit judgment to be entered against him in the matter of John Darrin Sawyer in the County Court of Saunders County, John Darrin Sawyer hereby provides his covenant against enforcements or collection*

against John R. Sawyer personally and John Darrin Sawyer hereby agrees to use the judgment for the sole purpose of maintaining an action against State Surety on the bond.

(Emphasis supplied.)

The bankruptcy court, pursuant to this stipulation, granted John D. relief from the automatic stay on January 8, 1993. John D. then moved the county court to enter a judgment by stipulation against John R. for $41,370. The county court granted John D.'s motion and entered judgment against John R. in the amount of $41,370.

Having received only $390 from John R., John D. filed this action against State Surety on August 30, 1993, seeking a $20,000 judgment on the surety bond. The district court, pursuant to § 30-2641(b), dismissed the action, holding that "an action against the primary obligator, John R. Sawyer, has been barred by adjudication or limitation and therefore no proceeding may be commenced against the surety, State Surety Company." John D. appeals.

ASSIGNMENT OF ERROR

In this appeal, John D. alleges the district court decision is contrary to law and is not supported by the facts.

STANDARD OF REVIEW

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *State v. Bundy*, 250 Neb. 213, 549 N.W.2d 122 (1996); *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995); *Douglas Cty. Bank & Trust v. Stamper*, 244 Neb. 226, 505 N.W.2d 693 (1993).

ANALYSIS

The question before us is whether a surety (State Surety) is released from liability on a guardian bond when the obligee

(John D.) stipulates that no action for collection or enforcement of a judgment will be pursued against the primary obligor (John R.) for moneys owed. The answer to this question is controlled by § 30-2641(b), which provides: "No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation." Thus, we must determine whether a stipulation not to enforce or collect on a judgment is an adjudication or limitation.

In this appeal, John D. essentially argues that the stipulation entered into by the parties does not act as a limitation or adjudication which prevents the bringing of an action against State Surety, because it was simply a means by which to lift the automatic stay in the bankruptcy court. John D. asserts that the term "limitation" as used in § 30-2641(b) refers to the statute of limitations for bringing an action, while the term "adjudication" as used in the statute should be interpreted to mean a proceeding to determine the liability of the guardian or prior proceeding against the surety. State Surety urges a more expansive interpretation of the term "adjudication" by arguing that the approval of the stipulation by the bankruptcy court and the reliance on it by the county court act as an "adjudication" for purposes of § 30-2641(b).

We note that this court has not determined an action against a surety within the confines of § 30-2641(b). We have, however, set forth general rules regarding the law of suretyship. In *Niklaus v. Phoenix Indemnity Co.*, 166 Neb. 438, 445, 89 N.W.2d 258, 262-63 (1958), suretyship was defined as

> a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal. *The surety's obligation is not an original and direct one for the performance of his own act, but is accessory or collateral to the obligation contracted by the principal. It is of the essence of the surety's contract that there be a valid obligation.*

(Emphasis supplied.) Accord *Shipley v. Baillie*, 250 Neb. 88, 547 N.W.2d 711 (1996).

Inherent in the existence of any surety relationship is the requirement that the principal owe some obligation. The liability of the surety for the debt to the holder of the obligation *is no greater and no less than that of the principal. Niklaus v. Phoenix Indemnity Co., supra* (citing *Kroncke v. Madsen*, 56 Neb. 609, 77 N.W. 202 (1898)). See, also, *Coleman v. Beck*, 142 Neb. 13, 5 N.W.2d 104 (1942) (surety released if creditor releases principal debtor without the knowledge of surety).

We conclude that the underlying rationale of these principles is clearly embodied within § 30-2641(b). The obvious mandate of § 30-2641(b) is that an obligation must exist against the primary obligor before an action can be commenced against the surety. If a proceeding against the primary obligor is barred, by adjudication or limitation, the same necessarily holds true for the surety. In other words, an action against a surety on a guardian bond cannot be maintained if the same action cannot be taken against the primary obligor because of an adjudication or limitation.

In the instant case, John D., by stipulation, has agreed not to enforce or collect on a judgment against John R., the primary obligor, for moneys owed. In approving this stipulation, the bankruptcy court lifted the automatic stay, thereby allowing John D. to pursue a judgment against John R. in county court. Seeking this relief was appropriate, for "no action may be maintained on a guardian's bond until the amount due thereon has been ascertained and judgment therefor entered." *Sherwood v. Merchants Mut. Bonding Co.*, 193 Neb. 262, 263, 226 N.W.2d 761, 762 (1975). With the stipulation, John D. was successful in receiving a $41,370 judgment against John R. in the Saunders County Court.

Quite apparent from the stipulation between the parties is the fact that no enforcement or collection action will be commenced against John R. for the $41,370. Thus, the sole question before us is whether the approval of this stipulation by the bankruptcy court and the county court for Saunders County is to be considered a limitation or adjudication for purposes of § 30-2641(b).

The term "adjudication" is not defined within the probate code, nor has this court had occasion to fashion a judicial defi-

nition of the term. We are mindful, however, that a court, in construing a statute, must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996). With this understanding, we note that "adjudication" is defined in Black's Law Dictionary 42 (6th ed. 1990) as "[t]he legal process of resolving a dispute. The formal giving or pronouncing a judgment or decree in a court proceeding; also the judgment or decision given."

The stipulation between John D. and John R. specifically stated that John D. "shall not be permitted to take any action against any property or any part of the estate of John R. Sawyer." John D. also provided his covenant "against enforcements or collection against John R. Sawyer personally . . . ." We conclude that the approval of this stipulation by the bankruptcy court was an adjudication, for it clearly resolved the dispute between the parties regarding John R.'s personal liability to John D. for moneys owed. In addition, the judgment entered against John R. in the county court relied on the acceptance of the stipulation. Implicit in the county court's judgment, therefore, is the inability of John D. to pursue the judgment against John R. directly. As such, this judgment also amounts to an adjudication, for it resolves the dispute between the parties in that it effectively bars the commencement of a collection action against John R.

The result of these two adjudications is clear; John R. owes no obligation on the debt owed to John D. To hold State Surety liable on its bond because a judgment was entered against John R. would exalt form over substance, because the essence of a principal-surety relationship is the existence of a valid obligation. *Niklaus v. Phoenix Indemnity Co.*, 166 Neb. 438, 89 N.W.2d 258 (1958). Since the two adjudications that took place establish that John R. is under no obligation to John D., it must necessarily follow that State Surety is also under no obligation. We therefore conclude, as did the district court, that § 30-2641(b) prevents John D. from maintaining this current action against State Surety.

CONCLUSION

The stipulation between John D. and John R., as approved by the bankruptcy court and relied upon by the Saunders County Court, acts as an adjudication that effectively bars the commencement of an action against John R. Thus, the district court was correct in concluding that § 30-2641(b) prevents the commencement of the same claim against State Surety as surety on the bond.

AFFIRMED.

FAHRNBRUCH, J., concurs in the result.

LANPHIER, J., dissenting.

I respectfully dissent. The majority states that the adoption by the bankruptcy court of the stipulation between John D. and John R. is an adjudication which bars recovery against the surety under Neb. Rev. Stat. § 30-2641 (Reissue 1995). That section, however, simply codifies a general principle of suretyship law. The principle states that the surety's liability to the holder of the obligation is no greater and no less than that of the principal. *Niklaus v. Phoenix Indemnity Co.*, 166 Neb. 438, 89 N.W.2d 258 (1958).

The reference to "adjudication" or "limitation" under § 30-2641(b) refers to claims barred by a statute of limitations or a proceeding in which it was determined that the principal was *not* liable. In the present case, no issue of statute of limitations exists. Similarly, we do not have an adjudication determining that the principal is not liable. Rather, this case involves two separate adjudications, one by the bankruptcy court allowing the son's claim, and the judgment by the county court in favor of the son against his father, the principal. Both determined the principal *was* liable. The liability of the surety is dependent on the liability of the principal. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). The fact that *recovery* cannot be had against the principal is why a surety bond was posted in the first place. To endorse the majority's reading of this statute is to render meaningless the very purpose of the principal-surety relationship.

WHITE, C.J., joins in this dissent.

THRIFT MART, INC., FORMERLY DOING BUSINESS AS HEARTLAND THRIFTMART, APPELLANT, V. STATE FARM FIRE & CASUALTY CO., APPELLEE.

558 N.W.2d 531

Filed January 10, 1997. No. S-94-1122.

1. **Final Orders.** An order in a civil action is final when no further act of the trial court is required to dispose of the cause.
2. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
3. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion.
4. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
5. **Actions: Dismissal and Nonsuit.** A dismissal of a cause of action is the equivalent of a discontinuance of it in the court. The rights of the parties in the cause of action are determined insofar as the court rendering the order of dismissal is concerned.
6. **Actions: Words and Phrases.** A cause of action consists of the set of facts on which a recovery may be had.
7. **Judgments: Equity: Time.** In an action to vacate a judgment after the adjournment of the term of the rendering court, the applicant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1995) or under the court's independent equity jurisdiction.
8. **Judgments: Equity: Time: Pleadings: Proof.** To invoke the equity powers set forth in Neb. Rev. Stat. § 25-2001 (Reissue 1995), the applicant, to be successful, must first allege and prove that he or she exercised due diligence and that his or her failure to secure a proper decision in the prior term was not due to his or her own fault or negligence.
9. **Equity.** Any litigant who seeks equity must also do equity.
10. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, the court must grant leave to amend unless it is clear that no reasonable possibility exists that an amendment will correct the defect.
11. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion.
12. **Pleadings: Appeal and Error.** The overruling of a motion in limine is not reviewable on appeal.
13. **Trial: Pleadings: Proof: Appeal and Error.** In order to preserve any error before an appellate court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context in which the questions were asked.

14. **Insurance: Contracts.** In order to recover under an insurance policy of limited liability, an insured must bring himself or herself within its express provisions.

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

Michael B. Kratville, of Terry & Kratville Law Offices, for appellant.

John M. Ryan and Roger L. Shiffermiller, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ., and CASSEL, D.J.

WHITE, C.J.

Thrift Mart, Inc. (Thrift Mart), appeals after a jury verdict finding that State Farm Fire & Casualty Company (State Farm) did not breach its fire insurance policy with Thrift Mart. We affirm.

Thrift Mart's store, located at 5033½ South 24th Street in Omaha, Nebraska, was destroyed by fire on August 19, 1989. Thrift Mart reported the fire to its insurance carrier, State Farm, on August 22, 1989, and a State Farm representative came to investigate that day.

Thrift Mart's fire insurance policy provided for coverage of debris removal, loss of business personal property, and loss of business income. State Farm paid the policy limit for the debris removal and loss of business personal property coverages within a month of the fire. Thrift Mart claimed loss of business income damages in the amount of $3.6 million, and State Farm denied that claim, instead tendering $29,567.78 in satisfaction of coverage. Thrift Mart refused this offer and filed suit.

In its petition filed on November 5, 1990, Thrift Mart alleged that State Farm had (1) breached its fire insurance policy, (2) acted in tortious bad faith, and (3) violated Nebraska's Unfair Competition and Trade Practices Act. Thrift Mart alleged that State Farm acted in bad faith during the course of negotiations when it allegedly accused Thrift Mart of setting fire to its own store, stated that Thrift Mart's president would be arrested for arson, and refused to provide an explanation for its failure to

pay Thrift Mart for certain claimed damages. On January 11, 1991, the trial court sustained State Farm's demurrer for failure to state facts sufficient to constitute a claim as to the tortious bad faith and violation of the Unfair Competition and Trade Practices Act causes of action. The trial court dismissed those causes of action at Thrift Mart's cost.

Eight days later, on January 18, 1991, the Nebraska Supreme Court formally recognized a first-party bad faith cause of action in *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991). On August 20, 1992, 19 months later, Thrift Mart filed a motion to vacate and/or reconsider the order dismissing the bad faith cause of action in light of *Braesch*, and on December 29, also filed a motion for leave to amend. The trial court overruled the motion to vacate and/or reconsider and stated that "an Order of Dismissal - whether pertaining to one cause of action in a petition which contains several causes of action or to the entire petition - is an appealable Order. The Defendant should have appealed . . . ." The trial court also stated that Thrift Mart failed to show why the motion was not filed in the term in which the dismissal was entered.

On March 1, 1994, Thrift Mart filed another motion to reconsider and/or vacate the dismissal of the tortious bad faith cause of action. The trial court also overruled this motion.

Prior to trial on the breach of contract action, State Farm filed two motions in limine. The first motion sought to exclude testimony at trial by Thrift Mart's expert, Dr. Jerome Sherman, involving Thrift Mart's operating losses or loss of investment. The trial court sustained this motion. The second motion sought to exclude any testimony involving loss of business income for the liquidation of Thrift Mart's inventory at its separate warehouse location after the fire. The trial court sustained this motion as well, stating:

> The insurance policy covers "loss of business income during the restoration period". These alleged losses at the warehouse are not recoverable under the policy as they are not continuing losses and, at best, may be consequential expenses which are speculative and not expenses to minimize the interruption of business if "operations" cannot continue.

The breach of contract action was tried to a jury on October 3 and 4, 1994. During trial, Thrift Mart made one offer of proof as to the testimony excluded in the second motion in limine. The offer of proof consisted of two exhibits, and the court received those exhibits for the purposes of the offer of proof. The jury returned a verdict for State Farm.

Thrift Mart timely appealed to the Nebraska Court of Appeals. Pursuant to our power to regulate the docket of the Court of Appeals, we removed this case to our docket.

On appeal, Thrift Mart assigns various errors, which may be summarized as follows: (1) The trial court erred in sustaining State Farm's demurrer as to the tortious bad faith and unfair trade practices causes of action; (2) the trial court erred in failing to vacate its prior order sustaining the demurrer with regard to the tortious bad faith cause of action; (3) the trial court erred in not allowing Thrift Mart to amend its petition to include the bad faith cause of action; and (4) the trial court erred in granting both of State Farm's motions in limine.

An appellate court lacks jurisdiction to entertain appeals from other than final orders; an order in a civil action is final when no further act of the trial court is required to dispose of the cause. *Jaramillo v. Mercury Ins. Co.*, 242 Neb. 223, 494 N.W.2d 335 (1993), *abrogated on different grounds by Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994). An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995). Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996); *Postma v. B & R Stores*, 250 Neb. 466, 550 N.W.2d 34 (1996). To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996), *abrogated on different grounds by Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Equitable Life v. Starr*, 241

Neb. 609, 489 N.W.2d 857 (1992); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990).

Thrift Mart's first assignment of error alleges that the trial court erred in sustaining State Farm's demurrer as to the tortious bad faith and unfair trade practices causes of action. State Farm argues that Thrift Mart cannot contest the trial court's order sustaining the demurrer as to the tortious bad faith and unfair trade practices causes of action because the order was a final, appealable one, and Thrift Mart did not appeal within 30 days of the order. We agree.

An appellate court lacks jurisdiction to entertain appeals from other than final orders; an order in a civil action is final when no further act of the trial court is required to dispose of the cause. *Jaramillo, supra.* However, we have held that a "dismissal of a cause of action is the equivalent of a discontinuance of it in the court. It is thereby sent out of court. The rights of the parties in the cause of action are determined insofar as the court rendering the order of dismissal is concerned." *Akins v. Chamberlain*, 164 Neb. 428, 434, 82 N.W.2d 632, 637 (1957). See, also, *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). A cause of action consists of the set of facts on which a recovery may be had. *Lewis v. Craig*, 236 Neb. 602, 463 N.W.2d 318 (1990).

In this case, as conceded by Thrift Mart's counsel during argument before this court, there were two distinct sets of operative facts, one set which gave rise to the breach of contract action and one set which gave rise to the tortious bad faith and unfair trade practices causes of action. As a result, the order sustaining the demurrer was a final, appealable order and should have been appealed within 30 days of its rendering. See, Neb. Rev. Stat. § 25-1912(1) (Reissue 1995); *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995). Therefore, we find this assignment of error to be without merit.

Thrift Mart's second assignment of error alleges that the trial court erred in failing to vacate its prior order sustaining the demurrer with regard to the tortious bad faith cause of action, given that the law in the State of Nebraska changed following the issuance of the order. Thrift Mart argues that the trial court could have vacated its judgment even though the motion was

heard after the term in which the order was rendered, because of the authority given the trial court to do so in Neb. Rev. Stat. § 25-2001 (Reissue 1995) or due to its own independent equity jurisdiction. Thrift Mart argues that the trial court's failure to invoke its equity powers by either of these methods was an abuse of its discretion. We disagree.

It is true that in an action to vacate a judgment after the adjournment of the term of the rendering court, the applicant may proceed either under § 25-2001 or under the court's independent equity jurisdiction. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995); *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). With regard to the invocation of the equity powers set forth in § 25-2001, the applicant, to be successful, must first allege and prove that he exercised due diligence and that his failure to secure a proper decision in the prior term was not due to his own fault or negligence. *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984). See, also, *Roemer, supra*. As stated above, Thrift Mart itself failed to properly and timely appeal the sustaining of the demurrer in the prior term of the trial court, and therefore any relief that might have been accorded under this statutory section is not available to Thrift Mart.

Thrift Mart alleges, in the alternative, that the trial court could have invoked its own independent equity powers to grant the motion to vacate or reconsider filed in a subsequent term of the court. However, any litigant who seeks equity must also do equity. *Roemer, supra*. This court will reverse a decision on a motion to vacate or modify judgment only if the litigant shows that the district court abused its discretion. *Roemer, supra*. We find that the district court did not abuse its discretion in refusing to exercise its independent equity powers to reinstate this cause of action when the request was made in a subsequent term, was due to Thrift Mart's failure to timely appeal the order sustaining the demurrer, and was aimed at doing indirectly what the trial court would not allow Thrift Mart to do directly. Thus, Thrift Mart's second assignment of error also must fail.

Thrift Mart alleges as its third assignment of error that the trial court should have allowed Thrift Mart to amend its petition to include the bad faith cause of action. Again, we disagree.

Permission to amend a pleading is addressed to the discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996); *Postma v. B & R Stores*, 250 Neb. 466, 550 N.W.2d 34 (1996); *Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1 (1996). When a demurrer to a petition is sustained, the court must grant leave to amend unless it is clear that no reasonable possibility exists that an amendment will correct the defect. *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). Before error can be predicated upon the refusal of the trial court to permit an amendment to the petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980).

At the time the court dismissed the tortious bad faith cause of action, such a cause of action was not recognized in the State of Nebraska. Thus, to allow Thrift Mart to amend at that time would not have cured that defect. When Thrift Mart did request permission to amend and to include the bad faith allegations as part of its breach of contract cause of action, almost 19 months of discovery had passed and the court was in a subsequent term. To refuse to allow amendment at this late date was clearly not an abuse of the trial court's discretion. Therefore, Thrift Mart's third assignment of error must also fail.

Thrift Mart's last assignment of error alleges that the trial court should have refused to grant both of State Farm's motions in limine. The first motion in limine (first motion) involved the testimony of Thrift Mart's expert, Dr. Sherman, regarding damages for operating losses or loss of investment. The second motion in limine (second motion) involved testimony as to damages involving the loss of warehouse inventory liquidated after the fire.

We note at the outset that the overruling of a motion in limine is not reviewable on appeal. *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 532 N.W.2d 11 (1995). In order to preserve any error before this court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context in

which the questions were asked. *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990). See Neb. Rev. Stat. § 27-103(1) and (3) (Reissue 1995). The record in this case is devoid of any offer of proof as to the first motion or any questions objected to from which the context of the evidence would be apparent, and we therefore decline to consider or address any arguments of Thrift Mart as to error involving the sustaining of the first motion.

As for the second motion, Thrift Mart's counsel did make an appropriate offer of proof during its case in chief. The offer of proof consisted of two exhibits, both addressing alleged damages resulting from the liquidation of Thrift Mart's warehouse inventory following the fire. It is Thrift Mart's position that this evidence should have been admitted because these damages were due to State Farm's conduct during the settlement of Thrift Mart's claim (i.e., State Farm's tortious bad faith conduct) and because the damages were recoverable under the loss of business income coverage in its insurance policy. We find these arguments to be without merit.

To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996), *abrogated on different grounds by Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Equitable Life v. Starr*, 241 Neb. 609, 489 N.W.2d 857 (1992); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). Neither of Thrift Mart's arguments as to the second motion implicate the unfair prejudice of a substantial right. First, as already discussed above, the tortious bad faith cause of action was not before the jury; second, these damages were not recoverable under the fire insurance policy.

In order to recover under an insurance policy of limited liability, an insured must bring himself within its express provisions. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). The fire insurance policy provisions at issue in this case involve the coverage for loss of business income. The policy specifically provides that this coverage includes:

1. loss of "business income" sustained by the insured during the "period of restoration";

2. any necessary "extra expense" incurred to avoid or minimize the interruption of business and to continue "operations":

a. at the described premises; or

b. temporarily at other locations including relocation expenses and costs to equip and operate the temporary locations;

3. any necessary "extra expense" incurred to minimize the interruption of business if "operations" cannot continue.

The policy specifically defines "operations" as "the type of business activities occurring at the premises shown in the Declarations," which in this case is the location at which the fire occurred and not the separate location of the warehouse. The policy defines "business income" as "net income . . . and continuing normal operating expenses, including payroll, that would have been earned during the 'period of restoration'." The policy also specifically states that State Farm "will not be liable for any other consequential loss."

Clearly, the liquidation of warehouse inventory which occurred, by Thrift Mart's own admission, when the business ceased its operations completely and which does not fit within the policy definitions of "business income" is not covered under the insurance policy's loss of business income provision. The policy specifically states that this coverage is for expenses arising from disruptions during the continuing operation of the business at a temporary site or during the relocation of the business to a new site if operations cannot continue at the premises where the fire occurred. Thrift Mart liquidated its warehouse after deciding to cease business operations—any loss sustained because of the circumstances of liquidation not related to continuing business operations is not recoverable under this fire insurance policy.

The exclusion of this evidence did not unfairly prejudice Thrift Mart because Thrift Mart had no right to recover these damages under its policy with State Farm. Accordingly, we find Thrift Mart's last assignment of error to be without merit.

Because we find that the trial court did not err in sustaining the demurrer to the bad faith and unfair trade practices causes of action, in failing to vacate that order, in failing to grant Thrift Mart leave to amend its petition, and in sustaining State Farm's two motions in limine, we affirm.

AFFIRMED.

THE LAW OFFICES OF RONALD J. PALAGI, P.C., A NEBRASKA PROFESSIONAL CORPORATION, APPELLANT, V. DAN DOLAN, NEBRASKA COMMISSIONER OF LABOR, AND JEAN V. FAULCONBRIDGE, APPELLEES.

558 N.W.2d 303

Filed January 10, 1997. No. S-95-134.

1. **Employment Security: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, that court conducts the review de novo on the record; but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. When reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling.
4. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
6. **Administrative Law: Appeal and Error.** Where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another.
7. **Statutes: Rules of the Supreme Court: Appeal and Error.** While Neb. Rev. Stat. § 25-1919 (Reissue 1995) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1996) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit the Court of Appeals or Supreme Court to note any plain error not assigned.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded for further proceedings.

Michael A. Nelsen, of Dixon & Dixon Ltd., L.L.P., for appellant.

John F. Sheaff and John H. Albin for appellee Dolan.

Mary Lou Perry, of Betterman Katelman & Hotz, for appellee Faulconbridge.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BURKHARD and CASSEL, D. JJ.

CASSEL, D.J.

The Law Offices of Ronald J. Palagi, P.C., appeals from the judgment of the district court affirming the decision of the Nebraska Appeal Tribunal granting unemployment compensation benefits to Jean V. Faulconbridge without disqualification. Because the district court committed plain error by applying the wrong standard of review, we reverse, and remand for reconsideration applying the proper standard.

This appeal was originally filed with the Nebraska Court of Appeals. We removed the case to this court's docket pursuant to statutory authority to regulate the caseloads of the appellate courts.

STANDARD OF REVIEW

In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, that court conducts the review de novo on the record; but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995). See Neb. Rev. Stat. §§ 48-638 (Reissue 1993) (subsequently amended as set forth in § 48-638 (Cum. Supp. 1996)) and 84-917 and 84-918 (Reissue 1994).

When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Dolan v. Svitak, supra*; *Lee v. Nebraska*

State Racing Comm., 245 Neb. 564, 513 N.W.2d 874 (1994). However, when reviewing a question of law, an appellate court reaches a conclusion independent of the district court's ruling. *Hausse v. Kimmey*, 247 Neb. 23, 524 N.W.2d 567 (1994).

Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Long v. Hacker, supra.*

ASSIGNMENTS OF ERROR

The appellant asserts that the district court erred in upholding the decision of the Nebraska Appeal Tribunal and that the decision was not based on relevant evidence and did not correspond to applicable law.

ANALYSIS

We need not discuss the specific facts appearing in the record in order to dispose of this appeal. The district court order affirming the administrative decision stated:

> The decision of the Nebraska Appeals [sic] Tribunal is correct and the same should be and is hereby affirmed.
>
> The Court specifically finds that said decision was not in violation of any constitutional provisions or was in excess of the statutory authority or jurisdiction of the agency.
>
> The Court further finds that it was made upon a lawful procedure and according to law and further, this decision is not affected by any other error of law.
>
> The Court specifically finds that the decision *was supported by competent, material and substantial evidence in view of the entire record as made on review and that said decision was neither arbitrary nor capricious.*
>
> In arriving at the decision, the Court considered that the evidence was in conflict and the Court gives weight to the

> fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another.

(Emphasis supplied.)

The district court erroneously limited its review. For review proceedings commenced before July 1, 1989, § 84-917(6)(a) specifically limits the district court's review. See *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). The standard used by the district court in this case precisely follows the former limited standard of review.

However, for review proceedings commenced on or after July 1, 1989, § 84-917(5)(a) specifies that the district court review shall be de novo on the record.

In *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 522-23, 466 N.W.2d 546, 549 (1991), this court observed:

> It is a logical impossibility for this court to review the district court judgment for errors appearing on the record if the district court incorrectly limited its review and, thus, failed to make factual determinations, as it must under a de novo on the record review. The district court's and this court's standards of review are interdependent.

This review proceeding was commenced after July 1, 1989. The district court was therefore obliged to make an independent determination of the facts without reference to the determinations of fact made by the Nebraska Appeal Tribunal, whose decision was being reviewed. See *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986).

However, where the evidence is in conflict, the district court, in applying a de novo standard of review, can consider and may give weight to the fact that the agency hearing examiner observed the witnesses and accepted one version of the facts rather than another. See *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988) (review of administrative proceeding by Supreme Court de novo on record). As stated in *Department of Health v. Lutheran Hosp. & Homes Soc.*, 227 Neb. 116, 117, 416 N.W.2d 222, 223 (1987), when an appellate court makes a de novo review, it "does not mean that [the court] ignore[s] the findings of fact made by the board and the fact that it saw and

heard the witnesses who appeared before the board at its hearing." These decisions do not constitute a directive to courts which make de novo reviews that the courts must give deference to the agency as fact finder. The language is permissive; the reviewing court may give weight to the fact that the agency hearing officer observed the witnesses where the evidence is in conflict.

That the appellant did not assign this error is of no matter. While Neb. Rev. Stat. § 25-1919 (Reissue 1995) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1996) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit the Court of Appeals or Supreme Court to note any plain error not assigned. See *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979).

We hold that the district court's application of the former limited standard of review constitutes plain error and requires that the cause be remanded to the district court for Douglas County for a de novo review of the record.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. TROY ADAMS, APPELLANT.
558 N.W.2d 298

Filed January 10, 1997. No. S-95-669.

1. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. Because of this duty, the trial court, on its own motion, must correctly instruct on the law.
3. **Jury Instructions: Appeal and Error.** An appellate court may take cognizance of plain error if the trial court's instructions to the jury indicate a probable miscarriage of justice.
4. **Jury Instructions.** The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence.
5. ____. Whether jury instructions given by a trial court are correct is a question of law.

6. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
7. **Appeal and Error.** An appellate court always reserves the right to note plain error.
8. **Motor Vehicles: Drunk Driving: Proximate Cause.** In order to convict a defendant in cases involving alcohol brought under Neb. Rev. Stat. § 60-6,198 (Reissue 1993), the act of driving while under the influence of alcoholic liquor must be the proximate cause of serious bodily injury to another person.
9. **Blood, Breath, and Urine Tests.** When there is a margin of error in a chemical test for alcohol, the test result must be adjusted and the defendant given the benefit of the adjusted reading.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Douglas County, MICHAEL W. AMDOR, Judge. Conviction and sentence vacated, and cause remanded with direction.

Thomas M. Kenney, Douglas County Public Defender, and Gary D. Olson for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Troy Adams' district court jury conviction for proximately causing serious bodily injury to Fred Schwartz while Adams was driving (1) under the influence of alcohol or (2) while he had an illegal concentration of alcohol in his body was reversed by the Nebraska Court of Appeals and remanded for a new trial because of what the Court of Appeals found to be an erroneous jury instruction. After his conviction, Adams was sentenced to prison for not less than 58 nor more than 60 months.

The State of Nebraska petitioned for further review by this court, which we granted.

We not only find that the trial court committed plain error in instructing the jury, as the Court of Appeals determined, but we

also find that the trial court committed additional plain error in instructing the jury, which plain error was not addressed by the Court of Appeals in its opinion. See *State v. Adams*, 96 NCA No. 18, case No. A-95-669 (not designated for permanent publication).

Adams' conviction and sentence are vacated, and this cause is remanded to the Court of Appeals with direction to remand it to the district court for Douglas County for a new trial in conformance with this opinion.

ASSIGNMENT OF ERROR

In this court, the State of Nebraska claims that the Court of Appeals erred in finding plain error in the trial court's instructions to the jury regarding the material elements of driving while under the influence and causing serious bodily injury.

STANDARD OF REVIEW

The dispositive issues in this cause present questions of law, in connection with which this court has an obligation to reach its own conclusions independent of those reached by the lower courts. See, *Hynes v. Hogan, ante* p. 404, 558 N.W.2d 35 (1997); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996); *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996).

FACTS

Shortly after 4 a.m. on June 22, 1994, at the intersection of 42d and Dodge Streets in Omaha, a motor vehicle being driven by Adams in a westerly direction on Dodge Street collided with a motor vehicle being driven by Schwartz in a southerly direction on 42d Street. Both drivers sustained injuries and were transported to a hospital. The record reflects that there were no witnesses to the accident. Schwartz, who suffered a head injury resulting in brain damage, has little or no memory of how the accident occurred. The record does not disclose Adams' version of the accident.

Subsequently, Adams was charged in the district court for Douglas County with violating Neb. Rev. Stat. § 60-6,198 (Reissue 1993). In substance, the information alleged that on or about June 22, 1994, while operating a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 or 60-6,197 (Reissue 1993), Adams proximately caused serious bodily injury to Schwartz.

CHARGING STATUTES

As relevant here, § 60-6,198 provides that "[a]ny person who, while operating a motor vehicle in violation of section 60-6,196 or 60-6,197, proximately causes serious bodily injury to another person shall be guilty of a . . . felony . . . ." "Serious bodily injury" is defined as a "bodily injury which involves a substantial risk of death, a substantial risk of serious permanent disfigurement, or a temporary or protracted loss or impairment of the function of any part or organ of the body." § 60-6,198.

Also, § 60-6,196 provides:

> (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;
>
> (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood[.]

Section 60-6,197 provides, as relevant here, that

> [a]ny person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood . . . for the purpose of determining the concentration of alcohol . . . in such blood . . . .

ANALYSIS

In analyzing this cause, we are reminded that whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. See, *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Storjohn v. Fay*, 246 Neb. 454, 519 N.W.2d 521 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). Because of this duty, the trial court, on its own motion, must correctly instruct on the law, and an appellate court may take cognizance of plain error if such instructions indicate a probable miscarriage of justice. See, *Wilson v. Misko, supra*; *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987); *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979). We are also reminded that the proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the

trial court of the issues which find support in the evidence. *Wilson v. Misko, supra.* As a result of these principles, whether jury instructions given by a trial court are correct is a question of law.

With these principles in mind, we consider the State's assignment of error that the Court of Appeals erred in finding plain error in the trial court's instructions to the jury regarding the material elements of driving while under the influence and causing serious bodily injury.

Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996); *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996). In regard to plain error, an appellate court always reserves the right to note plain error. *State v. Randall*, 249 Neb. 718, 545 N.W.2d 94 (1996); *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996).

The trial court's instruction No. 3, which the State claims is correct, reads:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of *causing* serious bodily injury while driving under the influence of alcoholic liquor *or drugs* are as follows:
>
> 1. That . . . Adams, on or about the 22d day of June, 1994, in the County of Douglas and State of Nebraska, then and there operated a motor vehicle, and at that time and place was (A) under the influence of alcoholic liquor; OR (B) *had a concentration of ten-hundredths of one gram or more by weight of alcohol per hundred milliliters of his blood.*
>
> AND
>
> 2. That while so operating a motor vehicle [Adams] did proximately cause serious bodily injury to . . . Schwartz.

(Emphasis supplied.)

Relying upon its holding in *State v. Bartlett*, 3 Neb. App. 218, 525 N.W.2d 237 (1994), the Court of Appeals found the trial court's instructions were defective because they failed to state that a material element of the crime charged is that the act of driving while under the influence must proximately cause serious bodily injury to the victim. Based upon our holdings in *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989), and *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), we agree with the Court of Appeals' holding in the instant case.

In *Batts* and in *Ring*, we held that in order to find that an accused committed felony motor vehicle homicide by driving while under the influence, the State must prove beyond a reasonable doubt that the accused's driving while under the influence was the proximate cause of the accident and resulting death. The language in the motor vehicle homicide statute, Neb. Rev. Stat. § 28-306 (Reissue 1995), and in the serious bodily injury statute, § 60-6,198, is virtually the same, except that the former holds a driver criminally liable for proximately causing the death of a person, while the latter holds a driver criminally liable for proximately causing serious bodily injury to a person. We, therefore, hold that to convict an accused driver in cases involving alcohol brought under § 60-6,198, the State must prove beyond a reasonable doubt that the act of driving while under the influence of alcoholic liquor must be the proximate cause of serious bodily injury to a person.

From our review of the instructions in this case, we find that the trial court committed additional plain error in drafting and giving instruction No. 3. As an example, William Ihm, called by the State as an expert on alcohol concentration in human blood, testified without objection that Adams' blood test showed a concentration of .097 grams by weight of alcohol per 100 milliliters of his blood. Ihm further testified that while the Nebraska Department of Health rules permit the use of the third digit after the decimal point, such third digit (in this case the 7) is "not used — it's usually not accepted because instruments are normally not accurate to that third point." Ihm also testified that a blood test could have a plus or minus deviation. He testified that applying the plus deviation to Adams' .097 test result would increase that result to .109 and that applying the minus devia-

tion to the .097 test result would decrease the test result to .084. We have held that when there is a margin of error in a chemical test for alcohol, the test result must be adjusted and the defendant given the benefit of the adjusted reading. See, *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978).

In the instant case, using only the first two digits of the .097 test result, and deducting the margin of error as testified to by Ihm, reduces the test result of the concentration of alcohol in Adams' blood to .08. Such a result fails, as a matter of law, to establish beyond a reasonable doubt that Adams had a concentration in his body of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his blood. Therefore, the trial court should have eliminated from its instructions all reference to what would constitute an illegal concentration of alcohol in Adams' blood. A trial court has an obligation to instruct the jury correctly. See *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995). In this case, the trial court should have instructed the jury that the alcohol test result was admitted into evidence only to show that Adams had consumed alcohol and that the test did not prove that Adams had an illegal concentration of alcohol in his blood or that the test by itself could prove that Adams was under the influence of alcohol at the time of the accident at issue here.

The trial court also committed plain error when it included the word "drugs" in its instructions Nos. 2 and 3. In instruction No. 2, the trial court stated in part, "This is a criminal case in which the State of Nebraska has charged [Adams] with causing serious bodily injury by driving under the influence of alcoholic liquor or *drugs*." (Emphasis supplied.) In instruction No. 3, the trial court stated, in substance, that the State must prove its charges by evidence beyond a reasonable doubt in order to convict Adams of causing serious bodily injury while driving under the influence of alcoholic liquor or *drugs*. We have found no *evidence* in the record regarding the use of drugs by Adams.

In addition to the plain error found by the Court of Appeals, we find that the trial court's instructions constitute plain error and were prejudicial to Adams because (1) they did not limit the jury's consideration of Adams' blood test results, (2) they

implied that Adams was a drug user, and (3) the instructions were not supported by the evidence.

A review of the record reflects there is sufficient evidence from which a jury could find, beyond a reasonable doubt, that at the time of the collision of Adams' and Schwartz' motor vehicles, Adams was driving while under the influence of alcohol and that such driving while under the influence of alcohol was the proximate cause of serious bodily injury to Schwartz.

We, therefore, vacate Adams' trial court conviction and sentence and remand the cause to the Court of Appeals with direction to remand the cause to the district court for a new trial consistent with this opinion.

CONVICTION AND SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTION.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCATION, RELATOR, V. MILES W. JOHNSTON, JR., ALSO KNOWN AS BILL JOHNSTON, RESPONDENT.

558 N.W.2d 53

Filed January 10, 1997. No. S-95-928.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline a lawyer is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** A lawyer who neglects an entrusted matter has failed to act competently and is guilty of unprofessional conduct.
3. ____. The violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment.
4. **Disciplinary Proceedings: Proof.** In order to sustain a complaint in a lawyer discipline proceeding, the Nebraska Supreme Court must find the complaint to be established by clear and convincing evidence.
5. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) The nature of the offense, (2) the need for deterring others, (3) the need to maintain the reputation of the bar as a whole, (4) the need to protect the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

Original action. Judgment of disbarment.

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

No appearance for respondent.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

This is a lawyer discipline case wherein the relator, Nebraska State Bar Association, seeks to have this court discipline the respondent, Miles W. Johnston, Jr., also known as Bill Johnston, a member of the relator association.

SCOPE OF REVIEW

A proceeding to discipline a lawyer is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. See *State ex rel. NSBA v. Van, ante* p. 196, 556 N.W.2d 39 (1996).

FACTS

Johnston was duly admitted by this court to the practice of law in the State of Nebraska and to membership in the association on June 28, 1965, and, except for periods of suspension as hereinafter noted, has at all times relevant hereto engaged in the private practice of law in Lancaster County, Nebraska.

On the basis of the amended application of the association's Committee on Inquiry of the First Disciplinary District representing that Counsel for Discipline had filed charges alleging a pattern by Johnston of neglecting matters entrusted to him as a lawyer and of failing to respond to inquiries made by Counsel for Discipline, and Johnston's failure to have responded to our order to show cause why such should not be done, we temporarily suspended Johnston from the practice of law by order dated August 29, 1995. Although the order was served upon Johnston on August 31, 1995, he has not yet complied with Neb.

Ct. R. of Discipline 16 (rev. 1996) requiring, among other things, that one suspended from the practice of law return to our clerk the card showing membership in the association and file an affidavit that all present clients and lawyers involved in pending matters with the suspended lawyer have been notified of the suspension and that clients have been assisted in obtaining other representation.

Johnston had represented Denise E. Mainquist in other matters and at her request undertook to seek a reduction of her child support obligation to her former husband. He prepared an application seeking such relief and led her to believe that he had filed it; however, he never did so, even after the former husband had filed his own application seeking an increase in child support. Moreover, not until after Mainquist was served with a motion for default judgment did Johnston file a response he had prepared to the former husband's application, which he had Mainquist sign. Although Johnston agreed because of Mainquist's vacation schedule to seek a continuance of the hearing set on the former husband's application, he did not do so. Moreover, he did not attend the hearing, about which he had forgotten. After he received a call from the judge, he submitted the matter on the discovery and the pleadings, notwithstanding that he had not reviewed the former husband's current representation of income. An order was entered increasing Mainquist's child support obligation.

Johnston was informed by the court of the increased child support order, but he said nothing about it to Mainquist, who testified she did not learn of it until approximately 4 months after it was entered, when her former husband told her. Although Johnston prepared and gave Mainquist a copy of a motion to set the order aside, he did not file it.

With respect to the hearing, Johnston explained he had worked out the husband's income based on information he had seen in the past and admitted he was probably negligent in not reviewing the former husband's current computations in that regard. He explained that he did not file the application he had prepared for Mainquist even after the husband filed his application because he initially thought the issues would be the same, but on reflection agreed that they were probably not. He can-

didly admitted that Mainquist "didn't get the best professional job out of it," but, recognizing that such was not a requirement for discipline, did not "know that she was substantially harmed." He also explained that he takes on too much and is trying to limit that problem.

Johnston also admits that he failed to respond in a timely fashion to the inquiries made by the association's Counsel for Discipline concerning the four complaints forming a part of the formal charges now before us. It was not until the hearing before the Committee on Inquiry that Johnston responded in writing to three of the complaints. He made no written response to Counsel for Discipline on the inquiry concerning Mainquist's complaint, the only complaint we consider on the merits.

The record further reveals that Johnston does not come to us with an unblemished past professional history. On June 1, 1989, Johnston was privately reprimanded for having violated our Code of Professional Responsibility on a charge of misrepresenting to a client that a petition had been filed. On May 22, 1991, Johnston was privately reprimanded for having violated the code on a charge of causing the dismissal of an appeal to this court through his failure to timely file a brief after he had been granted two extensions. On June 5, 1992, Johnston was suspended from the practice of law for a period of 30 days effective September 1, 1992, *State ex rel. NSBA v. Johnston*, 240 Neb. 872, 485 N.W.2d 577 (1992), on charges of failing to timely close two estates and failing to timely respond to the inquiry of Counsel for Discipline on the complaint leading to that charge. On November 22, 1994, Johnston was privately reprimanded on a charge of failing to timely respond to an inquiry of Counsel for Discipline.

The referee, Richard P. Nelson, found that the manner in which Johnston handled the Mainquist matters violated the code, and recommended that Johnston be suspended from the practice for a period of 2 years and be given credit for the period of temporary suspension "which has been in force continuously since August 29, 1995 . . . ." The association urges in its brief in this court that the recommended discipline is too lenient. Johnston has not filed a brief.

ANALYSIS

We have consistently held that a lawyer who neglects an entrusted matter has failed to act competently and is guilty of unprofessional conduct. *State ex rel. NSBA v. Van, ante* p. 196, 556 N.W.2d 39 (1996); *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996); *State ex rel. NSBA v. Carper*, 246 Neb. 407, 518 N.W.2d 656 (1994); *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993); *State ex rel. NSBA v. Copple*, 232 Neb. 736, 441 N.W.2d 894 (1989); *State ex rel. NSBA v. Doerr*, 216 Neb. 504, 344 N.W.2d 464 (1984); *State ex rel. Nebraska State Bar Assn. v. Divis*, 212 Neb. 699, 325 N.W.2d 652 (1982). Moreover, the violation of any of the ethical standards relating to the practice of law, or any conduct which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment. *Doerr, supra*; *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980).

In order to sustain a complaint in a lawyer discipline proceeding, we must find the complaint to be established by clear and convincing evidence. See *Johnson, supra.* From our de novo review, we find the evidence clearly and convincingly establishes that the manner in which Johnston handled the Mainquist matter violated Canon 1, DR 1-102(A), of the code, which provides, in relevant part, that a lawyer shall not "(1) Violate a Disciplinary Rule. . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law."

We further find that the manner in which Johnston handled the Mainquist matter violated Canon 6, DR 6-101(A)(2) and (3), which provide that a lawyer shall not "(2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him or her."

Additionally, we find the evidence clearly and convincingly establishes that Johnston's failure to make timely responses to the inquiries of Counsel for Discipline also violated Canon 1, DR 1-102(A)(1), (5), and (6), set forth above.

To determine whether and to what extent discipline should be imposed, this court considers the following factors: (1) The nature of the offense, (2) the need for deterring others, (3) the need to maintain the reputation of the bar as a whole, (4) the need to protect the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. See *Van, supra*. We also take into account that multiple acts of misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. *Id.*

To his credit, Johnston has been candid about his conduct and about the source of his problem. However, the problem is not new. We cannot overlook that we are presented not with a single instance of neglect, but with a longstanding pattern of neglect. Neither can we overlook that lesser punishment in the form of private reprimands and suspension has not altered Johnston's behavior or that his failure to have complied with Neb. Ct. R. of Discipline 16 (rev. 1996) on this occasion makes him currently in contempt of this court. Lamentably, his past conduct demonstrates a lack of both present and future fitness to practice law.

CONCLUSION

Just as a long history of neglecting client matters required that we disbar the respondent in *Doerr, supra*, the nature of the offenses, the need to deter others from similar misconduct, the need to maintain the reputation of the bar as a whole, and the need to protect the public require that we disbar Johnston, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.