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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 29, 1999 and MARCH 23, 2000

IN THE

Supreme Court of Nebraska

VOLUME CCLVIII

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge[1]

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

[1]As of January 28, 2000

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	Orville L. Coady	Hebron
		Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
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
		Steven D. Burns	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		Stephen A. Davis	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
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke	Columbus
		Alan G. Gless	Seward
		Michael Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		Maurice Redmond	Dakota City
		F.A. Gossett III	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden	Norfolk
		Robert B. Ensz	Wayne
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William B. Cassel	Ainsworth
		Ronald D. Olberding	Burwell
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Stephen Illingworth	Hastings
		Terri Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell	McCook
		John P. Murphy	North Platte
		Donald E. Rowlands II	North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Robert O. Hippe	Gering
		Brian Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	Sidney

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
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		Jean A. Lovell	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary F. Hatfield	Central City
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo

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
		Patrick G. Rogers	Dakota City
		Paul R. Robinson	Hartington
		C. Matthew Samuelson	Blair
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
		Robert A. Ide	Holdrege
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
		Kent D. Turnball	North Platte
		Carlton E. Clark	Lexington
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
	Christopher Kelly	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
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
Michael K. High	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 257

LEONARD AGENETA
MISTY M. ALLEN
LISA KAY ANDERSON
BETH ASCHER
DOROTHY D. BENTON
DARRON LEE BRAWNER
MARCIA BREVIK
JOHN W. CHILDRESS
RICHARD L. CONNORS
KYLE DAHL
KYLE LOGAN DOVIKEN
JILL MICHELLE DRESSNER
GREGORY L. GALLES
MISTY L. GILL
JACQUELINE A. GRIBENS
RANDOLPH MARTIN HAMMOCK
JENNIFER L. HARMS
MARIAN G. HEANEY
SCOTT A. HINDMAN
FRANK PETER HUSE
KATHLEEN JO ANN JANSANTE
JENNIFER L. JASKOLKA-BROWN
SHANICEE L. KNUTSON
MICHEL A. LAFOND
RAYMOND DEAN MACCHIA
REBECCA A. NELSON
THOMAS J. OLSEN
JENNIFER ANN PANKO-RAHE
TERRY L. PASTIKA
JACOB JOHN PETERS
CHRISTOPHER A. PFANSTIEL
SCOTT PETERS
KEVIN D. RHODES
BELINDA DAWN RINKER
M. BRETT RYAN
MARY M. SCHOTT
RYAN SHULTZ
AARON C. SMITH
HENRY SONDAY, JR.
JENNIFER A. THOMAS
MARK A. TREMAINE
DANA M. VANBEEK
JEFFREY D. VANNIEL
ERIC ANTHONY WELTER
STEVEN J. WILLIAMS

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No. S-90-471: **In re Conservatorship of Lane**. Affirmed. Stephan, J.

No. S-97-1246: **Esfahani v. Five Star Productions, Inc.** Petition for further review dismissed. Per Curiam.

No. S-98-145: **Garnick v. Garnick**. Petition for further review dismissed. Per Curiam.

No. S-98-698: **In re Interest of James B. et al.** Affirmed. Wright, J.

No. S-98-826: **Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.** Appeal dismissed. Connolly, J.

No. S-98-827: **Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.** Appeal dismissed. Connolly, J.

No. S-98-851: **State v. Keithley**. Affirmed. Per Curiam.

No. S-99-341: **State v. Hansen**. Affirmed. Stephan, J.

No. S-99-392: **In re Interest of Laura O. & Josh O.** Affirmed. Gerrard, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-98-795: **In re Trust of Irwin v. Irwin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-1257: **Bordeaux v. Bordeaux**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-1262: **Nebraska Equal Opp. Comm. v. Dahlquist**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-1307: **Fox v. Connors**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. S-98-1361: **Nebraska Equal Opp. Comm. v. Dahlquist**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-98-1387: **State v. Marshall**. Motion considered; appeal dismissed.

No. S-99-109: **State v. Tokosh**. Appeal dismissed. See rule 7A(2).

No. S-99-197: **Hughes v. Clarke**. Appeal dismissed for lack of a final, appealable order.

No. S-99-304: **Berke v. Clarke**. Appeal dismissed as moot. See rule 7A(2).

No. S-99-352: **Barnett v. Peters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-99-360: **State v. Kern**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-99-478: **Battle Creek Mutual Ins. Co. v. Peck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-99-627: **Sikora v. Bohn**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-705(6) (Supp. 1999).

No. S-99-704: **Heath v. Great Plains Co-op., Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-99-717: **State v. McLeod**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-99-754: **Variano v. Dial Corp.** Motion of appellee for summary affirmance sustained; judgment awarding attorney fees affirmed. See rule 7B(2).

No. S-99-833: **State ex rel. NSBA v. Baugh.** Judgment of disbarment.

No. S-99-882: **Shlien v. Board of Regents.** Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-99-957: **State v. Jones.** Appeal dismissed. See rule 7A(2).

No. S-99-1015: **State ex rel. Callan v. Minnesota Corn Processors.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-99-1040: **State ex rel. NSBA v. Bailey.** Judgment of disbarment.

No. S-99-1104: **Ponec v. Prodata Computer Services, Inc.** Stipulation allowed; appeal dismissed.

No. S-99-1210: **State v. Burdette.** Motion of appellee for summary dismissal overruled.

No. S-99-1429: **Stennis v. Conagra, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-00-013: **Waite v. Dawson.** Appeal dismissed for lack of jurisdiction. See rule 7A(2).

No. S-00-074: **State ex rel. NSBA v. Howze.** Andrei G. Howze is suspended from the practice of law in Nebraska until further order of this court.

No. S-00-085: **State v. Nesbitt.** Appeal dismissed. See rule 7A(2). Appellant's motion to dismiss appeal overruled as moot.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-93-853: **State v. Vann**, 2 Neb. App. 946 (1994). Petition of appellant for further review overruled on February 23, 2000.

No. A-97-325: **Rath v. Gallup, Inc.** Petition of appellant for further review overruled on January 12, 2000.

No. A-97-660: **State v. Tiff.** Petition of appellant for further review overruled on December 22, 1999.

No. A-97-965: **Northern Plains Surgical v. Deines.** Petition of appellant for further review overruled on January 12, 2000.

No. A-97-1210: **Wolfe v. Abramson.** Petition of appellant for further review overruled on November 10, 1999.

No. A-98-028: **State v. Frank.** Petition of appellant for further review overruled on December 1, 1999.

No. A-98-037: **Webster v. A.I.A. Insurance.** Petition of appellant for further review overruled on November 17, 1999.

No. A-98-077: **In re Testamentary Trust of Jacob.** Petition of appellee for further review overruled on December 15, 1999.

No. A-98-186: **McCoy v. Solid Waste Agency.** Petition of appellee for further review overruled on November 10, 1999.

No. A-98-225: **Faulconbridge v. Law Offices of Ronald J. Palagi.** Petition of appellant for further review overruled on November 23, 1999.

No. A-98-290: **State v. Cook.** Petition of appellee for further review overruled on November 23, 1999.

No. A-98-293: **Eisenman v. Eisenman.** Petition of appellant for further review overruled on November 23, 1999.

No. A-98-353: **State v. Torres.** Petition of appellee for further review overruled on October 20, 1999.

No. A-98-367: **Martinez v. Super 8 Motel.** Petition of appellant for further review overruled on January 20, 2000.

No. A-98-430: **Shapiro v. Shapiro.** Petition of appellant for further review overruled on November 10, 1999.

No. A-98-456: **Swaney v. City of Bellevue**. Petition of appellant for further review overruled on October 27, 1999.

No. A-98-489: **Battle Creek Farmers Co-op v. County of Madison**. Petition of appellant for further review overruled on December 22, 1999.

No. A-98-490: **Stegman v. State**. Petition of appellant for further review overruled on January 12, 2000.

Nos. A-98-522, A-98-523: **Howell v. Douglas**. Petition of appellant for further reviewed overruled on December 1, 1999.

No. A-98-537: **Andersen v. Ganz**. Petition of appellant for further review overruled on November 17, 1999.

No. A-98-544: **Nelson v. City of Omaha Zoning Bd. of Appeals**. Petition of appellant for further review overruled on December 22, 1999.

No. S-98-564: **Bowers v. Scherbring**. Petition of appellant for further review sustained on December 1, 1999.

No. A-98-571: **State v. Davenport**. Petition of appellant for further review overruled on January 12, 2000.

No. A-98-571: **State v. Davenport**. Petition of appellee for further review overruled on January 12, 2000.

No. A-98-586: **J.P. Theisen & Sons v. Omni Engineering**. Petition of appellant for further review overruled on October 27, 1999.

No. A-98-597: **Huston v. Huston**. Petition of appellee for further review overruled on January 12, 2000.

No. A-98-604: **Plucknett v. Prokop**. Petition of appellant for further review overruled on December 29, 1999.

No. A-98-619: **Kline v. Simon Meats**. Petition of appellee for further review overruled on October 27, 1999.

No. A-98-646: **Stover v. Northcott**. Petition of appellant for further review overruled on October 27, 1999.

Nos. A-98-661, A-98-796, A-98-797, A-98-835: **James Neff Kramper Family Farm v. Dakota Cty. Bd. of Equal**. Petition of appellant for further review overruled on March 1, 2000.

No. A-98-664: **State v. Weaver**. Petition of appellant for further review overruled on January 12, 2000.

No. A-98-679: **Osantowski v. Osantowski**. Petition of appellant for further review overruled on December 15, 1999.

No. A-98-722: **Oak View Mall Corp. v. Grace Co.** Petition of appellant for further review overruled on November 23, 1999.

No. A-98-761: **Laubscher v. Laubscher**, 8 Neb. App. 648 (1999). Petition of appellant for further review overruled on October 20, 1999.

No. A-98-780: **American Finance v. Hollywood Auto Sales.** Petition of appellee for further review overruled on January 12, 2000.

No. A-98-789: **Campos Constr. Co. v. Creighton St. Joseph Reg. Health Care.** Petition of appellee for further review overruled on February 24, 2000.

No. A-98-792: **Brown v. Hafer.** Petition of appellant for further review overruled on February 3, 2000.

No. A-98-802: **Hoppens v. Haugens.** Petition of appellee for further review overruled on November 10, 1999.

No. A-98-811: **Salsbury v. Salsbury.** Petition of appellee for further review overruled on January 12, 2000.

No. A-98-821: **In re Estate of Marsh.** Petition of appellant for further review overruled on November 10, 1999.

No. S-98-846: **Jones v. Omaha Constr. Co.** Petition of appellee Eugene for further review sustained on February 24, 2000.

No. S-98-846: **Jones v. Omaha Constr. Co.** Petition of appellee Thomas for further review overruled on February 24, 2000.

No. A-98-883: **State v. Quezada.** Petition of appellant for further review overruled on February 24, 2000.

No. A-98-892: **State v. Schoenthal.** Petition of appellee for further review overruled on December 1, 1999.

No. A-98-897: **State v. Lewis.** Petition of appellant for further review overruled on January 20, 2000.

No. A-98-898: **Jensen Dairy v. Wells Air Service.** Petition of appellant for further review overruled on January 12, 2000.

No. A-98-930: **Maxwell, Inc. v. Kenney Deans, Inc.** Petition of appellee for further review overruled on November 10, 1999.

No. A-98-1014: **State of Missouri ex rel. Nixon v. HTI Corp.** Petition of appellant for further review overruled on October 27, 1999.

No. A-98-1015: **Eli's, Inc. v. Commercial Lithographing, Inc.**, 8 Neb. App. 752 (1999). Petition of appellant for further review overruled on December 15, 1999.

No. A-98-1025: **McFadden v. Winters & Merchant, Inc.**, 8 Neb. App. 870 (1999). Petition of appellee for further review overruled on February 3, 2000.

No. S-98-1057: **Jack v. Clinton**. Petition of appellee for further review sustained on December 15, 1999.

No. A-98-1065: **Fidler v. Koster**, 8 Neb. App. 884 (1999). Petition of appellant for further review overruled on January 26, 2000.

No. A-98-1131: **Cole v. Stennis**. Petition of appellant for further review overruled on January 12, 2000.

No. A-98-1132: **Clinton v. MVI, Inc**. Petition of appellant for further review overruled on February 3, 2000.

Nos. A-98-1144, A-98-1145: **State v. Schake**. Petition of appellant for further review overruled on January 12, 2000.

No. A-98-1153: **Hoppe v. Hoppe**, Petition of appellant for further review overruled on March 1, 2000.

No. A-98-1172: **Astleford v. Astleford**. Petition of appellant for further review overruled on November 23, 1999.

No. A-98-1174: **Robertson v. Motor Club Ins. Assn.**, 8 Neb. App. 758 (1999). Petition of appellant for further review overruled on December 15, 1999.

No. S-98-1177: **In re Adoption of Trystyn D.**, 8 Neb. App. 704 (1999). Petition of appellee for further review sustained on January 12, 2000.

No. A-98-1201: **State v. Heil**. Petition of appellant for further review overruled on January 12, 2000.

Nos. A-98-1205, A-98-1206: **State ex rel. Miller v. Miller**. Petition of appellant for further review overruled on February 24, 2000.

No. A-98-1226: **Mak v. Mak**. Petition of appellant for further review overruled on January 12, 2000.

No. A-98-1241: **State v. Dockery** . Petition of appellant for further review overruled on November 23, 1999.

No. A-98-1245: **State v. Yoder**. Petition of appellant for further review overruled on January 12, 2000.

Nos. A-98-1252 through A-98-1255, A-98-1283 through A-98-1285: **Tyler v. Department of Corr. Servs.** Petitions of appellant for further review overruled on December 15, 1999.

No. A-98-1277: **Schindel v. Smejkal**. Petition of appellant for further review overruled on February 24, 2000.

No. A-98-1316: **Henneberry v. Omaha Pub. Power Dist.** Petition of appellant for further review overruled on December 1, 1999.

No. A-98-1334: **State v. Gresham**. Petition of appellant for further review overruled on November 10, 1999.

No. A-98-1337: **Mendoza v. Pepsi Cola Bottling Co.**, 8 Neb. App. 778 (1999). Petition of appellee for further review overruled on January 12, 2000.

Nos. A-98-1340 through A-98-1342: **State v. Davis**. Petition of appellant for further review overruled on November 17, 1999.

No. A-98-1353: **State v. Harker**, 8 Neb. App. 663 (1999). Petition of appellee for further review overruled on November 17, 1999.

No. A-98-1359: **Mathews v. Williams**. Petition of appellant for further review overruled on November 10, 1999.

No. A-98-1377: **State v. Zwygart**. Petition of appellant for further review overruled on December 15, 1999.

No. A-98-1382: **In re Interest of Tiffany C.** Petition of appellant for further review overruled on December 1, 1999.

No. A-99-040: **State v. Jensen**. Petition of appellant for further review overruled on October 27, 1999.

No. A-99-068: **State v. Cole**. Petition of appellant for further review overruled on November 10, 1999.

No. A-99-105: **New Tek Mfg., Inc. v. Beehner**. Petition of appellee for further review overruled on March 1, 2000.

No. S-99-137: **Reinsch v. Reinsch**, 8 Neb. App. 852 (1999). Petition of appellant for further review sustained on January 12, 2000.

No. A-99-205: **Feik v. Feik**. Petition of appellant for further review overruled on January 26, 2000.

No. A-99-231: **Prokop v. Chaloupka**. Petition of appellant for further review overruled on January 12, 2000.

No. A-99-236: **Bakhit v. The Paper Corp**. Petition of appellant for further review overruled on February 24, 2000.

No. A-99-282: **State v. Clark**, 8 Neb. App. 936 (2000). Petition of appellant for further review overruled on February 24, 2000.

No. A-99-303: **Sepulveda v. Department of Corr. Servs.** Petition of appellee for further review overruled on January 12, 2000.

Nos. A-99-348, A-99-349: **State v. Jackson**. Petition of appellant for further review overruled on October 27, 1999.

No. A-99-416: **State v. Smith**. Petition of appellant for further review overruled on November 17, 1999.

No. A-99-424: **DeWitt v. Garvey**. Petition of appellant for further review overruled on November 23, 1999.

No. A-99-477: **State v. Botts**. Petition of appellant for further review overruled on February 3, 2000.

No. A-99-490: **Herink v. Department of Motor Vehicles**. Petition of appellant for further review overruled on December 29, 1999.

No. A-99-503: **State v. Malcom**. Petition of appellant for further review overruled on November 10, 1999.

No. A-99-518: **State v. Holliday**. Petition of appellant for further review overruled on November 10, 1999.

No. A-99-526: **Gaines v. City of Omaha**. Petition of appellant for further review overruled on December 15, 1999.

Nos. A-99-541, A-99-542: **State v. Planer**. Petition of appellant for further review overruled on November 10, 1999.

No. A-99-561: **State v. Combs**. Petition of appellant for further review overruled on January 12, 2000.

No. A-99-600: **State v. Cedillo**. Petition of appellant for further review overruled on February 24, 2000.

No. S-99-627: **Sikora v. Bohn**. Petition of appellant for further review sustained on December 15, 1999.

No. A-99-643: **State v. Holroyd**. Petition of appellant for further review overruled on December 29, 1999.

No. A-99-664: **State v. Brown**. Petition of appellant for further review overruled on December 1, 1999.

No. A-99-753: **Ortega v. Excel Corp**. Petition of appellant for further review overruled on February 16, 2000.

No. A-99-767: **State v. Rodriguez**. Petition of appellant for further review overruled on January 18, 2000.

No. A-99-769: **State v. Davis**. Petition of appellant for further review overruled on December 22, 1999.

No. A-99-778: **Denis-Flows v. Dunning**. Petition of appellant for further review overruled on December 15, 1999.

No. A-99-778: **Denis-Flows v. Dunning**. Petition of appellee Edilma for further review overruled on December 15, 1999.

No. A-99-808: **Tyler v. Tesar**. Petition of appellant for further review overruled on December 15, 1999.

Nos. A-99-840 through A-99-844: **State v. Kinney**. Petition of appellant for further review overruled on February 16, 2000.

Nos. A-99-845 through A-99-847: **State v. Benish**. Petition of appellant for further review overruled on January 26, 2000.

No. A-99-867: **State v. Hurt**. Petition of appellant for further review overruled on February 3, 2000.

No. A-99-874: **Tyler v. Department of Corr. Servs**. Petition of appellant for further review overruled on March 1, 2000.

No. A-99-952: **Schluntz v. Clifford G. Hess Revocable Trust**. Petition of appellant for further review overruled on January 20, 2000.

No. A-99-981: **State v. Herink**. Petition of appellant for further review overruled on February 16, 2000.

No. A-99-1016: **Austin v. County of Lancaster**. Petition of appellant for further review overruled on December 1, 1999.

Nos. A-99-1045, A-99-1046: **State v. Lobato**. Petition of appellant for further review overruled on March 1, 2000.

No. A-99-1154: **State v. Peterson**. Petition of appellant for further review overruled on February 3, 2000.

IN THE SUPREME COURT
OF THE STATE OF NEBRASKA

IN THE MATTER OF)
JUDGE ROBERT L. SMITH)
MEMORIAL)

Proceedings held at 9:12 a.m., December 16, 1999, in the Nebraska Supreme Court, State Capitol, Lincoln, Nebraska.

APPEARANCES:

Chief Justice John V. Hendry
Justice Lindsey Miller-Lerman
Justice William M. Connolly
Justice John M. Gerrard
Justice Michael McCormack
Justice Kenneth C. Stephan

CHIEF JUSTICE HENDRY: The Supreme Court is meeting in special ceremonial session on this 16th day of December, 1999, to honor the life and memory of former Supreme Court Justice Robert L. Smith and to note his many contributions to the legal profession.

I would like to acknowledge the presence of Court Appeals Judges Richard Sievers, Edward Hannon and Everett Inbody who are also present to honor Judge Smith.

The Court also acknowledges the presence of Justice Smith's family, other members of the judiciary, members of the bar and friends of Justice Smith.

At this time the Court recognizes former Nebraska Supreme Court Chief Justice William Hastings, Chairman of the Supreme Court Memorial Committee, who will conduct these proceedings. Mr. Chief Justice. Good morning.

JUDGE HASTINGS: Good morning. May it please the Court, Mr. Chief Justice, it pleases me that Your Honor asked me

to form and chair a committee for the purpose of memorializing Judge Robert L. Smith. I am grateful to those committee members, some of whom are here in person and others unavoidably deprived of the privilege of delivering their remarks.

I did not know Judge Smith at the time that he was appointed to serve on the Supreme Court. However, our careers did parallel in a sense, although he served on the district court of Douglas County from 1961 to 1965 and was then appointed that year to this bench, the same year that I assumed my duties as a district judge for the district court of Lancaster County. I met him early on at a Lincoln Bar Association dinner meeting and the one thing I remembered was that we were fellow Presbyterians.

We became quite well acquainted after that during the various times that I have served by designation on this court and before my appointment in 1979. As a district judge I read his opinions with anticipation and marveled at the depth of thought that went into their preparation.

On a personal note, Julie and I were entertained by the judge and his wife Beth who took us to dinner at the Firehouse Dinner Theatre in Omaha.

But enough of my observations. I am pleased to call on James W. R. Brown, Esquire, a distinguished practitioner from Omaha, to offer his remarks.

CHIEF JUSTICE HENDRY: Thank you. Good morning, Mr. Brown.

MR. BROWN: Good morning. May it please the Court: In February of 1946 I was introduced to a young, smiling lieutenant in the United States Navy, Robert Lee Smith. The occasion for our meeting was that Bob and I were to become the two new associates in the law firm of Ellick, Fitzgerald and Smith.

After having served for four years in World War II in the South Pacific and Asiatic theaters, Bob was ready to return to civilian life and to begin the practice of law. Having completed three and a half years in the Army, I shared with Bob the eagerness to get started in the practice of our life work.

Now, most of those who are gathered here today probably did not know Bob until after a serious illness had impaired his personality and the keenness of his mind. For that reason I thought

it might be beneficial to describe very briefly the Bob Smith that I knew and that I will always remember.

First of all was his cheerfulness. He would always greet you with a broad smile and with sparkling eyes that made you feel welcome and comfortable in his presence. Having worked with him for a number of years, I always found him pleasant and very easy to work with.

Another characteristic of Bob's was his absolute fairness. In the years that we worked together as associates and then later as partners there was not a single incident that I felt that either Bob or Seymour acted unfairly. When they decided to set up their own firm, the separation of the practices was made without the slightest problem. In fact, for many years afterward Bob and Seymour would join us in our conference room before the annual dinner of the Nebraska State Bar Association. And Seymour and Bob Hamer would regale us with humorous and hilarious happenings in the law.

Bob Smith himself had a very good sense of humor but in this respect he was overshadowed by his father, the raconteur nonpareil of the legal profession and the Omaha community itself.

Bob was blessed with outstanding analytical ability. It was always a pleasure and a real learning experience to work with him on difficult legal matters.

I have always felt that the practices of Seymour and Bob marked in a somewhat rough way the end of one era in the practice of law and the beginning of another. Seymour's practice came at the end of a period in which the practice of law was to litigate. The contestants were the lawyers and the goal was to outdo the other lawyer or at least embarrass him.

When Bob began his practice the contestants were the clients. The emphasis was more on achieving the client's goal without litigation if possible. And office lawyer was no longer a term of belittlement.

While Bob was primarily a trial lawyer, he clearly belonged to this new era. This is the Bob Smith that I knew and the Bob Smith that I will always remember.

During his long illness Bob received the constant and loving care of his wife Beth. History does not record a greater example of affection, care and sacrifice. Thank you.

CHIEF JUSTICE HENDRY: Thank you, Mr. Brown.

JUDGE HASTINGS: If it please the Court: may I ask the Honorable Leslie Boslaugh, judge retired of this court, to address the court?

CHIEF JUSTICE HENDRY: Please. Good morning, Judge.

JUDGE BOSLAUGH: Good morning, sir. May it please the Court: I am honored to be invited to speak to you this morning briefly concerning the Honorable Robert L. Smith who was a judge of this court from 1965 until he retired in 1973.

Judge Smith was a true gentleman and a scholar of the law. He demonstrated that by everything he did as a judge of this court. He approached the cases which were assigned to him with a great deal of sincerity. He was a very sincere man.

He also had a final strong sense of the finality which we attached to the results we would adopt. He was careful to be aware that he was involved in each case and he was mindful of his responsibility to understand the propositions and conditions advanced by the parties and their lawyers.

He was careful in adopting an opinion that might be fair to all of the parties. And he did not agree to a rule in a case until he was sure that a proper result had been obtained. His aim was to do that which was right in each situation and he was careful that the result was proper and fair to all. His aim was to achieve justice and that was his goal in every case.

I think the language of Abraham Lincoln is appropriate here. Mr. Lincoln said, "I did the very best I know how, the very best I can, and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything."

We're all glad that Bob Smith was chosen to be a member of this court. He was a valued member of the court and his work remains as a testament to his dedication and ability. If you were to choose two words to describe Judge Smith's performance to this court I would remember that his activity was done with dignity and integrity. This characterizes Judge Smith during his tenure to this court. Thank you very much.

CHIEF JUSTICE HENDRY: Thank you, Judge Boslaugh.

JUDGE HASTINGS: If it further pleases the Court: May I read the prepared text of the remarks of the Honorable John T. Grant, judge retired of this court, who because of a long-standing commitment was unable to be here, also those of Donald H. Erickson, Esquire, a distinguished lawyer from Omaha who just this week unexpectedly found it necessary to seek the services of a hospital, as did the Honorable Donald P. Lay, Judge of the United States Court of Appeals, who also found it necessary to seek the assistance and care of a hospital. Both of these gentlemen, I am pleased to announce, are progressing nicely.

Judge Grant, I think, was seeking to outdo Bob Smith in the brevity of his remarks but they're very pointed. I quote:

> Others have spoken of Bob's life and contribution as a lawyer, district judge, and Supreme Court Judge. I won't be repetitive about Bob's tenure on the Nebraska Supreme Court, but I will say that in 1972 he used the word "anomie" in an opinion and I have remembered that word to this day, although I've never had the occasion to use it. As Ring Lardner used to say, you could look it up at 188 Neb. 579.
>
> What I want to remember are the great times we had working in the legal field and in our social lives in Omaha in the 1950's. Among other things, we had a floating bridge game with five young lawyers plus a CPA to keep score. It was great fun.
>
> I will always remember Bob as a fine lawyer and a boon companion. The State of Nebraska and the Nebraska bar have lost a good man who will not be forgotten.

And then from Donald Erickson:

> Robert L. Smith, a lifelong resident of Omaha, Nebraska, until his later years, was one of America's war heroes, having served in the United States Navy through the entire South Pacific naval and land engagements of Guadalcanal, Iwo Jima, Tarawa and Okinawa. He was decorated for extreme bravery and outstanding valor in the field in every one of those campaigns, each one of which would qualify as a D Day landing.

If you have seen the movie "Saving Private Ryan" and saw the story of those brave soldiers unfold on the screen making the ultimate commitment, you would have witnessed a Robert L. Smith fighting for his country.

I was in the South Pacific during some of those campaigns but was not engaged. I did, however, lose many friends at Okinawa to kamikaze attacks where Robert was fighting in blazing gasoline explosions for over two months.

I mention this because the boys like Robert who returned to America after the war had already lived a lifetime. America never had a more mature or responsible group of citizens than such fighting veterans, and certainly Bob's life showed the enduring commitment he had made to help mankind make our planet a better place to live.

Robert grew up in the shadows of his father, Seymour L. Smith, an outstanding lawyer and civic leader in Omaha. His father was not only colorful but an advocate of law as the highest tool of civilized society. He passed on this love of the law to his son, Robert, who studied and bathed in its pool of principles and precedents as a guide to a better society.

Robert excelled as a student, graduating from Southern Methodist University in Dallas, Texas, in 1940 when he entered the law school at Texas University. The war changed everyone's plans and as a returning veteran in 1945 he enrolled in Creighton University Law School and graduated LLB in 1947 when he joined his father in the practice of law at the firm of Fitzgerald & Smith.

The author of this remembrance of Robert L. Smith joined Fitzgerald & Smith as an associate upon graduation from Creighton Law School in 1948 where he met Robert for the first time.

It didn't take very long after meeting and working with Robert to see that his commitment to his profession was absolute. There never was a doubt in his mind or that of others that the pursuit of excellence in his chosen profession was paramount in his life.

One often hears about those who have succeeded in one profession or another about their outstanding characteristics as evidence of the reasons for their success. Outstanding people in most instances have superlative character traits. Integrity is most mentioned because it has a universal appeal to humanity looking for a mutual trust in their fellow human beings.

In Robert's case integrity was his deepest root. He would have plowed a field unlimited times to get it right, and he often did just that.

To research the law to discover what was right was a love of Robert's life. Not in a static way, but with an eye to where the law is leading us to right judgment.

If he took your case you had a pit bull for an advocate. There was never a waiver from his commitment to a client for any reason, personal or otherwise, unless the client committed the breach.

When Robert and his father started in the practice of law as Smith & Smith it was movie time. The large theater chains were being challenged in their allocation of movies to the exclusion of small independent movie houses. Antitrust damages were trebled and litigation ensued on a grand scale. Smith & Smith were in the thick of the fray, and in the end Robert L. Smith's discovery and development of the law won their cases and Smith & Smith gained the reputation of a lawyer's lawyer, which is to say the highest praise one can receive in this profession.

In the meantime, Robert had found the love of his life in Beth Haney, employee of the Municipal Court of Omaha, Nebraska. They were married in 1948 and had four children: Craig, Victoria, Calvert and Carey. Robert was as devoted to his family as he was to the law.

When Robert was elected judge of the district court of Douglas County in 1961, the bar association was pleased to have a consummate trial lawyer on the bench. One of their own so to speak. If they expected a loving father figure they did not get it. Robert walked the straight line and avoided all favoritism of any kind. He was a tough trial judge and moved his docket, not always the favorite with

many in the bar but a good judge. So good that he was appointed to the Supreme Court of the State of Nebraska in 1964 where he served with distinction until his retirement in 1973 because of physical disability.

Robert was somewhat controversial because of the brevity of his court opinions. There are those who thought he was, on occasion, cryptic or obscure. But he never loaded his opinions with ego or dallied with dictum for self-satisfaction. And above all, the judgments were from deep down integrity where the real foundation of civilized society lies.

And then from the Honorable Donald P. Lay:

Oliver Wendell Holmes once wrote to a friend: "We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done." It seems to me this philosophy is especially appropriate in celebrating the life of Justice Robert L. Smith.

In 1951 I graduated from the University of Iowa Law School and moved to Omaha, Nebraska, to join the law firm of Kennedy, Holland, DeLacy & Svoboda. Two blocks away, some of my law school friends had entered into the prestigious law firm of Fitzgerald and Smith. These were my immediate friends and I spent a good deal of time with the associates at Fitzgerald and Smith. The two senior partners of that firm were Jim Fitzgerald and the illustrious Seymour Smith.

Seymour's son, Bob, was among the young associates at that time along with Don Erickson and my Iowa friends of Jack Osborne and Chuck Schorr. All of us formed a close bond and spent many hours together eating lunch, playing golf, playing bridge, attending ball games and so forth. During those years my wife and I spent many hours with Bob Smith and his wife. Some of their children were the same ages as our children and also had many common interests.

Throughout this early relationship I came to respect Bob Smith as one of the more scholarly lawyers that I have known. We used to debate legal principles into the night.

His life had a great impact upon me. I can honestly say what he has conferred on his family and friends summons all of us to learn and elevate his virtues which by example he has so unselfishly contributed.

Benjamin Disraeli once said, "Life is too short to make it small." I would say that Bob Smith's greatest virtue was his zest for making one's life count. As I mentioned, he was a fine lawyer, but more importantly he loved his family. He adored his caring wife, Beth, and he was so proud of his children: Victoria, Craig, Calvert and Carey. He left behind nine grandchildren.

Bob lived his life to the fullest. He strived for perfection in everything that he attempted to do. In his early years he was an excellent golfer and bowler. Before graduating from law school in 1947 he had served four years in the United States Navy in the Pacific and received four stars. He was on the assault and capture of Guadalcanal, Iwo Jima, Tarawa, and Okinawa. He practiced law in Omaha from 1947 to 1960 when he was elected to the District Court for the Fourth Judicial District of Nebraska. He served in this position from 1961 to 1964 when he was named a judge for the Second Supreme Court Judicial District of Nebraska.

I can recall visiting with Governor Morrison in 1964 and showing to him several of the opinions that Bob had written as a district judge in Douglas County. It was highly unusual for a district judge to write opinions; only the parties received them and they were not published. His opinions were scholarly and well written. I remember Governor Morrison stating that he had never seen a district judge who had spent as much time in writing opinions and with such clarity as those of Bob Smith.

I can still remember in 1964 going with Bob and Beth and their family down to the legislative chambers where Bob was sworn in as a new Justice for the Supreme Court. He served in that capacity from 1964 to 1973. Unfortunately, an earlier illness became accentuated and Bob had a great deal of trouble in the last few years in carrying out his judicial duties. He suffered from nar-

colepsy causing severe headaches and drowsiness. He could not sleep at night and often would go to work at 2:00 o'clock in the morning and return home before noon. I know this became very disconcerting to many of his colleagues on the Court, but they all understood Bob's illness.

When Bob became severely ill and felt that in the interests of the Court he should no longer carry on, he resigned and did not state the reason for doing so. He told me he felt it would be wrong to attempt to get any kind of pension or compensation because of his physical condition. I know that his attitude was directly related to his own perception of inability to serve.

However, thanks to Justice Harry Spencer a claim was made on Bob's behalf for disability retirement so that he and his family were given a pension. He told me afterward that he would always be indebted to Harry Spencer for what Harry had done for him.

Nonetheless, during this period of time he wrote over 400 opinions for the Supreme Court. Most of them were brief and to the point. Several lawyers I can recall were concerned about the brevity of this work, and yet others acclaimed his clarity and writing style as being one of the best on the court.

It has been some time since I read these opinions, but I took time to pull out a few of them. Simply as an illustration I would like to quote a couple of them.

In one domestic relations case the husband had claimed that the alimony award was excessive. Justice Smith wrote:

"The finding of fault is correct. Michael angrily struck Maxyne on a number of occasions. Corroboration was supplied by one daughter and by a physician. Some violence was admitted.

"Perhaps Maxyne's conduct was less than exemplary. Certainly it was much less than cruel. We see no cause to lay blame on her for sexual incompatibility.

"Quarrels over tidiness of the home and discipline of the daughters have been magnified beyond all proportion. We can hardly set a standard of perfection for the performance of marital duties."

[*Sowder v. Sowder*,] 179 Neb. 29[, 29-30, 136 N.W.2d 231, 232 (1965)].

In another case involving the writ of habeas corpus, he wrote a three paragraph opinion which covered one-half page and eloquently stated:

"Habeas corpus is a writ of right but not a writ of course, and probable cause for its allowance must be shown.... Middlebrook had no judicial remedy, and rightly so."
[*Middlebrook v. Sigler*,] 187 Neb. 705[, 706, 193 N.W.2d 572, 573 (1972)].

In another case involving a workmen's compensation dispute, the employer had delayed making payments to the plaintiff. Justice Smith cited several legislative committee reports and stated:

"The cause of plaintiff's justifiable dissatisfaction actually lies elsewhere. Too much litigation which benefits neither employee nor employer is characteristic of the system....

"It is desirable that the Legislature simplify practice and proceedings in these cases...."
[*Marshall v. Columbus Steel Supply*,] 187 Neb. 102[,104, 187 N.W.2d 607, 609 (1971)].

In another domestic relations case, the husband was awarded a divorce on the grounds of adultery committed by the wife. The wife appealed and Justice Smith wrote:

"...the misconduct of Kathleen has not been limited to one or two occasions. Its continuance constitutes a potential source of harm to the moral welfare of the children; free love is not a way of life everywhere...." [*Oberg v. Oberg*,]188 Neb. 316[, 318, 196 N.W.2d 371, 372 (1972)].

In a criminal case, Justice Smith wrote in 1972 relating to the alleged excessiveness of the sentence for error. He wrote:

"Another variable is the emotion of the judge in determining and pronouncing the penal sanction. Should we deny its existence altogether, the illusion might cheat the reader.... On the other hand, a sentence dictated by inordinate emotion is suspect. It is only by coincidence that it finds support in the evidence.... At a sentencing hearing it

is especially important that the judge steel himself against predilection. Otherwise he may fuel the raging fire in youth against 'the establishment.'" [*State v. West*,]188 Neb. 579, 583-84, 198 N.W.2d 204, 206 (1972)].

Finally there are two cases which I have chosen to illustrate Bob's keen sense of brevity. One related to a zoning case and the interpretation of the statute. Bob wrote:

"Semantic skills can justify affirmance or reversal. It is our view that the statutory language does not mean that the voting requirement is moribund in respect to conditional use permits. This interpretation also aligns the statutory provision with requirements of notification and hearing." [*Stec v. Countryside of Hastings, Inc.*,]190 Neb. 733, 738, 212 N.W.2d 561, 564 (1973)].

In another domestic relations case involving custody of the children, Bob wrote:

"The rulings in question were erroneous; the refusal to receive evidence from Manfred on the issue of removal and to appoint counsel was not in the best interests of the children.

"The award of an absolute divorce is affirmed." [*Pieck v. Pieck*, 190 Neb. 419, 420, 209 N.W.2d 191, 192 (1973)].

Bob was a prolific reader of both fiction and nonfiction. He loved reading classics, and particularly in his later years, he became a student of the great philosophers.

A favorite book of mine, entitled *Eulogy of Judges*, was written in 1942 by a famous law professor, Piero Calamandrei, at the University of Florence, Italy. I treasure this little book because it was given to me by another great humanitarian, Justice Tom Clark. I recalled the following passage which seemed appropriate in commenting on Justice Smith's contribution to our society. In the final chapter, Professor Calamandrei hypothesizes a conversation between a lawyer and a judge. He concludes with the following colloquy:

"THE LAWYER: This is our life, O Judge, and if it is given to us to grow old, this in the end will be our fate. And yet I know I would at no cost alter my destiny.

> "THE JUDGE: Nor I; for it seems to me that among the professions that mankind can serve no other is better suited to maintain peace among men than that of the judge, the dispenser of a balm for every wound, called justice. For this, even though the end of my life seem lonely, it will be sweet and serene, for I know that the knowledge of having spent the better part of myself to bring about the just happiness of others will give me peace and hope at the end. In this hope, O Lawyer, our destinies meet at their terrestrial conclusion. We are brothers in this common purpose and therefore can shake hands."
>
> Piero Calamandrei, *Eulogy of Judges*, at 120-21.

I am privileged to celebrate Justice Robert Smith's great life. He will always be remembered as a friend to me. I close with a little prayer. The author is anonymous:

> Servant of God, well done
> Thy glorious warfare is past
> The battle is fought, the race is won
> And thou are crowned at last.

If it further please the Court: may I recognize that Justice Harry Spencer, a long, long time judge of this court, is here today and was a colleague of Judge Smith's.

Finally, if it further please the Court, I would move that the foregoing remarks be memorialized in the permanent records of this court and that a copy of that record be presented to the family of Judge Robert M. Smith.

CHIEF JUSTICE HENDRY: That will be granted. Thank you. On behalf of the Nebraska Supreme Court I extend its appreciation to former Chief Justice Hastings who chaired the Court's memorial committee and was primarily responsible for organizing this presentation.

This concludes the special ceremonial session of the Nebraska Supreme Court. The Court would encourage any of the participants, family members and friends of Justice Smith to remain in the courtroom for a moment to greet each other on this occasion. We are in adjournment. Thank you.

(Proceedings adjourned.)

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JEFFREY J. KNOLL, APPELLANT, V.
BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,
A CORPORATE GOVERNMENTAL BODY, APPELLEE.
601 N.W.2d 757

Filed October 29, 1999. No. S-97-1292.

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. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty. Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury.
3. ___. In determining whether a duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. Foreseeability alone is not dispositive.
4. **Negligence: Invitor-Invitee: Liability.** A business proprietor is liable for the adverse actions of a third party against an invitee when those actions were reasonably foreseeable to the proprietor.
5. **Negligence: Liability.** A third party's action need not amount to a violation of the criminal law to give rise to liability; such an act may be sufficient even if it is merely accidental.
6. **Negligence: Liability: Invitor-Invitee: Proof.** Landowner liability is predicated on proof of the possessor's superior knowledge, actual or constructive, of dangers to which the invitee is subjected and of which the invitee is unaware. However, the "superior knowledge rule" does not apply when the alleged negligence involves liability for the intentionally harmful acts of a third party.
7. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
8. **Negligence: Case Overruled.** Foreseeability, in the duty context, is a legal question for the court. To the extent that *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998); *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997); *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996); and

K.S.R. v. Novak & Sons, Inc., 225 Neb. 498, 406 N.W.2d 636 (1987), indicate to the contrary, they are hereby overruled.

9. **Negligence: Criminal Law.** In analyzing foreseeability in the duty context, the Supreme Court has noted that a prior criminal history need not involve the same suspect to make the further criminal acts reasonably foreseeable, nor need it involve the same type of crime. Likewise, the prior acts need not have occurred on the premises. Even one such prior incident may be enough. It is the totality of the circumstances, not solely the number or location of prior incidents, that must be considered in determining foreseeability.

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

Anne K. Holland and J. Joseph McQuillan, of Walentine, O'Toole, McQuillan & Gordon, and James M. McQuillan and Edward D. Steenburg, of McQuillan, Steenburg & McQuillan, P.C., for appellant.

Richard R. Wood, General Counsel for the University of Nebraska, and John C. Wiltse for appellee.

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

CONNOLLY, J.

The appellant, Jeffrey J. Knoll, was a student at the University of Nebraska at Lincoln (UNL). He was hazed by members of the Phi Gamma Delta fraternity (FIJI), which hazing resulted in severe injuries. Knoll brought a tort action against the Board of Regents of the University of Nebraska (University), and both parties filed for summary judgment. The trial court granted summary judgment to the University, finding no duty. This case presents the question whether the University owed Knoll a duty to exercise reasonable care to protect Knoll from FIJI's actions. We conclude that whether a duty was owed is a question of law and determine that a duty was owed. We reverse.

BACKGROUND

The stipulated facts and deposition testimony offered at the hearing on the parties' motions for summary judgment show the following: On November 3, 1993, during FIJI's "pledge sneak," four or five active FIJI members met Knoll in the basement of

Andrews Hall on the UNL campus. Knoll attempted to run, was tackled by the active members, and was then handcuffed to an active member. Knoll was taken to the FIJI house where he was handcuffed to a radiator. While handcuffed to the radiator, Knoll was given shot glasses of an alcoholic liquor and cans of beer by FIJI's officers and active members. Over the course of approximately 2½ hours, Knoll consumed 15 shots of brandy and whiskey and 3 to 6 cans of beer. Knoll became severely intoxicated and could no longer provide for his own welfare and safety. After becoming ill due to his intoxication, Knoll was taken to a restroom on the third floor of the FIJI house by his captors and handcuffed to a toilet pipe. Knoll broke loose from the handcuffs while unattended in the restroom and attempted to escape by exiting out the third-floor restroom window and sliding down a drainpipe. Knoll fell from the third-floor window to the ground below and suffered severe injuries. Knoll had a blood alcohol content of .209 grams of alcohol per 100 milliliters of blood. Knoll was 19 years of age when he fell and was injured.

The FIJI house is situated on land owned by the Phi Gamma Delta House Corporation. The FIJI house is considered to be a student housing unit subject to the UNL Student Code of Conduct (Code). The use of any alcoholic beverage in a student housing unit was a violation of the student housing regulations then in effect and a violation of the Code. Conduct that is unreasonably dangerous to the health or safety of other persons, or oneself, was also a violation of the Code, as was hazing. Unmarried students who were under the age of 19 at the beginning of the fall semester of the 1993-94 academic year were required by the University to live in a student housing unit during their freshman year.

It is routine for fraternities located at the UNL campus to participate in pledge sneak events. These fraternities are supposed to complete a form disclosing whether a pledge sneak event is planned and the details of that event, and file the form with the University. FIJI had not filed a pledge sneak form as of the date Knoll fell. However, the University was aware of at least two hazing incidents involving other fraternities and was aware of several instances of criminal conduct involving FIJI members.

Knoll filed suit against the University, alleging that the University had acted negligently in failing to enforce prohibitions against acts of hazing, the consumption of alcohol, and physically abusive behavior when the University knew or should have known that the FIJI house was in violation of the rules prohibiting such activities. The University filed a motion for summary judgment asserting that it did not owe Knoll a duty. Knoll likewise filed a motion for summary judgment, asserting that Knoll was entitled to judgment as a matter of law. The trial court sustained the University's motion and denied Knoll's. Knoll appeals the court's granting of the University's motion but did not appeal the denial of his motion for summary judgment.

ASSIGNMENTS OF ERROR

Knoll asserts that the trial court erred in concluding that the University did not have a duty to supervise the FIJI house and to protect Knoll from harm and that the trial court erred in not finding a breach of that duty.

SCOPE OF REVIEW

[1] 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. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

ANALYSIS

[2,3] The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty. See *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). Actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury. *Id.* In determining whether a duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. *Id.* Foreseeability alone is not dispositive. *Id.*

[4] Knoll argues that the University owed him a duty as a landowner based on FIJI's handcuffing and abducting Knoll on the University's property. We have held that a business

proprietor is liable for the adverse actions of a third party against an invitee when those actions were reasonably foreseeable to the proprietor. *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998). See, also, *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997) (holding that landlord has duty to protect tenant against foreseeable criminal acts of third persons). UNL students, such as Knoll, are clearly the University's invitees. E.g., *Nero v. Kansas State University*, 253 Kan. 567, 861 P.2d 768 (1993) (noting that all but one court to address issue has concluded that students are invitees). See, also, *Johnson v. State*, 77 Wash. App. 934, 894 P.2d 1366 (1995) (holding that on-campus student residents are invitees).

[5] The University contends that the landowner liability theory does not apply in the instant case because the actions that took place on the University's property were not criminal in nature, but, rather, were simply "horseplay." However, a third party's action need not amount to a violation of the criminal law to give rise to liability; such an act may be sufficient even if it is merely accidental. See *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996) (stating that third person's act may be accidental, negligent, or intentionally harmful).

[6] The University also argues that it owed no duty because Knoll had superior knowledge of the danger. In *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995), we stated that landowner liability is predicated on proof of the possessor's superior knowledge, actual or constructive, of dangers to which the invitee is subjected and of which the invitee is unaware. However, the landowner liability at issue in *Richardson* was not predicated on the acts of third parties; rather, it concerned a condition of the land itself.

The "superior knowledge rule" does not apply to the instant case, which involves liability for the intentionally harmful acts of a third party. An invitee may very well know that the intentionally harmful acts of a third party are foreseeable on the landowner's property. That fact does not obviate the invitee's expectation that the landowner will exercise reasonable care in providing protection. If it did, landowners in obviously high crime areas would have no duty to provide protection at all, since an invitee would always be aware of the danger. Awareness of

the danger in such cases is irrelevant; it is the landowner that has superior knowledge of, and the ability to provide, protection.

We conclude that the landowner liability theory applies in the instant case and that thus, if FIJI's actions in handcuffing and abducting Knoll were reasonably foreseeable, the University owed Knoll a duty to protect.

[7] This court has long held that whether a legal duty exists for actionable negligence is a *question of law* dependent on the facts in a particular situation. *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). Prosser and Keeton have stated:

> [Duty] is entirely a question of law . . . and it must be determined *only* by the court. *It is no part of the province of a jury to decide . . . whether the Long Island Railroad is required to protect Mrs. Palsgraf from fireworks explosions.* A decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant. A decision that, if certain facts are found to be true, a duty exists, leaves open the other questions now under consideration [which are the weight and sufficiency of the evidence, and the general and particular standard of conduct].

(Emphasis supplied.) W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 37 at 236 (5th ed. 1984).

As the quotation from Prosser and Keeton demonstrates, in the context of determining the existence of a duty, foreseeability is a question of law for the court to resolve. See, e.g., *Clohesy v. Food Circus Supermkts.*, 149 N.J. 496, 694 A.2d 1017 (1997); *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 863 P.2d 207, 25 Cal. Rptr. 2d 137 (1993); *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 647 P.2d 713 (1982); *Metropolitan Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980); *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 343 N.E.2d 465 (1976). "[T]he fact that a question of law involves the consideration of factual issues does not turn the former into a 'question of fact' or necessarily mire the court in evidentiary issues of weight and credibility." *Clemets v. Heston*, 20 Ohio App. 3d 132, 135 n.1, 485 N.E.2d 287, 290 n.1 (1985) (stating that duty is question of law for court).

Nonetheless, this court has held that whether a history of criminal activity makes an assault foreseeable is a question of fact. *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996). See, also, *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997) (holding that foreseeability is factor in establishing duty and is question of fact in negligence case). In so holding, this court cited *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987).

In *K.S.R.*, this court stated that questions of foreseeability, negligence, and proximate cause are questions for the trier of fact, citing *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981). However, in *Brown*, the foreseeability analysis was limited to proximate cause—duty was not at issue. This court stated: " 'The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, is a question of fact, rather than a question of law.' " *Brown v. Nebraska P.P. Dist.*, 209 Neb. at 67, 306 N.W.2d at 171. Thus, foreseeability as a question of fact migrated from the proximate cause context in *Brown*, to the duty context in *Hulett*, without any analysis whatsoever.

As we noted in *Kozicki v. Dragon*, 255 Neb. 248, 583 N.W.2d 336 (1998), citing *Hill v. Yaskin*, 75 N.J. 139, 380 A.2d 1107 (1977), the distinction between foreseeability as it applies to duty and as it applies to proximate cause is a critical distinction that is too often and too easily overlooked.

> Foreseeability as a determinant of a business owner's duty of care to its customers is to be distinguished from foreseeability as a determinant of whether a breach of duty is a proximate cause of an ultimate injury. Foreseeability as it impacts duty determinations refers to " 'the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.' " . . . Foreseeability that affects proximate cause, on the other hand, relates to "the question of whether the specific act or omission of the defendant was such that the

> ultimate injury to the plaintiff" reasonably flowed from defendant's breach of duty. . . . Foreseeability in the proximate cause context relates to remoteness rather than the existence of a duty.

(Citations omitted.) *Clohesy v. Food Circus Supermkts.*, 149 N.J. at 502-03, 694 A.2d at 1020-21. It is only in the proximate cause context that foreseeability is a question of fact for the jury. See *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

[8] We conclude that foreseeability, in the duty context, is a legal question for the court. See *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999), and *Koltes v. Visiting Nurse Assn.*, 256 Neb. 740, 591 N.W.2d 578 (1999) (analyzing foreseeability as question of law in duty context). To the extent that *Ratigan v. K.D.L., Inc.*, 253 Neb. 640, 573 N.W.2d 739 (1998); *Gans v. Parkview Plaza Partnership, supra*; *Hulett v. Ranch Bowl of Omaha, supra*; and *K.S.R. v. Novak & Sons, Inc., supra*, indicate to the contrary, they are hereby overruled. Therefore, the question in the instant case is not whether there was sufficient evidence for the jury to conclude that the act perpetrated against Knoll was foreseeable, it is a legal question for this court as to whether the University owed a duty to Knoll.

[9] In analyzing foreseeability in the duty context, we have noted that a prior criminal history need not involve the same suspect to make the further criminal acts reasonably foreseeable, *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994), nor need it involve the same type of crime, *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997) (indicating that burglary may be enough to make sexual assault foreseeable). Likewise, the prior acts need not have occurred on the premises. *Erichsen v. No-Frills Supermarkets, supra*. Even one such prior incident may be enough. *Gans v. Parkview Plaza Partnership, supra*. " '[I]t is the totality of the circumstances, not solely the number or location of prior incidents, that must be considered in determining foreseeability.' " *Doe v. Gunny's Ltd. Partnership*, 256 Neb. at 660, 593 N.W.2d at 290, quoting *Gans v. Parkview Plaza Partnership, supra*. Thus, we must determine whether, under the totality of the circumstances, FIJI's acts of handcuffing and abducting Knoll on the University's property were foreseeable by the University.

In the instant case, the University was aware of two separate hazing incidents involving fraternities, one of which occurred on September 23, 1989, and another on October 15, 1992. The October 15 incident involved grabbing and physically removing students from a building. These incidents did not involve FIJI.

The University was also aware of several incidents involving FIJI members. On February 9, 1989, a FIJI member was cited by UNL police for resisting arrest. On February 12, several FIJI members were found in possession of alcohol at the FIJI house, and had one or more females present at the house after the expiration of visitation hours for members of the opposite sex. One member was convicted of sexually assaulting a female high school student at the FIJI house as a result of this incident. On August 20, 1993, a FIJI member was found intoxicated and unconscious in a third-floor restroom of the FIJI house by UNL police. On September 4, an altercation occurred between members of FIJI and the Alpha Tau Omega fraternity in which UNL police intervened. Finally, on September 13, two FIJI members attempted to break into the Alpha Phi sorority house.

It is true there is no evidence that any of this activity occurred on the University's property. However, there is evidence that the FIJI house is located near the University's property. In *Doe v. Gunny's Ltd. Partnership, supra*, we determined that evidence of criminal activity, including assault and larceny, occurring near the landowner's property was relevant to our foreseeability analysis. See, also, *Erichsen v. No-Frills Supermarkets, supra* (indicating that evidence of criminal acts occurring on surrounding premises is relevant). Moreover, there is evidence that UNL exercised control over the FIJI house by considering it to be a "student housing unit" subject to the Code. The Code contained regulations prohibiting certain conduct, including consumption of alcohol; unreasonably dangerous conduct, including but not limited to hazing; and violation of Nebraska laws, which prohibit hazing and the provision of alcoholic liquor to minors. Insofar as we can determine from the record, the regulations set forth in the Code apply with equal force to student housing units which are situated on property owned by the University and those, such as the FIJI house, which are not. The prior instances of alcohol abuse and other law violations occur-

ring on the FIJI house premises are therefore particularly pertinent to our determination of whether a duty exists in this case.

The stipulated facts show that the University was aware of prior hazing instances where students had grabbed and physically removed other students from buildings, had coerced other students into drinking alcohol, and had engaged in other harassing activities. The record reflects that the University had notice that pledge sneaks could lead to illegal hazing. Thus, the University could have foreseen various forms of student hazing on its property, even though FIJI failed to disclose the pledge sneak event, including typical fraternity abductions and the consequences that could reasonably be expected to result from such activities. As such, we conclude the University owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property, and the harm that naturally flows therefrom.

We recognize that reasonable minds could differ on the issue whether the University breached its duty to act reasonably under the circumstances; but this issue, along with the issue of proximate causation, should be tried to the finder of fact with the benefit of the totality of the evidence presented at trial.

REVERSED.

US ECOLOGY, INC., A CALIFORNIA CORPORATION, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ENVIRONMENTAL QUALITY, AN EXECUTIVE DEPARTMENT AND AGENCY OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

601 N.W.2d 775

Filed October 29, 1999. No. S-98-412.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

3. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
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.
5. **Declaratory Judgments: Pleadings: Justiciable Issues.** A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination.
6. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions to dismiss.

Don Stenberg, Attorney General, William M. Lamson, Jr., Special Assistant Attorney General, of Lamson, Dugan & Murray, and Linda L. Willard for appellants.

Steven G. Seglin and David A. Jarecke, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

WRIGHT, J.

NATURE OF CASE

US Ecology, Inc. (USE), commenced this action for declaratory judgment, seeking (1) a declaration that the placement of fill in a depression less than 1 acre in size located on the proposed site of a low-level radioactive waste (LLRW) disposal facility and the creation of a new wetland in mitigation, approximately 2 acres in size, located off the disposal site do not constitute commencement of construction; (2) a declaration that the Nebraska Department of Health and Human Services (DHHS) and its LLRW program manager have no jurisdiction over the determination of whether the fill and mitigation constitutes commencement of construction; and (3) injunctive relief against the director of DHHS and the director of the Nebraska

Department of Environmental Quality (DEQ), enjoining them from interfering with the fill and mitigation proposed by USE.

SCOPE OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

FACTS

USE is a California corporation authorized to transact business in the State of Nebraska, with its principal office located in Lincoln, Lancaster County, Nebraska. USE is the developer of a regional disposal facility for the Central Interstate Low-Level Radioactive Waste Compact (Compact), which disposal facility has been designated by the Central Interstate Low-Level Radioactive Waste Commission (Commission) for the commercial disposal of LLRW generated in the states of Arkansas, Kansas, Louisiana, Nebraska, and Oklahoma. USE has filed an application to construct such facility near Butte, Nebraska.

Pursuant to Neb. Rev. Stat. §§ 81-1586 and 81-1599 (Reissue 1994), DEQ is the agency of the State of Nebraska responsible for licensing and regulation of the disposal facility designated by the Commission. DEQ has authority to license and develop a program for the regulation of LLRW in order to protect the public health, safety, and welfare, as well as the environment. At the time of this action, Randolph Wood was the director for DEQ, and Jay D. Ringenberg was the LLRW program manager for DEQ.

In accordance with the Low-Level Radioactive Waste Disposal Act (Disposal Act), Neb. Rev. Stat. §§ 81-1578 to 81-15,116 (Reissue 1994 & Cum. Supp. 1996), DEQ has promulgated certain regulations concerning the construction of the facility designated by the Compact. " 'Commencement of construction' means any clearing of land, excavation, or other substantial action that may affect the environment of a facility." 194 Neb. Admin. Code, ch. 1, § 008 (1994). "Failure to obtain a license prior to commencement of construction may be grounds

for denial of a license." 194 Neb. Admin. Code, ch. 3, § 001.03 (1994).

At the time of this action, Gina C. Dunning was the director of DHHS, and Cheryl K. Rogers was the LLRW program manager for DHHS. In June 1990, DEQ and DHHS entered into a "Memorandum of Understanding," which stated: DHHS "has the authority to regulate LLRW management, except for the commercial disposal of LLRW in a disposal facility designated by the Central Interstate LLRW Compact Commission . . . ." Pursuant to this memorandum, DEQ and DHHS agreed that there would be one license application and that both agencies would participate in the licensing process.

On July 27, 1990, USE submitted an application with the State of Nebraska for the construction, operation, and ultimate closure of an LLRW disposal facility. The original application was for a 320-acre site located in Boyd County (first site). During the pendency of this application, USE made certain improvements and modifications to the first site, including the installation of a gravel road and placement of a security trailer, equipment shed, fencing, and meteorological equipment.

In January 1993, DEQ and DHHS determined that the first site was not suitable because of the existence of a number of areas which were identified by the U.S. Army Corps of Engineers and DEQ as wetlands. Both DEQ and DHHS issued a notice of intent to deny the license application based solely on the existence of these wetlands. USE withdrew its original application, and on August 30, filed a revised license application (revised application) regarding 110 acres located in the southwest corner of the first site (second site). At the time the revised application was filed, no federal or state agency had identified any wetland within the boundaries of the second site. Ringenberg, the LLRW program manager for DEQ, testified that upon receipt of the revised application and review of an aerial photograph of the second site, he thought that an area in the second site might be a wetland. The area was personally examined, and upon determining that there appeared to be a possible wetland area, Ringenberg requested the Corps of Engineers to examine the area. This area has become known as the D-3 wetland.

Subsequently, USE hired an engineering firm to investigate the D-3 wetland. The engineering firm examined the site and determined that it was a "temporary wetland," which was wet only during rain. The vegetation that was designated "wetland vegetation" was a patch in the center that "you could put your arms around." The quality of the D-3 wetland was low, and the depression averaged 3 inches in depth.

USE then applied to the Corps of Engineers for a "404 permit" under the "Nationwide 26 Program" to fill the wetland. A 404 permit is available when the Corps of Engineers believes that a proposed project will have an insignificant impact on the environment. Public notice of the Corps of Engineers' intent to approve USE's application under the Nationwide 26 Program was mailed directly to DEQ on July 16, 1996. DEQ received notice of the intended decision but did not respond or offer any comments to the Corps of Engineers. A representative of DEQ stated that it did not respond because it wanted USE to get the permit.

USE's 404 permit application provided for mitigation that complied with DEQ's requirements. DEQ approves 404 permits under the Nationwide 26 Program as long as the applicant complies with the requirements that for any wetland taken, there is a replacement or mitigation wetland created 1½ times the size of the wetland taken and that the mitigation wetland created consists of the same type of vegetation as the wetland taken. The mitigation area proposed by USE would be located on the first site but not within the boundary of the second site.

On August 9, 1996, the Corps of Engineers issued a 404 permit giving USE until January 21, 1997, to complete the fill and mitigation work. The Commission had also given USE permission to fill the depression. This would require placing 400 cubic yards of fill in the D-3 wetland.

On September 6, 1996, USE wrote to Ringenberg and Rogers to inform them that the Corps of Engineers had issued USE a 404 permit to fill the D-3 wetland. In a joint letter dated October 21, Ringenberg and Rogers stated: "We have determined that this activity does constitute facility construction. . . . Therefore, by this letter we are advising you not to proceed with your plans at this time. It is acceptable to proceed only upon issuance of a

license." In response, USE claimed that it did not consider this work to be a substantial activity and requested that DEQ and DHHS reconsider their prior conclusion. The agencies refused to change their position.

On June 17, 1997, USE commenced this declaratory judgment action against DEQ and DHHS and their directors pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995), the Uniform Declaratory Judgments Act. On February 26, 1998, the Lancaster County District Court issued a memorandum and judgment. The following facts regarding the D-3 wetland were found to be undisputed: The wetland averaged 3 inches in depth and measured less than 1 acre. The wetland vegetation was an area not larger than what one could put one's arms around. The depression had no relation to the ground water and was merely a depression which collected water during heavy rains. Aside from the vegetation-type wetland, the area consisted primarily of weeds common to Nebraska. With the approval of the State of Nebraska, the Corps of Engineers had issued a permit authorizing this depression to be filled.

The district court found that the fill activity located on the second site did not involve the clearing of land or excavation and that DEQ had not done any monitoring, testing, sampling, or observation of any activity that would be impacted by filling the D-3 wetland. The court concluded that the fill and mitigation authorized by the 404 permit would not have an environmental impact.

The district court also found that the mitigation wetland area was located on the first site, but not on the second site. The court concluded that in the event that a license was issued by DEQ to permit the construction of the disposal facility, 12 to 18 inches of soil on the entire 110-acre tract, including the amount of fill placed in the D-3 wetland, would be removed to prepare the site for construction.

The district court further found that neither DHHS nor any of its officers or employees had statutory authority to render any decision regarding USE's application for a license to construct an LLRW facility and that any decision, order, rule, or regulation which DHHS made was void as being beyond the scope of its authority. The court declared that the construction of the mit-

igation wetland was not the subject of the pending license application and was, therefore, beyond the scope of the authority of both DEQ and DHHS as promulgated by the Disposal Act and the Radiation Control Act, Neb. Rev. Stat. § 71-3501 et seq. (Reissue 1996).

In addition, the district court found that DEQ had statutory authority to regulate and control the application for and construction of an LLRW disposal facility for which USE had made application, but found that DEQ could not properly deny USE's license solely on the basis of the fill and mitigation work being done before the license application was approved.

The district court subsequently enjoined DHHS from (1) taking or threatening to take any action regarding USE's revised application and (2) taking any action on the fill and mitigation project which USE intended to carry out pursuant to the 404 permit issued by the Corps of Engineers. The court further enjoined DHHS from attempting to enforce any rule, decision, or regulation relating to license applications.

In addition, the district court enjoined DEQ from (1) taking any action or threatening to take any action on USE's revised application because of work performed in reliance on the 404 permit and (2) attempting to enforce any decision, rule, or regulation relating to the fill and mitigation project.

Although USE requested that DEQ and DHHS be required to pay the costs of this action, the district court did not address this issue in its order.

ASSIGNMENTS OF ERROR

In summary, the State makes the following assignments of error: (1) The district court lacked jurisdiction over this dispute because USE failed to exhaust all available administrative remedies, because USE did not attack the validity of an agency rule or regulation, and because USE sought declaratory relief against the State, in violation of the doctrine of sovereign immunity; (2) the district court erred in granting injunctive relief because the injunction was against the State and its officers and agents, and USE failed to prove irreparable harm or inadequate remedy at law; (3) the district court erred in finding that DHHS lacked authority to render any decision regarding USE's license appli-

cation; and (4) the district court erred in finding that DEQ's determination that the construction of the wetland fill and mitigation constituted commencement of construction and DEQ's "threat" that the commencement of construction prior to license approval could be grounds for the denial of USE's license application were " 'beyond the scope of [DEQ's] authority, were lacking in reasonable relation to the statutes or its own regulations and were not a reasonable exercise of the authority [DEQ] has.' " Brief for appellants at 5.

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Application of SID No. 384*, 256 Neb. 299, 589 N.W.2d 542 (1999). While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. See, *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999); *State v. Jacob*, 256 Neb. 492, 591 N.W.2d 541 (1999).

[4,5] 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. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). Thus, a court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination. *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

In *Galyen*, taxpayers filed a declaratory judgment action against the State Tax Commissioner, seeking a judicial determination that the manner of taxing center-pivot irrigation systems and real property on which they were situated was unlawful. We noted that the case or controversy requirement applies with equal, if not stronger, force to an action for declaratory judgment, since the right to maintain the action is expressly granted only to those persons whose rights, status, or other legal relations are affected by a statute. In *Galyen*, the appellants' claim for relief was entirely dependent upon future events, e.g., whether the State Tax Commissioner would issue new regulations regarding taxation of center-pivot irrigation systems. The

appellants conceded that the requested declaratory relief could not have affected any right or interest existing at the time the matter was submitted to the district court. Therefore, we concluded that the appellants had presented no actual controversy capable of judicial resolution.

Here, DEQ and DHHS advised USE that they viewed the fill and mitigation project as commencement of construction without a license and thus as grounds for denying USE's application. However, DEQ and DHHS had made no decision regarding the license application at the time this action for declaratory relief was commenced, nor had USE violated any DEQ or DHHS regulation at the time the judgment was entered by the district court. Therefore, whether DEQ and DHHS would deny USE's application for the LLRW site on the basis of its attempt to fill the D-3 wetland remained uncertain. Declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. *Galyen v. Balka, supra.*

[6] We conclude that the threat of denial of USE's application does not create an actual case in controversy. Thus, the district court lacked jurisdiction to exercise judicial power over this cause, and we, likewise, are without jurisdiction. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. See *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

CONCLUSION

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JODY RICHARDSON GITTINS, APPELLANT, V.
JEREL A. SCHOLL, APPELLEE.
601 N.W.2d 765

Filed October 29, 1999. No. S-98-588.

1. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.

2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
3. **Rules of Evidence: Expert Witnesses.** The requirements for admission of expert opinion testimony are found in Neb. Rev. Stat. § 27-702 (Reissue 1995).
4. ___: ___. Under Neb. Rev. Stat. § 27-703 (Reissue 1995), an expert is allowed to base his or her opinion on data obtained before the hearing at which the expert is to testify.
5. ___: ___. Neb. Rev. Stat. § 27-705 (Reissue 1995) permits admission of an expert opinion without prior disclosure of the underlying facts upon which the expert's opinion is based.
6. ___: ___. Under Neb. Rev. Stat. § 27-705 (Reissue 1995), an expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for a new trial.

Herbert J. Friedman and Jeffrey B. Lapin, of Friedman Law Offices, for appellant.

Con M. Keating and Gary L. Young, of Keating, O'Gara, Davis & Nedved, P.C., for appellee.

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

CONNOLLY, J.

Jody Richardson Gittins appeals a jury verdict of the district court for Lancaster County, in which the jury awarded her $6,500 in damages arising from an automobile collision involving Jerel A. Scholl. Gittins challenges, among other things, the adequacy of the verdict and the trial court's failure to admit Gittins' expert witness' opinion that her medical bills were necessitated as a result of injuries she sustained from the collision. We conclude that the trial court erred in sustaining Scholl's foundational objection to Gittins' expert witness' testimony regarding the necessity of Gittins' medical bills. Accordingly, we reverse, and remand for a new trial.

BACKGROUND

This appeal arises from an automobile collision which occurred on March 10, 1994, in Lincoln, Nebraska. Gittins was

driving her automobile westbound on O Street when she began to slow with the traffic in front of her. Scholl was following approximately 1 to 1½ car lengths behind Gittins, at about 30 to 35 m.p.h. Scholl applied his brakes when he noticed the cars slowing in front of him, but was unable to stop his vehicle before running into the rear of Gittins' car.

Gittins commenced this action against Scholl, claiming that his negligence caused the collision and that she suffered injuries and sustained damages as a result. Gittins sought $38,550.68 in special damages, plus general damages and costs. Scholl admitted in his amended answer that his negligence was the proximate cause of the collision and that Gittins sustained some injury. Scholl denied, however, the nature, extent, and severity of those injuries.

Gittins introduced the videotaped deposition of Leo L. Meduna, M.D. Meduna was Gittins' family physician who treated her injuries from April 1994 until June 1997. Meduna testified that he saw Gittins 21 times over the course of her treatment. Although Meduna was the primary treating physician for Gittins, he referred her to several other health care providers for additional treatment. Meduna testified that he sent Gittins to a cardiologist, a physical therapist, and an orthopedist. These providers, in turn, referred Gittins to other health care providers, such as a sports medicine doctor and another physical therapist. Meduna testified that upon the suggestion of these other health care providers, he recommended that Gittins go to the University of Nebraska Medical Center's chronic pain center. Throughout this period of 3 years 4 months, Meduna continued to treat Gittins and was aware of the types of treatment and services provided by the other health care providers. At his deposition on August 6, 1997, Meduna testified that he had last seen Gittins on June 23. In his opinion, Gittins suffered from permanent, chronic, severe pain as a result of the collision with Scholl's vehicle.

On direct examination, Meduna was asked whether he had reviewed Gittins' medical bills compiled in deposition exhibit 5. At trial, deposition exhibit 5 was admitted into evidence as exhibit 24. To simplify matters, we shall refer to the exhibit in question as "exhibit 24." Meduna testified that he had reviewed

the bills and that he had an opinion, to a reasonable degree of medical certainty, whether the bills were necessitated by the collision with Scholl's vehicle. Scholl's counsel made a foundational objection which was sustained. Meduna's opinion on the necessity of the medical bills contained in exhibit 24, therefore, did not reach the jury.

STANDARD OF REVIEW

[1] The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999); *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998).

ANALYSIS

Gittins assigns that the trial court erred in failing to (1) admit expert opinion testimony on the necessity of Gittins' medical bills, (2) strike a juror for cause, and (3) grant a new trial on the basis of inadequate damages. Because we conclude that it was reversible error to sustain Scholl's objection to Gittins' expert witness' testimony, we need not reach the remaining two assignments of error. Therefore, we discuss only the trial court's decision to exclude Gittins' expert witness from testifying as to the necessity of Gittins' medical bills.

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998).

[3] The requirements for admission of expert opinion testimony are found in Neb. Rev. Stat. § 27-702 (Reissue 1995). Section 27-702 provides that "[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."

When asked by Gittins' counsel what foundation was lacking, Scholl's counsel stated: "The doctor, obviously, doesn't know all the work that was done and all the services provided and

there's not proper foundation." From this statement, the crux of Scholl's objection is clear: he did not consider Meduna to be familiar enough with the entirety of Gittins' treatment to render an opinion as to its necessity. Scholl did not object to Meduna's qualifications as an expert, nor did he object on the ground that expert testimony was not needed to assist the trier of fact. Scholl's objection as to lack of proper and sufficient foundation was a general objection. As noted, Meduna was Gittins' primary treating physician who saw her a total of 21 times over the course of her treatment. Therefore, we will consider Meduna a properly qualified expert witness whose testimony fell within § 27-702.

[4] Additionally, under Neb. Rev. Stat. § 27-703 (Reissue 1995), an expert is allowed to base his or her opinion on data obtained before the hearing at which the expert is to testify. Specifically, § 27-703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those *perceived by or made known to him at or before the hearing.* If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(Emphasis supplied.)

Meduna testified extensively on the various treatments received by Gittins since her accident with Scholl in March 1994. He described his treatment of her, as well as treatments provided by other health care providers upon his referral or recommendation or with his knowledge. He also testified that he reviewed the medical bills compiled in exhibit 24 before his deposition. As such, his opinion on the necessity of those bills would have been based on facts or data "perceived by or made known to him at or before the hearing," which is permissible under § 27-703.

[5,6] Finally, Neb. Rev. Stat. § 27-705 (Reissue 1995) permits admission of an expert opinion without prior disclosure of the underlying facts upon which the expert's opinion is based. Specifically, § 27-705 provides that "[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge

requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Under § 27-705, then, an expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. See R. Collin Mangrum, *Opinion and Expert Testimony in Nebraska*, 27 Creighton L. Rev. 85 (1993). Of course, § 27-705 allows the trial court to require the expert to disclose the facts underlying the opinion before it is stated. That, however, did not happen in this case where Meduna's testimony was presented by video deposition.

Meduna, Gittins' treating physician, was an expert witness familiar with the types of treatment that Gittins received from other health care providers. Gittins was entitled, therefore, under § 27-705 to have Meduna's opinion admitted. It then became Scholl's burden to challenge the foundational adequacy of Meduna's opinion on cross-examination. Scholl did not meet this burden. See *Tank v. Peterson*, 219 Neb. 438, 448, 363 N.W.2d 530, 537 (1985) ("experts having given their opinions and the bases thereof, it then became imperative for the defendants to establish that the experts' opinions were based on insufficient underlying facts or data. This simply was not done, and, as such, we hold that the trial court abused its discretion in striking the testimony of the plaintiffs' expert witnesses"). Therefore, the trial court erred in sustaining Scholl's objection and in keeping Meduna's testimony from the jury.

Scholl contends, however, that the trial court's decision to sustain his objection with respect to Meduna's opinion on the entire collection of medical bills contained in exhibit 24 is largely a moot point. Scholl argues that because Meduna testified to most of the bills individually, Gittins should have no complaint about the trial court's action with respect to those entries. We understand Scholl's argument in this respect to mean that if the trial court erred in sustaining his objection, it was harmless. We do not agree.

Scholl asserts that of the 23 bills contained in exhibit 24, the trial court ultimately allowed Meduna to testify that all but two of them were necessitated by Gittins' collision with Scholl.

Based on our reading of the record, however, there were eight bills, totaling approximately $10,000, that Meduna did not testify were necessitated by the collision. While we cannot say with certainty that the award for damages would have been higher had Scholl's objection been overruled, we likewise cannot say that the trial court's error had no adverse impact on the jury's deliberations. If the trial court had overruled Scholl's objection, the jury would have at least considered Meduna's expert opinion that another $10,000 of Gittins' medical bills were necessitated by the collision with Scholl's vehicle. For this reason, we cannot agree with Scholl's contention that the error was harmless.

We conclude, therefore, that the trial court committed reversible error when it sustained Scholl's objection to Gittins' expert witness' opinion as to the necessity of all the medical bills contained in exhibit 24. Accordingly, we reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MATTHEW B. JACKSON, APPELLANT.
601 N.W.2d 741

Filed October 29, 1999. No. S-98-812.

1. **Convictions: Appeal and Error.** On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition.
2. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
3. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.

4. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial.
5. **Judges: Words and Phrases.** A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
6. **Criminal Law: Trial: Juries: Evidence: Proof.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
7. **Trial: Evidence: Juries: Appeal and Error.** In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for a new trial.

James Martin Davis for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Matthew B. Jackson was convicted of manslaughter in the death of Christopher Knapp and first degree assault in the beating of James Haseltine. Jackson was sentenced to 10 to 12 years' imprisonment for the manslaughter conviction and 10 to 12 years' imprisonment for the assault conviction, with the sentences to be served concurrently. Jackson timely appealed these convictions.

SCOPE OF REVIEW

[1] On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explana-

tions, or reweigh the evidence presented to the jury, which are within the jury's province for disposition. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[2] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998).

[3] In all proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

FACTS

After 9 p.m. on October 4, 1997, Jackson and Phillip Caudell, Jr., were at Jake's Mini Mart located at 8320 Blondo Street in Omaha, Nebraska. Jackson used a pay telephone to call a taxicab, and the owner of the business adjacent to the mini mart testified that he overheard two men discussing that their cab would take 20 to 30 minutes to arrive.

Jackson and Caudell sat down outside the mini mart to wait. When Knapp and Haseltine exited the mini mart, they apparently made eye contact with Jackson and Caudell. Jackson stated that he was asked by either Knapp or Haseltine what he was looking at. Jackson said he replied, "What . . . are you looking at?" Jackson testified that a similar verbal exchange occurred between Caudell and the other man.

Knapp and Haseltine crossed the street, heading south, and stopped. Jackson said that one of the two men turned and yelled, "If you want to talk shit, come over here and talk shit, you wetback." Jackson stated that Caudell immediately got up and started walking across the street toward Knapp and Haseltine. Jackson followed Caudell across the street to where Knapp and Haseltine were standing.

Jackson claimed he was behind Caudell when Caudell and Knapp began fighting. Jackson stated that when he ran up to Caudell, intending to break up the fight, he was shoved by Haseltine. Believing he was being attacked, Jackson hit

Haseltine three times in quick succession, and Haseltine fell down. Jackson denied ever hitting or touching Knapp.

After Knapp and Haseltine had been beaten and knocked to the ground, Jackson and Caudell jogged back across the street to pick up their purchases, which they had left outside the mini mart. The two men returned to Caudell's apartment and called someone to come and get them.

Jennifer McGann, a passenger in the car that picked up Jackson and Caudell, testified that Jackson informed her that he and Caudell had been in a fight. Jackson, who did most of the talking, explained the fight in some detail, and Caudell seemed to agree with Jackson's account.

Later at a party, Jackson again bragged about the fight and stated that the victims had not had a chance to get their fists up. He said that he had kicked one of the individuals, and he had blood on his hand and socks. Jackson explained that words and looks had been exchanged between the four men and that he and Caudell just walked up to the other men and started hitting them. The police officer who arrived on the scene was told by Haseltine that he and Knapp had been jumped.

Joe DeSanti testified that he was driving east on Blondo Street at approximately 9:30 p.m. on the night of the fight when he saw four men standing in an empty parking lot. One man struck another man wearing red sweat pants and caused him to fall to the ground. DeSanti turned his vehicle around, and when he arrived at the parking lot, two of the men were gone, and the other two were lying on the ground. DeSanti asked the injured men what had happened, and Haseltine told him that "they were walking home from the store and two men came up and beat the shit out of them."

James Swanson and his wife also passed the parking lot around the time of the fight. Swanson turned his vehicle around, entered the parking lot, and saw two men running across the street. Swanson described one as "darker-skinned" and one as "lighter-skinned." One appeared to have on a long, white T-shirt, and the other had long hair or was wearing a bandanna. One of the injured men told Swanson that they had been jumped. Swanson then went for help and called the police.

Todd and Brenda Andrews also arrived at the parking lot soon after the fight and observed Haseltine cradling Knapp's head in his lap. Haseltine told them that two men, one of whom he described as being black and the other Hispanic, had jumped Knapp and Haseltine. Brenda Andrews stated that Knapp appeared incoherent and was moaning and repeatedly saying, "wait."

Knapp and Haseltine were taken to a hospital. While in the emergency room, Haseltine suffered a seizure and was hospitalized for several days. Haseltine has no memory of the time immediately preceding or following the incident. Knapp's condition was critical. He had external injuries caused by separate blunt traumas and internal head injuries. He did not regain consciousness and died a couple of weeks later.

The head dispatcher at the cab company called by Jackson testified that the name left with the dispatcher by the caller was "Phillip." Police determined that the address given to the dispatcher was Jackson's residence.

After Knapp died, Jackson was charged with and convicted of the first degree assault of Haseltine and manslaughter as a result of the death of Knapp.

ASSIGNMENTS OF ERROR

Jackson asserts that (1) the trial court erred by not granting his motion for a mistrial, (2) the trial court erred by allowing the State to improperly impeach him with inadmissible character evidence, (3) the trial court erred by giving the jury an aider and abetter instruction when there was no evidence to support the charge, (4) the evidence was insufficient to sustain his conviction for manslaughter, and (5) the evidence was insufficient to sustain his conviction for first degree assault.

ANALYSIS

MISTRIAL

Jackson claims that the trial court erred by not granting him a mistrial. Robert Gellner, the owner of a comic shop next to Jake's Mini Mart, testified that on October 4, 1997, he overheard two men discussing the sale or purchase of drugs. Jackson objected to the testimony as hearsay. The trial court sustained

the objection and instructed the jury to disregard it. Subsequently, in response to another question, Gellner again referred to the two men discussing the purchase or sale of drugs. Again, the defense attorneys objected to the testimony, and the trial court struck the testimony.

Out of the presence of the jury, Jackson's and Caudell's attorneys moved for a mistrial, claiming that Gellner's testimony denied them a fair trial. The motions were overruled. On appeal, Jackson claims the trial court erred because in his opening statement, Jackson's counsel told the jury that this case involved only a fight, and therefore Gellner's mention of drugs undermined counsel's credibility. Jackson asserts that Gellner's testimony exposed him to undue surprise and prejudice and, therefore, entitled him to a mistrial. We find these arguments to be without merit.

[4,5] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *Id.* A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

We conclude the trial court did not abuse its discretion in denying Jackson's motion for a mistrial. The trial court's action corrected any prejudice that might have been caused by the witness' mention of drugs. The trial court directed that the inappropriate testimony be stricken and ordered the jury to disregard it. A mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury. *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988). An objection followed by an admonition or instruction is typically presumed to be sufficient to dispel prejudice. *Id.* When the jury is admonished to disregard

objectionable questions and answers, a mistrial ordinarily will not be granted. *Id.*

IMPROPER IMPEACHMENT

Jackson testified in his own behalf, and Jackson's counsel requested that the State be prevented from eliciting testimony from Jackson regarding two prior convictions for assault. The State believed that it could offer evidence of Jackson's prior aggressive behavior as an element of the crime charged. The State argued that if Jackson asserted that Knapp and Haseltine had been the first aggressors, Jackson's character for peacefulness or aggressiveness became an issue in the case. In other words, the State believed that if Jackson claimed that the victims had started the fight, the State could "put on both evidence of the victims' peacefulness and the defendants' aggressiveness."

The trial court allowed the evidence of Jackson's prior assaults, concluding that once Jackson introduced evidence that he was not the first aggressor, he was claiming "a passive trait on his part [and attempting to put that trait] into evidence." The trial court concluded that if Jackson testified that he was acting in self-defense, his character would be placed at issue and the State would be permitted to examine the details of the prior assaults.

Jackson had been convicted in 1995 of attempted first degree assault. In response to questions by the State, Jackson stated that in 1994 he attacked Ryan Lovell and that Jackson had been the first aggressor. Jackson said he hit Lovell in the face and head and caused severe injury to Lovell because he thought Lovell was flirting with his girl friend.

In response to Jackson's objection to the testimony, the State candidly admitted this testimony was offered for the purpose of showing that Jackson was the first aggressor, to prove his aggressiveness, to prove his character trait for aggressiveness, and to prove that he acted in conformity with this character trait. Also over objection, the State was permitted to question Jackson about a prior adjudication as a juvenile in which Jackson admitted that he hit Forrest Hickman in the face three or four times, causing serious injury.

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial

discretion, except in those instances where judicial discretion is a factor involved in the admissibility of evidence. *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). Neb. Rev. Stat. § 27-609 (Reissue 1995) provides:

> (1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.

In *State v. Caradori*, 199 Neb. 691, 260 N.W.2d 617 (1977), we explained that § 27-609 limits the scope of any inquiry that may be made on cross-examination of a defendant in a criminal case. The statute permits inquiry when the defendant is a witness as to whether the defendant has previously been convicted of a felony. If the defendant admits that he has been convicted of a felony, the defendant may then be asked about the number of such convictions. If the defendant answers correctly, the inquiry must end at that point. However, if any answer of the defendant in this regard is incorrect, or if he claims not to remember, the fact of the conviction or convictions may only be shown by " 'the record thereof.' " *State v. Caradori*, 199 Neb. at 694, 260 N.W.2d at 620. Exploration of the charge or charges of which the defendant was previously convicted, the details thereof, or the sentence imposed upon the defendant is not permitted. *Id.* See, also, *State v. Whiteley*, 234 Neb. 693, 452 N.W.2d 290 (1990).

Here, the trial court allowed the facts of Jackson's prior convictions for assault not for the purpose of impeachment, but upon the State's urging, as evidence that Jackson had been the first aggressor in his fight with Haseltine in order to rebut Jackson's claim of self-defense. Neb. Rev. Stat. § 27-404 (Reissue 1995) provides:

> (1) Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:

> (a) Evidence of a pertinent trait of his or her character *offered by an accused*, or by the prosecution to rebut the same;
>
> (b) Evidence of a pertinent trait of character *of the victim* of the crime *offered by an accused* or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor. . . .
>
> . . . .
>
> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Emphasis supplied.)

It is clear that § 27-404 does not permit the State to offer evidence of Jackson's prior assaults to establish that Jackson was the first aggressor in this fight. The exception under § 27-404(1)(a) permits the accused to offer evidence of his or her own character trait, which the prosecution may rebut. Section 27-404(1)(b) permits the offering of a pertinent character trait of the victim offered by the accused or the prosecution to rebut the same.

Section 27-404(1)(a) and (b) are mutually exclusive. When an accused couples a claim of self-defense with evidence that the victim was the first aggressor, the accused does not interject the issue of the accused's character. See *State v. Austin*, 115 Ohio App. 3d 761, 686 N.E.2d 324 (1996). The accused's character is introduced in accordance with the provisions of § 27-404(1)(a) when the accused offers positive character evidence pursuant to Neb. Rev. Stat. § 27-405 (Reissue 1995). See *State v. Austin, supra*. Section 27-405 provides:

> (1) In all cases in which evidence of character or a trait of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

> (2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

In a claim of self-defense, the character of the accused for aggressiveness is not admissible unless the accused has offered evidence of the accused's pertinent character trait. See § 27-404(1)(a). The State was not permitted to question Jackson about prior violent conduct simply because Jackson claimed that Haseltine was the first aggressor. Here, the trial court incorrectly concluded that since Jackson had raised the issue of self-defense, his prior acts of assault could be inquired into by the State.

[6,7] Having concluded that such evidence of Jackson's character was improperly admitted, we consider whether the erroneous admission of this evidence entitles Jackson to a reversal of his convictions. In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999). In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

We conclude that the State has not demonstrated that the error was harmless beyond a reasonable doubt. Jackson's claim of self-defense was based upon his assertion that Haseltine was the first aggressor. Clearly, Jackson's previous assaults, in which he admitted to being the first aggressor, were prejudicial to his claim of being attacked by Haseltine. The State's admitted purpose in offering the prior assaults was to prove that Jackson acted in conformity therewith. For this reason, Jackson did not receive a fair trial, and his conviction for assault is reversed.

Aiding and Abetting Manslaughter

We next consider Jackson's assignments of error regarding his conviction for manslaughter. Jackson argues that the State presented insufficient evidence to warrant the reading of the aid-

ing and abetting instruction and that there was insufficient evidence to sustain Jackson's conviction for manslaughter.

The common-law distinction between principal and aider and abettor has been abolished; a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he were the principal offender. See Neb. Rev. Stat. § 28-206 (Reissue 1995). Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of a crime or that there be an express agreement to commit the crime. Mere encouragement or assistance is sufficient. See *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving a defendant guilty under an aiding and abetting theory. *Id.* A person may be an aider or abettor in involuntary manslaughter because of a common purpose to participate in unlawful acts, the natural and proximate result of which is to kill another, but when persons are present and are aiding and assisting each other in the commission of unlawful acts which proximately result in the death of another, all such persons are in fact principals. *Puckett v. State*, 144 Neb. 876, 15 N.W.2d 63 (1944). One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

The question then is whether the evidence was sufficient to warrant the giving of an aider and abettor instruction and whether there was sufficient evidence to sustain Jackson's conviction for manslaughter. While it is not necessary that Jackson took physical part in the attack on Knapp or that he expressly agreed to the attack, his participation must be evidenced by some word, act, or deed.

We therefore proceed to examine the evidence regarding Jackson's activity on the date of the assault. On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to

support the conviction. *State v. Larsen, supra.* In determining whether the evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented to the jury, which are within the jury's province for disposition. *Id.*

Jackson claims he was in the process of assisting or attempting to assist Caudell, who had confronted Knapp; that he did nothing more than follow Caudell across the street; and that in attempting to break up the fight between Caudell and Knapp, he was attacked by Haseltine. Jackson asserts that his actions were in self-defense, that he did not aid and abet Caudell, and that his mere presence at the fight did not constitute aiding and abetting.

Jackson argues that there was no evidence he procured or caused Caudell to commit the offense against Knapp and that Caudell was the person who assaulted Knapp. Jackson claims that he did nothing to encourage Caudell to assault Knapp and that there was no evidence regarding his words or conduct which rose to the level of either aiding or abetting Caudell to assault Knapp. We disagree. One who intentionally aids or abets the commission of a crime is responsible not only for the intended crime, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. *State v. Mantich, supra.*

Both Jackson and Caudell crossed the street and assaulted Knapp and Haseltine. In Jackson's statements after the incident, there is evidence from which the jury could have found that Jackson and Caudell had a common purpose of assaulting Knapp and Haseltine with their fists and feet. One eyewitness saw Jackson and Caudell standing in close proximity to one another and to Knapp and Haseltine. Jackson bragged at a party that he and Caudell jumped Knapp and Haseltine because they were "giving us shit . . . snubbing us." Jackson stated that Knapp and Haseltine did not have a chance to get their fists up, that words and looks had been exchanged, and that he and Caudell just walked up to Knapp and Haseltine and started hitting them.

In *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981), Ralph E. Thomas was charged with assault in the first degree. In his assignments of error, Thomas claimed that the evidence

presented was insufficient to find him guilty as an aider and abettor. The beating of a police officer was a group-like brawl committed by Thomas and his two brothers, and attributing particular injuries to particular actions was very difficult. We concluded however that Thomas, as a participant in the conspiratorial effort to harm the officer, was liable for all the victim's injuries, relying on *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946): " '[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." . . .' " *State v. Thomas*, 210 Neb. at 301-02, 314 N.W.2d at 18.

Mere encouragement or assistance is sufficient for a defendant to be prosecuted for aiding and abetting. See *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992). Giving all reasonable inferences to the State, which we are required to do, see *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998), the jury could have determined from the evidence that Jackson's participation in the assault on Haseltine could also be characterized as assistance or encouragement to Caudell's assault on Knapp. The jury could also have reasonably determined that Knapp's death was a natural and expected consequence of the beating inflicted by Caudell.

Prior to the jury's deliberations, the trial court gave an instruction on aiding and abetting. Although Jackson was not the person who struck the blows to Knapp, it could reasonably be inferred from his words, acts, and deeds that he assisted and participated in the assault on Knapp. Accordingly, there was sufficient evidence of aiding and abetting to give such instruction to the jury and to sustain Jackson's conviction for manslaughter.

Jackson also argues that the State did not prove the first two elements set forth in instruction No. 10, which stated:

> Either or both of the Defendants can be guilty of Manslaughter . . . even if he personally did not commit every or any act involved in the crime so long as he aided someone else to commit it. A Defendant aided someone else if:

1. A Defendant encouraged or intentionally helped another person to commit the offense of Manslaughter . . . and

2. A Defendant knew that the person intended to commit or expected the other person to commit an unlawful act . . . and

3. The offense of Manslaughter [was] committed by that other person.

Jackson claims that based on instruction No. 10, there was no evidence which satisfied the first two elements of the instruction. Jackson states there was no evidence that would indicate in any manner that he knew Caudell was going to commit the crime of manslaughter.

A person commits manslaughter if he kills another without malice, either upon a sudden quarrel or unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1995). The unlawful act committed by Caudell was the assault on Knapp. Thus, Jackson aided and abetted Caudell if it could reasonably be determined by the trier of fact that Jackson encouraged or intentionally helped Caudell to commit the assault on Knapp.

It is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). Before an error in the giving of an instruction can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

That part of instruction No. 10 given by the trial court which stated that Jackson aided Caudell if he "encouraged or intentionally helped another person to commit the offense of Manslaughter" was incorrect. Jackson correctly points out that one cannot intentionally help to commit the offense of manslaughter in the sense that manslaughter is an unintentional killing. However, we conclude that this instruction was not prejudicial to Jackson. Instruction No. 10 created a greater burden

on the State to prove intent, which is not an element of the crime of manslaughter. The instruction as given did not withdraw any of the essential elements of the crime of manslaughter from the jury's consideration.

In order to find Jackson guilty of manslaughter, the jury did not have to determine that Jackson knew Caudell intended to commit the offense of manslaughter. There is no requirement of intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter is the presence or absence of intent to kill. *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

The final question is whether Jackson should get a new trial on the manslaughter charge. Jackson's conviction for manslaughter involved his participation in the assaults on Haseltine and Knapp. Since the erroneous admission of evidence of the prior assaults prejudiced Jackson's conviction for assault, we conclude that this evidence affected the jury's determination regarding Jackson's involvement in the death of Knapp. We cannot say beyond a reasonable doubt that had Jackson been acquitted of the assault on Haseltine, the jury would still have convicted Jackson of manslaughter. The two incidents are so directly related that the prejudice from the erroneous admission of evidence of the prior assaults clearly taints both convictions.

CONCLUSION

Because we conclude the evidence was sufficient to sustain Jackson's convictions but that part of the evidence should not have been admitted, we reverse the judgments of conviction, vacate the sentences, and remand the cause for a new trial on both charges.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. KEVIN BOSLAU, APPELLANT.

601 N.W.2d 769

Filed October 29, 1999. No. S-98-878.

1. **Constitutional Law: Statutes.** Constitutional interpretation and interpretation of a statute present questions of law.
2. **Judgments: Appeal and Error.** In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Speedy Trial: Preliminary Hearings: Complaints: Indictments and Informations.** If an information is filed initially in district court, referred to as a "direct information," such filing is treated in the nature of a complaint until a preliminary hearing is held and, in conformity with Neb. Rev. Stat. § 29-1607 (Reissue 1995), after the preliminary hearing is concluded, the filing will then be treated as an information for speedy trial act purposes.
4. **Speedy Trial: Preliminary Hearings: Probable Cause: Waiver: Indictments and Informations.** For purposes of calculating the 6-month speedy trial act time period in a direct information case, the direct information should be deemed filed the day the order is entered finding probable cause or the day the defendant waives the preliminary hearing, and the speedy trial act calculations should be measured from either of these events.

Petition for further review from the Nebraska Court of Appeals, IRWIN, C.J., and HANNON and SIEVERS, Judges, on appeal thereto from the District Court for Hall County, TERESA K. LUTHER, Judge. Judgment of Court of Appeals affirmed.

James E. Mitchell for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Kevin Boslau petitioned this court for further review of the decision of the Nebraska Court of Appeals, in which the Court of Appeals affirmed the order of the district court for Hall County denying Boslau's motion for an absolute discharge of the charge against him due to the State's alleged failure to bring Boslau to trial within 6 months as required by Neb. Rev. Stat.

§ 29-1207(1) (Reissue 1995). *State v. Boslau*, 8 Neb. App. 275, 593 N.W.2d 747 (1999). For the reasons stated below, we affirm the decision of the Court of Appeals.

STATEMENT OF FACTS

The critical events pertaining to this court's analysis on further review are set forth below. On September 25, 1997, a complaint was filed in the county court for Hall County charging Boslau with criminal mischief. Boslau was bound over to district court, where an information was filed on December 1. On December 1, Boslau filed a plea in abatement. His motion was sustained on January 21, 1998. This first proceeding was dismissed on March 5.

On March 3, 1998, an information was filed directly in district court, charging Boslau with criminal mischief, a Class IV felony. See Neb. Rev. Stat. § 28-519(2) (Reissue 1995). It is the direct filing of this information in district court in the instant case which gives rise to the issues in this appeal.

In the instant case, Boslau requested and was granted a preliminary hearing, which was held on April 23 and 27, 1998. On May 27, the district court found probable cause that the crime as charged had occurred. On June 9, Boslau entered a plea of not guilty.

On July 29, 1998, the State filed a motion to amend the information to add a witness. On the same day, Boslau filed an answer, stating that he had no objection to the State's motion. The trial court granted the motion. On August 18, the State filed its amended information, adding a witness. Also on August 18, Boslau filed a motion to dismiss, alleging the State had denied him his statutory right to a speedy trial. Neb. Rev. Stat. §§ 29-1205 through 29-1209 (Reissue 1995) ("speedy trial act"). The trial court denied the motion on August 19. Boslau appealed the denial of his motion to dismiss to the Court of Appeals.

On appeal to the Court of Appeals, Boslau argued that the trial court erred in failing to dismiss the case "upon the expiration of time to commence trial according to Neb. Rev. Stat. Sec. 29-1205 *et seq.*," *State v. Boslau*, 8 Neb. App. at 276, 593 N.W.2d at 748, and in improperly progressing the case for trial,

in violation of his due process rights. The Court of Appeals did not address Boslau's due process argument because Boslau had failed to raise such a constitutional claim at the trial court level and no plain error was apparent.

The Court of Appeals affirmed the denial of Boslau's motion to dismiss, based on speedy trial act grounds. As the Court of Appeals noted, the speedy trial act provides that a person informed against shall be brought to trial within 6 months, § 29-1207(1); that "such six-month period shall commence to run from the date the indictment is returned or the information filed," § 29-1207(2); and that the Nebraska statutes elsewhere provide that "[n]o information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor . . . ," Neb. Rev. Stat. § 29-1607 (Reissue 1995). Taking these statutes together, the Court of Appeals reasoned that the information filed directly in district court prior to a preliminary hearing, such as occurred in this case, shall be treated as a complaint and that the time for computing the speedy trial act calculation shall commence after the preliminary hearing is conducted and the defendant is bound over to trial. In its opinion, the Court of Appeals identified some ambiguity in Nebraska case law applying the speedy trial act as it pertains to informations filed directly in district court.

The Court of Appeals determined that, excluding the time during which Boslau's plea in abatement was pending in the first proceeding, 43 days were to be charged against the State attributable to the first proceeding. See § 29-1207(4)(a). With respect to the instant proceeding, the Court of Appeals determined that regardless of whether the time attributable to the instant proceeding commenced on May 27, 1998, the date on which the district court found probable cause and Boslau was subject to trial, or August 18, the date the amended information was filed, Boslau had not been denied a speedy trial. In sum, the Court of Appeals totaled the number of days Boslau had awaited trial in both the first and the instant proceedings and concluded that Boslau had not been denied a speedy trial under the speedy trial act. The Court of Appeals affirmed the district court's order denying Boslau's motion to dismiss. Boslau successfully petitioned this court for further review.

ASSIGNMENT OF ERROR

Boslau claims, restated, in his petition for further review that the Court of Appeals erred in concluding that an information filed directly with the district court is considered a complaint prior to the preliminary hearing and that the Court of Appeals compounded its error in further determining that under these circumstances, the time period for speedy trial act purposes does not commence until after the district court has ruled at the defendant's preliminary hearing. Boslau claims that the Court of Appeals' decision violates the speedy trial act and his rights under Neb. Const. art. I, § 10, the latter of which provides that a defendant shall not be tried on a felony without first being indicted or informed against.

STANDARD OF REVIEW

[1,2] Constitutional interpretation and interpretation of a statute present questions of law. *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999); *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998). In connection with questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Garza, supra.*

ANALYSIS

In his brief in support of his petition for further review, Boslau challenges the Court of Appeals' determinations that an information filed directly with the district court is treated in the nature of a complaint until the finding of probable cause is made and that the commencement of the speedy trial act time period for trial is postponed until the district court rules on the preliminary hearing. Contrary to Boslau's assertion, we find no error in these determinations made by the Court of Appeals.

Section 29-1207(1) provides that "[e]very person . . . informed against . . . shall be brought to trial within six months . . . ." State statute determines when the 6-month speedy trial period runs. The speedy trial act provides that the "six-month period shall commence to run from the date . . . the information [is] filed." § 29-1207(2). However, § 29-1607 provides that "[n]o information shall be filed against any person for any

offense until such person shall have had a preliminary examination therefor . . . ." The foregoing statutes may be read together harmoniously, giving effect to each. See *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

Ordinarily, when an individual is charged with the commission of a felony such as criminal mischief, a complaint is filed in county court. See, generally, Neb. Rev. Stat. § 29-110 (Reissue 1995). Thereafter, a preliminary hearing is held to determine if probable cause exists to charge the defendant with the commission of the crime or crimes as alleged in the complaint. Neb. Rev. Stat. § 29-504 (Reissue 1995). If probable cause is found, the defendant is bound over to the district court, where he or she is held unless bail is set and posted. Neb. Rev. Stat. § 29-506 (Reissue 1995). Once the defendant is bound over to district court, the State files an information with the district court, setting forth the charge or charges against the defendant. Under the foregoing scenario, pursuant to § 29-1207, the statutory 6-month speedy trial period begins to run upon the filing of the information in district court which is subsequent to the preliminary hearing. § 29-1607.

[3] Contrary to the foregoing practice, if an information is filed initially in district court, referred to as a "direct information," such filing is treated in the nature of a complaint until a preliminary hearing is held and, in conformity with § 29-1607, after the preliminary hearing is concluded, the filing will then be treated as an information for speedy trial act purposes. We note that we have previously had an opportunity to consider certain of the effects of the speedy trial act on an information filed directly in district court. In *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), we stated, inter alia, that when the State does not file a complaint in county court, and instead files an information directly in district court, such a filing is treated as a complaint and requires a preliminary hearing. In this regard, we note that in the instant case, following the filing of the direct information, Boslau sought a preliminary hearing wherein probable cause was found. Thus, the record in this case complies with the foregoing procedure described in *Thomas*.

The statement by the Court of Appeals that the direct information is treated in the nature of a complaint prior to the pre-

liminary hearing comports with the provisions of the speedy trial act, Nebraska Constitution and other statutes, and case law. Boslau's challenge thereto is without merit.

On further review, Boslau claims generally that the effect of the Court of Appeals' decision is to deny him his constitutional and statutory rights to a speedy trial. Boslau specifically contends that to the extent the direct information is treated as a complaint, he is subject to being tried on a felony charge without having first been indicted or informed against, in contravention of Neb. Const. art. I, § 10, and § 29-1607. Boslau misinterprets the opinion of the Court of Appeals and our decision in *Thomas*.

In the context of a direct information, the filing is treated as a complaint until the conclusion of the preliminary hearing wherein probable cause is found. Thereafter, the information regains its status as a true information, and the case proceeds on the basis of the information filed in the case. In the instant case, the direct information filed on March 3, 1998, regained its status as an information on May 27, when the district court found probable cause. Therefore, Boslau had been "informed against" on the felony charge before he faced trial, and such information was effectively filed after the preliminary hearing, in accordance with Neb. Const. art. I, § 10, and § 29-1607.

For the sake of completeness, we note that in the instant case, following the preliminary hearing and after Boslau advised the court that he had no objection, the State was given leave to file an "amended information." We have held that it is unnecessary for a preliminary hearing to be held on an amended information when the amendment adds nothing "irrelevant" to the initial charge. *State v. Forbes*, 203 Neb. 349, 352, 278 N.W.2d 615, 618 (1979). In the instant case, the charge remained the same, only a witness was added, and no further preliminary hearing needed to be conducted.

At the time he filed his motion to dismiss, Boslau was scheduled to go to trial upon the amended information. Thus, at the time of trial, based on either the direct information or amended information, Boslau had been informed against after the preliminary hearing concerning the felony charge he faced. Both the direct information and the amended information provided Boslau with valid notice of the charges he faced. See *State v. Kennedy*,

251 Neb. 337, 557 N.W.2d 33 (1996). Therefore, his claim that the effect of the decision of the Court of Appeals was to deny him his constitutional and statutory rights to be informed against prior to trial on a felony charge is without merit.

Although not discussed by Boslau in his brief, we have reviewed the opinion of the Court of Appeals which aptly noted that some confusion exists in the prior decisions of this court concerning the day on which the statutory 6-month time period begins to run for speedy trial act purposes following the filing of a direct information. We take this opportunity to clarify the proper procedure.

[4] Under § 29-1607, it is clear that the 6-month speedy trial time period cannot begin to run until after the preliminary hearing finding probable cause is held or a preliminary hearing is waived by the defendant. Prior to the finding of probable cause or until a preliminary hearing is waived, the direct information is treated as a complaint. *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990). Once probable cause is found or a preliminary hearing is waived, however, the information is transformed into a true information. For purposes of calculating the 6-month speedy trial act time period in a direct information case, the direct information should be deemed filed the day the order is entered finding probable cause or the day the defendant waives the preliminary hearing, and the speedy trial act calculations should be measured from either of these events. Pursuant to our case law interpreting the speedy trial act, the statutory 6-month speedy trial time period begins to run the day following the filing of the information, and in the case of a direct information, the day the information is filed for speedy trial act purposes is the day the district court finds probable cause or the day the defendant waives the preliminary hearing. See, *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991) (holding that final date for trial under § 29-1207 is determined by excluding date information is filed, counting forward 6 months, backing up 1 day, and then adding excludable time periods to that date); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). Certain of our prior opinions in direct information cases have utilized without analysis the date of a second information filed following a preliminary hearing finding probable cause, e.g., *State v.*

Thomas, supra, or the date of an amended information filed prior to the preliminary hearing, e.g., *State v. Kearns*, 245 Neb. 728, 514 N.W.2d 844 (1994), as the commencement date for speedy trial act purposes, rather than the date of the finding of probable cause or the date the defendant waives the preliminary hearing, upon either of which dates the direct information gains its status as a true information. We now conclude that in a case where a "direct information" has been filed, the commencement of the 6-month period for speedy trial act purposes occurs upon either the finding of probable cause at a preliminary hearing or the date the defendant waives the preliminary hearing and that the 6-month period shall be calculated in conformance with *State v. Sumstine, supra*. To the extent our opinions such as *State v. Thomas, supra*, and *State v. Kearns, supra*, hold otherwise, they are disapproved.

CONCLUSION

Having considered Boslau's assignment of error and having concluded that it is without merit, we affirm the decision of the Court of Appeals.

AFFIRMED.

IN RE INTEREST OF KALIE W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KEVIN R., APPELLANT, AND ANGELA W., APPELLEE.

601 N.W.2d 753

Filed October 29, 1999. No. S-99-001.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the child's best interests.

3. **Parental Rights: Abandonment.** A parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect.
4. ___: ___. One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 1998).
5. ___: ___. Although incarceration itself may be involuntary as far as a parent is concerned, the criminal conduct causing the incarceration is voluntary.
6. ___: ___. In termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated.
7. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Affirmed.

Patrick L. Neid for appellant.

Shurie R. Graeve, Deputy Hall County Attorney, and Brandi Bosselman, of Bosselman Law Office, guardian ad litem.

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

HENDRY, C.J.

INTRODUCTION

Kevin R., father of Kalie W., appeals the order of the Hall County Court, sitting as a juvenile court, terminating his parental rights. We removed this case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We affirm the termination of Kevin's parental rights.

BACKGROUND

Kalie, born December 2, 1996, is the daughter of Angela W. and Kevin. On December 4, 1996, a juvenile petition was filed, alleging that Kalie was a child in a situation dangerous to life or limb or injurious to her health and morals under Neb. Rev. Stat. § 43-247(3) (Reissue 1993). This allegation resulted from an incident in which Angela's other child, Devin W., was taken to

the hospital emergency room with suspicious burns resulting from scalding. Kalie was placed in the temporary custody of the Department of Social Services, now the Department of Health and Human Services (DHHS).

On January 9, 1997, approximately 1 month after Kalie was taken into temporary custody, Kevin was arrested for assaulting Angela. Kevin's assault on Angela occurred over a 2-day period, during which time Kevin would not allow Angela to leave the home. Angela's injuries, which included two very swollen black eyes, very swollen lips, bleeding in her facial area, and bruising on her back, right ankle, left leg, and upper right thigh, required emergency room care. Susan Haecker, director of the Family Violence Coalition, spoke with Angela and observed her injuries the night Angela was transported to the emergency room. Haecker testified that Angela's face and lips were so swollen that she was hardly recognizable and that this was the worst domestic violence incident she had seen that had not resulted in a homicide. Kevin was convicted of assault in the first degree, a Class III felony, and sentenced to 5 to 8 years' imprisonment in the state penitentiary. Kevin has been incarcerated since his January 9 arrest.

On February 5, 1997, Kalie was adjudicated as a child in a situation dangerous to life or limb or injurious to her health and morals under § 43-247(3) (Cum. Supp. 1996). Various case plans were then submitted by DHHS, setting goals for both Angela and Kevin to meet in order to have Kalie returned. On May 13, 1998, the State filed a motion to terminate the parental rights of both parents. The State alleged three grounds for termination pursuant to Neb. Rev. Stat. § 43-292 (Reissue 1998): (1) The parents have substantially and continuously or repeatedly neglected and refused to give Kalie necessary parental care and protection; (2) following a determination that Kalie is a juvenile as described in subsection (3)(a) of § 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination; and (3) Kalie has been in out-of-home placement for 15 or more months of the most recent 22 months.

On November 12, 1998, the Hall County Court terminated both Angela's and Kevin's parental rights. In its order of

termination, the court stated that the record reflected "substantial and continuous or repeated neglect justifying termination of parental rights." The court made specific findings regarding Kevin's incarceration; his history of criminal, violent, and assaultive behavior; and his vicious assault on Angela shortly after Kalie's birth. Based on this evidence, the court found that termination of Kevin's parental rights was in Kalie's best interests. It is from this order which Kevin appeals. Angela does not appeal.

ASSIGNMENTS OF ERROR

Kevin claims the juvenile court erred in (1) finding that he substantially and continuously or repeatedly neglected and refused to give Kalie necessary parental care and protection, (2) determining that reasonable efforts to preserve and reunify the family have failed to correct the conditions leading to the determination that Kalie is a juvenile as described in § 43-247(3)(a), and (3) finding that Kalie has been in out-of-home placement for 15 or more months of the most recent 22 months.

STANDARD OF REVIEW

[1] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999).

ANALYSIS

[2] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). Thus, only one ground for termination need be proved in order for Kevin's rights to be terminated.

[3] In his first assignment of error, Kevin claims that the State failed to prove that he substantially and continuously or repeatedly neglected and refused to give the child necessary

parental care and protection. In support of this contention, Kevin correctly asserts that the fact he is incarcerated, standing alone, does not provide grounds for termination of parental rights. See, *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of B.A.G.*, 235 Neb. 730, 457 N.W.2d 292 (1990). However, a parent's incarceration may be considered along with other factors in determining whether parental rights can be terminated based on neglect. *In re Interest of L.V., supra*; *In re Interest of B.A.G., supra*. Most recently in *In re Interest of Joshua M. et al.*, we stated, "While incarceration alone is not a basis for termination of parental rights . . . we note that [the mother's] incarceration has contributed to the neglect of her children." 256 Neb. at 613, 591 N.W.2d at 568, citing *In re Interest of L.V., supra*. Thus, it is appropriate to consider Kevin's incarceration as a factor in regard to whether he neglected Kalie.

[4,5] Kevin's incarceration makes it nearly impossible for him to provide for any of Kalie's needs. Kevin argues that he was not given the opportunity to meet Kalie's needs because he was denied visitation while imprisoned. However, in *In re Interest of J.N.V.*, 224 Neb. 108, 111-12, 395 N.W.2d 758, 761 (1986), we stated:

> One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by § 43-292(2). . . .
>
> . . . .
>
> A parent may as surely neglect a child of whom [he or] she does not have possession by failing to put [himself or] herself in a position to acquire possession as by not properly caring for a child of whom [he or] she does have possession.

See, also, *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 457 N.W.2d 274 (1990). At the time Kevin became incarcerated, he knew Kalie had been placed in the custody of DHHS. In spite of this knowledge, he severely beat Angela and was incarcerated as a result. We have often noted that although incarceration itself may be involuntary as far as a parent is concerned, the criminal conduct causing the incarceration is voluntary. See, *In re Interest of L.V., supra*; *In re Interest of B.A.G., supra*; *In re Interest of R.T. and R.T.*, 233 Neb. 483, 446 N.W.2d 12 (1989).

The conduct resulting in Kevin's incarceration was voluntary on his part. Kevin chose to severely assault Angela, which seriously impaired any possibility of having Kalie placed in his care. He cannot now complain that he did not have the opportunity to meet Kalie's needs when it was his own conduct that placed him in a position where he could not care for Kalie.

[6] Furthermore, the nature of Kevin's crime and the fact that the crime was committed against Angela, Kalie's mother, should also be considered. We have recognized that in termination of parental rights cases, it is proper to consider "'"a parent's inability to perform his parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated . . . ."'" *In re Interest of L.V.*, 240 Neb. at 420, 482 N.W.2d at 260-61, quoting *In re Pawling*, 101 Wash. 2d 392, 679 P.2d 916 (1984). See, also, *In re Interest of Reed*, 212 Neb. 208, 322 N.W.2d 411 (1982) (considering fact that father was incarcerated for shooting with intent to kill); *In re Interest of R.T. and R.T., supra* (considering fact that mother was incarcerated on several occasions due to compulsive shoplifting).

Kevin became incarcerated because he severely assaulted Angela. The assault on Angela was especially prolonged and violent and resulted in serious injuries. Perpetrating a severe assault on Angela, Kalie's mother, is obviously not in Kalie's best interests. Furthermore, Kevin had assaulted Angela on several previous occasions and testified at the termination hearing that he had assaulted previous girl friends as well.

The record establishes that Kevin has a history of criminal, violent, and assaultive behavior. In addition to the conviction for first degree assault on Angela, Kevin's criminal history includes convictions for third degree assault against another female victim, arson, escape, and tampering with a witness.

[7] The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). The evidence in this case clearly and convincingly establishes that Kevin neglected his child. He placed himself in a position where

he could not care for Kalie. He committed a serious crime at a time when he knew that Kalie had already been placed in the custody of DHHS. The crime leading to Kevin's incarceration was especially violent and, moreover, was perpetrated upon Angela, Kalie's mother.

Based upon our de novo review of the record, we conclude that the evidence clearly and convincingly establishes that Kevin substantially and continuously or repeatedly neglected and refused to give Kalie necessary parental care and protection and that Kalie's best interests require the termination of Kevin's parental rights. Because we conclude that the evidence is sufficient to terminate Kevin's parental rights on the ground of neglect, we need not reach his other assignments of error. See *In re Interest of Constance G., supra.*

CONCLUSION

The judgment of the Hall County Court is affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.

IN RE INTEREST OF SARAH K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ROBERT K. AND SANDRA K., APPELLANTS.

601 N.W.2d 780

Filed October 29, 1999. No. S-99-181.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
3. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
4. **Judgments: Appeal and Error.** To be appealable, an order in a special proceeding must affect a substantial right.

5. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Juvenile Courts: Judgments: Appeal and Error.** A dispositional order which merely continues a previous determination is not an appealable order.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Appeal dismissed.

Robert K. and Sandra K., pro se.

Linda S. Porter, Deputy Lancaster County Attorney, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Robert K. and Sandra K., respectively the father and mother of Sarah K., a minor, appeal from the December 22, 1998, order entered by the juvenile court of Lancaster County. The December 22 order approved an initial permanency plan which provided for long-term foster care for Sarah, supervised visitation with the parents, and the possibility of reunification with the parents. The December 22 order also found that the filing of a petition to terminate the parental rights of the parents was not in Sarah's best interests. We conclude that the December 22 order is not an appealable order and, therefore, dismiss for lack of jurisdiction.

STATEMENT OF FACTS

On September 28, 1995, Sarah, born on October 31, 1981, was adjudicated to be a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1995). The adjudication was based in part on the faults of the mother due to her inappropriate physical discipline of Sarah and in part not due to the fault of the parents because of Sarah's self-destructive behavior. Since June 1997, Sarah has resided at a foster care facility. The family has been subject to rehabilitation plans since Sarah's adjudication, and no appeals have been taken therefrom.

Operative July 1, 1998, Neb. Rev. Stat. § 43-1312 (Reissue 1993) was amended to require, in pertinent part, that initial and periodic hearings be held to review permanency plans for juveniles who have been in state foster care for 12 months. See § 43-1312(3) (Reissue 1998). Also operative July 1, Neb. Rev. Stat. § 43-292.02 (Reissue 1998) requires that termination of parental rights proceedings be instituted where a juvenile has been in foster care for 15 or more of the most recent 22 months, or that the State establish at an exception hearing that an exception to termination is in the juvenile's best interests under § 43-292.02(3)(b).

Pursuant to §§ 43-1312(3) and 43-292.02, the State filed a motion to hold an initial hearing on a permanency plan for Sarah relative to her foster care. The trial court granted the motion, and the combined permanency and exception hearing was scheduled for October 22, 1998, the same date as the next regularly scheduled case disposition review. In response to the State's motion, the parents, appearing pro se, filed a "demurrer" objecting to the combined dispositional and permanency hearing.

At the October 22, 1998, hearing, the juvenile court approved the case plan submitted by the State. The juvenile court, however, specifically continued the hearing on the permanency plan and exception to November 30. The case plan, supported by a report approved by the juvenile court on October 22, provided, inter alia, for long-term foster care for Sarah, supervised visitation by the parents, and a goal of reunification. No appeal was taken from the October 22 order.

On November 30, 1998, the juvenile court conducted the initial permanency hearing involving Sarah and her parents. This hearing was combined with an exception hearing which, pursuant to § 43-292.02(1)(a), must be held after the juvenile has been in foster care for 15 or more of the most recent 22 months. At the exception hearing, the State shall advise the court of the steps taken to terminate parental rights or document an "exception" to termination by demonstrating a compelling reason not to file for termination. Where the exception is demonstrated by the evidence, the juvenile court shall find an exception to termination if the juvenile court also finds that it is in the best inter-

ests of the juvenile that the parental rights not be terminated. § 43-292.02(3)(b).

The juvenile court heard testimony and received evidence at the November 30, 1998, hearing. The evidence included testimony from Patrick Kreifels, a Child Protective Services worker for the Nebraska Department of Health and Human Services assigned to Sarah's case. Kreifels testified that while Sarah's reunification with her parents remained a possibility, the permanency plan proposed by the State called for Sarah to continue in long-term foster care. Other evidence received by the court included a recommendation by Sarah's therapist, Jody L. Busse, that, in addition to long-term care, Sarah, then 17 years of age, be prepared for the "eventual transition to independent living." The parents offered a competing plan which, inter alia, called for Sarah to immediately return to the family home.

On December 22, 1998, the juvenile court entered a written order overruling the parents' "demurrer." The juvenile court found that the State's permanency plan of long-term foster care transitioning to independent living was in the best interests of Sarah. In addition, the court specifically found that the "parents' parental rights should not be terminated," that the "exception" set forth in § 43-292.02(3)(b) had been established by the evidence, that an exception was in Sarah's best interests, and that as a result, the State was not required to file a motion or petition to terminate parental rights. The parents appeal the December 22 order.

STANDARDS OF REVIEW

[1] 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, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998).

[2] 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 deci-

sions made by the lower courts. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

ANALYSIS

For their assignments of error, the parents claim that the juvenile court erred in its December 22, 1998, order in nine particulars. The parents' brief on appeal makes clear that they take exception to the content of the December 22 order and not orders previously entered in the case. The State argues that this court lacks appellate jurisdiction because the appeal is taken from a nonappealable order. Because we conclude that the December 22 order is a nonappealable order, we dismiss.

[3-5] A proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Interest of Tabatha R., supra.* To be appealable, an order in a special proceeding must affect a substantial right. *Id.* A substantial right is an essential legal right, not a mere technical right. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

[6] This court has previously noted that "a judicial determination made following an adjudication in a special proceeding which affects the substantial rights of parents to raise their children is a final, appealable order." *In re Interest of Tabatha R.*, 255 Neb. at 827, 587 N.W.2d at 116. However, we have also recognized in juvenile cases that where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed. *In re Interest of Joshua M. et al., supra.* Thus a dispositional order which merely continues a previous determination is not an appealable order. *Id.* To determine appealability in this case, it is necessary for us to consider the nature of the court's December 22, 1998, order and what parental rights, if any, it affected.

The State's motion for permanency hearing sought that a hearing be held pursuant to "Neb. Rev. Stat. § 43-1312(3) and Section 30 of LB 1041." As amended by 1998 Neb. Laws, L.B. 1041, § 43-1312(3) provides:

> (3) Each child in foster care under the supervision of the state shall have a permanency hearing by a court, no later

> than twelve months after the date the child enters foster care and annually thereafter during the continuation of foster care. The court's order shall include a finding regarding the appropriateness of the permanency plan determined for the child and shall include whether, and if applicable when, the child will be:
>
> (a) Returned to the parent;
>
> (b) Referred to the state for filing of a petition for termination of parental rights;
>
> (c) Placed for adoption;
>
> (d) Referred for guardianship; or
>
> (e) In cases where the state agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, (i) referred for termination of parental rights, (ii) placed for adoption with a fit and willing relative, or (iii) placed with a guardian.

The permanency hearing of November 30, 1998, was combined with the exception hearing provided for in § 43-292.02(3)(b). Neither the statute nor legislative history contains a definition of "permanency hearing."

According to the introducer's Statement of Intent to L.B. 1041, Health and Human Services Committee, 95th Leg., 2d Sess. (Jan. 22, 1998), the amendments effectuated by L.B. 1041 were necessitated by the terms of the federal Adoption and Safe Families Act of 1997 (ASFA), which mandated certain changes to state juvenile codes as a condition to continued federal funding of certain state programs, including foster care. See 42 U.S.C. § 671 (1994 & Supp. III 1997). The ASFA does not define "permanency hearing."

In the absence of a statutory definition of "permanency" or "permanency hearing," we find the explanations contained in a report entitled "Permanency for Children: Guidelines for State Legislation" (Guidelines) to be helpful. See U.S. Dept. of Justice and U.S. Children's Bureau, Adoption 2002: The President's Initiative on Adoption and Foster Care (Final Draft 1999). The Guidelines were developed to explain the ASFA and to assist state and federal agencies and professionals involved in

juvenile matters in the implementation of the "requisite changes" in state law mandated by ASFA. Guidelines at I-1.

The Guidelines describe "permanency" as "epitomized by a safe, stable and nurturing caregiver" who establishes a positive relationship with the child which allows the basic needs of the child to be met. *Id.* at I-3. We utilize this definition of "permanency" for purposes of defining the nature of a permanency hearing conducted pursuant to § 43-1312(3) as amended.

Under § 43-1312(3), a permanency hearing considers the appropriateness of a plan for a child in foster care with respect to the plan's likelihood of providing, inter alia, a safe, stable, and nurturing environment. A permanency hearing must be conducted no later than 12 months after the child enters foster care. An exception hearing must be conducted after the child has been in foster care for 15 of the most recent 22 months. These hearings are directives to those charged with implementing the juvenile system that the State's objectives for the child in foster care must be presented to the juvenile court and determined after 12 and 15 months, respectively.

The permanency plan proposed by the State and approved by the juvenile court on December 22, 1998, provided that Sarah be placed in long-term foster care with supervised visitation with the parents. The plan provided for the possibility of reunification. The plan further provided that Sarah participate in a program designed to prepare her for independent living. The State proposed, and the juvenile court concluded, that termination proceedings should not be initiated against the parents. The terms of the December 22 order adopting the permanency plan and finding an exception to termination merely repeat the essential terms of the juvenile court's order of October 22. There is nothing inconsistent with the December 22 order compared to the plan approved by the court in its October 22 order, and there is some indication in the record that the October 22 plan continued the terms of prior plans which are not in the record. The parents were not disadvantaged by the juvenile court's order of December 22, nor were their substantial rights changed or affected thereby.

A review of the record shows that the parents have not appealed from any previous orders adopting rehabilitation plans.

In this case, the parents are appealing from the December 22, 1998, juvenile court's order, which merely continued the terms of the plan approved by the juvenile court on October 22. The parents' appeal from the terms of the December 22 order represents a collateral attack on the juvenile court's prior orders establishing the rehabilitation plan. Such attacks are impermissible and do not give rise to appellate jurisdiction. *In re Interest of Zachary L.*, 4 Neb. App. 324, 543 N.W.2d 211 (1996).

The order of December 22, 1998, effects no change in the parents' status or the plan to which the parents and Sarah were previously subject. We conclude on the facts of this case that the court's December 22 order approving the initial permanency plan and finding an exception to termination did not affect a substantial right of the parents, and the December 22 order was, therefore, not an appealable order. See, *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998); *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997); *In re Interest of Zachary L., supra.* Having concluded that the December 22 order adopting the initial permanency plan and establishing the exception to termination is not an appealable order, we lack jurisdiction to consider the parents' appeal.

CONCLUSION

The juvenile court order adopting the initial permanency plan and finding an exception to termination did not affect a substantial right of the parents and is, therefore, not an appealable order. The appeal must be dismissed for lack of jurisdiction for the reasons stated above.

APPEAL DISMISSED.

NEBRASKA POPCORN, INC., APPELLANT, V. DENNIS WING, DOING BUSINESS AS WING SCALE SERVICE, AND CARDINAL SCALE MANUFACTURING COMPANY, APPELLEES.

602 N.W.2d 18

Filed November 5, 1999. No. S-98-450.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record demonstrate that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
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. ___: ___. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
6. **Summary Judgment: Evidence: Proof.** After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
7. **Uniform Commercial Code: Warranty.** In order to meet the exception in Neb. U.C.C. § 2-275(2) (Reissue 1992) based on a warranty of future performance, the warranty must be an express rather than an implied warranty and the warranty must *explicitly* extend to future performance.
8. **Limitations of Actions: Uniform Commercial Code: Warranty.** A warranty to repair or replace, without more, is not an explicit warranty of future performance and will not extend the commencement of the 4-year statute of limitations set forth in Neb. U.C.C. § 2-725(1) (Reissue 1992).

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Steven M. Curry, of Sampson, Curry & Hummel, P.C., for appellant.

Roger G. Steele, of Luebs, Leininger, Smith, Busick, Johnson, Baack, Placzek & Steele, for appellee Cardinal Scale Manufacturing Company.

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

MILLER-LERMAN, J.

NATURE OF CASE

Nebraska Popcorn, Inc., appellant, sued Dennis Wing, doing business as Wing Scale Service (Wing), and Cardinal Scale Manufacturing Company (Cardinal), for breach of warranty on a motor truck scale manufactured by Cardinal and sold by Wing to Nebraska Popcorn. Nebraska Popcorn appeals from the decision of the district court for Hall County which granted summary judgment in favor of Cardinal and dismissed the "Corrected Amended Petition" as to Cardinal. The trial court concluded that Nebraska Popcorn's claim against Cardinal was time barred by Neb. U.C.C. § 2-725 (Reissue 1992), the Uniform Commercial Code's 4-year statute of limitations. We affirm.

STATEMENT OF FACTS

On October 16, 1992, Nebraska Popcorn, then operating under the name "Morrison Farms, Inc.," purchased a "Model 13570PRC-1 Low Profile Motor Truck Scale" from Wing. The scale was manufactured by Cardinal, and the sale price was $29,460. The scale was installed at Nebraska Popcorn's place of business on October 19.

The scale was certified for commercial use by the State of Nebraska's Department of Agriculture (State) on October 27, 1992. Beginning in September 1993, the scale began exhibiting errors. The State tested the scale on September 14 and found it unsuitable for commercial weighing.

Nebraska Popcorn contacted Wing which dispatched service technicians to repair the scale. The scale functioned properly for some time but began to exhibit errors again. The State rejected the scale for commercial use on October 3, 1994. A series of repairs by Wing and rejections by the State stretched over the next year.

After the State rejected the scale on January 11, 1996, Cardinal sent a service technician from its factory to repair the scale. The scale worked on and off until July 11, when the State rejected the scale and ordered it placed out of service.

On August 1, 1996, Nebraska Popcorn notified Wing and Cardinal that Nebraska Popcorn was revoking its acceptance of the scale and demanded return of the purchase price. Cardinal's technicians attempted repairs in late August. The scale weighed accurately for some time, but by November, it was again giving erroneous readings and was shut down.

Nebraska Popcorn filed suit against Wing and Cardinal on February 18, 1997. Nebraska Popcorn filed an amended petition on March 19 and a corrected amended petition (petition) on April 17, in which it alleged that "Cardinal warranted the scale for a period of two years to be free of defects." Cardinal filed an answer denying the allegation of a 2-year warranty. Cardinal further alleged, inter alia, that Nebraska Popcorn's action was barred by the statute of limitations. Cardinal's answer prayed that Nebraska Popcorn's petition be dismissed.

Cardinal filed a motion for summary judgment on January 21, 1998, based on the claim that Nebraska Popcorn's action was time barred. In support of its motion for summary judgment, Cardinal offered and the court received the affidavit of Craig Fisher, a customer service manager for Cardinal. In his affidavit, Fisher states: "Cardinal does not warrant the Model 13570PRC-1 Low Profile Motor Scale will be free of any defects for any number of years. Cardinal does not guarantee its performance for any number of years." In his affidavit, Fisher further states that "the only warranty that Cardinal offers for the Model 13570PRC-1 Low Profile Motor Scale" is found in exhibit A attached to his affidavit. Exhibit A is entitled "Statement of Limited Warranty." In the statement of limited warranty, Cardinal warranted that "it will repair or replace, at its option, any part of a Cardinal product which, in Cardinal's judgment, is defective in material or workmanship for a period of one (1) year from date of shipment." The statement of limited warranty also provides:

> In addition to the standard one (1) year limited warranty, Cardinal Scale Manufacturing Company offers the following warranty on load cells.
>
> Cardinal Scale warrants to the original purchaser that it will repair or replace, at its option, any load cell supplied with a motor truck scale which, in Cardinal's judgment, is defective in material or workmanship for a period of two (2) years from the date of original shipment. This warranty expressly excludes any load cell damaged by lightning, overvoltage, overloading, or submersion.

In response to Cardinal's motion for summary judgment, Nebraska Popcorn offered, and the court received, the affidavit of Frank Morrison, president of Nebraska Popcorn. In it, Morrison states, inter alia, that he was provided "written information" regarding the motor truck scale. The information was attached as exhibit A. Morrison further states that he was "informed that the scale was warranted for a period of two years including damage from lightening [sic]." Nebraska Popcorn's exhibit A is in part an advertising bulletin in which the features of a load cell are described and states: "That's why we offer a two year warranty*." The asterisk portion of the bulletin continues: "Statement of Limited Warranty available on request."

The district court granted Cardinal's motion for summary judgment on February 23, 1998, and dismissed Cardinal. The trial court found that the evidence was undisputed that Nebraska Popcorn's action, filed February 18, 1997, was not brought within 4 years after tender of delivery on October 19, 1992, and that the warranty given by Cardinal on the motor truck scale did not extend the 4-year statute of limitations set forth in Neb. U.C.C. art. 2 (Reissue 1992).

Nebraska Popcorn appealed. Prior to the July 15, 1998, effective date of Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998), the dismissal of one of multiple defendants is a final, appealable order. *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997); *Green v. Village of Terrytown*, 188 Neb. 840, 199 N.W.2d 610 (1972).

ASSIGNMENT OF ERROR

Nebraska Popcorn claims that the trial court erred in granting Cardinal's motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record demonstrate 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. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

[2] In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

ANALYSIS

Shifting Burden in Summary Judgment.

[4-6] 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. *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Id.* After the movant makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

Statute of Limitations Under Neb. U.C.C. art. 2.

The parties agree that the underlying transaction in this case is a contract for the sale of goods subject to Neb. U.C.C. art. 2. Nebraska Popcorn's petition asserts a breach of warranty claim in connection with that transaction.

The statute of limitations applicable to contract claims under the Nebraska Uniform Commercial Code is set forth in § 2-725. Section 2-725(1) and (2) provides as follows:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

The foregoing statute by its terms provides that an action for breach of contract must be brought within 4 years after the cause of action has accrued and that the cause of action accrues when the breach occurs. § 2-725(1) and (2). It further provides that a breach of warranty generally occurs when tender of delivery is made. § 2-725(2). The statute makes an exception to the commencement of the 4-year period at the time of delivery in § 2-725(2) where the warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance. *Id.* In such a case, the cause of action accrues when the breach is or should have been discovered. *Id.*

[7] This court has long held that in order to meet the exception based on a warranty of future performance, the warranty must be an express rather than an implied warranty and that the warranty must *explicitly* extend to future performance. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb.

559, 279 N.W.2d 603 (1979). In *Celotex Corp.*, we rejected the argument that a bond in which the surety guaranteed that it would repair leaks in a roof for 20 years constituted an explicit warranty of future performance of the roofing materials. In *Celotex Corp.*, we stated that the exception contained in § 2-725(2) "applies only where the seller *explicitly* states, for example, that the product will 'last for 10 years.' " (Emphasis in original.) 203 Neb. at 568, 279 N.W.2d at 609.

[8] Similar to our holding in *Celotex Corp.*, which was limited to a bond providing a guarantee to repair, the majority of other jurisdictions have found that a warranty given by a manufacturer or seller "to repair or replace" does not constitute an explicit warranty of future performance of goods for purposes of § 2-725(2), and therefore the promise to repair or replace does not extend the commencement of the running of the statute of limitations. *Tittle v. Steel City Oldsmobile GMC*, 544 So. 2d 883 (Ala. 1989) (repair or replace language does not guarantee that goods will perform free of defects; rather, it anticipates that defects will occur); *Boyd v. A.O. Smith Harvestore Products*, 776 P.2d 1125 (Colo. App. 1989) (unlike warranty to repair or replace, warranty of future performance does not assume that product will not perform and will need repair or replacement); *Flagg Energy Devel. v. General Motors*, 244 Conn. 126, 709 A.2d 1075 (1998) (repair or replacement clause provides buyer no relief other than that expressly promised and is not promise of future performance); *Centennial Ins v General Electric*, 74 Mich. App. 169, 253 N.W.2d 696 (1977) (repair or replace language is specification of remedy and does not explicitly state warranty of future performance); *Liecar Liquors v. CRS Business Computers*, 205 A.D.2d 868, 613 N.Y.S.2d 298 (1994) (warranty expressly limited to repair or replacement would not be warranty which extended to future performance of goods); *Kline v. U.S. Marine Corp.*, 882 S.W.2d 597 (Tex. App. 1994) (repair or replace language provides a remedy if goods fail and does not explicitly extend to future performance; future performance exception is construed narrowly, with emphasis on term "explicitly"). But see *Wienberg v. Independence Lincoln-Mercury*, 948 S.W.2d 685 (Mo. App. 1997) (finding under Missouri law that repair or replacement language does not nul-

lify future performance warranty, but, rather, limits remedy for breach of warranty of future performance to repair or replacement). Cases such as the foregoing generally reason that the future performance exception in § 2-725(2) should be narrowly construed to include only those warranties that explicitly guarantee the proper performance of goods for some period of time into the future. A warranty to repair or replace does not guarantee proper performance. Rather, it anticipates potential defects and specifies the buyer's remedy during the stated period. We agree with the rationale of the foregoing cases and extend our reasoning in *Celotex Corp.* to hold that a warranty to repair or replace, without more, is not an explicit warranty of future performance and will not extend the commencement of the 4-year statute of limitations set forth in § 2-725(1).

For the sake of completeness, we note that under an unusual set of facts in which the parties stipulated that the description of goods as "siding" carried with it the representation that the goods would last the lifetime of the house, we stated that an express warranty may arise under Neb. U.C.C. § 2-313 (Reissue 1992) from a description of the goods which becomes a part of the basis of the bargain. *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983). In the circumstance in which a buyer claims that a warranty has been made part of the basis of the bargain, the buyer must prove reliance upon the warranty to extend the commencement of the 4-year statute of limitations of § 2-725(1). *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990). Our holding in the instant case does not alter the holdings in these cases.

Statute of Limitations on Nebraska Popcorn's Action.

In ruling on the motion for summary judgment, the district court had, inter alia, two exhibits to consider. Cardinal offered the affidavit of Fisher, a customer service manager for Cardinal, and Nebraska Popcorn offered the affidavit of Morrison, its president.

As noted above, Fisher asserted in his affidavit that the model 13570PRC-1 low profile motor truck scale at issue was covered by a limited warranty, a copy of which was attached to the affidavit. Fisher stated that the attached limited warranty was the

only warranty that Cardinal offered on that model. Fisher further asserted that Cardinal did not warrant that the scale would be free of any defects for any number of years and that Cardinal did not guarantee the performance of the scale for any number of years.

The statement of limited warranty attached to Fisher's affidavit provides that "Cardinal Scale warrants to the original purchaser that it will repair or replace, at its option, any part of a Cardinal product which, in Cardinal's judgment, is defective in material or workmanship for a period of one (1) year from date of shipment." In addition to the standard 1-year limited warranty, the statement of limited warranty provides:

> Cardinal Scale warrants to the original purchaser that it will repair or replace, at its option, any load cell supplied with a motor truck scale which, in Cardinal's judgment, is defective in material or workmanship for a period of two (2) years from the date of original shipment. This warranty expressly excludes any load cell damaged by lightning, overvoltage, overloading, or submersion.

In the present case, there is no dispute that the scale was delivered to Nebraska Popcorn on October 19, 1992. There is also no dispute that Nebraska Popcorn filed its action on February 18, 1997. Therefore, absent an express warranty of future performance which would toll the commencement of the running of the statute of limitations, the statutory period for bringing an action expired on October 19, 1996, which was 4 years after delivery, and Nebraska Popcorn's action was not filed until 4 months after the statute ran.

The evidence produced by Cardinal established that Cardinal did not explicitly guarantee the future performance of the scale for any number of years nor did it give a warranty that the scale would be free of defects for any number of years. Fisher asserted in his affidavit that the only warranty Cardinal gave was that set forth on the attached exhibit entitled "Statement of Limited Warranty." The language of the statement of limited warranty demonstrates that it was a warranty to repair or replace defective parts during the specified periods: 1 year as to any part and 2 years as to the load cell. Such a warranty is not a warranty of future performance; it does not warrant that the scale will be free of defects nor does it explicitly guarantee the scale's proper

performance for any period of time. Instead, it is a limited warranty which promises that Cardinal will repair or replace any part that is found to be defective during the specified periods of time. The warranty given by Cardinal is not a warranty which explicitly extends to future performance under § 2-725(2). *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). See, similarly, *Tittle v. Steel City Oldsmobile GMC*, 544 So. 2d 883 (Ala. 1989); *Boyd v. A.O. Smith Harvestore Products*, 776 P.2d 1125 (Colo. App. 1989); *Flagg Energy Devel. v. General Motors*, 244 Conn. 126, 709 A.2d 1075 (1998); *Centennial Ins v General Electric*, 74 Mich. App. 169, 253 N.W.2d 696 (1977); *Liecar Liquors v. CRS Business Computers*, 205 A.D.2d 868, 613 N.Y.S.2d 298 (1994); *Kline v. U.S. Marine Corp.*, 882 S.W.2d 597 (Tex. App. 1994).

The foregoing evidence submitted by Cardinal showed that the warranties applicable to the motor truck scale at issue were to repair or replace and were not warranties of future performance, and therefore, the 4-year statute of limitations in § 2-725(1), commencing upon delivery, see § 2-725(2), controlled. Cardinal met the burden of providing sufficient evidence to demonstrate that if such evidence were uncontroverted at trial, Nebraska Popcorn's action was time barred, and Cardinal was entitled to judgment as a matter of law. Because Cardinal met its burden of producing sufficient evidence to demonstrate that Nebraska Popcorn's action was time barred and Cardinal was entitled to judgment as a matter of law, Nebraska Popcorn had the burden to bring forth evidence to show a genuine issue of material fact that would prevent entry of judgment in Cardinal's favor as a matter of law. See *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). In other words, Nebraska Popcorn needed to bring forth evidence showing a genuine issue as to whether the statute of limitations had been extended beyond February 18, 1997, the date it filed its action.

Nebraska Popcorn submitted Morrison's affidavit in opposition to Cardinal's motion for summary judgment. Morrison's affidavit and the materials attached thereto speak to the warranty issue. Morrison asserts in paragraph 6 of his affidavit:

> I was assured by Wing Scale and by the information provided by Cardinal Scale Manufacturing that the Cardinal

> Model 13570PRC-I was made with the finest materials, the best production methods, and manufactured to the strict guidelines of the National Institute of Standards and Technology; and that it would meet all the needs of Morrison Farms, Inc. in its commercial business.

Morrison states in paragraph 7 of his affidavit that "I was further informed that the scale was warranted for a period of two years including damage from lightening [sic]."

Morrison's statement in paragraph 6 asserts a warranty as to the condition of the scale at the time of delivery and its suitability for the purpose intended. The written information from Cardinal attached to Morrison's affidavit contains statements which are consistent with the assurances regarding the scale to which Morrison refers in paragraph 6 of his affidavit. To the extent these materials amount to a promise, such warranty is limited to the condition of the scale at the time of delivery. Although such statements may become part of the basis of the bargain and, therefore, create express warranties under § 2-313, see *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983), the statements in the instant case are limited to the condition of the scale at the time of delivery and do not warrant the future performance of the scale. Therefore, Morrison's statement in paragraph 6 of the affidavit does not show that the scale was warranted for future performance. See *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979) (stating warranty of future performance must state period of time during which proper performance is warranted).

Morrison states in paragraph 7 of his affidavit that the scale was "warranted for a period of two years." This statement is not an explicit assertion that the scale was warranted for future performance. See *Celotex Corp., supra* (stating that warranty of future performance must be explicit). Morrison's further assertion that the warranty included "damage from lightening [sic]" does not reasonably infer that the scale was explicitly warranted for future performance, but, rather, the language regarding damage from lightning indicates that it was a warranty to repair or replace in the event of damage to the scale from lightning. The statements in paragraph 6 and 7 of Morrison's affidavit did not

reasonably establish that Nebraska Popcorn had been given a warranty of future performance.

Morrison attached to his affidavit copies of written information he was provided in connection with the purchase of the truck scale. Included in the attachments is Wing's proposal regarding the scale. Wing's proposal states that "[t]his scale system has a two year warranty against lightning damage." This comports with the warranty to which Morrison refers in paragraph 7 of his affidavit. Such language is not a warranty of future performance, but is a warranty that the scale will be repaired or replaced in the event it is damaged by lightning. There is no claim of damage by lightning in this case. Such a warranty does not warrant future performance and does not extend the statute of limitations in this case.

Finally, the written information which Morrison states Nebraska Popcorn received from Cardinal contains information regarding the load cell used in the motor truck scale. The bulletin states that the load cell "is backed by a two year warranty," and that a "Statement of Limited Warranty" is available on request. The statement of limited warranty provided by Cardinal in support of its motion for summary judgment indicates that the 2-year provision attendant to the load cell is limited to repair and replace the load cell, and as we have noted, such warranty is not a warranty of future performance which extends the statute of limitations.

In sum, neither Morrison's statements nor the statements in the materials attached to Morrison's affidavit provide evidence that or reasonably support the inference that Cardinal explicitly warranted the future performance of the scale for any period of time.

Cardinal's evidence established that its warranty was to repair and replace and was not a warranty of future performance, the statute of limitations was not extended, Nebraska Popcorn's action was time barred, and Cardinal was entitled to judgment as a matter of law. Nebraska Popcorn did not meet its burden of showing a genuine issue as to whether Cardinal explicitly warranted the scale for future performance. Giving Nebraska Popcorn all reasonable inferences from the evidence, there was no genuine issue of material fact, and the grant of summary

judgment in favor of Cardinal and the dismissal of Nebraska Popcorn's petition as to Cardinal were proper.

CONCLUSION

The evidence submitted in support of Cardinal's motion for summary judgment established that Nebraska Popcorn's cause of action based on breach of warranty was time barred under § 2-725(1) as a matter of law. Nebraska Popcorn did not meet its subsequent burden to show a genuine issue of material fact preventing entry of judgment. We, therefore, affirm the decision of the district court granting Cardinal's motion for summary judgment and dismissing Cardinal.

AFFIRMED.

PRIME REALTY DEVELOPMENT, INC., A NEBRASKA CORPORATION, APPELLANT, V. CITY OF OMAHA, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE.

602 N.W.2d 13

Filed November 5, 1999. No. S-98-615.

1. **Constitutional Law: Supreme Court: Appeal and Error.** Constitutional interpretation is a question of law, on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
2. **Constitutional Law: Due Process: Property.** Under article I, § 3, of the Nebraska Constitution, the state cannot deprive any person of life, liberty, or property without due process of law. The protections of this procedural due process right attach when there has been a deprivation of a significant property interest.
3. **Constitutional Law: Due Process: Property: Notice.** If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case.
4. **Constitutional Law: Property: Claims.** In order to have a protected property interest one must have a legitimate claim of entitlement.
5. **Constitutional Law: Due Process: Property.** Property interests for purposes of procedural due process are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law.
6. **Constitutional Law: Statutes: Ordinances: Municipal Corporations: Property.** Only when a statute or ordinance eliminates the decisionmaking power of a city, by making the city's obligation to act mandatory when a party fulfills the requirements of the statute, is a significant property interest created.

7. **Municipal Corporations: Property.** The Community Development Law gives a city the discretion to remove blighted designations as it sees fit to best serve the sound needs of the community.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas E. Whitmore and Sandra K. Markley, of Monen & Whitmore, for appellant.

Paul D. Kratz, Omaha City Attorney, and Charles K. Bunger for appellee.

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

HENDRY, C.J.

INTRODUCTION

Prime Realty Development, Inc. (Prime Realty), brought suit against the City of Omaha (City) alleging that the City, among other things, violated art. I, § 3, of the Nebraska Constitution in removing a blighted designation from land owned by Prime Realty without due process. Both parties filed motions for summary judgment, and the district court granted summary judgment in favor of the City. Prime Realty appeals.

FACTUAL BACKGROUND

Spring Valley Industrial Park, owned by Prime Realty, is located on approximately 35 acres between 50th and 60th Streets in Omaha, Nebraska. In 1988, pursuant to Neb. Rev. Stat. § 18-2109 (Reissue 1991) of the Community Development Law, the City declared 217 acres located between 50th and 60th Streets, including the tract where the industrial park would later be built, as blighted. Blighted land, as currently defined by Neb. Rev. Stat. § 18-2103(11) (Reissue 1997), is land that constitutes an economic or social liability and meets at least one of several criteria set out in § 18-2103(11)(b)(i) through (v). Once an area is declared blighted, the City can fashion a redevelopment plan, including special financial incentives, to encourage commercial development within the blighted area.

Tax increment financing (TIF) is one of the financial incentives the City uses to develop blighted areas. Developers submit an application for TIF, which is then reviewed by the "TIF Committee" and either approved or denied. TIF funds are essentially a loan granted by the City to the developer to assist with the costs of the proposed development. The developer is not required to repay TIF funds. Instead, the loan is paid back over time by the increased tax base created by the new commercial development.

Prime Realty first began developing the industrial park in 1989. The Spring Valley Industrial Park Redevelopment Plan II, approved by the City, allowed for 75 percent from TIF funds and 25 percent financing from Prime Realty. The initial development required significant infrastructure additions, including extending and improving the sewer system and storm drainage and making street improvements. The City approved $702,250 in TIF funds for this project.

In 1991, Prime Realty made a further request to the City regarding the granted TIF funds. As of that date, $562,220 of the $702,250 approved for the initial development had been expended. Prime Realty requested that the remaining $140,029 be used to cover a portion of the grading and site preparation expenses which arose after a large corporation agreed to move into the industrial park. The City approved this amended use of the funds.

In 1992, the City reevaluated the status of all blighted areas within Omaha. On February 23, 1992, the City published notice in the Omaha World-Herald that one of the items on the agenda for the March 4 Omaha city planning board meeting was the repeal of all blighted designations in the City, and the establishment of new blighted areas. On June 2, 1992, the City formally withdrew the blighted designation from all previously designated properties, including the industrial park, and assigned new blighted areas within the City.

In early 1993, Prime Realty began negotiating with Coca-Cola Enterprises, Inc. (Coca-Cola), regarding the relocation of Coca-Cola's existing operations to the industrial park, at the City's request. During negotiations Prime Realty, Coca-Cola, and the City all contemplated the use of TIF funds to assist with

the project. In December 1993, Coca-Cola purchased 13.06 acres within the industrial park.

In 1994, Prime Realty submitted a new application for TIF funds regarding the Coca-Cola project. On May 31, the TIF Committee met. The committee denied Prime Realty's request for $164,766, and instead approved TIF funds for two other projects. The committee noted in its minutes regarding Prime Realty's application that "[w]ith the improvements in place at the 50th and Dayton location, the project will not qualify for consideration as a Blighted and Substandard Area."

At Prime Realty's request, the City reevaluated the industrial park in October 1994. The resulting report also concluded that the improved property no longer qualified as a blighted area based on the statutory criteria set out in § 18-2103(11). In 1995, Prime Realty instituted this action against the City.

In 1998, the matter was heard before the district court for Douglas County on motions for summary judgment by both parties. The court sustained the City's motion for summary judgment, finding that Prime Realty had no property interest in the blighted designation conferred by the City and that thus, there was no due process violation. In the alternative, the court found that if Prime Realty did have a property interest in the blighted designation, the City gave Prime Realty proper notice and an opportunity to be heard.

Prime Realty's motion for summary judgment was overruled. Prime Realty appealed, and we moved the case to our docket pursuant to our authority to regulate the caseloads of Nebraska appellate courts. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Prime Realty asserts that the trial court erred in (1) determining that the blighted designation could be removed from the industrial park without providing notice and an opportunity to be heard and (2) finding in the alternative that the notice afforded by the City provided adequate due process.

STANDARD OF REVIEW

[1] Constitutional interpretation is a question of law, on which the Nebraska Supreme Court is obligated to reach a con-

clusion independent of the decision by the trial court. *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998).

ANALYSIS

[2,3] Prime Realty asserts that the trial court erred in finding that the City was not required to provide due process to Prime Realty when removing the blighted designation from the industrial park as part of a citywide reevaluation. Under article I, § 3, of the Nebraska Constitution, the state cannot deprive any person of life, liberty, or property without due process of law. The protections of this procedural due process right attach when there has been a deprivation of a significant property interest. *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993), citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997). We address Prime Realty's due process claim under state constitutional law only because Prime Realty did not raise any violation of federal due process under the 14th Amendment in its petition to the district court.

[4] Prime Realty asserts that the blighted designation, with the concomitant ability to apply for TIF funds, was the type of public benefit which triggers due process protection. In order to have a protected property interest, one must have a legitimate claim of entitlement. See *Tracy v. City of Deshler*, 253 Neb. 170, 568 N.W.2d 903 (1997). See, also, *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

[5] Property interests for purposes of procedural due process are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994). See, also, *Ashby v. Civil Serv. Comm.*, 241 Neb. 988, 492 N.W.2d 849 (1992). We conclude that under this standard, for the reasons set forth below, Prime Realty had no significant property interest in the blighted designation.

[6] In the Community Development Law, Neb. Rev. Stat. §§ 18-2101 to 18-2154 (Reissue 1991 & Cum. Supp. 1994), there are no notice or statutory requirements set out for removing a blighted designation. Nothing in the statutory scheme suggests that a blighted designation is permanent. Further, nothing in the statutory scheme requires that an area be declared blighted, even if it meets all of the statutory criteria. Based on the above, we conclude that the decision to remove a blighted designation is left within the City's discretion. Only when a statute or ordinance eliminates the decisionmaking power of a city, by making the city's obligation to act mandatory when a party fulfills the requirements of the statute, is a significant property interest created. See *Tracy v. City of Deshler, supra.* See, also, *North Memorial Medical Center v. Gomez*, 59 F.3d 735 (8th Cir. 1995); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986), *abrogated on other grounds, Lemke v. Cass County, Neb.*, 846 F.2d 469 (8th Cir. 1987).

[7] In *Tracy*, we held that a garbage hauler did not have a vested property right to a garbage hauling permit issued by the city. We noted that the statutory framework at issue in *Tracy* gave the city the discretion to revoke all permits issued to private garbage collectors. Thus, the city did not deprive the garbage hauler of a significant property interest when it revoked his garbage hauling license. Similarly here, the Community Development Law gives the City the discretion to remove blighted designations as it sees fit to best serve the sound needs of the community. See § 18-2104. When the City removed the blighted designation from the industrial park, as part of a city-wide reevaluation, it did not deprive Prime Realty of a significant property interest.

Prime Realty asserts that it had a legitimate claim of entitlement to TIF funds. However, the record makes clear that the decisionmaking process regarding TIF applications is a discretionary process. Even if the TIF application filed by Prime Realty to assist with the Coca-Cola project had met all of the necessary criteria, the TIF Committee was free to deny the application in favor of other projects which it deemed more worthy. Prime Realty was never granted TIF funds for the Coca-Cola project, nor was there ever a guarantee from the City that

Prime Realty's TIF application would be approved for this project. Thus, Prime Realty had no legitimate claim of entitlement to TIF funds.

We conclude that Prime Realty did not have a significant property interest in the blighted designation. Prime Realty was not entitled to notice and an opportunity to be heard under article I, § 3, of the Nebraska Constitution regarding the removal of a blighted designation. Having made this determination, we find it unnecessary to reach Prime Realty's second assignment of error.

CONCLUSION

The decision of the trial court granting summary judgment to the City and overruling Prime Realty's motion for summary judgment is affirmed.

AFFIRMED.

SCOTT FERGUSON, APPELLANT AND CROSS-APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE AND CROSS-APPELLANT.

601 N.W.2d 907

Filed November 5, 1999. No. S-98-652.

1. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear a case.
2. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
3. **Judgments: Jurisdiction: Final Orders: Appeal and Error.** Even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a question of law which requires an appellate court to reach a conclusion independent from that of the trial court.
5. **Federal Acts: Intent: Actions.** Whether federal law preempts a state law establishing a cause of action is a question of congressional intent.
6. **Federal Acts: Labor and Labor Relations: Railroads.** The Railway Labor Act (RLA) is a federal law enacted to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes in the transportation industry. The RLA requires that minor disputes between railroads and their

employees be resolved by a nonjudicial arbitral mechanism established by the RLA. In this context, "minor disputes" include those growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions and involving controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.

7. **Federal Acts: Labor and Labor Relations: Railroads: Claims.** A claim founded on state law is preempted by the Railway Labor Act where the resolution of a state law claim depends on an interpretation of the collective bargaining agreement.
8. ___: ___: ___: ___. The existence of a potential remedy under a collective bargaining agreement does not deprive an employee subject to the Railway Labor Act of independent remedies available under state law. Even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, there is no federal preemption.
9. ___: ___: ___: ___. For purposes of determining whether the Railway Labor Act preempts a state law claim, a court must assume without deciding that a state remedy exists.
10. **Labor and Labor Relations: Claims.** A claim which turns on purely factual questions about an employee's conduct or an employer's conduct and motives is independent of a collective bargaining agreement.
11. **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.
12. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
13. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
14. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. 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.
15. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
16. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed

to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

17. **Statutes: Employer and Employee.** Neb. Rev. Stat. § 55-160 (Reissue 1998) is inapplicable to private sector employment relationships.

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

James C. Bocott, of Ruff Nisley & Lindemeier, for appellant.

Brenda J. Council for appellee.

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

STEPHAN, J.

Scott Ferguson brought this action to recover compensation allegedly due him from his employer, Union Pacific Railroad Company (Union Pacific), for periods when he was on active duty with the U.S. Army Reserve. The district court for Lincoln County determined, as a matter of law, that Ferguson's claim lacked merit and therefore entered summary judgment in favor of Union Pacific. Ferguson appealed, and we moved the appeal to our docket on our own motion. We find no error and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ferguson has been an employee of Union Pacific and a member of the Army Reserve since November 1993. He served on active duty with the Army Reserve for at least 15 days during each of the years 1994 through 1996. Ferguson submitted claims to Union Pacific for compensation allegedly due him while he was on active military duty, but Union Pacific denied his claims. Thereafter, Ferguson invoked the assistance of the United Transportation Union, his collective bargaining agent, which submitted several formal claims on his behalf, each indicating that Ferguson's claims for lost wages were made pursuant to Neb. Rev. Stat. § 55-160 and §§ 55-163 to 55-165 (Reissue 1998).

Sharon F. Boone, manager of labor relations for Union Pacific, denied each of these claims, stating in correspondence

that "there is no basis in any rule and/or agreement to support the payment as claimed. You are citing Nebraska Statues [sic] other than Collective Bargaining Agreements in support of this claim." Boone's correspondence further stated:

> When employees take a leave of absence from the Company for any reason (military, personal, sick, etc.) they relieve themselves from the covenants and benefits of the Collective Bargaining Agreement and are not covered under such agreements. Therefore, for the reasons stated above, Claimant would not be entitled to any additional compensation as claimed.

On December 19, 1996, Ferguson filed suit against Union Pacific in the district court for Lincoln County, Nebraska, claiming lost wages for work missed while in the active service of the U.S. Army Reserve. Union Pacific removed the case to the U.S. District Court for the District of Nebraska, and Ferguson moved for remand, arguing that the federal court lacked subject matter jurisdiction. The federal court granted Ferguson's motion on July 16, 1997, and remanded the cause to the state district court.

Union Pacific then filed its answer, asserting as affirmative defenses that the court lacked subject matter jurisdiction over the action because Ferguson's claim was preempted by the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq. (1994 & Supp. III 1997), and that Ferguson's petition failed to state a claim upon which relief could be granted. Thereafter, Union Pacific filed a motion for summary judgment, arguing that Ferguson's claim was a minor dispute subject to the mandatory arbitration procedures of the RLA and, alternatively, that Ferguson's petition failed to state a cause of action. Ferguson also filed a motion for summary judgment, arguing that no genuine issue of material fact existed in the case and that he was entitled to judgment as a matter of law.

The district court granted Union Pacific's motion for summary judgment based upon its determination that Ferguson was not entitled to compensation under § 55-160 or upon any other basis. The court did not specifically rule on Union Pacific's contention that it lacked subject matter jurisdiction over Ferguson's claim because of an RLA preemption.

ASSIGNMENTS OF ERROR

Ferguson contends on appeal, restated and summarized, that the district court erred in determining that § 55-160, regarding military leaves of absence from employment without loss of pay, applies only to state or public employees, not private employees, and thus erred in granting summary judgment in favor of Union Pacific.

On cross-appeal, Union Pacific contends that the district court erred in (1) declining to squarely address Union Pacific's contention that the court lacked subject matter jurisdiction over Ferguson's claim for wages while attending training with the U.S. Army Reserve and (2) failing to dismiss Ferguson's petition for lack of subject matter jurisdiction on the ground that the claim is subject to the mandatory and exclusive dispute resolution procedures under the RLA.

ANALYSIS

Subject Matter Jurisdiction.

We initially address Union Pacific's argument, set forth in its cross-appeal, that the district court lacked jurisdiction over the subject matter of Ferguson's claim because it was preempted by the RLA. We interpret the fact that the district court did not specifically rule on the preemption issue, but, rather, determined the action on its merits, as a finding that Ferguson's claim was not preempted and the court therefore had subject matter jurisdiction. See *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999).

[1-4] Subject matter jurisdiction is a court's power to hear a case. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999); *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). However, even though an extrajudicial act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the

power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed. *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998). When a jurisdictional question does not involve a factual dispute, its determination is a question of law which requires an appellate court to reach a conclusion independent from that of the trial court. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

[5-8] Union Pacific argues that the district court lacked subject matter jurisdiction because Ferguson's claim is a "minor dispute" within the meaning of the RLA and is thus subject to the exclusive, nonjudicial resolution procedures set forth therein, thereby preempting any cause of action under state law. "Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994). The RLA is a federal law enacted "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes" in the transportation industry. *Id.* See, also, *Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987). The RLA requires that "minor disputes" between railroads and their employees be resolved by a nonjudicial arbitral mechanism established by the RLA. *Hawaiian Airlines, Inc. v. Norris, supra*; 45 U.S.C. § 153. In this context, "minor disputes" include those " 'gro[wing] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions' " and involving " 'controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.' " *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. at 252-53, quoting 45 U.S.C. § 151a(5) and *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957). A claim founded on state law is preempted by the RLA "where the resolution of a state-law claim depends on an interpretation of the [collective bargaining agreement]." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. at 261. However, the existence of a potential remedy under a collective bargaining agreement does not deprive an employee subject to the RLA of "independent remedies available under state law." *Id.* Indeed,

" 'even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself,' " there is no federal preemption. 512 U.S. at 262, quoting with approval *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988).

The preemption argument which Union Pacific advances here was specifically rejected by the U.S. District Court for the District of Nebraska when it remanded the cause to state court following removal by Union Pacific. U.S. Magistrate Judge Thomas D. Thalken reasoned:

> An examination of the plaintiff's complaint does not lead the court to believe that the resolution of this dispute will depend upon an interpretation of a collective bargaining agreement or any other aspect of federal law. Rather, although involving a railroad company as the defendant, this case appears to relate solely to an interpretation of Neb. Rev. Stat. § 55-160 (Reissue 1993). This statute creates rights that are independent of the collective bargaining agreement and is therefore not preempted by the RLA.

Our analysis leads to the same conclusion. Although Ferguson's petition does not make specific reference to § 55-160, it is clear from the record that entitlement under this state statute was the only specific substantive basis for Ferguson's claim which was argued to or considered by the district court. Additionally, the formal claims submitted by the United Transportation Union on Ferguson's behalf, as well as Union Pacific's letters denying them, acknowledge § 55-160 as the source of his alleged entitlement.

[9,10] For purposes of determining whether the RLA preempts a state law claim, a court must assume without deciding that a state remedy exists. See, *Poole v. Burlington Northern R. Co.*, 987 F. Supp. 753 (D. Neb. 1997); *Trexler v. Norfolk Southern Ry. Co.*, 957 F. Supp. 772 (M.D.N.C. 1997). A claim which turns on " 'purely factual questions' " about an employee's conduct or an employer's conduct and motives is independent of a collective bargaining agreement. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261, 114 S. Ct. 2239,

129 L. Ed. 2d 203 (1994). Resolution of the merits of this case would require a court to determine: (1) whether Ferguson is employed by an entity to which the statute applies, (2) whether Ferguson is a member of the military, (3) whether Ferguson took a leave of absence from his employment under the orders or authorization of competent authority in the active service of the state or of the United States, and (4) whether such leave of absence from employment was without pay. See, § 55-160; *Poole v. Burlington Northern R. Co., supra.* Clearly, each of the above inquiries are purely factual questions, and we therefore conclude that Ferguson's state law claim is independent of the collective bargaining agreement. Moreover, we note that Union Pacific's manager of labor relations characterized Ferguson's claim for compensation as one arising under Nebraska statutes and therefore not subject to the provisions of any collective bargaining agreement. Thus, assuming for purposes of the preemption analysis only that Ferguson has a remedy under § 55-160, it is clear that adjudication of such a claim would not require interpretation of the collective bargaining agreement. Accordingly, we hold that Ferguson's claim is not preempted by the RLA and that the district court had subject matter jurisdiction to reach the merits of the claim. Union Pacific's cross-appeal is, thus, without merit.

Entitlement to Compensation.

[11,12] In reviewing the district court's decision granting Union Pacific's motion for summary judgment, we are guided by the principle that summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 597 N.W.2d 602 (1999); *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999). In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable infer-

ences deducible from the evidence. *NECO, Inc. v. Larry Price & Assocs., supra*; *Fackler v. Genetzky, supra.*

[13] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999).

Section 55-160 provides:

> All employees, including elected officials of the State of Nebraska, or any political subdivision thereof, who shall be members of the National Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve, shall be entitled to leave of absence from their respective duties, without loss of pay, on all days during which they are employed with or without pay under the orders or authorization of competent authority in the active service of the state or of the United States, for not to exceed fifteen workdays in any one calendar year. Such leave of absence shall be in addition to the regular annual leave of the persons named herein. When the Governor of this state shall declare that a state of emergency exists, and any of the persons named in this section are ordered to active service of the state, an additional leave of absence will be granted until such member is released from active service by competent authority. During the additional leave of absence because of the call of the Governor, any official or employee subject to the provisions of this section shall receive such portion of his salary or compensation as will equal the loss he may suffer while in active service of the state. Governmental officers serving a term of office shall receive their compensation as provided by law.

We have considered this statute on one prior occasion in *King v. School Dist. of Omaha*, 197 Neb. 303, 248 N.W.2d 752 (1976).

While we stated in that case that § 55-160 applied to all employees of the state and any political subdivisions thereof, we were not presented with the question before us here, namely, whether the statute applies to nongovernmental employers and employees.

[14,15] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999); *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999). 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. *Hagelstein v. Swift-Eckrich, supra*; *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999); *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

Ferguson focuses on the first sentence of § 55-160, which provides that "[a]ll employees, including elected officials of the State of Nebraska, or any political subdivision thereof, who shall be members of the . . . Army Reserve . . . shall be entitled to leave of absence from their respective duties, without loss of pay" during periods of active military duty not to exceed 15 days per calendar year. He argues that because there is no comma after the word "officials," the statute plainly applies to all employees of any employer and is not limited to employees of the state or its political subdivisions. However, the manner in which a statute is punctuated does not require that we disregard other well-settled standards of statutory construction in determining its meaning. For example, in *State v. Robbins*, 253 Neb. 146, 149, 570 N.W.2d 185, 188 (1997), we declined to attribute a meaning to a statute derived from the placement of a comma where doing so would have rendered other provisions of the

statute "meaningless surplusage." Ferguson's contention that the first sentence of § 55-160 extends its applicability to all employees of any public or private employer is inconsistent with subsequent language which indicates a narrower scope. The leave of absence provided for by § 55-160 is to be "in addition to the regular annual leave *of the persons named herein.*" (Emphasis supplied.) Additional leave of absence is required when the Governor declares a state of emergency "and *any of the persons named in this section* are ordered to active service of the state." (Emphasis supplied.) *Id.* Further, the statute provides that during such periods, "any official or *employee subject to the provisions of this section* shall receive such portion of his salary or compensation as will equal the loss he may suffer while in active service of the state." (Emphasis supplied.) *Id.* Were § 55-160 universally applicable to all employees of any employer, this language limiting its application to persons "named" or "subject to the provisions" of the statute would be unnecessary and meaningless.

[16] The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999); *Central States Found. v. Balka, supra.* Section 55-160 is included in Nebraska's Military Code, which also includes Neb. Rev. Stat. § 55-162 (Reissue 1998), which provides:

> *Except for persons subject to section 55-160* members of the reserve components of the armed forces of the United States or of the military forces of the State of Nebraska, who, having been involuntarily ordered into the active military service of the United States, or of this state, leave a position in the employ of *any employer*, and who make application within thirty days after they are relieved from such training or duty, shall be entitled to be restored to their previous or a similar position with the same status and pay.
>
> The period of absence for military training or duty with the armed forces of the United States or active service of

> the state shall be construed as an absence with leave and seniority shall continue to accrue during such period of absence. In the discretion of the employer, such leave may be with or without pay.

(Emphasis supplied.)

[17] The provisions of § 55-162 plainly apply to persons "in the employ of any employer" *except* those falling within the scope of § 55-160. Reading § 55-160 in pari materia with § 55-162, we conclude that the Legislature has established a general rule that employers may decide whether or not to compensate employees for periods when they are on leave due to military obligations, with an exception that employees and officials of the state or any of its political subdivisions are entitled to be compensated as set forth in § 55-160. We hold that § 55-160 is inapplicable to private sector employment relationships and that Ferguson's claim against Union Pacific therefore must fail as a matter of law.

CONCLUSION

The district court had subject matter jurisdiction over Ferguson's claim that Union Pacific was obligated by § 55-160 to compensate him for periods when he was in its employ and on active military duty. For the reasons stated herein, we agree with the court's determination that no such obligation arose under the statute. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., not participating.

IN RE INTEREST OF KASSARA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LESA C., ALSO KNOWN AS CHEYENNE T., APPELLANT.

601 N.W.2d 917

Filed November 5, 1999. No. S-98-1230.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests.
3. **Juvenile Courts: Parental Rights: Rules of Evidence: Due Process.** Notwithstanding that the Nebraska rules of evidence do not apply in dispositional hearings held in proceedings arising under the Nebraska Juvenile Code, the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.
4. **Parental Rights: Evidence: Appeal and Error.** Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record.
5. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in a higher appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
6. **Trial: Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
7. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
8. **Parental Rights.** A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
9. **Juvenile Courts: Rules of Evidence.** Although strict rules of evidence are not applied to dispositional hearings, the proceedings must still be fundamentally fair.
10. **Rules of Evidence: Due Process.** In determining whether admission or exclusion of particular evidence would violate due process, the Nebraska Evidence Rules serve as a guidepost in that determination.
11. **Parental Rights: Evidence: Proof.** In order to terminate parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1998), the State must prove by clear and convincing evidence that (1) the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child. The State is required to prove that the parents have

been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so.

12. **Parental Rights.** Last-minute attempts by parents to comply with the rehabilitation plan do not prevent termination of parental rights.
13. **Parental Rights: Appeal and Error.** Although incarceration alone is not a basis for termination of parental rights, an appellate court may note that a parent's incarceration has contributed to the neglect of his or her child.
14. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
15. ___. Children cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, JR., Judge. Affirmed.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, for appellant.

James S. Jansen, Douglas County Attorney, and Vernon Daniels and Kristin M. Lynch for appellee.

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

MCCORMACK, J.

BACKGROUND

On January 21, 1996, Kassara M., then 7 years old, woke up at 3 a.m. and found herself at home alone. Kassara called the 911 emergency dispatch service, and the police came to her home and waited until 7 a.m., when Kassara's mother, Lesa C., also known as Cheyenne T. (Cheyenne), finally appeared. Kassara was taken into protective custody. On January 22, a petition was filed alleging that Kassara lacked proper parental care, and a detention hearing was held on February 2. An adjudication hearing was held on February 22, at which Cheyenne admitted the allegations of the petition, and Kassara was found to be a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). Kassara has been in foster care throughout the pendency of this action.

On April 17, 1996, a rehabilitation plan was ordered for Cheyenne, generally directing Cheyenne to attend therapy, obtain a legal source of income and adequate housing, complete

parenting classes, and have reasonable rights of supervised visitation. The provisions of this rehabilitation plan were reaffirmed on July 12 and October 24, 1996, and on August 19 and October 17, 1997. Additionally, Cheyenne was ordered to undergo a psychiatric evaluation. On March 2, 1998, the trial court further ordered Cheyenne to refrain from using alcohol or drugs, submit to urinalysis testings, take the medications prescribed by her psychiatrist, and abstain from violating the law. On August 31, the trial court reaffirmed these previously established goals.

The degree to which Cheyenne met the objectives set forth in the rehabilitation plans is contested by the parties, although Cheyenne concedes that she did not complete all of the objectives prior to the termination hearing. On September 2, 1998, the county attorney filed a motion for termination of parental rights, alleging that termination was warranted under Neb. Rev. Stat. § 43-292(6) and (7) (Reissue 1998).

A hearing was held on the motion to terminate parental rights on October 22, 1998. On October 23, the trial court found that Kassara came within the meaning of § 43-292(6) and (7) and that the best interests and welfare of Kassara required that Cheyenne's parental rights be terminated. Cheyenne appeals.

ASSIGNMENTS OF ERROR

Cheyenne assigns, summarized and restated, that the trial court erred in (1) retroactively applying § 43-292(7); (2) admitting certain exhibits that allegedly contained hearsay, speculation, conclusions, and irrelevant material; (3) admitting evidence of Department of Health and Human Services (Department) referrals that occurred prior to the adjudication hearing; (4) finding that there was clear and convincing evidence to prove that Cheyenne failed to comply with the requirements of the rehabilitation plan; and (5) finding that termination of Cheyenne's parental rights was in Kassara's best interests.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in

conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Danielle D. et al.*, 257 Neb. 198, 595 N.W.2d 544 (1999).

[2] Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests. *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997).

[3,4] Notwithstanding that the Nebraska rules of evidence do not apply in dispositional hearings held in proceedings arising under the Nebraska Juvenile Code, the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record. *Id.*

ANALYSIS

RETROACTIVE APPLICATION

We do not reach Cheyenne's assignment of error concerning the retroactivity of § 43-292(7). Although Cheyenne had notice that the State was proceeding under the amended version of § 43-292(7), the record does not reveal any manner of objection by Cheyenne. The record on appeal does not contain any responsive filing to the State's motion, nor does the bill of exceptions contain any objection by Cheyenne to the application of the amended version of the statute.

[5-7] In the absence of plain error, where an issue is raised for the first time in a higher appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). It is well-established that an appellate court will not consider an

issue on appeal that was not presented to or passed upon by the trial court. *Kropf v. Kropf*, 248 Neb. 614, 538 N.W.2d 496 (1995); *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994); *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

Evidence Issues

Cheyenne assigns that the trial court erred in admitting exhibits 1, 3, 6, 8, 11, and 14, which were all reports prepared for the court by Michelle Hemphill, Kassara's caseworker with the Department. Cheyenne argues that the exhibits lacked proper foundation and contained hearsay, speculation, conclusions, and irrelevant material. Each of these contentions will be addressed in turn.

[8-10] It is beyond dispute that a parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). Therefore, although strict rules of evidence are not applied to dispositional hearings, the proceedings must still be fundamentally fair. See *In re Interest of Gloria F.*, 254 Neb. 531, 577 N.W.2d 296 (1998). In determining whether admission or exclusion of particular evidence would violate due process, the Nebraska Evidence Rules serve as a guidepost in that determination. *In re Interest of Floyd B.*, 254 Neb. 443, 577 N.W.2d 535 (1998).

With respect to foundation, Cheyenne argues that there was no evidence presented regarding who authored the documents or what they were. This argument is not supported by the record. Each report was signed by Hemphill, and the testimony given at the hearing indicates that the reports were prepared by Hemphill and that Hemphill prepared such reports in the normal course of her business. This foundation is sufficient to satisfy the requirement of fundamental fairness.

Cheyenne's hearsay argument is also without merit. Cheyenne argues that the reports constituted hearsay, the consideration of which violated due process. As support, she relies

on *In re Interest of L.H. et al.*, 241 Neb. 232, 243, 487 N.W.2d 279, 287 (1992), in which the court stated that " '[i]n proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 198[9]) . . . .' "

In re Interest of L.H. et al., supra, is distinguishable from the present case. This court has long expressed concern where reports are admitted into evidence at termination hearings and the authors of those reports are not present to lay foundation for the exhibits or to be cross-examined. See, e.g., *In re Interest of Constance G., supra*; *In re Interest of L.H. et al., supra*; *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987). In fact, in *In re Interest of L.H. et al., supra*, the trial court was found to have acted improperly not simply in receiving reports, but in taking judicial notice of them.

In the present case, however, the author of the reports, Hemphill, laid the foundation for their admission, testified on behalf of the State, and was cross-examined by counsel for Cheyenne. Thus, the concerns expressed in the above-cited cases are not implicated in the instant case. Furthermore, Hemphill laid appropriate foundation for the admission of the reports pursuant to the hearsay exception for business records found in Neb. Rev. Stat. § 27-803(5) (Reissue 1995). Taken together, these circumstances provide sufficient guarantees of trustworthiness to make consideration of the reports fundamentally fair.

Cheyenne further argues that the reports contained speculation and conclusions by their author and that the reports contained irrelevant material relating to children other than Kassara and referrals prior to the one leading to the instant case. We first note that even if admission of this evidence was improper, it is still incumbent upon Cheyenne to show that inclusion of the exhibits was prejudicial to her due process rights. See *In re Interest of L.H. et al., supra*. Cheyenne has failed to make the required showing.

The reports in question contained several references to the progress of Kassara's half-sister, Misty. Cheyenne's objection

is, in part, directed at the relevancy of this information. The statements relating to Misty, however, set forth how she was progressing in school and with her father, who became her physical custodian. While it is true that Misty's progress is irrelevant to the issues at Kassara's termination hearing, it is also clear that Cheyenne was in no way prejudiced by such evidence. The reports provide no indication of how Misty came to be in the custody of the State or what may have occurred between Misty and Cheyenne. Misty's progress in school and relationship with her father cast no light, unfavorable or otherwise, on Cheyenne's fitness to be a parent. Consequently, no prejudice to Cheyenne could result.

Additionally, in response to Cheyenne's relevancy objection at trial, the court made the following statement:

> Okay. I'm going to receive all of the exhibits. Insofar as any conclusionary [sic] type statements, I think I'm capable of deciphering that out and ignoring it. Also, any references to another child, the fact that another child is referenced doesn't necessarily mean it's not relevant, but to the extent — unless you have something specific you want to point out — to the extent that I don't believe it is relevant, then I'll ignore that. But if you're talking about something very specific, then I can make a ruling on that in terms of whether or not I'll ignore it or consider it.

The only specific materials to which Cheyenne called the trial court's attention were items relating to prior referrals. Cheyenne, however, admitted that the details of such prior filings were unclear, such that it could not be clearly determined if the reports actually referred to other filings, and her counsel stated that "[t]here isn't really enough information on these to tell who the filing is against, which parent." References to referrals which occurred prior to the adjudication which led to the instant case would, generally, be considered irrelevant. See *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

The vagueness of the material to which Cheyenne objected, however, demonstrates that the admission of such evidence was hardly prejudicial. Given the lack of information regarding these possible prior referrals, it cannot be concluded that the inclusion of this evidence was prejudicial to Cheyenne's interests. In any

event, the trial court indicated that it would not consider evidence it felt to be irrelevant, and this court, in its de novo review of the record, is certainly capable of doing the same. See *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

Similarly, the trial court stated its intent to disregard any speculative or conclusory statements contained in the exhibits, and this court's de novo review allows it to do the same. See *id.* Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record. *Id.*

Failure to Comply With Rehabilitation Plan

[11] Cheyenne assigns that the trial court erred in terminating her parental rights pursuant to § 43-292(6). In order to terminate parental rights under this subsection, the State must prove by clear and convincing evidence that (1) the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). The State is required to prove that the parents have been provided with a reasonable opportunity to rehabilitate themselves according to a court-ordered plan and have failed to do so. *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992).

Cheyenne was first ordered by the trial court on April 17, 1996, to maintain a legal source of income, obtain adequate housing, attend therapy, and complete parenting classes; these provisions were repeatedly reordered over the course of these proceedings. Nonetheless, the evidence overwhelmingly demonstrated that by October 22, 1998, Cheyenne had not accomplished these basic goals, which are necessary for a parent to be able to provide for a child.

With respect to employment, in the 2½ years between the initial rehabilitation order and the termination hearing, the evidence established that Cheyenne had been employed at two

different jobs, both for only a few weeks, between her release from jail in Council Bluffs, Iowa, in December 1997 and her reincarceration in Arizona in April 1998. On one other occasion, Cheyenne obtained employment but never actually reported for work before she lost that job, again because she was arrested. At the time of the termination hearing, Cheyenne was without adequate housing because she was still in an Arizona correctional facility, and at no time during the pendency of these proceedings had she maintained a stable residence.

The evidence further indicated that Cheyenne did not regularly attend therapy. Generally, her attendance was sporadic; she would attend therapy for a few weeks and then fail to attend for weeks at a time, often without contacting her therapist or the Department.

[12] Cheyenne also failed to complete a parenting class as she had been directed to do. Testifying over the telephone at the termination hearing, Cheyenne indicated that she had taken a parenting class in her Arizona jail and that her last class was to be the same day as the hearing. Even if true, this is hardly persuasive, given the 2½ years in which Cheyenne failed to complete such a class. Last-minute attempts by parents to comply with the rehabilitation plan do not prevent termination of parental rights. *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997). See, also, *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998); *In re Interest of V.M.*, 235 Neb. 724, 457 N.W.2d 288 (1990).

Cheyenne was also provided by the trial court with the opportunity for supervised visitation. Although Cheyenne claims that she was denied visits by the Department and Kassara's foster parents, the evidence indicates that Cheyenne on many occasions failed to take advantage of the opportunity to visit.

[13] Cheyenne claims that her failure to demonstrate her intention and fitness to maintain her parental rights stems, in part, from her various instances of incarceration. It need hardly be said that this is far from a compelling excuse. Although incarceration alone is not a basis for termination of parental rights, we may note that Cheyenne's incarceration has contributed to her neglect of Kassara. See *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). This is not to say that any

parent who is incarcerated will automatically have his or her parental rights terminated. These cases need to be evaluated on a case-by-case basis and will always be based on the best interests of the child. Cheyenne claims, in particular, that she violated the terms of her Arizona parole because she feared that if she did not return to Nebraska, she would lose Kassara. Furthermore, Cheyenne claims that she returned to Arizona to finish her jail term because she was motivated by her desire to keep Kassara.

It should be noted that Cheyenne's motivation and desire to be a parent are not at issue. The State is not required to show that noncompliance with a court-ordered rehabilitation plan is willful in order to prove that termination of parental rights should be ordered under § 43-292(6). *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Instead, the evidence concerns Cheyenne's ability to be a parent. In any event, Cheyenne's fear of losing Kassara might justify seeking legal permission to leave Arizona to participate in the proceedings regarding Kassara. It does not justify Cheyenne's actions in illegally leaving Arizona in knowing violation of parole. Moreover, Cheyenne admitted that she lied to the Department upon her return to Nebraska, informing Hemphill that Cheyenne had legally left Arizona when Cheyenne knew that to be untrue.

In short, the evidence presented at the termination hearing demonstrated, by clear and convincing evidence, that Cheyenne failed to comply with nearly every aspect of the court-ordered rehabilitation plan. The trial court did not err in so determining.

BEST INTERESTS

Cheyenne claims that the trial court erred in finding that the State proved, by clear and convincing evidence, that termination of parental rights was in Kassara's best interests. This claim is without merit. Cheyenne admitted, at the adjudication phase of the proceedings, the allegations of neglect that brought Kassara within the jurisdiction of the trial court. The evidence presented at the termination hearing amply demonstrated that termination of Cheyenne's parental rights was in Kassara's best interests.

[14] The evidence, as set forth above, that Cheyenne failed almost entirely to comply with the rehabilitation plan is

persuasive evidence that warrants the termination of her parental rights. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *Id.*

We must also consider Kassara's treatment by Cheyenne and Kassara's condition and progress during foster care. Evidence presented at the termination hearing, and admitted without objection, shows that Kassara was, prior to detention, subjected to sexual abuse by a friend of Misty. The evidence also shows that Kassara was well behind her peers educationally because she had missed so much school. The evidence further shows that when Kassara's foster parents took her to the dentist, she had cavities in every tooth. Kassara's foster mother testified that Kassara had been prone to emotional outbursts and violent behavior when she first arrived in foster care, but that Kassara's behavior had improved. The foster mother also testified that Kassara's behavior would deteriorate for a time after visits with Cheyenne.

Kassara's counselor, who also had counseling sessions with Cheyenne, testified that in her opinion, Kassara had stabilized since being placed in foster care, but that Cheyenne had not. The therapist testified that Kassara did not trust Cheyenne and wished to remain in foster care. The therapist testified that in her opinion, Kassara's best interests would be served if Cheyenne's parental rights were terminated.

[15] Children cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity. *Id.* The record in this case shows, by clear and convincing evidence, that termination of Cheyenne's parental rights is in Kassara's best interests.

CONCLUSION

The State proved, by clear and convincing evidence, that Cheyenne was given a reasonable opportunity to comply with a court-ordered rehabilitation plan but almost completely failed to do so and that termination of Cheyenne's parental rights was in Kassara's best interests. This showing was sufficient to justify termination of Cheyenne's parental rights pursuant to § 43-292(6). No prejudicial error resulted from the admission of

evidence in the trial court. Consequently, the judgment of the trial court terminating Cheyenne's parental rights to Kassara was without prejudicial error and is affirmed.

AFFIRMED.

DANIEL A. PARDE, APPELLANT, V. LORALEE A. PARDE, APPELLEE.
602 N.W.2d 657

Filed November 12, 1999. No. S-97-985.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Judgments: Property Division.** In determining what assets constitute the marital estate and how the property should be divided, Nebraska, by statute, is an equitable property distribution jurisdiction. Neb. Rev. Stat. § 42-365 (Reissue 1998).
5. **Divorce: Property Division.** Compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate.
6. **Property Division.** Compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership.
7. **Divorce: Property Division: Case Overruled.** Insofar as *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985), adopted the mechanical approach to the division of a personal injury award in a subsequent divorce, it is overruled.
8. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
9. **Property Division: Proof: Workers' Compensation: Presumptions.** In those cases where the party making the claim of nonmarital property fails to prove that all or portions of an injury compensation are for purely personal losses or loss of future earning capacity, the presumption remains that the proceeds from the personal injury or workers' compensation settlement or award are marital property.

Petition for further review from the Nebraska Court of Appeals, MUES, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Gage County, WILLIAM B. RIST, Judge. Judgment of Court of Appeals affirmed.

David P. Lepant and Reggie L. Ryder, of Andersen & Lepant, for appellant.

James E. Gordon and Kevin T. Lytle, of DeMars, Gordon, Olson and Shively, for appellee.

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

GERRARD, J.

INTRODUCTION

Loralee A. Parde (wife) petitions this court for further review of the Nebraska Court of Appeals' decision in *Parde v. Parde*, 8 Neb. App. 242, 591 N.W.2d 783 (1999), claiming that the appellate court either ignored or incorrectly applied the principles set forth in *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985). The Court of Appeals had determined that the marital estate in a divorce proceeding does not include that portion of one spouse's personal injury settlement which represents compensation for pain and suffering or future earnings; rather, the marital estate includes only that portion of a judgment or settlement which diminishes the marital estate, e.g., items such as past wages and medical expenses. *Parde v. Parde, supra*. We granted the petition for further review to clarify the law regarding which portions of an injured party's personal injury or workers' compensation award should be included in the marital estate for purposes of property division in this equitable distribution jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Daniel A. Parde (husband) and the wife were married on December 11, 1976. The Pardes separated on January 5, 1997, and a decree of dissolution was entered on August 11, 1997. The evidence reveals that during the marriage, the husband worked 16 years for Burlington Northern Railroad Company. In the

scope of his employment, the husband was injured on three separate occasions in 1989 and 1990. As a result of these injuries to his lower back, the husband negotiated a settlement with Burlington Northern on August 26, 1992, a settlement memorialized by a "General Release Agreement" (Release). The husband was 40 years old at the time of the settlement.

The Release was negotiated pursuant to the Federal Employers' Liability Act (FELA). As part of the Release, the husband agreed that the injuries he sustained had permanently disabled him and would prevent him from ever returning to work for Burlington Northern. Additionally, at the time he signed the Release, the husband received a check for $148,364.16. This cash payment was expressly divided into two components: $54,101.70 for "time lost" between July 1, 1992, and May 31, 1996, and $98,892.30 to "other factors." The "time lost" component was allocated so that the husband could receive creditable service hours for the purpose of receiving railroad retirement benefits. Railroad retirement tax and railroad retirement board liens were deducted, resulting in the net cash payment of $148,364.16.

The Release also provided that Burlington Northern would arrange for payment to the husband of an annuity in the sum of $98,750 on September 1, 2002, the amount being payable notwithstanding the husband's death.

The primary issue at the trial court was whether the $98,750 amount remaining to be paid under the Release should be included or excluded from the marital estate. Likewise, the divisibility of the cash settlement is not contested on appeal; rather, it is the divisibility of the annuity which is at issue. The trial court found that the cash portion of the settlement received by the husband in 1992 was already reflected in the other assets of the parties which were divided pursuant to their settlement agreement. The parties stipulated to a nearly equal division of all other property, each receiving approximately $60,000 in net value. There was no express allocation in the Release regarding past wages or future earnings with respect to the $98,750 annuity. The husband sought to prove, through the testimony of Burlington Northern's claims representative Lori Savidge and the language of the Release itself, that the $98,750 annuity

represented compensation for loss of future earnings and was thus excludable from the marital estate.

Savidge's testimony did not provide a precise allocation of the settlement proceeds between loss of past wages, pain and suffering, and loss of future earnings. The following colloquy, however, occurred during the testimony regarding the settlement proceeds:

> Q. [The husband's counsel] Ms. Savidge, when you negotiated this settlement and determined an amount to be paid, how much of it was based on economic loss?
>
> A. I would say the majority of it. I would — I don't break it down, the figure, into so many dollars for future, so many dollars for pain and suffering, so many dollars for liability or contrib. [sic], but I can say the majority of it was based on the fact that he was not working for the railroad. He was a young man and disabled and he was going to lose some earnings down the road at least 20-some years.

The evidence also revealed that after the settlement, the husband attended and graduated from Southeast Community College, which prepared him to become a respiratory therapist. Child support calculations show that at the time of trial, the husband was making approximately $26,000 per year working as a respiratory therapist at Bryan Memorial Hospital. The record does not show the date of the husband's graduation or when he was first employed following the date of the Release.

The district court found that the entire amount of the settlement, both cash and annuity, was based upon injuries the husband received during the marriage of the parties and upon his income earned during the marriage, and determined that the entire settlement should be considered marital property. The husband appealed, assigning as error the district court's holding that the annuity was marital property. The Court of Appeals agreed and found that the district court abused its discretion in failing to exclude the annuity portion from the marital estate and modified the decree accordingly. See *Parde v. Parde*, 8 Neb. App. 242, 591 N.W.2d 783 (1999). The wife petitioned this court for further review, and we will narrowly review the Court of Appeals' determination that the amount due under the annuity

should be excluded from the marital estate. All other aspects of the Court of Appeals' judgment stand affirmed.

ASSIGNMENTS OF ERROR

In her petition for further review, the wife specifically assigned as error (1) the Court of Appeals' finding that the district court abused its discretion in deciding that insufficient evidence had been presented to support an allocation of the annuity; (2) the Court of Appeals' ignoring *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985), and incorrectly applying *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999); (3) the Court of Appeals' determining that because the testimony of Savidge was not contradicted by direct evidence, the evidence was necessarily not in conflict and, therefore, the court need not accord weight to the fact that the finder of fact heard and observed the witness and chose to reject such testimony; (4) the Court of Appeals' finding that since the lump-sum payment was reflected in the parties' marital property, it must necessarily be treated as an allocation of the marital estate; (5) the Court of Appeals' determining what part of the entire settlement was marital or nonmarital in character, even though only the characterization of the annuity as marital property was assigned as error; (6) the Court of Appeals' failing to dismiss the appeal on the ground that the husband had accepted the benefits of the district court judgment; and (7) the Court of Appeals' failing to award attorney fees for the services of the wife's attorneys in the Court of Appeals.

STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

[3] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

ANALYSIS

Background—Personal Injury Award as Marital Property

We granted further review in this cause to clarify what has unnecessarily become a muddled area of the law—i.e., which portions of an injured party's personal injury or workers' compensation award should be included in the marital estate for purposes of property division. This court last dealt with the issue of one spouse's personal injury settlement being considered marital property in *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985).

The divorce in *Maricle v. Maricle* occurred a few years after the husband had been injured in a truck collision that left him permanently and totally disabled. In actions for damages arising out of the accident, the husband and wife received a $300,000 settlement. After attorney fees, this sum was divided so that the wife received 20-some thousand dollars for loss of consortium and the husband received the balance. When the couple divorced, the question presented to this court was whether the husband's personal injury settlement should be included in the marital estate for purposes of dividing the parties' property. Without discussing whether and what portions of such an award should be considered to be the separate property of the injured spouse, this court, sitting on a division panel, determined that the husband's entire settlement should be included in the marital estate. The court stated:

> In the present case equity requires that the proceeds from the settlement of the damage actions be included in the marital estate. The proceeds were not acquired by gift or inheritance, *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), nor were they assets held in a trust established by a third person, thereby rendering them not a part of the marital estate, *Essex v. Essex*, 195 Neb. 385, 238

> N.W.2d 235 (1976). Furthermore, the proceeds from the settlement constitute the main asset and the primary source of income of the parties.

Maricle v. Maricle, 221 Neb. at 554, 378 N.W.2d at 857. Since deciding *Maricle v. Maricle* in 1985, we have not revisited the issue of how to divide one spouse's personal injury settlement or award upon dissolution of marriage.

In 1995, however, the Court of Appeals found itself confronted with a similar issue in *Gibson-Voss v. Voss*, 4 Neb. App. 236, 541 N.W.2d 74 (1995). That case involved the question whether one spouse's workers' compensation award should be included in the marital estate upon divorce. Noting that Nebraska is an equitable distribution jurisdiction and citing cases from other equitable distribution jurisdictions, the Court of Appeals articulated four factors to be considered in determining which portions of an award are marital property and which are separate property.

> [A] court must consider (1) the purpose of the award, e.g., whether it was made for lost earnings, loss of future earning capacity, or some other purpose; (2) the time period of any diminished earning potential or disability; (3) the nature and date of the underlying injury; and (4) the terms of the award.

Id. at 242, 541 N.W.2d at 78. The Court of Appeals concluded that an injured spouse's workers' compensation award should not be included in the marital estate to the extent that it compensates the injured party for loss of premarriage or postdivorce earnings. *Id.* In doing so, the Court of Appeals did not mention or discuss our holding in *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985).

Then, in 1999, the Court of Appeals decided *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999). At the time of the parties' divorce in *Mathew v. Palmer*, the wife was a plaintiff in a pending medical malpractice suit alleging personal injuries from defective breast implants. The wife had also obtained a $100,243 settlement from a breach-of-privacy suit wherein a physician provided a newspaper with an x ray of the wife's breasts, and the newspaper published that x ray and identified the wife by name.

In deciding that the proceeds from neither of the wife's actions should be included in the marital estate, the Court of Appeals in *Mathew v. Palmer, supra*, considered two approaches employed in other jurisdictions: the mechanical approach and the analytical approach. Under the mechanical approach, all the moneys realized from a personal injury action are placed in a marital estate. Meanwhile, under the analytical approach, only those portions of a personal injury award that represent compensation for past wages, medical expenses, and other items which diminish the marital estate are included within the marital estate. *Id.*

In *Mathew v. Palmer, supra*, the Court of Appeals correctly acknowledged that the existing jurisprudence in Nebraska would place our state among the mechanical approach jurisdictions. It accurately conveyed the facts and holding in *Maricle v. Maricle, supra*, wherein this court held that the husband's *entire* personal injury award should be placed in the marital estate. Nevertheless, the Court of Appeals concluded that Nebraska now uses the analytical approach in determining what should be considered as separate property of the injured spouse and analyzed the division of the parties' property accordingly. In *Parde v. Parde*, 8 Neb. App. 242, 591 N.W.2d 783 (1999), the Court of Appeals then cited *Mathew v. Palmer, supra*, for the same proposition.

[4] Because obvious confusion exists regarding the extent to which an injured party's personal injury or workers' compensation award should be included in a marital estate, we now revisit the issue to resolve the apparent conflict in the law. In determining what assets constitute the marital estate and how the property should be divided, we note that Nebraska, by statute, is an equitable property distribution jurisdiction. Neb. Rev. Stat. § 42-365 (Reissue 1998). In equity, there is rarely one tidy answer that fits every size and type of problem that courts are called upon to resolve. It is precisely for this reason that a principled *approach* to this issue should be consistent with the basic policy rule that the marital estate should include only property created by the marital partnership. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

The Court of Appeals, in *Mathew v. Palmer, supra*, correctly observed that there are two general approaches to this issue. In

the analytical approach, courts analyze the nature and underlying reasons for the compensation. "The core of the analytic approach is its recognition that the classification of the award depends upon the nature of the underlying loss." Brett R. Turner, Equitable Distribution of Property § 6.18 at 390 (2d ed. 1994). One court explains the analytical approach's rationale:

> "Nothing is more personal than the entirely subjective sensations of agonizing pain, mental anguish, embarrassment because of scarring or disfigurement, and outrage attending severe bodily injury. Mental injury, as well, has many of these characteristics. Equally personal are the effects of even mild or moderately severe injury. None of these, including the frustrations of diminution or loss of normal body functions or movements, can be sensed, or need they be borne, by anyone but the injured spouse. Why, then, should the law, seeking to be equitable, coin these factors into money to even partially benefit the uninjured and estranged spouse? . . . The only damages truly shared are those discussed earlier, the diminution of the marital estate by loss of past wages or expenditure of money for medical expenses. Any other apportionment is unfair distribution."

Turner, *supra* at 389-90 (quoting *Amato v. Amato*, 180 N.J. Super. 210, 434 A.2d 639 (1981)).

By contrast, a minority of courts apply the mechanical approach. These courts note that personal injury awards are not neatly categorized under the traditional definitions of separate property and therefore hold that personal injury awards are entirely marital property. Turner, *supra*. With little analysis, that is exactly the approach this court adopted in *Maricle v. Maricle*, 221 Neb. 552, 378 N.W.2d 855 (1985).

[5-7] Upon further consideration, however, we think the analytical approach is much more consistent with the basic rule that the marital estate should include only property created by the marital partnership, and we now adopt that approach. Compensation for purely personal losses is not in any sense a product of marital efforts. We, therefore, hold that compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the

other hand, compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership. By so holding, we overrule *Maricle v. Maricle, supra*, insofar as it adopted the mechanical approach to the division of a personal injury award in a subsequent divorce.

[8,9] We add, however, that the burden of proof to show that property is nonmarital remains with the person making the claim. See *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). Thus, in those cases where the party making the claim of nonmarital property fails to prove that all or portions of an injury compensation are for purely personal losses or loss of future earning capacity, the presumption remains that the proceeds from the personal injury or workers' compensation settlement or award are marital property. See § 42-365.

Evidence Regarding FELA Settlement

The wife claims that even if the analytical approach was to be applied to the instant case, the husband failed to carry his burden of proving the nonmarital character of the $98,750 annuity. We disagree. After reappraising the evidence and reaching our own independent conclusions by applying the analytical approach to our de novo review of the record, we determine that the Court of Appeals correctly concluded that the trial court abused its discretion in treating the $98,750 annuity as marital property and dividing it between the husband and the wife.

Our de novo review of the record discloses that the husband received his last paycheck from Burlington Northern on June 15, 1992. The husband and Burlington Northern executed the Release on August 26. Consequently, the husband was owed past wages for the time period between June 15 and August 26. Based upon a $31,000 per year income with Burlington Northern, wages for that period were roughly $6,450. Subtracting that sum from the total settlement figure of $251,744 leaves a remaining sum of $245,294 as compensation for loss of future earnings or pain and suffering as of the Release date.

The marriage, however, continued for approximately 5 years after the settlement was made and before the August 1997

divorce decree. The Court of Appeals correctly pointed out that a portion of the remaining $245,294, to the extent that it represented "future" lost wages in August 1992, was obviously "past" lost wages by August 1997 when the divorce decree was entered. We must determine whether the husband proved what portion of the $245,294 is attributable to pre-August 1997 lost wages (marital property) versus postdivorce loss of future earnings (nonmarital property).

The Court of Appeals analyzed the evidence two ways:

> [The husband] and Burlington [Northern] allocated the sum of approximately $54,000 for "time lost" for the time period from July 1, 1992, through May 31, 1996. . . .
>
> If we accept the $54,000 allocation and additionally assume that [the husband] earned no wages between May 31, 1996, and the date of the divorce decree (an assumption favoring [the wife] as it is clear that at some point [the husband] was reemployed), approximately another $35,000 would be attributable to lost wages, again based on a $30,000 annual income. This results in a total amount of lost wages for the period of July 1992 through August 1997 of roughly $89,000 ($54,000 plus $35,000), leaving approximately $156,500 of the total settlement remaining as compensation for [the husband's] future losses as of the time of the divorce.
>
> If we entirely ignore the Release's allocation of [the husband's] lost wages for the stated time period, we reach a similar conclusion. At the time of this settlement, [the husband's] worklife was approximately 22 years. If we simply divide the $245,294 balance remaining as of August 1992 by 22 years, thus attributing that entire amount to future lost wages and none of it to nonmarital pain and suffering, one arrives at a figure of slightly over $11,000 per year. This establishes an annual figure designed to compensate for [the husband's] lost earnings or diminished capacity from age 40 in August 1992 through age 62. At that rate, some $55,000 to $60,000 of the remaining compensation would be amortized over the approximately 5-year period the parties remained married after the Release date. Using the $60,000 figure,

> approximately $185,500 of the settlement remained as compensation for [the husband's] postdivorce loss of wages or diminished earning capacity.

Parde v. Parde, 8 Neb. App. 242, 251-52, 591 N.W.2d 783, 789 (1999).

We agree. Moreover, even if we assumed, despite evidence to the contrary, that the husband had *no* earnings for the 5-year period in question and that a full $31,000 was lost to the marital estate during that time, only $155,000 of the total settlement amount could be attributable to the past lost wages as of the time of the decree. This hypothetical calculation is absurd in light of the evidence that the husband *did* return to work as a respiratory therapist sometime in that 5-year period at the rate of $26,000 per year. Nevertheless, even using this calculation, nearly $90,300 would remain as compensation for the husband's postdivorce lost earnings.

Regardless of the analysis employed, the bottom line is this. The money received in August 1992 at the time the Release was signed—some $152,994, less taxes and a lien—went into the marriage and is now, according to the trial court's finding, reflected in the parties' remaining assets. That sum more than adequately compensated the marital estate, in advance, for any losses it might have suffered due to the husband's lost wages during the marriage. Indeed, as the Court of Appeals noted, it might be argued that the marital estate has already received a windfall. The district court's conclusion that the remaining $98,750 annuity should also be considered part of the marital estate is clearly untenable and deprives the husband of a substantial right and a just result. See *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998).

In reaching this conclusion, we have considered the wife's argument that the husband failed to meet his burden of proof because he could not establish, by direct evidence, that the remaining unpaid amount through the annuity carried a specific designation showing it was for a nonmarital purpose. While the husband's evidence did not consist of a settlement document with a tidy breakdown of each dollar of the settlement into well-defined categories, the testimony of Savidge, when considered with the language of the Release itself and the settlement as a

whole, proved what portion of the entire settlement is to be reasonably considered as lost wages during the marriage and, thus, as a marital asset. By proving what portion of the entire settlement should be considered as a marital asset, the husband has necessarily proved what portion could properly be viewed as nonmarital property. The Court of Appeals was correct in its determination.

We have considered the wife's other assignments of error and find them to be without merit.

CONCLUSION

The Court of Appeals determined that the district court abused its discretion in not setting aside to the husband, as nonmarital property, the remaining $98,750 due under his settlement with Burlington Northern. The Court of Appeals, therefore, ordered that the district court's decree be modified to set that sum aside to the husband as his sole and separate property. For the foregoing reasons, we affirm the judgment of the Court of Appeals.

AFFIRMED.

STEPHAN, J., not participating.

STATE OF FLORIDA EX REL. THE DEPARTMENT OF INSURANCE OF THE STATE OF FLORIDA, RECEIVER FOR UNITED SOUTHERN ASSURANCE COMPANY, A FLORIDA CORPORATION AUTHORIZED TO TRANSACT AN INSURANCE BUSINESS IN FLORIDA, APPELLEE, V. COUNTRYWIDE TRUCK INSURANCE AGENCY, INC., A FLORIDA CORPORATION, APPELLEE, AND COUNTRYWIDE INSURANCE AGENCY, INC., A NEBRASKA CORPORATION, AND DAVID L. FULKERSON, APPELLANTS.

602 N.W.2d 432

Filed November 12, 1999. No. S-98-794.

1. **Default Judgments: Appeal and Error.** In an appeal from the entry of a default judgment, or the denial of a motion to stay entry of a default judgment, an appellate court will affirm the action of the trial court in the absence of an abuse of discretion.

2. **Default Judgments.** A trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default.
3. **Default Judgments: Pleadings: Damages.** Where a defendant is in default, the allegations of the petition are to be taken as true against him, except allegations of value and amount of damage.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and vacated, and cause remanded for further proceedings.

Steven D. Davidson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

Mark E. Novotny and Kyle Wallor, of Lamson, Dugan & Murray, for appellee State of Florida.

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

STEPHAN, J.

This is an action brought by the State of Florida on the relation of the Department of Insurance of the State of Florida, the receiver of United Southern Assurance Company (USAC), an insolvent insurance company, against Countrywide Truck Insurance Agency, Inc. (Truck); Countrywide Insurance Agency, Inc. (Agency); and David L. Fulkerson. The petition alleges that Truck collected premiums for USAC but failed to remit them pursuant to the parties' agreement. Agency is alleged to be the "alter ego" of Truck, and Fulkerson is alleged to be the operator, director, and controlling person of both Truck and Agency.

Florida filed a motion for default judgment against Truck upon Truck's failure to file a responsive pleading. Agency and Fulkerson, who were not in default, moved to stay the entry of default judgment against Truck until after trial. The district court for Douglas County, Nebraska, overruled the motion to stay, granted the motion for default judgment, and entered judgment against Truck in favor of Florida in the amount of $4,997,210. Upon consideration of the appeal of Agency and Fulkerson from this order, we conclude that the district court erred in denying the requested stay and entering the default judgment, and we

therefore reverse, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

In Florida's petition filed January 12, 1998, it alleged that its Department of Insurance served as the liquidator of USAC pursuant to the Florida Insurers Rehabilitation and Liquidation Act, Fla. Stat. Ann. § 631.001 et seq. (West 1996). It further alleged that Truck was a Florida corporation with its principal place of business in Omaha, Nebraska, and that Agency was a Nebraska corporation and the "alter ego" of Truck. Florida alleged that the operations of the two corporations were identical in that both utilized the same premises, equipment, and personnel, and that Agency was therefore "indistinguishable" from Truck. Florida further alleged that Fulkerson was a resident of Nebraska and at all times material was the officer and/or director and controlling person of both Truck and Agency.

Florida alleged that on or about January 1, 1989, USAC and Truck entered into a "General Agency Agreement," pursuant to which Truck functioned as an insurance agent on behalf of USAC in Nebraska and numerous other states and collected premiums for insurance products provided by USAC. During the months of May, June, July, and August 1997, Truck allegedly collected and reported collecting USAC premiums which, after deducting the 18.5 percent commission to which Truck was entitled, amounted to $3,171,817. Florida further alleged on information and belief that "defendants" also collected additional premium deposits that totaled $2,325,401 and that "defendants" remitted only about $500,000, leaving a balance due and owing of at least $4,997,218. Based upon these factual allegations, Florida sought relief against Truck, Agency, and Fulkerson on nine separately designated "causes of action": conversion of trust funds, statutory obligation to remit premium, enforcement of security interest, fraudulent conveyance, receivership fraudulent conveyance, conversion, breach of contract, breach of fiduciary duty, and accounting. Each "cause of action" refers to Truck, Agency, and Fulkerson collectively as "defendants."

Although Truck was served with summons, it failed to file a responsive pleading, and Florida moved for default judgment,

requesting that the court enter judgment against Truck in the amount of $4,997,210; require Truck to provide an accounting of all premiums collected by it; and direct that Truck turn over its assets, including its books and records, to Florida. Agency and Fulkerson filed a motion to stay the entry of the default judgment against Truck, based upon the assertion that because Florida sought relief jointly against all named defendants, the entry of a default judgment against Truck would operate to their prejudice. On July 6, 1998, the district court granted Florida's motion for default judgment against Truck in the amount of $4,997,210, plus costs and interest, and directed Truck to turn over control of all assets, including its books and records, to Florida. The record reflects no hearing or receipt of evidence on the issue of damages. In the same order, the court overruled the motion to stay entry of default judgment. Agency and Fulkerson perfected a timely appeal, which we removed to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts.

ASSIGNMENT OF ERROR

Agency and Fulkerson assign as error, restated, the entry of a default judgment against Truck for the relief demanded in the petition and the denial of their motion to stay entry of default judgment.

SCOPE OF REVIEW

[1] We have held that in reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion. *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996). We have not previously addressed the applicable standard of review in a direct appeal from an entry of a default judgment. Neb. Rev. Stat. § 25-1302 (Reissue 1995) provides in relevant part, "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." We therefore conclude that in an appeal from the entry of a default judgment, or the denial of a motion to stay entry of

a default judgment, an appellate court will affirm the action of the trial court in the absence of an abuse of discretion.

ANALYSIS

Frow Doctrine

The principal issue in this appeal is whether the district court erred in not applying what has become known as the "*Frow* doctrine," which arose from the opinion of the U.S. Supreme Court in *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872). In that case, De La Vega filed suit against Frow and 13 other defendants, alleging that 8 of the defendants, including Frow, fraudulently obtained a tract of land by various devices, including the use of a forged power of attorney. All defendants except Frow filed timely answers. On application of De La Vega, the district court entered the equivalent of a default judgment against Frow in which it determined that De La Vega had title to the land and awarded injunctive relief. The case was then tried and resolved in favor of the answering defendants, resulting in its dismissal. In his appeal, Frow contended that the court erred in entering judgment against him while the case was still pending on the merits as to the answering defendants.

The Supreme Court reversed the judgment against Frow, holding:

> If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.
>
> The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant

> has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal.

82 U.S. at 554.

The Court in *Frow* did not identify under what specific circumstances it is inappropriate to enter a default judgment against one of multiple defendants. See *Farzetta v. Turner & Newall, Ltd.*, 797 F.2d 151, 154 n.2 (3d Cir. 1986) (noting, inter alia, that *Frow* opinion does not describe "relationship between Frow and his co-defendants"). Various courts and commentators have taken different approaches to the applicability of *Frow*.

According to one treatise, *Frow* establishes a general rule that "when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted." 10A Charles A. Wright et al., Federal Practice and Procedure: Civil § 2690 at 73 (3d ed. 1998). Wright further states that the *Frow* doctrine also applies where liability is joint and several and even "probably can be extended to situations in which several defendants have closely related defenses." *Id.* at 76. Several courts have applied *Frow* in accordance with this approach. See, *Farzetta v. Turner & Newall, Ltd., supra* (holding that *Frow* stands for proposition that if facts are proved at trial which exonerate answering defendants and that as matter of logic preclude liability of defaulting defendant, plaintiff cannot obtain judgment against defaulting defendant, even though defaulter failed to participate in proceeding in which exculpatory facts were proved); *Gulf Coast Fans v. Midwest Elec. Importers*, 740 F.2d 1499 (11th Cir. 1984) (noting that when defendants are similarly situated, though not jointly liable, judgment should not be entered against

defaulting defendant if other defendant prevails on merits); *Federal Deposit Ins. Corp. v. Manatt*, 723 F. Supp. 99 (E.D. Ark. 1989) (stating that when defendants are sued jointly and severally and one defaults, judgment should not be entered against defaulter until matter has been adjudicated as to all defendants); *Warrington U.S.A., Inc. v. Allen*, 631 F. Supp. 1456 (E.D. Wis. 1986) (stating that when complaint makes joint charge against two or more defendants and one fails to answer, judgment should not be entered against defaulter until matter has been adjudicated as to all defendants).

Other authorities interpret *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872), more narrowly. A noted commentator states:

> *Frow* stands for the narrow rule that a default judgment may not be entered against one of several defendants when: "the theory of recovery is one of true joint liability, such that, as a matter of law, no one defendant may be liable unless all defendants are liable, or; the nature of the relief demanded is such that, in order to be effective, it must be granted against each and every defendant."

10 James W. Moore, Moore's Federal Practice § 55.25 at 55-45 and 55-46 (3d ed. 1999). Under this approach,

> *Frow* . . . does not apply to cases involving the joint and several liability of multiple defendants for damages, because in such a case the liability of each defendant is not necessarily dependent upon the liability of any other defendant, and plaintiff may be made whole by a full recovery from any defendant.

Id. at 55-46.

Some courts have followed the narrow interpretation of *Frow* articulated by Moore. See, *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319 (8th Cir. 1997) (finding *Frow* inapplicable where defendants had closely related interests but were not alleged to be jointly liable); *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980) (holding that *Frow* does not apply where liability is joint and several); *Martin v. Coughlin*, 895 F. Supp. 39 (N.D.N.Y. 1995) (holding that *Frow* prohibits entry of default judgment against one of several defendants only: (1) where theory of recovery is one of true joint

liability, such that, as matter of law, no one defendant may be liable unless all defendants are liable, or (2) where nature of relief demanded is such that, in order to be effective, it must be granted against every defendant); *Montcalm Pub. Corp. v. Ryan*, 807 F. Supp. 975 (S.D.N.Y. 1992) (holding that where joint and several liability of multiple defendants was alleged, court may enter default judgment against any defendants who fail to appear); *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747 (Fla. Dist. App. 1997) (recognizing that where relief against one defendant is completely dependent upon liability of codefendant, it is improper to enter default judgment until liability of codefendant is decided). This approach is aptly summarized in *In re Uranium Antitrust Litigation*, 617 F.2d at 1257-58:

> *Frow* involved a claim of a joint tort to defraud the plaintiff of title to a res. To the extent that it holds that there cannot be inconsistent adjudications as to joint liability or as to a single res in controversy this ancient equity case remains good law. But to apply *Frow* to a claim of joint and several liability is to apply that venerable case to a context for which it was never intended, and ignores the several or independent aspects of the claim set forth in this complaint. The result in *Frow* was clearly mandated by the Court's desire to avoid logically inconsistent adjudications as to liability. However, when different results as to different parties are not logically inconsistent or contradictory, the rationale for the *Frow* rule is lacking.

The appellate courts of Nebraska have never specifically recognized or applied the *Frow* doctrine. However, two reported cases address circumstances in which a default judgment was entered against one of several defendants. In *Grant v. Clarke*, 58 Neb. 72, 78 N.W. 364 (1899), the plaintiff brought an action against multiple defendants to foreclose a mortgage securing two promissory notes. The court entered a default judgment against one of the defendants and, after trial, resolved the action against the other defendants. On appeal, this court found that there was no proof establishing the plaintiff's title to the notes and his right to foreclose the mortgage securing them, and thus we reversed the order of the district court. However, without mentioning *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L.

Ed. 60 (1872), this court noted that as to a defendant who defaulted, the averments of the petition were taken as true, and therefore as to the defaulter, the original foreclosure decree entered by the district court was still valid.

In *German-American Bank of Milwaukee v. Stickle*, 59 Neb. 321, 80 N.W. 910 (1899), a bank sued four defendants on a promissory note. One defendant answered, denying the execution of the note, and the other three defaulted. A jury found in favor of the answering defendant, and the trial court dismissed the action as to all defendants. On appeal, this court noted without reference to *Frow* that the trial court was correct in not instructing the jury to return a verdict against the defaulted defendants, stating:

> The business of the jury was to try issues of fact, and, as between the plaintiff and the defaulted defendants, there was no issue of fact to try. The claim of the bank against [the defaulters] was confessed, and judgment should have been rendered accordingly. The court therefore erred in dismissing the action.

Id. at 325-26, 80 N.W. at 911.

APPLICABILITY OF *FROW* IN THIS CASE

Florida characterized the relationship of Agency and Truck as follows:

> Agency is the alter ego of Truck, its operations being identical to Truck's, consisting of:
>
> A. the same persons;
>
> B. engaged in the same business activities;
>
> C. utilizing the same assets and personnel; and
>
> D. operating from the same premises with the same telephone numbers, the same network of insurance producers, the same computer system, and is otherwise indistinguishable from Truck.

In addition, it alleged that Fulkerson "functioned as an officer and/or director, as well as a controlling person" of both corporations.

A similar relationship between defendants was alleged in *Nichiro Gyogyo Kaisha v. Norman*, 606 P.2d 401, 404 (Alaska 1980), where the plaintiff alleged that two corporations "acted

as a single corporate entity in regard to the significant facts set forth in the amended complaint and are in essence the alter egos of each other." One of the corporations answered, but the other defaulted, and the plaintiff obtained a default judgment. Characterizing the claim as one alleging joint liability and citing the *Frow* doctrine, the court held that the default judgment was improperly entered because the answering defendant had not had an opportunity to defend on the merits.

Additionally, as one of its theories of recovery in the instant petition, Florida alleged a fraudulent transfer of assets from Truck to Agency. In this regard, it asserted that the three named defendants "undertook a course of action between and among themselves to strip substantially all value from Truck and transfer it to Agency, both of which companies were controlled by defendant Fulkerson." Similar allegations were considered in *In re Vantage Petroleum Corp.*, 43 B.R. 257 (Bankr. E.D.N.Y. 1984), where bankruptcy trustees alleged that debtors and other defendants fraudulently transferred assets to a corporate entity alleged to be an alter ego of the transferors. In determining that the *Frow* doctrine precluded entry of a default judgment against the transferee corporation where other defendants were not in default, the court reasoned that

> where several defendants are charged with transferring funds to one of the defendants, all of the defendants might be found liable, or fewer than all of the defendants might be found liable; but never would only a transferor or only a transferee be found liable. Such a situation, however, becomes a possibility upon the entry of a default judgment solely against [the transferee]. Although all of the alleged transferors might be exonerated, the transferee would nevertheless be held liable. A finding of liability as to the transferee but no liability as to all transferors would certainly be inconsistent and unjust.

Id. at 260.

[2] As we interpret *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872), a trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in

default. Under the alter ego and fraudulent transfer theories asserted by Florida, a trial on the merits could only result in the liability of both Truck and Agency or the liability of neither. However, the entry of default judgment against Truck could lead to the illogical and inconsistent result that Truck, the alleged fraudulent transferor, would be liable, whereas Agency, the alleged alter ego and fraudulent transferee, would not. Furthermore, in asserting its alternative theories of recovery, Florida alleges joint and collective action on the part of the defendants, as opposed to independent acts on the part of each named defendant. It alleges that "defendants have converted plaintiff's trust funds to their own benefit," that "defendants have failed and refused to turn over" premiums collected, and that the "transfer of the Truck business and assets and/or USAC premium to other entities constitutes unlawful distributions for the benefit of defendants in violation of their fiduciary obligations to USAC and plaintiff." In light of these allegations of alter ego, fraudulent transfer, and collective action, we construe the operative petition, taken as a whole, as alleging that the three named defendants are jointly liable as a single entity.

Because the default judgment against Truck and a judgment on the merits in favor of Agency and Fulkerson would be logically inconsistent and prejudicial to the interests of Agency and Fulkerson, we conclude that the *Frow* doctrine is applicable in this case involving, inter alia, allegations of joint liability, and that Agency and Fulkerson have sufficient stakes in the outcome of the controversy to afford them standing to appeal from the default judgment against Truck. See, *Hussey, Gay & Bell v. Georgia Ports Authority*, 204 Ga. App. 504, 420 S.E.2d 50 (1992); *C. W. Matthews Contracting Company, Inc. v. Studard*, 201 Ga. App. 741, 412 S.E.2d 539 (1991). To the extent that *Grant v. Clarke*, 58 Neb. 72, 78 N.W. 364 (1899), and *German-American Bank of Milwaukee v. Stickle*, 59 Neb. 321, 80 N.W. 910 (1899), are inconsistent with this determination, they are overruled.

[3] Also pertinent to our review is the longstanding principle of Nebraska law that the amount of damages alleged is not proved by default. Neb. Rev. Stat. § 25-842 (Reissue 1995) provides, "Every material allegation of the petition not controverted

by the answer . . . shall, for the purposes of the action, be taken as true . . . . Allegations of value or of amount of damage shall not be considered as true by failure to controvert them." Applying this statutory language, we have held that where a defendant is in default, the allegations of the petition are to be taken as true against him, *except allegations of value and amount of damage.* See, *Gatchell v. Henderson*, 156 Neb. 1, 54 N.W.2d 227 (1952) (holding that amount of default judgment should have been limited to amount of damages established by evidence); *Slater v. Skirving*, 51 Neb. 108, 70 N.W. 493 (1897) (holding that necessity of proof on default arises only with respect to value or amount of damages). In the present case, no evidence was offered to substantiate the $4,997,210 in damages for which Truck was adjudged liable by default, and the district court therefore had an inadequate factual basis upon which to enter judgment against Truck.

For these reasons, we conclude that the district court abused its discretion in denying the motion to stay entry of a default judgment against Truck pending resolution of the claims against Agency and Fulkerson and in entering the default judgment against Truck. The district court should have entered an order finding Truck to be in default and, therefore, ineligible to assert defenses or participate in trial, but should have deferred any entry of judgment until after the claims against Agency and Fulkerson were adjudicated.

We note that the judgment in this case was entered 9 days prior to the effective date of Neb. Rev. Stat. § 25-705(6) (Cum. Supp. 1998), which provides that in a civil case involving multiple parties,

> the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at

any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

We express no opinion regarding the applicability of the *Frow* doctrine after the effective date of this statute.

CONCLUSION

For the reasons stated, we conclude that the district court abused its discretion in entering a default judgment in the amount of $4,997,210 against Truck. The judgment is therefore reversed and vacated, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

JEREMY D. PARNELL, APPELLANT, V. MADONNA REHABILITATION HOSPITAL, INC., A NEBRASKA CORPORATION, AND REHABILITATION SPECIALISTS, A DIVISION OF MADONNA REHABILITATION HOSPITAL, APPELLEES.

602 N.W.2d 461

Filed November 12, 1999. No. S-98-985.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation 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. **Pleadings.** A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.
4. **Statutes: Appeal and Error.** 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.
5. **Pleadings: Summary Judgment.** Absent some mitigating factor which justifies raising new issues by a party after a motion for summary judgment has been heard and submitted, denying a motion to amend pleadings is not an abuse of discretion.
6. **Pleadings: Evidence.** Unless evidence or testimony exists in the record indicating that a proposed claim or defense was newly discovered or that counsel was unaware of the claim or defense prior to the pending action, a proposed amendment to

pleadings is merely a belated effort to inject issues of material fact into a proceeding where previously the pleadings revealed none.

7. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.

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

James D. Carson and Eric W. Kruger, of Rickerson & Kruger, for appellant.

Richard P. Garden, Jr., and John L. Horan, of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

CONNOLLY, J.

The appellant, Jeremy D. Parnell, was injured in an automobile accident and treated by the appellees, Madonna Rehabilitation Hospital, Inc. (Madonna), and Rehabilitation Specialists, a division of Madonna. Pursuant to Neb. Rev. Stat. § 52-401 (Reissue 1998), Madonna claimed a lien against settlement money obtained by Parnell as part of a personal injury action related to the accident. Parnell brought suit seeking a determination that the "usual and customary charges" of Madonna and Rehabilitation Specialists were less than what he had been billed. Madonna filed a counterclaim seeking judgment for the amount owed and brought a motion for summary judgment. Parnell sought leave to amend his petition in order to raise the issue of the constitutionality of § 52-401. The district court granted the motion for summary judgment, and Parnell appealed. We conclude that the district court was correct in granting Madonna's motion for summary judgment and did not abuse its discretion in denying Parnell's motion for leave to amend. Accordingly, we affirm.

BACKGROUND

Following injuries he sustained in an automobile accident, Parnell was admitted to Madonna and received services there for a period of just under 1 year. As a result of the accident, Parnell

incurred total expenses of approximately $90,000, $11,174.56 of which was incurred from his treatment at Madonna and $781 incurred from his treatment by Rehabilitation Specialists. Parnell received a settlement for his injuries in the amount of $800,000. Pursuant to § 52-401, Madonna sent Parnell two notices claiming a hospital lien against him. As part of the settlement, an insurance company sent Parnell two claim checks made out jointly to Parnell and Madonna, and Parnell and Rehabilitation Specialists in the amount of their charges.

Parnell did not deliver the claim checks to Madonna and subsequently began asking his medical care providers if they would accept less than the full amount billed as payment in full. Many providers agreed to a lesser amount, but Madonna would not. Parnell then filed suit against Madonna and Rehabilitation Specialists contending that the amount of the lien claimed by Madonna and the charges made by Rehabilitation Specialists were not "usual and customary charges" because both parties accept less than the full amount billed from some patients, such as those receiving medicaid or workers' compensation benefits. Madonna filed a counterclaim seeking judgment in the amount billed to Parnell. The checks Parnell received from the insurance company were then put in escrow pending the outcome of the lawsuit.

According to an affidavit submitted by Madonna's director of patient accounts, Madonna has one charge for each good or service it provides to its patients and these charges are cataloged in a "Charge Master Description" (CMD). Madonna bills its patients monthly pursuant to the prices set in the CMD and does not bill at different rates according to the ultimate payor of the bill. Madonna receives reimbursement for services rendered to patients who are covered by medicaid, medicare, and workers' compensation. Although Madonna bills such patients according to the CMD, it is typically reimbursed for an amount less than that which is billed. Madonna is required by law to accept the reimbursed amount as payment in full. At the time Parnell received services at Madonna, approximately 59.64 percent of Madonna's patients were covered by medicare and 34.22 percent were covered by commercial insurance. Parnell was not covered by medicaid, medicare, or workers' compensation.

Madonna filed a motion for summary judgment, and a hearing on the motion was held on May 20, 1998. While the court was considering the motion, Parnell filed a motion to postpone the determination of the summary judgment and a motion for leave to amend his petition so that he could allege the unconstitutionality of § 52-401. In support of the motion, Parnell alleged that a recent decision of this court, *In re Conservatorship of Holle*, 254 Neb. 380, 576 N.W.2d 473 (1998), called the constitutionality of § 52-401 into question. *In re Conservatorship of Holle* was released by this court on April 3, 1998. The only reference in *In re Conservatorship of Holle* to the constitutionality of § 52-401 was the following statement: "Neither party has raised the constitutionality of § 52-401, and we therefore will not consider that issue." *Id.* at 384, 576 N.W.2d at 476. The district court concluded that Madonna had a valid hospital lien, granted Madonna's motion for summary judgment, and ordered that the funds in escrow be paid to Madonna.

ASSIGNMENTS OF ERROR

Parnell assigns that the district erred in (1) denying his motion to postpone determination of summary judgment and for leave to file an amended petition, (2) interpreting "usual and customary charges" in a manner that did not take the amounts actually received by Madonna into consideration, and (3) granting Madonna's motion for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *NECO, Inc. v. Larry Price & Assocs.*, 257 Neb. 323, 597 N.W.2d 602 (1999); *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

[2] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Miller v. M.F.S. York/Stormor*, 257

Neb. 100, 595 N.W.2d 878 (1999); *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999).

[3] A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

ANALYSIS

The issue in this case is the interpretation of the phrase "usual and customary charges" in § 52-401. Section 52-401 provides in part:

> Whenever any person employs a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the *usual and customary charges* of such physician, nurse, or hospital applicable at the times services are performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act.

(Emphasis supplied.) This court has not previously addressed whether "usual and customary charges" could be something less than the amount that a service provider typically bills patients. Parnell contends that because Madonna often receives less than the full amount of its billings for services provided to patients covered by medicaid, medicare, and workers' compensation, the "usual and customary charges" of the hospital are less than the amount that it bills to patients.

[4] 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. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). Section 52-401 plainly states that a lien attaches to "the usual and customary *charges*" of the service provider. (Emphasis supplied.) However, Parnell's interpretation

would require that the amounts actually collected by a service provider be considered instead of the amount charged. Such an interpretation is contrary to the plain language of the statute.

The evidence presented in Madonna's motion for summary judgment shows that Parnell received services from Madonna, obtained a settlement as compensation for his injuries, and was billed by Madonna for the services he received pursuant to a fixed set of charges. Under these circumstances, there is no issue of material fact and Madonna is entitled to judgment as a matter of law. Accordingly, the district court was correct in sustaining Madonna's motion for summary judgment.

Parnell also contends that the district court abused its discretion by not allowing him to amend his petition. Parnell argues that this court questioned the constitutionality of § 52-401 in *In re Conservatorship of Holle*, 254 Neb. 380, 576 N.W.2d 473 (1998), which was released by this court during the time that the motion for summary judgment was pending. Based on *In re Conservatorship of Holle*, Parnell argues that he should have been allowed to amend his petition in order to assert that § 52-401 is unconstitutional.

[5,6] A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998). Absent some mitigating factor which justifies raising new issues by a party after a motion for summary judgment has been heard and submitted, denying a motion to amend pleadings is not an abuse of discretion. *Id.* Unless evidence or testimony exists in the record indicating that a proposed claim or defense was newly discovered or that counsel was unaware of the claim or defense prior to the pending action, the proposed amendment is merely a belated effort to inject issues of material fact into a proceeding where previously the pleadings revealed none. *Id.*

[7] In the instant case, there was no new discovery of previously unknown facts which made Parnell aware of the possibility of a new claim. Rather, he could have raised the constitutionality of § 52-401 under the same facts found in his original pleading. Further, *In re Conservatorship of Holle* did not call the constitutionality of § 52-401 into question. Rather, it merely stated that we were not considering that issue in that case.

A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court. *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997); *Grammer v. Endicott Clay Products*, 252 Neb. 315, 562 N.W.2d 332 (1997). Under these circumstances, it was not an abuse of discretion for the district court to deny Parnell the opportunity to amend his pleadings. Accordingly, the order of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

IN RE INTEREST OF NATASHA H. AND SIERRA H., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANGEL H., APPELLANT, AND JOHN H., APPELLEE.

602 N.W.2d 439

Filed November 12, 1999. Nos. S-98-1116, S-98-1117.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests.
3. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from that of a trial court.
4. **Parental Rights: Rules of Evidence: Due Process.** Notwithstanding that the Nebraska rules of evidence do not apply in dispositional hearings held in proceedings arising under the Nebraska Juvenile Code, the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated.
5. **Parental Rights: Evidence: Appeal and Error.** Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record.

6. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
7. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
8. **Due Process: Notice: Words and Phrases.** The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified.
9. **Due Process.** The extent to which procedural due process must be afforded a recipient is influenced by the extent to which the recipient may be condemned to suffer grievous loss.
10. **Evidence: Appeal and Error.** Evidence objected to, which is substantially similar to evidence admitted without objection, results in no prejudicial error.
11. **Parental Rights.** Under Neb. Rev. Stat. § 43-292(5) (Reissue 1998), when a natural parent suffers from a mental deficiency and cannot be rehabilitated within a reasonable period of time, the best interests of the child require that a final disposition be made without delay.
12. ___. Where a parent is unable to discharge parental responsibilities because of mental illness or disorder and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is found to be in the best interests of the children.
13. **Parental Rights: Statutes: Words and Phrases.** A mental deficiency, as used in Neb. Rev. Stat. § 43-292(5) (Reissue 1998), includes an impairment in capacity such that a parent is unable to profit from instruction and acquire parenting skills.
14. **Parental Rights.** Children cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity.
15. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
16. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 1996), if affirmative relief is to be obtained.

Appeal from the County Court of York County: CURTIS H. EVANS, Judge. Affirmed.

Julie L. Reiter, of Mills & Reiter, for appellant.

Randy R. Stoll, York County Attorney, for appellee State.

Stephen A. Burt, of Jeffrey, Hahn, Hemmerling, & Zimmerman, for appellee John H.

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

MCCORMACK, J.

BACKGROUND

Natasha H. was born to John H. and Angel H. on June 21, 1996, and was placed in the temporary custody of the then Nebraska Department of Social Services, now the Department of Health and Human Services (Department), the day after her birth. Sierra H. was born to the same parents on September 11, 1997, and was taken into custody by the Department on that date.

On July 15, 1991, Samantha H. had been born to John and Angel. On August 16, 1991, Samantha was severely injured by John, who shook her violently after she woke him. Samantha suffered severe neurological injuries which have caused permanent and profound brain damage. John was convicted of felony child abuse, and the parental rights of John and Angel to Samantha were terminated.

In 1995, John was charged with third degree assault after he severely beat Angel. Initially, Angel was the complaining witness, but at trial, she substantially retracted her initial statements in an apparent attempt to protect John. John was convicted nonetheless and sentenced to 350 days in the York County Jail. Angel and John maintained their relationship despite John's abusive behavior, and Natasha was conceived during John's jail term while he was out on work release.

On August 26, 1996, Natasha was adjudicated and found to be within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). *In re Interest of Natasha H.*, 97 NCA No. 28, case No. A-96-964 (not designated for permanent publication), *petition for further review overruled* 253 Neb. xxvii (Sept. 17, 1997). Angel, but not John, appealed to the Nebraska Court of Appeals, which affirmed. *Id.* Sierra was similarly adjudicated on December 4, 1997. The trial court specifically found that Angel was either unwilling or unable to protect herself and her children from John's abusive behavior.

The trial court issued rehabilitation plans for Angel relating to Natasha and Sierra on January 23, 1998. The orders generally required Angel to engage in psychotherapy, stop using drugs,

establish a home for herself, stop covering up John's behavior, and make a decision about her future relationship with John. No appeal was taken from the rehabilitation plan.

On April 17, 1998, the State filed petitions to terminate parental rights of John and Angel to Natasha and Sierra, pursuant to Neb. Rev. Stat. § 43-292 (Cum. Supp. 1996). On May 14, the State amended its petition to allege grounds under the recently amended Neb. Rev. Stat. § 43-292 (Reissue 1998).

The matter came on for hearing on July 16, 1998. The trial court found that termination of parental rights for both Natasha and Sierra was warranted pursuant to § 43-292(2), (5), and (6), and, for Natasha, also on the basis of § 43-292(7). The trial court also found, with respect to John, that he had committed a felony assault that resulted in serious bodily injury to another of his minor children, within the meaning of § 43-292(10)(d). Angel appeals. John filed a notice of appeal in Sierra's case but not in Natasha's case. The appeals relating to Natasha and Sierra have been consolidated in this court.

ASSIGNMENTS OF ERROR

In both appeals, as consolidated and restated, Angel assigns that the trial court erred in (1) entering an order terminating her parental rights 6 months after identifying reunification as the permanency objective, where the facts establish that Angel was working toward compliance with the rehabilitation plan; (2) applying 1998 Neb. Laws, L.B. 1041 (the 1998 amendment to § 43-292) retroactively to the present case; (3) finding that Angel had denied the children necessary care and protection; (4) finding that Angel was unable to discharge parental responsibilities because of a mental deficiency; (5) finding that reasonable efforts to preserve or reunify the family were made or that such efforts had failed to correct the conditions leading to the adjudications; (6) finding that Angel's continued relationship with John supported termination of parental rights; (7) finding that Angel failed to comply with the terms of the dispositional orders; and (8) finding that it was in the best interests of the children that parental rights be terminated.

Additionally, in the appeal with respect to Natasha, Angel assigns that the trial court erred in (9) continuing to hold

dispositional hearings relating to John during Angel's appeal from the adjudication and (10) excluding Angel from participating in John's dispositional hearings and using evidence obtained at those hearings against Angel at the termination of her parental rights hearing.

John, as appellee, assigns, restated, that the trial court erred in (1) applying L.B. 1041 retroactively and (2) in overruling his continuing objection to the sufficiency of the State's petition. John has not, however, designated his brief as a cross-appeal as required by Neb. Ct. R. of Prac. 9D(4) (rev. 1996).

SCOPE OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Danielle D. et al.*, 257 Neb. 198, 595 N.W.2d 544 (1999).

[2] Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting such and that such is in the juvenile's best interests. *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997).

[3] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from that of a trial court. *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

[4,5] Notwithstanding that the Nebraska rules of evidence do not apply in dispositional hearings held in proceedings arising under the Nebraska Juvenile Code, the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute

reversible error, for, as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record. *Id.*

ANALYSIS

DUE PROCESS

In Natasha's case, Angel claims the trial court erred in excluding her from participation in John's dispositional hearings while her appeal from the adjudication was pending.

[6] Angel appears, to some extent, to be arguing that the trial court did not have jurisdiction to act regarding John while Angel's case was on appeal. Angel does not have standing to raise this claim. In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998). To the extent that Angel is arguing that the trial court lacked jurisdiction to proceed against John, she is asserting his rights and not her own.

Angel also argues that her own due process rights were violated by the trial court's determination to proceed against John, yet prevent her from participating while her appeal was pending. This presents a procedural due process claim.

[7-9] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998); *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998). The extent to which procedural due process must be afforded a recipient is influenced by the extent to which the recipient may be condemned to suffer grievous loss. *In re Interest of Constance G., supra.*

The foregoing propositions, however, assume that the complaining party's rights have, in fact, been affected. In short, in order to sustain her procedural due process claim, Angel must demonstrate that the trial court's actions in some way prejudiced her, as error without prejudice provides no ground for appellate relief. See *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988). In this regard, the only prejudice Angel claims is that the record of the hearing conducted without her participation was admitted into evidence at the termination of parental rights hearing as exhibit 11.

[10] An examination of exhibit 11 reveals that its admission did not result in prejudice to Angel. Exhibit 11 is the testimony from a dispositional hearing relating to John and contains information relating to John's participation in counseling sessions. There is no information in exhibit 11 that casts any light on Angel, unfavorably or otherwise. Moreover, the record is replete with other sources for the same information contained in exhibit 11, none of which are complained of on appeal. Evidence objected to, which is substantially similar to evidence admitted without objection, results in no prejudicial error. See *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997).

In short, the admission and consideration of exhibit 11 did not prejudice Angel, and Angel alleges no other prejudicial effect from her failure to participate in John's dispositional hearing. As Angel has not shown how her rights have been affected, she has not raised a colorable claim that her right to procedural due process was denied.

Basis for Termination

Angel essentially assigns as error all of the factual findings underlying the trial court's grounds for termination of her parental rights. We turn first to termination under § 43-292(5) (Cum. Supp. 1996), which provides:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:

. . . .

(5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.

We note that this subsection was not affected by the 1998 amendments to § 43-292. See § 43-292(5) (Reissue 1998). Consequently, this subsection presents no question regarding retroactive application of the amended statute.

Factual Record

The evidence presented at the termination of parental rights hearing indicated, generally, that although Angel did not pose a danger to the children, John did, and that Angel's relationship with John was such that she was unable to disassociate herself from him and would be unable to protect her children from his violent behavior.

Sherrie Spilde, one of the parents' caseworkers with the Department, testified that generally, Angel had complied with the case plan prepared by the Department. Angel rarely missed visitation with the children, acted appropriately with the children, attended a support group for victims of domestic violence, and obtained employment. Angel also rented a residence separate from John's.

John, however, failed to take anger management classes as directed by the case plan. John also admitted to the abuse which left John and Angel's oldest daughter, Samantha, in a vegetative state and resulted in the termination of their parental rights to Samantha. Spilde observed an instance where John failed to control his anger. John did see a counselor, a Reverend Blanchard, but discontinued that treatment after a few sessions. John also made some threatening telephone calls, apparently to law enforcement officials.

Despite some progress, Spilde testified that Angel continued to be detrimentally involved with John. Angel documented instances of John's anger, but she took responsibility for those events. Angel moved out of John's home but returned after 6 weeks. Angel also sought a protection order against John but voluntarily dismissed the order after a few days and again

returned to John. Spilde also saw an incident in which Angel reinforced John's anger toward others. In short, Spilde said that Angel had made progress but was still unable to protect her children from John.

Lee C. Zlomke, a clinical psychologist, testified regarding his observations and diagnoses of John and Angel. Zlomke testified that although he proposed providing family services to John in John's home, John refused, and was resistant to therapy. Zlomke testified that John was suffering from an unsocialized, aggressive personality disturbance that posed a risk to his children. Zlomke testified that John would require years of therapy before his condition might improve and that even then, such therapy was unlikely to be successful.

Zlomke diagnosed Angel as having a passive-dependent personality disorder. Zlomke said that Angel, like John, would require years of therapy and that Angel would, prior to completion of therapy, be unable to protect her children from John. Zlomke also testified that before reunification could be achieved, John and Angel would have to attend family therapy after they had each completed individual therapy. Zlomke concluded that John and Angel were unlikely to successfully complete therapy.

Helen M. Montoya, another clinical psychologist, also testified regarding John and Angel. Montoya diagnosed John as having a paranoid personality disorder as well as an antisocial personality disorder. Montoya also testified that John was a drug abuser, as John informed her that he used marijuana daily and would continue to do so. Montoya testified that John represented a risk to his children and that although John had made progress, he would require another 4 to 5 years of therapy to address his psychological problems.

Angel was diagnosed as having an adjustment disorder, a dependent personality disorder, and a drug abuse problem. Montoya testified that John dominated and controlled Angel, in part by isolating her from other influences. Montoya testified that Angel needed 2 to 4 years of therapy to address her disorders but that she would be incapable of changing unless John changed as well. Montoya concluded that John and Angel, together, posed a risk to their children.

Julia Christoffersen, a family therapy psychologist, testified regarding her treatment of Angel. Christoffersen testified generally that Angel had made some progress in addressing her problems, but had been unable to separate herself from John, and that Angel depended on John to provide meaning to her life.

Christoffersen testified that although Angel obtained her own apartment in February 1998, in part paid for by the Department, Angel had not, at the time of the hearing, moved into the apartment on a full-time basis. John reportedly interfered with Angel's attempts to live independently. Christoffersen testified that Angel reported that she had decided, in March, to seek legal separation from John but that this was not done. Angel told Christoffersen that Angel would be unable to remain in Nebraska and still separate from John. In fact, Angel intended to go on vacation with John at the end of July 1998, after the termination of parental rights hearing.

Ervin Kopp, an employee of Omni Behavioral Health, testified regarding his observations while supervising John and Angel's visitation. Kopp testified that he had seen John, on several occasions, lose his temper and that John had, on one occasion, seemed to threaten Kopp with physical violence. Shannon Marksbury, another employee of Omni Behavioral Health, confirmed that John and Angel were going on vacation together and also testified that Angel was not spending nights at her own apartment. Karen Bachman, a domestic abuse advocate for Blue Valley Community Action Crisis Intervention, testified that Angel had been attending a domestic violence support group and, in her opinion, was making progress.

Dawana Wilcox, the Department caseworker assigned to John and Angel at the time of the termination of parental rights hearing, testified regarding her observations. Wilcox testified that Angel had not reached a decision regarding her relationship with John, as she had been directed to do by the trial court. Wilcox confirmed that Angel had not sought a separation or divorce. Wilcox stated that Angel had not moved into her own apartment on a full-time basis. Wilcox also testified that John had attended some anger management classes, but had quit. Wilcox also testified regarding an incident, shortly before the termination hearing, in which John had physically assaulted Angel, pinned her

onto a bed, and screamed at her regarding her attempts to move out of his home.

Angel testified on her own behalf. She stated that although she had secured employment, John did not like her having a job. Angel testified that she had not made a decision regarding her relationship with John and did not know when she would. Angel confirmed the details of the incident in which John pinned her onto the bed and yelled at her. Angel testified that, generally, she was uncertain about the future of her relationship with John.

Angel admitted that John was a danger to their children, but asserted that he was not a danger to them when she was present. She discussed her frustration with John that he was unwilling to attend therapy. Angel admitted that she and John were planning a vacation to Kansas City together and also admitted that despite having her own apartment, she spent many nights at John's. Regarding her children, Angel testified that there was mutual affection between them and that she felt they would miss each other if separated.

John did not testify at the termination hearing.

Mental Defect or Deficiency

[11,12] Under § 43-292(5), when a natural parent suffers from a mental deficiency and cannot be rehabilitated within a reasonable period of time, the best interests of the child require that a final disposition be made without delay. *In re Interest of D.A.B. and J.B.*, 240 Neb. 653, 483 N.W.2d 550 (1992). We have held that where a parent is unable to discharge parental responsibilities because of mental illness or disorder and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is found to be in the best interests of the children. See *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991).

In *In re Interest of C.A.A. and V.S.A.*, 229 Neb. 135, 425 N.W.2d 621 (1988), the mother was diagnosed with borderline intellectual ability and dependent personality disorder. We noted the opinion of a psychologist that "in order for the children to be without danger and exist in a situation in which there was a very low likelihood of neglect, the mother would essentially need to

have someone acting in a parental role for her." *Id.* at 137, 425 N.W.2d at 622. The psychologist further testified that "the mother's mental condition will continue for a prolonged and indeterminate period" and that the dependent personality disorder was "by definition a long-term pervasive and relatively unchanging diagnosis." *Id.* at 137, 425 N.W.2d at 623. This court affirmed the termination of the mother's parental rights pursuant to § 43-292(5), stating that "[a]lthough termination of parental rights may sometimes appear cruel or harsh, experience has shown that failure to terminate parental rights in appropriate cases simply punishes the child for the uncorrectable deficiencies of the parents, thereby extending the same problems and conditions into successive generations." *Id.* at 138-39, 425 N.W.2d at 623.

In re Interest of D.L.S., 230 Neb. 435, 432 N.W.2d 31 (1988), also presented a factual situation that was extremely similar to that in the instant case. In that case, the father abused the child, and the mother was diagnosed with a dependent personality disorder. *Id.* Two psychological experts expressed concern that the mother would inevitably choose a boyfriend or husband who would take control and potentially harm the child. *Id.* One expert testified that with up to 2 years of therapy, the mother could overcome her disorder, while the other expert testified that the condition was potentially treatable with long-term therapy over an indeterminate period of time. *Id.*

[13] We determined that a "mental deficiency," as used in § 43-292(5), included an impairment in capacity such that a parent was unable to profit from instruction and acquire parenting skills. *Id.* We concluded that

> even to the extent the disorder is theoretically treatable, assuming that to mean it is curable, the record tells us that the treatment would extend over an indeterminate period. The only concrete suggestion is that treatment would take another 2 years. We cannot gamble away an additional 2 years of this child's life on the speculative hope that the mother can overcome the deficiency which she, albeit through no fault of her own, brought to motherhood. As we have noted in the past, a child cannot, and should not, be

> suspended in foster care, nor be made to await uncertain parental maturity.

Id. at 445, 432 N.W.2d 38.

As detailed above, the record in the instant case contains ample testimony from psychological experts, stating that Angel suffers from personality disorders which render her unable to adequately protect her children and that these disorders will take years to treat, if they can in fact be successfully treated at all. This record provides clear and convincing evidence that Angel's personality disorder prevents her from discharging parental responsibilities and that she cannot be rehabilitated within a reasonable period of time.

BEST INTERESTS

Under § 43-292(5), the State must also show that termination of parental rights is in the best interests of the children. The evidence established that John is a threat to his children and will not cease to be a threat in the foreseeable future. The evidence further established that Angel is psychologically dependent upon John, that she is likely to remain so for the foreseeable future, and that she is unable to protect her children from the threat he represents. Given the unlikelihood that Angel will be able to sever her relationship with John, the best interests of the children require termination of the parental rights of both parents in order to protect them from John's abuse.

[14] Some of the evidence at trial did establish that Angel is making slow progress toward independence from John. It would certainly appear to be to her benefit to do so. Nonetheless, this has not yet been accomplished and is not likely to happen for a significant period of time, if at all. We have often said that children cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). In the interim, it cannot be "remotely proper" to subject these children "to an environment where violence, abuse . . . and drugs reign supreme, and where no one appears to be able or willing to defend [these] helpless little human being[s] from the hazards that inevitably flow from such conditions." See *In re Interest of D.L.S.*, 230 Neb. 435, 450-51, 432 N.W.2d 31, 41 (1988) (Grant, J., concurring).

Given the danger posed by John and Angel as a couple to the well-being of their children, and given the near certainty that preserving the parental rights of Angel is tantamount to maintaining the threat posed by John, at least for the foreseeable future, the clear and convincing evidence is that the best interests of the children weigh in favor of termination of Angel's parental rights.

As termination of Angel's parental rights was appropriate pursuant to § 43-292(5), we need not consider Angel's assignments of error relating to the other grounds for termination.

JOHN'S CROSS-APPEAL

[15] John did not raise in the trial court the first assignment of error he sets forth in his brief, in which he states that the court erred in applying L.B. 1041 retroactively. In the absence of plain error, when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

John also has failed to properly cross-appeal in either case. John's brief is entitled simply "Brief of Appellee." John is an appellee, as provided by Neb. Rev. Stat. § 25-1913 (Reissue 1995), which provides:

> The cause shall be docketed in the Court of Appeals or Supreme Court under the same title it had in the district court. The party or parties asking for the reversal, vacation, or modification of such judgment, decree, or final order shall be designated as appellant or appellants, and the adverse party or parties shall be designated as appellee or appellees.

John is not merely resisting the claims of the appellant, however. He is seeking affirmative relief, but his argument is not designated as a cross-appeal as required by rule 9D(4), which provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be

headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

[16] The appellate courts of this state have repeatedly indicated that a cross-appeal must be properly designated, pursuant to rule 9D(4), if affirmative relief is to be obtained. See, *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999); *Osborn v. Kellogg*, 4 Neb. App. 594, 547 N.W.2d 504 (1996); *Ainslie v. Ainslie*, 4 Neb. App. 70, 538 N.W.2d 175 (1995), *aff'd* 249 Neb. 656, 545 N.W.2d 90 (1996). Compare, *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994) (considering assignment of error where appellee mistakenly filed notice of appeal and designated brief as that of appellant); *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990) (considering assignments of error where cross-appellants mistakenly designated themselves as appellants).

In *Schindler v. Walker, supra*, the appellee did not designate a cross-appeal on the cover of its brief, nor did it set forth a specific assignment of error. This court affirmed the determination of the Court of Appeals that the appellee had defaulted the argument, given its failure to assign an error or comply with the requirements of rule 9D(4). *Id.*

In *Osborn v. Kellogg, supra*, the appellant landlords appealed from a judgment in favor of the appellee tenant from the Nebraska Equal Opportunity Commission. In her brief on appeal, the appellee argued that she was entitled to greater compensatory damages than she had been awarded. *Id.* She did not, however, assign the alleged error, nor did she label her brief as a cross-appeal pursuant to rule 9D(4). *Id.* The Court of Appeals refused to consider her argument on those bases. *Id.*

In *Ainslie v. Ainslie, supra*, the husband appealed from a divorce decree which awarded him what he alleged was insufficient alimony. In her appellee's brief, the wife argued that no alimony should have been awarded at all and sought a reversal of that portion of the decree. *Id.* The Court of Appeals noted that the wife failed to present a cross-appeal pursuant to rule 9D(4) and, accordingly, viewed her position as merely resisting the increase in alimony sought by the husband. *Id.*

In *Knaub v. Knaub, supra*, the trial court awarded the divorcing wife attorney fees against both the husband and the husband's attorney. The first notice of appeal was filed by the husband's attorney in his individual capacity. *Id.* Subsequently, the husband filed his own notice of appeal through counsel. *Id.* The husband and his attorney filed a combined brief, which designated both of them as appellants. *Id.* Upon further review of the Court of Appeals, this court noted that since the husband's attorney had filed the first notice of appeal, the husband himself was actually an appellee, and had not complied with the rules for presenting a cross-appeal. *Id.* Since the combined "appellants' brief" comported with the rules for an appellants' brief, however, this court considered the husband's assignments of error. *Id.*

In re Application A-16642, supra, presented an instance in which a number of parties challenged an order of the Director of Water Resources granting a permit sought by the Nebraska Game and Parks Commission. One of the objectors filed a notice of appeal, thereby relegating the other objectors to the status of appellees and cross-appellants. *Id.* Two of the objectors mistakenly designated themselves as appellants. *Id.* This court noted the error, but nonetheless considered their assignments of error. *Id.*

The present case is governed by the rule set forth in *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999); *Osborn v. Kellogg*, 4 Neb. App. 594, 547 N.W.2d 504 (1996); and *Ainslie v. Ainslie*, 4 Neb. App. 70, 538 N.W.2d 175 (1995), *aff'd* 249 Neb. 656, 545 N.W.2d 90 (1996). The distinguishing factor is that in *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994), and *In re Application A-16642, supra*, a party who was an appellee and should have cross-appealed mistakenly designated itself as an appellant, rather than as a cross-appellant. In this case, as in *Schindler v. Walker, supra*; *Osborn v. Kellogg, supra*; and *Ainslie v. Ainslie, supra*, the party that should have cross-appealed designated itself as an appellee, yet still sought affirmative relief.

In short, the appellate courts of this state have always refused to consider a prayer for affirmative relief where such a claim is raised in a brief designated as that of an appellee. We have, in the past, decided to entertain a procedurally defective cross-appeal only where such cross-appeal has been mistakenly

asserted as an appellant's brief. Even this is a matter left solely to the discretion of the courts and does not imply a willingness to consider such defective appeals in the future.

Parties wishing to secure appellate review of their claims for relief must be aware of, and abide by, the rules of this court and the Court of Appeals in presenting such claims. Any party who fails to properly identify and present its claim does so at its peril. See *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). John has not complied with the rules of this court in the instant case, and we decline to waive those rules on his behalf.

CONCLUSION

Angel suffered no prejudice from the trial court's exclusion of her from John's dispositional hearings during the pendency of her prior appeal. The State proved, by clear and convincing evidence, that Angel was unable to discharge parental responsibilities because of mental illness or mental deficiency; that there were reasonable grounds to believe that such condition would continue for a prolonged, indeterminate period; and that termination of Angel's parental rights was in the best interests of the children. John did not raise in the trial court the first assignment of error he sets forth in his brief and has not properly cross-appealed the trial court's judgment. Consequently, the orders of the trial court terminating John's and Angel's parental rights to Natasha and Sierra should be, and are, affirmed.

AFFIRMED.

IN RE INTEREST OF SUNSHINE A. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LAURA A., ALSO KNOWN AS LAURA H., ALSO KNOWN AS LAURA J., APPELLANT.

602 N.W.2d 452

Filed November 12, 1999. No. S-98-1381.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Parental Rights: Evidence.** An order terminating parental rights must be based on clear and convincing evidence.
3. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights: Evidence: Proof.** The language of Neb. Rev. Stat. § 43-292 (Reissue 1998) imposes two requirements before parental rights may be terminated. First, requisite evidence must establish the existence of one or more of the circumstances described in subsections (1) to (10) of § 43-292. Second, if a circumstance designated in subsections (1) to (10) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. Each of the requirements prescribed by § 43-292 must be proved by clear and convincing evidence.
5. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
6. **Parental Rights: Abandonment: Words and Phrases.** In the context of Neb. Rev. Stat. § 43-292(1) (Reissue 1998), "abandonment" is defined as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
7. **Parental Rights: Abandonment.** If a parent voluntarily, but unreasonably or unjustifiably, departs from the state of residence of the parent's child or children, such departure may constitute parental abandonment of the child or children.
8. ___: ___. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
9. ___: ___. Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child. Small tokens of parental affection for a child are an inadequate substitute for parental presence in a child's life.

10. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
11. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Affirmed.

Jennifer A. Huxoll, of Glynn & Bollerup, P.C., for appellant.

Gary E. Lacey, Lancaster County Attorney, and Marcie A. Hagerty for appellee.

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

STEPHAN, J.

Laura A. is the natural mother of Sunshine A., born May 26, 1986; Joseph A., born August 3, 1988; and Maria A., born April 29, 1991. Laura appeals from an order of the separate juvenile court for Lancaster County which terminated her parental rights to each of the three minor children pursuant to Neb. Rev. Stat. § 43-292(1) and (7) (Reissue 1998) and committed the children to the custody of the Nebraska Department of Health and Human Services (DHHS). Laura contends that there is insufficient evidence to establish abandonment under § 43-292(1) and that the juvenile court's retroactive application of § 43-292(7), operative July 1, 1998, violated her due process rights. We conclude that there is clear and convincing evidence which supports termination of parental rights under § 43-292(1) and therefore affirm.

FACTS

In June 1995, the three children who are the subject of this proceeding were removed from Laura's physical custody and placed in the temporary legal custody of DHHS because of filthy conditions in Laura's home and her failure to adequately feed and clothe them. In July, following adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993), the children were placed in the home of their maternal grandmother, Anna Hopkins, and her husband, Gene Acosta. The children have

resided in Hopkins' home at all times since the original placement. During that time, various behavioral, speech, and educational deficiencies they exhibited at the time of placement have improved considerably, and all of the children have become involved in school and in numerous extracurricular activities.

On July 29, 1998, the State filed a supplemental motion to terminate Laura's parental rights pursuant to § 43-292(1), (5), and (7). A termination hearing was held on October 26. Laura did not attend, but she was represented by counsel. Also present at the hearing were a guardian ad litem for the children and a guardian ad litem appointed for Laura. Hopkins and Stephanie Stromp, a caseworker employed by DHHS, appeared as witnesses for the State.

Hopkins testified that Laura last saw her children in July 1997. Laura then left Nebraska so she could travel throughout the country "spreading the word about parents . . . having their children taken away by the State." According to Hopkins, Laura claims to be building momentum for an uprising by people who resent such governmental action and believes "the whole country is really moving in behind her." At the time of the hearing, Laura had been living in a bus stop in El Paso, Texas, for about a year. She derives her income from standing on a street corner with other people, singing, dancing, and begging for money.

Between January and October 1998, Laura telephoned the Hopkins residence 50 or 60 times, averaging once or twice a week. She spoke to her children on two or three of these occasions. During these conversations, Laura always asked about the children's health but did not inquire about their progress in school. She changed the subject when Hopkins attempted to tell her about the children's activities because she was " 'not interested in that.' " The children have stopped offering information about their education and activities to avoid receiving Laura's negative response, and Joseph does not wish to speak with her at all. Hopkins and the children have no direct means of contacting Laura. They can attempt to reach her by calling two pay telephone numbers Laura has provided and leaving a message with anyone who answers, or by leaving messages with the local police or outreach workers in El Paso. Hopkins testified that

Laura wants her three children to live the kind of lifestyle she is living, because Laura feels "there was some meaning in that."

Since January 1998, Laura has provided no financial or material support for her children, either directly or through DHHS. During the time the children have been living with Hopkins, Laura has sent them small gifts approximately once every 3 to 6 months. She sent gifts more frequently during the 3 months preceding the termination hearing. Laura has indicated to Hopkins that she wants to continue to be the children's mother; however, within the year preceding the termination hearing, she had not expressed a willingness to return to Lincoln to parent her children, stating only that if she returns to Lincoln, she would like to see them.

Laura told Hopkins that she has no intention of following orders entered by the juvenile court establishing requirements for reunification with her children. Rather, Laura believes that traveling around the country talking to people about "the injustice of it all" is the more appropriate method for obtaining the return of her children and hopes to fundamentally change the system. Laura told Hopkins that she does not wish to follow the juvenile court's orders because her cause extends beyond her immediate situation.

Hopkins has a master's degree in social work and is employed as a licensed psychotherapist working with families and children. She testified that when the children came to live with her, their performance in school was not at an appropriate level for their ages, but that they have subsequently made significant improvement. As their grandmother and caregiver, Hopkins believes that it is in the best interests of the children to remain in her care.

Stromp, the DHHS caseworker assigned to this case, testified that she has had some contact with Laura since August 1996, but that communication has been difficult because Laura does not have a permanent address or telephone number. Further, Stromp testified that she has never been able to meet with Laura consistently and has not met with Laura at all since May 1997. It was Stromp's opinion that terminating Laura's parental rights would be in the children's best interests. She based this opinion upon the length of time the children have been out of Laura's home

and the fact that they have a safe and secure environment in Hopkins' home where their educational and other needs are being met. Stromp further opined that the children need permanency, which Hopkins and Acosta could provide upon adoption, and that the children want to remain with Hopkins. According to Stromp, Laura has not taken advantage of opportunities or made any progress in correcting the problems which led to the children's removal and, thus, has not complied with the juvenile court's orders. Stromp stated that the DHHS permanency plan called for adoption of the children by Hopkins and Acosta upon termination of parental rights. No evidence was offered on behalf of Laura.

In an order filed November 4, 1998, the juvenile court made findings based upon clear and convincing evidence that Laura had abandoned her children for 6 months or more immediately prior to the time the motion to terminate parental rights was filed; that the children had been "in an out-of-home placement for eighteen (18) or more months and fifteen (15) of the most recent twenty two (22) months"; and that termination of the parental rights of Laura to Sunshine, Joseph, and Maria was in the best interests of the children. Based upon these findings, the court terminated Laura's parental rights pursuant to § 43-247(3)(a) and § 43-292(1) and (7), but dismissed the State's allegation of § 43-292(5) as a ground for termination. Laura perfected this appeal.

ASSIGNMENTS OF ERROR

Laura contends, restated, that the juvenile court erred in finding that the State had met its burden of proving by clear and convincing evidence that Laura had abandoned her minor children for 6 months or more immediately prior to the filing of the motion and that termination of Laura's parental rights was in the best interests of her minor children. Laura further contends that the juvenile court erred by retroactively applying the amended version of § 43-292(7).

STANDARD OF REVIEW

[1-3] In an appeal from a juvenile court order terminating parental rights, the appellate court tries factual questions de

novo on the record. Appellate review is independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999); *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998). An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of Constance G., supra*; *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

ANALYSIS

[4,5] The language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish the existence of one or more of the circumstances described in subsections (1) to (10) of § 43-292. Second, if a circumstance designated in subsections (1) to (10) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). Each of the requirements prescribed by § 43-292 must be proved by clear and convincing evidence. *Id.* Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). In this case, the juvenile court found that termination was in the best interests of the children and that there was clear and convincing evidence establishing the grounds for termination specified in § 43-292(1) and (7).

Sufficiency of Evidence of Parental Abandonment

[6] At all times relevant to this action, § 43-292(1) specified as an independent basis for termination of parental rights the

circumstance in which "[t]he parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition." We have defined "abandonment" in this context as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992); *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988). The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances. *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990); *In re Interest of C.A., supra*; *In re Interest of A.G.G., supra.*

[7] A significant and uncontroverted fact relevant to Laura's intent to fulfill her parental responsibilities is her voluntary absence from this state after the children were removed from her home. The record reflects that while Laura has traveled extensively throughout the country, she has not returned to Nebraska, where her children reside, since July 1997, and that she did not appear at the termination hearing. We have stated that if a parent voluntarily, but unreasonably or unjustifiably, departs from the state of residence of the parent's child or children, such departure may constitute parental abandonment of the child or children. *In re Interest of C.K., L.K., and G.K., supra*; *In re Interest of A.G.G., supra.* See *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990). For example, in *In re Interest of C.K., L.K., and G.K., supra*, a mother was absent from Nebraska for over 3½ years, during which time she had 30 different addresses while in 6 different states. She did not return to Nebraska until 1 month prior to the termination hearing, claiming that protracted unemployment rendered her financially unable to return sooner and that she was helping her former common-law husband search for his children. When she did return, she intended to stay only a few weeks before leaving for Minnesota, but then decided to stay longer and resume some visitation with her children when the petition to terminate her parental rights was filed. Further, the mother did not comply with the court-ordered rehabilitation plan, failing to attend numerous therapy sessions, parenting classes, and review

hearings. The mother's psychotherapist stated that the mother remained resistant to participating in therapy and had difficulty understanding why she should be involved. Noting that the mother had elected to remain separated from her children while pursuing other interests, we held that the mother had abandoned her children pursuant to § 43-292(1), justifying termination of her parental rights. We concluded:

> The mother's somewhat nomadic existence left little hope for parentally produced stability in the lives of her children, and her prolonged absence from Nebraska, coupled with her unwillingness to attend to the needs of her children, as demonstrated by her rejection of parenting classes and counseling sessions, demonstrates the mother's disregard for the basic needs of her young children. At a time in the lives of the children when they most needed their mother, there was only maternal itinerancy, not interest.

240 Neb. at 713, 484 N.W.2d at 75. The same can be said of Laura's relationship with her children.

[8,9] We are not persuaded by the argument made on Laura's behalf that notwithstanding her voluntary separation from her children, she has not abandoned them because she inquires about their health during her regular telephone calls to Hopkins; has sent them small gifts; and has stated, in telephone conversations with Hopkins, that "she wanted to continue to be a mother to her children." Brief for appellant at 10. As we have frequently stated, " '[a]bandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.' " *In re Interest of K.M.S.*, 236 Neb. 665, 670, 463 N.W.2d 586, 591 (1990). Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child. *In re Interest of E.G.*, 240 Neb. 373, 482 N.W.2d 17 (1992); *In re Interest of K.M.S., supra*. Small tokens of parental affection for a child are an inadequate substitute for parental presence in a child's life. See *In re Interest of C.A.*, 235 Neb. 893, 457 N.W.2d 822 (1990). Stated another way, the obligation which a parent owes to his or her children is not something which can simply be "phoned in."

Based upon our de novo review of the record, we conclude that for a period exceeding 6 months prior to the filing of the supplemental motion to terminate Laura's parental rights, Laura has intentionally, and without just cause or excuse, withheld her presence, care, love, protection, maintenance, and opportunity for display of parental affection from her three children. She has not seen them, furnished them with material or emotional support, or expressed interest in any aspect of their well-being and growth other than their physical health. She has quite clearly chosen to advocate her cause instead of raising her children and has given no indication that she ever intends to do more than periodically inquire about their health. Thus, there exists clear and convincing evidence to support a finding that Laura abandoned her children within the meaning of § 43-292(1).

RETROACTIVE APPLICATION OF § 43-292(7).

When the State's supplemental motion to terminate parental rights was filed on July 29, 1998, and at all subsequent times, § 43-292(7) provided that parental rights could be terminated upon a finding that "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." This language was derived from an amendment to the statute which became operative July 1, 1998. See 1998 Neb. Laws, L.B. 1041. Prior to its amendment in 1998, this statute provided that termination could be based upon a finding that

> [t]he juvenile has been in an out-of-home placement for eighteen or more consecutive months and the parents have failed to correct the conditions leading to the juvenile's out-of-home placement in spite of reasonable efforts and services to the parents ordered by the court or offered by the Department of Health and Human Services or other designated agency.

§ 43-292(7) (Cum. Supp. 1996).

The juvenile court correctly found that the children were in out-of-home placement for 18 consecutive months *and* 15 of the most recent 22 months, thus meeting the durational requirements of both the current and prior versions of § 43-292(7). However, the juvenile court made no specific finding as to whether Laura failed to correct the conditions which led to the

out-of-home placement despite reasonable efforts and services ordered by the court or DHHS, as required under the prior version of the statute. Based on this, Laura contends on appeal that the juvenile court erred in retroactively applying § 43-292(7), as amended, in violation of her due process rights.

[10] In her brief, Laura acknowledges that the supplemental motion for termination of parental rights "alleged as one of its grounds for termination language of the newly amended §43-292, section (7)." Brief for appellant at 11. Although she was thus placed on notice that the State was proceeding under the amended statute, Laura did not assert a due process challenge in the juvenile court. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997). Moreover, because we have concluded that the record supports a finding of abandonment under § 43-292(1), we need not reach the issue of whether the juvenile court erred in finding an additional factual basis for termination of parental rights under § 43-292(7), as amended.

Best Interests of Children

Having determined that the State has proved, by clear and convincing evidence, parental abandonment as set forth in § 43-292(1), we must next examine whether it has also shown, by the same quantum of proof, that termination of parental rights would be in the best interests of the children. The record reflects that since their placement in Hopkins' home in July 1995, the three children have grown and thrived. The inappropriate behavior and educational deficiencies noted by Hopkins when the children were initially placed in her care have been corrected. The children currently do well in school and are involved in such diverse activities as sports, chess, and music.

Acknowledging that the children are well cared for by Hopkins, Laura argues that the evidence does not establish that termination of parental rights would be in the best interests of the children, because there was no showing that the "children were experiencing behavior problems or other ill effects due to their time in foster care with their grandmother, or due to an actual or perceived lack of 'permanency.' " Brief for appellant

at 20. She further argues that little would be accomplished by terminating her parental rights, because Hopkins testified that she would probably allow the children to have the same type of contact with Laura that they have had since Laura last saw them in 1997. Laura contends that termination of parental rights and adoption of the children by Hopkins may diminish the children's eligibility for state benefits and concludes that "there was no showing that the children's current placement, as it stood prior to the termination of [Laura]'s parental rights, was failing to meet their 'permanency' needs." Brief for appellant at 21.

[11] The fact that children benefit from foster placement after they are removed from the custody of a natural parent does not lend support to an argument that termination of parental rights is not in their best interests. In *In re Interest of E.G.*, 240 Neb. 373, 482 N.W.2d 17 (1992), we noted that "[p]erhaps the most significant piece of evidence" bearing on the issue of whether termination of parental rights was in the best interests of the child was the fact that while in foster care, the child's "arrested state of development" at the time of removal from custody was being reversed. *Id.* at 382, 482 N.W.2d at 23. Moreover, Laura's argument in this regard clearly illustrates her failure to understand and appreciate a parent's role in raising a child. We have held that where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id.*; *In re Interest of R.A.*, 226 Neb. 160, 410 N.W.2d 110 (1987), *disapproved on other grounds, In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147. The concept of permanency is not simply a "buzzword," as Laura contends, but, rather, a recognition that when there is no reasonable expectation that a natural parent will fulfill his or her responsibility to a child, the child should be given an opportunity to live with an adult who has demonstrated a willingness and ability to assume that responsibility *and* has a permanent legal obligation to do so.

There is clear and convincing evidence that since their placement with Hopkins, the three children have lived in a stable, safe,

and secure environment where their educational, physical, and emotional needs are met. It is also evident that Laura has been either unable or unwilling to meet these needs in the past and demonstrates no interest or ability to do so in the future. We are satisfied that termination of Laura's parental rights, enabling the children's adoption by Hopkins, is in the children's best interests.

CONCLUSION

Based upon our de novo review of the record, we conclude that there is clear and convincing evidence that Laura abandoned Sunshine, Joseph, and Maria for a period of at least 6 months prior to the filing of the motion to terminate her parental rights and that there is clear and convincing evidence that such termination is in the best interests of the children. Accordingly, we affirm the judgment of the juvenile court terminating the parental rights of Laura to these children.

AFFIRMED.

IN RE APPLICATION OF PAUL RAYMOND CONVERSE FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION. PAUL RAYMOND CONVERSE, APPELLANT, V. NEBRASKA STATE BAR COMMISSION, APPELLEE.

602 N.W.2d 500

Filed November 19, 1999. No. S-34-990001.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 1996), the Nebraska Supreme Court considers the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. ___: ___: ___. When reviewing a final adverse ruling of the Nebraska State Bar Commission, the Nebraska Supreme Court shall reach a conclusion independent of the findings of the commission; however, where credible evidence is in conflict on a material issue of fact, an appellate court shall consider and may give weight to the fact that the commission heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Constitutional Law: Attorneys at Law.** A state is constitutionally entitled to make an inquiry into the moral character and past conduct of applicants seeking admission to the bar.

4. ___: ___. Notwithstanding the First Amendment to the U.S. Constitution, speech and conduct of an applicant to the bar may be considered by the Nebraska State Bar Commission to the extent such speech and conduct reflects upon the moral character and fitness of an applicant to practice law.
5. **Attorneys at Law: Proof.** Nebraska requires an applicant for admission to the bar to show that the applicant is of good moral character. Neb. Rev. Stat. § 7-102 (Reissue 1997).
6. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
7. **Attorneys at Law.** Behavior that will not be tolerated in attorneys admitted to practice law in Nebraska will not be tolerated in those applying for admission to the Nebraska bar.

Appeal from the Nebraska State Bar Commission. Affirmed; application denied.

Jay E. Denne, of Munger & Reinschmidt, for appellant.

Michael G. Lessmann and Denzel R. Busick for appellee.

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

PER CURIAM.

Paul Raymond Converse appeals a decision of the Nebraska State Bar Commission (Commission) denying his request to take the July 1998 Nebraska bar examination. Converse claims that the decision of the Commission should be reversed because the Commission rested its denial of Converse's application, at least in part, upon conduct protected by the First Amendment to the U.S. Constitution and, in the alternative, that Converse's conduct did not constitute sufficient cause under Nebraska law for denying his application on the ground of deficient moral character. For the reasons that follow, we affirm the decision of the Commission.

FACTUAL BACKGROUND

In 1998, Converse applied for permission to sit for the Nebraska bar examination. On June 29, 1998, Converse was notified by letter that the Commission had denied permission for him to take the July 1998 Nebraska bar examination because it had determined that Converse lacked the requisite moral char-

acter for admission upon examination to the Nebraska State Bar Association. On July 7, the Commission received notice that Converse was appealing the Commission's initial determination. Converse's appeal was heard on September 15, after which the Commission reaffirmed its initial determination and notified Converse on December 18 that he would not be allowed to sit for the Nebraska bar examination at that time.

The evidence at the Commission hearing revealed that as part of the application process, Converse was required to request that the dean of his law school submit a form certifying completion of Converse's law school studies. That form contained a question asking, "Is there anything concerning this applicant about which the Bar Examiners should further inquire regarding the applicant's moral character of fitness to practice law?" The question was answered, "Yes," and the dean also noted, "Additional information will be provided upon request." The Commission followed up on this notation by conducting an investigation which ultimately revealed certain facts regarding Converse.

After the completion of his first semester at the University of South Dakota (USD) Law School, Converse sent a letter to then assistant dean Diane May regarding certain issues—not relevant to this appeal—that he had had with the law school during fall classes, closing that letter with the phrase, "Hope you get a full body tan in Costa Rica." Subsequent to that note, Converse had several more encounters with May, beginning with his writing letters to May about receiving grades lower than what he believed he had earned in an appellate advocacy class.

After he received a grade he believed to be unjustified by his performance in the appellate advocacy course, Converse wrote letters to May and to the USD law school dean, Barry Vickrey, requesting assistance with an appeal of that grade. In addition to writing letters to Vickrey and May, Converse also sent a letter to the South Dakota Supreme Court regarding the appellate advocacy course professor's characterization of his arguments, with indications that carbon copies of the letter were sent to two well-known federal court of appeals judges. The letter was written to suggest the professor believed her stance on certain issues was more enlightened than that of the judges. Converse sent numer-

ous correspondence to various people regarding the grade appeal against the specific professor. Despite all such correspondence, Converse testified at the hearing that no formal appeal of the grievance was ever filed. Converse's grade was never adjusted.

The evidence showed that following the grade "appeal," Converse prepared a memorandum and submitted it to his classmates, urging them to recall an "incident" in which yet another professor lashed out at him in class, and to be cognizant of the image that incident casts "on [that professor's] core professionalism" prior to completing class evaluations. Converse also wrote a letter to a newspaper in South Dakota, the Sioux Falls Argus Leader, regarding a proposed fee increase at the USD law school. Converse immediately began investigating the salaries of USD law professors and posted a list of selected professors' salaries on the student bulletin board, as well as writing a letter that accused Vickrey of trying to pull a "fast one."

Converse's next altercation at the USD law school involved a photograph of a nude female's backside that he displayed in his study carrel in the USD law library. The picture was removed by a law librarian. In response to the removal of this photograph, Converse contacted the American Civil Liberties Union (ACLU) and received a letter indicating that his photograph might be a protected expression under the First Amendment. Once again, Converse went to the student newspaper to alert the student body of the actions of the law school authorities, accusing them of unconstitutional censorship.

Converse redisplayed the photograph once it was returned by the law librarians. Vickrey received several complaints about the photograph from other students, classifying Converse's behavior as "unprofessional and inappropriate." Upon Converse's redisplay of the photograph, Vickrey sent him a memorandum explaining that the picture would not be removed only because Vickrey did not want to involve the school in controversy during final examinations. Converse testified that he redisplayed the photograph in order to force the alleged constitutional issue.

The evidence also revealed that Converse filed an ethics complaint with the North Dakota Bar Association regarding certain correspondence between Vickrey and a retired justice of the

North Dakota Supreme Court. The complaint was dismissed. Converse went to the USD student newspaper, claiming that a letter from a retired North Dakota justice to the ACLU, in response to questions from Vickrey, was a violation of professional ethics (apparently Model Rules of Professional Conduct Rule 4.2 (1999), which precludes a lawyer from discussing matters with opposing parties the lawyer knows to be represented by counsel). In addition to going to the press, Converse also contacted the president of USD, referring to Vickrey as an "incompetent" and requesting that Vickrey be fired. In addition to this incident, Converse reported his suspicions about USD's student health insurance policy to the student newspaper under the title of "Law Student Suspects Health Insurance Fraud," as well as in a separate article alleging that USD had suppressed an investigation of its insurance carrier.

The Commission also heard testimony regarding Converse's attempt to obtain an internship with the U.S. Attorney's office in South Dakota. Converse arranged for the internship on his own, only to have his request subsequently rejected by the law school. Upon receiving his denial, Converse sent a complaint to all of USD's law school faculty members. Vickrey testified that Converse's internship was rejected because he failed to comply with the law school's procedures regarding internships. Converse then contacted the chairperson of the law school committee of the South Dakota State Bar Association with his complaint, expressly referring to Vickrey as being "arrogant." There is no indication of a response from the chairperson in the record.

The issue next considered by the Commission was that of various litigation threatened by Converse. Converse indicated that he would "likely" be filing a lawsuit against Vickrey for violations of his First Amendment rights. Converse was also involved in a dispute with other law students, in which he threatened to file a lawsuit and warned the students that all lawsuits in which they were involved would need to be reported to proper authorities when they applied to take a bar examination. Further, Converse posted signs on the bulletin board at the law school denouncing a professor, in response to the way in which Converse's parking appeal was handled, and then went to the

student newspaper to criticize the process and those involved in that appeal.

One of the final issues addressed by the Commission in its hearing was that of a T-shirt Converse produced and marketed on which a nude caricature of Vickrey is shown sitting astride what appears to be a large hotdog. The cartoon on the shirt also contains the phrase "Astride the Peter Principle," which Converse claims connotes the principle that Vickrey had been promoted past his level of competence; however, Converse admits that the T-shirt could be construed to have certain sexual overtones. Converse admitted that the creation of this T-shirt would not be acceptable behavior for a lawyer.

In response to not being allowed to post signs and fliers at the law school, Converse sent a memo to all law students in which he noted to his fellow students that his "Deanie on a Weanie" T-shirts were in stock. In that same memo, Converse included a note to his schoolmates:

> So far 4 causes of action have arisen, courtesy Tricky Vickrey. [He then listed what he believed the causes of action to be.] When you pass the SD Bar, if you want to earn some atty [sic] fees, get hold of me and we can go for one of these. I've kept evidence, of course.

Vickrey asked Converse not to wear his T-shirt to his graduation ceremony, and Converse decided that "it would be a better choice in [his] life not to go to that commencement." Converse acknowledges that Vickrey's request was made in a civil manner.

The evidence also revealed that prior to law school, Converse, in his capacity as a landlord, sued a tenant for nonpayment of rent and referred to the tenant as a "fucking welfare bitch." At the hearing, in response to questioning from the Commission, Converse testified at great length as to how he tends to personally attack individuals when he finds himself embroiled in a controversy.

After the Commission notified Converse on December 18, 1998, that he would not be allowed to sit for the Nebraska bar examination, Converse appealed the adverse determination to this court pursuant to Neb. Ct. R. for Adm. of Attys. 15 (rev. 1996).

ASSIGNMENTS OF ERROR

Converse claims, restated and renumbered, that the Commission erred in (1) basing its decision, in part, upon conduct and speech arguably protected by the First Amendment; (2) not making Converse aware of all of the "charges" against him in the proceedings in violation of the 14th Amendment; and (3) determining that Converse's conduct gave rise to sufficient cause under Nebraska law for the Commission to deny his application to sit for the Nebraska bar examination.

STANDARD OF REVIEW

[1,2] Under rule 15, this court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998). When reviewing such a determination, we reach a conclusion independent of the findings of the Commission; however, where credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the Commission heard and observed the witnesses and accepted one version of the facts rather than another. *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996).

ANALYSIS

Converse first assigns as error that the Commission's determination should not stand because it is based in large part upon speech that is protected by the First Amendment. Thus, the threshold question we must answer is whether conduct arguably protected by the First Amendment can be considered by the Commission during an investigation into an applicant's moral character and fitness to practice law. We answer this question in the affirmative.

There are four U.S. Supreme Court cases that provide particular guidance with respect to this issue. In *Konigsberg v. State Bar*, 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), the bar applicant argued that when the California bar commission forced him to either answer questions about his affiliation with the Communist Party or face the repercussions of not being

certified as possessing the required moral character to sit for the bar, the commission violated his First Amendment rights. The Supreme Court disagreed, pointing out that "regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment [forbids] . . . when they have been found justified by subordinating valid governmental interests." 366 U.S. at 50-51. In the context of a character inquiry, "it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically . . . exclude all reference to prior speech or association on such issues as character, purpose, credibility, or intent." 366 U.S. at 51. The Court balanced the effect of allowing such questions against the need for the state to do a complete inquiry into the character of an applicant and concluded that questions about membership would not chill association to the extent of harm caused by striking down the screening process. *Id.* The Court held that requiring the applicant to answer the questions was not an infringement of the applicant's First Amendments rights.

[3] In 1971, the Court was once again confronted with the issue and decided a trilogy of cases concerning the bar admissions procedures of various states. See, *Baird v. State Bar of Arizona*, 401 U.S. 1, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971); *In re Stolar*, 401 U.S. 23, 91 S. Ct. 713, 27 L. Ed. 2d 657 (1971); *Law Students Research Council v. Wadmond*, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971). It was the final case in this trilogy, *Law Students Research Council v. Wadmond*, that clarified the law as to the appropriate depth of a state bar commission's inquiry on an applicant's moral character. The Court declined to uphold a First Amendment attack against the admission procedure of the New York bar association. The Court upheld the statute, which required that the admitting authority be " 'satisfied that [the applicant] possesses the character and general fitness requisite for an attorney and counsellor-at-law.' " 401 U.S. at 156. The Court declared that a state is constitutionally entitled to make such an inquiry of an applicant for admission to the bar and placed its imprimatur upon a state's con-

ducting a preliminary inquiry into the moral character of those seeking admission. *Id.*

Converse conceded at oral argument that the Commission's decision cannot be based solely on an applicant's exercise of First Amendment freedoms but that it is proper for the Commission to go behind the exercise of those freedoms and consider an applicant's moral character. That is exactly what was done by the Commission in the instant case. An investigation of Converse's moral character is not a proceeding in which the applicant is being prosecuted for conduct arguably protected by the First Amendment, but, rather, "an investigation of the conduct of [an applicant] for the purpose of determining whether he shall be [admitted]." See *In re Doss*, 367 Ill. 570, 572, 12 N.E.2d 659, 660 (1937). Converse's reliance upon cases where a judgment was invalidated at least in part because it was based on conduct protected by the First Amendment is therefore misplaced.

[4] Were we to adopt the position asserted by Converse in this case, the Commission would be limited to conducting only cursory investigations of an applicant's moral character and past conduct. Justice Potter Stewart, writing for the majority in *Law Students Research Council v. Wadmond, supra*, noted that the implications of such an attack on a bar screening process are that no screening process would be constitutionally permissible beyond academic examination and an extremely minimal check for serious, concrete character deficiencies. "The principle means of policing the Bar would then be the deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits, and criminal prosecutions." 401 U.S. at 167. Assuming but not deciding that Converse's conduct may have been protected by the First Amendment to the U.S. Constitution, *Law Students Research Council v. Wadmond, supra*, makes clear that a bar commission is allowed to consider speech and conduct in making determinations of an applicant's character, and that is precisely what has occurred in the instant case. As aptly stated by the South Dakota Supreme Court in *In re Egan*, 24 S.D. 301, 326-27, 123 N.W. 478, 488 (1909):

> [T]here can be such an abuse of the freedom of speech and liberty of the press as to show that a party is not possessed

> "of good moral character," as required for admission to the bar of this state . . . and therefore to require that such person be excluded from the bar of this state; and to our mind the evidence submitted here shows such an instance. . . .
> "Nor can the respondent be justified on the ground of guaranteed liberty of speech. When a man enters upon a campaign of villification, he takes his fate into his own hands, and must expect to be held to answer for the abuse of the privilege extended to him by the Constitution. . . ."

We conclude that the Commission properly considered Converse's conduct as it reflects upon his moral character, even if such conduct might have been protected by the First Amendment. Converse's first assignment of error is therefore without merit.

Converse next contends that the Commission violated his due process rights by not making him aware of all of the "charges" against him in these proceedings. This argument is basically that when the Commission determined that he lacked the requisite moral character and gave some examples as to why they reached such a determination, they should have provided an all-inclusive list delineating every reason on which their decision was based. We conclude that such a procedure is not required.

By alleging that he has not been made fully aware of the "charges" against him, Converse has confused this inquiry into his moral character with a trial. Such is not the case. An inquiry regarding an application to the bar is not a lawsuit with the formalities of a trial, but, rather, is an investigation of the conduct of an applicant for membership to the bar for the purpose of determining whether he shall be admitted. See *In re Doss*, 367 Ill. 570, 12 N.E.2d 659 (1937). No charges have been filed against Converse, and he has been advised of the reasons for which his application was denied. Converse's assignment of error that he has been denied due process of law is therefore without merit.

Converse's third assignment of error alleges that the Commission erred by determining there was sufficient cause to deny his application to sit for the Nebraska bar exam. Much of his argument centers around his conduct being protected by the First Amendment, as discussed previously. However, the ques-

tion presented is not the scope of Converse's rights under the First Amendment, but whether Converse's propensity to unreasonably react against anyone whom he believes opposes him reveals his lack of professional responsibility, which renders him unfit to practice law. See *In re Martin-Trigona*, 55 Ill. 2d 301, 302 N.E.2d 68 (1973).

[5] There is no question that "[a] state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957). The Court has also stated that it must be "kept clearly in mind . . . that an applicant for admission to the bar bears the burden of proof of 'good moral character'—a requirement whose validity is not, nor could well be, drawn in question here." *Konigsberg v. State Bar*, 366 U.S. 36, 40-41, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961). "If at the conclusion of the proceedings the evidence of good character and that of bad character are found in even balance, the State may refuse admission . . . ." 366 U.S. at 42. Nebraska does, in fact, require a bar applicant to show that the applicant is of good moral character. See, *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993); Neb. Rev. Stat. § 7-102 (Reissue 1997). Therefore, the burden is upon Converse to adequately prove his fitness to practice law in Nebraska, and the evidence will be viewed in this light.

[6] The legal reality is that this court, and only this court, is vested with the power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998); *In re Application of Majorek, supra.* With that in mind, we commence our analysis with the standards for moral character required for admission to the Nebraska bar as set out in our rules governing the admission of attorneys. Neb. Ct. R. for Adm. of Attys. 3 (rev. 1998) governs this situation, which provides in pertinent part:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency by an applicant

> in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission. In addition to the admission requirements otherwise established by these Rules, the essential eligibility requirements for admission to the practice of law in Nebraska are:
>
> (a) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> . . . .
>
> (c) The ability to conduct oneself with respect for and in accordance with the law and the Code of Professional Responsibility;
>
> . . . .
>
> (j) The ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

Under rule 3, Converse must prove that his past conduct is in conformity with the standards set forth by this court, and the record in this case compels the conclusion that he has failed to do so.

We considered an appeal of a similarly situated bar applicant in *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996). *In re Appeal of Lane* involved an individual seeking readmission to the Nebraska bar whose past included confrontations with law school faculty, the use of strong and profane language with fellow students at his bar review course, the use of intimidating and rude conduct directed at a security guard at the place where he was taking his bar review course, and some controversial interactions with females. We held that, taken together, "these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system," and we upheld the denial of his application. *Id.* at 510, 544 N.W.2d at 374.

[7] We explained in *In re Appeal of Lane*, 249 Neb. at 511, 544 N.W.2d at 375, that the "requisite restraint in dealing with others is *obligatory conduct for attorneys* because '[t]he efficient and orderly administration of justice cannot be success-

fully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel . . . . Such tactics seriously lower the public respect for . . . the Bar.' " (Emphasis supplied.) (Quoting *Application of Feingold*, 296 A.2d 492 (Me. 1972).) Furthermore, " '[a]n attorney who exhibits [a] lack of civility, good manners and common courtesy . . . tarnishes the . . . image of . . . the bar . . . .' " *Id.* (Quoting *In re McAlevy*, 69 N.J. 349, 354 A.2d 289 (1976).) We held in *In re Appeal of Lane*, 249 Neb. at 512, 544 N.W.2d at 375, that "abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar." *Id.* Expanding on this holding, we stated:

> "Care with words and respect for courts and one's adversaries is a necessity, not because lawyers and judges are without fault, but because trial by combat long ago proved unsatisfactory.
>
> . . . .
>
> "The profession's insistence that counsel show restraint, self-discipline and a sense of reality in dealing with courts, other counsel, witnesses and adversaries is more than insistence on good manners. It is based on the knowledge that civilized, rational behavior is essential if the judicial system is to perform its function. Absent this, any judicial proceeding is likely to degenerate into [a] verbal free-for-all . . . . [H]abitual unreasonable reaction to adverse rulings . . . is conduct of a type not to be permitted of a lawyer when acting as a lawyer. *What cannot be permitted in lawyers, cannot be tolerated in those applying for admission as lawyers.*"

(Emphasis supplied.) 249 Neb. at 513, 544 N.W.2d at 376. In Nebraska, *In re Appeal of Lane* is clearly the rule and not an exception thereto. See, *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998); *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993).

The evidence in this case shows that Converse's numerous disputes and personal attacks indicate a "pattern and a way of life which appear to be [Converse's] normal reaction to opposition and disappointment." See *In re Appeal of Lane*, 249 Neb. 499, 512, 544 N.W.2d 367, 376 (1996). The totality of the evi-

dence clearly establishes that Converse possesses an inclination to personally attack those with whom he has disputes. Such inclinations "are not acceptable in one who would be a counselor and advocate in the legal system." *Id.* at 510, 544 N.W.2d at 374.

In addition to Converse's tendency to personally attack those individuals with whom he has disputes, his pattern of behavior indicates an additional tendency to do so in arenas other than those specifically established within the legal system. This tendency is best exemplified by observing Converse's conduct in situations where there were avenues through which Converse could have and should have handled his disputes, but instead chose to mount personal attacks on those with whom he had disputes through letters and barrages in the media.

One such incident occurred when Converse received the below average grade in the appellate advocacy course, and he wrote letters to various individuals regarding his arguments. Converse testified that he wrote letters to members of the South Dakota Supreme Court, Judge Richard Posner, Judge Alex Kozinski, and others, but filed no formal appeal. Moreover, upon return of the nude photograph, Converse testified that he redisplayed the photograph to force the issue with the university, but chose not to pursue any action regarding the alleged violation of his rights. There was also the incident regarding Converse's internship with the U.S. Attorney's office, where Converse went outside established procedures, arranged for the internship on his own, and then complained to all faculty and to members of the South Dakota bar when his request was denied for not complying with established procedures. Finally, there was Converse's production and marketing of the T-shirt containing a nude depiction of Vickrey on a hotdog as a result of the ongoing tension between Vickrey and himself. Converse is 48 years old, and his actions cannot be excused as isolated instances of youthful indiscretions.

Taken together with the other incidents previously discussed, the evidence clearly shows that Converse is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one seeking admission to the Nebraska bar. See *In re Appeal of Lane, supra.* In light of Converse's admission that

such conduct would be inappropriate were he already an attorney, we reiterate that we will not tolerate conduct by those applying for admission to the bar that would not be tolerated were that person already an attorney. See *id.* Furthermore, Converse has consistently exhibited a tendency to cause disruption and then go to some arena outside the field of law to settle the dispute, often to an arena not specifically designed for dispute resolution. As explained by Justice Stewart in *Law Students Research Council v. Wadmond*, 401 U.S. 154, 166, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971),

> a State is constitutionally entitled to make . . . an inquiry [into the moral character and past conduct] of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government. The very Constitution that the appellants invoke stands as a living embodiment of that ideal.

The record before us reflects that the Commission conducted such an inquiry and, at the conclusion thereof, correctly determined that Converse possessed a moral character inconsistent with one "dedicated to the peaceful and reasoned settlement of disputes," see 401 U.S. at 166, but, rather, more consistent with someone who wishes to go outside the field of law and settle disputes by mounting personal attacks and portraying himself as the victim and his opponent as the aggressor. Such disruptive, hostile, intemperate, threatening, and turbulent conduct certainly reflects negatively upon those character traits the applicant must prove prior to being admitted to the Nebraska bar, such as honesty, integrity, reliability, and trustworthiness. See *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996). See, also, rule 3.

The result might have been different if Converse had exhibited only a "single incident of rudeness or lack of professional courtesy," see *In re Snyder*, 472 U.S. 634, 647, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985), but such is simply not the case. The record clearly establishes that he seeks to resolve disputes not in a peaceful manner, but by personally attacking those who oppose him in any way and then resorting to arenas outside the field of law to publicly humiliate and intimidate those oppo-

nents. Such a pattern of behavior is incompatible with what we have required to be obligatory conduct for attorneys, as well as for applicants to the bar.

Converse has exhibited a clear lack of self-restraint and lack of judgment, and our de novo review of the record leads us to independently conclude that Converse has exhibited such a pattern of acting in a hostile and disruptive manner as to render him unfit for the practice of law in Nebraska. We conclude that the Commission's determination to deny Converse's application was correct, and Converse's third assignment of error is therefore without merit.

CONCLUSION

The Commission correctly determined that Converse possessed insufficient moral character and was unfit to practice law in the State of Nebraska. This determination was based on an inquiry into Converse's moral character that was both proper and constitutionally permissible. Finding no error in the Commission's determination or the process used to reach that determination, we affirm the Commission's denial of application.

AFFIRMED; APPLICATION DENIED.

STATE OF NEBRASKA, APPELLEE, V.
COLBY P. BARTHOLOMEW, APPELLANT.
602 N.W.2d 510

Filed November 19, 1999. No. S-98-585.

1. **Motions to Suppress: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Sentences: Appeal and Error.** Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.

4. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant.
5. **Investigative Stops: Police Officers and Sheriffs: Motor Vehicles.** A law enforcement officer may, during a routine traffic stop, run a computer check to establish whether a vehicle has been stolen and to ascertain whether there are outstanding arrest warrants for the occupants of the vehicle.
6. **Sentences: Appeal and Error.** While an appellate court typically reviews criminal sentences that are within statutory limits for abuse of discretion, the appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
7. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
8. **Sentences.** Under Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Cum. Supp. 1998), the minimum limit for Class IV felonies cannot exceed one-third of the maximum statutory sentence.

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

David E. Kimble, Seward County Public Defender, for appellant.

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

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

GERRARD, J.

NATURE OF CASE

Seeing sparks coming from a car driven by Colby P. Bartholomew, a sheriff's deputy stopped Bartholomew's vehicle and subsequently discovered that Bartholomew's Nebraska driving privileges had been revoked for a period of 15 years. After a bench trial, Bartholomew was convicted of driving during a 15-year period of license revocation, a Class IV felony, and was ultimately sentenced to a term of 2 to 4 years' imprisonment. Bartholomew appeals, claiming that the traffic stop and the deputy's request for Bartholomew's driver's license were unlawful and that the sentence was excessive. For the reasons that follow, we affirm the judgment of the district court as modified.

FACTUAL BACKGROUND

Bartholomew was charged in the district court with operating a motor vehicle on the highways of this state while his operator's license had been revoked for a period of 15 years in violation of Neb. Rev. Stat. § 60-6,197(7) (Cum. Supp. 1996). Prior to trial, Bartholomew moved to suppress his driving record as the fruit of an illegal search and seizure. The following testimony was adduced at the suppression hearing:

Seward County sheriff's deputy Daniel J. Nantkes was on duty and driving his patrol car during the daytime on September 25, 1997, when he saw sparks coming from the rear of a blue car driven by Bartholomew. Nantkes activated his overhead lights, signaling Bartholomew to pull over. Nantkes stated that he did so because he was worried that the sparks might cause damage to Bartholomew's car or cause a fire if the car proceeded down the highway.

Once Bartholomew's car came to a stop, Nantkes told Bartholomew about the sparks. According to Nantkes, Bartholomew responded by saying that the muffler may have been the reason for the sparks. Nantkes then requested Bartholomew's driver's license, vehicle registration, and proof of insurance. Bartholomew produced a California operator's license and proof of insurance, but did not have a vehicle registration document.

Nantkes returned to the patrol car to run a records check on Bartholomew's driver's license. Nantkes said he instructed Bartholomew to remain in the blue automobile. Despite that instruction, Bartholomew stepped out of the car to look underneath it. Bartholomew said that he observed nothing that would cause sparks and that the car was operating properly prior to being stopped. Bartholomew acknowledged, however, that he did not know whether the vehicle was actually emitting sparks.

The records check of Bartholomew's license revealed that Bartholomew's driving privileges had been revoked. Nantkes placed Bartholomew under arrest for driving on a revoked license and took Bartholomew into custody.

After hearing arguments at the conclusion of the suppression hearing, the district court ruled that Nantkes' stop of Bartholomew was lawful. At trial, Bartholomew's counsel again

objected to the admission of Bartholomew's driving record, arguing that the stop was unlawful. After the district court overruled Bartholomew's objection, Nantkes went on to testify that Bartholomew's driving privileges were under a 15-year revocation at the time of arrest.

Nantkes' trial testimony regarding the stop mirrored that which he gave in the suppression hearing. Thereafter, the State offered a driving abstract of Bartholomew, certified by the Nebraska Department of Motor Vehicles. The driving abstract revealed that Bartholomew had been convicted of driving under the influence of alcohol (DUI) on four separate occasions, the last of which resulted in a 15-year revocation of Bartholomew's driving privileges.

The State also offered a certified copy of a York County Court transcript containing the conviction and January 1992 sentencing of Bartholomew for third-offense DUI. The sentencing transcript denoted that Bartholomew was present and represented by counsel when the court revoked his driving privileges for a period of 15 years. In addition to revoking Bartholomew's driving privileges, the York County Court had sentenced Bartholomew to 4 months in jail.

Bartholomew objected to the admission of both these exhibits as a fruit of an unlawful stop, and the objection was overruled by the district court. Upon finding Bartholomew guilty of driving during a 15-year period of license revocation, a Class IV felony, the district court sentenced Bartholomew on May 26, 1998, to serve 2 to 4 years in prison, and also revoked Bartholomew's driving privileges for 15 years to commence upon his release from prison.

ASSIGNMENTS OF ERROR

Bartholomew claims, summarized and restated, that the district court erred in (1) failing to suppress evidence of Bartholomew's driving record as the fruit of an unlawful search and seizure and (2) imposing an excessive sentence on Bartholomew.

SCOPE OF REVIEW

[1] In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure,

an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

[2] Sentences within statutory limits will only be disturbed by an appellate court if the sentence complained of was an abuse of judicial discretion. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

ANALYSIS

Traffic Stop

In his first assignment of error, Bartholomew argues that the district court should have suppressed evidence of Bartholomew's driving record as the fruit of an illegal search and seizure. To be precise, Bartholomew claims that the deputy, Nantkes, did not have reasonable suspicion to make the investigatory stop that ultimately led to his requesting Bartholomew's driver's license. We disagree.

We initially note that the trial court found, as a factual matter, that Nantkes' testimony was credible and that sparks were emitting from Bartholomew's automobile. In choosing to believe Nantkes' testimony, the district court found that Nantkes observed the sparks prior to initiating the stop and was concerned that Bartholomew's car might catch fire. After conducting our review of the record, we find no clear error and accept, rather than disturb, those findings. See *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997).

The evidence reveals that after being lawfully stopped, Bartholomew informed Nantkes that the cause of the sparks could have been Bartholomew's muffler's dragging on the pavement. In Nebraska, it is a traffic infraction to drive a vehicle with a muffler that is in disrepair. See Neb. Rev. Stat. § 60-6,286 (Reissue 1998). Compare, also, Neb. Rev. Stat. § 60-682 (Reissue 1998) (mandating that violation of Nebraska Rules of the Road is traffic infraction) and Neb. Rev. Stat. § 60-601 (Supp. 1997) (placing § 60-6,286 within Nebraska Rules of the Road). It does not matter whether the muffler ultimately was the cause of the sparks so long as the officer had a reasonable sus-

picion, based on articulable facts, that a traffic violation was occurring. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996).

[3,4] It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *U.S. v. Rehkop*, 96 F.3d 301 (8th Cir. 1996); *U.S. v. Bell*, 86 F.3d 820 (8th Cir. 1996); *U.S. v. Pereira-Munoz*, 59 F.3d 788 (8th Cir. 1995). See, also, *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant. *U.S. v. Bell, supra*. See, also, *Whren v. United States, supra*.

[5] Our de novo review of the record leads us to conclude that probable cause existed for Nantkes to stop the driver of Bartholomew's vehicle. Moreover, a law enforcement officer may, during a routine traffic stop, run a computer check to establish whether a vehicle has been stolen and to ascertain whether there are outstanding arrest warrants for the occupants of the vehicle. *U.S. v. White*, 81 F.3d 775 (8th Cir. 1996). Nantkes efficiently carried out this procedure during his stop of Bartholomew.

The facts found by the district court, all of which are amply supported in the record, demonstrate that Nantkes' stop of Bartholomew, request for Bartholomew's license, and subsequent records check violated neither the Fourth Amendment to the U.S. Constitution, nor article I, § 7, of the Nebraska Constitution. For these reasons, Bartholomew's first assignment of error is without merit.

In addition, the State requests that we recognize a community caretaking exception to the Fourth Amendment warrant requirement because the district court's findings could be read to support such an exception in cases where sparks are being emitted from a vehicle on a highway. Under these circumstances, however, we need not consider the so-called community caretaking exception, and we do not do so in the instant case.

SENTENCE

[6,7] Bartholomew also appeals for a reduction in his sentence pursuant to this court's authority to modify criminal sen-

tences. See Neb. Rev. Stat. § 29-2308 (Reissue 1995). While we typically review criminal sentences that are within statutory limits for abuse of discretion, *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999), an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal, *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

With that in mind, we note Bartholomew's May 26, 1998, sentence stemmed from his conviction of a Class IV felony on April 3. As such, Bartholomew's sentence falls within the strictures of Neb. Rev. Stat. § 29-2204 (Cum. Supp. 1998) (operative date April 15, 1998). See *State v. Urbano, supra* (applying *Randolph* doctrine and holding that defendant convicted prior to enactment came under amended statute because sentence is not final judgment until conclusion of appeals). While Bartholomew did not raise the issue on appeal, we note plain error in Bartholomew's sentence, insofar as the minimum limit imposed exceeded that which is permitted by § 29-2204.

With regard to sentences for Class IV felonies, § 29-2204(1)(a)(ii)(A) mandates that the sentencing court "shall fix the minimum and maximum limits of the sentence, *but the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term . . .*." (Emphasis supplied.)

[8] Under § 29-2204(1)(a)(ii)(A), then, the minimum limit for Class IV felonies cannot exceed one-third of the maximum statutory sentence. The maximum statutory sentence for a Class IV felony is 5 years, which can also be expressed as 60 months. See Neb. Rev. Stat. § 28-105 (Reissue 1995). Therefore, since one-third of 60 months is 20 months, Bartholomew could not be sentenced to a minimum sentence of more than 20 months for the conviction of a Class IV felony. See *State v. Urbano, supra*.

As previously noted, the district court sentenced Bartholomew to an indeterminate sentence with a minimum term of 2 years, which can be restated as 24 months. Thus, we modify Bartholomew's sentence to a term of 20 months to 4 years in prison.

Notwithstanding that, Bartholomew argues that the district court abused its discretion by ordering Bartholomew to serve a prison sentence instead of probation. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

At the time of his sentencing, Bartholomew was 41 years old. Prior to the instant offense, Bartholomew had been convicted of four separate DUI offenses between the years of 1979 and 1991. Bartholomew served jail time—a sentence of 4 months—for only the most recent of those offenses. Given that fact and the nature of the repeat offenses, we conclude that the sentence imposed on Bartholomew is not excessive, nor does it constitute an abuse of discretion by the district court. Therefore, we affirm the sentence as modified.

CONCLUSION

Bartholomew's conviction is affirmed. Bartholomew's sentence, as modified, is affirmed. Bartholomew's sentence as modified is 20 months' to 4 years' imprisonment.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES P. MILLER, RESPONDENT.

602 N.W.2d 486

Filed November 19, 1999. No. S-98-769.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** The charges against an attorney in a disciplinary proceeding must be established by clear and convincing evidence.
3. **Attorney and Client.** Neb. Rev. Stat. § 7-105(6) (Reissue 1997) provides that an attorney shall not encourage the commencement or continuance of an action or proceeding from any motive of passion or interest.

4. **Disciplinary Proceedings: Rules of the Supreme Court: Attorney Fees: Words and Phrases.** Under Canon 2, DR 2-106(A) and (B), of the Code of Professional Responsibility, a fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.
5. **Attorney and Client: Attorney Fees.** Funds which belong in part to the client and in part presently or potentially to an attorney or a law firm must be deposited in a bank account and the attorney can withdraw the attorney's portion when due, unless the attorney's right to do so is disputed. If a dispute arises, the attorney cannot withdraw it until the dispute is resolved.
6. **Trial: Witnesses: Appeal and Error.** The exclusion or sequestration of a witness is within the discretion of a trial court or referee, and a denial of a sequestration motion will not be overturned absent evidence of prejudice to the defendant.
7. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion and its ruling will be upheld absent an abuse of discretion.
8. **Expert Witnesses.** Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony is outweighed by the danger of unfair prejudice or other considerations.
9. **Criminal Law: Administrative Law: Trial: Polygraph Tests.** The results of polygraph examinations are inadmissible in both criminal and administrative proceedings in Nebraska.
10. **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 maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
11. ___. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
12. ___. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers respondent's acts both underlying the events of the case and throughout the proceeding.
13. ___. Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.
14. ___. Mitigating circumstances are weighed in determining the proper discipline of an attorney.

Original action. Judgment of disbarment.

John J. Reefe, Jr., for respondent.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

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

PER CURIAM.

This is an attorney discipline case in which the Nebraska State Bar Association (NSBA), relator, seeks to discipline James P. Miller, respondent.

This disciplinary case arises from Miller's representation of Sharon Best (Sharon) and her son, Brian Best (Brian), who is now deceased. A brief factual background is set forth to give context to the charges filed against Miller. Since birth, Brian had been plagued by significant heart and kidney problems. Because of his poor health, Sharon had maintained a health insurance policy on Brian through Blue Cross Blue Shield of Nebraska. When Sharon was employed by U S West in 1993, she insured Brian under her group health insurance policy, MetLife, as a handicapped dependent. Sharon maintained both policies on Brian so that if she lost her U S West job, Brian would still be covered by Blue Cross Blue Shield. The two policies did not coordinate benefits.

In April 1994, Brian's health deteriorated and he was admitted to the University of Michigan Medical Center at Ann Arbor, Michigan (Hospital), and was treated there for over a month. The total hospital bill was $242,740.26. Both insurers paid the bill in full, with MetLife paying $242,737.76 on July 22, 1994, and Blue Cross Blue Shield paying $242,422.76 on September 26.

For 10 months, Sharon sought a refund of the excess payment, but was unsuccessful. She contacted the Nebraska Department of Insurance, which recommended that she hire an attorney to write a demand letter. Sharon hired Miller, who had previously employed her and represented her, to obtain the overpayment. Sharon and Miller met for a consultation on or about July 3, 1995. There is a factual dispute about the fee arrangement. Sharon claims that Miller orally agreed at the July 3 meeting to charge a 20-percent contingent fee. Thereafter, Brian went to Miller's office on July 14, at which time Brian was asked to sign an assignment of proceeds, which he did. Brian was also presented with an "Attorney Fee Contract" (written agreement) by Miller. When Brian questioned the percentage

fees in the written agreement (one-third if settlement is reached before filing suit and 40 percent after suit is filed), Miller stated that it was just a formality and that Miller had an oral agreement with Sharon to charge a 20-percent contingent fee. Based upon that assurance by Miller, Brian signed the written agreement; Brian was not given a copy of the written agreement. Miller denies any separate fee discussion with Brian, and Miller claims that the written agreement that Brian signed on July 14 is the true agreement: one-third if settlement is reached before filing suit and 40 percent after suit is filed.

Between July 5 and 18, 1995, Miller made telephone calls to Ann Arbor to talk to the Hospital's attorney, Leslie Kamil. Miller testified that he performed some research and had informal discussions with other attorneys about the issues in the case. Miller also drafted an assignment of proceeds and a complaint for filing in federal court. Miller estimated the total time he spent on the Best matter was 50 hours.

On July 19, 1995, at about 2:30 p.m., Kamil, the Hospital's attorney, contacted Miller's partner, Ernest Addison, and told Addison that the Hospital was trying to correct the overpayment situation and had agreed with Julie Nurre at MetLife that MetLife would pay Sharon the money. Notwithstanding this information, at 4:04 p.m. on the same day, Miller filed suit against the Hospital in the U.S. District Court for the District of Nebraska. Miller explained that he filed suit that day because he thought the money could be obtained more quickly from the Hospital, rather than having the money returned to MetLife and then passed on to Sharon. In a letter sent by Miller to Sharon dated July 19, Miller enclosed the complaint but failed to mention Addison's conversation with Kamil.

On August 1, 1995, Kamil called Addison and agreed to send the federal district court a check for $242,737.76. A settlement agreement was reached, and interest was never discussed. Brian later went to Miller's office to sign the settlement agreement, but refused to do so when Brian saw that Miller was claiming 40 percent of the recovery. On September 27, Miller sent Sharon a check for $145,642.66, which is the total recovery less Miller's 40-percent fee. Sharon then hired attorney Melvin Hansen to represent her in connection with this fee issue. Hansen advised

Sharon to negotiate the check because although the check to Sharon in fact was written on Miller's trust account, the check itself did not indicate its source. Sharon negotiated the check on October 26. On November 7, Miller withdrew $96,000 in attorney fees from his trust account.

On November 27, 1995, Sharon lodged a complaint against Miller with the NSBA Counsel for Discipline, and the Disciplinary Review Board of the NSBA subsequently filed formal charges against Miller. The Disciplinary Review Board charged that while representing Sharon and Brian, Miller violated his oath of office as an attorney and Canon 1, DR 1-102(A)(1) and (4); Canon 2, DR 2-106(A) and (B); and Canon 9, DR 9-102(A)(2), of the Code of Professional Responsibility. The relevant provisions of the code are as follows:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> DR 2-106 Fees for Legal Services.
>
> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

. . . .

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:

. . . .

(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.*

(Emphasis supplied.) In his answer, Miller denied that he violated the attorney's oath of office or any disciplinary rules.

This court referred the matter to a referee, who conducted a formal evidentiary hearing and made findings of fact and conclusions of law. Miller attended and was represented by counsel. The referee found that the actions of Miller constituted violations of his oath of office. Specifically, the referee found that Miller did not faithfully discharge the duty mandated by Neb. Rev. Stat. § 7-105(6) (Reissue 1997), which prohibits an attorney from encouraging the commencement of an action from any motive of passion or interest. Also, the referee found a violation of Neb. Rev. Stat. § 7-106 (Reissue 1997) by Miller's acts, determining that he engaged in deceit or collusion with intent to deceive a party to the action. Finally, the referee found that Miller violated all the disciplinary rules (DR 1-102(A)(1) and

(4), DR 2-106(A) and (B), and DR 9-102(A)(2)) for which he was formally charged by the Disciplinary Review Board.

After concluding his findings of fact, the referee recommended disbarment. In his recommendation, the referee noted the previous disciplinary action taken against Miller, *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987), in which Miller was found to have previously violated DR 1-102 and DR 9-102 by taking money from a client, but he had returned it before the impropriety was discovered. In his report, the referee concluded: "Respondent was given a second chance. He had an opportunity to redeem himself. He failed to do so. He again sought to benefit himself at the expense of his clients. . . . I recommend he be disbarred." Miller filed exceptions to the referee's report, challenging the referee's findings and his recommendation of disbarment.

I. STANDARD OF REVIEW

[1,2] 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. *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999). The charges against an attorney in a disciplinary proceeding must be established by clear and convincing evidence. *Id.*

II. ASSIGNMENTS OF ERROR

Miller assigns 10 errors, which can be summarized as follows: First, Miller asserts that the evidence submitted was not sufficient to reach the clear and convincing standard required to find a violation of the Code of Professional Responsibility. Specifically, Miller takes exception to certain findings by the referee, including his finding that Miller filed an unnecessary lawsuit in order to increase his fee, that Miller engaged in fraud or collusion to defraud, that Miller took an excessive fee, and that he withdrew from a trust account his attorney fees with knowledge of an existing fee dispute. Second, Miller alleges

error in the referee's refusal to sequester Sharon as a witness. Third, Miller claims that the referee should not have allowed Hansen to testify as an expert witness regarding the propriety of Miller's fee because Hansen was the attorney for Sharon. Fourth, Miller disputes the referee's exclusion of the exculpatory results of his polygraph examination. Finally, Miller alleges error in the recommendation of disbarment, arguing that such a sanction is inappropriate under these circumstances.

III. ANALYSIS

As noted in *State ex rel. NSBA v. Johnson, supra*, although we are conducting a de novo review, if there is credible evidence in conflict, this court may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than the other. In this case, there is conflicting evidence concerning the fee arrangement and the existence of a fee dispute.

After a thorough de novo review of the record, we do, in fact, give significant weight to the following findings of fact: The referee determined that Miller orally agreed to represent Sharon for a 20-percent contingent fee; when Brian signed the written fee agreement and questioned the higher fees, Miller informed Brian that it was just a formality and that the real agreement was for 20 percent. On July 19, 1995, Kamil informed Addison that she had an oral understanding with Nurre at MetLife, so that when the Hospital returned the excess payment to MetLife, MetLife would in turn pay the excess payment to Sharon. Upon this information, Addison asked that the Hospital not pay the money to MetLife until he had spoken to Sharon, but neither he nor Miller contacted Sharon about the arrangement. That same day, Miller filed suit in U.S. District Court, without obtaining the express authorization of Brian or Sharon. Miller and Addison later settled the matter with the Hospital without contacting the Bests and waived their claim for interest, attorney fees, and costs.

On or about August 29, 1995, Miller and Addison submitted to the federal court magistrate an order directing the clerk of the court to pay "plaintiff's attorney Addison and Miller, P.C." the funds previously paid into the court by the Hospital. The order

was signed, but Miller did not inform the Bests of the fact of the settlement or that funds had been paid into the court which named Addison and Miller, P.C., as payee instead of the Bests. On September 7, Miller deposited the court's check for $242,737.76 into a trust account. Miller then contacted Brian and asked him to come into his office to sign some papers. When Brian went to Miller's office, Brian refused to sign a settlement statement which provided that Miller would receive 40 percent of the recovery. Brian was not given a copy of the settlement statement, but he told Sharon about the statement. Sharon attempted to contact Miller, to no avail. On September 27, Addison sent Sharon a letter stating that her case was settled and that the attorney fees were $97,095.10. Enclosed with the letter was a check to Sharon for $145,642.66 as her net receipt from the settlement.

Sharon hired Hansen to help her with the fee issue. Hansen notified Miller in an October 2, 1995, letter that his fee with Sharon was in dispute. Hansen advised Sharon to negotiate the check because, although the check to Sharon in fact was written on Miller's trust account, the check itself did not indicate its source. Sharon negotiated the check on October 26. On November 7, without resolution of the fee dispute, Miller withdrew $96,000 in attorney fees from his trust account. On November 27, the NSBA Counsel for Discipline received Sharon's complaint against Miller.

For the reasons that follow, we conclude that the charges levied against Miller concerning §§ 7-105(6) and 7-106, and DR 1-102(A)(1) and (4), DR 2-106(A) and (B), and DR 9-102(A)(2) have been established by clear and convincing evidence. We will address each of Miller's assigned errors in turn.

1. Sufficiency of Evidence

Miller first claims that the evidence presented is not sufficient to show by clear and convincing evidence that he violated the attorney's oath of office or the relevant disciplinary rules.

(a) Violation of § 7-105(6)

[3] Section 7-105(6) provides that an attorney shall not "encourage the commencement or continuance of an action or

proceeding from any motive of passion or interest." The record establishes that Miller's partner, Addison, informed him, shortly after 2:30 p.m. on July 19, 1995, that an understanding had been reached between the Hospital and MetLife, in which MetLife had promised to pay to Sharon the overpayment it would receive from the Hospital. Notwithstanding this information, at 4:04 p.m. on the same day, Miller filed suit against the Hospital in the U.S. District Court. Miller's justification for filing suit has been consistent throughout the proceedings: He needed to sue quickly before the Hospital returned the money to MetLife because he thought that if MetLife had the money, it would be more difficult for the Bests to obtain the overpayment from the insurance company. This explanation is rather dubious in light of the record we have reviewed.

First, there was absolutely no attempt at negotiating a satisfactory settlement agreement with the Hospital and MetLife (in spite of the Hospital's and MetLife's apparent willingness to do so), which would render the filing of suit unnecessary. During Addison's conversation with Kamil, on July 19, 1995, at 2:30 p.m., Addison was informed that Kamil had an oral understanding with Nurre at MetLife that when the Hospital returned the excess payment to MetLife, then MetLife would in turn pay the excess payment to Sharon. Upon being so informed by Kamil, Addison asked her not to pay the money to MetLife until after Addison had spoken with his client. However, neither Miller nor Addison contacted either Sharon or Brian to advise them of the telephone call with Kamil. Miller further admits that MetLife was not called prior to the time that the lawsuit was filed. Second, in a letter sent by Miller to Sharon dated July 19, Miller enclosed the complaint but failed to mention Addison's conversation with Kamil—and the record reveals no other attempt by Miller to contact Sharon regarding Addison's conversation with Kamil.

In the rush to the courthouse, Miller failed to communicate to the Bests the content or tenor of the July 19, 1995, telephone conversation between Addison and Kamil, and Miller failed to obtain permission from the Bests to file the lawsuit. Miller's questionable rationale for filing an immediate lawsuit does not hold up in light of the evidence. We, therefore, conclude that a

violation of § 7-105(6) has been established by clear and convincing evidence.

(b) Violation of § 7-106

Section 7-106 provides, "An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred."

Miller's deceitful acts are demonstrated in several circumstances. In addition to the acts of July 19, 1995, we determine, giving weight to the referee's findings of fact, see *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999), that Miller induced Brian to sign the written agreement on July 14, containing a higher percentage of attorney fees, based upon his statement that the oral agreement was 20 percent and that the written agreement was a mere formality.

Second, Miller's utter lack of candor with his clients reveals his deceit. Again giving weight to the referee's findings, Miller waived Brian's claim for interest and settled the suit without obtaining his express permission. Only after a significant time period had elapsed did Miller inform the Bests of the settlement.

Third, Miller has conducted himself in a deceitful manner throughout this disciplinary proceeding. Most revealing of this deceit is his response to the bar complaint and his later testimony, which are riddled with mischaracterizations and nondisclosures.

In his response to the bar complaint, Miller contends that after consulting with Sharon, he performed "extensive research on the issue, including conferences with Joe Jones, whom I consider an insurance law expert. I consulted with a number of attorneys besides Joe Jones, including Bill Gallup and others . . . ." By his own admission, this "extensive research" totaled 5 hours. Additionally, his "conference" with Jones was a 6-minute conversation.

Several nondisclosures and inconsistencies indicate that Miller has changed his story throughout these proceedings. First, conspicuously absent from his response to the bar complaint is a disclosure that before he filed suit on July 19, 1995, Miller knew of the Hospital's understanding with MetLife that

MetLife would refund the money to the Bests. Since this information proved so critical at later stages of the proceedings, its absence from Miller's initial response suggests that he perfected his story to meet the exigencies of the pending proceedings. Rather than disclosing the Hospital conversation, Miller attempted to mislead the Counsel for Discipline in his initial response when he stated: "I attempted to call the attorney for the University of Michigan hospital several times without success, and then filed suit . . . ." Miller admitted in his testimony at the referee's hearing that Addison had reached Kamil and had discussed the case before the suit was filed, and Miller's attempt to explain his response in the letter to the Counsel for Discipline does not ring true.

Additionally, Miller's deceitful conduct is demonstrated by another notable omission in his account of July 19, 1995. In his testimony before the Committee on Inquiry, Miller stated that after Addison informed him of his conversation with Kamil, Miller called Sharon to tell her of Addison's conversation before he filed suit. However, in the later hearing before the referee, Miller claims that he called Sharon on the day he filed suit to discuss the interest issue, but Miller did not assert, as he did earlier, that he disclosed Addison's conversation with Kamil. Miller also fails to mention the Hospital conversation in his July 19 letter to Sharon. In short, we conclude that a violation of § 7-106 has been established by clear and convincing evidence.

(c) Violation of Disciplinary Rules

The evidence reveals that Miller's conduct in the Best matter also violated several disciplinary rules. He violated DR 1-102(A) by engaging in dishonest, deceitful, and fraudulent conduct. This conduct is most clearly illustrated by the evidence concerning the fee arrangement, the settlement of the lawsuit, and his conduct during the disciplinary proceedings, as previously detailed.

[4] Miller also violated DR 2-106 by charging a clearly excessive fee. A fee is clearly excessive when, "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B). In the instant case, several lawyers of ordi-

nary prudence have deemed this fee to be excessive. These lawyers include those on the Committee on Inquiry, members of the Disciplinary Review Board, Hansen, and the referee of the disciplinary proceedings. Although no singular factor enumerated in DR 2-106(B) is dispositive, particular attention must be directed to certain facts in this matter. It is obvious that Miller spent little time on the Best matter. Between July 3 and 18, 1995, he made seven brief calls to the Hospital. Miller allegedly spent up to 5 hours doing research, but was unable to provide copies of any research notes or cases. Miller informally discussed the issues with other attorneys and spent some time drafting an assignment of proceeds and the complaint. Based upon his efforts, Miller claims entitlement to a $96,000 fee.

The fee cannot be justified by its contingent nature, nor does its contingent nature provide an escape from a judicial review of the fee's reasonableness. See *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1983). In *Kirby v. Liska*, an attorney sought to recover a 30-percent contingent fee earned in relation to a potential quiet title action. After the action was settled, the attorney claimed 30 percent of the recovery for his fees, but the client refused to pay. This court asserted its authority to monitor and determine the reasonableness of a contingent fee contract and did not allow the attorney to recover 30 percent. *Id.* Citing DR 2-106, we noted that the attorney actually performed little work:

> When Kirby accepted employment in the litigation, the case was pending on a motion . . . for summary judgment. The record shows that Kirby examined the record, filed some pleadings, wrote some correspondence, conferred with his client, obtained continuances, drafted a settlement offer, and was present when the settlement agreement was signed. The record before us will not sustain an allowance of $65,340 for attorney fees upon the basis of an express agreement or upon a quantum meruit basis. Such an amount is excessive.

Kirby v. Liska, 214 Neb. at 363, 334 N.W.2d at 183.

Similarly, in the instant case, Miller did little work in a relatively unsophisticated case for the $96,000 fee to which he claims entitlement. By his own admission, his total effort in the Best case consisted of several brief telephone calls, a few

research hours, informal discussions with other attorneys, and the drafting of an assignment of proceeds and the complaint. Miller admits in his testimony that the Hospital had no right to the money. These circumstances did not require sophisticated legal effort or expertise. Like the attorney in *Kirby v. Liska, supra*, Miller had minimal work to do, and he did only minimal work. A fee of $96,000 is clearly excessive.

[5] We also find clear and convincing evidence that Miller violated DR 9-102 by withdrawing his fee before the fee dispute had been resolved. DR 9-102 provides that funds which belong in part to the client and in part presently or potentially to an attorney or a law firm must be deposited in a bank account and that the attorney can withdraw the attorney's portion when due, unless the attorney's right to do so is disputed. If a dispute arises, an attorney cannot withdraw the fee until the dispute is resolved. Hansen's October 2, 1995, letter provided Miller with sufficient notice that his fee was being disputed by Sharon. Sharon did cash the check on October 26, and it is only later, on November 7, that Miller withdrew his fee from the trust account. The evidence is in sharp conflict about whether Hansen indicated to Miller that the dispute was resolved. Hansen denies making any such suggestion, but Miller claims that Hansen told him the matter was resolved. The referee heard and observed the witnesses and accepted Hansen's version of the facts rather than Miller's. See *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999). Miller's actions have provided no reason for us to find that the referee erred in this determination. Accepting Hansen's version of the facts necessitates a finding that Miller violated DR 9-102 because he withdrew his fees before the matter was resolved.

2. Refusal to Sequester Sharon

[6] Next, Miller alleges error in the referee's refusal to sequester Sharon and in allowing her to be present throughout the testimony and to testify as a rebuttal witness. The exclusion or sequestration of a witness is within the discretion of the trial court, and a denial of a sequestration motion will not be overturned absent evidence of prejudice to the defendant. *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975). Referees in

disciplinary proceedings have the same type of discretion in determining sequestration motions.

The general rule provides that witnesses may be excluded upon a party's motion or by the court sua sponte. As noted in *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 138, 141, 74 N.W. 403, 404 (1898), sequestration of witnesses has long been a part of Nebraska law:

> We think the practice of causing unexamined witnesses, except those called as experts, to be sequestered so that they may not hear the testimony of the witness being examined is a good one, as it tends to elicit the truth and promote the ends of justice; but we also think that the decided weight of authority, as well as the doctrine of this court, is that whether the witnesses shall be so sequestered is a matter resting in the discretion of the trial court . . . .

Miller points to Neb. Rev. Stat. § 27-615 (Reissue 1995) to support his claim that Sharon should have been excluded. Section 27-615 provides:

> At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Miller argues that none of the exceptions apply. Further, he asserts that the refusal to sequester Sharon and then subsequently allowing her to testify as a rebuttal witness provided Sharon with the opportunity to "fine tune" her testimony and denied Miller the right to a fair hearing.

We disagree. First, as noted in *State v. Bautista, supra*, Miller must show prejudice for this court to disturb the denial of a motion to sequester. Miller has failed to show prejudice. The initial hearing before the Committee on Inquiry revealed to Miller what Sharon's testimony would likely be at the referee's hearing. Sharon's testimony in both proceedings is substantially the same. Further, there is no evidence that her rebuttal testimony

was "fine tuned" because of her presence during the hearing. Rather, the rebuttal was substantially a mere reiteration of Sharon's previous testimony. This does not constitute prejudice sufficient to find error in the referee's ruling.

Additionally, Sharon falls within the § 27-615(3) exception as an essential witness, and therefore, the referee was correct in excepting her from the sequestration order. Although this court has never ruled on who is an essential witness in a disciplinary case, *State v. Eynon*, 197 Neb. 734, 250 N.W.2d 658 (1977), gives guidance. In *State v. Eynon*, this court affirmed the trial court's decision to allow the victim to remain in the courtroom during the prosecution of the defendant on the charge of burglary with intent to commit rape. We determined that the essential witness exception applied to the circumstance. Similarly, Sharon was an essential witness to this cause because she was Miller's client and was also the complaining witness in the instant cause.

3. Hansen as Expert Witness on Excessive Fee Issue

Miller also alleges error in the referee's decision to allow Hansen, Sharon's attorney, to testify as an expert witness about the excessiveness of Miller's fee. Miller argues that because of his representation of Sharon, Hansen could not testify in any other way about the unreasonableness of the fee. This argument is without merit.

[7] The admission of expert testimony is ordinarily within the trial court's discretion and its ruling will be upheld absent an abuse of discretion. *Gittins v. Scholl, ante* p. 18, 601 N.W.2d 765 (1999). The same discretion is accorded to referees, and we find no abuse of discretion in the referee's decision to allow Hansen to testify about the excessiveness of the fee.

[8] Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony is outweighed by the danger of unfair prejudice or other considerations. *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998) (interpreting Neb. Rev. Stat. § 27-403 (Reissue 1995)). Hansen was sufficiently qualified as an expert; he has practiced

law in Omaha for over 29 years, and in recent years, he has focused on the insurance area. Hansen's opinion with respect to the reasonableness of the fee is highly relevant because that fee is a major issue in this disciplinary case. Moreover, his opinion assists the trier of fact in determining that issue, and its probative value is not substantially outweighed by the danger of unfair prejudice. Although Miller claims that Hansen should not have been allowed to testify because of an alleged bias in favor of Sharon, any such bias goes to the credibility of Hansen's testimony, not its admissibility.

4. EXCLUSION OF EXCULPATORY POLYGRAPH EXAMINATION

Miller took a polygraph examination in May 1997, and deception was apparently not indicated when asked questions regarding, inter alia, his motivation behind filing the Bests' suit, the fee agreement made between him and the Bests, and his decision to withdraw his fee from the trust account. The referee sustained the NSBA's motion in limine to exclude the exculpatory polygraph results, and Miller alleges error in that ruling.

[9] The results of polygraph examinations have been held inadmissible in both criminal and administrative proceedings in Nebraska. *Mathes v. City of Omaha*, 254 Neb. 269, 576 N.W.2d 181 (1998). In *Mathes v. City of Omaha*, 254 Neb. at 273-74, 576 N.W.2d at 184, a case involving the admission of inculpatory polygraph evidence in a judicial review of a police personnel decision, we noted: "Such truth and deception examinations are not favored under Nebraska law. . . . [C]ourts must be particularly cautious in according evidentiary status to a polygraph examination since the result 'is unique in that its truth seeking functions nearly duplicate the purpose of the trial.' " In accordance with our established rule of inadmissibility, we determine that the referee did not err in refusing to admit the polygraph evidence.

5. IMPOSITION OF SANCTION

[10-14] We now address the appropriate disciplinary measures to be taken. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the

offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Johnson*, 256 Neb. 495, 590 N.W.2d 849 (1999). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *Id.* For purposes of determining the proper discipline, we consider Miller's acts both underlying the events of this case and throughout this proceeding. See *id.* Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. *Id.* Mitigating circumstances are also weighed in determining the proper discipline. *Id.*

The circumstances of this case are inexcusable and warrant the most severe sanction. The nature of Miller's offenses are based in deceitful conduct. The referee in the instant case found that Miller had previously represented both Sharon and Brian and, because of those earlier dealings, the Bests placed their trust and confidence in him. The referee concluded that Brian's trust was such that he accepted Miller's assurance that the 40-percent contingency written agreement was simply a formality and that the 20-percent contingency oral agreement with Sharon was the actual fee agreement. The evidence supports the referee's determination that Miller then deliberately set upon a course of action that violated the Bests' trust and confidence for his own economic gain.

This case does not merely involve the withdrawal of disputed fees from a lawyer's trust account. The withdrawal of the disputed fee was simply the culmination of a series of devious and deceptive actions by Miller that have previously been set forth. Moreover, Miller's mischaracterizations and inconsistencies in the bar proceedings reflect an irreverent attitude toward its interest in promoting ethical conduct.

Additionally, this court has consistently taken into account that cumulative acts of attorney misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. See, *State ex rel. NSBA v. Johnson, supra*; *State ex rel. NSBA v. Caskey*, 251 Neb. 882, 560 N.W.2d 414 (1997).

We cannot ignore Miller's prior acts in *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987). In that case, Miller misappropriated slightly more than $19,000 from an estate and paid back the sums of money to the devisees before he was formally charged. At the time, this court made a rather rare exception to the usual rule that conversion of a client's funds requires disbarment. *Id.* Acting upon the recommendation of the referee in that case, and considering the mitigating circumstance of excessive use of alcohol and drug abuse at the time of the misappropriation, we suspended Miller from the practice of law for a period of 2 years.

Lamentably, Miller violated DR 1-102 and DR 9-102 in both the earlier case and the instant case. Because we have a duty to protect the public, to maintain the reputation of the bar as a whole, and to deter others from similar conduct, Miller will not be given another chance. There are no mitigating circumstances favoring a sanction less severe than disbarment.

IV. CONCLUSION

It is therefore the judgment of this court that James P. Miller be disbarred, effective immediately. Miller is further directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997).

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. SCOTT MOORE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, APPELLEE.

602 N.W.2d 465

Filed November 19, 1999. No. S-98-983.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusions independent from that of the trial court.

2. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
3. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
4. **Judgments: Jurisdiction: Appeal and Error.** Orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable.
5. **Judgments: Final Orders.** A conditional judgment is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
6. ___: ___. Final judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of the defendants, a conditional judgment is wholly void.
7. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
8. **Statutes: Appeal and Error.** 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.
9. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
10. **Statutes: Legislature: Intent.** A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature.
11. **Statutes: Initiative and Referendum: Public Officers and Employees.** Neb. Rev. Stat. § 32-1409(1) (Reissue 1998) requires an "exact match" of information, and the statute does not on its face provide for the Secretary of State to allow county officials to make exceptions to the matching requirement.
12. **Legislature: Initiative and Referendum.** The people of Nebraska have reserved the power to propose and enact laws independent of the Legislature.
13. ___: ___. The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual.
14. **Courts: Initiative and Referendum.** The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.
15. **Constitutional Law: Legislature: Initiative and Referendum.** The constitutional provision authorizing the Legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment.
16. **Statutes: Initiative and Referendum.** Any legislative act which tends to ensure a fair, intelligent, and impartial result on the part of the electorate may be said to facilitate the exercise of the initiative power.

17. **Constitutional Law: Initiative and Referendum.** Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved.
18. **Constitutional Law: Statutes.** Legislation which hampers or renders ineffective the power reserved to the people is unconstitutional.
19. **Constitutional Law: Statutes: Appeal and Error.** It is the duty of the Nebraska Supreme Court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done.
20. ___: ___: ___. The Supreme Court must judge the constitutionality of an act of the Legislature not necessarily by what has been done or possibly may be done under it, but by what the statute authorizes to be done under its provisions.
21. **Constitutional Law: Initiative and Referendum.** Neb. Rev. Stat. § 32-1409(1) (Reissue 1998) is unconstitutional.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, L. Steven Grasz, and Dale Comer for appellant.

Michael F. Coyle, Special Assistant Attorney General, and Michael L. Schleich, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

CONNOLLY, J.

The Attorney General, Don Stenberg, appeals a decision of the district court which upheld the constitutionality of Neb. Rev. Stat. § 32-1409(1) (Reissue 1998). Section 32-1409(1) provides that signatures on initiative petitions will not be presumed to be valid unless the printed name, date of birth, street and number or voting precinct, and city, village, or post office address match the voter registration records. Under Neb. Const. art. III, § 4, the initiative and referendum process is self-executing, but legislation may be enacted to facilitate its operation. We conclude that on its face, § 32-1409(1) does not facilitate the operation of the initiative process and thus is unconstitutional. Accordingly, we reverse.

I. BACKGROUND

The appellee, Secretary of State Scott Moore, serves as the state's chief election officer and administers the election laws of

the state. When Nebraska citizens seek to change the law or the state Constitution through the initiative or referendum process, they are required to submit the proposed language for the change to Moore's office, which assists the petitioners in preparing a form to be circulated. In order to place a proposed change on the ballot, the petitioners must obtain signatures of 10 percent of the registered voters in the state as of the date the petition is due to be returned to Moore's office. See Neb. Const. art. III, § 2; *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). Moore then begins a process of verifying the signatures on the petition pursuant to § 32-1409(1).

Before September 9, 1995, § 32-1409(1) (Cum. Supp. 1994) provided:

> Upon the receipt of the petitions, the Secretary of State, with the aid and assistance of the election commissioner or county clerk, shall determine the validity and sufficiency of signatures on the pages of the filed petition. The Secretary of State shall deliver the various pages of the filed petition to the election commissioner or county clerk .... The election commissioner or county clerk shall compare the signature of each person signing and the circulator upon each of the pages of the petition with the voter registration records to determine if the circulator was a registered voter on the date of signing the petition and to determine if each signer was a registered voter on or before the date on which the petition was required to be filed with the Secretary of State. *The election commissioner or county clerk shall also compare the signer's street and number or voting precinct and city, village, or post office address with the voter registration records to determine whether the signer was a registered voter. All signatures and addresses shall be presumed to be valid signatures and addresses if the election commissioner or county clerk has found the signers to be registered voters on or before the date on which the petition was required to be filed with the Secretary of State, except that such presumption shall not be conclusive and may be rebutted by any credible evidence which the election commissioner or county clerk finds sufficient.* The express purpose of the comparison of

> names and addresses with the voter registration records, in addition to helping to determine the validity of such petition, the sufficiency of such petition, and the qualifications of the signer, shall be to prevent fraud, deception, and misrepresentation in the petition process.

(Emphasis supplied.) The Legislature subsequently passed 1995 Neb. Laws, L.B. 337, effective September 9, 1995. Following L.B. 337, the Legislature passed 1997 Neb. Laws, L.B. 460, effective September 13, 1997, which slightly modified § 32-1409(1). Thus, the changed language of § 32-1409(1) emphasized above, as amended by L.B. 337 and L.B. 460, now reads:

> The election commissioner or county clerk shall also compare the signer's printed name, date of birth, street and number or voting precinct, and city, village, or post office address with the voter registration records to determine whether the signer was a registered voter. The signature, date of birth, and address shall be presumed to be valid only if the election commissioner or county clerk finds the printed name, date of birth, street and number or voting precinct, and city, village, or post office address to match the registration records . . . . The finding of the election commissioner or county clerk may be rebutted by any credible evidence which the Secretary of State finds sufficient.

Section 32-1409(4) provides that "[t]he Secretary of State may adopt and promulgate rules and regulations for the issuance of all necessary forms and procedural instructions to carry out this section."

Following the change in § 32-1409(1), the Attorney General brought this declaratory judgment action contending that § 32-1409(1) was facially unconstitutional. The Attorney General also sought an injunction enjoining Moore from implementing § 32-1409(1). During the hearing on the issue, Moore offered evidence regarding the manner in which his office administered § 32-1409. According to Moore, once petitions are filed with his office, he sends them to each of the separate counties in the state. Moore also provides the counties with "guidelines" on how to complete the verification process. These guide-

lines state that the county officials should use their best efforts to verify a signature as opposed to disqualifying a signature.

Under the guidelines, a signature that utilizes a nickname can be counted if it is a shortening of the name or is on a list of approved nicknames. According to Moore, if a registered voter signed a petition using a nickname instead of the full name he or she had registered under, the signature would be presumed to be valid and would be counted if the nickname used was on the list. Moore also testified that if a voter's registration record showed his or her address as a specific rural address, but the voter signed a petition using only a rural route number, the signature should be counted under his guidelines. According to Moore, the guidelines he sent to county officials required them to "find some sort of conversion to make sure that those count." The guidelines also provide that signatures with errors such as a missing or incomplete year for the date or a misspelling of a street or village name should be counted.

Neal Erickson, an employee in Moore's office, testified that under some circumstances, the signature of a registered voter might not be counted. For example, a registered voter who moves within the same county is still qualified to vote without changing his or her registration prior to the election. See Neb. Rev. Stat. § 32-914.02 (Reissue 1998). However, if a person signed a petition using a new address that did not match the address found in the voter registration records, the signature would not be counted. According to Moore, the signature could not be counted in such circumstances because there would be nothing on the record to prove that the signer was a registered voter.

Erickson further testified that if a person used initials or a nickname not found on the list provided by Moore, the signature would not be counted if it did not match the name shown in the registration records. In addition, Moore's testimony indicated that the failure of a person to write down the name of the city or town his or her address was located in or the ZIP code would likely result in the signature not being counted even if all other information matched the registration records. The guidelines Moore provides to the counties clearly states that if the name of the city or village is left blank, the signature may not be counted.

In a memorandum and order on temporary injunction filed on July 29, 1998, the district court applied the proposition of law that it must " 'give a statute an interpretation which meets constitutional requirements if it can reasonably be done.' " The court determined that the requirement that each signer be a registered voter was constitutionally mandated and concluded that the requirements of § 32-1409(1) did not interfere with or impede that mandate. In reaching this determination, the court concluded that § 32-1409(1) did not require an "exact match" of information and that there was no constitutional requirement that signatures on a petition be presumed to be valid. The district court then "ordered" as follows: "[T]he temporary injunction is denied. Relator and Respondent shall advise the Court within fourteen (14) days of any reason they have why this decision should not become a permanent and final decision in this case." In an order filed on August 13, the district court stated that "the Court's Order dated July 29, 1998, is the final permanent order and the Relator's Petition for Injunction is dismissed." The Attorney General filed his notice of appeal with the district court on September 8. On October 21, we issued an order to show cause as to why the appeal should not be dismissed for lack of jurisdiction for failure to meet the 30-day requirement of Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1998).

II. ASSIGNMENTS OF ERROR

The Attorney General assigns that the district court erred in failing to find that § 32-1409(1) violated article III of the Nebraska Constitution and in failing to apply the correct standard of scrutiny when considering a statute that restricts the initiative petition process.

III. STANDARD OF REVIEW

[1] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusions independent from that of the trial court. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

[2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach

a conclusion independent of the decision reached by the court below. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998); *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998).

IV. ANALYSIS

1. JURISDICTION

Whether we have jurisdiction to hear this appeal depends on which order is the final order in the case. The confusion arises because the district court, in an order filed August 13, 1998, declared that the order dated July 29, 1998, was the final order. Pursuant to § 25-1912, a party has 30 days in which to appeal from a final order. Thus, if the order filed July 29 was the final order, then the appeal was filed out of time. The Attorney General contends that it would be improper to allow the district court to retroactively establish a prior order as the final order because such action can have the effect of depriving a party of the full 30 days in which to file an appeal. The Attorney General further argues that if such a retroactive application is allowed, the time to appeal could effectively be eliminated in some cases by the action of the district court.

[3-6] A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987); Neb. Rev. Stat. § 25-1301 (Reissue 1995). Orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable. *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

> "[A] conditional judgment is wholly void because it does not 'perform in praesenti' and leaves to speculation and conjecture what its final effect may be. [Citation omitted.] . . . [F]inal judgments must not be conditional, and unless there is an equitable phase of the action wherein it is necessary to protect the interests of defendants, a conditional judgment is wholly void."

Schaad v. Simms, 240 Neb. 758, 759, 484 N.W.2d 474, 475 (1992), quoting *Lemburg v. Adams County, supra.*

In this case, despite the fact that the district court utilized its August 13, 1998, order to label the July 29 order as the final order in the case, the July 29 order was not final. At the time the July 29 order was made, it was conditional upon the future action or inaction of the parties. Thus, the order failed to operate in the present and would not have been a final, appealable order. The order filed August 13 is the final order in the case, as it was this order which had the effect of dismissing the action. We read the reference to the July 29 order as incorporating the reasoning of that order into the final order of August 13. Accordingly, the Attorney General timely filed this appeal, giving us jurisdiction over the case.

2. Constitutional Issue

The Attorney General contends that § 32-1409(1) is facially unconstitutional because it requires an "exact match" between the information a signer places on a petition and the voter registration records. As a result, some signatures do not get counted even though the signers are registered voters. The Attorney General contends that § 32-1409(1) is unconstitutional because it creates a hardship for voters, creates situations in which signatures are improperly presumed to be invalid, and because the Legislature can only legislate the initiative process in order to facilitate the process and prevent fraud. Moore contends that § 32-1409(1) does not require an "exact match" and that the provision does act to prevent fraud. Moore further argues that although signatures that do not match the voter registration records are not presumed to be valid, it does not mean the signatures are presumed to be invalid. Rather, Moore contends that signatures that do not match simply require additional inquiry before they can be counted.

(a) Interpretation of Term "Match" in § 32-1409(1)

Each party points to differing definitions of the word "match" in § 32-1409(1). The Attorney General contends that the term means an "exact match" while Moore argues that the term means something akin to "substantially similar." Each party also cites to the legislative history of L.B. 337 to support their respective positions.

[7-9] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998); *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997). 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. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). However, a statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Kimball v. Nebraska Dept. of Motor Vehicles*, 255 Neb. 430, 586 N.W.2d 439 (1998); *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997).

[10] The use of the term "match" in the statute is ambiguous. Webster's Third New International Dictionary, Unabridged 1391 (1993), provides in part the following definitions for the word "match": (1) A person or thing that equals or resembles another in some respect or (2) a person or thing that is an exact counterpart of another. Accordingly, the term "match" in § 32-1409(1) may be interpreted in differing ways, thus requiring that we construe the meaning of the term. A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature. *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996); *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995).

The legislative history of L.B. 337 indicates that the Legislature was concerned that under the old law, county officials were required to make judgment calls regarding whether the signer of a petition was a registered voter. The history indicates that the Legislature wanted to place decisions regarding problems such as the use of nicknames with the Secretary of State in order to achieve a more uniform interpretation and application of § 32-1409(1).

The history also shows that the Legislature was made aware of possible constitutional problems with § 32-1409(1). Due to

concerns regarding constitutionality, various amendments were proposed which would have presumed signatures to be valid if they "substantially" matched the registration records or would have provided a definition of "match" that would allow signatures to be counted if they were substantially the same as the voter registration records. The proposed amendments did not pass, and the history indicates that by rejecting the amendments, the Legislature was specifically rejecting a term that would allow signatures that were "substantially similar" to the registration records to be counted. Thus, a reading of the history as a whole indicates that the Legislature intended to require an "exact match" between the signatures on petitions and the registration records, at least at the level where the signatures were being considered by county officials. The history further indicates that the Legislature also intended for such signatures to be presumed invalid by county officials.

The history, however, also indicates that the Legislature intended the Secretary of State to be able to count signatures that were not an exact match with the registration records in some instances. For example, the history indicates that some members of the Legislature were of the belief that the Secretary of State could promulgate rules and regulations regarding when some signatures that did not exactly match the registration records could be counted. Although § 32-1409(4) provides that the Secretary of State may promulgate "procedural instructions" to carry out the statute, § 32-1409(1) never states an intention for the Secretary of State to be able to provide exceptions to the requirement that the information on the petition match the registration records. Further, proposed amendments to L.B. 337 that would have expressly stated this intention in § 32-1409(1) were specifically rejected by the Legislature. Accordingly, as § 32-1409(1) reads on its face, the Secretary of State has the power to promulgate instructions only regarding how to carry out the requirements of § 32-1409(1). To hold that the Secretary of State could promulgate exceptions to the matching requirement of § 32-1409(1) would be reading an additional provision into the statute. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative

language. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999).

[11] Accordingly, the legislative history shows that § 32-1409(1) requires an "exact match" of information, and the statute does not on its face provide for the Secretary of State to allow county officials to make exceptions to the matching requirement. Thus, the next issue is whether § 32-1409(1) is facially unconstitutional by requiring an "exact match" between the information required on the petition and the voter registration records.

(b) Constitutionality of § 32-1409(1)

The Attorney General contends that § 32-1409(1) violates article III of the Nebraska Constitution on its face because it does not act to facilitate the operation of the initiative process and creates a presumption that signatures that do not exactly match the voter registration records are invalid. Moore contends that § 32-1409(1) does not create any presumptions regarding the invalidity of signatures and interprets § 32-1409(1) to mean that when the information does not match, further investigation is necessary.

The provisions of the Nebraska Constitution dealing with the initiative provide in part:

> The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature.

Neb. Const. art. III, § 1. "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature." *Id.*, § 2. "The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation." *Id.*, § 4.

[12-14] By the foregoing constitutional provisions, the people of Nebraska have reserved the power to propose and enact laws independent of the Legislature. Consequently, the Legislature and the electorate are concurrently equal in rank as sources of

legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984); *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966). Thus, we have stated that " '[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.' " *State ex rel. Brant v. Beermann*, 217 Neb. at 636, 350 N.W.2d at 21, quoting *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948).

[15-19] We have described the ability of the Legislature under article III, § 4, to pass laws in order to facilitate the initiative process as follows:

> "[T]he constitutional provision authorizing the legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. See *State v. Amsberry*, 104 Neb. 273, 177 N.W. 179. Any legislative act which tends to insure a fair, intelligent, and impartial result on the part of the electorate may be said to facilitate the exercise of the initiative power."

State ex rel. Stenberg v. Beermann, 240 Neb. 754, 755-56, 485 N.W.2d 151, 152 (1992), quoting *State, ex rel. Winter v. Swanson*, 138 Neb. 597, 294 N.W. 200 (1940). Therefore, we have said that " '[c]onstitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved.' " *State ex rel. Stenberg v. Beermann*, 240 Neb. at 756, 485 N.W.2d at 152, quoting *Klosterman v. Marsh, supra*. Legislation which hampers or renders ineffective the power reserved to the people is unconstitutional. *State ex rel. Stenberg v. Beermann, supra*; *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968); *Klosterman v. Marsh, supra*. However, it is also clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done. *State ex rel. Morris v. Marsh, supra*.

In *State ex rel. Morris v. Marsh, supra*, this court considered whether electors' signatures on pages of petitions could be

counted when the circulator had not signed his or her full given name as required by statute. We noted the fact that petition circulators were required to file verification affidavits stating under oath that he or she was a legal and qualified voter of the state. We further recognized that at that time, it was a felony for a person not registered to vote to circulate a petition. We then stated that "[i]n the light of such criminal sanctions and the specific constitutional provisions preserving the right of initiative, presumptions must be in favor of legality rather than illegality." *Id.* at 528, 162 N.W.2d at 267. We concluded that where the circulator had signed and sworn to a properly executed statutory form of affidavit that he or she was a legal and qualified voter of the state, there is a presumption that he or she is a qualified elector in the absence of affirmative evidence to the contrary and this presumption did not disappear simply because he or she did not sign his or her full given name.

We also considered in *State ex rel. Morris v. Marsh, supra*, whether signatures could be counted on a petition when the signer failed to provide the date, used ditto marks for part or all of the address, or portions of the address were written by someone else. Many of the signatures that lacked dates were situated between two signatures that were correctly dated and which both bore the same date. We noted that the date was important in order to determine if the signer was an elector on the date of signing. We then stated:

> The problem of what presumptions shall apply in the construction of statutory provisions which are constitutionally permitted to "facilitate" the exercise of the initiative power reserved to the people has often been considered by the courts. As this court said in State ex rel. Ayres v. Amsberry, *supra*; "The amendment under consideration reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience."
>
> The decisions almost universally hold that the power of initiative must be liberally construed to promote the democratic process and that the right of initiative constitution-

> ally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to i[t]s exercise.

Id. at 531, 162 N.W.2d at 269. Accordingly, we held that on an otherwise validly executed initiative petition form, where the actual and exact date on which the signature of the elector was signed was readily apparent, the omission or faulty rendition of the date should be treated as a clerical or technical error and constituted substantial compliance. Under such circumstances, the signatures would be counted. We further held that the use of ditto marks did not invalidate the signatures.

In the instant case, § 32-1409(1) requires an exact match of information on petitions with information in the voter registration records. Further, the previous version of the statute contained a rebuttable presumption that signatures were valid when the county official had made the determination that the signer was a registered voter. This presumption was in line with our reasoning in *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968), and *State, ex rel. Ayers v. Amsberry*, 104 Neb. 273, 177 N.W. 179 (1920), *dismissed* 104 Neb. 279, 178 N.W. 822. Under the amended version of § 32-1409(1), signatures are no longer presumed to be valid. Although the language of § 32-1409(1) is unclear on whether a signature is presumed to be invalid when there is not an exact match, the legislative history indicates that a presumption against validity would be the case. At a minimum, the legislative history and the language of § 32-1409(1) show that when there is not an exact match, additional information is necessary in order to count the signature and that this information would have to be provided to the Secretary of State by the voter or group submitting the petitions.

A requirement that the voters be responsible for independently proving the validity of signatures that were invalidated because they did not exactly match the registration records is contrary to the high value we place on the right of the people to engage in the initiative and referendum process. Any presumption must be in favor of the legality of the signer's act. Further, it is clear from *State ex rel. Morris v. Marsh, supra*, that signatures cannot be discounted due to technical errors. The exact match requirement of § 32-1409(1) has the potential to cause

some signatures not to be counted on the basis of technical errors.

Section 32-1409(1) also cannot be considered as a necessary provision for the prevention of fraud. Less onerous provisions are already in place to prevent fraud in the initiative and referendum process. For example, it is a crime to falsify information on a petition or for an unregistered voter to sign a petition. See, e.g., Neb. Rev. Stat. § 32-1546 (Reissue 1998). A provision enacted to prevent fraud that also has the effect of causing the signatures of some registered voters not to be counted cannot be deemed to facilitate the initiative process. Finally, the legislative history indicates that § 32-1409(1) was enacted in part as a way to ease the counting process for county officials by placing decisions regarding signatures with the Secretary of State. However, the convenience of the public must take precedence over convenience to public officials in legislation affecting the initiative process. Section 32-1409(1) improperly hampers the public by making it more difficult for valid signatures to be counted.

[20] The Secretary of State argues that in practice, things such as technical errors, the use of nicknames, and rural addresses do not prevent signatures from being counted. Thus, it is clear that § 32-1409(1) is not applied in a manner that requires an "exact match" or disqualifies signatures for technical errors. However, the Attorney General challenges § 32-1409(1) on its face and does not challenge it as it is applied. This court must judge the constitutionality of an act of the Legislature not necessarily by what has been done or possibly may be done under it, but by what the statute authorizes to be done under its provisions. *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). As previously discussed, on its face, § 32-1409 does not state that it will be applied to allow for substantial compliance in some instances. Proposed amendments that would have put such language in § 32-1409(1) were specifically voted against by the Legislature.

V. CONCLUSION

[21] We interpret § 32-1409(1) to require an exact match between signature information placed on initiative petitions with the voter registration records. We further conclude that

such a provision does not facilitate the initiative process because it hampers the ability of the public to engage in the initiative process and does not act to prevent fraud. Accordingly, we find that § 32-1409(1) is unconstitutional. The order of the district court is reversed and the cause is remanded with directions to enter an order enjoining the Secretary of State from implementing § 32-1409(1).

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN W. WAGSTAFFE III, RESPONDENT.

602 N.W.2d 665

Filed November 19, 1999. No. S-98-1107.

Original action. Judgment of disbarment.

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

PER CURIAM.

Respondent, John W. Wagstaffe III, was admitted to the practice of law in the State of Nebraska on April 30, 1984.

Pursuant to the application for temporary suspension made by the Chair of the District Two Committee on Inquiry of the Nebraska State Bar Association (NSBA), this court entered an order of temporary suspension on October 21, 1998. On July 12, 1999, the NSBA, relator, filed formal charges against respondent. On August 11, relator filed additional formal charges.

In total, 10 counts were filed against respondent. The substance of the charges includes various acts of neglect, failure to properly maintain client trust accounts, and failure to respond to inquiries of the Counsel for Discipline.

A referee was appointed on September 15, 1999. The hearing of this matter was set for October 28, 1999. On October 27, 1999, respondent filed a voluntary surrender of license to practice law. Therein, respondent admits that certain of the allegations against him are true and constitute violations of Canon 1, DR 1-102(A)(1) and (5); Canon 6, DR 6-101(A)(3); and Canon

7, DR 7-101(A)(2), of the Code of Professional Responsibility, and, therefore, we conclude that respondent violated his oath of office as an attorney.

In particular, respondent admits to: Count VII, involving client Mary Levering, based on his failure to file bankruptcy proceedings after receipt of a fee requiring him to do so; count VIII, involving clients Michael and Kay Bivens, based on his failure to file bankruptcy proceedings after receipt of a fee requiring him to do so; count IV, involving client Mary Jo Rippy, based on his failure to file dissolution proceedings after receipt of a fee requiring him to do so; and counts V and X, based on his failure to file responses to the inquiries of the Counsel for Discipline.

Respondent states that he has freely and voluntarily consented to the entry of an order of disbarment and has waived his right to notice, appearance, or hearing prior to the entry of such order.

This court hereby accepts respondent's surrender of his license to practice law and orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 1996), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

Miller-Lerman, J., not participating.

THE STATE OF NEBRASKA EX REL. JOHN D. CHERRY, M.D., ET AL., RELATORS, V. JUDGE STEVEN D. BURNS, RESPONDENT.

602 N.W.2d 477

Filed November 19, 1999. No. S-99-043.

1. **Mandamus: Words and Phrases.** Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

2. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear.
3. ___. Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
4. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
5. **Constitutional Law: Jury Trials.** The purpose of Neb. Const. art. I, § 6, is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875.
6. **Actions: Pleadings: Equity.** The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the petition determine whether a particular action is one at law to be tried to a jury or in equity to be tried to a court.
7. ___: ___: ___. The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. This determination is unaffected by the conclusions of the pleader or whether or not the pleader denominates the case as one at law or in equity.
8. **Jurisdiction: Equity.** If a court of equity has properly acquired jurisdiction of a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
9. **Civil Rights: Damages.** Punitive damages are recoverable in a civil rights suit filed in Nebraska state court pursuant to 42 U.S.C. § 1983 (1994 & Supp. III 1997).

Original action. Peremptory writ denied.

Don Stenberg, Attorney General, and Therese N. James for relators.

Gail S. Perry and Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, for respondent.

Patrick Ronald Russell, amicus curiae.

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

MILLER-LERMAN, J.

NATURE OF CASE

John D. Cherry, M.D., and Randy Lienneman, P.A.C., in their individual and official capacities, and Reynold Maixner, M.D., deceased, in his official capacity only (the Relators), seek a writ of mandamus compelling the district judge for Lancaster

County, Judge Steven D. Burns (the Respondent), to grant a jury trial in an action brought against them by Patrick Ronald Russell. We granted leave to file this original action and previously issued an alternative writ of mandamus ordering the Respondent to vacate his order overruling the Relators' motion for jury trial or to appear and show cause why a peremptory writ commanding the Respondent to do so should not issue. The Respondent made such appearance and showing, and we deny a peremptory writ of mandamus.

STATEMENT OF FACTS

On October 31, 1997, Russell, an inmate serving a life sentence at the Nebraska State Penitentiary, filed his third amended petition (petition) pro se in the district court for Lancaster County alleging several causes of action against the Relators and several other parties in both their individual and official capacities. Russell's claims generally pertained to an alleged pattern of denial of proper health care.

The Relators and the other defendants filed a demurrer to Russell's petition. On January 13, 1998, the Respondent sustained the demurrer in part by dismissing five of the six causes of action against all defendants and by dismissing the remaining cause of action against all defendants except the Relators. The Respondent held that the remaining cause of action, the first cause of action in the petition, liberally construed, stated an Eighth Amendment claim against the Relators brought pursuant to the federal civil rights statute, 42 U.S.C. § 1983 (1994 & Supp. III 1997). The Eighth Amendment prohibits cruel and unusual punishment.

In his sole remaining cause of action, Russell alleged deliberate indifference to his medical care by the Relators which violated his civil rights as guaranteed by the 8th and 14th Amendments. In his petition, Russell requested relief which he labeled as "Injunctive Relief," "Declaratory Judgement," and "Monetary Damages." For his injunctive relief and declaratory judgment requests, Russell sought, inter alia, rulings that the Relators had deliberately denied him proper medical care, had deliberately caused him permanent pain and injury, and had attempted to cause his death; an order directed to the Nebraska

Medical Board to take action with respect to the Relators' medical licenses; an order of the court releasing Russell from prison; a prohibition on placing Russell in the prison hospital without Russell's authorization or a court order; a mandate that further medical treatment of Russell must be pursuant to written directives; an order to the Nebraska State Patrol to initiate criminal investigations for charges against the Relators; and "[a]ny and all costs and relief this court deems just." For his "monetary damages request," Russell sought $50 million in punitive damages.

On July 30, 1998, the district court set the case for a bench trial on its equity docket to commence February 22, 1999. On November 17, 1998, the Relators filed an application for jury trial in the case. The Respondent heard arguments on the application for jury trial on December 4 and overruled the application on December 7.

The Relators filed a petition for mandamus with this court on December 28, 1998. On January 13, 1999, we issued an alternative writ of mandamus ordering the Respondent to "vacate and set aside his order of December 7, 1998, overruling relators' motion for jury trial or appear and show cause in this Court within fourteen (14) days hereof why a peremptory writ commanding respondent to so do should not issue." The Respondent appeared and has made a showing.

ASSIGNMENT OF ERROR

The Relators contend that the district court erred in overruling their motion for jury trial. The Relators assert that they have a clear right to a jury trial and that mandamus is their only adequate remedy to secure that right.

REQUIREMENTS FOR ISSUANCE OF WRIT OF MANDAMUS

[1] Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and

(3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999); *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

[2,3] To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998). Mandamus is not available to control judicial discretion and will be issued only if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Id.*

[4] In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *State ex rel. Acme Rug Cleaner, supra.*

ANALYSIS

Prior Case Law.

In their petition for mandamus, the Relators ask that we issue a writ of mandamus compelling the Respondent to grant a jury trial in the underlying action. In two previous cases, this court has been asked to issue a writ of mandamus compelling a lower court to vacate an order denying a defendant a jury trial. *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 279 N.W.2d 860 (1979); *State, ex rel. Garton v. Fulton*, 118 Neb. 400, 225 N.W. 28 (1929).

In *State, ex rel. Garton*, as described in *State ex rel. Simpson*, the relator, as defendant in the county court, demanded a trial by jury. The State resisted relator-defendant's demand, claiming that the controlling statute afforded the county court discretion to proceed without a jury in the case. Relator-defendant contended that the statute was unconstitutional in that it denied her of her right to a jury trial. We concluded that the action of the county court in refusing to designate a jury trial, if error, should not be remedied in a mandamus proceeding. Instead, we determined that the county court had jurisdiction to hear and decide the question of whether to grant a jury trial; that such decision

involved " 'judicial discretion,' " *id.* at 701, 279 N.W.2d at 865; and that if the county court erred in its decision, the relator-defendant had an adequate remedy after judgment was entered to proceed to review the county court's decision with respect to the jury issue by either appeal or proceedings in error.

In contrast to *State, ex rel. Garton, State ex rel. Simpson* involved a statute that granted either party the right to demand a trial by jury if such demand was made in writing on or before answer day. The issue between relator-defendant and respondent judge pertained to the determination of the correct and applicable date on or before which such demand must have been made after the case was transferred from small claims court to municipal court. We found the facts in *State ex rel. Simpson* distinguishable from *State, ex rel. Garton* in that the statute in *State, ex rel. Garton* gave the inferior court judicial discretion, whereas the statute in *State ex rel. Simpson* permitted no discretion and mandated a jury trial when demand was timely filed.

In *State ex rel. Simpson*, we recognized the general rule that a writ of mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law and that the writ may not be used to usurp or take the place of a writ of error or an appeal. However, we found that where a specific duty is provided by statute, mandamus may be invoked to enforce it, and the party entitled to such relief will not be forced to pursue his or her remedy by circuitous and dilatory means. We therefore concluded that, under the facts in *State ex rel. Simpson* and in the interest of conserving further expenditure of time, expense, and effort, justice required the issuance of a writ of mandamus granting relator-defendant a jury trial.

Taking *State, ex rel. Garton* and *State ex rel. Simpson* together, we determine that a writ of mandamus ordering a lower court to grant a jury trial is appropriate when, in addition to the customary mandamus criteria noted above, under the facts of the case, (1) a jury trial is mandated and the inferior court has no discretion in the matter and (2) other remedies available at law, such as appeal of the trial court's ruling, are inadequate to serve justice.

Instant Case: Claimed Right to Jury Trial.

In order to issue a peremptory writ of mandamus in the instant case, we would need to conclude that the Relators have a clear legal right to trial by jury, that the Respondent has a clear legal duty to grant trial by jury in the underlying action, and that Relators have no other plain and adequate remedy. These requirements are conjunctive, and the absence of any one precludes issuance of the peremptory writ.

The Relators argue that they have a constitutional right to a trial by jury in the underlying § 1983 action guaranteed by Neb. Const. art. I, § 6, as well as the 7th and 14th Amendments to the U.S. Constitution. Because we have previously determined that the federal constitutional provision of the Seventh Amendment does not apply in Nebraska state courts, *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986), and the U.S. Supreme Court has held under the Seventh Amendment that a jury is not invariably required in a § 1983 action, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), a constitutional right to a jury trial in the underlying action, if any, must stem from the state constitution.

The sole remaining cause of action in Russell's underlying case against the Relators, liberally construed, is an Eighth Amendment claim brought in state court pursuant to the federal civil rights statute, § 1983, claiming a deliberate indifference to the provision of proper health care to Russell. See *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). The U.S. Supreme Court recently held that the statutory language of § 1983 does not confer the right to a jury trial in a § 1983 action and that entitlement to a jury trial under federal constitutional law in a § 1983 action depends on the nature of the underlying action. *City of Monterey, supra.* As we read the U.S. Supreme Court's decision in *City of Monterey*, entitlement to a jury trial under § 1983 must be determined on the basis of either the federal or state constitutional law, depending on whether the case is filed in federal or state court. *Id.* Because the case in *City of Monterey* was filed in federal court, the U.S. Supreme Court looked to the federal jurisprudence under the

Seventh Amendment to the U.S. Constitution to determine whether the parties had a right to a jury trial in that case.

In *City of Monterey*, the Court noted that the case before it was a suit for just compensation for a taking and the relief sought was damages. Under the cases construing the Seventh Amendment, the *City of Monterey* Court concluded that an action for damages is an action at law requiring a trial to a jury. Under *City of Monterey*, whether or not a jury is required in a § 1983 action depends on the nature of the action as pled. In his concurring opinion, Justice Scalia observes that a § 1983 action seeking only equitable relief, even if sounding in tort, would under federal constitutional law "disentitle" the plaintiff to a jury. *City of Monterey*, 119 S. Ct. at 1647 n.1. Similar to the approach mandated in *City of Monterey*, in the instant case, we must look to article I, § 6, of the Nebraska Constitution and the Nebraska constitutional law on jury entitlement to determine whether the Relators have a clear right to trial by jury in the § 1983 case as pled and which was filed against them by Russell in the state district court.

[5] The Nebraska Constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." Neb. Const. art. I, § 6. The purpose of this constitutional provision is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875. *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). Pursuant to the Nebraska Constitution and statutes, this court has traditionally denied jury trials in equitable actions and provided them as a matter of right in legal actions. *Id.*

[6-8] The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the petition determine whether a particular action is one at law to be tried to a jury or in equity to be tried to a court. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999); *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995). The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. This determination is unaffected by the conclu-

sions of the pleader or whether or not the pleader denominates the case as one at law or in equity. *Dillon Tire, Inc., supra*; *Synacek, supra.* We have repeatedly concluded that if a court of equity has properly acquired jurisdiction of a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. E.g., *Dillon Tire, Inc., supra*; *Synacek, supra*; *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988); *Ames v. Ames*, 75 Neb. 473, 106 N.W. 584 (1906).

A review of Russell's petition reveals that the essential character of his sole remaining cause of action is equitable in nature. In the first cause of action in his petition, Russell asserts that the actions of the Relators in their official and individual capacities constituted a denial of proper medical care in violation of his right to be free from cruel and unusual punishment. He alleges that Relator Maixner deliberately failed to provide proper medical treatment for certain medical conditions and that Relators Cherry and Lienneman "acted deliberately to deny [Russell] proper medical treatment." Because the object of this mandamus action is limited to the issue of jury entitlement, we make no comment regarding the propriety of suing the Relators in their official or individual capacities or both. See *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999). In his "Order Re: Demurrer to Third Amended Petition," the Respondent determined that Russell's first cause of action, liberally construed, stated an Eighth Amendment claim against the Relators under § 1983.

In a section of the petition entitled "Relief Sought," Russell makes various requests which, as noted above, he categorizes under the labels "Injunctive Relief," "Declaratory Judgement," and "Monetary Damages." Certain of those requests appear to pertain solely to the causes of action that were dismissed. Those that pertain to the remaining Eighth Amendment claim include the following:

A) INJUNCTIVE RELIEF . . . :

1. Rule each of the respondants [sic] deliberately denied petitioner proper medical care for serious life threating [sic] conditions . . . .

. . . .

3. Rule each of the respondants [sic] deliberately caused petitioner permanent pais [sic], injury and has attempted to cause petitioners death.

. . . .

B) DECLARATORY JUDGEMENT . . . :

1. Order the Nebraska Medical Board to take action against the medical license of respondant [sic] Cherry; respondant [sic] Lienenmann [sic] and respondant [sic] Maxiner [sic].

2. Order the release of the petitioner from the custody of the respondants [sic] pursuant to the provisions of the Nebraska Jail Standards since respondants [sic] has [sic] deliverately [sic] refusal [sic] to provide petitioner proper medical care for serious life threating [sic] medical conditions.

3. Forbid respondants [sic] from placing petition [sic] in the prison hospital for any reason without the signed authorization of petitioner or a court order.

. . . .

5. Mandate that any further treatment of petitioner must be placed in writing, signed by the doctor and a copy of same be provided to petitioner.

C) MONETARY DAMAGES;

1. Punitave [sic] danages [sic] in the amount of Fifty million Dollars in their official capacity for the denials of medical care.

2. Punitive damages in the amount of fifty million dollars in their individual capacity for the denial of proper medical care.

Unlabeled requests:

D. Order the Nebraska State Patrol to start a criminal investigation for charges against the respondants [sic].

> E. Order respondants [sic] to pay the cost of this litigation including the reimbursement to petitioner for postage and copies in connection with this case.
>
> F. Any and all costs and relief this court deems just.

Taking the allegations of the first cause of action and the relief sought as a whole, it is apparent that Russell has invoked the equitable power of the court. Russell requests that the court make various rulings, orders, and pronouncements which, regardless of whether labeled as "Injunctive Relief" or "Declaratory Judgement," can only be classified as equitable in nature. Such equitable relief includes rulings that the Relators had deliberately denied him proper medical care, had deliberately caused him permanent pain and injury, and had attempted to cause his death; an order directed to the Nebraska Medical Board to take action with respect to the Relators' medical licenses; an order of the court releasing Russell from prison; a prohibition on placing Russell in the prison hospital without Russell's authorization or a court order; a mandate that further medical treatment of Russell must be pursuant to written directives; and an order to the Nebraska State Patrol to initiate criminal investigations for charges against the Relators. Russell further prays for "[a]ny and all costs and relief this court deems just," a prayer which has been deemed to invoke the equitable power of the court. *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995). Taken as a whole, Russell asks the court to declare that the Relators have denied him proper medical care, prevent them from continuing to deny him such care in the future, and provide other equitable relief.

In addition to the equitable relief that is the main object of Russell's cause of action, Russell makes a request for punitive damages "in the amount of fifty million dollars." We have held that ordinarily, with respect to state causes of action, punitive damages contravene Neb. Const. art. 7, § 5, and are not allowed. *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991), *disapproved on other grounds, Wortman v. Unger*, 254 Neb. 544, 578 N.W.2d 413 (1998); *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). However, Russell has brought his claim in state court under federal civil rights law,

§ 1983, and the U.S. Supreme Court has held that punitive damages are recoverable under § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983).

[9] The Supremacy Clause of U.S. Const. art. VI obligates state courts " 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " *Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 2d 239 (1942)). See, also, *Shearer v. Leuenberger*, 256 Neb. 566, 575, 591 N.W.2d 762, 768 (1999) (recognizing that although states have concurrent jurisdiction to hear § 1983 actions, "as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling and preempts any conflicting state law"). Accordingly, we acknowledge that punitive damages are recoverable in a suit filed in Nebraska state court pursuant to § 1983. Therefore, Russell may seek punitive damages in this § 1983 equity action brought in state court, and his federal substantial right to punitive damages is thereby protected. See *Garrett, supra.*

The Relators focus on Russell's punitive damages request to emphasize their contention that this action is at law and should be tried to a jury in state court. In so doing, they rely on the U.S. Supreme Court's opinions in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), and *Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). The Relators' arguments are unpersuasive.

As noted above, we read *City of Monterey* to permit a trial to the court in a § 1983 action, depending on the substance of the action as pled, and we distinguish *Tull*. *Tull* involved an action brought by the government under the Clean Water Act, 33 U.S.C. §§ 1311, 1344, and 1362(7) (1994), seeking civil penalties and injunctive relief. The *Tull* Court held that the case was analogous to actions in debt which were " 'suits at common law' " within the meaning of the Seventh Amendment and, therefore, a jury was required. 481 U.S. at 416. In contrast to the

civil penalties under the Clean Water Act, which the *Tull* Court found to serve as a remedial purpose to compensate for past acts, the punitive damages that Russell seeks in his § 1983 action serve the equitable purpose of deterring future misconduct.

Because the *City of Monterey* opinion construed § 1983, as opposed to the *Tull* opinion which construed the Clean Water Act, we find that the pronouncements in *City of Monterey* give the more specific guidance on jury entitlement in a § 1983 action, and therefore, we follow *City of Monterey*. We read *City of Monterey* to permit a trial to the court of a § 1983 action if the pleadings so indicate. We further observe that the *Tull* Court noted that although a jury was required to determine liability under the Clean Water Act, the Court indicated that it had "been presented with no evidence that the Framers [of the Seventh Amendment] meant to extend the right to a jury to the remedy phase of a civil trial." 481 U.S. at 426 n.9. Accordingly, we conclude there is no federal preemptive prohibition to the state trial court's consideration of Russell's punitive damages request without a jury.

Although the punitive damages requested by Russell constitute permissible relief under federal law and are therefore recoverable in the underlying state court action, the main object of Russell's action remains equitable in nature. The relief requested by Russell is overwhelmingly equitable, and the fact that he has included a request for $50 million as punitive damages does not change the inherent nature of the action. In this regard, we note the prayer for monetary relief is neither compensatory or nominal in nature nor tied to any identifiable damage Russell is alleged to have actually suffered. Indeed, the very magnitude of the dollar amount requested persuades us that punitive damages are not the main object of the action, but, rather, serve as an allegation by Russell that the Relators' conduct is viewed by Russell as demonstrating a deliberate indifference to his civil rights and that a punitive damages award would tend to deter such acts in the future. Notwithstanding the prayer for punitive damages, we determine that the underlying action in this case is equitable in nature.

Because the underlying action is equitable in nature and the district court has properly acquired jurisdiction of the action as a court of equity, under Nebraska jurisprudence the district court may properly determine all issues in the action and grant such legal or equitable relief as it deems proper. See, *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999); *Synacek v. Omaha Cold Storage*, 247 Neb. 244, 526 N.W.2d 91 (1995); *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988); *Ames v. Ames*, 75 Neb. 473, 106 N.W. 584 (1906).

In concluding that the district court, without a jury, may properly determine both the claims for equitable relief and the request for punitive damages, we note the case *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). In *Schroeder*, an action was brought by the Attorney General pursuant to Neb. Rev. Stat. § 59-1608 (Reissue 1984) of the Consumer Protection Act. We concluded that the principal thrust of the act was equitable in nature and that the trial court properly denied the defendant's request for a jury trial in that case notwithstanding the fact that recovery could include an attorney fee, restoration of the purchase price, and the imposition of civil penalties. In *Schroeder*, we stated that the monetary consequences which might be imposed therein were designed to "discourage future like acts and practices" but were ancillary to the main action. 222 Neb. at 477, 384 N.W.2d at 630. The civil penalties in *Schroeder* bear a resemblance to the punitive damages sought by Russell under the federal law in that both are designed to deter future like acts. *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) (stating that punitive damages in § 1983 cases are awarded to deter similar conduct in future); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981) (stating that deterrence of future misconduct is important purpose of both punitive damages and § 1983). *Schroeder* reiterates the principle that there is no constitutional right to a jury trial where the thrust of the claim is equitable in nature, and upon gaining jurisdiction of the case in equity, the district court may properly determine all issues in the action and grant equitable and legal relief notwithstanding the possible award of civil penalties.

Because we conclude that the Relators do not have a clear right to the relief they seek and that the Respondent does not have a clear duty to perform the act they request, mandamus is not appropriate. In view of our conclusion, we need not consider whether the Relators had other plain and adequate remedies available in the ordinary course of the law.

CONCLUSION

We find that mandamus is not appropriate because the Relators do not have a clear right to a jury trial in the underlying equitable action and the Respondent does not have a corresponding clear duty to grant such jury trial. We therefore decline to issue a peremptory writ of mandamus.

PEREMPTORY WRIT DENIED.

ROBERT E. HENTON AND DELORES M. HENTON, HUSBAND AND WIFE, DOING BUSINESS AS PRAIRIE VIEW DEVELOPMENT, APPELLEES, V. LAURA H. NOKES, APPELLANT, AND WYMAN & SON ET AL., APPELLEES.

603 N.W.2d 1

Filed December 3, 1999. No. S-97-1203.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. 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.

Petition for further review from the Nebraska Court of Appeals, MUES, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Red Willow County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

J. Bryant Brooks, of Brooks & Green, P.C., for appellant.

Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellees Robert E. Henton and Delores M. Henton.

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

MILLER-LERMAN, J.

NATURE OF CASE

Robert E. Henton and Delores M. Henton, doing business as Prairie View Development, brought suit to enforce a construction lien against Laura H. Nokes in connection with a house the Hentons built for Nokes in McCook, Nebraska. Nokes counterclaimed against the Hentons for damages from breach of contract. The district court for Red Willow County found generally in favor of the Hentons on their construction lien claim and dismissed Nokes' counterclaim.

Nokes appealed to the Nebraska Court of Appeals which, in *Henton v. Nokes*, No. A-97-1203, 1999 WL 294488 (Neb. App. May 11, 1999) (not designated for permanent publication), affirmed the trial court's decision as to the Hentons' construction lien claim, but reversed the trial court's dismissal of Nokes' counterclaim and remanded the cause with directions to the district court to enter a judgment on Nokes' counterclaim in the amount of $7,998.68.

The Hentons petitioned for further review of the Court of Appeals' decision on the basis that the Court of Appeals erred in applying a de novo rather than a clearly erroneous standard of review to its appellate evaluation of Nokes' counterclaim and in holding that Nokes was entitled to breach of contract damages in the amount of $7,998.68. Nokes did not cross-appeal seeking further review of the Court of Appeals' affirmance of the judgment in favor of the Hentons on their construction lien claim, and accordingly, that ruling is affirmed. We granted the Hentons' petition for further review and now reverse the Court of Appeals' decision granting relief to Nokes on her counterclaim.

STATEMENT OF FACTS

The Hentons sold two adjoining lots in McCook, Nebraska, to Nokes, upon which Nokes planned to build a house in which her

in-laws would live. The Hentons agreed to coordinate the construction of the house.

Nokes selected a floor plan and photograph of the type of house she wanted to build, and the Hentons then ordered blueprints. Neither the floor plan nor the blueprints included a basement, but Nokes, who had no training in architecture or engineering, drew up a sketch of a house modified to include a basement and provided it to the Hentons. The Hentons then arranged for construction of the house, including the hiring of a subcontractor, Daniel Rempel.

On April 24, 1994, at the office of Nokes' attorney, Nokes and the Hentons signed a six-page document (the Agreement) pursuant to which the Hentons agreed to build the house for a total of $132,224. The Agreement provided that the house would be built "in conformity with the plans, drafts, blue prints, specifications, and explanations thereof, which are hereunto annexed and made a part hereof."

The record shows that Nokes met with Delores Henton numerous times during the construction of the house. At those times, Delores Henton and Nokes would review the work in progress and the pending bills, and Nokes would pay up to 90 percent of the amount then due. Nokes performed a walk-through of the house in early October 1994 and sent the Hentons a letter, dated October 6, 1994, outlining problems that needed to be corrected. The uncontroverted testimony of Delores Henton at trial was that the majority of the problems listed in the letter were corrected and that she had not been advised of additional problems.

Although not listed in the October 6, 1994, letter, it was established without contradiction at trial that the floor under the guest room sagged and that the sagging occurred because the floor was inadequately supported. The parties stipulated that Nokes spent $7,998.68 to repair it.

On or about October 1, 1994, Nokes' in-laws took possession of the house. On November 22, the Hentons presented Nokes with a final statement which asserted that an additional $22,177.71 was due, consisting of $9,320.10 due under the original agreement and $12,857.61 attributed to "extras." Nokes refused to pay.

On January 17, 1995, the Hentons recorded a construction lien against the house in the amount of $21,222.82, and on February 27, they filed the petition in the instant case. In her answer, Nokes denied, inter alia, that she had received all the credits to which she was entitled. She also counterclaimed for an accounting and for expenses incurred due to contractual breaches by the Hentons, including "the contracted labor and materials which must be paid in the future to correct faulty work and to complete the house."

On October 2, 1997, following a 2-day trial, the district court found generally for the Hentons. The court concluded that Nokes was indebted to the Hentons in the amount of $20,252.33, which consisted of the $9,320.10 claimed by the Hentons as the balance due pursuant to the original contract, plus an additional $10,932.23 for "extras."

The district court also found that Nokes' counterclaim should be dismissed. The district court's decree stated:

> The Court finds that many of the difficulties in the construction were of the Defendants [sic] making. The Court specifically finds that the Defendant ordered the major subcontractor to not place a beam which would reinforce the first floor of the home. The contractor clearly had the beams on site and was ready to use them in the construction until ordered not to by the Defendant. The Court further finds that the subcontractor, Rempel, used his best efforts in obtaining a system which would support the main floor, and, attempted to have the Defendant use a truss system which would fully support the floor. The Defendant wanted to save costs by using the method that was used. Had the Defendant accepted the beam, most of the structural problems that arose would not have arisen, and she can not [sic] be now heard to complain that the house has defects created by her decision. . . .
>
> The Court has no difficulty in accepting the testimony of Bob Hinde [an architect called by Nokes who testified as an expert witness as to the quality of the construction of the house], but the Court finds that in light of the Defendant's decision to not use the beam in the first place,

> his testimony becomes unnecessary for the Court to reach its decision.

Nokes appealed the district court's decision to the Court of Appeals, asserting eight assignments of error which the Court of Appeals

> restated and summarized into the following five: The district court erred in (1) finding that the Hentons constructed the house as provided in the contract; (2) failing to correctly assess charges, credits, and penalties; (3) finding that the Hentons pled or proved the existence of subsequent oral change orders; (4) overruling Nokes' motion for new trial; and (5) failing to "clearly set forth findings of fact and conclusions of law in the Decree."

Henton v. Nokes, No. A-97-1203, 1999 WL 294488 at *3 (Neb. App. May 11, 1999) (not designated for permanent publication).

In its unpublished opinion, the Court of Appeals concluded for its standard of review applicable to the case that an action to foreclose a construction lien is one grounded in equity and that

> [i]n an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Id. The Court of Appeals did not recite a separate standard of review applicable to the appellate review of the counterclaim based on contract although it did recite that the construction of a contract is a matter of law.

In its opinion, the Court of Appeals analyzed Nokes' appeal in two sections, the first labeled "Hentons' Construction Lien" and the second labeled "Counterclaim by Nokes." In the section labeled "Hentons' Construction Lien," the Court of Appeals rejected Nokes' assignments of error and affirmed the district court's holding and award with regard to the Hentons' construction lien claim.

In the section labeled "Counterclaim by Nokes," the Court of Appeals stated that although Nokes had several complaints about the house, the one complaint it deemed critical was that of "the sagging floor and the problems relating to it." The Court of Appeals found it uncontroverted that "the sagging occurred because the floor was inadequately supported" and that "Nokes spent $7,998.68 to repair it." *Henton*, 1999 WL 294488 at *2. The Court of Appeals stated that the controverted issue was who was responsible for the condition of the inadequately supported floor.

The Court of Appeals reviewed various pieces of evidence from the record and concluded that "[h]aving conducted a de novo review of the record, we find that the sagging floor was attributable to the Hentons, not to Nokes." The Court of Appeals accordingly reversed the trial court's dismissal of Nokes' counterclaim and remanded the matter to the district court to enter a judgment on Nokes' counterclaim in the amount of $7,998.68. The Hentons successfully petitioned for further review.

ASSIGNMENTS OF ERROR

In their petition for further review, the Hentons assert that the Court of Appeals erred (1) in applying a de novo standard of review to Nokes' counterclaim for breach of contract damages and (2) in finding that the sagging floor was attributable to the Hentons, and thus, in holding that Nokes was entitled to breach of contract damages of $7,998.68.

ANALYSIS

Standard of Review.

In the appeal of a case with a pleading structure similar to that of the instant case, we concluded that the plaintiff's lien foreclosure suit was to be reviewed de novo and that the defendant's counterclaim for damages arising from breach of contract was to be reviewed under the "clearly erroneous" standard. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). In *Lange Indus.*, the plaintiff, Lange Industries, Inc. (Lange), brought an action against the project owner, Hallam Grain Co. (Hallam), to foreclose on a mechanic's lien. Hallam counterclaimed for damages from Lange's alleged breach of

contract. The trial court held for Lange on its foreclosure action, but at a reduced amount, and dismissed Hallam's counterclaims. Hallam appealed, and Lange cross-appealed. On appeal, we found that "this court must review Lange's foreclosure suit de novo and Hallam's counterclaims under the 'clearly erroneous' standard." *Id.* at 468, 507 N.W.2d at 469.

[1,2] Nokes' counterclaim is based on breach of contract. A suit for damages arising from breach of a contract presents an action at law. *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999). In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Id.* 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. *Id.*

Nokes' counterclaim asserts, inter alia, that Nokes "is entitled to credits under the aforesaid Agreement . . . for the contracted labor and materials which must be paid in the future to correct faulty work and to complete the house in accordance with the specifications of said Agreement." Nokes prayed for judgment against the Hentons in an amount for, inter alia, "future expenses to complete the Agreement." Nokes' counterclaim is a claim for damages from breach of contract which should have been reviewed by the Court of Appeals under the clearly erroneous standard.

The opinion of the Court of Appeals states that it reviewed Nokes' counterclaim pertaining to the sagging floor, which was based on contract, de novo on the record. It is clear from the Court of Appeals' unpublished opinion filed May 11, 1999, that the Court of Appeals reweighed the evidence regarding Nokes' counterclaim and came to a conclusion independent of the findings of the trial court. In its opinion, the Court of Appeals discussed various pieces of evidence in the record and came to its own conclusion that the Hentons were responsible for the sagging floor. Such conclusion was made without reference to the trial court's factual findings that many of the difficulties in the construction were of Nokes' making, that most of the structural

problems that arose would not have arisen if Nokes had accepted the beam, and that the Hentons' subcontractor, Rempel, had used his best efforts in obtaining a system which would support the main floor. We therefore conclude that the Court of Appeals erred as a matter of law in applying a de novo standard of review to the issues raised by Nokes' counterclaim based on contract.

Court of Appeals' Conclusions Regarding Nokes' Counterclaim.

Given our conclusion that the Court of Appeals applied the incorrect standard of review to the appeal of the dismissal of Nokes' counterclaim, we must further analyze whether that error of law was of consequence to the appellate outcome of the case. Accordingly, in order to determine whether the Court of Appeals erred in determining that the sagging floor was attributable to the Hentons and, thus, in holding that Nokes was entitled to breach of contract damages in the amount of $7,998.68 on her counterclaim, we must review the trial court's dismissal of Nokes' counterclaim under the clearly erroneous standard. Under that standard, we view the trial court's factual findings in a light most favorable to the Hentons and resolve any evidentiary conflicts in their favor, giving them every reasonable inference deducible from the evidence. See *General Fiberglass Supply, supra.* We will set aside the trial court's factual findings only if they are clearly erroneous. See *id.*

In its decree, the trial court made various factual findings which supported its ruling that Nokes' counterclaim should be dismissed. The trial court evaluated the evidence and the credibility of the witnesses and found that many of the difficulties in the construction were of Nokes' making. Specifically in regard to the sagging floor, the trial court found that Nokes ordered Rempel "to not place a beam which would reinforce the first floor of the home" because Nokes "wanted to save costs by using the method that was used." The trial court found that the Hentons had the beam on site and were ready to use it in the construction but that Nokes ordered that the beam not be used.

The trial court further found that the Hentons' subcontractor, Rempel, used his best efforts in constructing a system to support the main floor and attempted to persuade Nokes to use a truss

system which would fully support the floor. The trial court found that had Nokes accepted the beam, most of the structural problems that ensued would not have arisen. The trial court concluded that Nokes could not be heard to complain that the house had defects which were created by her decisions and that therefore, her counterclaim based on alleged breach of contract by the Hentons was without merit.

The trial court noted that it accepted the testimony of Bob Hinde, an architect who testified as an expert that he had observed several problems with the construction of the house, including inadequate floor support. However, the trial court stated that in light of Nokes' decision not to use the beam, Hinde's testimony was not necessary for the trial court to reach its decision.

Considering the trial court's ruling on Nokes' counterclaim in a light most favorable to the Hentons, who were the successful parties on the counterclaim at the trial level, we do not find that the trial court's factual findings were clearly erroneous. The trial court found that Nokes made the decision not to use the beam, that Nokes' decision was responsible for the structural problems that arose, and that under the circumstances, Rempel used his best efforts to construct a system which would support the main floor. Such factual findings were supported by evidence in the record including, inter alia, the testimony of Rempel; the testimony of Jene F. Custer, the plumbing and heating subcontractor on the job; the testimony of Troy William Oelkers, an employee of the lumber company that supplied beams for the house; and the testimony of Delores Henton.

As the Court of Appeals accurately set forth in its opinion, there was conflicting evidence, some of which could support a finding that the Hentons were responsible for the sagging floor. However, under the clearly erroneous standard of review properly applicable to the appeal of the counterclaim, we must resolve such conflicts in favor of the Hentons and give the Hentons every reasonable inference deducible from the evidence. See *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999). Under this standard, we cannot say that the trial court's factual findings were clearly erroneous.

We conclude, therefore, that the Court of Appeals erred by reviewing the contract counterclaim evidence de novo, in setting aside the trial court's factual findings, in finding that the sagging floor was attributable to the Hentons rather than to Nokes, and in concluding that Nokes was entitled to breach of contract damages in the amount of $7,998.68.

CONCLUSION

The Court of Appeals erred in applying a de novo standard of review to Nokes' counterclaim for breach of contract damages. Upon further review, we determine that the trial court's factual findings support its dismissal of Nokes' counterclaim and were not clearly erroneous and that the Court of Appeals erred in setting aside such findings on appeal. Nokes did not seek further review of the Court of Appeals' decision affirming the trial court's award to the Hentons on their construction lien claim, and we, therefore, affirm the Court of Appeals' affirmance of the trial court's judgment on that claim. We reverse the Court of Appeals' holding granting relief to Nokes on her counterclaim and remand the cause to the Court of Appeals with directions to reinstate the trial court's dismissal of Nokes' counterclaim.

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

STATE OF NEBRASKA, APPELLEE, V. RONALD P. DREIMANIS, APPELLANT.

603 N.W.2d 17

Filed December 3, 1999. No. S-98-650.

1. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.
2. **Rules of Evidence: Other Acts: Appeal and Error.** Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of that discretion.

3. **Rules of the Supreme Court: Appeal and Error.** A petition for further review and supporting memorandum brief must specifically set forth and discuss any error assigned to the Court of Appeals.
4. ___: ___. Absent plain error, the Supreme Court's review on a petition for further review is restricted to matters assigned and argued in the briefs.
5. ___: ___. Consideration of plain error occurs at the discretion of an appellate court, and a party who fails to properly assign an error on further review does so at its peril.
6. ___: ___. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Petition for further review from the Nebraska Court of Appeals, MUES, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Lancaster County, KAREN FLOWERS, Judge. Judgment of Court of Appeals affirmed.

Tom F. Wilson for appellant.

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

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Ronald P. Dreimanis was convicted by a jury of first degree sexual assault in the district court for Lancaster County. His conviction was affirmed by the Nebraska Court of Appeals. *State v. Dreimanis*, 8 Neb. App. 362, 593 N.W.2d 750 (1999). We granted Dreimanis' petition for further review which challenged the Court of Appeals' analysis of the trial court's rulings relating to the admissibility of evidence of Dreimanis' prior conviction for sexual assault of a child. We affirm the Court of Appeals' decision.

II. STATEMENT OF FACTS

On September 9, 1997, Dreimanis was charged with first degree sexual assault on a child under Neb. Rev. Stat. § 28-319 (Reissue 1995) for incidents which occurred between March 1, 1995, and August 10, 1997. Dreimanis entered a plea of not guilty, and the matter was set for trial. The victim in the instant

case, E.W., is a young girl who was 7 years old at the time of trial in 1998.

On March 3, 1998, the trial court held three hearings outside the presence of the jury: (1) a hearing pursuant to Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 1995), to determine the admissibility of evidence of Dreimanis' other crimes, wrongs, or acts under rule 404(2) (the 404 hearing); (2) a hearing pursuant to *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989), to determine the admissibility of evidence of Dreimanis' prior conviction in 1988 for sexual assault of a child, C.G., for the purpose of impeachment pursuant to Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 1995) (the *Olsan* hearing); and (3) a hearing, as required by *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), to determine the voluntariness of Dreimanis' statements to officers during the investigation of the charges in the instant case involving E.W. (the *Denno* hearing). A description of the hearings and the trial may be found in *State v. Dreimanis, supra*. In its opinion, the Court of Appeals refers to E.W. as "Jane" and C.G. as "Mary."

Following the three hearings noted above, the trial court held on March 4, 1998, as follows:

> With respect to 404, I have determined that evidence with respect to the acts concerning [E.W.]'s brother . . . are admissible, as well as the previous events with [C.G.] with respect to the prior conviction. It is admissible for purposes of impeachment should the defendant testify.
>
> And then I do find that the statements the defendant made to Officer Wilke [in connection with the investigation of the instant case] were freely and voluntarily made and those will be admissible as well.

The case proceeded to trial on March 4 and 5, 1998. At trial, Dreimanis did not testify. E.W. testified regarding the sexual assault at issue. Several other witnesses testified. The testimony included evidence of Dreimanis' prior conviction involving C.G. C.G. testified, over objection, that in 1987, when she was 9 years old and Dreimanis was 19 years old, Dreimanis had kissed, fondled, and digitally penetrated her while C.G.'s younger sister was in the room. Tim Domgard, a former officer with the Lincoln Police Department, testified over objection as

to statements Dreimanis had made to Domgard in connection with Domgard's investigation of the assault on C.G.

The case was submitted to the jury. The jury returned a guilty verdict on March 11, 1998. On April 29, Dreimanis was sentenced to a term of 8 to 12 years' imprisonment. Dreimanis appealed his conviction to the Court of Appeals.

Dreimanis made four assignments of error to the Court of Appeals: (1) The trial court erred in allowing testimony of a prior bad act; (2) the trial court erred in failing to make specific findings in its ruling on the 404 hearing; (3) the trial court erred in failing to determine whether Dreimanis' confession during his prior act was voluntary; and (4) his trial counsel was ineffective. On April 27, 1999, the Court of Appeals issued its opinion rejecting each of Dreimanis' assignments of error and affirming the decision of the trial court in all respects. Specific portions of the Court of Appeals' opinion relevant to our decision are described below in our analysis. Dreimanis successfully petitioned this court for further review.

III. ASSIGNMENTS OF ERROR

Dreimanis states in his petition for further review that the Court of Appeals erred (1) "when it determined that the decision in State v. Osborn, 250 Neb. 57 (1996) only applied to motions to suppress," (2) "when it determined that the district court's order implicitly contained specific findings as to the purpose for which the testimony was admissible," (3) "when it determined that [Dreimanis] was not entitled to a Jackson v. Denno hearing with regard to his statement made to police in a prior act because he had pled guilty in that case and therefore waived all defenses," and (4) "when it determined that the district court allowing the admission of [Dreimanis'] prior conviction into evidence in direct conflict and contrary to it's [sic] prior ruling on its admissibility had no prejudicial impact and was not plain error."

IV. STANDARD OF REVIEW

[1,2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those

instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and rule 404(2), and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Sanchez, supra; State v. McManus, supra.*

V. ANALYSIS

1. Specific Findings: Trial Court's 404 Ruling

Taking Dreimanis' first two assignments of error on further review together, Dreimanis asserts that the Court of Appeals erred in determining that the trial court was not required to make express findings in its ruling pursuant to rule 404 and in determining that the trial court's 404 ruling implicitly contained specific findings as to the purpose under rule 404 for which evidence regarding the prior conviction involving the victim C.G. was received. Dreimanis relies on *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996), as support for these two assignments of error. Because the rulings by the trial court and Court of Appeals antedate our decision in *State v. Sanchez, supra*, we reject these assignments of error as more fully explained below.

In *Osborn*, we held that "district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress." 250 Neb. at 67, 547 N.W.2d at 145. The Court of Appeals noted that our holding in *Osborn* expressly addressed rulings on motions to suppress and that, at the time of the trial court's ruling on the 404 hearing, no authority existed extending the *Osborn* requirement of specific findings regarding motions to suppress to rule 404 findings.

On July 16, 1999, subsequent to both the trial court's and the Court of Appeals' decisions in the instant case, we issued our opinion in *State v. Sanchez, supra*. In *Sanchez*, we held that

> *henceforth*, the proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be

> required to state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court shall similarly state the purpose or purposes for which such evidence is received.

(Emphasis supplied.) 257 Neb. at 308, 597 N.W.2d at 374. We further held that "[a]ny limiting instruction given upon receipt of such evidence should likewise identify only those specific purposes for which the evidence was received." *Id.*

In the present case, prior to trial, the trial court's ruling on the 404 hearing did not state the specific purpose or purposes for which evidence of Dreimanis' other bad acts would be received. At trial, when Dreimanis objected to the admission of such evidence on the basis of relevance and rule 404, his objections were overruled without a statement of the specific purpose or purposes for which the evidence was received. The trial court gave jury instruction No. 12 regarding evidence of Dreimanis' other acts as follows:

> You heard evidence that the defendant 1) sexually assaulted [C.G.], 2) sexually assaulted [E.W.'s brother], and 3) caused [E.W.] to rub his penis. Such evidence was not received to prove the character of the defendant in order to show that he acted in conformity therewith. Such evidence was received only for the limited purpose of helping you to decide whether the defendant had the motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident to commit the first degree sexual assault of a child charged. You must consider the evidence for that limited purpose and for no other.

The limiting instruction given to the jury recited the enumerated purposes for which evidence may be admitted under rule 404(2) but did not identify the specific purpose or purposes for which the evidence was received. In sum, the trial court's rulings admitting evidence of prior bad acts do not indicate the purpose for which they were admitted.

The trial court's rulings do not comport with our opinion in *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). However, as noted, Dreimanis' trial took place in March 1998, prior to the issuance of our opinion in *Sanchez*. We stated in *Sanchez* that the requirements imposed on the trial courts to

state the specific purposes for admission of evidence under rule 404(2) would apply "henceforth," *id* at 308, 597 N.W.2d at 374, and therefore, we cannot find that the Court of Appeals erred in concluding that, at the time of its ruling and that of the trial court, the trial court was "under no obligation to make express findings in rulings pursuant to rule 404." See *State v. Dreimanis*, 8 Neb. App. 362, 370, 593 N.W.2d 750, 757 (1999). We reject Dreimanis' first assignment of error.

With respect to the second assignment of error, namely, that the Court of Appeals erred in implicitly finding that the trial court made specific findings under rule 404, Dreimanis misreads the Court of Appeals' opinion. Contrary to Dreimanis' assertion, the Court of Appeals did not find that the trial court made specific findings, but, rather, concluded that specific findings under rule 404 were not required, and consequently, the absence of specific findings by the trial court was not error. Accordingly, we reject Dreimanis' second assignment of error.

At oral argument, Dreimanis' counsel argued that notwithstanding the language of the first and second assignments of error on further review, these assignments of error should be interpreted by this court as challenging the Court of Appeals' conclusion that evidence regarding the prior sexual assault of C.G. was admitted for a proper purpose under rule 404. We have reviewed the first and second assignments of error on further review and determine that the first and second assignments of error on further review simply do not pose the issue of the admissibility of the prior bad act under rule 404.

[3,4] A petition for further review and supporting memorandum brief must specifically set forth and discuss any error assigned to the Court of Appeals. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). Absent plain error, our review on a petition for further review is restricted to matters assigned and argued in the briefs. *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999).

Because the issue of admissibility of evidence of prior bad acts regarding C.G. under rule 404 was not properly assigned in Dreimanis' petition for further review nor was it argued in the supporting brief, the issue is not properly before us on further

review, and we render no opinion regarding the admissibility of such evidence under rule 404.

2. *Denno* Hearing Regarding Statements Made by Dreimanis During Prior Investigation of Sexual Assault of C.G.

As his third assignment of error, Dreimanis asserts on further review that the Court of Appeals erred when it found that Dreimanis was not entitled to a *Denno* hearing regarding statements he made to police during the investigation of the prior sexual assault involving C.G. This assignment of error is without merit.

In connection with its analysis of Dreimanis' claim that the trial court should have afforded him a *Denno* hearing in the instant case, which involves E.W., regarding statements he made in connection with the investigation of the previous case involving C.G., the Court of Appeals stated as follows:

> Whether the statements Dreimanis made during the course of that investigation [of the victim C.G.] were voluntary was resolved by his guilty plea in that case. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. . . . Dreimanis cannot now raise an issue he long ago waived.

State v. Dreimanis, 8 Neb. App. 362, 371, 593 N.W.2d 750, 757 (1999).

The Court of Appeals further observed that it was not required to decide the issue of whether Dreimanis was entitled to a *Denno* hearing in the instant case regarding the statements he made during the prior investigation involving C.G. because Dreimanis had not preserved that issue for appellate review. The Court of Appeals stated:

> Dreimanis never raised this issue during pretrial proceedings and never sought a *Denno* hearing [related to the previous investigation of the case involving the victim C.G.]. . . . Because Dreimanis did not object on the basis of whether his statements in the investigation of the sexual assault on [C.G.] were voluntary, and such issue is not

> apparent from the context, the matter was not preserved for appellate review.

Id. at 371, 593 N.W.2d at 757.

A review of the record indicates that Dreimanis' objections to the admission of his statements made in the course of the investigation of the prior case involving C.G., as well as all other evidence of the prior conviction, was limited to relevance and rule 404. Dreimanis did not attack the voluntariness of his statements regarding the C.G. investigation in the trial of the instant case, and no such objection is apparent from the context. Because such challenge was not made at the trial level, it has not been preserved for appeal. See *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993). Further, we make no comment on the propriety of the collateral attack based on *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), proposed by Dreimanis on appeal.

We agree with the Court of Appeals that Dreimanis did not preserve this issue for appellate review and accordingly reject Dreimanis' third assignment of error.

3. Plain Error in Admission of Evidence of Prior Conviction

For his fourth assignment of error, Dreimanis claims the Court of Appeals erred "when it determined that the district court allowing the admission of [Dreimanis'] prior conviction into evidence in direct conflict and contrary to it's [sic] prior ruling on its admissibility had no prejudicial impact and was not plain error." Specifically, Dreimanis argues that the Court of Appeals erred in not finding plain error for two reasons. First, he asserts that admission of evidence of his prior conviction was plain error because no *Denno* hearing was held to determine the voluntariness of his statements to police in the prior case. Second, he asserts that the trial court's stated purpose for admitting such evidence was impeachment in the event Dreimanis testified, and because he did not testify, such evidence could not have been received, and such admission was plain error. We reject both arguments.

[5,6] Consideration of plain error occurs at the discretion of an appellate court, and a party who fails to properly assign an

error on further review does so at its peril. *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999); *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998). Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Woods, supra.*

(a) *Denno* Hearing

Dreimanis asserts that admission of evidence of his statements to police during the investigation of the prior sexual assault was plain error because no *Denno* hearing was held to determine whether such statements were voluntary. As discussed above, the Court of Appeals found that Dreimanis did not raise this issue during pretrial proceedings and did not seek a *Denno* hearing relating to those statements. The Court of Appeals further found that Dreimanis did not object to the admission of his statements regarding C.G. on the basis of voluntariness and that such issue was not apparent from the context. We agree with these findings of the Court of Appeals, and because the issue was not evident from the record, we reject Dreimanis' argument that the Court of Appeals erred in failing to find plain error regarding the *Denno* hearing involving the investigation of the sexual assault of C.G.

(b) *Olsan* Ruling: Impeachment

Dreimanis asserts that the admission of prior conviction evidence at trial was plain error because the trial court had limited the introduction of such evidence exclusively to impeachment in the event Dreimanis testified. Dreimanis argues that because he did not testify at trial, the need for impeachment did not arise, and it was plain error for the trial court to receive the evidence in the absence of his testimony. We disagree.

The trial court's ruling after the 404, *Olsan*, and *Denno* hearings stated in pertinent part: "With respect to 404, I have determined that evidence with respect to the acts concerning [E.W.]'s brother . . . are admissible, as well as the previous events with

[C.G.] with respect to the prior conviction. It is admissible for purposes of impeachment should the defendant testify."

Dreimanis asserts that pursuant to the trial court's ruling, impeachment was the *only* purpose for which evidence of his prior conviction was admissible and that because he did not testify, the prior conviction evidence was improperly admitted at trial. However, Dreimanis misinterprets the trial court's ruling.

In its analysis, the Court of Appeals observed: "It is clear from the context of the proceedings that the trial court's comment regarding impeachment was directed toward the *Olsan* aspect of the proceedings." *State v. Dreimanis*, 8 Neb. App. 362, 373, 593 N.W.2d 750, 758 (1999). We agree with the Court of Appeals' assessment. Given the combined nature of the pretrial hearing, the trial court was obligated to rule, inter alia, on whether evidence of the prior conviction was admissible under rule 404(2) and, separately, on whether it was admissible under *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989), for impeachment, should Dreimanis testify. In the portion of its ruling quoted above, the trial court ruled in the first sentence that the evidence was admissible for rule 404 purposes without specification and then ruled in the second sentence that it was also admissible for impeachment purposes under *Olsan* should Dreimanis testify. We reject Dreimanis' assertion that the trial court's ruling limited the use of prior conviction evidence exclusively for the purpose of impeachment and that the Court of Appeals erred in failing to find plain error in the trial court's admission of the challenged evidence at trial simply because the admission was on non-*Olsan* grounds. Dreimanis' fourth assignment of error is without merit.

VI. CONCLUSION

Upon further review, we reject Dreimanis' assignments of error and affirm the decision of the Court of Appeals.

AFFIRMED.

IN RE INTEREST OF RACHAEL M. AND SHERRY M., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. LISA G., APPELLANT.

603 N.W.2d 10

Filed December 3, 1999. Nos. S-98-955, S-98-956.

1. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Appeal and Error.** Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.
3. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition.
4. **Parental Rights: Appeal and Error.** The adjudication that a child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) is a final, appealable order.
5. ___: ___. In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
6. **Juvenile Courts: Parental Rights.** The purpose of Neb. Rev. Stat. § 43-292(6) (Reissue 1998) is to advance the best interests of the child by giving the juvenile court power to terminate parental rights where the grounds for adjudicating the child within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) have not been corrected.
7. **Parental Rights.** When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay.

Appeal from the County Court for Red Willow County: CLOYD CLARK, Judge. Affirmed.

Clyde F. Starrett for appellant.

Maurice A. Green, of Green Law Offices, P.C., guardian ad litem.

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

WRIGHT, J.

NATURE OF CASE

Lisa G. appeals from orders terminating her parental rights to Rachael M. and Sherry M. (the children).

SCOPE OF REVIEW

[1] The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Winter v. Department of Motor Vehicles*, 257 Neb. 28, 594 N.W.2d 642 (1999).

[2] Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *Varela v. Fisher Roofing Co.*, 253 Neb. 667, 572 N.W.2d 780 (1998).

FACTS

On August 1, 1994, the then Nebraska Department of Social Services, now the Department of Health and Human Services (the department), received a child neglect report concerning the children, who were less than 2 weeks old. Three employees of the department responded by going to the apartment of Vernon J., who was later determined to be the father of the children. Piles of clothing were observed throughout the home. Ashtrays overflowing with cigarette butts were found in beds that were being used by the children. Other ashtrays lying throughout the apartment were also full of debris.

The department attempted to provide Lisa with voluntary services on at least two different occasions, but she refused to cooperate. In addition, the children were hospitalized twice. The second time, the children were in a dehydrated condition and had lost weight. On October 27, 1994, the department requested the county attorney to initiate proceedings to have the care, custody, and control of the children placed with the department.

On November 4, 1994, petitions were filed alleging that the children were within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). The Red Willow County Court, sitting as a juvenile court, ordered that the temporary custody of the children be placed with the department. In addition, Lisa was to receive basic parenting information through instruction with a family service support provider.

At an adjudication hearing on December 19, 1994, the trial court concluded that the allegations in the petitions were true in

that the children suffered from failure to thrive due to lack of proper parental care by reason of the fault or habits of Lisa and that Lisa neglected or refused to provide proper and necessary care for the health and well-being of the children. Thus, the trial court determined that it was in the best interests of the children to remain in the care, custody, and control of the department for out-of-home placement. Following adjudication, visitation and parenting education continued.

Following a hearing on January 17, 1995, the trial court ordered Lisa to undergo a medical and psychological evaluation which was to include a parenting skills evaluation. Dr. Lee Kimzey conducted a psychological examination of Lisa and concluded that her level of functioning was such that she was barely able to care for herself, let alone care for the needs of the children. Kimzey opined that Lisa appeared to be in the throes of a major depression with associated psychotic thought processing, as reflected in delusional thinking and hallucinations.

On March 3, 1995, the trial court adopted a case plan and made Vernon, the putative father, a party to the case. On May 5, an adjudication hearing was held regarding a petition filed against Vernon. The petition was based on Vernon's mental health condition indicating that he was not a fit and proper custodian for the children. Concluding that the facts in the petition were true, the trial court scheduled a dispositional hearing and requested that a case plan and court report be developed. Visitation was ordered to be continued as outlined in a case plan and court report dated February 21.

Following a physical altercation between Lisa and Vernon on June 12, 1995, Lisa severed their relationship and requested separate case plans for herself and Vernon. At a hearing on August 9, Vernon requested that his parental rights be terminated. The trial court instructed the department to investigate Vernon's request and ordered continuation of the visitation plan involving Lisa and the children.

After several review hearings concerning the parents' progress, a hearing was held on November 6, 1996, at which time the county attorney informed the trial court of his intention to file petitions to terminate Lisa's parental rights. Subsequently, the guardian ad litem for the children filed such petitions. Trial

was completed on August 12, 1998, at which time the trial court found that the children were within § 43-247(3)(a) in that they had failed to thrive because of a lack of proper parental care by the fault and habits of Lisa and that Lisa had neglected and refused to provide proper subsistence and care necessary to the health and well-being of the children. The trial court found that the parents were unable to provide proper and necessary care for the children because (1) they had failed to successfully complete counseling and the medical treatment necessary to correct mental illnesses diagnosed by qualified mental health professionals, (2) they had failed to visit the children on a regular and frequent basis necessary for the children's return to the home of a parent without causing severe trauma and stress, and (3) Lisa was unable to provide an adequate home with adequate care for the children and their two siblings. The trial court noted that numerous efforts, including psychological, medical, and educational guidance, had failed to give the parents the skills and ability to provide proper and necessary care for the children and to provide a safe, stable, and permanent environment for the children. Based on these findings, the trial court ordered that the parental rights of Lisa and Vernon be terminated.

ASSIGNMENTS OF ERROR

Lisa asserts that the trial court erred (1) in allowing the guardian ad litem to file pleadings and participate in the trial in an adversarial fashion even after objection; (2) in finding clear and convincing evidence to terminate her parental rights; (3) in not requiring a written determination that continuation in the home would be contrary to the children's welfare before the court ordered that the children be removed from their home, which was alleged to be unconstitutional; (4) in not requiring the department to situate the children nearer to Lisa's home after her move to Fairfield; and (5) in not making reasonable efforts to reunify the family, as required by law.

ANALYSIS

We first address whether the trial court erred in allowing the guardian ad litem to file the petitions to terminate parental rights and then proceed to try the case as an attorney for the children.

Lisa relies on *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998), to support her claim that a guardian ad litem may be an attorney, but an attorney who performs the functions of a guardian ad litem does not act as an attorney and is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings or briefs.

Betz is clearly distinguishable because it involved a guardian ad litem in a divorce proceeding who was appointed pursuant to Neb. Rev. Stat. § 42-358 (Cum. Supp. 1996). In *Betz*, we held that when making the appointment of a guardian ad litem or an attorney to represent the interests of a minor pursuant to § 42-358 in forums other than the juvenile court, the appointing court, in the order making the appointment, shall specify whether the person appointed is to act as a guardian ad litem or as an attorney pursuant to § 42-358. One person may not serve in both capacities.

Here, the actions of the guardian ad litem are governed by Neb. Rev. Stat. § 43-272.01(2) (Cum. Supp. 1996), which states that the guardian ad litem "(e) [m]ay present evidence and witnesses and cross-examine witnesses at all evidentiary hearings . . . and (h) [m]ay file a petition in the juvenile court on behalf of the juvenile, including a supplemental petition as provided in section 43-291."

The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Winter v. Department of Motor Vehicles*, 257 Neb. 28, 594 N.W.2d 642 (1999). The guardian ad litem proceeded under the statutory authority of § 43-272.01(2) in presenting evidence and witnesses, cross-examining witnesses, and filing the petitions for termination. Thus, the trial court did not err in overruling Lisa's objection to the guardian ad litem's participation with regard to termination of her parental rights.

[3] In addition, Lisa's argument that § 43-272.01(2)(e) as amended is unconstitutional was not properly raised on appeal. An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507

N.W.2d 465 (1993); *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). We also point out that we recently considered the constitutionality of § 43-272.01(2) in *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999), where we specifically held that § 43-272.01(2) is not rendered unconstitutional by its authorization for a guardian ad litem to perform the investigatory duties of a guardian ad litem as well as to bring and try a motion to terminate parental rights.

We next address Lisa's claim that the trial court erred in finding clear and convincing evidence to terminate her parental rights. Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *Varela v. Fisher Roofing Co.*, 253 Neb. 667, 572 N.W.2d 780 (1998). Because Lisa has not discussed this assignment of error in her brief, we will not consider it other than to note that there was clear and convincing evidence to support the order of termination.

Lisa claims the trial court erred by not requiring a written determination that continuation in the home would be contrary to the children's welfare before entering a dispositional order. This assignment of error is based upon Neb. Rev. Stat. § 43-284 (Reissue 1993), which was in effect at the time of the order removing the children from their home. At that time, § 43-284 stated in relevant part:

> The court may enter a dispositional order removing a juvenile from his or her home only upon a written determination that continuation in the home would be contrary to the welfare of such juvenile and that reasonable efforts have been made to prevent or eliminate the need for removal of the juvenile from his or her home and to make it possible for the juvenile to return.

[4] The petition filed November 4, 1994, alleged that the children were within § 43-247(3)(a). On that same date, the trial court ordered that temporary custody of the children be placed with the department. The matter came on for adjudication on December 19, at which time the trial court determined that the children should remain in the care, custody, and control of the department for out-of-home placement. No appeal was taken

from that adjudication. The adjudication that a child is within the meaning of § 43-247(3)(a) is a final, appealable order. *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991). As Lisa's assignment of error is based upon a final order which was not appealed, we do not address or consider this assignment of error.

Lisa's fourth and fifth assignments of error are essentially a claim that the trial court erred in not making reasonable efforts to reunify the family, as required by law.

On August 12, 1998, the trial court found by clear and convincing evidence that Lisa and Vernon were still unable to provide proper and necessary care for the children or to provide a safe, stable, and permanent environment. The trial court noted that the following reasonable efforts under the direction of the court had failed to give the parents the skills and ability to provide the proper and necessary care for the children and a safe and permanent environment for the children: (1) voluntary assisted services in homemaking and parenting; (2) psychological evaluation and assistance by Kimzey and other mental health professionals; (3) visits in the home; (4) visits at a department facility, with transportation provided; (5) assistance and transportation to McCook for visits and lodging expenses for visitation after Lisa relocated outside of McCook; (6) visits in Hastings to accommodate parental visitation, with transportation provided; (7) therapeutic services and financial assistance; (8) a family support provider to teach parenting skills and budgeting; (9) family support services to assist in job applications and retention assistance; (10) attendance at Educational Service Unit (ESU) meetings and assistance for the children; and (11) videos on parenting skills.

Thus, the trial court found by clear and convincing evidence that reasonable efforts and services to the parents ordered by the court had failed and that the parents had failed to correct the conditions as adjudicated in the following particulars: (1) Lisa failed to comply with the court's order regarding visitation in the following particulars—from December 30, 1996, to January 31, 1997, Lisa attended 6 out of 10 scheduled visits; from February 1 to 28, Lisa attended 4 out of 8 scheduled visits; from March 1 to 31, Lisa attended 4 out of 8 scheduled visits; and from April 1 to 30, Lisa attended 5 out of 9 scheduled visits,

with Vernon having wholly failed to comply with the visitation plans. (2) Lisa failed to comply with the court's order wherein attendance at therapy was mandated and failed to attend individual counseling sessions that were ordered per the April 8, 1996, case plan as adopted. (3) Lisa failed to follow through with the recommendations of her doctors; failed to accept and utilize therapeutic services and financial planning assistance; failed to place into practice the parenting skills that were provided; failed to obtain consistent employment and financial independence; failed to place appropriate personal boundaries and provide a safe home environment and personal relationships for the children; failed to attend physician appointments, hospital visits, and visits with ESU personnel; and failed to participate in educational classes offered.

The trial court further found by clear and convincing evidence that the children had been in an out-of-home placement for 45 consecutive months since November 4, 1994, and that after a close examination of all the evidence, there were no times during the period of foster placement that these children could have returned to a safe and stable home environment with Lisa. Finally, the trial court found by clear and convincing evidence that it was in the best interests of the children to terminate Lisa's and Vernon's parental rights and place the children in the care, custody, and control of the department.

[5] In an appeal from a judgment terminating parental rights, an appellate court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but when evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

[6,7] The purpose of Neb. Rev. Stat. § 43-292(6) (Reissue 1998) is to advance the best interests of the child by giving the juvenile court power to terminate parental rights where the grounds for adjudicating the child within § 43-247(3)(a) have not been corrected. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child

require that a final disposition be made without delay. *In re Interest of Constance G., supra.*

Upon our de novo examination of the record, we find that the trial court correctly determined that the evidence showed clearly and convincingly that Lisa and Vernon were unable to provide proper and necessary care for the children or to provide a safe, stable, and permanent environment for the children because they failed to successfully complete the requirements necessary to provide an adequate home with adequate care for the children; that reasonable efforts and services provided to the parents by order of the court have failed; and that the parents have failed to correct the conditions set forth in the adjudication. Thus, we find by clear and convincing evidence that it is in the best interests of the children that the parental rights of Lisa be terminated.

CONCLUSION

The judgment of the county court, sitting as a juvenile court, is affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.

IN RE INTEREST OF ALYCIA P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CATHERINE H., APPELLANT, AND ANDRE P., APPELLEE.

603 N.W.2d 7

Filed December 3, 1999. No. S-98-1184.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
4. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties.

5. **Actions: Child Support.** A cause of action to enforce a parental duty to provide support belongs to the child.
6. **Parties: Standing: Appeal and Error.** Only a person aggrieved or injured by a judgment may take an appeal from it.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Appeal dismissed.

Bruce E. Stephens for appellant.

Randy R. Stoll, York County Attorney, for appellee State.

Jane K. Brogan, guardian ad litem.

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

CONNOLLY, J.

Catherine H. appeals from an order of the county court, sitting as a juvenile court, terminating the parental rights of Andre P. to his and Catherine's daughter, Alycia P. Catherine's parental rights were not terminated, but she contends that the portion of Neb. Rev. Stat. § 43-292.02 (Reissue 1998) enacted by 1998 Neb. Laws, L.B. 1041, is unconstitutional. Catherine further contends that the termination of Andre's parental rights deprives her of receiving child support. We granted Catherine's petition to bypass. Although Catherine's brief was submitted by both Catherine and the guardian ad litem, neither Andre nor the guardian ad litem filed a notice of appeal. Because Catherine lacks standing, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

The instant case involves the application of L.B. 1041, now codified at § 43-292.02. Section 43-292.02 provides:

> (1) A petition shall be filed on behalf of the state to terminate the parental rights of the juvenile's parents or, if such a petition has been filed by another party, the state shall join as a party to the petition, and the state shall concurrently identify, recruit, process, and approve a qualified family for an adoption of the juvenile, if:

> (a) A juvenile has been in foster care under the responsibility of the state for fifteen or more months of the most recent twenty-two months . . . .
>
> . . . .
>
> (3) The petition is not required to be filed on behalf of the state or if a petition is filed the state shall not be required to join in a petition to terminate parental rights or to concurrently find a qualified family to adopt the juvenile under this section if:
>
> (a) The child is being cared for by a relative;
>
> (b) The Department of Health and Human Services has documented in the case plan or permanency plan, which shall be available for court review, a compelling reason for determining that filing such a petition would not be in the best interests of the juvenile; or
>
> (c) The family of the juvenile has not had a reasonable opportunity to avail themselves of the services deemed necessary in the case plan or permanency plan approved by the court if reasonable efforts to preserve and reunify the family are required under section 43-283.01.

Alycia has been placed in foster care since August 26, 1996. On May 14, 1998, the State brought a motion to hold a permanency hearing on the bases that Alycia had been in foster care for 15 or more months of the most recent 22 months and that L.B. 1041 required that a hearing be held to determine if an exception to filing a petition to terminate parental rights existed under L.B. 1041. Catherine then brought a motion to quash contending that L.B. 1041 was unconstitutional. Specifically, Catherine contended that L.B. 1041 was overbroad because it prescribed unreasonable time requirements for the placement of a juvenile in foster care, was overbroad as it applied to Alycia and Catherine, and deprived a person of procedural and/or substantive due process. The district court denied the motion.

On August 13, 1998, a hearing on the State's motion was held. The court determined that an exception existed as to Catherine under subparagraph (3)(b) of L.B. 1041, but that no exception existed as to Andre. Catherine argued that a petition to terminate Andre's parental rights should not be filed, because it would deprive Catherine and Alycia of child support. The

guardian ad litem agreed that Catherine's parental rights should not be terminated but argued that a petition should be filed to terminate Andre's parental rights.

The State next filed a supplemental petition to terminate Andre's parental rights. Catherine filed an objection on the basis that it was not in Alycia's best interests to terminate Andre's parental rights, because Alycia was deserving of support from Andre. The guardian ad litem did not join in this objection. On August 20, 1998, a review hearing was held, and the court ordered that Alycia was to remain in the full care, custody, and control of the Nebraska Department of Health and Human Services but that Catherine would have physical custody beginning August 26.

On September 3, 1998, a hearing was held on the supplemental petition to terminate Andre's parental rights. Andre attended and did not object to the termination of his parental rights. Andre further explicitly stated that he desired that his parental rights be terminated. Catherine again objected to the termination on the basis that it would deprive Alycia of support. The guardian ad litem made no objection. The trial court determined that it was in the best interests of Alycia that Andre's parental rights be terminated. As a result of the termination of his parental rights, the court found the support issue to be moot.

Catherine filed a notice of appeal. The notice did not state that the appeal was being filed on Alycia's behalf, and neither Andre nor the guardian ad litem filed a notice of appeal or signed the notice filed by Catherine. The guardian ad litem did not cross-appeal. Following the notice of appeal, however, the briefs were filed with the guardian ad litem's signature. A motion to bypass and a motion to continue were also made which listed the guardian ad litem as appearing on behalf of Alycia. We granted both motions.

ASSIGNMENTS OF ERROR

Catherine assigns, rephrased, that the trial court erred in terminating the parental rights of Andre, in overruling Catherine's motion to quash, and in overruling Catherine's objection to the supplemental petition to terminate parental rights.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999); *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999).

ANALYSIS

[2,3] The State contends that Catherine does not have standing to appeal. Neither Andre nor Alycia, by and through a next friend or guardian ad litem, filed a notice of appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *In re Interest of William G., supra*; *Cotton v. Steele, supra.*

[4,5] In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *In re Interest of Natasha H. & Sierra H., ante* p. 131, 602 N.W.2d 439 (1999). To the extent that Catherine argues that the trial court erred in terminating Andre's parental rights, she is not asserting rights of her own and, thus, lacks standing. See *In re Interest of Natasha H. & Sierra H., supra.* Catherine also assigns that the trial court erred in overruling her objection to the supplemental petition to terminate parental rights. Catherine contends that it was not in Alycia's best interests to terminate Andre's parental rights, because Alycia was deserving of support. However, only Catherine filed a notice of appeal, and she did not do so on behalf of Alycia. Although the guardian ad litem signed Catherine's brief, she approved of the termination of Andre's parental rights before the trial court and did not bring her own appeal on behalf of Alycia. We have said that a cause of action to enforce a parental duty to provide support belongs to the child. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). In Catherine's assignment of error regarding her objections to the supplemental petition, Catherine is

asserting the rights of Alycia instead of rights of her own. Accordingly, Catherine lacks standing on this issue.

[6] Finally, it is a general rule that only a person aggrieved or injured by a judgment may take an appeal from it. *In re Interest of William G., supra.* Catherine argues that § 43-292.02 is overbroad because it prescribes unreasonable time requirements for the placement of a juvenile in foster care and deprives a person of due process. However, because Catherine's parental rights were not terminated, she was not injured by the denial of her motion to quash. Accordingly, we do not address Catherine's assignment of error regarding the denial of her motion to quash.

Having determined that Catherine either lacked standing or was not an aggrieved person on all of her assignments of error, we dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR LYLE, APPELLANT.
603 N.W.2d 24

Filed December 3, 1999. No. S-99-011.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
3. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proven, constitute an infringement of the movant's rights under the state or federal Constitution. An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. Further, when the motion properly alleges an infringement of the defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
4. **Constitutional Law: Effectiveness of Counsel: Proof.** Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for

counsel's deficient performance, the result of the proceeding would have been different.

5. **Effectiveness of Counsel: Proof.** The two prongs of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
6. **Criminal Law: Trial: Judges: Presumptions.** A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise.
7. **Homicide: Intent: Proof.** The elements of first degree murder in Nebraska are intent to kill, premeditated malice, and deliberate malice. The State bears the burden of proving all of these elements beyond a reasonable doubt.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Arthur Lyle, pro se, on brief.

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

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

HENDRY, C.J.

INTRODUCTION

Arthur Lyle brought a motion for postconviction relief in the district court for Douglas County. The court denied Lyle an evidentiary hearing, denied his request for counsel, and concluded that Lyle was not entitled to any postconviction relief. Lyle appeals from the district court's decision. We affirm.

BACKGROUND

After a bench trial, Lyle was convicted of first degree murder in the shooting death of his brother, John Gould. He was sentenced to life in prison. Lyle's conviction and sentence were affirmed on direct appeal in *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994), in which the facts surrounding Gould's death are set out in greater detail. In summary, Gould and Lyle became involved in an argument which escalated into a physical fight. This fight occurred at the Florence Heights Nursing Home in Omaha, Nebraska, where their mother lived. The fight ended

when Gould pushed Lyle off a porch and onto the grass below. A nurse's aide who witnessed part of the fight gave Lyle back his eyeglasses, and Lyle told the aide, "I'll be back."

Lyle left the nursing home and dropped off his two grandchildren, who were with him, at a convenience store. He returned to the nursing home approximately 20 minutes after the fight. Gould's wife testified at trial that she saw Lyle drive at a high rate of speed across the lawn to the front porch of the nursing home. Lyle then grabbed a gun he kept in his truck; got out, saying "Here, you mother fucker"; and immediately began firing. Lyle shot Gould five times, moving the gun up and down Gould's body as he fired. He also shot and injured Gould's wife.

Lyle brings this motion for postconviction relief regarding his conviction and sentence for Gould's murder, asserting that his constitutional rights were violated. In particular, Lyle asserts in his motion that he "was denied Due Process" because Lyle had the burden at trial to prove beyond a reasonable doubt that he acted in the heat of passion when he shot his brother. He also asserts trial counsel "failed to provide the defendant with effective assistance of counsel" and his direct appeal counsel "failed to provide the defendant with effective assistance of counsel."

In support of these assertions, Lyle pleads in his postconviction motion that trial counsel advised Lyle that he had to testify at trial because Lyle had to "prove that he had acted in the heat of passion when he shot his brother." Lyle also claims that trial counsel did no investigation of other eyewitnesses to the fight and the shooting who could "confirm [Lyle's] version of what had occurred during the altercation." Lyle alleges he asked trial counsel to summon these people to the trial so that Lyle would not have to testify, but none of the witnesses were summoned. Finally, Lyle asserts that direct appeal counsel failed to raise any of the issues related to the actions or inactions of trial counsel on appeal.

In appealing the decision of the district court, Lyle argues that the allegations contained in his motion for postconviction relief show that he is entitled to an evidentiary hearing, appointed counsel, and postconviction relief.

ASSIGNMENTS OF ERROR

Lyle contends, rephrased and summarized, that the district court erred in (1) finding no violation of due process during Lyle's trial, (2) finding no ineffective assistance of trial counsel, (3) finding no ineffective assistance of appellate counsel, (4) denying Lyle an evidentiary hearing, (5) denying Lyle appointed counsel, and (6) finding that Lyle was entitled to no relief.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

ANALYSIS

[2] Lyle claims that his due process rights were violated during trial in that the burden of proof somehow shifted to Lyle to prove he acted in the heat of passion when he shot Gould. This issue, standing alone, is procedurally barred. Lyle failed to raise this issue in his direct appeal, when this issue was known to Lyle and could have been addressed using the record available on direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal. *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *State v. Ryan, supra.*

Lyle also claims that he was deprived of effective assistance of counsel at trial. The ineffectiveness of trial counsel could also have been raised on direct appeal, since Lyle was represented by different counsel at trial and on appeal. Thus, issues related to the ineffectiveness of trial counsel, except as reached through Lyle's claim of ineffective assistance of direct appeal counsel as discussed below, are procedurally barred. *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999).

Lyle also asserts that he was deprived of effective assistance of counsel on direct appeal. Lyle's claim regarding the ineffective assistance of direct appeal counsel is not procedurally barred. See *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999). This is the first opportunity Lyle has had to present his

claim regarding the alleged ineffectiveness of direct appeal counsel in failing to recognize and raise any claimed errors which occurred at the trial court level.

We proceed to review only Lyle's assertion of ineffective assistance of direct appeal counsel to determine whether the district court was clearly erroneous in holding that Lyle was not entitled to an evidentiary hearing, denying Lyle appointed counsel, and concluding that Lyle was entitled to no relief.

[3] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proven, constitute an infringement of the movant's rights under the state or federal Constitution. *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *Id.* Further, when the motion properly alleges an infringement of the defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

[4] Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

Lyle's postconviction motion alleges four different prejudicial actions by trial counsel which Lyle asserts appellate counsel should have raised on direct appeal. First, trial counsel advised Lyle that Lyle had the burden to prove he acted in the heat of passion when he killed his brother. Second, trial counsel advised Lyle that he must testify. Third, trial counsel failed to investigate other witnesses Lyle identified. Fourth, trial counsel failed to address the issue of who had the burden to prove or disprove malice on a charge of first degree murder which, because

of the state of the law in Nebraska, impermissibly shifted the burden to Lyle to disprove malice.

Lyle asserts that he was prejudiced by trial counsel's actions in that he elected to testify and his testimony was confusing and contradictory. He was also allegedly prejudiced because he was denied the opportunity to call witnesses who would support his testimony or testify in his place. Finally, he was allegedly prejudiced in that he had the burden of proving he acted in the heat of passion when he shot his brother.

Accepting the allegations of Lyle's motion as true, we conclude that Lyle's motion pleads facts which, if proven, could indicate that appellate counsel was ineffective in failing to raise the improper actions of trial counsel. Accordingly, we turn to the files and records to determine whether they affirmatively show that Lyle is entitled to no relief. See *State v. Silvers, supra.*

[5] In so doing, we consider whether the records and files affirmatively show that Lyle was not prejudiced by the actions of direct appeal counsel. The two prongs of the *Strickland* test, deficient performance and prejudice, may be addressed in either order. See *State v. Ryan, supra.* If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *Id.* Accordingly, in order for Lyle to be denied an evidentiary hearing, the records and files must affirmatively show no reasonable probability that but for appellate counsel's failure to raise the deficient performance of trial counsel, the result of the proceeding would have been different. See *id.*

We first consider whether Lyle was prejudiced by electing to testify. In order to be guilty of first degree murder, the State must prove beyond a reasonable doubt that the defendant intentionally killed the victim with deliberate and premeditated malice. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). As a part of the State's case in chief, Gould's wife testified that the fight between Lyle and Gould was relatively short and consisted of mostly pushing and shoving. Lyle left, then came back 20 or 30 minutes later, driving at a high rate of speed. Lyle stopped his truck, got out, shouted at Gould, and began shooting. He shot and killed Gould, shot and injured Gould's wife, then got back into the truck and left.

Lyle admitted in his direct testimony that he shot Gould and Gould's wife with a gun he kept in his truck. He further testified that he had helped raise Gould, who was 15 years younger than Lyle. Gould lived with Lyle from the time Gould was 10 years old until he was about 15 years old. Lyle generally looked after Gould and had at one time given him a car and a motorcycle. Lyle also testified that at the time of the shooting, "I was real angry. I just couldn't think; I couldn't see straight. I was angry. I was mad."

Given the records and files in this case, it cannot be shown that there was a reasonable probability that but for Lyle's testifying, the outcome of the proceeding would have been different. The record shows that even before Lyle testified, the State had presented sufficient evidence to convict Lyle of first degree murder. If anything, Lyle's testimony was helpful to his defense in that Lyle was able to testify that he was provoked due to the sudden quarrel with Gould.

If the claim of provocation is successful, the killing is reduced from first degree murder to manslaughter because the defendant acted not with malice, but instead acted while provoked. *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994). Being able to provide evidence of provocation was far from prejudicial to Lyle. The records and files affirmatively show that Lyle was not prejudiced by his testimony.

Lyle's second allegation of prejudice is that his testimony was confusing and inconsistent with the testimony of the State's witnesses. This claim also fails because, as discussed above, Lyle's testimony was largely exculpatory, or alternatively, it was cumulative of evidence already adduced by the State. See *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999).

Lyle's third allegation of prejudice is that he was deprived of witnesses who would have either obviated the need for Lyle to testify or confirmed Lyle's version of the events. In particular, Lyle asserts that these witnesses would have confirmed Lyle's testimony that Gould was the aggressor throughout the fight and that Lyle was gone for 10 minutes, rather than 20 or 30.

The fact that Lyle allegedly was deprived of witnesses who would have confirmed his version of the events fails to show prejudice. The evidence that Gould was the aggressor during the

fight and that Lyle was gone for only 10 minutes was already before the judge in the form of Lyle's testimony. Additional testimony as to those two facts would have been merely cumulative. Lyle seems to assume that the court did not believe his testimony, which is why he was found guilty of first degree murder. However, even if the court believed Lyle's version of events, this does not preclude a finding that Lyle was guilty of premeditated, deliberate murder. Upon proper proof, premeditation can be formed in an instant or in 10 minutes as easily as in 20 to 30 minutes. See, *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). Further, we have already concluded that Lyle was not prejudiced by choosing to testify.

The records and files affirmatively show that Lyle was not prejudiced by the lack of testimony from the missing witnesses.

[6] Lyle's final assertion of prejudice is that he bore the burden at trial to prove that he acted in the heat of passion, that is, without malice, due to trial counsel's ineffective performance. In particular, in his motion for postconviction relief, Lyle asserts, "[T]he trial record shows that under the laws of this state the burden of proving the absence of malice was imposed upon [Lyle]." Because Lyle waived his right to a jury trial, there are no jury instructions in the record setting out the burden of proof on the issue of malice with regard to first degree murder. Therefore, we must look to the state of the law at the time of Lyle's trial. This is the proper inquiry because a trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise. *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995); *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

[7] The elements of first degree murder in Nebraska are intent to kill, premeditated malice, and deliberate malice. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). The State bears the burden of proving all of these elements beyond a reasonable doubt. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995). See, also, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

Lyle asserts that Nebraska's law was unclear as to how the trier of fact was to assess evidence provided by the defendant that would tend to negate malice, which in Lyle's case is evidence of provocation caused by a sudden quarrel. Trial counsel's failure to address this lack of clarity, according to Lyle, required Lyle to prove provocation beyond a reasonable doubt, that is, in order to negate malice, Lyle was required to prove the absence of malice.

As support for his contention, Lyle directs us to *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992). Cave was charged with first degree murder and found guilty of second degree murder. There was testimony at trial that Cave was quarreling with the victim at the time of the murder. In his direct appeal, Cave argued that the evidence adduced would support only a finding of manslaughter, the killing of another upon a sudden quarrel without malice. See Neb. Rev. Stat. § 28-305 (Reissue 1995). In assessing the sufficiency of the evidence, we reiterated that the State was required to prove all of the elements of second degree murder beyond a reasonable doubt in order to convict the defendant. We further stated,

> it is by no means clear that in a prosecution for second degree murder, the burden is on the State to prove the absence of a sudden quarrel beyond a reasonable doubt. We do not decide the question, however, because even assuming the State carried such a burden, the evidence is sufficient to sustain the convictions in this case.

State v. Cave, 240 Neb. at 790, 484 N.W.2d at 464.

In *Cave*, we declined to reach the issue of whether the State was required to prove the absence of a sudden quarrel as an element of second degree murder. However, the elements of second degree murder are not at issue in Lyle's postconviction motion. Lyle's allegations concern who has the burden of proof, and in *Cave*, we reiterated that the State has the burden to prove all the elements of a murder charge beyond a reasonable doubt. *State v. Cave, supra*. When there is evidence of provocation in a case involving first degree murder, the burden remains on the State to show beyond a reasonable doubt all of the elements of first degree murder. See *State v. McHenry, supra*. It is a question for the trier of fact whether the defendant in a particular case has

presented sufficient evidence of provocation to cast a reasonable doubt on the element of malice. See *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

As we held in Lyle's direct appeal, the State proved all the elements of first degree murder beyond a reasonable doubt against Lyle. The State's proof was sufficient to allow the trial court to find that Lyle's evidence regarding provocation was rebutted by the State's evidence beyond a reasonable doubt. *State v. Lyle, supra.*

The records and files affirmatively show that Lyle did not have the burden of proving the absence of malice at trial. Thus, Lyle was not prejudiced by appellate counsels' alleged failure to raise this issue, or any of the other issues, alleged by Lyle.

The district court was not clearly erroneous in finding that the records and files affirmatively show that Lyle is not entitled to any relief. Thus, Lyle was not entitled to an evidentiary hearing. Further, the district court did not abuse its discretion in refusing to appoint counsel for Lyle in that his postconviction motion does not present any justiciable issues. See *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

CONCLUSION

After examining all of Lyle's assigned errors, we conclude they are without merit and affirm the decision of the district court in all respects.

AFFIRMED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
JAMES E. MYERS, APPELLANT.
603 N.W.2d 390

Filed December 10, 1999. No. S-98-027.

1. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
2. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.

3. **Constitutional Law: Wiretaps: Appeal and Error.** In dealing with the requisites for obtaining authority to intercept wire and oral communications and with the contents of orders granting such authority, the Nebraska Supreme Court has determined that in all substantive ways and in wording, these requisites are virtually identical to 18 U.S.C. § 2518 (1994).
4. **Wiretaps: Probable Cause.** An application for an order permitting the interception of telephone conversations serves a similar purpose to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or a warrant.
5. **Constitutional Law: Wiretaps: Probable Cause.** The test for issuance of a wiretap warrant pursuant to 18 U.S.C. § 2518 (1994) is whether the sworn information before a court is of sufficient apparent reliability to justify a neutral judicial officer in finding that there is probable cause to believe that an offense has been or is being committed.
6. **Wiretaps: Affidavits.** An affidavit in support of an application for a wiretap is similar to an affidavit in support of an application for a search warrant and is to be tested in a practical and commonsense fashion.
7. **Wiretaps: Appeal and Error.** In passing on the validity of an order to intercept wire or oral communications, an appellate court considers only information brought to the attention of the magistrate.
8. **Wiretaps: Controlled Substances: Affidavits.** Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap or eavesdrop explain away all possible alternative techniques of investigation.
9. **Wiretaps: Proof.** The ultimate burden of showing an unlawful interception rests upon the party against whom the fruits of an electronic surveillance are offered.
10. **Criminal Law: Motions for Mistrial: Juries.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
11. **Criminal Law: Jury Misconduct: Proof.** Where jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.
12. ___: ___: ___. A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such conduct was prejudicial to the extent that the defendant was denied a fair trial.
13. **Motions for Mistrial: Jury Misconduct.** The determination of whether to grant a mistrial rests not only on what the jurors say on interrogation, but also upon the nature of the published material, together with all other facts and circumstances in the record.
14. **Judges: Words and Phrases.** A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
15. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determi-

nation of the action more probable or less probable than it would be without the evidence.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for a new trial.

Alan G. Stoler and Jerry M. Hug for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

James E. Myers was charged by information with criminal conspiracy, unlawful possession with intent to deliver a controlled substance, use of a deadly weapon to commit a felony, possession of a deadly weapon by a felon, and, for sentencing purposes, being a habitual criminal. Following trial, Myers was convicted on all counts, and he appeals.

SCOPE OF REVIEW

[1] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

[2] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

FACTS

On September 18, 1995, law enforcement officials commenced an investigation regarding the murder of Lynette Mainelli. On April 19, 1996, upon the recommendation of the Attorney General of the State of Nebraska, the Douglas County

Attorney made application to the Douglas County District Court for an order authorizing interception of wire communications involving telephone numbers listed to Myers' mother, Annie Henley. The application sought interception of wire communications by Myers which might produce evidence regarding Mainelli's murder and the distribution of illegal drugs. The affidavit in support of the application set forth the following reasons for requesting the wiretap:

A narcotics distribution operation of any size will utilize the telephone, whether it be for contacting sources and distributors or for discussing such things as cost, quality, and payments. The telephone may be used for arranging and verifying meetings. In addition, persons involved in a homicide often use the telephone to assist in the destruction of evidence, construction of alibis, and intimidation of potential witnesses, as well as for purposes of contacting others involved in the homicide.

The objective of intercepting the wire communications was to record conversations revealing details of Mainelli's murder so as to ascertain the identity of individuals involved in the murder and to record conversations revealing details of suspected narcotics trafficking. Such information would be used by police to assess the nature and scope of the continuing conspiracy regarding the murder and drug trafficking; to discover the location of physical evidence; to track the manner in which moneys derived from the illegal narcotics transactions were utilized, concealed, laundered, or otherwise disposed of; and to locate the sources of the illegal narcotics.

Normal investigative procedures had been tried and failed or reasonably appeared to be unlikely to succeed if tried, and there was probable cause to believe that the telephone numbers listed to Henley were being used by Myers and others. The affidavit stated that the county attorney had probable cause to believe that Myers and others may have knowingly and willingly engaged in murder, the distribution of narcotics, and related offenses, and that Myers and others were conspiring with each other regarding these crimes.

On May 3, 1996, upon approval by the Attorney General, the Douglas County Attorney applied for another order authorizing the interception of wire communications involving a telephone number listed to Tara Lynam, an alleged girl friend of Myers.

The affidavit for this wiretap, referred to as "wiretap 2," was based on information obtained from the first wiretap, which we refer to as "wiretap 1." Based upon the information gained through wiretaps 1 and 2, search warrants were obtained and executed. As a result, numerous individuals, including Myers, were arrested.

Myers was subsequently charged with the murder of Mainelli, as well as the other charges listed above. Myers' motion to sever the murder charge was denied by the district court. Subsequently, the State moved to sever the murder and narcotics charges, and that motion was granted.

Prior to trial, Myers moved to suppress evidence derived from wiretaps 1 and 2, and the search warrants obtained pursuant to those wiretaps. Myers also moved in limine to keep out any references to a charge of first degree murder, as well as references to gangs and previous felony convictions. Myers' motion to suppress was overruled, while his motion in limine was sustained in part and overruled in part. The district court ordered that no references be made to the murder investigation, but allowed gang references.

Following opening statements, an article appeared in the Omaha World-Herald Midlands edition pertaining to Myers' trial. The article was entitled "Drug Ring Suspect's Trial Starts." The fifth paragraph of the article stated: "[Myers] also faces a separate murder charge." The defense voiced concerns that the jurors might have read the article and learned that Myers had also been charged with murder. Thus, the defense asked that the jurors be questioned. The jurors were then questioned about the article and polled. Eleven of the jurors and one of the alternate jurors admitted to knowing about and seeing the article which one of the jurors had brought into the jury room.

The jurors were subsequently questioned individually as to the extent to which they had read the article. One juror stated she had read only the headline and stopped because she realized that the article pertained to the trial for which she was a juror. Another said the jurors were "passing [the article] around," but that she read only the title of the article. Another indicated that he "just gave [the first page of the article] a quick glance over," but stated that the article contained only information which he already knew. He denied reading the article "word for word" and

did not think the article contained any evidence which he did not know about from opening statements or from the evidence presented the day before.

Another juror read the entire first page and learned that Myers was also on trial for murder. She was surprised, but thought she could disregard this fact. Another read only the headline of the article and noticed that it continued onto another page. He noticed the phrase "Murder Town Gangsters." Another juror read "bits and pieces" of the article in addition to the headline, but did not indicate she knew anything about the separate murder charge.

One juror, who read the entire article, stated, "I didn't realize that he had murdered somebody." She was concerned about her ability to put knowledge of the murder out of her mind and stated, "[R]ight now, it seems like he's guilty, but I haven't heard the other side . . . ." Another juror "briefly scanned through the whole article." She did not remember reading anything new. Another had read "bits and pieces" of the article, in addition to the headline, but did not learn anything new. One juror had read the headline and the first paragraph, and another juror had read only the headline.

One juror admitted bringing the newspaper to the jury room, reading the entire article, and learning that Myers had also been charged with murder. When she read the article, she said, "[O]h, my goodness" upon learning of the murder charge. She believed that she could be impartial because "[p]eople are charged [with crimes] all the time."

After the jurors had been questioned, Myers moved for a mistrial, which motion was overruled. Only the juror who said she was concerned about her ability to put the knowledge of the murder out of her mind was stricken from the jury panel and replaced with an alternate.

The jury found Myers guilty of all counts, and following a hearing, the district court sentenced Myers as a habitual criminal. Myers timely filed this appeal.

ASSIGNMENTS OF ERROR

Myers claims that (1) the district court erred in failing to suppress evidence derived from unlawful wiretaps; (2) the affidavit for wiretap 2 failed to demonstrate probable cause for belief that

Myers had committed, was committing, or was about to commit a crime, and the order authorizing wiretap 2 was unlawfully issued because wiretap 1 was tainted; (3) the district court erred in failing to grant Myers' motion for mistrial, based on the jury's being exposed to a newspaper article concerning Myers' pending charge for first degree murder; (4) the district court erred in failing to sustain Myers' motion in limine with regard to gang references, as his right to a fair trial was prejudiced because there existed little probative value in comparison to the inflammatory effect; and (5) the district court erred in failing to dismiss the habitual criminal charge against Myers because the State failed to comply with the statutory requirements of Neb. Rev. Stat. § 29-2221 (Reissue 1995).

ANALYSIS

We first address Myers' claims that the district court erred in failing to suppress evidence derived from unlawful wiretaps and that wiretap 2 was unlawful because wiretap 1 was tainted. Myers moved to suppress evidence obtained as a result of two wiretaps placed on telephones to which he had access. He claimed that the wiretaps violated his rights under the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution; article I, § VII, of the Nebraska Constitution; Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1994 & Supp. 1995); and Neb. Rev. Stat. § 29-822 (Reissue 1995).

Nebraska's wiretap statutes are found at §§ 86-701 to 86-712. Section 86-703 provides in part:

> The Attorney General or any county attorney may make application to any district court of this state for an order authorizing or approving the interception of wire, electronic, or oral communications . . . when such interception may provide or has provided evidence of the commission of the offense of murder . . . dealing in narcotic or other dangerous drugs, or any conspiracy to commit any such offenses.

Section 86-705 provides:

> (1) . . . Each application shall include the following information:

(a) The identity of the applicant;

(b) A full and complete statement of the facts and circumstances relied upon by the applicant to justify his or her belief that an order should be issued, including details as to the particular offense that has been, is being, or is about to be committed, a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted . . . .

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) A statement of the period of time for which the interception is required to be maintained. . . .

. . . .

(3) [T]he judge may enter an ex parte order . . . authorizing or approving interception of wire, electronic, or oral communications . . . if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 86-703; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and (d) . . . there is probable cause for belief that the facilities from which or the place where the wire, electronic, or oral communications are to be intercepted are being used or are about to be used in connection with the commission of such offense or are leased to, listed in the name of, or commonly used by such person.

[3] Nebraska law permits appropriate parties to apply to the district courts for authority to intercept wire or oral communications when such interception "may provide or has provided evidence of," among other things, "the offense of murder . . . dealing in narcotic or other dangerous drugs, or any conspiracy to commit any such offenses." See, § 86-703; *State v. Hinton*,

226 Neb. 787, 415 N.W.2d 138 (1987). In dealing with the requisites for obtaining authority to intercept wire and oral communications and with the contents of orders granting such authority, we have determined that in all substantive ways and in wording, these requisites are virtually identical to 18 U.S.C. § 2518 (1994). See, *State v. Hinton, supra*; *State v. DiMauro and Kessler*, 205 Neb. 275, 287 N.W.2d 74 (1980); *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977). As a result, we look to federal law to interpret Nebraska's intercepted communications statutes. See *State v. Hinton, supra.*

[4,5] An application for an order permitting the interception of telephone conversations serves a similar purpose to that served by an application for a search warrant, that is, to present information sufficient to enable a detached and neutral judicial officer to find that probable cause exists to issue an order or a warrant. *United States v. Garcia*, 785 F.2d 214 (8th Cir. 1986); *State v. Hinton, supra.* The test for issuance of a wiretap warrant pursuant to 18 U.S.C. § 2518 is whether the sworn information before a court is of sufficient apparent reliability to justify a neutral judicial officer in finding that there is probable cause to believe that an offense has been or is being committed. *United States v. Abramson*, 553 F.2d 1164 (8th Cir. 1977).

[6] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). An affidavit in support of an application for a wiretap is similar to an affidavit in support of an application for a search warrant and is to be tested in a practical and commonsense fashion. See, *State v. Nash*, 233 Neb. 318, 444 N.W.2d 914 (1989); *State v. Holmes and Beardslee*, 208 Neb. 114, 302 N.W.2d 382 (1981).

We therefore examine the contents of the affidavit to determine whether the requirements of § 86-705(3) have been satisfied. Each of the requirements of § 86-705(3) must be shown by proof sufficient to support a finding that those facts exist. See

State v. Hinchion, DiBiase, Olsen, and Cullen, 207 Neb. 478, 299 N.W.2d 748 (1980).

Myers complains that the district court made no specific references to the evidence presented or findings of fact and that there is no way for this court to apply the appropriate standard of review for factual findings. In *State v. Osborn*, 250 Neb. 57, 67, 547 N.W.2d 139, 145 (1996), we stated that "[h]enceforth, district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress. The degree of specificity required will vary . . . from case to case."

[7] Our purpose in *Osborn* was to direct the trial courts to articulate findings of fact, which may be indispensable to a proper appellate review. We still adhere to that reasoning, but note that in the case at bar, appellate review is based upon the four corners of the affidavit. See *State v. McCleery*, 251 Neb. 940, 560 N.W.2d 789 (1997). Since we consider only the facts set forth in the affidavit, we can effectively determine whether the requirements of § 86-705(3) have been met. In passing on the validity of an order to intercept wire or oral communications, we consider only information brought to the attention of the magistrate. See *State v. Hinchion, DiBiase, Olsen, and Cullen, supra.*

Probable Cause Regarding Murder to Support Wiretap 1

The following is a summary of the relevant facts set forth in the affidavit as to probable cause regarding the murder of Mainelli:

Omaha police officers were investigating the murder of Robert Flowers. The suspect in the shooting was identified as Charles Duncan, who at the time of the murder was seen with a female later identified as Mainelli.

After the shooting, Duncan and Mainelli fled to the residence of Sherry Anderson, a friend and neighbor of Mainelli's. While there, Duncan made several telephone calls and recounted the shooting to Anderson. Myers and several black males associated with the "Murder Town Gangsters" came to the residence, and

Myers was heard to say that if Duncan needed Myers to "shut up" the witnesses, he could do that.

Mainelli later told police that Myers and three other black males had come to Anderson's residence and that during a conversation, Myers said something similar to, " '[Y]ou can't let that white bitch out of your sight until this is over.' " In addition, the night Flowers was killed, Anderson heard Myers tell Mainelli to watch the females who were in the car with Flowers so that Myers could "take them out" and that he would kill any of the witnesses who talked about Flowers' murder.

On September 18, 1995, Mainelli was found dead in her apartment from two gunshot wounds to the head. Two .22-caliber Remington shell casings were located in the bedroom near the body. Anderson told police that she had gone to Mainelli's apartment at approximately 11 p.m. on September 17 and that she believed Mainelli had male company at that time. Darnell Tatum, who had been dating Mainelli, said he knocked on her apartment door between 11:45 p.m. on September 17 and 1 a.m. on September 18, but that no one answered. However, he believed someone was in the apartment because a light came on after he knocked.

A confidential source, who was not on probation or parole and had provided information to police which had led to numerous arrests and the seizure of narcotics, informed the police that Myers and Tim Sanders had severely beaten Blandon Grayer because he had cooperated with police in the investigation of Flowers' murder and that Myers wanted to send a message that you do not "snitch" on Murder Town Gangsters.

When police interviewed Myers, he told them he had had an intimate relationship with Mainelli which was cut short when he went to prison, but claimed that he was with a girl friend, Edwina Wilson, on September 17, 1995, the night of Mainelli's murder.

Police later arrested Demond Briggs for being a felon in possession of a firearm. The pistol obtained was a "Jennings .22-caliber model J-22 semiautomatic pistol, serial number 685824, chrome with black grips." Ballistic tests showed that this was the weapon used in Mainelli's murder. Briggs told

police he had purchased the pistol from Edward Wilson in December and that Wilson and Myers were associates.

Edwina Wilson, Edward Wilson's sister, reported that Myers had assaulted her at her residence because she had confronted him about Mainelli's death. Edwina Wilson also identified the pistol seized from Briggs as a pistol Myers had once given her and claimed that she had returned the pistol to Myers in September of the previous year. Myers had told her that if the police came by, she was to tell them he had been with her the night Mainelli was killed and not to be specific about the time he actually came home. Edwina Wilson told police that Myers had left her apartment on the night of Mainelli's murder and that he had not returned until Monday, September 18, 1995, between 5 and 6 a.m.

Edward Wilson told police that he, Sam Edwards, Grayer, and Alvin Morris accompanied Myers and Ronnie Cross to a Bible study on September 17, 1995. After leaving the church, Myers drove to the apartments where Mainelli lived. Myers got out, put on a pair of brown work gloves, slid a round into the chamber of a small pistol, and left for an hour to an hour and a half. Upon his return, Myers took off the gloves, pulling them over the pistol. Myers later got out of the vehicle and gave Edwards a small ball-like article that looked like brown work gloves.

Edward Wilson later obtained the pistol from Edwards. When Edwards handed Edward Wilson the pistol, it was concealed inside a pair of brown work gloves. Wilson told the police that he had seen the pistol in Edwina Wilson's possession in the summer of 1995. This gun was eventually sold to Briggs and was seized by the police when Briggs was arrested.

Edward Wilson told police he was later taken to a Best Western motel in Council Bluffs, Iowa, and threatened by Myers, Sanders, Edwards, Cross, James Benford, Cameron Hollis, and Torraz Davis. Police confirmed that Sanders had obtained a room at a Best Western motel in Council Bluffs on December 19, 1995. In addition, Edwina Wilson reported a second assault by Myers, and when police questioned him, they observed that Myers had a hand-held police scanner.

Without further detailing the contents of the affidavit, we conclude that the affidavit was sufficiently detailed and of suffi-

cient apparent reliability to warrant a finding by a neutral judge that there was probable cause to believe that Myers and parties unknown had committed a murder and were conspiring in its coverup, that communications concerning these offenses would be obtained through interception of Myers' telephone conversations, and that the telephones at Myers' home would be used in the commission of these offenses. Therefore, we conclude that the requirements of § 86-705(3)(a), (b), and (d) have been satisfied.

PROBABLE CAUSE REGARDING NARCOTICS TRAFFICKING TO SUPPORT WIRETAP 1

The following summary of facts relates to the conspiracy to distribute narcotics:

Narcotics investigators know that narcotics trafficking precludes direct person-to-person discussions and that a distribution structure of any size will use a telephone for contacting sources and distributors from the top to the bottom of the organization regarding payments, distribution, supply, and marketing. When personal meetings are necessary, the telephone and cryptic messages will be used to schedule such meetings.

Pen registers were installed on two telephone numbers which were listed in the name of Henley, Myers' mother. A pen register is an electronic device that prints out the number dialed or numbers calling into a particular telephone number. Records showed that Myers called Edwards and Sanders numerous times. In addition, from December 1995 to February 1996, Myers' pager received over 3,200 pages. Messages left on the pager were in code. Officers believed, based on past experience in conducting gang and narcotics investigations, that this type of messaging system and high volume of calls were indicative of narcotics activity.

Myers and other gang members were observed by police via drive-by surveillance and fixed surveillance coming and going from Myers' residence at 2018 North 30th Street. Drive-by surveillance of Myers, Edwards, and Sanders established the registration and ownership of various vehicles operated by Edwards and Sanders and that Myers operated a vehicle registered to Lynam. These vehicles repeatedly came and went from

Myers' residence. Police also noted that some parties were admitted to the residence, while others were turned away.

On February 26, 1996, an anonymous person reported having been inside Myers' residence and stated that Myers was in possession of firearms, narcotics, crack cocaine, and a large amount of U.S. currency, which Myers had stated was from the sale of crack cocaine. Surveillance also disclosed lookouts posted at the residence.

On March 21, 1996, police contacted a confidential source who was not on parole or probation and who had proved reliability in the prior 3 years by providing information that led to the issuance of numerous search warrants, felony arrests, and convictions for crack cocaine. While wearing a "wire," the source purchased crack cocaine from Myers at 2009 North 31st Street. An attempt was also made to purchase cocaine from Myers at his residence, 2018 North 30th Street, but Myers refused. The source was advised that Myers would be obtaining a larger quantity of crack cocaine if the source wanted to return. Police were also told by the director of the housing authority where Myers lived that other residents had complained that there were weapons at Myers' residence and that Myers was selling drugs.

Subsequent video surveillance showed various people, known and unknown, coming and going from Myers' residence. Myers was seen meeting another black male, walking to 2018 North 30th Street, going inside, and returning. The party outside was seen counting money, and an exchange was observed. After reviewing the videotape, a trained narcotics investigator stated that the exchange was indicative of a narcotics transaction. Other parties on the videotape who subsequently knocked at the residence were not allowed inside.

Without further detailing the contents of the affidavit, we conclude that it was sufficiently detailed and of sufficient apparent reliability to warrant a finding by a neutral judge that there was probable cause to believe that Myers and parties unknown were involved in a conspiracy to traffic narcotics, that communications concerning this offense would be obtained through the interception, and that the telephones at Myers' home would be used in the commission of this offense. Therefore, we conclude

that the requirements of § 86-705(3)(a), (b), and (d) have been satisfied.

OTHER INVESTIGATIVE TECHNIQUES

Myers claims that the affidavit for wiretap 1 failed to demonstrate that other investigative techniques were tried and failed, were unlikely to succeed if tried, or were too dangerous. We disagree.

The affidavit recited that normal investigative techniques had succeeded to a limited degree in obtaining evidence against Myers and others with regard to the murder of Mainelli but had failed to provide sufficient evidence against all of the conspirators involved in the murder.

Drive-by surveillance yielded only limited results and drew attention to the officers in the housing district. This surveillance was not effective because officers observed that Myers did not have a vehicle that he typically drove. Myers either borrowed a vehicle or obtained a ride for transportation. Also, Myers was in possession of a portable scanner that had the capability to monitor radio traffic between law enforcement officers. Surveillance from a fixed position provided only a view of the southern access of Myers' residence, and it was difficult for officers to maintain long-term or daily moving surveillance without coming to the attention of Myers. The inspection of trash discarded by Myers was not possible in that the housing area relied on large community trash receptacles, and officers attempting to locate such trash would draw undue attention to their presence.

Information from Edward Wilson did not give a full accounting of Myers' actions and would not lead to a successful prosecution of Myers or others involved in the conspiracy. At the time the affidavit was submitted, there were no parties willing to come forward and testify against Myers involving his narcotics activity.

[8] Although investigators may not use wiretaps or eavesdropping devices as the first step in a narcotics investigation, neither must such devices be used only as a last resort; nor must an affidavit supporting a request for permission to wiretap or eavesdrop explain away all possible alternative techniques of investigation. *State v. Hinton*, 226 Neb. 787, 415 N.W.2d 138

(1987); *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985); *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983). See, also, *United States v. Garcia*, 785 F.2d 214 (8th Cir. 1986). We conclude the State has demonstrated that investigative techniques had been tried and had failed to produce sufficient evidence to obtain the warrants required and that there was probable cause to find that normal investigative techniques would not produce sufficient results. Therefore, § 86-705(3)(c) has been satisfied.

PROBABLE CAUSE REGARDING NARCOTICS TRAFFICKING TO SUPPORT WIRETAP 2

Myers next asserts that the affidavit for wiretap 2 failed to demonstrate sufficient probable cause for issuance of the order. The affidavit for wiretap 2 was similar to the affidavit for wiretap 1 and, in summary, stated the following:

A telephone number was listed to Lynam at 3130 Chicago Street, apartment No. 7, Omaha, Nebraska. Based in part upon wiretap 1, Omaha police officers believed that Lynam's telephone was being used by Myers and others in committing the offenses of murder and conspiracy to commit or to cover up the murder and the possession, distribution, and dispensing of illegal narcotics, controlled substances, and other dangerous drugs.

While monitoring the telephone conversations at Myers' residence, officers confirmed that Myers was also receiving calls at Lynam's residence. He received calls from unidentified coconspirators at Lynam's residence via a three-way calling feature initiated by Henley, utilizing a telephone at her residence.

During one telephone call to Myers' home, the caller identified himself as "Paco's brother." The parties spoke cryptically and discussed whether going to California for "4.7" was a good idea when Myers could drive 10 hours less for "4.8." The caller told Myers that the Chevy pickup, " 'the green one,' " could possibly go on Tuesday. Police believed this to be a reference to marijuana. During another intercept, Myers asked his mother to locate Paco's brother's pager number and to call the pager number. Another intercept disclosed that Myers needed to rent a vehicle for a possible trip the next day. Myers was subsequently observed leaving Atchley Ford, driving a rented Ford Taurus. On

April 27, 1996, a number of calls were intercepted which show that Myers went to Denver, Colorado, to obtain cocaine.

On April 30, 1996, Myers spoke to a party and stated that by driving, he still came up with " 'twenty nine five.' " The party tells Myers that the next time Myers goes to Denver, there "won't be any 'bullshit.' " Myers tells the party he does not know if he is going back to Denver on Friday, and the party says he will call Myers back the next day.

Without further detailing the contents of the affidavit, we find that it was sufficiently detailed and of sufficient apparent reliability to warrant a finding by a neutral judge that there was probable cause to believe that Myers and parties unknown were involved in a conspiracy to traffic drugs, that communications concerning these offenses would be obtained through the interception, and that the telephone at Lynam's home would be used in the commission of this offense.

Other Investigative Techniques

We also conclude that the affidavit for wiretap 2 demonstrated that other investigative techniques were tried and failed, were unlikely to succeed if tried, or were too dangerous for the same reasons as wiretap 1.

Normal investigative techniques had succeeded to a limited degree in providing evidence against Myers and others, but these methods failed and appeared unlikely to be successful in the future for obtaining evidence against Myers, Edwards, Sanders, Grayer, Cross, Morris, Benford, Hollis, and others unknown relative to the objectives set forth in the affidavit.

[9] In conclusion, we find that Myers' assigned errors relating to the failure to suppress the evidence obtained from wiretaps 1 and 2 to be without merit. The ultimate burden of showing an unlawful interception rests upon the party against whom the fruits of an electronic surveillance are offered. *State v. Nash*, 233 Neb. 318, 444 N.W.2d 914 (1989). Myers has failed to establish that the wiretaps were unlawfully ordered. Having determined that wiretaps 1 and 2 were properly issued, we conclude that the district court did not err in failing to suppress the evidence obtained pursuant to the wiretaps or in suppressing the

evidence that was obtained pursuant to the search warrants based on the wiretaps.

MISTRIAL

We next address whether the district court erred in denying Myers' request for a mistrial based on the jury being exposed to a newspaper article containing a reference to Myers' pending charge for first degree murder.

On the second day of the trial, the jury was polled, and it was discovered that several members of the jury had read a newspaper article and learned that Myers was charged with murder in a separate case. One of the jurors was stricken, but the motion for mistrial was overruled.

[10,11] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Where jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct. *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[12] In *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997), we were guided by the rule that in order for a verdict to be set aside because of the prejudicial effect of a newspaper account on jurors, there must be evidence presented that the jurors read the newspaper account and that the account was unfair or prejudicial to the defendant. A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such conduct was prejudicial to the extent that the defendant was denied a fair trial. *Id.*

The State argues that no jury misconduct actually occurred because prior to reading the article, the jurors had not been admonished not to read newspaper accounts of the trial. We disagree. The jurors had been admonished not to discuss the case among themselves and had been told not to formulate any opinions before the case was submitted to them. Reading about the case in the newspaper constituted jury misconduct.

We next consider whether the article read by the jurors prejudiced Myers' right to a fair trial. Eleven of the jurors and one of the alternates saw the newspaper article and read it to some extent. Three of the jurors admitted to having read the entire article and specifically mentioned the murder charge when interviewed. One of these three jurors was stricken, but two of the jurors who remained on the jury had been exposed to the material about which Myers complains.

[13,14] The determination of whether to grant a mistrial rests not only on what the jurors say on interrogation, but also upon the nature of the published material, together with all other facts and circumstances in the record. *State v. Anderson, supra.* The decision whether to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Kirksey, supra.* A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

Three jurors who read the article in its entirety specifically remembered the fact that Myers also faced a murder charge. Upon being questioned about the article, it was the first thing mentioned by those jurors. All three expressed some degree of surprise upon learning about the murder charge.

The district court had sustained a motion in limine excluding and prohibiting the State from admitting evidence regarding the murder charge. Myers' motion in limine was premised on the fact that knowledge of a separate murder charge was more prejudicial than probative, and the district court concluded that Myers' murder charge and the evidence in support of that charge was prejudicial enough to exclude the fact from this trial. Thus, we conclude that the newspaper article was prejudicial to Myers.

Therefore, the district court abused its discretion in denying Myers' motion for a mistrial, and Myers is entitled to a new trial.

The courts, through their bailiffs, are required to ensure that juries do not bring extraneous information into the jury room. In this instance, the jurors passed around a newspaper in the jury

room and read accounts of the trial. This kind of activity cannot and will not be tolerated.

Reference to Gang Membership

Finally, Myers argues that the district court erred in failing to sustain his motion in limine in regard to gang references. Prior to trial, Myers moved in limine to keep the State from introducing evidence or testimony relating to gangs or gang activity, specifically the "19th Street" gangs or the Murder Town Gangsters. Myers claims that the evidence was irrelevant, that the prejudicial effect to Myers far outweighed any probative value, and that any prejudice could not be corrected by instructing the jury.

At trial, police officers for the city of Omaha testified that Myers and members of the Murder Town Gangsters were under investigation. Certain individuals who had participated in the intercepted telephone conversations testified to gang-related references in the telephone conversations. For instance, the number "19" entered into a pager meant 19th Street to a member of the Murder Town Gangsters. Myers asserts that the nature and quantity of the gang evidence served merely to inflame the jury and was not necessary to the State's case.

[15] 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). Neb. Rev. Stat. § 27-403 (Reissue 1995) excludes relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.

The State argues that evidence regarding gang membership played a much greater role and was relevant in the overall scheme of the trial. We agree. The evidence established that Myers would sell drugs only to members of his own gang. Myers' nephew testified that the people to whom Myers sold were members of a gang called the "19th Street Murder Town Gangsters." Surveillance of Myers' residence confirmed that not everyone who sought entry was allowed inside even though Myers was observed to be present in the residence. Some members of the gang testified they could reach Myers by dialing his

pager number and entering the number "19." The record establishes that the people who associated with Myers were in the same gang and were the people with whom Myers did business. We conclude that the evidence of Myers' gang-related activities is relevant.

Generally, the evidence which the State offers against a criminal defendant is prejudicial. The issue is whether the evidence was unfairly prejudicial. We conclude that the evidence regarding Myers' gang-related activity did not create an undue prejudice. His gang affiliation was part of the drug-dealing activities and conspiracy which were under investigation by police. Evidence established that Myers did business only with gang members. Thus, the district court did not abuse its discretion in admitting testimony regarding Myers' activity within the gang.

CONCLUSION

The district court abused its discretion in not granting a mistrial in light of the jury's misconduct. Therefore, we reverse Myers' convictions and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., concurring.

I concur. However, I am disturbed by the multiple occurrences in recent years of newspaper articles slipping past bailiffs and ending up in the hands of jurors in Douglas County. See, *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998) (juror given newspaper during recess); *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998) (we declined to address assignment of error regarding trial judge's comments about newspaper found in jury room); *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997) (newspaper in jury room); *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992) (juror in possession of newspaper during deliberations). See, also, *State v. Anderson, supra* (Caporale, J., concurring) (wondering where bailiff was when newspaper was taken into jury room).

It is the duty of the trial judge to admonish the jury regarding bringing extraneous materials into the jury room. However, it is the bailiff's duty to see that that warning is carried out. The Handbook for Bailiffs During Jury Duty, section 3 at 3-4 (1998), which was prepared by the Nebraska State Court

Administrator's Office, states, "B. Specific Duties Pertaining to Jury Trials are to: . . . . Guard against and prevent the introduction into the jury room or use of extraneous items, including laptop computers and reading material."

Obviously, if a bailiff is to fulfill his or her duty, the bailiff is going to have to be present each time the jury is admitted into the jury room.

MILLENNIUM SOLUTIONS, INC., APPELLEE, V. RICK DAVIS, APPELLANT.

603 N.W.2d 406

Filed December 10, 1999. No. S-98-590.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Contracts: Public Policy.** The determination of whether a contract is void as against public policy is a question of law.
3. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. ___: ___: ___. In noncriminal cases, statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively.
6. **Constitutional Law: Statutes.** An unconstitutional statute creates no new rights and abrogates no old ones. It is for all purposes as though the statute had never been passed.
7. **Constitutional Law: Statutes: Legislature.** If the lawmaking body goes through the form of enacting a law which it is prohibited by the Constitution from enacting, its action is wholly void and cannot be validated by a subsequent amendment to the Constitution so as to confer authority upon the Legislature to pass such a law.
8. ___: ___: ___. An act of the Legislature not authorized by the state Constitution at the time of its passage is absolutely null and void and is not validated by subsequent adoption of an amendment to the Constitution authorizing it.
9. **Constitutional Law: Supreme Court: Appeal and Error.** Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.

Appeal from the District Court for Douglas County, J. PATRICK MULLEN, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

George Achola, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

John G. Liakos, Bruce R. Gerhardt, and Howard N. Epstein, of Liakos & Associates, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Millennium Solutions, Inc. (Millennium), commenced this action in Douglas County Court, alleging that Rick Davis had breached a contract between the parties. Davis demurred and moved to compel arbitration pursuant to a clause in the contract which required arbitration. The county court sustained Davis' motion to compel and dismissed Millennium's petition.

Millennium appealed to the district court, alleging that the county court erred, inter alia, in finding that the predispute binding arbitration clause in the contract was enforceable. The district court reversed the decision of the county court and remanded the matter for further proceedings, finding that the county court erred in sustaining Davis' demurrer and dismissing Millennium's petition. Davis timely appeals.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999).

[2] The determination of whether a contract is void as against public policy is a question of law. See *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998).

[3] As to questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

FACTS

On February 17, 1997, Millennium and Davis entered into a contract entitled "Executive Marketing Agreement." The contract contained a predispute binding arbitration clause which provided that

> [a]ny dispute or controversy arising under, out of, or in relation to this Agreement, any amendment thereto, or breach thereof, shall be first discussed between Contract marketer [Davis] and Technology Vendor [Millennium] and if the two parties are unable to reach a settlement, any dispute or controversy will be determined through binding arbitration.

On February 6, 1998, Millennium commenced this action in Douglas County Court, alleging that Davis had breached their contract. Davis demurred and moved to compel arbitration. The county court sustained the demurrer and dismissed the petition.

On appeal, the district court found that Neb. Rev. Stat. § 25-2602.01 (Cum. Supp. 1998) became effective on June 11, 1997, and that the alleged breach of contract occurred on February 9, 1998. The district court concluded that § 25-2602.01 was substantive in nature and operated prospectively only; that at the time the parties executed the contract, the predispute binding arbitration clause contained therein was void as against public policy; and that the subsequent enactment of § 25-2602.01 did not validate the clause. Thus, the district court reversed the decision of the county court and remanded the matter for further proceedings.

ASSIGNMENTS OF ERROR

Davis assigns as error that the district court erred in finding that the predispute binding arbitration clause contained in the contract between the parties was void as against public policy and in failing to find that the Uniform Arbitration Act, Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 1995 & Cum. Supp.

1998), operates to include predispute binding arbitration clauses in any agreement made subsequent to August 30, 1987.

ANALYSIS

The following timeline sets forth dates relevant to this opinion:

08/30/87	Uniform Arbitration Act (§§ 25-2601 to 25-2622) took effect.
12/13/91	*State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991), declared § 25-2602 unconstitutional as against public policy because it violated Neb. Const. art. I, § 13.
06/25/96	Article I, § 13, amended to state that "the Legislature *may* provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract." (Emphasis supplied.)
02/17/97	Millennium and Davis entered into the executive marketing agreement.
06/11/97	Section 25-2602.01(b) took effect, stating: "A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid . . . ."
02/06/98	Alleged breach of contract by Davis.

The issue presented is whether the predispute binding arbitration clause in the contract between the parties is void as against public policy. In summary, Davis argues that the clause is binding, is not against public policy, and therefore should be enforced. Millennium argues that § 25-2602.01 does not apply retroactively to contracts in existence before June 11, 1997, and that at the time the parties entered into their contract, the predispute binding arbitration clause violated public policy.

[4] We first consider whether § 25-2602.01 applies retroactively to the contract entered into between Davis and Millennium. The district court determined that § 25-2602.01 was substantive and, thus, must only be applied prospectively. Statutory interpretation presents a question of law, in connection

with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999).

[5] In noncriminal cases, statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively. *Battle Creek State Bank v. Haake*, 255 Neb. 666, 587 N.W.2d 83 (1998). This is particularly true when the amendment to the statute is a substantive change, as opposed to a procedural change. See *id.* There is nothing in the plain language of § 25-2602.01 which suggests that the Legislature intended that it operate retroactively. The corresponding legislative bill carried an emergency clause which made the statute effective 1 day after its passage. We therefore determine that since there is no clearly expressed legislative intent to apply § 25-2602.01 retroactively, the district court's conclusion that this statute should only be applied prospectively was correct.

[6-8] We next consider whether the amendment to article I, § 13, revived § 25-2602. In *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991), we declared that § 25-2602 was unconstitutional and void as against public policy. An unconstitutional statute creates no new rights and abrogates no old ones. It is for all purposes as though the statute had never been passed. *Whetstone v. Slonaker*, 110 Neb. 343, 346, 193 N.W. 749, 750 (1923):

> If the law-making body goes through the form of enacting a law, which it is prohibited by the Constitution from enacting, its action is wholly void and cannot be validated by a subsequent amendment to the Constitution so as to confer authority upon the legislature to pass such a law.

An act of the Legislature not authorized by the state Constitution at the time of its passage is absolutely null and void and is not validated by subsequent adoption of an amendment to the Constitution authorizing it. *Id.* Thus, it is as if § 25-2602 had

never been passed, and Davis may not rely upon it to enforce the predispute binding arbitration clause.

Other jurisdictions which have addressed the issue of whether a subsequent constitutional amendment retroactively validated a prior unconstitutional statute have concluded that absent an express or implied ratification of such statute, the constitutional amendment does not validate the statute. See, *State v. Bates*, 305 N.W.2d 426 (Iowa 1981); *Armco Steel v. City of Kansas City*, 883 S.W.2d 3 (Mo. 1994); *Sampson-Miller A. C., Inc. v. Landmark R. C.*, 224 Pa. Super. 25, 303 A.2d 43 (1973); *Harney v. Russo et al.*, 435 Pa. 183, 255 A.2d 560 (1969).

In *Burton v. City of Albany*, 40 Misc. 2d 50, 53-54, 242 N.Y.S.2d 510, 514-15 (1963), the court stated:

> [I]t is a general rule of construction that constitutional provisions, as well as statutes, are to be construed as prospective only unless a clear expression of intent to the contrary is found . . . . Secondly, while statutes in conflict with the Constitution are validated by a constitutional amendment which expressly or impliedly ratifies and confirms them . . . an unconstitutional statute is not validated by a subsequent constitutional amendment which does not ratify and confirm the statute but merely authorizes the enactment of such a statute.

See *State v. Cousan*, 684 So. 2d 382 (La. 1996).

The amendment to article I, § 13, made no reference to § 25-2602. While the language of the amendment authorized the Legislature to enact laws allowing for predispute binding arbitration, it did not make any attempt to revive or validate the prior existing law. Therefore, we conclude that the amendment did not revive or validate § 25-2602.

We now consider what effect the amendment to article I, § 13, had upon the right of Millennium and Davis to include a predispute binding arbitration clause in their contract. In our prior cases which considered article I, § 13, we explicitly relied upon article I, § 13, to determine the public policy with regard to arbitration clauses. See, *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901); *National Masonic Accident Association v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895); *German-*

American Ins. Co. v. Etherton, 25 Neb. 505, 41 N.W. 406 (1889). Therefore, prior to the 1996 amendment to article I, § 13, the public policy of this state prohibited predispute binding arbitration clauses.

[9] Davis argues that the public policy of the state changed once the 1996 amendment to article I, § 13, became effective. Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998).

At the primary election in May 1996, the following proposed amendment to the Nebraska Constitution was submitted to the electors of the State of Nebraska for approval or rejection:

> All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law; and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.

The amendment was submitted to the electors with the following ballot language: "A constitutional amendment to authorize the Legislature to provide for enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution."

The amendment specifically stated that the Legislature "may" provide for the enforcement of arbitration, and therefore, the decision to pass a statute authorizing predispute binding arbitration was left to the Legislature's discretion. Also, the legislative history and the ballot language both illustrate that the drafters of the amendment and the electors anticipated the need for subsequent legislation. Thus, had the Legislature chosen not to pass § 25-2602.01, predispute binding arbitration clauses would have continued to be against public policy in this state.

We therefore conclude that the public policy of the State of Nebraska did not change until § 25-2602.01 became effective on June 11, 1997. Any contract clause allowing for predispute bind-

ing arbitration entered into before that date is void as against public policy. Davis and Millennium entered into their contract before § 25-2602.01 became effective, and thus, the district court correctly determined that the arbitration clause contained therein was not enforceable.

CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. MYERS, APPELLANT.

603 N.W.2d 378

Filed December 10, 1999. No. S-98-856.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
3. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous.
4. **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.
5. **Juries: Discrimination.** An attack on the use of peremptory challenges on grounds under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), must be made prior to the jury's being sworn.
6. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of purposeful discrimination in the selection of a jury based on the prosecutor's use of peremptory challenges, the defendant must show (1) that he or she is a member of a cognizable racial group, (2) that the prosecutor has exercised peremptory challenges to remove from the panel members of the defendant's race, and (3)

that facts and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race. After the defendant has made a prima facie showing, the burden shifts to the State to provide a race-neutral explanation for challenging the jurors.

7. **Juries: Discrimination: Proof.** If a race-neutral explanation is tendered for striking a member of the venire, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination.
8. ___: ___: ___. Common racial identity between a defendant and an excluded venireperson is not a prerequisite for a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
9. ___: ___: ___. The race of a venireperson and a defendant need not be the same in order to sustain a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
10. **Conspiracy: Hearsay: Evidence.** Before a trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence.
11. **Trial: Evidence: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.
12. ___: ___: ___: ___. In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.
13. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
14. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
15. **Jury Instructions: Appeal and Error.** Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous.
16. **Jury Instructions: Lesser-Included Offenses.** Step instructions which require consideration of the most serious crime charged before consideration of lesser-included offenses are not erroneous.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Alan G. Stoler and Jerry M. Hug for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

James E. Myers was charged by amended information with first degree murder (count I), use of a deadly weapon in the commission of a felony (count II), possession of a deadly weapon by a felon (count III), and, for sentencing purposes, being a habitual criminal (count IV). A jury returned guilty verdicts on counts I, II, and III, and the district court determined that Myers should be sentenced as a habitual criminal. Myers was sentenced to life imprisonment on count I, 18 years' imprisonment on count II, and 10 years' imprisonment on count III. The present appeal followed.

SCOPE OF REVIEW

[1] A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Cuny*, 257 Neb. 168, 595 N.W.2d 899 (1999).

[2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[3] A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous. *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996).

[4] In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sanchez, supra.*

FACTS

In September 1995, law enforcement officials began investigating the murder of Lynette Mainelli. On April 19, 1996, the Douglas County Attorney filed an application with the Douglas County District Court for an order authorizing interception of wire communications involving telephone numbers listed to Myers' mother, Annie Henley.

The affidavit attached to the application for the wiretap stated that the Douglas County Attorney had probable cause to believe that Myers and others had knowingly and willingly engaged in murder and the distribution of narcotics and that Myers and others were conspiring with each other regarding these crimes. The affidavit stated that a narcotics operation of any size will utilize the telephone, whether it be for contacting sources and distributors or for discussing such things as cost, quality, and payments. In addition, persons involved in a murder often use the telephone to assist in the destruction of evidence, construction of alibis, and intimidation of potential witnesses, as well as for purposes of contacting others involved in the murder.

The objective of intercepting the wire communications was to record conversations revealing details of Mainelli's murder so as to ascertain the identity of individuals involved in the murder and to record conversations revealing details of suspected narcotics trafficking. Such information would be used by police to assess the nature and scope of the continuing conspiracy regarding the murder and drug trafficking; to discover the location of physical evidence; to track the manner in which moneys derived from the illegal narcotics transactions were utilized, concealed, laundered, or otherwise disposed of; and to locate the sources of the illegal narcotics.

The affidavit also stated that normal investigative procedures had been tried and failed or reasonably appeared to be unlikely to succeed if tried and that there was probable cause to believe that the telephone numbers listed to Henley were being used by Myers and others. The district court found the affidavit to be sufficient, and the police were then allowed to place a wiretap (wiretap 1) on the telephones at Henley's residence.

On May 3, 1996, the Douglas County Attorney applied for an order authorizing the interception of wire communications involving a telephone number listed to Myers' girl friend, Tara Lynam. The affidavit for this wiretap (wiretap 2) was based on information obtained from wiretap 1, and as a result of the information gained from both wiretaps, the State obtained search warrants and arrested Myers.

Myers filed a pretrial motion to suppress evidence derived from the wiretaps and to suppress the warrants obtained as a result of the wiretaps on the grounds that his rights under the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution; article I, § 7, of the Nebraska Constitution; Neb. Rev. Stat. §§ 86-701 to 86-712 (Reissue 1994 & Supp. 1995); and Neb. Rev. Stat. § 29-822 (Reissue 1995) were violated. Myers also moved in limine to keep out evidence and testimony related to gangs, previous felony convictions, and communications intercepted via a wiretap, including conversations between Henley and Myers' sister, Sheila Myers.

The pretrial motions were denied by the district court. The district court found that the State had satisfied the four requirements set forth in § 86-703, that the Nebraska Attorney General's approval of the wiretaps satisfied the statutory requirements, that the State had established probable cause, and that the amendments to the original interception order did not affect Myers.

After the jury was sworn, Myers made a motion under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), claiming that three African-American jurors had been stricken because of their race. While the motion was not timely, the State waived the timeliness issue with the district court's approval. The State advanced its reasons for striking the three jurors, and the case proceeded to trial.

The jury found Myers guilty of counts I, II, and III, and the district court found Myers to be a habitual criminal. Myers was sentenced to life imprisonment for the murder, a term of 18 years' imprisonment for use of a deadly weapon in the commission of a felony, and a term of 10 years' imprisonment for possession of a deadly weapon by a felon. This timely appeal follows.

ASSIGNMENTS OF ERROR

Myers claims that (1) the district court erred in failing to suppress evidence derived from unlawful wiretaps; (2) the affidavit supporting the application for wiretap 2 failed to demonstrate probable cause for belief that Myers had committed, was committing, or was about to commit a crime, and the order authorizing wiretap 2 was unlawfully issued because wiretap 1 was tainted; (3) the district court committed error in determining that the State had valid race-neutral explanations for its peremptory challenges to three African-American jurors; (4) the district court erred in overruling Myers' motion in limine and allowing the State to play tape-recorded conversations to the jury, as the conversations were hearsay and irrelevant and their probative value was outweighed by their prejudicial effect; (5) the district court erred in allowing testimony regarding a meeting involving Myers at a Council Bluffs, Iowa, hotel, as it was hearsay and irrelevant and its probative value was outweighed by its prejudicial effect; (6) there was insufficient evidence to support the convictions for first degree murder, use of a weapon in the commission of a felony, and possession of a weapon by a felon; and (7) the district court erred in submitting jury instruction No. 6 to the jury, as step instructions in murder cases are violative of the 6th, 8th, and 14th Amendments to the U.S. Constitution; article I, §§ 3 and 11, of the Nebraska Constitution; and *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

ANALYSIS

WIRETAPS

Myers claims that the district court erred in failing to suppress evidence derived from two unlawful wiretaps. We have fully evaluated the placement of these wiretaps and the accompanying pretrial motions in *State v. Myers, ante* p. 272, 603 N.W.2d 390 (1999). We concluded that the search warrants authorizing placement of the wiretaps were valid and that the district court was not clearly wrong in overruling Myers' pretrial motions to exclude evidence obtained as a result of these wiretaps. *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. 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. Cuny*, 257 Neb. 168, 595 N.W.2d 899 (1999). We find this assignment of error is without merit.

PEREMPTORY CHALLENGES TO AFRICAN-AMERICAN JURORS

Myers argues that the State's peremptory challenges to three African-American members of the jury pool were racially motivated. Relying upon *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), Myers challenged the removal of these jurors, but did not do so until after the jury had been sworn.

[5] In *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993), *questioned on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995), we held that an attack on the use of peremptory challenges on *Batson* grounds must be made prior to the jury's being sworn. We reasoned that in Neb. Rev. Stat. § 25-1601.03(4) (Reissue 1995), the Legislature provided that one of the purposes of chapter 25, article 16, is to ensure that no citizen is excluded from jury duty because of discrimination based upon race, color, religion, sex, national origin, or economic status. Neb. Rev. Stat. § 25-1637(1) (Reissue 1995) provides that a motion for relief based on the ground of substantial failure to comply with chapter 25, article 16, must be made before the jury is sworn to try the case. Thus, we concluded that a defendant's objection to the use of peremptory strikes on *Batson* grounds should also be made prior to the swearing in of the jury or before any objections are waived.

Here, Myers did not raise his claim that the State had stricken jurors in a racially motivated manner until after the jury had been sworn. At the hearing on this motion, the State acknowledged that the motion was untimely, but counsel stated: "However . . . I also believe that we simply create yet another appellate issue by my challenging his ability to raise a Batson issue. And for that reason, I will waive any objection to the

Batson challenges being raised out of time, and I am prepared to defend my challenges." Although the State waived the error of raising the *Batson* challenge out of time, we must consider whether the State is empowered to make such a waiver.

In *People v. Banks*, 243 Ill. App. 3d 525, 611 N.E.2d 1270, 183 Ill. Dec. 622 (1993), the state argued that the defendant had waived his *Batson* claim for the purpose of appeal because he did not object before the jury was sworn. The court noted that while it is true that a defendant's failure to object to a prosecutor's use of peremptory challenges before the jury is sworn results in a waiver of that claim, the doctrine of waiver applies to the state as well as to the defendant. In that case, the defendant raised the *Batson* challenge out of time, but the state argued the merits of the claim without objecting to the challenge's timeliness. The court found the state had waived the argument of procedural bar. See, also, *People v. Harris*, 129 Ill. 2d 123, 544 N.E.2d 357, 135 Ill. Dec. 861 (1989).

Likewise, we conclude that the State waived any objection to the timeliness of this *Batson* challenge. See, *Carter v. Hopkins*, 151 F.3d 872 (8th Cir. 1998) (noting that state had waived defense of procedural default to *Batson* challenge); *People v. Wiley*, 156 Ill. 2d 464, 622 N.E.2d 766, 190 Ill. Dec. 736 (1993) (finding that state may waive timeliness of *Batson* challenge); *People v. Harris, supra* (finding that state may waive timeliness of *Batson* challenge); *People v. Lott*, 196 Ill. App. 3d 967, 554 N.E.2d 569, 143 Ill. Dec. 634 (1990) (finding that state may waive timeliness of *Batson* challenge).

[6,7] In *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997), we held that in order to make a prima facie case of purposeful discrimination in the selection of a jury based on the prosecutor's use of peremptory challenges, the defendant must show (1) that he or she is a member of a cognizable racial group, (2) that the prosecutor has exercised peremptory challenges to remove from the panel members of the defendant's race, and (3) that facts and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race. After the defendant has made a prima facie showing, the burden shifts to the State to provide a race-neutral explanation for challenging the jurors. See, *Batson v. Kentucky*, 476

U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996); *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

[8,9] The rule, as articulated in *State v. Allen, supra*, suggests that the race of the defendant and the members of the jury who were stricken must be the same in order for a *Batson* challenge to stand. In *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the Court held that common racial identity between a defendant and an excluded venireperson is not a prerequisite for a challenge under *Batson* and that such a requirement would contravene the Equal Protection Clause of the U.S. Constitution. See, also, *State v. Rodriguez*, 6 Neb. App. 67, 569 N.W.2d 686 (1997). We also hold that the race of the venireperson and the defendant need not be the same in order to sustain a *Batson* challenge. To the extent that *State v. Allen, supra*, could be interpreted to require a common racial identity between the defendant and an excluded venireperson as a prerequisite for a challenge under *Batson*, it is disapproved.

The State articulated several reasons for striking the three African-American jurors. The State struck one juror because she was young and single, and the State was concerned that she might be attracted to Myers. This juror was also stricken because she lived in an area of high gang activity, but when she was questioned, she claimed to know nothing about gangs. The State found her response unbelievable. The second juror was stricken because she was unemployed, did not follow court instructions, and seemed to have a disagreeable attitude. The third juror was described as elderly and disabled. The State expressed concern about her paying attention during the trial and her ability to follow directions.

After hearing these explanations, the district court concluded that the State had race-neutral reasons for using its strikes and overruled Myers' motion. A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous. *State v. Lopez, supra.*

This court has affirmed various neutral reasons for striking a juror presented by the prosecution. See, e.g., *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988) (juror stricken because she was unemployed, was single, lived at particular address, and did not have community ties); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987) (juror was stricken because she was young and defense witnesses were young and because of unavailability of juror background questionnaire for her). We conclude that the reasons articulated by the prosecution in this case are sufficiently neutral to avoid reversal on a "clearly erroneous" standard. Thus, this assignment of error is without merit.

Tape-Recorded Statements Played to Jury

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

Prior to trial, Myers moved in limine to prevent the State from introducing tape-recorded statements involving Henley and Lynam. Myers argued that these recordings were inadmissible hearsay and irrelevant and that their probative value was outweighed by their prejudicial effect.

The State argues that Myers did not preserve his hearsay objection to the tapes. The State's claim is unpersuasive in light of the fact that the hearsay issue was argued at the hearing and that when the tapes were played to the jury, Myers renewed his earlier objection to the tapes.

[10] The State claims that the statements contained in the tapes are not hearsay because the statements prove that Myers, Henley, and Sheila Myers conspired to conceal Myers' involvement in the murder of Mainelli. Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 1995) provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. In *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), we held that statements made by coconspirators could be admitted even when the conspiracy was not charged in the information.

However, before the " 'trier of facts may consider testimony under the coconspirator exception to the hearsay rule, a *prima facie* case establishing the existence of the conspiracy must be shown by independent evidence. . . .' " *Copple*, 224 Neb. at 693, 401 N.W.2d at 156.

The State asserts that the tapes contain statements made in furtherance of the conspiracy to cover up Mainelli's murder. However, our review of the record reveals that the conspiracy to cover up the murder can only be proved by the hearsay statements themselves. Thus, the State has failed to make a prima facie showing of the existence of the conspiracy between Myers, Lynam, and Henley separate and apart from the hearsay statements. Consequently, the statements contained within the tape recording cannot be considered "nonhearsay." The State advanced no other grounds for admitting this hearsay, and as such, the district court erred in admitting the tapes.

[11,12] In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sanchez, supra.* Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997). In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

In *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), we reasoned that any error in admitting a police investigator's hearsay testimony concerning statements made by an accomplice's wife was harmless when the statements pertain merely to a collateral matter or are cumulative. In the tapes, Sheila Myers called Henley to tell her that the police had towed Sheila Myers' van. Henley then called Lynam looking for Myers to tell him about the van. Henley later spoke to Myers and told him that Sheila Myers' van had been towed by the police.

The evidence about which Myers complains was admitted later in the trial when Sheila Myers testified that in May 1996, the police came to search and tow her van. She also stated that after her van was towed, she called Henley to ask what was going on. These are the same facts established by the tape-recorded statements. We, therefore, conclude beyond a reasonable doubt that Myers could not have been harmed by the admission of the tape-recorded statements and that this assignment of error is without merit.

Admission of Sanders' Threat to Wilson

Myers' next assignment of error pertains to the admission of hearsay testimony by Edward Wilson. The State called Edward Wilson, and he testified that he had attended a meeting with Myers at a hotel in Council Bluffs prior to trial. All those who were in the van with Myers on the night of Mainelli's murder were present in the hotel room. Edward Wilson testified that Tim Sanders told those present that if anyone said anything about the Mainelli murder to the police, "something [was] going to happen to them." Edward Wilson interpreted this as a threat that any person who spoke with the police would be harmed.

Myers' objection to this testimony as hearsay was overruled. We find no error in allowing this testimony, for the statement was made in furtherance of a conspiracy and thus qualified as nonhearsay. Prior to Edward Wilson's taking the stand, Ronnie Cross, a defense witness, also testified that Sanders, Myers, and all the men who were in the van on the night of Mainelli's murder congregated at a hotel in Council Bluffs. Cross testified that while at the hotel, Sanders informed the men that they were not to speak to the police regarding Mainelli's murder. Cross' testimony constitutes independent evidence which established the prima facie elements of a conspiracy to cover up Mainelli's murder. See *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Thus, the statement about which Edward Wilson subsequently testified was a statement made by Sanders in the furtherance of the conspiracy and therefore was admissible as nonhearsay.

However, even if we found that the evidence was erroneously admitted, Myers could not have been harmed by its admission. As already indicated, during the cross-examination of Cross, it

was established that both Myers and Sanders had made comments about people talking to the police about the murder. Cross testified that the men who were in the van with Myers on the night of Mainelli's murder had a meeting in Council Bluffs. At this meeting, Myers and Sanders threatened the men in some fashion such that they understood that if they spoke to the police they would be harmed. Therefore, Edward Wilson's testimony regarding what was said at the meeting in Council Bluffs was largely cumulative.

Sufficiency of Evidence

[13] Myers claims there was insufficient evidence to sustain his convictions. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis omitted.) *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." 443 U.S. at 319.

[14] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

At trial, the defense and the State stipulated that at all relevant times, Myers was a person who had previously been convicted of a felony. Edward Wilson testified that he was in the van driven by Myers the night Mainelli was killed. Myers drove to

the Blue Lake Manor Apartments, where Mainelli lived. Myers got out of the van, and Edward Wilson saw that he had on gloves. Myers went to the back of the van, and Edward Wilson heard a "clacking" noise, which he recognized as the sound of a bullet moving into a chamber. Myers then left the van and walked toward the apartment complex. He was gone for about 1 hour, and upon his return, he got in the van and took the passengers home.

Sam Edwards testified that as Myers dropped him off, Myers gave him a handgun and told him to "put it up" because the police were out and Myers had in-transit stickers on the van. Earlier, Edwards had seen the pistol on Myers' lap. Edwards subsequently retrieved the pistol and gave it to Edward Wilson, who stated the pistol had once belonged to his sister, Edwina Wilson. Edward Wilson testified that he recognized the gun because it had a unique color and a name written on it and that he thought the black handle was unusual. Edward Wilson sold the pistol because he suspected that it had been used in the murder of Mainelli. The pistol was the same caliber as two .22-caliber casings found beside Mainelli's body. Daniel Bredow, a firearm toolmarks examiner with the city of Omaha, testified that he compared the bullets found at the crime scene with bullets fired from the gun Myers gave Edwards. Bredow concluded that the bullets taken from the crime scene had been fired by the gun which could be traced to Myers.

Sanders testified that in the summer and early fall of 1995, Myers had said that Mainelli was going to testify against Charles Duncan, so she needed to have "her cap pulled back and to be shot." Sanders saw Myers with a small .22-caliber handgun in the summer of 1995. Edwina Wilson testified that in December 1996, after Mainelli's death, Myers had told her to tell the police he was with her at the time of the killing.

Viewing this evidence in a light most favorable to the State, we conclude the jury could have found beyond a reasonable doubt that the State had proved the essential elements of the crimes of first degree murder, use of a deadly weapon in the commission of a felony, and possession of a deadly weapon by a felon. This assignment of error is without merit.

JURY INSTRUCTION NO. 6

Myers argues that the district court erred in submitting instruction No. 6 to the jury because it was a step instruction prohibited by *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Instruction No. 6 provided in relevant part:

> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the first degree.
>
> On the other hand, if you find that the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, or you are unable to agree on whether the State has proved each of the foregoing material elements beyond a reasonable doubt, then you must consider the lesser included offense of second degree murder.

The jury was further instructed that if it was unable to find Myers guilty of second degree murder, it was to consider the lesser-included offense of manslaughter. If the jury found that manslaughter had not been proved beyond a reasonable doubt, it was to find Myers not guilty.

[15,16] An instruction conference was held before the jury was instructed. Myers did not object to instruction No. 6 at that time or at any time prior to the reading of the instruction. Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous. *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). Myers waived any error regarding jury instruction No. 6.

> "[I]t is the duty of the trial court, without any request to do so, to instruct the jury on the issues presented by the pleadings and supported by the evidence. . . .
>
> "In applying that principle we have established that the failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice."

Ellis & Guy Advg. v. Cohen, 219 Neb. 340, 342-43, 363 N.W.2d 180, 182 (1985), quoting *McCauley v. Briggs*, 218 Neb. 403, 355 N.W.2d 508 (1984). Step instructions which require consideration of the most serious crime charged before consideration of lesser-included offenses are not erroneous. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). Therefore, there was no plain error in reading this instruction, and this assignment of error is without merit.

CONCLUSION

Having reviewed all of Myers' assignments of error and finding them to be without merit, we affirm his convictions for first degree murder, use of a deadly weapon in the commission of a felony, and possession of a deadly weapon by a felon. We must, however, address the sentences imposed.

The sentence imposed as to count I is affirmed. However, during sentencing, the State brought it to the district court's attention that Myers had been adjudicated as being a habitual criminal on January 20, 1998. Thus, Myers' status as a habitual criminal affected the sentences imposed as to counts II and III.

Neb. Rev. Stat. § 29-2221 (Reissue 1995) provides for a hearing to be conducted to ascertain whether a defendant qualifies as a habitual criminal. Section 29-2221(2) states that "[a]t the hearing, if the court finds from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed . . . the court shall sentence such person so convicted as a habitual criminal."

We find no evidence in the record that the district court conducted a hearing on January 20, 1998, as claimed by the State. The only indication that the district court considered Myers to be a habitual criminal is a trial docket sheet entry dated January 15, which states that "[the] Court finds and adjudges defendant to be a habitual criminal as charged in Count IV of [the] Amended Information."

We cannot tell from the record what the district court relied on when it adjudged Myers to be a habitual criminal. We are concerned that the district court's conclusion that Myers was a habitual criminal was based upon the convictions which we reversed in *State v. Myers, ante* p. 272, 603 N.W.2d 390 (1999).

Thus, we reverse the district court's finding that Myers is a habitual criminal, and we vacate the sentences imposed on counts II and III. The cause is remanded for a determination of whether Myers is a habitual criminal and for the imposition of new sentences on counts II and III. All other aspects of the judgment are affirmed.

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

VERNON R. JOHNSON, APPELLEE, V. HAROLD CLARKE, DIRECTOR OF DEPARTMENT OF CORRECTIONAL SERVICES, AND RONALD RIETHMULLER, RECORDS MANAGER, APPELLANTS.
603 N.W.2d 373

Filed December 10, 1999. No. S-98-1330.

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. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusions independent from the trial court.
3. **Actions: Public Officers and Employees: Immunity.** A suit against a state officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.
4. ___: ___: ___. Suits which seek to compel an affirmative action on the part of state officials are barred by sovereign immunity.
5. **Sentences.** From September 9, 1993, through June 30, 1998, determinate sentences were permissible and indeterminate sentencing was not required.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Suzanna G. Glover-Ettrich for appellants.

Vernon R. Johnson, pro se.

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

HENDRY, C.J.

INTRODUCTION

Vernon R. Johnson, an inmate at the Omaha Correctional Center, brought an action under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995), against Harold Clarke, director of the Department of Correctional Services (DCS) and Ronald Riethmuller, DCS records manager (collectively referred to as "defendants"). Johnson requested a determination of his rights under certain parole eligibility statutes. The Douglas County District Court found that Johnson's sentence carried a statutory minimum of 1 year's imprisonment and that he was eligible for parole after serving 6 months of that minimum sentence. Defendants then filed this appeal. We moved this case to our docket pursuant to our power to regulate the caseload of this court and that of the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

On May 28, 1996, Johnson was charged with unauthorized use of a financial transaction device. Johnson was convicted of the offense, and on January 17, 1997, he was sentenced to 10 years' imprisonment. In his petition for declaratory judgment, Johnson claimed he received a "Time Computation Sheet" stating that his initial parole eligibility date was October 7, 1997. On August 6, 1997, in a postconviction action before the district court, Johnson's sentence was reduced to "a period of Eight (8) Years." No change in Johnson's parole eligibility date was mentioned in the court's order reducing the sentence.

On May 11, 1998, Johnson appeared before the parole board, seeking to be considered for release on parole. Johnson was informed that he was not eligible for parole and that he would be released on his mandatory release date.

Johnson then filed a declaratory judgment action requesting restoration of his parole eligibility "based upon the statutory minimum as described in N.R.S. § 83-1,110 and § 83-170(9) (Reissue 1995) [sic]." The Douglas County District Court, in its amended order entered December 8, 1998, found that it had subject matter jurisdiction over the declaratory judgment action and

further determined that Johnson's sentence of 8 years' imprisonment was in reality a sentence of "no less than one and no more than eight years for the purpose of determining parole eligibility." In so ruling, the court relied on Neb. Rev. Stat. § 29-2204(1)(a)(ii) (Supp. 1997), which provided that when an offender receives a sentence with no minimum term stated, or a determinate sentence, "the minimum term shall be the minimum sentence provided by law." The crime for which Johnson was sentenced carried a minimum statutory penalty of 1 year's imprisonment. Thus, the court determined that Johnson would be eligible for parole after serving 6 months of the minimum sentence of 1 year. The court ordered defendants to restore Johnson's initial parole eligibility date. It is from this order which defendants appeal.

ASSIGNMENTS OF ERROR

Defendants assert, restated, that the trial court erred in (1) finding that it had subject matter jurisdiction to hear the action, (2) applying a sentencing statute that was not in effect at the time of Johnson's sentencing, and (3) finding that Johnson's sentence of 8 years' imprisonment carried a statutory minimum of 1 year.

STANDARD OF REVIEW

[1,2] 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. *Heinold v. Siecke*, 257 Neb. 413, 598 N.W.2d 58 (1999). The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusions independent from the trial court. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

ANALYSIS

Sovereign Immunity

Defendants argue that the trial court erred in finding that it had subject matter jurisdiction over Johnson's case. Section 25-21,150 of the Uniform Declaratory Judgments Act provides,

"Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." Johnson brought this action to determine his rights under Neb. Rev. Stat. §§ 83-170(9) (Reissue 1994) and 83-1,110 (Cum. Supp. 1998) regarding parole eligibility. However, defendants contend that Johnson's action is barred by the state's sovereign immunity.

[3,4] In this case, Johnson is not suing the state, but is suing state officials. A suit against a state officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993). However, suits which seek to compel an affirmative action on the part of state officials are barred by sovereign immunity. *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

Defendants assert that Johnson is seeking to compel an affirmative action on the part of defendants by requesting restoration of his original parole eligibility date. Defendants cite *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), for the proposition that Johnson's suit is barred by sovereign immunity. In *Perryman*, an inmate brought a declaratory judgment action asking that certain state officials restore his good time credit. The inmate's good time credit had been revoked based on a letter from the Attorney General. We held that the inmate's action against the defendants was barred by sovereign immunity because he was seeking to compel an affirmative action on the part of the officials. We noted that the inmate's good time credit had already been taken away from him and that the inmate sought to compel immediate restitution of his good time credit. The relief sought was affirmative and within the scope of sovereign immunity. Therefore, the district court lacked subject matter jurisdiction.

Defendants claim that because Johnson's original parole eligibility date has already been taken away from him, he is seeking to compel an affirmative action by requesting restoration of

his original parole eligibility date and that thus, his claim is barred by sovereign immunity. Defendants have classified Johnson's sentence as "determinate," with no minimum upon which parole eligibility can be calculated, based on an opinion from the Attorney General. See Att'y Gen. Op. No. 98013 (Feb. 28, 1998). We interpret Johnson's petition as seeking a determination of whether defendants invalidly determined that he was not eligible for parole on the parole eligibility date he claims he was originally given. Johnson seeks to restrain defendants from performing an invalid act. To the extent *Perryman v. Nebraska Dept. of Corr. Servs., supra*, characterizes such relief as affirmative, such characterization is disapproved. Because Johnson's suit is not seeking to compel an affirmative action by defendants, his suit is not barred by sovereign immunity. The trial court properly found that it had subject matter jurisdiction.

Sentencing Statute

Defendants contend that the trial court erred in applying § 29-2204 (Supp. 1997), which was not in effect at the time of Johnson's sentencing. Section 29-2204 determines an offender's minimum sentence from which parole eligibility is then calculated. The key issue is which version of § 29-2204 was in effect when Johnson was sentenced.

Prior to 1993, Nebraska law provided for indeterminate sentencing by operation of law. See Neb. Rev. Stat. § 83-1,105(1) and (2) (Reissue 1987). Thus, if the court imposed a determinate sentence, the "minimum" term of that sentence was considered to be the minimum term provided by law. See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). In 1993, Nebraska passed the "truth in sentencing" legislation, effective September 9, 1993, which repealed § 83-1,105 and replaced it with § 29-2204. See §§ 83-1,105 and 29-2204 (Supp. 1993). Section 29-2204(1)(a) (Supp. 1993) provided that in imposing a sentence, the court shall "[f]ix the minimum and maximum limits of the sentence to be served within the limits prescribed by law." See, also, § 29-2204(1)(a) (Reissue 1995). This statute abolished the minimum term provided by operation of law. *State v. Urbano, supra.* Under this sentencing scheme, the minimum term could be any term imposed by the court within the sen-

tencing range. *Id.* If the minimum and maximum terms imposed by the court were the same number, the sentence was considered determinate. *Id.* This version of § 29-2204 did not provide a minimum sentence by operation of law when a definite term of years was imposed by the trial court.

In 1997, § 29-2204 was amended, operative July 1, 1998, reinstating indeterminate sentencing by operation of law. This version of the statute provided, in relevant part, that in imposing sentence, the court shall:

> (a)(i) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony . . . ; or
>
> (ii) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law.

§ 29-2204 (Supp. 1997).

[5] In summary, Nebraska law mandated indeterminate sentencing by operation of law prior to 1993. From September 9, 1993, through June 30, 1998, determinate sentences were permissible and indeterminate sentencing was not required. Commencing on July 1, 1998, indeterminate sentencing by operation of law was reinstated and is the sentencing scheme currently in effect. See § 29-2204 (Cum. Supp. 1998).

Applicable Version of § 29-2204

In the present case, defendants contend that the court applied the wrong version of § 29-2204. In its order, the trial court applied § 29-2204 (Supp. 1997), which provided for indeterminate sentencing by operation of law. The court noted that Johnson was sentenced to a flat sentence of 8 years' imprisonment, with no minimum term provided, and that the crime Johnson was convicted of carried a penalty of from 1 to 20 years' imprisonment. Thus, in applying § 29-2204(1)(a)(ii) (Supp. 1997), the court found that Johnson's determinate sentence of 8 years carried a statutory minimum of 1 year.

However, upon a review of the various amendments to the sentencing statute, it is clear the court applied the wrong version of the statute. The operative date of the 1997 amendment to

§ 29-2204 was July 1, 1998. See § 29-2204 (Supp. 1997). Johnson's sentence became final in 1997, before the operative date of the 1997 amendment to § 29-2204. Johnson's minimum sentence should have been determined under § 29-2204 (Reissue 1995), not § 29-2204 (Supp. 1997). The trial court erred in applying § 29-2204 (Supp. 1997).

Section 29-2204 (Reissue 1995) controlled Johnson's sentence. Under this statute, when the court imposes only one term of years, the sentence is determinate. Furthermore, the sentencing scheme in effect prior to July 1, 1998, did not require indeterminate sentencing or that the minimum term be different than the maximum. See *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997). Thus, the trial court erred in determining that Johnson's sentence of 8 years carried a statutory minimum of 1 year. Under the law in effect at the time Johnson was sentenced, there was no minimum sentence provided by operation of law on a determinate sentence.

CONCLUSION

The district court was correct in finding that it had subject matter jurisdiction over Johnson's declaratory judgment action. However, the district court erred in applying § 29-2204 (Supp. 1997) because that statute was not in effect at the time of Johnson's sentencing. Under the law as it existed at the time Johnson was sentenced, Johnson's sentence was a determinate sentence of 8 years. Accordingly, the judgment of the district court finding and determining that Johnson has a statutory minimum of 1 year is reversed, and the cause is remanded to the district court, which is ordered to vacate and set aside its order of December 8, 1998.

REVERSED AND REMANDED WITH DIRECTIONS.

BEN THOMPSON, APPELLANT, V. KIEWIT CONSTRUCTION COMPANY, APPELLEE.

603 N.W.2d 368

Filed December 10, 1999. No. S-99-110.

1. **Jurisdiction: Appeal and Error.** It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Workers' Compensation: Appeal and Error.** Appeals from a workers' compensation trial court to a review panel are controlled by statutory provisions found in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1998).
5. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
6. **Workers' Compensation: Final Orders: Appeal and Error.** Pursuant to Neb. Rev. Stat. §§ 48-179 and 48-182 (Reissue 1998), a party may appeal to a review panel only from a final order of the Workers' Compensation Court.
7. **Workers' Compensation: Final Orders: Words and Phrases: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Reissue 1995) defines a "final order" for purposes of a workers' compensation appeal from a trial court to a review panel.
8. **Workers' Compensation: Final Orders.** A workers' compensation case is a "special proceeding."
9. **Final Orders: Appeal and Error.** A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
10. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court is without jurisdiction to entertain appeals from nonfinal orders.

Appeal from the Nebraska Workers' Compensation Court. Appeal dismissed.

Christopher D. Jerram and Jeffery R. Kirkpatrick, of Kelley, Lehan & Hall, P.C., for appellant.

Michael F. Scahill, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Ben Thompson appeals from the decision of a three-judge review panel of the Nebraska Workers' Compensation Court, which affirmed the decision of a single Workers' Compensation Court judge (trial court) granting a motion by Kiewit Construction Company (Kiewit) for an order compelling Thompson to participate in a functional capacity evaluation (FCE) with a physical therapist. For the reasons stated below, we conclude that Thompson's appeal from the trial court to the review panel was an appeal from a nonfinal, nonappealable order, and that the review panel was without authority to hear his appeal. Because the review panel lacked jurisdiction, this court is likewise without jurisdiction to hear Thompson's appeal. Accordingly, we dismiss.

STATEMENT OF FACTS

On November 15, 1993, while employed by Kiewit as a laborer, Thompson suffered a work-related injury to his lumbar spine. On November 20, 1995, Thompson filed a petition with the Workers' Compensation Court seeking workers' compensation benefits. On June 25, 1996, on original hearing, the trial court entered an award which found, inter alia, that Thompson was permanently and totally disabled and provided that Thompson was to receive from Kiewit indemnity benefits in the amount of $265 per week "for so long in the future as [Thompson] shall remain permanently and totally disabled as a result of [the] accident and injury."

On May 19, 1998, Kiewit filed a motion with the Workers' Compensation Court docketed in the case file of the original action seeking an order compelling Thompson to attend an FCE conducted by a physical therapist. The motion recited that Kiewit sought the FCE as support for any attempt it might make to modify the original award finding Thompson permanently and totally disabled.

Thompson opposed the motion, claiming that the Workers' Compensation Court lacked jurisdiction in the matter because

there was no pending controversy in the case and further claiming that the Workers' Compensation Court lacked authority to order him to attend an FCE conducted by anyone other than a physician. Thompson also requested that the hearing on Kiewit's motion be recorded by a court reporter at Kiewit's expense.

On June 4, 1998, Kiewit's motion and Thompson's objection thereto came on for hearing before the trial court. During the hearing, Kiewit orally amended its motion to include a request that the FCE be videotaped. Three exhibits were offered and received into evidence. At Thompson's request, a court reporter attended the hearing and recorded the court's receipt of the evidence.

In a written order filed June 12, 1998, the trial court overruled Thompson's objections and granted Kiewit's motion. The trial court ordered Thompson to attend an FCE as scheduled by Kiewit. The court also ruled that the physical therapist was "free to" videotape the examination. With regard to the court reporting expenses, the court found that the reporting services were not necessary and ordered that the party requesting the services, Thompson, should pay for same.

Thompson sought review of the June 12, 1998, order, and on June 15, Thompson filed an amended application for review to the review panel. Thompson's appeal to the review panel came up for a review hearing on October 28, 1998. In an order dated January 5, 1999, the review panel stated that pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995), the trial court's June 12, 1998, order was not a final order and, therefore, was not appealable to the review panel. Notwithstanding this determination, the review panel, nevertheless, considered the merits of Thompson's appeal of the June 12 order. The review panel concluded that the June 12 order was within the sound discretion of the trial court and was not clearly wrong, and it affirmed the trial court's June 12 order. Thompson appeals from the review panel's decision affirming the June 12 order of the trial court.

ASSIGNMENTS OF ERROR

On appeal from the review panel's decision affirming the trial court's order, Thompson assigns six errors. Thompson claims the review panel erred in affirming the trial court's order

because the trial court erred in (1) considering Kiewit's motion for an FCE, given the trial court's lack of jurisdiction; (2) ordering Thompson to attend an FCE, conducted by a physical therapist and scheduled by Kiewit, because the court lacked the statutory authority to enter such an order; (3) permitting the physical therapist to videotape the examination; (4) holding a hearing on Kiewit's motion pursuant to Neb. Rev. Stat. § 48-162.03 (Reissue 1998) because the statute is unconstitutional; (5) failing to order Kiewit to pay for the court reporting services at the June 12, 1998, hearing; and (6) failing to award Thompson attorney fees.

STANDARDS OF REVIEW

[1-3] It is not only within the power but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999). When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999); *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998). 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. *Pier v. Bolles*, 257 Neb. 120, 596 N.W.2d 1 (1999).

ANALYSIS

Before we address the errors assigned by Thompson, we must first consider Kiewit's claim that the trial court's order of June 12, 1998, was interlocutory, thereby depriving the review panel and this court of jurisdiction to hear Thompson's appeal. We find merit to Kiewit's assertion that the review panel and consequently this court lack jurisdiction to hear Thompson's appeal.

[4] Appeals from a workers' compensation trial court to a review panel are controlled by statutory provisions found in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1998). Specifically, §§ 48-179 and 48-182 pro-

vide for the review procedure for appeals brought from the trial court to the review panel.

Section 48-179 provides, inter alia, as follows:

> Either party at interest who refuses to accept the *findings, order, award, or judgment* of the Nebraska Workers' Compensation Court on the original hearing may, within fourteen days after the date thereof, file with the compensation court an application for review before the compensation court, plainly stating the errors on which such party relies for reversal or modification and a brief statement of the relief sought.

(Emphasis supplied.)

Section 48-182 provides, inter alia, as follows:

> In case either party at interest refuses to accept *any final order* of the Nebraska Workers' Compensation Court on original hearing, such party may, within fourteen days thereafter, file with the compensation court an application for review and within fourteen days from the date of such final order file with the compensation court a praecipe for a bill of exceptions.

(Emphasis supplied.)

[5] As can be seen from the language quoted above, § 48-179 provides for appeals from findings, orders, awards, or judgments whereas § 48-182 provides for appeals from final orders. With respect to statutory construction, we have stated that " '[w]hen considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.' " *In re Interest of Joshua M. et al.*, 256 Neb. 596, 605, 591 N.W.2d 557, 563 (1999) (quoting *Baker's Supermarkets v. State*, 248 Neb. 984, 991, 540 N.W.2d 574, 579 (1995)). We have further stated that "we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute and its amendments." *Battle Creek State Bank v. Haake*, 255 Neb. 666, 680, 587 N.W.2d 83, 92 (1998). Finally, we have stated that "we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction

which would defeat it." *Id.* We examine §§ 48-179 and 48-182 together in light of the foregoing principles of statutory construction.

Sections 48-179 and 48-182 pertain to the same subject matter, and must be construed, if at all possible, as consistent with one another and in a sensible manner. Notwithstanding the individuation of examples of rulings listed in § 48-179, § 48-182 makes clear that when reading the two provisions together, an order appealed from a trial court to a review panel must be a "final order" of the workers' compensation trial court. By its terms, § 48-182 outlines the mechanics for bringing an appeal from such final order. Taking §§ 48-179 and 48-182 together and giving them a sensible construction, we conclude that the appeal from the trial court to the review panel must be taken from a final order. This interpretation comports with the general policy against interlocutory appeals. E.g., *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997). See, generally, 4 C.J.S. *Appeal and Error* § 81 (1993).

[6,7] Having determined that pursuant to §§ 48-179 and 48-182, a party may appeal to a review panel only from a final order of the Workers' Compensation Court, we must ascertain the definition of a final order for purposes of such an appeal. Neither § 48-179 nor § 48-182 defines a "final order" for purposes of a workers' compensation appeal from a trial court to a review panel. Accordingly, we refer to § 25-1902, which defines three types of final orders which may be reviewed on appeal, to wit: (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). We rely on this statutory provision and the case law under it to define "final order" for purposes of an appeal from the trial court to the review panel. Of the three types of final orders identified above, it is obvious that the June 12, 1998, order is neither an order that determines an action or prevents a judgment under (1) nor an order made on summary application in an action after judgment under (3). Accordingly,

we examine the June 12 order under (2), which concerns an order affecting a substantial right made during a special proceeding.

[8,9] It is well settled that a workers' compensation case is a "special proceeding." See *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). Accordingly, we examine the trial court's order of June 12, 1998, to determine if such order affected a substantial right made in this special proceeding. We have held:

> A substantial right is an essential legal right, not a mere technical right. . . . A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.

Holste v. Burlington Northern RR. Co., 256 Neb. at 724, 592 N.W.2d at 904.

In the instant case, no substantial right was affected by ordering an FCE, and Thompson does not identify any. In this regard, Thompson does not assert that he is entitled to be free from participating in an FCE. To the contrary, he admits that Kiewit has a statutory right to have him evaluated by certain types of medical professionals, and the fact that he merely challenges the type of professional who can conduct the FCE does not rise to the level of a substantial right. Such challenge can be effectively addressed on appeal from a bona fide final order.

[10] Thompson has failed to identify a substantial right which has been affected by the trial court's order of June 12, 1998. "If a party's substantial rights are not determined by a court's order and the cause is retained for further action, the order is not final for purposes of appeal. . . . An appellate court is without jurisdiction to entertain appeals from nonfinal orders." *State v. Schlund*, 249 Neb. 173, 176-77, 542 N.W.2d 421, 423-24 (1996). The June 12 order is a nonfinal order. Accordingly, the review panel was without jurisdiction to consider Thompson's appeal of the trial court's June 12 order. Because the review panel lacked jurisdiction, this court in turn lacks jurisdiction, and we are without authority to consider the substantive ruling of the review panel. See, *State v. Jacob*, 256 Neb. 492, 591 N.W.2d 541 (1999); *Trew v. Trew*, 252 Neb. 555, 567 N.W.2d

284 (1997). Because this court lacks jurisdiction, the appeal must be dismissed.

CONCLUSION

We conclude that pursuant to §§ 48-179 and 48-182, appeals from a workers' compensation trial court to a review panel must be from final orders. Having determined that the trial court's June 12, 1998, order directing that Thompson submit to an FCE is not a final order, we conclude that the review panel lacked jurisdiction of Thompson's appeal therefrom and that accordingly, this court lacks jurisdiction to hear this appeal from the review panel. We dismiss Thompson's appeal to this court for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
CHRISTOPHER A. BROWN, APPELLANT.
603 N.W.2d 419

Filed December 17, 1999. No. S-98-982.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Convictions: Appeal and Error.** A criminal conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. ___: ___. 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.
5. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
6. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
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. **Homicide: Motor Vehicles: Negligence.** Contributory negligence is not a defense to the charge of motor vehicle homicide.
9. **Homicide: Motor Vehicles: Negligence: Proximate Cause.** A victim's negligence cannot act to absolve the defendant in a motor vehicle homicide case unless the actions of the victim were the sole proximate cause of the accident.
10. **Homicide: Motor Vehicles: Negligence: Jury Instructions.** When evidence has been presented in a motor vehicle homicide case that a victim was negligent, it is error for the trial court to refuse a requested instruction which would assist the jury in determining if the victim was actually negligent.
11. **Homicide: Motor Vehicles: Negligence: Proximate Cause: Evidence.** When there has been evidence of negligence on the part of the victim in a motor vehicle homicide case, the trial court should instruct the jury of the effect of any negligence of the victim on the element of proximate cause as follows: The negligence of a victim or third person is not a defense to a prosecution for motor vehicle homicide unless such negligence is the sole proximate cause of the death. Such negligence, if it exists, may be considered on the issue of whether the conduct of the accused was a proximate cause of the homicide.
12. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
13. **Jury Instructions: Appeal and Error.** A party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions.
14. **Criminal Law: Motor Vehicles: Evidence: Proof.** While speed alone does not support a conviction for willful reckless driving, speed does have a bearing on whether one was driving dangerously under the surroundings and attendant circumstances of the particular case.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

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

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

CONNOLLY, J.

Christopher A. Brown was convicted of motor vehicle homicide by reckless driving. During trial, evidence was adduced that the victim was contributorily negligent. Brown contends that the

jury was improperly instructed regarding the effect of the victim's contributory negligence on causation, the elements of the offense, and the elements of the lesser-included offense of motor vehicle homicide by careless driving. He also contends that there was insufficient evidence to support the verdict and that the trial court erred in sentencing.

The major issue to be resolved in Brown's motor vehicle homicide conviction is whether Brown was entitled to have the jury instructed that it may consider the actions of a victim who was operating another vehicle in determining whether Brown's conduct was the proximate cause of the victim's death. We hold that the jury was not properly instructed regarding the effect of the victim's negligence on the element of proximate cause. Accordingly, we reverse, and remand for a new trial.

I. BACKGROUND

On March 5, 1997, Brown was driving southbound on 27th Street in Lincoln, Nebraska. Twenty-seventh Street runs north and south and has two lanes of traffic in each direction. Irene M. Heidtbrink was in a left-hand turn lane on 27th Street facing north. Brown did not testify at trial, but according to his statements to the investigating police officer, he was driving south on 27th Street and had a green light at the intersection of 27th Street and K-Mart Drive. As he approached the intersection, he saw Heidtbrink's vehicle in the intersection. However, her vehicle was stopped, and he could see through the intersection. Brown assumed Heidtbrink would wait for him before she turned because he had the right-of-way. However, as he entered the intersection, Heidtbrink turned left in front of him. Brown slammed on his brakes and attempted to avoid a collision, but was unable to do so. Brown admitted to making one lane change as he proceeded toward the intersection and told the investigating police officer that he thought he had been traveling around 60 m.p.h. There was a conflict in the testimony regarding what the posted speed limit was in the area of the accident. However, it was either 40 or 45 m.p.h. A test of Brown's blood showed no presence of drugs or alcohol. While he was at the hospital waiting for his blood to be drawn, Brown stated to another police officer, "I suppose you guys hate me . . . speeding around."

Heidtbrink died the day after the collision. The medical doctor who performed the autopsy testified that the cause of death was multiple blunt force trauma resulting from a motor vehicle accident. Brown was subsequently charged with motor vehicle homicide by reckless driving.

Michael Witt, a witness to the accident, testified that traffic was heavy on 27th Street at the time of the collision. However, Witt was unable to remember details regarding any other cars besides his own and Brown's. Just prior to the accident, Witt turned onto 27th Street going south. As Witt was turning, Brown passed him and pulled into the right-hand lane in front of him. Witt was unable to provide an estimate of Brown's speed but stated that Brown passed him "at a good rate of speed" and was definitely traveling faster than the other vehicles on 27th Street at that time. Witt's testimony indicates that Brown changed lanes again after passing him. According to Witt, Heidtbrink's vehicle "nosed out" into the intersection and Brown's vehicle collided with it. Witt did not observe that the brake lights were lit on Brown's vehicle prior to the collision and testified that it appeared that Brown had not slowed down at all.

Jeremy Walker, another witness to the accident, testified that he was traveling south on 27th Street and that traffic was moderate at the time of the accident. Like Witt, Walker could not remember any details regarding other cars in the vicinity of the accident other than Brown's and his own. According to Walker, Brown traveled past him at a high rate of speed. At the time Brown passed him, Walker was driving approximately 40 m.p.h. Although the posted speed limit on 27th Street was 40 or 45 m.p.h., Walker testified that it was rare to be able to travel at that speed on the portion of 27th Street at issue because of the high level of traffic that is usually there. At the time of trial, Walker was unable to give an opinion of Brown's speed. However, Walker stated that "[i]n comparison to the rate of speed my vehicle was traveling, I would estimate it appeared that [Brown's] vehicle passed by me as if mine weren't moving."

Officer Marlin Hohnstein testified regarding skid marks at the accident scene. Utilizing measurements of the skid marks and a mathematical formula, Hohnstein concluded that Brown had been traveling in excess of 60 m.p.h. at the time of the accident.

Following the presentation of the State's evidence at trial, Brown made a motion to dismiss on the basis that there was insufficient evidence. The trial court overruled the motion. Brown presented no evidence, and the case was submitted to the jury.

The jury was instructed regarding the elements of motor vehicle homicide by reckless driving and the elements of the lesser-included offense of motor vehicle homicide by careless driving in instruction No. 4, in part, as follows:

> In this case, depending on the evidence, you may find the defendant:
>
> 1. Guilty of motor vehicle homicide by reckless driving;
> 2. Guilty of motor vehicle homicide by careless driving; or
> 3. Not guilty.
>
> The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of motor vehicle homicide by reckless driving are:
>
> 1. That the defendant, Christopher A. Brown, caused the death of Irene Heidtbrink;
> 2. That he did so on or about March 5, 1997 in Lancaster County, Nebraska;
> 3. That he did so unintentionally while engaged in the unlawful operation of a motor vehicle upon the streets or highways of the state of Nebraska;
> 4. That his unlawful operation of a motor vehicle consisted of driving in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property; and
> 5. That his unlawful operation of a motor vehicle was a proximate cause of Irene Heidtbrink's death.
>
> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction.
>
> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of motor vehicle homicide by reckless driving. On the other hand, if you find the state has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements you

must then consider the lesser included offense of motor vehicle homicide by careless driving.

The material elements of motor vehicle homicide by careless driving that the state must prove beyond a reasonable doubt are:

1. That the defendant, Christopher A. Brown, caused the death of Irene Heidtbrink;

2. The he did so on or about March 5, 1997 in Lancaster County, Nebraska;

3. That he did so unintentionally while engaged in the unlawful operation of a motor vehicle on the streets or highways of the state of Nebraska;

4. That his unlawful operation of motor vehicle consisted of driving carelessly or without due caution so as to endanger a person or property; and

5. That his unlawful operation of a motor vehicle was a proximate cause of Irene Heidtbrink's death.

The state has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction.

The trial court further instructed the jury on the definitions of reckless and careless driving in instruction No. 7 as follows:

The statutes of the State of Nebraska in full force and effect on March 5, 1997 provided in substance as follows:

1. Any person who drives a motor vehicle in this state in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be guilty of reckless driving

2. Any person who drives a motor vehicle in this state carelessly or without due caution so as to endanger a person or property is guilty of careless driving.

In regard to proximate cause, the jury was given instruction No. 8, which instructed that "[p]roximate cause is that [sic] produces a result in a natural and continuous sequence, and without which the result would not have occurred." The jury was also given instruction No. 9 as follows:

Whether the conduct of Irene Heidtbrink may or may not have contributed to her death is not an issue in this case. If the evidence is sufficient to prove beyond a rea-

> sonable doubt that defendant's unlawful conduct was a proximate cause of Irene Heidtbrink's death, the conduct of Irene Heidtbrink does not matter.

Brown objected to the instructions on the bases that they did not properly consider the effect of his speeding, were confusing to the jury, and did not properly describe the elements of each offense. Brown also contended that the instructions had the effect of telling the jury not to consider the lesser-included offense unless or until they unanimously determined that Brown must be acquitted of motor vehicle homicide by reckless driving. Brown further contended that the definitions of careless and reckless driving were incorrect and that the instructions acted to direct a verdict for the State by removing any consideration by the jury of Heidtbrink's negligence when they were considering the element of proximate cause. Brown offered the following proposed jury instruction No. 2, for the elements of the offense charged, the lesser-included offense, and when the jury could consider the lesser-included offense:

> Under the information in this case, depending on the evidence, you may find the defendant:
>
> a. Guilty of reckless motor vehicle homicide; or
>
> b. Guilty of motor vehicle homicide; or
>
> c. Not guilty.
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of reckless motor vehicle homicide are:
>
> 1. That the defendant, CHRISTOPHER A. BROWN, unintentionally caused the death of Irene M. Heidtbrink, while engaged in the operation of a motor vehicle in violation of the laws of the State of Nebraska;
>
> 2. That the proximate cause of the death of Irene M. Heidtbrink was defendant's operation of the motor vehicle in such a manner so as to indicate an indifferent or wanton disregard for the safety of persons or property; and
>
> 3. That the defendant did so on March 5, 1997, in Lancaster County, Nebraska.
>
> . . . .

> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of reckless motor vehicle homicide, and you shall not then consider the lesser included offense hereafter set forth in this instruction. On the other hand, if you disagree as to whether the evidence proves beyond a reasonable doubt that each of the foregoing material elements is true, you may consider the lesser included offense of motor vehicle homicide.
>
> The material elements . . . of the crime of motor vehicle homicide are:
>
> 1. That the defendant, CHRISTOPHER A. BROWN, unintentionally caused the death of Irene M. Heidtbrink, while engaged in the operation of a motor vehicle in excess of the posted speed limit;
>
> 2. That the defendant did so on March 5, 1997, in Lancaster County, Nebraska.

The trial court denied Brown's request that it give the instruction.

Brown also offered jury instruction No. 1 which stated that "[s]peed alone will not support a conviction for reckless driving, although speed may have a bearing on whether one was driving dangerously under the surroundings and attendant circumstances of the particular case." In rejecting this instruction, the trial court stated that the instruction could be confusing to the jury because once factors besides speed were introduced by the State, the question for the jury was whether the speed, combined with the other factors, constituted reckless driving. Brown then stated he understood why the first part of the proposed instruction might need to be left out and requested an instruction telling the jury that "speed may have a bearing on whether one was driving dangerously under the surroundings and attendant circumstances."

Brown next offered the following jury instruction No. 3:

> The driver of an automobile upon the public highways of this state is required to have his or her auto under such reasonable control as will at all times enable him or her to avoid collision with other vehicles operated on said high-

> way, but the law does not require such driver to anticipate negligence or violation of traffic regulation by another, in the absence of notice, warning or knowledge of such condition.

The trial court refused to give this instruction on the basis that introducing the rules of the road into the case would be confusing to the jury.

Finally, Brown objected to the trial court's refusal to give the following jury instruction No. 4, which gives the definition of recklessness taken from cases involving recklessness in a civil law context:

> Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act. Conduct is in reckless disregard to the safety of another if the actor intentionally does an act, or intentionally fails to do an act which it is his or her duty to another to do, knowing or having reason to know of facts which would lead a reasonable person to realize not only that his or her conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his or her conduct negligent. Recklessness differs from intentional wrongdoing in that while the act must be intended by the actor in order to be considered reckless, the actor does not intend to cause the harm which results from the act.

The jury found Brown guilty of motor vehicle homicide by reckless driving. The trial court sentenced Brown to 360 days in the Lancaster County jail, plus ordered he pay the costs of the prosecution. Brown then perfected this appeal.

II. ASSIGNMENTS OF ERROR

Brown assigns, rephrased and renumbered, that the trial court (1) improperly instructed the jury on the elements of the offense of motor vehicle homicide by reckless driving, (2) improperly instructed the jury on the elements of the lesser-included offense of motor vehicle homicide by careless driving, (3) improperly instructed the jury regarding the manner by which it could distinguish between the offenses of motor vehicle homicide by reckless driving and motor vehicle homicide by careless driving,

(4) improperly instructed the jury on the definitions of careless and reckless driving, (5) improperly instructed the jury regarding proximate cause and the effect of any contributory negligence of the victim, (6) erred in overruling Brown's motion to dismiss on the basis that there was insufficient evidence to support a conviction of motor vehicle homicide by reckless driving, and (7) erred by improperly considering an element of the offense as an aggravating factor in sentencing.

III. STANDARD OF REVIEW

[1,2] Whether a jury instruction given by a trial court is correct is a question of law. *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999). In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Greer, supra*; *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

[3,4] A criminal conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). 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. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

IV. ANALYSIS

1. Jury Instructions

Brown's contention that the jury was improperly instructed falls into three general categories. Brown contends that (1) the jury instructions removed from the jury any consideration of Heidtbrink's conduct, (2) the jury was not properly instructed regarding the elements of motor vehicle homicide by reckless driving and motor vehicle homicide by careless driving because the terms "reckless" and "careless" were not properly defined, and (3) the failure of the trial court to instruct on the effect of speeding resulted in the jury's being unable to distinguish between reckless and careless driving.

[5] It is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Greer, supra*; *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998).

[6] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Greer, supra*; *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

[7] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999); *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

(a) Instructions Regarding Negligence on Part of Victim

Brown contends that the trial court erred by failing to provide an instruction on the rules of the road, that a person must keep his or her vehicle under reasonable control, and that a driver may assume that others are going to obey the law. When combined with the instruction given regarding proximate cause, Brown contends that the jury was unable to take into account Heidtbrink's actions when considering whether his driving over the speed limit proximately caused her death.

[8,9] It has been a longstanding principle that contributory negligence is not a defense to the charge of motor vehicle homicide. *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989); *State v. Rotella*, 196 Neb. 741, 246 N.W.2d 74 (1976). Rather, the issue is whether a defendant's violation of the law was a contributing factor to the death. *Id.*

> " 'In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another

> driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, [are] not a defense if the evidence is sufficient to sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another.' "

State v. William, 231 Neb. at 89, 435 N.W.2d at 178, quoting *State v. Rotella, supra*. Thus, a victim's negligence cannot act to absolve the defendant in a motor vehicle homicide case unless the actions of the victim were the *sole* proximate cause of the accident. See *State v. Bartlett*, 3 Neb. App. 218, 525 N.W.2d 237 (1994).

Brown cites to *Buckles v. State*, 830 P.2d 702 (Wyo. 1992), to support his position that the instructions acted to foreclose the jury from considering whether Heidtbrink's actions were the proximate cause of her injuries. In *Buckles*, there was evidence that the victim in a motor vehicle homicide case had been driving under the influence of a controlled substance. The Supreme Court of Wyoming considered the following instructions:

> "You are instructed that any negligence on the part of a victim is not a defense to criminal prosecution and does not excuse any criminal acts on the part of a Defendant. The state is required to prove that it was the criminal act on the Defendant's part that caused the death of [the victim].
>
> ". . . .
>
> "A proximate cause is a cause which directly brings about the injury either immediately or through happenings which follow one after another."

Id. at 707. The court concluded that although a victim's negligence is not a defense to a charge of motor vehicle homicide, it was plain error for the court to give the above instructions. The court reasoned that the instructions failed to inform the jury that it could consider the victim's negligence for its bearing upon whether the defendant's actions were the proximate cause of the death. See, also, *Com. v. Molinaro*, 429 Pa. Super. 29, 631 A.2d 1040 (1993) (jury must be instructed to consider victim's actions in connection with causation determination where evidence indicates that those actions may have contributed to accident); *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463

(1985) (failure of victim to exercise due care and keep proper lookout could break chain of causation and jury should have been instructed of its effect on element of proximate cause).

Brown also cites to *State v. Shumway*, 137 Ariz. 585, 672 P.2d 929 (1983). In *Shumway*, a motor vehicle homicide case, the defendant was traveling in excess of the speed limit and collided with a vehicle that attempted to turn left in front of him. The trial court refused to give the following instruction requested by the defendant: "The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard." *Id.* at 588, 672 P.2d at 932.

The Supreme Court of Arizona, en banc, found that it was error to refuse to give the instruction when requested because while contributory negligence of the victim is not a defense, the jury could still consider the victim's negligence regarding how it affected the element of causation.

We find the reasoning of *Buckles* and *Shumway* to be persuasive. In the instant case, the first sentence of jury instruction No. 9 stated: "Whether the conduct of Irene Heidtbrink may or may not have contributed to her death is not an issue in this case." However, if the jury were to determine that Heidtbrink's actions were the *sole* proximate cause of her death, then it would be required that the jury acquit Brown. Thus, the instructions failed to instruct the jury regarding when and in what manner Heidtbrink's actions were to be considered.

[10] We conclude that when evidence has been presented in a motor vehicle homicide case that a victim was negligent, it is error for the trial court to refuse a requested instruction which would assist the jury in determining if the victim was actually negligent. Thus, the trial court erred in failing to give Brown's requested instruction on the rules of the road.

[11] The trial court in such circumstances should also instruct the jury of the effect of any negligence of the victim on the element of proximate cause as follows:

> The negligence of a victim or third person is not a defense to a prosecution for motor vehicle homicide unless such negligence is the sole proximate cause of the death.

> Such negligence, if it exists, may be considered on the issue of whether the conduct of the accused was a proximate cause of the homicide.

Because we reverse and remand for a new trial, we will address Brown's other assignments of error regarding jury instructions on the basis that such issues are likely to arise again upon retrial.

(b) Reckless and Careless Driving

Brown contends that the jury instructions were improper because the instructions as given utilized the statutory language defining reckless and careless driving without any further definition. See Neb. Rev. Stat. §§ 60-6,212 and 60-6,213 (Reissue 1998). Brown proposed instructions that defined reckless in a manner used in the civil law. In particular, Brown relies on the definition of reckless found in *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990), a case involving personal injuries arising out of participation in an athletic event. In his brief, Brown further contends that the trial court should have sua sponte instructed the jury utilizing the definition of recklessly found in Neb. Rev. Stat. § 28-109(19) (Reissue 1995). Brown did not request an instruction based on § 28-109(19). Brown also did not request a definition of careless driving.

[12,13] Although Brown cites to civil cases for a definition of reckless, the criminal statutes in §§ 60-6,213 and 28-109(19) provide a definition applicable in the criminal context. Further, we have said that in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Thus, Brown was not entitled to a definition of reckless based on the definition found in civil cases. Brown did not request an instruction utilizing the definition found in § 28-109(19), nor did he request an instruction defining careless driving. A party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). Accordingly, we find no reversible error on this issue.

Brown additionally contends that the instructions did not allow the jury to consider the lesser-included offense unless or until they unanimously agreed that he was not guilty of motor

vehicle homicide by reckless driving. However, Brown cites to no legal authority for this proposition. Additionally, we have addressed an instruction with similar language and determined that such an instruction does not require jury unanimity before considering a lesser offense. *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Thus, there is no merit to Brown's argument on this issue.

(c) Instructions Regarding Speed

[14] Brown contends that the jury should have been instructed on how to consider the effect of his speeding. We have said that while speed alone does not support a conviction for willful reckless driving, speed does have a bearing on whether one was driving dangerously " 'under the surroundings and attendant circumstances of the particular case.' " *State v. Howard*, 253 Neb. 523, 527, 571 N.W.2d 308, 313 (1997), *quoting State v. DiLorenzo*, 181 Neb. 59, 146 N.W.2d 791 (1966). We have generally utilized this proposition of law using the terminology of "willful" reckless driving, which is proscribed by Neb. Rev. Stat. § 60-6,214 (Reissue 1998). The instant case concerns reckless driving under § 60-6,213 rather than willful reckless driving pursuant to § 60-6,214. However, although we state the proposition as applying to willful reckless driving, we have applied it in a case involving reckless driving under § 60-6,213. See *State v. Howard, supra*.

In the instant case, the State presented evidence that Brown had made several lane changes prior to the accident and was not only driving over the posted speed limit, but was doing so in an area of moderate-to-heavy traffic. Thus, the speed at which Brown was traveling was introduced as one piece of evidence for the purpose of proving that he drove in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property. Under such circumstances, the trial court was correct in refusing to instruct on the effect that speed alone has on reckless driving.

As an alternative, Brown requested an instruction that speed has a bearing on whether one was driving dangerously under the circumstances. However, the jury was already instructed to con-

sider whether Brown was engaged in an unlawful operation of his vehicle and whether such unlawful operation consisted of driving in a manner as to indicate an indifferent or wanton disregard for the safety of persons or property. The fact that Brown was driving over the speed limit did not need to be further pointed out to the jury in order for them to consider it. Thus, the failure to give Brown's requested alternate instruction was not error.

2. Sufficiency of Evidence

Because we reverse on the issue of jury instructions, we must consider Brown's challenge to the sufficiency of the evidence in order to determine whether Brown may be retried. See *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). Brown contends that there was insufficient evidence to convict him of motor vehicle homicide by reckless driving because the State presented credible evidence only that he was driving in excess of the posted speed limit. Brown further argues that evidence that he had changed lanes several times and that traffic was heavy or moderate was not sufficient to support a finding that he was driving recklessly.

A criminal conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). 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. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997). We have held that when there was evidence that a defendant had been speeding and had passed several other automobiles on a heavily traveled public highway at night, there was sufficient evidence to support a conviction for willful reckless driving. See *State v. DiLorenzo*, 181 Neb. 59, 146 N.W.2d 791 (1966). Such a holding is equally applicable to a case involving reckless driving.

In the instant case, the State presented evidence that Brown had twice changed lanes and passed another driver at a high rate of speed. There was also evidence indicating that traffic in the area at the time of the accident was moderate to heavy. Thus, the

fact that Brown was traveling at a speed of approximately 60 m.p.h. had a bearing on whether he was driving dangerously under circumstances where he was engaged in lane changes during moderate-to-heavy traffic. Construed in a light most favorable to the State, there was sufficient evidence to support Brown's conviction of motor vehicle homicide by reckless driving.

V. CONCLUSION

The trial court erred in refusing to give Brown's requested instructions on the rules of the road and in failing to adequately instruct on the effect that Heidtbrink's negligence, if any, had on the element of proximate cause. We find Brown's other assignments of error regarding the jury instructions to be without merit. There was sufficient evidence to convict, allowing the cause to be remanded to the trial court for a new trial. Because we reverse, and remand for a new trial, we do not consider Brown's assignment of error regarding sentencing.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
MERRITT G. BROWN, APPELLANT.
603 N.W.2d 456

Filed December 17, 1999. No. S-98-352.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
4. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is not prejudicial error.
5. **Homicide: Motor Vehicles: Negligence.** Contributory negligence is not a defense to the charge of motor vehicle homicide.

6. **Constitutional Law: Criminal Law: Due Process.** The Due Process Clause of the 14th Amendment guarantees a criminal defendant the right to fairly present his or her defense at trial.
7. **Motor Vehicles: Rules of the Road.** A driver cannot violate Neb. Rev. Stat. § 60-6,148(2) (Reissue 1998) by failing to yield to a vehicle he or she did not or could not see in the exercise of reasonable care.
8. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme so that effect is given to every provision.
9. **Homicide: Motor Vehicles: Rules of the Road.** Neb. Rev. Stat. § 60-6,148(2) (Reissue 1998) must be interpreted to mean that the vehicle to be yielded to was or could reasonably have been seen in order for a driver to be held criminally responsible for motor vehicle homicide for failure to yield.

Petition for further review from the Nebraska Court of Appeals, Sievers, Inbody, and Carlson, Judges, on appeal thereto from the District Court for Buffalo County, TERESA K. LUTHER, Judge, on appeal thereto from the County Court for Buffalo County, GRATEN D. BEAVERS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

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

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

GERRARD, J.

NATURE OF CASE

Merritt G. Brown was convicted by the county court, pursuant to a jury verdict, of motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306(1) (Reissue 1995) for unintentionally causing the death of another person while driving his motor vehicle in violation of Neb. Rev. Stat. § 60-6,148(2) (Reissue 1998) in that Brown had failed to yield the right-of-way to the victim's vehicle. Brown was sentenced to 12 months' probation and was fined $500. Brown appealed to the district court, which affirmed his conviction and sentence. Brown then appealed to the Nebraska Court of Appeals, which affirmed the judgment of the district court. Brown petitioned this court for further review, which was granted.

FACTUAL BACKGROUND

On October 8, 1996, Brown was traveling south on Evergreen Road in Buffalo County when he came to a stop sign at the intersection of Evergreen Road and U.S. Highway 30. Brown stopped at the stop sign and prepared to turn left onto the highway. The time was between 4:30 and 5 a.m., and the sky was still dark. There were no obstructions interfering with Brown's view of the oncoming traffic on the highway.

Brown waited for two passing vehicles and then pulled out into the intersection. At the time, a westbound pickup truck driven by Gary Stauffer was approximately 100 to 200 feet away. Stauffer's vehicle collided with Brown's vehicle, and Stauffer was killed.

Brown was charged with motor vehicle homicide, on the theory that he had unintentionally caused the death of another person while driving his motor vehicle in violation of § 60-6,148(2) by failing to stop his vehicle at the point nearest the intersecting roadway, where Brown had a view of approaching traffic before entering the intersection, and by failing to yield the right-of-way to a vehicle that had entered the intersection from another highway or was approaching closely on such highway so as to constitute an immediate hazard. Brown defended by presenting evidence that Stauffer's vehicle had not been visible to Brown because Stauffer's headlights were not working properly. This was the central issue at trial.

At trial, Brown testified that Stauffer's headlights had not been visible at the time of the accident. The relevant testimony is as follows:

> Q- [Defendant's counsel] Showed the location of the vehicle number 1 [Stauffer's vehicle]. To the best of your recollection would that have been generally where it would of been located in the road north to south?
>
> A- [Defendant] I have no idea.
>
> . . . .
>
> A- I have no idea. I didn't see the vehicle at all.
>
> Q- Were there any headlights from the west that you saw — from the east that you saw after the pickup went by?
>
> A- No, no there was not.

. . . .

Q- When you looked towards Kearney, did you see one set of headlights or did you see more than one set of headlights?

A- One.

Q- And was that the pickup that went by you?

A- Yes.

In addition, Brown presented evidence that Stauffer's alternator and voltage regulator were broken. Richard Ostrander testified that there was a hole in the voltage regulator, and it did not appear that anything in the pickup itself had pushed a hole into that device. Todd Thorell testified that upon testing the alternator after the accident, he discovered that it was putting out a current of "30 to 35 amp[s]," although it was supposed to be emitting "55 [amps]." Thorell also testified that although the voltage regulator should have tested at 13.8 to 15.2 volts, it tested at only 13.2 volts, a low result. On cross-examination, the State elicited testimony suggesting that these systems could have been damaged in the accident, rather than before.

The State then offered two rebuttal witnesses, Roger Swearingen and Lowene Jacobs. Swearingen, who owned a salvage business, sold the pickup to Stauffer 3 weeks before Stauffer's death, and Swearingen testified that he had never had any problems with the headlights and had told Stauffer to contact him regarding any problems with the pickup. Stauffer did contact him, but only because he wanted mud flaps. The previous owner of the pickup, Jacobs, testified that she had experienced no problems with the headlights.

The jury was instructed in the language of several statutory provisions, including § 60-6,148(2) and the statutes that establish the duty of a vehicle operator to maintain functional headlights. The relevant portion of the elements instruction (instruction No. 3) provided:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime charged are:
>
> (1) The defendant, Merritt G. Brown, was engaged in the unlawful operation of a motor vehicle; and

(2) That such unlawful operation of a motor vehicle consisted of failing to yield right of way to a vehicle that had entered the intersection from another highway or was approaching so closely on such highway so as to constitute an immediate hazard, in violation of section 60-6,148; and

(3) That such unlawful operation of a motor vehicle was a proximate cause of the death of Gary Stauffer; and

(4) That the death of Gary Stauffer was caused unintentionally; and

(5) That these events occurred on or about October 8, 1996, in Buffalo County, Nebraska.

Brown proffered an alternative to this instruction, which was refused by the trial court. The relevant portion of Brown's proffered instruction stated:

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime charged are:

(1) The Defendant, on or about October 8, 1996 did cause the death of Gary Stauffer.

(2) The cause of death of Gary Stauffer was unintentional while the Defendant was engaged in the unlawful operation of a motor vehcile [sic].

(3) The unlawful operation of the Defendant's vehicle, if any, consisted of:

a. After having stopped at a stop sign, the Defendant proceeded into the intersection;

b. That Gary Stauffer's vehicle had entered the intersection prior to the Defendant entering the instersection [sic]; or

c. At the time the Defendant entered the intersection, Gary Stauffer's vehicle was appraoching [sic] the intersection so closly [sic] as to constitute an immediate hazard if the Defendant moved across or into such intersection.

d. Gary Stauffer's vehcle [sic] or headlights was visible.

(4) The above described events all took place in Buffalo County, Nebraska.

After his conviction, Brown filed a motion for new trial on the basis of newly discovered evidence. Brown offered the affidavit of Robert Peters, who averred that during the time between

Stauffer's purchase of the pickup and the accident, he heard Stauffer tell another person who had asked Stauffer for a ride, "I can't take you because I don't have enough battery," and that several days after this statement, Stauffer told Peters that he needed to put a new alternator in the vehicle. The motion for new trial was overruled.

After sentencing, Brown's conviction was affirmed by both the district court and the Court of Appeals. The Court of Appeals, in an unpublished opinion, stated that "it would have been preferable for the jury to have been directly instructed" on the issue whether Stauffer's vehicle was visible to Brown, but concluded that the instructions given addressed the issue "in an indirect fashion." The Court of Appeals relied on the instructions (1) that the jury was to apply the general knowledge that it could be presumed to have regarding the legal responsibility of a driver to have operating headlights, (2) that a reasonable doubt is based on reason and common sense, and (3) that the jury must find that Stauffer's vehicle was approaching so closely on such highway as to constitute an immediate hazard. Consequently, the Court of Appeals determined that the jury instructions given adequately covered the issues and that no prejudicial error had occurred. See *State v. Brown*, No. A-98-352, 1999 WL 1337643 (Neb. App. Mar. 16, 1999) (not designated for permanent publication).

Brown petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

In his petition for further review, Brown assigned that the Court of Appeals erred in (1) determining that the trial court properly instructed the jury on Brown's defense, (2) failing to order a new trial based on newly discovered evidence, and (3) failing to find that the State's rebuttal evidence should have been excluded.

STANDARD OF REVIEW

[1,2] Whether a jury instruction given by a trial court is correct is a question of law. *State v. Brown, ante* p. 330, 603 N.W.2d 419 (1999). In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

ANALYSIS

Brown contends that the trial court erred by failing to instruct the jury that in order to be criminally responsible for failure to yield the right-of-way to another vehicle, the other vehicle must be capable of being seen by the defendant under the existing conditions.

[3] It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Brown, supra*; *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999).

[4] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is not prejudicial error. *Id.*

[5,6] We have long held that contributory negligence is not a defense to the charge of motor vehicle homicide. *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989); *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989); *State v. Rotella*, 196 Neb. 741, 246 N.W.2d 74 (1976). However, the Due Process Clause of the 14th Amendment guarantees a criminal defendant the right to fairly present his or her defense at trial. U.S. Const. amend. XIV, § 1. See, also, Neb. Const. art. I, § 3. To determine if due process was achieved at Brown's trial, we must decide whether the jury instructions, when read as a whole, fairly present the law so that the jury could not be misled on the essential issue or elements of the crime charged.

As noted previously, the contested instruction on appeal is No. 3; the instruction given did not provide that in order to violate the failure to yield statute, the victim's car must be visible or reasonably capable of being seen. In Brown's proposed jury instruction, the State must prove that Brown unlawfully operated his vehicle and this unlawful operation consisted of failing to yield to a vehicle which was visible to Brown.

These conflicting instructions point to the core issue of this appeal: Can a driver "fail to yield" to another vehicle that the driver could not reasonably see? For the reasons that follow, we answer in the negative and conclude that the visibility of

Stauffer's vehicle is a factual question to be answered by a properly instructed jury.

There are two statutes at issue here. Section 28-306(1) provides: "A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide." In this case, Brown's alleged unlawful operation of a motor vehicle was failure to yield to Stauffer's pickup, in violation of § 60-6,148(2). Section 60-6,148(2) provides:

> Except when directed to proceed by a peace officer or traffic control signal, every driver of a vehicle approaching an intersection where a stop is indicated by a stop sign shall stop at a clearly marked stop line or shall stop, if there is no such line, before entering the crosswalk on the near side of the intersection or, if no crosswalk is indicated, at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, such driver shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on such highway as to constitute an immediate hazard if such driver moved across or into such intersection.

The language of § 60-6,148(2) obviously does not state whether a driver can fail to yield to a vehicle that he or she cannot reasonably see, and we have not addressed this issue in a criminal context. In negligence actions, by contrast, we have fashioned rules which allow for instructions regarding the nonvisibility of another vehicle. For example, failure to have working headlights could support an instruction regarding contributory negligence. The rule in such actions is that where the driver of a turning vehicle does not see an approaching automobile because of unusual conditions or circumstances, or sees the approaching vehicle and erroneously misjudges its speed or distance, or for some reason assumes that he or she can safely complete the turn, then a question for the jury is presented, and negligence of the turning driver is not presumed as a matter of law. See, e.g., *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645

(1997); *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995); *Petersen v. Schneider*, 153 Neb. 815, 46 N.W.2d 355 (1951), *modified* 154 Neb. 303, 47 N.W.2d 863 (1951). We have also said that where a vehicle strikes a parked car or other obstruction on the road, it is negligence as a matter of law unless the object cannot, for sufficient reasons, be observed by the exercise of ordinary care in time to avoid the collision. See *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973).

[7] We have not, however, addressed this issue in the context of a criminal trial. We do note that failure to specifically instruct the jury that the approaching vehicle must or should reasonably be visible to a driver to be convicted of failure to yield creates a situation in which a jury could find a criminal defendant guilty simply by virtue of making a turn in front of another vehicle, regardless of whether the other vehicle was visible or whether the defendant could have done anything to avoid the accident. This reading of § 60-6,148(2), in effect, creates a strict liability offense. Because penal statutes are given a strict construction which is sensible and prevents injustice or an absurd consequence, see *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998), we ultimately reject this construction. Through a careful interpretation of § 60-6,148(2), we conclude that a driver cannot violate § 60-6,148(2) by failing to yield to a vehicle he or she did not or could not see in the exercise of reasonable care. Therefore, Brown was entitled to a specific instruction on that point, and the lower court's refusal to give an instruction regarding the alleged nonvisibility of Stauffer's vehicle violated Brown's right to a fair trial.

The statute itself reveals that the approaching vehicle must have been seen or should have been seen by the driver in order for the driver to fail to yield to that other vehicle. Section 60-6,148(2) requires that a driver approaching an intersection should stop at a clearly marked stop line or, if there is no clearly marked stop line, a driver must stop immediately before entering the nearest crosswalk. However, if there is no stop line or crosswalk, the driver shall stop "at the point nearest the intersecting roadway *where the driver has a view of approaching traffic on the intersecting roadway before entering the intersec-*

tion." (Emphasis supplied.) See, also, *Salazar v. Nemec*, 253 Neb. 298, 570 N.W.2d 366 (1997) (approving instructions concerning § 60-6,148(2)). The intersection here did not have a stop line or crosswalk, so Brown was required by statute to stop at the point nearest the intersecting roadway where he had a view of approaching traffic on Highway 30. Clearly, if Stauffer did not have his vehicle's lights on, there is no point at which Brown could have viewed approaching traffic because Stauffer's vehicle would not have been visible to him and Brown could not logically have violated the provisions of the statute.

Section 60-6,148(2) implies a "seen or should have seen" standard. We refuse to read § 60-6,148(2) to require a driver to wait indefinitely at an intersection before he or she dare undertake to cross the road during nighttime hours. Such a construction would defeat a significant purpose of the Nebraska Rules of the Road: to increase the efficiency of our streets and highways. See Neb. Rev. Stat. § 60-602(5) (Reissue 1998). If a driver exercises reasonable care to see what should be seen, the requirements of § 60-6,148(2) have been satisfied.

Our interpretation of § 60-6,148(2) requiring a seen or should have seen requirement has been implicitly approved in Nebraska, in reference to emergency vehicles. In *State v. Otto*, 184 Neb. 597, 169 N.W.2d 612 (1969), a police officer was sounding his siren and speeding when he collided with an automobile driven by the defendant, and the police officer died. The defendant was convicted of motor vehicle homicide, and he appealed. Otto argued that "audible" in the emergency vehicle statute means that the driver actually hear the signal of the emergency vehicle, but we rejected that argument. See Neb. Rev. Stat. § 60-6,151 (Reissue 1998). Instead, we approved of the instruction that defined audible as " 'a signal capable of being heard, a signal which is heard, or in the exercise of ordinary care should have been heard.' " *State v. Otto*, 184 Neb. at 601, 169 N.W.2d at 615. The relevant part of the emergency vehicle statute provides:

> (1) Upon the immediate approach of an authorized emergency vehicle which makes use of proper audible or visual signals:

> (a) The driver of any other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the roadway or to either edge or curb of a one-way roadway, clear of any intersection, and shall stop and remain in such position until such emergency vehicle passes unless otherwise directed by any peace officer[.]

§ 60-6,151(1)(a).

[8,9] Although §§ 60-6,151 and 60-6,148(2) are different statutes, they are both integral parts of the Nebraska Rules of the Road. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme so that effect is given to every provision. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997). Additionally, Neb. Rev. Stat. § 60-604 (Reissue 1998) provides, "The Nebraska Rules of the Road shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws relating to motor vehicles." In accordance with these principles of statutory interpretation, since the emergency vehicle statute requires that the emergency vehicle "was or should reasonably have been heard," to be consistent within interpreting that section of the code as a whole, we conclude that § 60-6,148(2) must also be interpreted to mean that the vehicle to be yielded to was or could reasonably have been seen in order for a driver to be held criminally responsible for motor vehicle homicide for failure to yield.

The requirement that a driver must see or should reasonably have seen the approaching vehicle to be convicted of motor vehicle homicide due to a failure to yield is consistent with existing jurisprudence regarding negligence cases. Since a party in a civil case is entitled to, at the very least, an instruction regarding the visibility or nonvisibility of another vehicle, due process demands that a criminal defendant, under the more exacting beyond a reasonable doubt standard, should similarly be entitled to such an instruction. The trial court committed prejudicial error in failing to so instruct in the instant case.

CONCLUSION

For the foregoing reasons, we conclude that the trial court's refusal to instruct the jury regarding the visibility of Stauffer's

vehicle denied Brown his due process right to a fair trial; thus, we need not address Brown's other assignments of error. Because we determine that there was reversible error by the county court, we reverse the judgment of the Court of Appeals and remand this cause with directions to reverse the judgment of the district court and remand this cause to the county court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL J. SIMS, APPELLANT.
603 N.W.2d 431

Filed December 17, 1999. No. S-98-1343.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence received at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Appeal and Error: Words and Phrases.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Criminal Law: Proof.** The burden in a criminal proceeding is on the State to produce proof beyond a reasonable doubt of every element of a charged offense.
4. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
5. **Homicide: Intent: Words and Phrases.** One kills with premeditated malice if before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
6. **Homicide: Intent: Time.** The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design

or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.

7. **Homicide: Intent: Weapons.** The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death.
8. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
9. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such intent.
10. **Convictions: Testimony: Proof.** A conviction may be based upon the uncorroborated testimony of an accomplice.
11. **Constitutional Law: Criminal Law: Effectiveness of Counsel.** The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel.
12. **Constitutional Law: Effectiveness of Counsel: Proof.** To state a claim of ineffectiveness of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
13. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Scott A. Calkins, of Byam & Hoarty, for appellant.

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

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

STEPHAN, J.

On March 24, 1997, Michael J. Sims, then a 20-year-old resident of Omaha, Nebraska, purchased a Maverick 12 gauge shotgun, a Norinco Model SKS 7.62-mm x .39-caliber semiautomatic assault rifle, and ammunition for each from Arms & Ammo Sporting Goods in Fremont, Nebraska. On the following day, two men drove into a residential neighborhood in Omaha and fired these weapons at Nathan Coleman and William Booth. Both victims were injured, Coleman fatally. Harry Winefeldt admitted that he fired the shotgun and identified Sims as the person who fired the assault rifle. Sims was charged with first degree murder, attempted first degree murder, and two counts of use of a deadly weapon to commit a felony. Following a jury trial, Sims was convicted and sentenced on all four counts, and he now appeals.

I. BACKGROUND

1. PROCEDURAL BACKGROUND

The four-count information charging Sims with the offenses for which he was convicted was filed in the district court for Douglas County on May 7, 1997. On May 8, Sims appeared for arraignment with his attorney and entered a plea of not guilty subject to a plea in abatement, which he was given leave to file within 10 days. Although it appears that a plea in abatement was filed, it is not included in the record on appeal.

Sims' appointed counsel moved for leave to withdraw on September 18, 1997, citing a "breakdown in communications" which prevented his effective representation of Sims. The district court granted the motion on September 26, but noted that Sims had elected to represent himself and therefore required his former attorney to remain in the case as Sims' technical advisor. On October 8, the court overruled Sims' plea in abatement. Sims then filed a pro se "Motion on Conflicts and Negligence of Stand by Counsel and Courts" on October 29. A hearing on this motion was held on November 4, and the matter was continued until November 10. On that date, Sims informed the court that he was "interviewing attorneys to try to retain one" and would continue pro se until he was able to secure new counsel. The court ordered Sims' original attorney to remain available as a

legal advisor if requested by Sims. On December 10, another attorney entered his appearance as counsel for Sims and his originally appointed counsel was granted leave to withdraw.

At a pretrial conference held on January 28, 1998, the court scheduled trial to begin on April 6. On that date, the State was granted leave to endorse three additional witnesses and Sims' motion for continuance was granted. Trial to a jury commenced on August 24 and continued until September 1, when the jury returned a verdict of guilty on all four counts and Sims was adjudged guilty pursuant to the verdict. A hearing on aggravating and mitigating factors was held on October 29. On November 24, Sims' motion for new trial was overruled and he was sentenced to life imprisonment on the first degree murder count, 20 to 25 years' imprisonment on the attempted first degree murder count, and 10 to 12 years' imprisonment on each of the two weapons counts. On the same date, Sims' trial counsel was granted leave to withdraw and a new attorney was appointed to represent him. Sims' newly appointed counsel perfected this timely direct appeal.

2. Facts

There was undisputed evidence at trial that the two firearms Sims purchased on March 24, 1997, were used on the following day to kill Coleman and injure Booth. There was conflicting evidence regarding the events which transpired between the purchase of the weapons and the shootings.

(a) State's Evidence

Christopher Cannon, who was 22 years old and a previously convicted felon at the time of trial, testified that on five to eight occasions, he obtained marijuana from Sims, sold it to others, and then paid a portion of the proceeds to Sims and retained the remainder for himself. He characterized this transaction as "fronting," which a law enforcement witness confirmed to be a common means of marketing illicit drugs. Cannon testified that he obtained marijuana from Sims under a "fronting" arrangement a day or two before March 25, 1997. Cannon testified that on the afternoon of March 25, he had a telephone conversation with Mikeal Gatewood during which Gatewood expressed inter-

est in purchasing one-half pound of marijuana from him. Cannon informed Gatewood that the price would be $550 and instructed him to meet him at the home of Cannon's parents, located at 2532 Hartman Avenue in Omaha, later that day to conclude the transaction. Cannon then contacted his friend Winefeldt and asked that he accompany him during the meeting with Gatewood to provide protection, as he had done during several of Cannon's prior drug transactions.

Cannon drove his blue and white 1977 Chevrolet Blazer to his parents' home where he parked in the driveway and met Winefeldt, who lived next door. Winefeldt sat in the front passenger seat of the Blazer while he and Cannon waited for Gatewood to arrive, and then Winefeldt moved to the rear seat when Gatewood and another man approached. Gatewood's companion entered the rear seat of the Blazer, and Gatewood sat in the front passenger seat. Cannon had packaged the marijuana in four cellophane bags contained within a larger bag and placed it in the console situated between the two front seats of his vehicle. Gatewood informed Cannon that he did not have enough money to conclude the transaction and stated that he would go to an automatic teller machine and return immediately. He and his companion then left while Cannon and Winefeldt remained seated in the Blazer, waiting for their return.

When Gatewood returned 15 to 20 minutes later, Cannon placed the marijuana on a cupholder where Gatewood could see it. Gatewood acted as though he was about to reenter the vehicle but instead grabbed the marijuana and fled. Knowing that Winefeldt had a weapon, Cannon told him to get out of the vehicle and "get him," referring to Gatewood. Winefeldt exited the vehicle and pointed a handgun at the fleeing Gatewood while Cannon yelled, "C'mon back with my shit." No shots were fired because Winefeldt's weapon lacked a firing pin and was therefore inoperable. Cannon observed Gatewood enter his vehicle and leave the area.

Cannon told Winefeldt that they should go after Gatewood and his companion and "smoke" them, but his attempt at immediate pursuit was thwarted by his inability to locate the ignition key to the Blazer. After he eventually found it under the seat approximately 10 minutes later, Cannon and Winefeldt drove

around the immediate area in an unsuccessful effort to find Gatewood. Cannon's testimony regarding the theft of the marijuana by Gatewood was generally corroborated by the testimony of Gatewood and Winefeldt. Winefeldt testified that following the theft, Cannon threatened to shoot Gatewood if he did not recover the marijuana.

Gatewood and Coleman had been close friends for 6 or 7 years. Gatewood had been visiting at Coleman's home, located at 3908 Ellison Avenue in Omaha, prior to his meeting with Cannon on March 25, 1997, and returned there immediately after taking the marijuana from Cannon's vehicle. Coleman was not home when Gatewood arrived sometime between 5 and 5:30 p.m., so Gatewood obtained the permission of Coleman's fiance, who also lived at the residence, to park his vehicle in Coleman's garage. Gatewood left the residence with a friend at approximately 6 p.m. to obtain materials used to smoke marijuana. When he returned a short time later, he encountered Coleman, who was walking to the door of his home. Several other persons, including Coleman's fiance and children, were also present at that time. After entering the house briefly, Gatewood went outside to watch for the blue and white Blazer because he suspected that Cannon might be searching for him in order to retaliate for the theft of the marijuana.

Cannon testified that after Gatewood took the marijuana and then eluded him, he called Joshua Hill, whom he knew to be a close friend of Sims, to determine Sims' whereabouts. He and Winefeldt then proceeded to the automotive garage where Sims worked. When they arrived there, Cannon went inside and found Sims. The two men went outside, and Cannon informed Sims of the theft of the marijuana by Gatewood. Cannon testified that Sims responded by stating, "Let's get 'em. Let's go." Cannon, Sims, and Winefeldt then left in the Blazer, stopping first at Winefeldt's home to drop off his nonfunctioning handgun and then proceeding to Sims' home near 30th and Newport Streets. Cannon testified that during this drive, he and Sims discussed the theft of the marijuana, which angered both of them.

Cannon testified that Sims briefly entered his home and returned to the vehicle carrying a box which contained a 12 gauge shotgun and an SKS assault rifle. As Sims entered the rear

seat of the Blazer, he placed the box containing the weapons on the floor. Cannon then drove to a pawnshop located near 30th and Laurel Streets and went inside to purchase cigarettes and a beverage. When he returned to his Blazer, he observed Winefeldt seated in the front seat holding the shotgun and talking on a cellular telephone, and Sims seated in the rear seat loading the assault rifle.

Cannon stated that he entered the Blazer and drove off to look for Gatewood, but was unsuccessful. At 6:34 p.m., Cannon received a page from his wife, who was in her 9th month of pregnancy. He immediately placed a call to his wife using his cellular telephone. His wife told him that she may be going into labor, so he drove directly to his home, arriving there between 6:40 and 6:45 p.m. Cannon stated that he got out of the vehicle to attend to his wife, and Sims said, "I'll handle this" as he and Winefeldt drove off in the Blazer with Sims behind the wheel.

Winefeldt testified that he remained in the Blazer while Cannon went inside the garage shop to find Sims. When Cannon and Sims returned to the vehicle, Winefeldt observed Sims carrying a box but did not observe its contents at that time. Winefeldt testified that Sims entered the rear seat of the Blazer and that Cannon drove around for a period of time, looking for Gatewood without success. He testified that they stopped at Sims' home so that he could pick up a jacket, but he did not observe Sims bring a box from his house to the vehicle. They then proceeded to the nearby pawnshop, and Cannon went inside after making a call from his cellular telephone in an effort to locate Gatewood and then handing the telephone to Sims, who completed the conversation. Winefeldt testified that after Cannon returned to the Blazer, Cannon received a page from his wife and then drove to his home, where he exited the Blazer. He stated that he and Sims then departed with Sims driving the Blazer.

Winefeldt testified that as he and Sims drove in the vicinity of 39th Street and Sorensen Parkway, he spotted Gatewood standing in front of a residence near 39th Street and Ellison Avenue. Sorensen Parkway runs parallel to Ellison Avenue and was visible from the front of Coleman's residence, which faced south. Ellison Avenue is a no-outlet street which extends west from its

intersection with 39th Street to a cul-de-sac at its west end. There are duplexes on the north and south sides of Ellison Avenue, and Coleman's residence was in the east half of the second duplex west from 39th Street on the north side of Ellison Avenue.

According to Winefeldt, Sims drove to the middle of the intersection of 39th Street and Ellison Avenue and stopped. Winefeldt testified that as two or three individuals from the Coleman residence approached the Blazer, Sims took the assault rifle from the floor of the Blazer and instructed Winefeldt to use the shotgun to shoot the approaching men before they could shoot them. Although he did not observe any weapons in the possession of the individuals who were approaching the vehicle, Winefeldt observed them raise their shirts and display gang signs. Winefeldt fired three or four shots from the shotgun, hitting both Booth and Coleman, and then opened the door of the Blazer. Winefeldt testified that he mistook Coleman for Gatewood because both were of similar build and complexion and wore their hair in a similar fashion. Winefeldt testified that after firing the shotgun, he heard shots from the assault rifle and observed Sims outside the vehicle firing at Coleman and Booth. Coleman, who was attempting to get away after being shot by Winefeldt, fell to the ground when Sims fired the assault rifle. As Sims and Winefeldt drove off in the Blazer, Winefeldt observed Gatewood, carrying a gun, come around the side of a building. Sims then took Winefeldt home.

Gatewood testified that at approximately 6:15 p.m., he spotted the blue and white Blazer heading east on Sorensen Parkway, driven by a person whom he assumed to be Cannon. He continued observing the vehicle until it was out of sight. Thirty to 45 minutes later, while standing in Coleman's front yard with Coleman and others, Gatewood observed the Blazer again, this time heading north on 39th Street and slowing as it approached the intersection of 39th Street and Ellison Avenue. Gatewood told Coleman and the others to go inside the house, and he went to the rear of a house at 3904 Ellison Avenue to retrieve a handgun he had hidden in a window well. He then walked around looking for the Blazer, but did not see it so he

returned his handgun to its hiding place and returned to Coleman's home.

A short time later, while standing near Coleman's house, Gatewood observed the Blazer again, this time southbound on 39th Street. As Gatewood went to retrieve his handgun from the window well, he heard the fire of a shotgun and someone shout, "I'm hit." He ran to the front of Coleman's home and observed Coleman crawling on his hands and knees toward his daughter. As he went to assist Coleman, Gatewood heard what he thought were "calculated" shots "fired from a different gun, a rifle of some sort, a high-powered weapon." He saw one shot hit Coleman in the lower part of his body, and a second shot impacted the back of his head. Gatewood did not observe the person or persons who fired the shots. After the gunmen had left in the Blazer, Gatewood covered Coleman with a jacket and others placed him in a vehicle and transported him to a hospital.

Gatewood admitted that he was not entirely truthful in the initial statements he made to police officers who investigated the shooting and that he initially told officers that he saw Cannon in the Blazer when he observed the vehicle in the vicinity of 39th Street and Ellison Avenue. He eventually gave police the same account of the events of March 25, 1997, as set forth in his trial testimony.

Gatewood testified that when he first observed the Blazer in the vicinity of Coleman's home on the evening of March 25, 1997, he assumed that Cannon was searching for him as a result of the marijuana theft. Gatewood acknowledged that he and his friend Coleman bore a physical resemblance to each other.

Several witnesses who were standing outside Coleman's home observed the shooting by the two occupants of the Blazer, but none were able to positively identify the person who fired the assault rifle. Coleman's fiance identified a photograph of Winefeldt as the person occupying the passenger seat of the Blazer. She described the other gunman, whom she observed exit the vehicle from the driver's seat and fire a weapon while standing at the rear of the Blazer, as "not too tall," "light-skinned," and not heavyset but of "average" build. When shown a photograph of Cannon and asked if he was the second gunman, she replied "That's surely not him." She was unable to identify

Sims as the second gunman, but stated that she did not see the person well enough to recognize him if she saw him again.

Booth testified that after observing the Blazer circle the block several times, he and Coleman approached the vehicle and raised their shirts and arms to show that they were unarmed. Although he was a gang member, Booth denied displaying any gang signs toward the occupants of the Blazer. He testified that when the Blazer stopped, he observed a person whom he did not recognize but believed to be white on the passenger side pointing a shotgun out the window. As Booth and Coleman tried to run away, Booth heard two shotgun blasts, the second hitting him in the leg. He was subsequently hit in the foot, back, and arm by several additional shots fired from the shotgun. Booth testified that one of the individuals in the Blazer wore his hair in braids and that the other appeared to be a white person of average build, "wasn't fat, wasn't skinny." He was unable to identify them further from photograph arrays shown to him by police.

Another witness who was visiting Coleman's home on the night of the shooting observed the Blazer on 39th Street on three occasions during the evening. On the third occasion, the vehicle stopped near the intersection of 39th Street and Ellison Avenue. He observed two persons in the Blazer, one a "bright-skinned fellow" with his hair braided, and another person of medium build. The person with braided hair fired first, hitting Coleman in the leg. The witness then observed a second person standing at the rear of the Blazer, firing a rifle. This person had short, dark hair and was of medium build, "[not] fat." He was unable to make a courtroom identification of this person.

Another witness, who resided on Ellison Avenue, was inside her home when she heard gunshots and stepped out to her front porch. She observed a blue and white Blazer stopped at the intersection of 39th Street and Ellison Avenue and "two shooters," one tall and skinny with long hair, and the other shorter, of medium build, with short hair. She said that the second person had a light complexion but that she could not tell whether he was Caucasian or of mixed race. She stated that this person was not a "large white guy," and further stated that the person she saw resembled Sims, but she could not be certain that it was Sims. The witness was shown a photograph of Cannon and tes-

tified that she did not see him at the time of the shooting. Another resident of Ellison Avenue observed the occupants of the Blazer at the intersection of 39th Street and Ellison Avenue as he was leaving for work at approximately 7 p.m. He described the driver as "light-complected" but not necessarily Caucasian.

On the "Firearms Transaction Record" completed by Sims on March 24, 1997, when he purchased the shotgun and assault rifle, he listed his height as 5 feet 6 inches, his weight at 150 pounds, and his race as "H." The salesperson who assisted him on that date testified that "he was quite light-skinned and could easily have been taken for a Caucasian." Cannon, who is Caucasian, is 6 feet tall and weighed approximately 285 pounds at the time of the shootings. Winefeldt had his hair arranged in "lokes," a type of braid, at the time of the shooting.

Winefeldt testified that after Sims dropped him off at his home, he called Cannon using a pager code indicating "homicide." Cannon, driving his mother's vehicle, arrived at Winefeldt's home and observed him changing his shirt and taking the braids out of his hair. While the two proceeded to the garage where Sims worked, Winefeldt told Cannon about the shootings. Sims and Shannon Johnsen were in the garage when Cannon and Winefeldt arrived. According to Cannon and Winefeldt, Sims gave Cannon a detailed verbal account of the shootings, laughing as he described the shots from the assault rifle striking Coleman's body. Cannon testified that he then returned to his home, arriving between 7:30 and 8 p.m., and subsequently took his wife to the hospital.

Winefeldt admitted that when he was arrested on the day after the shooting, he initially made false statements to police about his involvement. Later that day, however, he gave police a statement which was essentially the same as his eventual trial testimony. Approximately 1 year later, he pled guilty to manslaughter and use of a weapon to commit a felony. Winefeldt had not yet been sentenced for these offenses at the time of his testimony at Sims' trial. The State agreed not to oppose his attorney's recommendation of a term of imprisonment of 13 to 16 years if he testified truthfully.

Cannon was arrested but never charged in connection with the shootings. He stated that he had not received any "deals" or "promises" from the prosecution at the time of his trial testimony. He admitted that after his arrest, he initially lied about his involvement in the events of March 25, 1997, because he was concerned that his probation would be revoked due to his involvement in the failed marijuana transaction.

Several witnesses testified with respect to the police investigation of the crime scene. The initial call was received at 7:05 p.m., with the first officers arriving at the scene about 5 minutes later, after Coleman had been transported to a hospital, where he died. Police recovered spent 7.62-mm shell casings from the intersection of 39th Street and Ellison Avenue and an area immediately adjacent to the east. The gunshop employee who sold the assault rifle to Sims testified that the casings were from "full metal jacket" rounds not typically used for hunting purposes. Police also found internal components from shotgun shells in the same general area. Blood, hair, and an employee identification badge belonging to Coleman were recovered from the front yard of the residence. Bullet holes were found in the front door and interior of Coleman's residence. At the time of the shooting, Coleman's two young children were among the group of people gathered in front of his residence.

A police officer familiar with gang activity testified that lifting one's shirt is an ambiguous gesture which can mean either that the person is armed or unarmed. Another witness testified that Sims' fingerprints were found on Cannon's Blazer. A detective involved in the investigation testified that to the best of her knowledge, the weapons used in the shooting were never recovered, and the record does not indicate otherwise.

An autopsy revealed that Coleman sustained large wounds to his head and right leg caused by high-velocity rifle bullets. Additionally, he sustained nonfatal shotgun wounds to both legs. The cause of Coleman's death was determined with reasonable medical certainty to be "a perforating gunshot wound of the head, with massive comminuted fractures of the skull and marked lacerations and disruption of the brain."

(b) Sims' Evidence

A homicide detective who interviewed Gatewood on the day after the shooting was called as a witness by Sims. He testified that during this interview, Gatewood stated that Cannon was one of the occupants of the Blazer when he observed it in the vicinity of 39th Street and Ellison Avenue prior to the shooting.

Johnsen, a close friend of Sims, testified that he and Hill accompanied Sims to Fremont on March 24, 1997, to purchase weapons. On March 25, he and Sims were together at the garage where they both worked, modifying suspensions on vehicles. He stated that Cannon and Winefeldt arrived at the garage at approximately 6 p.m. on that date and spoke to Sims. After they had been there a few minutes, Sims told Johnsen that "he had to go somewhere real quick." Johnsen stated that Sims returned alone about 15 minutes later and remained at the garage during the remainder of the evening. He testified that approximately 2 hours later, Cannon and Winefeldt returned to the garage and that Cannon appeared nervous while Winefeldt appeared calm. Johnsen stated that after Sims, Cannon, and Winefeldt conversed in a corner of the garage, Sims asked Johnsen to take Winefeldt to his girl friend's house, and he did so. Johnsen stated that he then returned to the garage and had a brief conversation with Sims, consisting of "normal talk," before Sims took him home. Johnsen testified that on the afternoon of March 27, he and Hill met Sims at a cemetery in Council Bluffs, Iowa, where Sims stated that he was leaving town because he was a suspect in a murder which he did not commit. However, he acknowledged that the weapons which he had purchased on March 24 were used in the crime. Johnsen testified that he knew that Sims used marijuana but had never known him to be involved in selling it.

Hill, also a friend of Sims, testified that he had never known Sims to deal in marijuana. He testified that he supplied Cannon with 2 pounds of marijuana several days before the shootings, for which Cannon paid him $500 on March 24, 1997. Hill testified that on that same day, he accompanied Sims and Johnsen to Fremont where Sims purchased the SKS assault rifle and four boxes of ammunition for Hill with $280 he had given Sims. Hill, who was 21 years old at the time of trial, explained that he

wanted the assault rifle for "[t]arget shooting . . . out in the woods somewhere." Sims used his own money to purchase the shotgun, and completed and signed the necessary documentation for both weapons. Hill stated that upon their return to Omaha, he left the assault rifle with Sims because his mother and stepfather with whom he lived did not approve of weapons in their home.

Hill testified that he next saw Sims at approximately 10:30 p.m. on March 25, 1997, and that Sims told him that Cannon had borrowed the two weapons purchased on the previous day and he had not seen them since. Hill further testified that Cannon contacted him earlier that day and told Hill that Gatewood had stolen marijuana from him and inquired about a 9-mm handgun which Cannon had recently sold to Hill. According to Hill, Cannon was "screaming, yelling, cussing" during this conversation and stated that he had just been "jacked" for a half pound of marijuana and that he was going to kill someone. Hill said he told Cannon that "if he wanted to go get the marijuana back . . . I had an SKS and Michael had a shotgun and that he could come get me from my house, and I had the 9-millimeter." He also told Cannon where Sims could be found. Hill said that he waited for Cannon to pick him up, but he never arrived.

Hill testified that he met with Sims on the day after the shooting at a motel in Council Bluffs, Iowa, and again on the following day at a Council Bluffs cemetery and that on both occasions, Sims discussed his intention to leave town because the weapons he had purchased on March 24, 1997, had been used in the shooting.

After being advised of his privilege against self-incrimination by his attorney in the presence of the trial judge and acknowledging that he understood that it was his decision whether or not to testify, Sims testified on his own behalf. He stated that he purchased the shotgun for himself and the assault rifle for Hill and that he completed the documentation for both weapons because Hill did not have his identification. Each weapon was packaged in a plain brown box. Upon their return from Fremont, Sims and Hill went to Sims' home where they removed the weapons from the boxes, observed their mechanisms, and read the instructions. Sims testified that on the following day, he gave Johnsen a ride

to work, picking him up at approximately 10 a.m. He stated that late that afternoon while he was working at the shop, Cannon approached him and asked to borrow the weapons because he had been "jacked" and needed protection. According to Sims, Cannon told him that he had been informed by Hill that Sims had the weapons in his possession.

Sims testified that he, Cannon, and Winefeldt then left the shop and drove to Winefeldt's home in Cannon's Blazer, stopping there briefly so that Winefeldt could drop off his gun. They then went to Sims' home where he retrieved the two weapons and brought them back to the Blazer. From there, they proceeded to a pawnshop on 30th Street. Sims testified that while Cannon went inside, he loaded the SKS assault rifle and determined that Winefeldt was familiar with the shotgun, which was already loaded with five rounds. Sims stated that when Cannon returned to the vehicle, Cannon took Sims back to the garage where he worked and that Cannon then left with Winefeldt and the two loaded weapons.

Sims testified that Cannon and Winefeldt returned to the garage that evening and explained that they had to dispose of the weapons, that Cannon needed to take his wife to the hospital, and that Winefeldt needed a ride to his girl friend's house. Sims said that Johnsen transported Winefeldt while he continued working and that after Johnsen returned, they cleaned the garage and went home. Sims stated that later that evening, he told Hill about Cannon's borrowing and disposing of the weapons, and Hill replied that he had heard on a police scanner that an incident had occurred involving Cannon's Blazer.

Sims testified that while at work on the following day, he learned that police were at his home, so he left the garage and had Louis Godoy take him to a motel in Council Bluffs. After meeting with Hill, Godoy, and Sims' girl friend at the motel that afternoon, Sims decided to leave town but returned to Omaha on the following day to pick up his vehicle. While there, he contacted Hill and Johnsen and asked them to meet him at the Black Angel cemetery in Council Bluffs. Sims testified that after this meeting, he drove to Chamberlain, South Dakota, but then returned to Omaha, picked up his girl friend, and went to the same motel where he had previously stayed. On the following

day, Sims turned himself in to Omaha police. Sims denied supplying or "fronting" marijuana to Cannon and further denied that he was in the vicinity of 39th Street and Ellison Avenue at the time of the shooting on March 25, 1997. On cross-examination, he acknowledged that spent cartridges found at the scene of the shooting were from shells that he loaded into the clip of the SKS assault rifle.

II. ASSIGNMENTS OF ERROR

Sims asserts, rephrased and summarized, that (1) the State failed to present sufficient evidence to convict him of any of the crimes for which he was charged and that thus, the court erred in failing to grant his motion for a directed verdict at the close of the evidence or, alternatively, grant his motion for a new trial; (2) that his right to effective assistance of counsel was denied in that trial counsel failed to move to discharge Sims pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 1995), failed to move to discharge Sims under the Sixth Amendment to the U.S. Constitution, and failed to request jury instructions regarding either uncorroborated accomplice testimony or the issue of self-defense; and (3) that the trial court committed plain error in failing to instruct the jury regarding uncorroborated accomplice testimony and self-defense.

III. STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence received at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. See *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999).

[2] Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a lit-

igant, 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. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999); *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

IV. ANALYSIS

1. Sufficiency of Evidence to Support Conviction

[3,4] The burden in a criminal proceeding is on the State to produce proof beyond a reasonable doubt of every element of a charged offense. See, *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995); *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995). Sims asserts that there was insufficient evidence presented at trial to convict him of any of the criminal offenses with which he was charged. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Ramsay, supra*; *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).

(a) Murder in the First Degree

[5-7] Neb. Rev. Stat. § 28-303 (Reissue 1995) provides in pertinent part: "A person commits murder in the first degree if he kills another person . . . purposely and with deliberate and premeditated malice . . . ." As used in this definition, "premeditation" means "a design formed to do something before it is done." Neb. Rev. Stat. § 28-302(3) (Reissue 1995). One kills with premeditated malice if before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *State v. Hansen, supra*; *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Marks, supra*. The intent to kill may be inferred, sufficient to support a

murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. *State v. Hansen, supra*; *State v. Marks, supra*.

[8,9] In addition, Neb. Rev. Stat. § 28-206 (Reissue 1995) provides that a "person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999); *State v. Larsen, supra*. When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such intent. *State v. Ramsay, supra*; *State v. Larsen, supra*; *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998).

Viewing the evidence in a light most favorable to the State, as required by the applicable standard of review, we conclude that there is ample evidence to support Sims' conviction for murder in the first degree. Winefeldt testified that he observed Sims fire the shots from the assault rifle which killed Coleman. Although Winefeldt admitted that he made prior statements which were inconsistent with his trial testimony, generally such statements do not negate, erase, or eradicate the evidence that a certain fact exists. See, *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986).

[10] We have held that a conviction may be based upon the uncorroborated testimony of an accomplice. *State v. Campbell, supra*; *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990). In this case, however, Winefeldt's testimony is corroborated by other evidence. Sims admitted that the assault rifle from which the fatal shots were fired was the same weapon which he purchased on March 24, 1997, and retrieved from his home on the afternoon of March 25 when Cannon told him that he had been

"robbed." Cannon testified that Sims produced the weapons after he told him that Gatewood had stolen the marijuana which Cannon had obtained from Sims, with the understanding of future payment, to which Sims responded angrily, "Let's get 'em. Let's go." Sims further admitted that while seated in Cannon's vehicle a short time later, he loaded the assault rifle and asked Winefeldt if he was familiar with the operation of the shotgun which he had previously loaded. Sims acknowledged that spent casings found at the scene of the shooting were from the shells he loaded into the assault rifle.

Although no witness to the shooting other than Winefeldt positively identified Sims as the person who fired the assault rifle, one witness testified that the shooter resembled Sims. In addition, several witnesses gave physical descriptions of the shooter which generally matched Sims' appearance more closely than that of Cannon.

There is evidence upon which a finder of fact could reasonably infer that Sims was an active participant in undertaking to hunt down and kill Gatewood in retaliation for the marijuana theft. There is evidence that upon learning of the theft, he was angry and exclaimed, "Let's get 'em. Let's go." Immediately thereafter, Sims retrieved the two weapons, with one already loaded, from his home. Further, there is evidence that Sims loaded the assault rifle with highly lethal ammunition, entrusted the loaded shotgun to Winefeldt after ascertaining that he knew how to use it, and then set out in search of Gatewood. Finally, there is evidence that upon observing Coleman, who resembled Gatewood, Sims told Winefeldt to fire the shotgun and then took aim at the already wounded and fleeing Coleman with a weapon that is accurate to 300 yards, killing him with a shot to the back of his head. This evidence, if believed, is clearly sufficient to sustain a finding that Sims intentionally killed Coleman purposely and with deliberate and premeditated malice.

(b) Attempted Murder in the First Degree

At all times relevant to this action, the offense of criminal attempt was defined by Neb. Rev. Stat. § 28-201 (Reissue 1995), which provided in pertinent part:

> (1) A person shall be guilty of an attempt to commit a crime if he:
>
> . . . .
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

Much of the evidence which supports Sims' conviction for the first degree murder of Coleman is also supportive of his conviction for the attempted first degree murder of Booth. It is undisputed that Winefeldt fired Sims' shotgun at Booth, knowing that the shots could prove fatal. Sims admitted that he provided the loaded shotgun to Winefeldt and ascertained that he understood how to use it shortly before the shooting. Winefeldt testified that Sims instructed him to fire the shotgun at the group of unarmed individuals which included Booth. A finder of fact could reasonably conclude from the evidence, taken as a whole, that, acting with malice and premeditation, Sims intentionally engaged in conduct which was a substantial step in the course of conduct intended to cause Booth's death. Thus, there is sufficient evidence to sustain Sims' conviction of attempt to commit murder in the first degree.

(c) Using Deadly Weapon to Commit Felony

At all relevant times, Neb. Rev. Stat. § 28-1205 (Reissue 1995) provided in pertinent part that "[a]ny person who uses a firearm . . . or any other deadly weapon to commit any felony which may be prosecuted in a court of this state . . . commits the offense of using a deadly weapon to commit a felony." We con-

clude that the evidence summarized above is sufficient to sustain Sims' convictions for using a deadly weapon to commit murder in the first degree and attempted murder in the first degree.

2. INEFFECTIVE ASSISTANCE OF COUNSEL

[11,12] Sims contends that his trial counsel was ineffective because he (1) did not move for discharge pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 1995); article I, §§ 3 and 11, of the Constitution of the State of Nebraska; and the 6th and 14th Amendments to the U.S. Constitution, based upon an alleged violation of his right to a speedy trial; (2) did not request a jury instruction regarding uncorroborated accomplice testimony; and (3) did not request a jury instruction on the issue of self-defense. The Sixth Amendment to the U.S. Constitution guarantees every criminal defendant the right to effective assistance of counsel. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998). To state a claim of ineffectiveness of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Becerra, supra*; *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

[13] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Lotter, supra*; *State v. Becerra, supra*. In this case, we conclude that the record on appeal affords an insufficient basis upon which to resolve Sims' claims of ineffective assistance of trial counsel and that this issue is therefore not reviewable on direct appeal.

3. Plain Error

Finally, Sims argues that the trial court committed plain error in (1) failing to properly instruct the jury with respect to uncorroborated accomplice testimony and (2) failing to properly instruct the jury with respect to self-defense.

Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999); *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

As noted above, this is not a case involving the *uncorroborated* testimony of an accomplice. Although it was not requested at trial, Sims argues on appeal that the trial court should have given an instruction similar to NJI2d Crim. 5.6, which states:

> There has been testimony from (here insert name), a claimed accomplice of the defendant. You should closely examine (his, her) testimony for any possible motive (he, she) might have to testify falsely. [You should hesitate to convict the defendant if you decide that (here insert name) testified falsely about an important matter and that there is no other evidence to support (his, her) testimony.
>
> In any event, you should convict the defendant only if the evidence satisfies you beyond a reasonable doubt of (his, her) guilt.]

In this case, the trial court did instruct the jury that it was to determine the credibility of the witnesses and the weight to be given to their testimony based upon several factors, including: "[t]he interest or lack of interest of the witness in the result of this case"; "[a]ny previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial"; and "[a]ny other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness." See jury instruction No. 20. The State's burden of proving guilt beyond a reasonable doubt was mentioned no fewer than 26 times in the instructions given by the court, and a separate instruction was given correctly defin-

ing the term "reasonable doubt" in the context of a criminal trial. In *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986), we rejected the defendant's contention that the uncorroborated testimony of an accomplice was insufficient to support his conviction and further concluded that there was no reversible error based upon the trial court's failure to give a specific instruction on credibility of an accomplice, where such an instruction was not requested and a general instruction on credibility was given.

In addition, the jury in the instant case was instructed that with respect to the murder and attempted murder charges, the State's burden included proving that "the defendant did not act in self-defense." Sims did not object to this instruction, nor did he request an additional instruction on self-defense. Sims' trial strategy was not to convince the jury that he shot at Coleman and Booth in self-defense, but that he did not shoot at them at all and was not even present when the shooting occurred. Under these circumstances, there is no plain error with respect to the jury instructions given by the trial court.

V. CONCLUSION

In summary, we conclude that there was sufficient evidence to sustain Sims' convictions on each of the four offenses with which he was charged. We further conclude that the trial court did not commit plain error in instructing the jury and that Sims' allegations of ineffective assistance of trial counsel are not reviewable on direct appeal. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

HENDRY, C.J., not participating.

GREGORY J. JORDAN, APPELLANT, V. MORRILL COUNTY AND EMPLOYERS MUTUAL CASUALTY COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

603 N.W.2d 411

Filed December 17, 1999. No. S-99-030.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ___: ___. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. ___: ___. An appellate court is required to make its own determinations as to questions of law in workers' compensation cases.
4. ___: ___. If a Workers' Compensation Court review panel makes different findings of fact from those made by the trial judge and there is evidence in the record before the trial judge to support the judge's findings, then the review panel has acted in excess of its powers.
5. ___: ___. A review panel of the Workers' Compensation Court should not substitute its view of the facts for that of the trial judge if there is competent evidence in the record to support the trial judge's decision.
6. **Workers' Compensation.** Generally, compensation for repetitive trauma injuries is to be tested under the statutory definition of an accident.
7. **Workers' Compensation: Words and Phrases.** Under Neb. Rev. Stat. § 48-151(2) (Cum. Supp. 1996), an accident is defined as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
8. ___: ___. An occupational disease is a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed.
9. **Workers' Compensation.** If an injury is an occupational disease, the unique condition of the employment must result in a hazard which distinguishes it in character from employment generally.
10. ___. Cessation of employment is a requirement regardless of whether an injury arises from an accident or an occupational disease.
11. ___. An injury must culminate at a point when the employee can no longer perform the required work.
12. **Workers' Compensation: Proof.** For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point

in time requiring the employee to discontinue employment and seek medical treatment.

13. **Workers' Compensation: Case Disapproved.** To the extent that *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), and *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991), are interpreted to mean that interruption of employment means something other than discontinuation of employment, they are disapproved.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Tylor J. Petitt, of The Van Steenberg Firm, for appellant.

Brenda S. Spilker and Timothy E. Clarke, of Baylor Evnen Curtiss Grimit & Witt, for appellees.

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

WRIGHT, J.

NATURE OF CASE

Gregory J. Jordan appeals from an order entered by a review panel of the Nebraska Workers' Compensation Court which reversed the trial judge's determination that Jordan had sustained a repetitive trauma injury to his right shoulder for which benefits were payable under the Nebraska Workers' Compensation Act.

SCOPE OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999).

[3] An appellate court is required to make its own determinations as to questions of law in workers' compensation cases. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

FACTS

In a prior workers' compensation case heard before the Honorable Paul E. LeClair, Jordan received an award against Morrill County for injuries to his cervical spine as the result of an accident on January 19, 1995. Jordan also alleged at the trial before Judge LeClair that in February or March 1996, he injured his right shoulder in a "work hardening" program that was required due to his injuries suffered in the January 1995 accident. Judge LeClair denied benefits for this alleged injury, finding that Jordan had failed to prove that his right shoulder problems were causally related to his accident and injury of January 19.

In the workers' compensation case at issue herein, the trial judge noted that Jordan had had three cervical spine operations, the last of which was on February 28, 1996. After this surgery, Jordan participated in a work hardening program at Scottsbluff Physical Therapy Associates. On March 28, Jordan reported neck and upper back pain while lifting. A summary dated April 19, 1996, noted persistent right upper back and neck pain which had been manageable. During a functional capacity assessment, Jordan felt pain on both sides of his neck and in his right shoulder.

Jordan returned to work in May 1996, and on June 13, he had an initial evaluation by Dr. Scott Primack. The evaluation was for a permanent impairment rating as a result of the cervical spine injury of January 19, 1995. Primack's letter of June 13, 1996, did not indicate any problems with Jordan's right shoulder.

On November 21, 1996, Jordan was examined by Dr. Hans Coester for problems with his right shoulder. At that time, Jordan reported that the shoulder pain was worse with activity. Jordan was then referred to Dr. Garth Nelson, an orthopedic surgeon, who examined Jordan on January 6, 1997. Nelson diagnosed Jordan's right shoulder problem as posttraumatic impingement syndrome with partial rotator cuff tears. In a letter dated March 24, Nelson stated:

> Jordan clearly has a right shoulder impingement syndrome with partial thickness rotator cuff tears. The mechanism of his industrial injury January 19, 1995 is consistent with this condition, although I understand that most of his complaints at the time of injury and the months following were in reference to his neck and his left shoulder. The right shoulder injury may have been masked by the greater intense cervical pain which resolved after healing after his third cervical operation in February, 1996. . . . I am unaware of any nonindustrial causes of his right shoulder impingement and rotator cuff partial tears.

When Primack was asked to diagnose the cause of Jordan's impingement syndrome, he noted that Jordan had reported pain in his right arm when Primack examined him on June 13, 1996. At the time of that evaluation, Primack felt that Jordan's right shoulder problem was residual to a recent surgery. He then saw Jordan on October 23, and at that time, Jordan complained of problems with his right arm due to the vibration he experienced while operating a road grader. In a letter dated July 29, 1997, Primack stated:

> I do not feel that the patient's impingement syndrome is from his initial injury from 1/19/95. More than likely, it is from driving his road gra[d]er with his arms at 90 degrees. Therefore, given the initial mechanism of injury and Mr. Jordan's follow-up examinations, his right shoulder problem is not related to his initial injury from January of 1995.

Jordan's amended petition alleged that in June 1996, he sustained a personal injury arising out of and in the course of his employment with Morrill County and that he was entitled to workers' compensation benefits. He asserted that he sustained an injury to his right shoulder while operating a road grader and that his employer had notice and knowledge of the accident and injury on or about June 1996. Jordan alleged that although he was still working, he continued to be treated by physicians, would need more medical treatment, and would be off work in the future. Morrill County and its workers' compensation insurance carrier, Employers Mutual Casualty Company (Employers Mutual), admitted Jordan's employment, but denied that the disability which Jordan claimed was the result of an accident or

occupational disease arising out of or in the course of his employment with Morrill County.

The trial judge found that Jordan had suffered an accident and injury to his right shoulder from constant repetitive trauma while operating a road grader during May 1996 and, in particular, on June 13, 1996. The trial judge also found that Jordan had missed no time from work although he needed surgery as recommended by Nelson and that Jordan was entitled to surgery for the right shoulder impingement syndrome and rotator cuff tears. The trial judge held that during the time Jordan was unable to work and was under a physician's care for treatment of his right shoulder, he was entitled to receive temporary disability benefits.

Morrill County and Employers Mutual appealed, alleging error in the finding that Jordan suffered an injury to his right shoulder from constant repetitive trauma while operating a road grader. A review panel of the Workers' Compensation Court found that the trial judge's determination that Jordan had sustained a repetitive trauma injury was clearly wrong and in error as a matter of law for two reasons.

First, the review panel found that the evidence before the trial judge showed that Jordan was undergoing a functional capacity evaluation for an unrelated injury on June 13, 1996, and that Primack, the physician examining Jordan, did not note until July 29, 1997, that Jordan had mentioned his right shoulder problems at the time of the evaluation. The review panel believed that the definition of a repetitive trauma accident requires that the medical attention being sought is for the condition for which compensation is being claimed. The review panel concluded that since the evidence would suggest that Jordan did not seek medical attention for his claimed right shoulder injury until October 1996, the trial judge's finding of a June 13, 1996, accident was clearly wrong. Second, the review panel noted the trial judge's finding that Jordan had missed no time from work and therefore concluded that Jordan had not experienced an interruption or discontinuation of employment.

In light of its specific finding that an essential element of an accidental injury had not been satisfied, the review panel concluded that the trial judge's finding that Jordan had suffered a work-related accident and injury to his right shoulder was in

error as a matter of law. Thus, the review panel ordered that the award entered June 10, 1998, be reversed and that the case be dismissed.

One of the judges on the review panel dissented, concluding that it made little practical or legal sense to require an injured worker to know the causation of his condition before seeking medical attention for that condition. The dissent opined that it was obvious that Primack was confused with respect to Jordan's condition and initially thought it was a residual effect of a previous and unrelated surgery.

Jordan timely appeals from the decision of the Workers' Compensation Court review panel.

ASSIGNMENTS OF ERROR

Jordan assigns the following errors: (1) The review panel erred in reversing and dismissing the award entered by the trial judge on June 10, 1998; (2) the review panel erred in finding that the trial judge's determination that Jordan sustained a repetitive trauma injury on June 13, 1996, was clearly wrong and in error as a matter of law; (3) the review panel erred in ruling that the definition of a repetitive trauma accident requires that the medical attention being sought be for the condition for which the compensation is being claimed; and (4) the review panel erred in ruling that Jordan had not experienced an interruption or discontinuation of employment and thus had not met the "suddenly and violently" portion of the definition of an "accident."

ANALYSIS

[4] We focus on whether the review panel erred in concluding that the trial judge's finding that Jordan had sustained a repetitive trauma injury on June 13, 1996, was clearly wrong. As provided by Neb. Rev. Stat. § 48-179 (Reissue 1998), a workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or that the decision was contrary to law. Our review of the Workers' Compensation Court review panel is pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998). If a Workers' Compensation Court review panel makes different findings of fact from those made

by the trial judge and there is evidence in the record before the trial judge to support the judge's findings, then the review panel has acted in excess of its powers. *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). As *Pearson* points out, the review panel is not hearing or seeing witnesses and is not in the position of the finder of fact. The trial judge of the compensation court is the factfinding trial court, and the review panel is performing the first level of appellate review. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

The evidence established that Jordan saw Primack on June 13, 1996, and that during the course of the examination, he mentioned to Primack that he was suffering from pain in his right shoulder. At trial, it was established that the pain required him to take more breaks and operate the road grader in different positions to relieve the pain and numbness in his arm. At times, the pain was nauseating.

Primack acknowledged that Jordan had reported problems with his right shoulder on June 13, 1996, but at that time, Primack felt that Jordan's problems were residual to his surgery. Primack later changed his opinion and concluded that the cause of those complaints was a repetitive trauma injury, as was alleged by Jordan.

[5] Under the standard of review described herein, the review panel should not substitute its view of the facts for that of the trial judge if there is competent evidence in the record to support the trial judge's decision. Therefore, we conclude that the review panel acted in excess of its powers by substituting its view of the facts for that of the trial judge.

Jordan was required to seek medical attention for the condition for which compensation is being claimed, but he was not required to know the causation of his condition at the time that he went to see Primack. The evidence supports the trial judge's determination that Jordan told Primack he was having problems with his right shoulder when he was examined on June 13, 1996. The fact that Primack believed the shoulder problem was residual to Jordan's surgery does not equate with a determination that Jordan did not seek medical treatment for the condition for which he is now seeking compensation. The Nebraska

Workers' Compensation Act does not require an employee to know the causation of his condition at the time he sees a doctor for treatment.

[6] We next address whether Jordan has proved the essential elements which will support his compensation award. This requires us to first consider whether the repetitive trauma injury is an accident or an occupational disease. We have stated that the condition resulting from cumulative effects of repeated work-related trauma has characteristics of both an accidental injury and an occupational disease. Generally, compensation for repetitive trauma injuries is to be tested under the statutory definition of an accident. See, *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992); *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991); *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991).

[7-9] Under Neb. Rev. Stat. § 48-151(2) (Cum. Supp. 1996), an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." An occupational disease is a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed. § 48-151(3). If the injury is an occupational disease, the unique condition of the employment must result in a hazard which distinguishes it in character from employment generally. *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992). We have recognized a time element for determining when an injury occurs with regard to occupational diseases. In *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956), we stated that the time of the injury was to be determined at the moment the employee's disability first manifested itself. In *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981), we stated that the date of the injury was the date when the disability first occurred. However, whether the injury is considered to be an accident or an occupational disease, the employee must meet certain requirements in order to receive compensation for the injury.

In this case, Jordan alleged an injury as a result of an accident, and both the trial judge and the review panel treated the injury as an accident. Therefore, we consider the injury in the same manner as did the compensation court.

The first element of the statutory definition of an accident is that the injury must be "unexpected or unforeseen." The second element is that the accident must happen "suddenly and violently." The third element is that the accident must produce "at the time objective symptoms of an injury." *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

The first element is satisfied if the cause was of an accidental character or the effect was unexpected or unforeseen. *Schlup v. Auburn Needleworks, supra.* There is no evidence that Jordan knew the operation of heavy equipment could cause the injury he received. Therefore, the trial judge correctly determined that at least the first element had been satisfied.

The third element, that the accident produced objective symptoms, is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause. *Id.* Jordan testified that in June 1996, he had pain in his right shoulder, and his right arm started to go numb. This required him to take more breaks and to operate the road grader in different positions to alleviate the pain and numbness in his right arm. He stated that the pain made him nauseated at times. The trial judge was therefore correct in finding that the third element had been satisfied.

The review panel reversed the decision of the trial judge based on the second element of the statutory definition of an accident. The second element requires that the accident happen "suddenly and violently." A majority of the review panel concluded that the definition of a repetitive trauma accident requires that the medical attention sought be for the condition for which compensation is being claimed. The majority determined that Jordan had not experienced an interruption or discontinuation of employment and that, therefore, he failed to satisfy the second element of the statutory definition of an "accident."

[10,11] The issue presented is whether an employee who sustains an injury during the course of employment must discontinue employment and seek medical treatment. Under existing

law, cessation of employment is a requirement regardless of whether the injury arises from an accident or an occupational disease. In either event, the injury must be such that the employee discontinues employment and seeks medical treatment. In *Sandel*, we referred to Arthur Larson's "The Law of Workmen's Compensation," noting that the injury must culminate at a point when the employee can no longer perform the required work. See 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 50.05 (1999).

Other jurisdictions which have treated repetitive trauma injuries as occupational diseases have also required that the employee become disabled. See, *Fruehauf Corp. v. Workmen's Comp. App. Bd.*, 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968); *Matter of Keefer v. Norton Co.*, 68 A.D.2d 961, 414 N.Y.S.2d 764 (1979). In some jurisdictions, the employee with an occupational disease is not considered injured until the disease causes a compensable injury requiring the employee to stop work. See, *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226 (Mo. App. 1988); *Matter of Muniak v. ACF Ind., Inc.*, 7 A.D.2d 258, 182 N.Y.S.2d 539 (1959).

[12] The injury must require the employee to discontinue employment and seek medical treatment. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

Both accidents and occupational diseases have specific requirements which must be met in order for compensation to be received. One requirement is common to both. The injury must result in a disability, and the disability must be such that the employee can no longer perform the work required. The review panel correctly determined that since Jordan had not missed time from work, the second element had not been satisfied, and therefore, the trial judge's finding that Jordan suffered a work-related accident and injury to his right shoulder was in error as a matter of law.

[13] Some confusion exists regarding the phrase "interruption of employment." To the extent that *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), and *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991), are interpreted to mean that interruption of employment means something other than discontinuation of employment, they are disapproved.

CONCLUSION

For the reasons set forth herein, the judgment of the review panel reversing the decision of the trial judge is affirmed.

AFFIRMED.

DAN PITTMAN, SARPY COUNTY ASSESSOR, APPELLEE, V. SARPY COUNTY BOARD OF EQUALIZATION, APPELLEE, AND MERCY CRESTVIEW VILLAGE, APPELLANT.

603 N.W.2d 447

Filed December 17, 1999. No. S-99-063.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by an appellate court for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Under the Tax Equalization and Review Commission Act, the Tax Equalization and Review Commission was granted the power to hear appeals involving certain property tax matters, including decisions of a county board of equalization granting or denying tax-exempt status for real or personal property.
4. **Statutes.** Statutes relating to the same subject matter are to be construed together so as to maintain a consistent and sensible scheme.
5. ___. Construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.
6. **Taxation: Appeal and Error.** When the assessor is aggrieved by an exemption determination, the assessor's remedy is to bring the matter to the Tax Equalization and Review Commission's attention. The method by which the assessor brings the matter to the commission's attention is by filing an appeal with the commission.
7. **Taxation: Presumptions: Evidence: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) creates a presumption that the county board of equalization has faithfully performed its official duties and has acted upon sufficient competent evidence

to justify its actions. That presumption remains until rebutted by clear and convincing evidence.

8. **Taxation: Presumptions.** An exemption from taxation is never presumed.
9. **Taxation: Proof.** The burden of showing entitlement to a tax exemption is on the applicant.
10. **Taxation: Property: Charities.** Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes is exempt from property taxes.
11. ___: ___: ___. Low-income housing is not a charitable use of property.
12. **Taxation: Property: Words and Phrases.** The term "exclusively" in Neb. Rev. Stat. § 77-202(1)(c) (Cum. Supp. 1998) means that the primary or dominant use of the property, and not an incidental use, is controlling in determining whether a property is exempt from taxation.
13. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
14. ___: ___. The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds.

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

Jerry M. Slusky and Shaun M. James, of Gross & Welch, P.C., for appellant.

Michael E. Thew, Deputy Lancaster County Attorney, for appellee Dan Pittman.

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

HENDRY, C.J.

I. INTRODUCTION

The Sarpy County Board of Equalization (county board) granted a property tax exemption to Mercy Crestview Village (Mercy) in 1998, against the recommendation of the Sarpy County assessor (assessor). The assessor then appealed the county board's decision to the Tax Equalization and Review Commission (TERC). TERC reversed the county board's decision to grant Mercy's property tax exemption and ordered the property placed on the county's tax rolls. Mercy now appeals. We removed this case to our docket pursuant to our power to

regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. BACKGROUND

In 1996, Mercy purchased an apartment complex in Sarpy County, Nebraska. Mercy, a nonprofit corporation, is ultimately sponsored by the Sisters of Mercy, a Catholic religious order. Mercy's mission is to "create and strengthen healthy communities through the provision of quality, affordable, service-enriched housing for individuals and families who are economically poor."

The apartment complex consists of 154 residential units. One unit is used as an office and another is used as a "network center." The network center is used to provide programs such as neighborhood watch, tutoring, computer classes, home ownership seminars, cancer awareness, and CPR classes. The network center is also used for social events and as a meeting place. Tenants are not required to participate in any of the services Mercy provides through the network center.

Mercy employs a service coordinator who meets with individual tenants to assess what programs or services would meet the needs of the tenants. The coordinator encourages tenants to participate in programs offered through the network center. The programs and services offered are constantly changing based on the specific needs of the tenants. Classes offered through the network center are generally taught by volunteers, and class materials are informational in nature. In October 1998, the network center was used 12 percent of the time (61 hours) for providing educational programs.

Persons applying to live at Mercy are subject to a credit check. Tenants must sign a lease and pay rent. Mercy has two low-income housing contracts with the Department of Housing and Urban Development (HUD), commonly referred to as "Section 8" and "Section 236" contracts. In order to qualify for HUD housing, a tenant's income must be at or below a certain level. Mercy sets a rental rate in compliance with HUD's requirements. Tenants of Section 8 units may receive a HUD subsidy. Tenants are subject to eviction for nonpayment of rent. There is no time limit on how long a tenant may reside at Mercy.

Mercy is self-supporting based on rent and rent subsidies. The property is expected to stand on its own financially. Any operating loss is covered by the "reserve for replacement" account, which is funded by Mercy's operating income. Mercy has never had to go beyond this reserve account to cover losses. However, if the reserve account would run short of covering a loss, Mercy would apply to HUD for a rent increase.

Mercy applied for a property tax exemption for the apartment complex in 1996 and 1997 based on Neb. Rev. Stat. § 77-202 (Cum. Supp. 1998), which provides that property owned by educational, religious, charitable, or cemetery organizations used exclusively for educational, religious, charitable, or cemetery purposes is exempt from property taxes. The county board granted the exemptions for both years over the assessor's recommended denial.

In 1998, Mercy filed an affidavit of use for continued tax exemption in order to have its property tax exemption continued for 1998. The assessor recommended denial of the continued tax exemption for the reason that low income housing is not an exempt use of the property under § 77-202. However, the county board granted the continuing exemption for 1998.

On June 10, 1998, the assessor appealed the county board's decision to approve Mercy's 1998 property tax exemption to TERC. On July 15, Mercy filed a motion to dismiss the assessor's appeal, claiming the assessor did not have standing to bring such an appeal based on *Bemis v. Board of Equalization of Douglas County*, 197 Neb. 175, 247 N.W.2d 447 (1976). In October 1998, the assessor requested, pursuant to Neb. Rev. Stat. § 77-5007.01 (Cum. Supp. 1998), to have counsel appointed to represent him. That request was granted. TERC overruled Mercy's motion to dismiss, finding that *Bemis* was no longer controlling due to the 1995 enactment of the Tax Equalization and Review Commission Act (TERCA), Neb. Rev. Stat. §§ 77-5001 through 77-5031 (Reissue 1996 & Cum. Supp. 1998). TERC found that under §§ 77-5007 and 77-5007.01 of TERCA, the assessor had standing to appeal the county board's granting of the property tax exemption.

In December 1998, TERC held a hearing on the assessor's appeal. At the hearing, TERC received testimony and exhibits

regarding Mercy's use of the property. TERC found that the predominant use of the property was to provide low-income housing and that thus, it was not exempt from taxation. TERC reversed the county board's decision and ordered the property returned to the tax rolls of Sarpy County. Mercy appeals.

III. ASSIGNMENTS OF ERROR

Mercy claims, restated and summarized, that TERC erred in (1) finding the assessor had standing to bring the appeal, (2) incorrectly placing the burden of proof on Mercy to show entitlement to the tax exemption, (3) finding the assessor presented clear and convincing evidence to support denial of the tax exemption, and (4) finding that the county board's decision to grant the exemption was arbitrary and unreasonable.

IV. STANDARD OF REVIEW

[1,2] Decisions rendered by TERC shall be reviewed by an appellate court for errors appearing on the record. § 77-5019(5). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

V. ANALYSIS

1. Standing of County Assessor

Mercy claims the assessor lacks standing to appeal the county board's granting of Mercy's tax exemption based on *Bemis v. Board of Equalization of Douglas County*, 197 Neb. 175, 247 N.W.2d 447 (1976), in which we held that a county assessor had no standing to bring an appeal of a tax exemption determination. At the time *Bemis* was decided, Neb. Rev. Stat. § 77-202.04 (Reissue 1976) provided:

> Persons, corporations, or organizations denied exemption from taxation for real or tangible personal property . . . by a county board of equalization may appeal de novo to the district court . . . in the same manner and under the same procedure as provided by sections 77-1510 and 77-1511, in the case of appeals from other actions of a county board of equalization . . . .

Also at the time of the *Bemis* decision, Neb. Rev. Stat. § 77-202.06 (Reissue 1976) provided:

> The Tax Commissioner may review and reverse any decision of the county board of equalization granting tax exempt status for real or tangible personal property, including motor vehicles, but only after a hearing has been held by the Tax Commissioner in the county where the property exempted is situated, upon ten days' written notice to the applicant and to the county board of equalization. The Tax Commissioner shall within thirty days of the hearing certify his order to the applicant, the county assessor, and the county board of equalization.

In *Bemis*, we concluded that "the county assessor's responsibility is limited to an advisory rather than an adversary capacity" and that the assessor did not have standing to appeal a tax exemption determination. 197 Neb. at 177, 247 N.W.2d at 448. We stated that the assessor's remedy was not to prosecute an appeal but to bring the decision to the attention of the Tax Commissioner who could then review the decision as provided in § 77-202.06. *Bemis, supra.*

[3] The statutory scheme regarding tax exemptions has changed since the *Bemis* decision. The Legislature adopted TERCA in 1995, which created TERC. See § 77-5003. Under TERCA, TERC was granted the power to hear appeals involving certain property tax matters, including decisions of a county board of equalization granting or denying tax-exempt status for real or personal property. § 77-5007(2).

After the adoption of TERCA, § 77-202.04 (Cum. Supp. 1998) was amended to provide: "Persons, corporations, or organizations denied exemption from taxation for real or tangible personal property by a county board of equalization may appeal to the Tax Equalization and Review Commission. The Property Tax Administrator may in his or her discretion intervene in any such appeal."

Section 77-202.06 (Cum. Supp. 1998) now provides:

> The Property Tax Administrator shall adopt and promulgate rules and regulations governing tax-exempt status for real or tangible personal property. The Tax Equalization and Review Commission may review and reverse any deci-

> sion of the county board of equalization granting tax-exempt status for real or tangible personal property but only after a hearing has been held by the commission, upon ten days' written notice to the applicant and to the county board of equalization. The commission shall within thirty days after the hearing mail an order to the applicant, the county assessor, and the county board of equalization.

Furthermore, § 77-5007.01 provides: "In appeals by a county assessor in his or her official capacity pursuant to section 77-5007, the county assessor may request that the district court appoint an attorney to represent the county assessor before the commission."

Mercy claims that § 77-202.04 limits the parties who may appeal a tax exemption determination to "persons, corporations, or organizations denied exemption from taxation." Mercy interprets this section to mean that only parties denied a tax exemption may appeal a tax exemption determination. Mercy claims that because § 77-202.04 was not repealed when TERCA was enacted, *Bemis v. Board of Equalization of Douglas County*, 197 Neb. 175, 247 N.W.2d 447 (1976), is still controlling, and the assessor does not have standing to appeal to TERC.

[4,5] Statutes relating to the same subject matter are to be construed together so as to maintain a consistent and sensible scheme. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999); *FirsTier Bank v. Department of Revenue*, 254 Neb. 918, 580 N.W.2d 537 (1998). Construction of a statute will not be adopted which has the effect of nullifying or repealing another statute. *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998).

In the present case, § 77-5007(2) gives TERC the power to hear appeals of decisions *granting or denying* property tax exemptions. Under Mercy's interpretation that only parties enumerated in § 77-202.04 may appeal a tax exemption determination, a grant of a property tax exemption could never be appealed to TERC because § 77-202.04 includes only parties who have been *denied* a tax exemption. This interpretation would nullify § 77-5007(2), which provides that TERC has the power to hear appeals of both denials and grants of exemptions.

Section 77-5007.01 provides that an assessor may request appointment of counsel to represent the assessor in an appeal under the situations listed in § 77-5007, which includes appeals of decisions granting tax exemptions. The fact that § 77-202.04 limits the parties who may appeal the *denial* of a tax exemption does not limit an assessor's power to bring an appeal of a decision *granting* an exemption. Contrary to Mercy's assertions, these provisions can be read together to maintain a sensible scheme in which appeals of decisions denying tax-exempt status can be brought only by certain parties, but appeals of decisions granting tax-exempt status are not so limited.

[6] In *Bemis*, we stated that if the assessor feels aggrieved by a tax exemption determination, the assessor's remedy was to bring the decision to the attention of the Tax Commissioner, who may then review the decision as provided in § 77-202.06 (Reissue 1976). After enactment of TERCA, TERC replaced the Tax Commissioner in § 77-202.06. Thus, under the new statutory scheme, when the assessor is aggrieved by an exemption determination, the assessor's remedy is to bring the matter to TERC's attention. The method by which the assessor brings the matter to TERC's attention is by filing an appeal with TERC. Section 77-5007(2) gives TERC jurisdiction to hear such an appeal. Under the current statutory scheme, the assessor has standing to appeal the granting of Mercy's property tax exemption.

2. Reversal of County Board's Decision Granting Property Tax Exemption

(a) Burden of Proof

Mercy's remaining assignments of error relate to the propriety of TERC's reversal of the county board's granting of Mercy's 1998 property tax exemption. Mercy first claims that TERC improperly placed on Mercy the burden of proving its entitlement to the tax exemption. Mercy claims that it was entitled to a presumption that the county board's decision was correct and that the assessor had the burden of rebutting that presumption.

Neb. Rev. Stat. § 77-1510 (Cum. Supp. 1998) provides that appeals may be taken "from any action of the county board of

equalization" to TERC in accordance with TERCA. Further, Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that TERC shall hear appeals taken under § 77-1510 and "shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary . . . ."

[7] We have held that § 77-1511 creates a presumption that the county board of equalization has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). That presumption remains until rebutted by clear and convincing evidence. *Id.*

[8] The assessor claims that this presumption should not be applied in appeals involving exemptions, citing *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 517, 412 N.W.2d 459, 464 (1987), in which we stated, "An exemption from taxation is never presumed." However, the issue in *Indian Hills Comm. Ch.* was whether a religious organization who failed to file an application for exemption was entitled to an automatic tax exemption. The presumption that arises under § 77-1511 is a presumption that the county board acted properly in making a decision on the issue before it, not a presumption that property is entitled to exemption. The presumption that arises under § 77-1511 is consistent with the holding in *Indian Hills Comm. Ch.* that a tax exemption is never presumed.

The assessor further claims that the presumption which arises under § 77-1511 has never been applied in an exemption case and should not be applied in this case. However, the fact that the presumption has been previously discussed only in valuation cases does not necessarily mean that the presumption is inapplicable in exemption cases.

Section 77-1511 provides that TERC shall "determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof." The term "assessment" is defined in Neb. Rev. Stat. § 77-126 (Cum. Supp. 1998) as "the act of listing the description of all real property and taxable tangible personal property, determining its taxability, determining its taxable or assessed value, and placing it on the assessment roll." Section 77-1511 deals with valuation of property and with whether

property is subject to taxation at all. Furthermore, because § 77-1511 provides the standard of review for appeals from any action of a county board taken under § 77-1510, this standard applies to both valuation and exemption decisions by a county board. Accordingly, the presumption we have recognized in valuation cases is applicable in exemption cases.

Mercy claims TERC improperly placed the burden on Mercy to prove its entitlement to the tax exemption instead of first placing the burden on the assessor to present clear and convincing evidence to rebut the presumption that the county board acted properly in granting the exemption. However, TERC stated in its order that "the Assessor has established by a clear and convincing evidence that the decision of the County was unreasonable and arbitrary."

[9] Once the assessor rebutted the presumption, the burden shifted back to Mercy to prove its entitlement to the exemption. The burden of showing entitlement to a tax exemption is on the applicant. *Indian Hills Comm. Ch., supra.* TERC found that Mercy had not met this burden. TERC correctly applied the burden of proof.

(b) Sufficiency of Evidence

[10] Mercy claims TERC erred in finding the assessor presented clear and convincing evidence to support denial of the tax exemption. Property "owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes" is exempt from property taxes. § 77-202(1)(c). An educational organization is one that offers regular courses with systematic instruction in academic, vocational, or technical subjects. § 77-202(1)(c). In the present case, the property is not owned by an educational organization or used primarily for educational purposes. Although the record indicates that educational programs do take place in Mercy's network center, these programs are not regular courses with systematic instruction in academic, vocational, or technical subjects. The programs Mercy offers are informational in nature and change based on the needs of the tenants.

A religious organization is one which professes a sectarian creed and belief in a divine and superhuman power. 316 Neb.

Admin. Code, ch. 42, § 006.01B (1993). Although Mercy is ultimately sponsored by a Catholic religious order, it is not owned by a religious organization and the property is not predominantly used for religious purposes. There is nothing in the record indicating that the property is used to promote a sectarian creed or belief in a divine and superhuman power. A cemetery organization is an organization which maintains areas formally set apart for the interment of the human dead. *Id.*, § 006.01D. Mercy is obviously not a cemetery organization.

The only possible exempt category Mercy could qualify for would be a charitable organization using the property exclusively for charitable purposes. A charitable organization is "an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons." § 77-202(1)(c).

[11] TERC found that because the predominant use of Mercy's property is to provide low-income housing, it was not entitled to a tax exemption under § 77-202(1)(c) as property used exclusively for charitable purposes. It is well established that low-income housing is not a charitable use of property. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *OEA Senior Citizens, Inc. v. County of Douglas*, 186 Neb. 593, 185 N.W.2d 464 (1971); *Christian Retirement Homes, Inc. v. Board of Equalization*, 186 Neb. 11, 180 N.W.2d 136 (1970); *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961).

Mercy asserts that providing housing is incidental to the services it provides and that it is entitled to an exemption under *Young Women's Christian Assn. v. City of Lincoln*, 177 Neb. 136, 128 N.W.2d 600 (1964) (*YWCA*). In *YWCA*, we held that property used to provide temporary low-cost housing for young women was a charitable, religious, or educational use of the property. We reaffirmed in *YWCA* that property predominantly used for low-income housing was not an exempt use of property. However, we noted that the property in *YWCA* was purchased through a bequest and a fundraising drive and was not self-

supporting. The residents were required to become members of the YWCA, which included commitment to the Christian faith. The residents were also required to abide by certain supervision rules in order to live on the property. The residents could live there no longer than 3 years while they pursued vocational or educational training.

Operation of Mercy's property is significantly different than that involved in *YWCA*. Mercy is self-supporting based on rental income. Mercy's housing is not temporary. Tenants are not required to participate in services Mercy offers through the network center. A tenant may simply live in the housing and take no part in the services Mercy offers. In a typical month, the network center was used 12 percent of the time for providing educational programs. Only one unit at Mercy is used to provide services, while 152 units are used to provide housing. Although the supportive services may be important to Mercy's overall goals, they do not constitute the predominant use of the property.

[12] The evidence presented supports TERC's determination that the exclusive use of the property is to provide low-income housing. The term "exclusively" in § 77-202(1)(c) means that the primary or dominant use of the property, and not an incidental use, is controlling in determining whether a property is exempt from taxation. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993). The evidence presented in this case supports TERC's finding that the charitable and educational uses of the property, while providing a valuable community service, are incidental uses. TERC's decision to deny Mercy tax-exempt status is supported by the evidence, and Mercy's assignment of error in this respect is without merit.

(c) Unreasonable and Arbitrary Finding

[13,14] Finally, Mercy claims TERC erred in finding that the county board's decision was unreasonable and arbitrary. "A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion." *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 255, 549 N.W.2d 112, 115 (1996). "The term 'unreasonable' can be applied to an adminis-

trative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds." *Id.* at 256, 549 N.W.2d at 115.

The county board's decision granting Mercy's property tax exemption was unreasonable and arbitrary. The evidence clearly established that the predominant use of the property is to provide low-income housing, which is not an exempt use. The county board disregarded this fact when granting the property tax exemption.

Based on the evidence presented, there is no room for a difference of opinion among reasonable minds on this issue. Mercy's mission may have charitable and educational aspects, but it is clear that the *predominant* use of the property is to provide low-income housing. Thus, TERC did not err in determining that the county board's decision was arbitrary and unreasonable.

VI. CONCLUSION

TERC's decision to reverse the county board's granting of Mercy's tax exemption conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. TERC correctly found that after the enactment of TERCA, the assessor had standing to appeal the county board's granting of Mercy's tax exemption. Because the predominant use of the property does not qualify for an exemption, TERC was correct in finding that the county board's decision granting the exemption was arbitrary and unreasonable.

AFFIRMED.

JUNEAL PRATT, APPELLANT, V.
HAROLD CLARKE ET AL., APPELLEES.
604 N.W.2d 822

Filed December 23, 1999. No. S-97-1267.

1. **Jurisdiction: Appeal and Error.** It is not only within the power, but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law,

which requires an appellate court to reach a conclusion independent from that of the trial court.

3. **Administrative Law: Civil Rights: Prisoners.** No action shall be brought with respect to prison conditions under 42 U.S.C. § 1983, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
4. **Administrative Law: Prisoners.** The provisions of Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1999) prescribe the procedures under which hearings before prison boards shall be conducted.
5. **Administrative Law: Civil Rights: Prisoners.** Where a prisoner has requested both monetary damages and injunctive relief with respect to prison conditions under 42 U.S.C. § 1983 (Supp. III 1997), the Prison Litigation Reform Act requires that the prisoner must exhaust his or her administrative remedies before bringing such action.

Petition for further review from the Nebraska Court of Appeals, MUES, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed.

Juneal D. Pratt, pro se.

Don Stenberg, Attorney General, and Terri M. Weeks for appellees.

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

WRIGHT, J.

NATURE OF CASE

Juneal Pratt, an inmate at the Lincoln Correctional Center (LCC), has appealed from an order of the district court which sustained the demurrer of Harold Clarke, Michael Durst, and Mark Horton (defendants). The Nebraska Court of Appeals concluded that Pratt's petition requesting that the defendants perform certain affirmative acts was barred by sovereign immunity but that Pratt should be given the opportunity to amend his petition to allege that he had complied with the State Tort Claims Act. See *Pratt v. Clarke*, 8 Neb. App. 199, 590 N.W.2d 426 (1999). We granted Pratt's petition for further review.

SCOPE OF REVIEW

[1] It is not only within the power, but it is the duty of an appellate court to determine whether it has jurisdiction over the

matter before it. *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999).

[2] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999).

FACTS

On May 28, 1997, Pratt filed a petition pursuant to 42 U.S.C. § 1983 (Supp. III 1997), alleging that the defendants were conspiring to deprive him of his 8th and 14th Amendment rights under the U.S. Constitution. At that time, Clarke was the director of the Department of Correctional Services, Durst was the State Fire Marshal, and Horton was the director of the then Department of Health.

Pratt alleged that the defendants were violating his Eighth Amendment rights by subjecting him to a dangerous, overcrowded, and illegally constructed facility in direct violation of Neb. Rev. Stat. § 83-954 (Reissue 1999) and the Enabling Act of Congress. Pratt claimed that LCC was constructed in violation of the standards set forth in § 83-954 and that (1) he was subjected to dangerous overcrowding and "double celling"; (2) there was no way other than beating and kicking on the doors to alert staff to danger; (3) there were no smoke detectors, sprinklers, or smoke exhaust systems; (4) a faulty ventilation system failed to work without blowing dust throughout the building; and (5) the defendants exhibited overall indifference to his health and safety.

Pratt sought injunctive relief directing the defendants to (1) reduce the number of inmates to design capacity, (2) correct the ventilation system, (3) install fire and cell alarm systems, (4) install working smoke detectors in cells, (5) reestablish single celling, and (6) increase staff. In the absence of such relief, he requested that the defendants be ordered to show cause as to why the facility should be allowed to function in conflict with § 83-954 and the Enabling Act of Congress. In the absence of such cause supported by clear authority, he requested that the district court order the immediate closing of LCC. In addition,

Pratt sought an order directing that each defendant pay him $50,000 for the damage he suffered as a result of the faulty ventilation system and the mental stress caused by the defendants' deliberate indifference to his rights.

The defendants demurred to the petition, alleging that it failed to state a claim for which relief could be granted, that the district court did not have subject matter jurisdiction, and that Pratt had no legal capacity to sue. The district court sustained the defendants' demurrer and dismissed Pratt's petition. Pratt appealed.

The Court of Appeals affirmed in part and in part reversed and remanded with directions. It held that the allegations of Pratt's petition which sought to compel affirmative actions on the part of the State were barred by sovereign immunity but that Pratt should be allowed to amend his petition to allege that he had complied with the State Tort Claims Act. Pratt successfully petitioned this court for further review.

ASSIGNMENTS OF ERROR

In his petition for further review, Pratt assigns as error that the Court of Appeals erred in applying sovereign immunity provisions to his § 1983 claim and in concluding that he was required to exhaust the remedies of the State Tort Claims Act prior to bringing an action under § 1983.

ANALYSIS

It is not only within the power, but it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999). When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *Ferguson v. Union Pacific RR. Co., ante* p. 78, 601 N.W.2d 907 (1999).

We conclude that Pratt failed to exhaust his administrative remedies prior to filing an action pursuant to § 1983 and that therefore the district court lacked jurisdiction to consider Pratt's petition. As the district court was without jurisdiction, the Court

of Appeals and this court also lack jurisdiction to consider the merits of Pratt's action.

[3] On April 26, 1996, the Prison Litigation Reform Act (PLRA) was signed into law. Prior to the adoption of the PLRA, 42 U.S.C. § 1997e(a) (1994) granted district courts discretion to require a prisoner to exhaust administrative remedies, and a district court's dismissal for failure to exhaust was reviewed only for an abuse of discretion. See *Irwin v. Hawk*, 40 F.3d 347 (11th Cir. 1994). The PLRA now requires, inter alia, that prisoners exhaust administrative remedies prior to filing actions under § 1983 or any federal law. Specifically, 42 U.S.C. § 1997e(a) (Supp. III 1997) states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." As stated in *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998), "Congress enacted this mandatory exhaustion requirement in section 1997e(a) as part of the PLRA's effort to curtail frivolous and abusive prisoner litigation."

[4] Pratt has administrative remedies available to him in Nebraska. Pursuant to Neb. Rev. Stat. §§ 83-4,111 and 83-4,135 through 83-4,139 (Reissue 1999) and § 1997e, the Department of Correctional Services has adopted and promulgated rules and regulations to establish criteria for determining the rights and privileges of an inmate, including grievance procedures. Copies of all rules and regulations are to be filed pursuant to the Administrative Procedure Act and distributed to all adult correctional facilities in the state. Inmates are to be informed of the rules and policies concerning complaint procedures. See Neb. Rev. Stat. § 83-4,112 (Reissue 1999). The provisions of Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 1999) prescribe the current procedures under which the hearings before the prison boards shall be conducted. *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981).

The grievance procedures described herein are set forth in 68 Neb. Admin. Code, ch. 2. When Pratt's petition was filed, 68 Neb. Admin. Code, ch. 2, § 003.02 (1994), provided: "Inmates shall submit the inmate concern to the unit staff mem-

ber who can most adequately respond on an Informal Grievance Resolution Form. If dissatisfied with the informal response the inmate may file a grievance for formal resolution." We note that other remedies are not precluded. In particular, 68 Neb. Admin. Code, ch. 2, § 005.01 (1994), stated: "Claims against the Department involving miscellaneous or tort claims for money damages may be filed pursuant to the State Tort Claims Act." Thus, prisoners in Nebraska must adhere to and exhaust these specific provisions before bringing a § 1983 claim.

There are circumstances, however, in which courts have recognized that prisoners are not required to exhaust administrative remedies under the PLRA before bringing a § 1983 claim. In doing so, courts generally look to the type of remedy sought by the prisoner.

When injunctive relief is sought, prisoners are required to exhaust administrative remedies if any are in place. For example, in *Alexander v. Hawk, supra*, an inmate brought an action against prison officials, claiming that enforcement of federal legislation restricting prisoners' access to magazines that are sexually explicit or feature female nudity violated his First Amendment rights. The court held that the prisoner was required to submit his claim for monetary and injunctive relief to the prison grievance program and therefore dismissed the claim. Similarly, in *Hanson v. Chesney*, 37 F. Supp. 2d 399 (E.D. Pa. 1999), an inmate brought a § 1983 action against prison officials, alleging that his Eighth Amendment rights were violated because the defendants failed to protect him from attack by a fellow prisoner. The court held that the inmate was required to exhaust his administrative remedies before bringing an action seeking damages and injunctive relief. See, also, *Russo v. Palmer*, 990 F. Supp. 1047 (N.D. Ill. 1998).

There appears to be a split of authority when the prisoner is seeking monetary damages. Some courts have ruled that a prisoner seeking only monetary damages does not need to exhaust administrative remedies if the grievance procedure does not allow for that type of recovery. For instance, in *Hollimon v. DeTella*, 6 F. Supp. 2d 968 (N.D. Ill. 1998), a former inmate brought a civil rights action against prison officials who allegedly subjected him to a strip search for the sole purpose of

humiliation. The defendants moved to dismiss the action on the ground that the plaintiff had failed to exhaust his administrative remedies as required by § 1997e(a). After deciding to consider only the plaintiff's claim for monetary damages, the court held that the exhaustion requirement was inapplicable because the grievance procedure that was available to the plaintiff did not allow for recovery of monetary damages. In *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997), an inmate sought monetary damages for alleged constitutional violations by prison officials. The court held that he was not required to exhaust administrative remedies pursuant to § 1997e(a), since there were no administrative remedies available for such claims. See, also, *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *Davis v. Woehrer*, 32 F. Supp. 2d 1078 (E.D. Wis. 1999).

In contrast, other courts dealing with prisoners seeking monetary damages have focused on whether there is an administrative remedy program available within the prison, not whether the type of remedy is available through the procedure. See, *Alexander v. Hawk,* 159 F.3d 1321 (11th Cir. 1998); *Moore v. Smith,* 18 F. Supp. 2d 1360 (N.D. Ga. 1998) (state prisoner required to exhaust administrative remedies with respect to claim for monetary damages); *Funches v. Reish*, No. 97 Civ. 7611, 1998 WL 695904 (S.D.N.Y. Oct. 5, 1998) (federal prisoner required to exhaust administrative remedies regardless of type of relief sought).

In the case at bar, Pratt seeks injunctive relief and $50,000 from each of the defendants for personal damages caused by the alleged faulty ventilation system and the mental stress caused by the defendants' alleged deliberate indifference. Our review of Pratt's claim does not indicate that he asserts a claim for physical damages, but, rather, for the risk of physical damages and mental stress. Section 1997e(e) does not permit recovery for custodial mental or emotional damages without a prior showing of physical injury. See *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997).

[5] We conclude that where a prisoner has requested both monetary damages and injunctive relief with respect to prison conditions under § 1983, the PLRA requires that the prisoner must exhaust his or her administrative remedies before bringing

such action. Allowing a prisoner to evade the requirement of § 1997e(a) by inserting a claim for monetary damages would defeat the purpose of the PLRA. See *Hanson v. Chesney*, 37 F. Supp. 2d 399 (E.D. Pa. 1999). Pratt seeks both monetary damages and injunctive relief, and he must therefore adhere to the requirements of § 1997e(a) by exhausting all available administrative remedies before bringing a § 1983 action. Pratt failed to comply with the PLRA, and therefore, the district court lacked jurisdiction to hear his § 1983 claim. Accordingly, the district court properly sustained the defendants' demurrer.

We next address whether the Court of Appeals properly remanded the cause with directions that Pratt be allowed to amend his petition to allege that he had complied with the State Tort Claims Act. The Court of Appeals relied on *Kane v. Vodicka*, 238 Neb. 436, 471 N.W.2d 136 (1991). In *Kane*, we concluded that the district court had subject matter jurisdiction over an action brought by a prisoner seeking monetary damages for alleged unsanitary conditions in the prison kitchen. In doing so, we stated that "Neb. Rev. Stat. § 81-8,214 . . . specifically vests in the district court jurisdiction to hear tort claims filed against the state." *Kane*, 238 Neb. at 438, 471 N.W.2d at 138. We cited to several cases decided under such power, including *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975), and *Webber v. Andersen*, 187 Neb. 9, 187 N.W.2d 290 (1971), *appeal after remand, Webber v. City of Omaha*, 190 Neb. 678, 211 N.W.2d 911 (1973).

The PLRA was adopted subsequent to our decision in *Kane* and therefore controls as to cases relating to prison conditions brought under § 1983 or any other federal law. However, 68 Neb. Admin. Code, ch. 2, § 005 (1994), provides that a state tort claim is not precluded by requiring a prisoner to exhaust administrative remedies adopted by the Department of Correctional Services. The question presented is whether Pratt's claim for monetary damages is part of his § 1983 claim or a separate cause of action brought as a state tort claim.

Nothing in Pratt's claim leads us to conclude that he has brought a state tort claim. To allow Pratt to now allege a tort claim would in effect permit him to amend his petition to set forth a completely separate and different cause of action. Thus,

the Court of Appeals erred in remanding the cause in order to allow Pratt to amend his petition to set forth a separate and different cause of action.

CONCLUSION

For the reasons set forth herein, we affirm that portion of the judgment of the Court of Appeals which affirmed the district court's dismissal of Pratt's petition, and we reverse that portion of the judgment of the Court of Appeals which remanded the cause with directions that Pratt be allowed to amend his petition.

AFFIRMED IN PART, AND IN PART REVERSED.

RICHARD E. AUSTIN, APPELLANT, V.
JEFFREY K. SCHARP ET AL., APPELLEES.
604 N.W.2d 807

Filed December 23, 1999. No. S-98-616.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Workers' Compensation: Notice.** Substantial compliance with the notice requirement of Neb. Rev. Stat. § 48-118 (Reissue 1998) is sufficient, and the requirement is met when the other party receives actual notice of a third-party claim and an opportunity to join in its prosecution.
3. **Workers' Compensation: Waiver.** The notice required by Neb. Rev. Stat. § 48-118 (Reissue 1998) may be waived in writing, or waiver may be implied from unequivocal conduct.
4. **Workers' Compensation: Subrogation.** The extent of a subrogated employer's participation in third-party litigation initiated by an injured employee is the critical factor in determining whether the employer has joined the action within the meaning of Neb. Rev. Stat. § 48-118 (Reissue 1998).

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded.

Gordon R. Hauptman and Matthew A. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

John W. Iliff, of Gross & Welch, P.C., for appellees.

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

STEPHAN, J.

Richard E. Austin appeals from an order of the district court for Douglas County, Nebraska, which determined pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1998) that Andy's Tires, Inc., and its workers' compensation insurance carrier were entitled to satisfaction of their subrogation lien out of proceeds from a third-party settlement obtained by Austin without obligation for any portion of the attorney fees and expenses which Austin incurred in obtaining the settlement. We conclude that the district court erred in its application of § 48-118 and, therefore, reverse, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On March 13, 1995, Austin was a passenger in a motor vehicle which was struck from behind by a vehicle operated by Jeffrey K. Scharp and owned by Midland Recycling L.L.C. (Midland), Scharp's employer. At the time of the accident, Austin was acting within the scope of his employment with Andy's Tires, and accordingly, he received workers' compensation benefits paid by Cincinnati Insurance Company (Cincinnati) as insurer of Andy's Tires. Austin retained an attorney to prosecute a personal injury claim against Scharp and Midland, agreeing to a fee of one-third of the total amount recovered plus payment of expenses. Austin's attorney notified Cincinnati of the claim. Shortly after he was retained, Austin's attorney conducted an investigation of the accident, gathered medical and wage-loss records, and initiated communication with the liability insurance carrier for Midland and Scharp. The attorney also prepared and submitted a "settlement package," which included an itemized and tabulated collection of Austin's medical bills, records and reports, and documentation of wage loss.

When settlement negotiations proved unsuccessful, Austin's attorney filed this action against Scharp and Midlands in the district court for Douglas County on February 1, 1996. Andy's Tires was named as a codefendant "solely in accordance with

Section 48-118 of the Nebraska Workers' Compensation Act." Thereafter, Cincinnati retained an attorney on behalf of Andy's Tires to protect its subrogation interest. Andy's Tires' attorney filed an answer which asserted the subrogation lien for workers' compensation benefits paid to Austin on behalf of the employer but did not seek any affirmative relief against Scharp or Midland.

After filing suit and obtaining service upon the defendants, Austin's attorney conducted written discovery and assisted Austin in responding to discovery requests propounded by Scharp and Midland. He also retained expert witnesses, participated in several depositions, and prepared the case for trial. Throughout this period, Austin's attorney and the attorneys representing Scharp and Midland sent copies of some, but not all, documents filed in the case to Andy's Tires' attorney, who testified that he was not notified of any of the depositions in the case, except that of Austin, which was the only deposition he attended. The record discloses that certificates of service accompanying 30 documents filed in the action between March 22, 1996, and September 23, 1997, do not reflect service on the attorney representing Andy's Tires, notwithstanding his appearance of record when the answer was filed on February 22, 1996. The attorney for Andy's Tires responded to two sets of interrogatories received from Austin's attorney, but did not initiate any discovery, conduct any investigation, retain expert witnesses, or otherwise participate in preparing the case for trial. The attorney for Andy's Tires testified that for a period of approximately 2 years while the suit was pending, he had no knowledge of what was being done by Austin's attorney and made no effort to find out because he felt that the burden was upon Austin's attorney to initiate discovery.

Shortly before the case was scheduled for trial, the attorneys for Austin, Scharp, and Midland agreed to submit the case to mediation. The mediation session was scheduled for Monday, October 27, 1997. On Friday, October 24, Austin's counsel contacted the Cincinnati claims representative assigned to the case and advised him of the scheduled mediation. The adjuster did not request that the mediation be postponed, and neither he nor Austin's attorney notified counsel of record for Andy's Tires of

the scheduled mediation which occurred without that attorney's participation.

The mediation resulted in a settlement whereby the liability insurer for Scharp and Midland agreed to pay $42,250 on their behalf in exchange for dismissal of the lawsuit and a release and indemnity agreement which included an agreement by Austin's attorney and his firm

> to reimburse and pay [Scharp, Midland, and their insurance carrier and attorneys] any costs, damages, losses, attorney's fees or expenses, including the full extent of any subrogation interest of Richard E. Austin's employer, Andy's Tires, Inc. and its workers' compensation carrier, Cincinnati Insurance, which the parties discharged herein may be compelled to pay or may suffer in any manner whatsoever by reason of any such claim or cause of action by Andy's Tires, Inc. and its workers' compensation insurance carrier . . . .

Neither Cincinnati nor Andy's Tires were parties to this agreement. In a letter dated November 17, 1997, transmitting the executed agreement to counsel for Scharp and Midland, Austin's attorney stated: "I am continuing to fight with the workers' compensation carrier with regard to any subrogation they are entitled to. Hopefully that will be resolved in the next couple of weeks."

On November 25, 1997, the action was dismissed without prejudice due to noncompliance with a progression order. On December 19, a motion was filed on behalf of Andy's Tires requesting reinstatement and adjudication of its subrogation rights in the settlement proceeds. The motion recited that Andy's Tires and Cincinnati had been advised of the mediation and settlement of Austin's claim by correspondence dated October 30, 1997, and had declined a proposed settlement of their subrogation lien. The case was reinstated, and an evidentiary hearing was held on April 2, 1998. At the commencement of the hearing, counsel for Austin and Andy's Tires advised the court that the only matter in dispute was whether a portion of the fees and expenses of Austin's attorney should be payable out of the portion of the settlement to which Andy's Tires and Cincinnati were entitled by virtue of their workers' compensation subrogation rights.

In a memorandum and order entered on May 29, 1998, the district court determined that Andy's Tires and Cincinnati had no obligation to pay any of the attorney fees or costs out of the subrogation recovery, which amounted to $24,842.09, and that the entire amount which had been deposited in the registry of the court should be paid to Cincinnati with accrued interest. The court reasoned that although Austin's counsel rendered legal services "of the highest caliber" to his client, he failed to give counsel for Andy's Tires advance notice of discovery, hearings, mediation and settlement, and "may have compromised the third party claim for an amount that would not match [Andy's Tires'] liability under the Worker's Compensation Act, in absence of a third party claim." The district court concluded that under these circumstances, § 48-118 gave Andy's Tires the option of moving to have the settlement declared void or seeking its approval as made, without the imposition of attorney fees. The court found that because Andy's Tires and Cincinnati had chosen the latter option, the court was bound by the statute to enforce that choice.

Austin perfected a timely appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of Nebraska appellate courts.

ASSIGNMENTS OF ERROR

Austin contends, summarized and restated, that the district court erred (1) in determining that the "common fund" doctrine does not apply to cases arising under § 48-118; (2) in finding that Austin's counsel chose to exclude Andy's Tires' counsel from meaningful participation in the third-party claim; (3) in failing to find that Andy's Tires' counsel did not fully and adequately represent its subrogation interest and relied upon Austin's counsel to effect the subrogation recovery; (4) in determining that Andy's Tires could obtain court approval of the settlement without an imposition of attorney fees due to the failure of Austin's counsel to provide notice of discovery, hearings, mediation, and settlement; and (5) in denying Austin's request for attorney fees to be paid out of the settlement proceeds attributable to the employer's subrogation interest in accordance with § 48-118.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999); *Janssen v. Tomahawk Oil Co.*, 254 Neb. 370, 576 N.W.2d 787 (1998).

ANALYSIS

Resolution of the issues presented by this appeal rest upon application of the provision of the Nebraska Workers' Compensation Act, codified at § 48-118, which provides in pertinent part:

> When a third person is liable to the employee [receiving workers' compensation benefits] . . . for the [compensable] injury . . . the employer shall be subrogated to the right of the employee . . . against such third person . . . . Nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee . . . to bring suit against such third person in his or her own name . . . based upon such liability, but in such event an employer having paid or paying compensation to such employee . . . shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid. Before the making of a claim or the bringing of suit against such third person by the employee . . . or by the employer or his or her insurer, each shall give to all others, unless waived in writing, notice of not less than thirty days, by certified or registered mail, an opportunity to join in the making of such claim or the instituting of an action and to be represented by counsel. . . . Each shall have an equal voice in the claim and the prosecution of such suit and any dispute arising shall be passed upon by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought. If either party after the giving of such notice fails, by and through his or her attorney, to join in the making of such claim and the prosecuting of

> the suit, such party shall waive any and all claims or causes of action for improper prosecution of such suit or inadequacy of a settlement made in accordance herewith, and the party bringing the claim or prosecuting the suit shall be entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees, which expenses and attorney's fees shall be prorated to the amounts payable to the employer or his or her insurer under the above right of subrogation and to the amount in excess of such amount payable to the employer or his or her insurer under his or her right of subrogation, and which expenses and attorney's fees shall be apportioned by the court between the parties as their interests appear at the time of such recovery. If either party makes the claim or prosecutes such action without the giving of a notice to the other party, the party bringing the claim and prosecuting such action shall not deduct expenses or attorney's fees from the amount payable to the other party.
>
> If the employee . . . or the employer or his or her compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought. A settlement of any lawsuit commenced under this section shall be void unless (1) such settlement is agreed upon in writing by the employee . . . and the insurer of the employer if there is one, and if there is no insurer, then by the employer, or (2) in the absence of such agreement, the court before which the action is pending determines that the settlement offer is fair and reasonable considering liability, damages, and the ability of the third person and his or her liability insurance carrier to satisfy any judgment.

[2,3] We first address the question of whether Andy's Tires received the "notice" of Austin's claim against Scharp required by § 48-118. We have held that substantial compliance with the

notice requirement of § 48-118 is sufficient and that the requirement is met when the other party receives actual notice of a third-party claim and an opportunity to join in its prosecution. *Versch v. Tichota*, 192 Neb. 251, 220 N.W.2d 8 (1974); *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), *disapproved on other grounds, Nekuda v. Waspi Trucking, Inc.*, 222 Neb. 806, 388 N.W.2d 438 (1986). Notice may be waived in writing, or waiver may be implied from unequivocal conduct. *Versch, supra*; *Gillotte, supra*. In *Versch*, we held that an unequivocal waiver of notice occurred where the employer was joined as a party to determine its subrogation rights in an action commenced by the compensated employee against a third party and the employer entered a voluntary appearance in that action. In the present case, the answer filed by Andy's Tires, in which it asserted its subrogation lien against the recovery Austin sought from Scharp and Midland, constituted an unequivocal waiver of the notice required by § 48-118. While it is apparent that counsel for Andy's Tires did not receive notice of certain discovery proceedings or of the mediation which resulted in the settlement, it is clear that at all relevant times, Andy's Tires had actual knowledge of the lawsuit in which the third-party claim was asserted, which is all that the statute requires. The legal significance of Austin's failure to apprise counsel for Andy's Tires of events occurring after the entry of his appearance in the lawsuit will be discussed later in this opinion.

As noted, § 48-118 provides that

> [i]f either party after the giving of such notice fails, by and through his or her attorney, *to join in the making of such claim and the prosecuting of the suit* . . . the party bringing the claim or prosecuting the suit *shall be entitled* to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees . . . .

(Emphasis supplied.) Having determined that Andy's Tires had notice of the third-party suit, our next inquiry is whether Andy's Tires joined in its prosecution.

[4] The extent of a subrogated employer's participation in third-party litigation initiated by an injured employee is the crit-

ical factor in determining whether the employer has "joined" the action within the meaning of § 48-118. *Janssen v. Tomahawk Oil Co.*, 254 Neb. 370, 576 N.W.2d 787 (1998). In *Janssen, supra*, we considered whether a subrogated employer had joined in the prosecution of an unsuccessful third-party claim initiated by a compensated employee so as to incur liability for a portion of the costs under § 48-118. See *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950) (holding that employer who actively participated in trial of employee's third-party liability claim was equally liable with employee for costs of unsuccessful suit). The employer in *Janssen* filed an answer asserting its subrogation lien and informed the employee that it intended to " 'actively participate and pursue' " the lien, but did not participate in depositions, a pretrial conference, trial, or the appeal. 254 Neb. at 377, 576 N.W.2d at 791. We concluded that the employer was not responsible for any of the costs which its employee incurred in unsuccessfully pursuing the third-party claim because it "was a party defendant . . . for the sole purpose of protecting its statutory right of subrogation and, therefore, did not join in the prosecuting of the claim." *Id.* at 377, 576 N.W.2d at 791-92. See *Sterkel v. Fruehauf Corp.*, 975 F.2d 528 (8th Cir. 1992) (holding that filing answer asserting subrogation lien in employee's action against third party, answering interrogatories, attending depositions, and attending pretrial conference and commencement of trial did not constitute "joining" in employee's suit for purposes of § 48-118 where employer was not involved in trial and did not exercise any voice in investigation or prosecution of employee's case).

The record reflects that after receiving notice of Austin's action against Scharp and Midland, Andy's Tires did nothing more than file an answer to assert and protect its subrogation lien and respond to two sets of interrogatories propounded by Austin. Applying the same rationale as we did in *Janssen*, we conclude that Andy's Tires did not join in the prosecution of Austin's claim within the meaning of § 48-118.

We are not persuaded by Andy's Tires' contention that it was prevented from active participation in the litigation against Scharp and Midland by the failure of Austin's counsel to serve pleadings and discovery documents on its attorney or to notify

him of the scheduled mediation which resulted in settlement. Once it became a party to the suit, Andy's Tires had an "equal voice" in its prosecution by operation of § 48-118. Andy's Tires was not relegated to the reactive posture suggested by the testimony of its attorney, but had every right to seek affirmative relief against Scharp and Midland, to initiate discovery, to retain expert witnesses, and to take all other steps normally associated with the "prosecution" of a civil claim. Thus, because Andy's Tires had notice of the claim and either failed to exercise its statutory right to join in the prosecution of the action or chose not to do so, it is subject to the mandatory directive of § 48-118 that such conduct

> *shall* waive any and all claims or causes of action for improper prosecution of such suit or inadequacy of a settlement . . . and the party bringing the claim or prosecuting the suit *shall be entitled* to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees . . . .

(Emphasis supplied.)

We share the concern of the district court regarding the failure of Austin's attorney to serve copies of all pleadings and discovery documents upon counsel of record for Andy's Tires and to notify him of the scheduled mediation, which is contrary to familiar standards of professional practice and common courtesy among lawyers. However, we reach a different conclusion as to the consequence of these facts under § 48-118. If Andy's Tires believed that the conduct of Austin's counsel was prejudicial to its subrogation interest, it could have invoked the provision of § 48-118 which authorizes the district court to declare as void a settlement between an injured employee, who has received workers' compensation benefits, and a third party if it is not agreed to in writing by the employer or its insurer. By obtaining such a declaration, Andy's Tires would have restored its right to prosecute its subrogation claim utilizing its own attorney and thereby avoided potential liability for any portion of Austin's attorney fees. But where, as in the present case, an employer elects not to utilize this remedy, we do not read § 48-118 to permit the employer to realize the benefit of recov-

ery of its subrogation interest without sharing the cost of obtaining that recovery.

CONCLUSION

The record contains uncontroverted evidence that Andy's Tires had notice of the third-party liability claim initiated by Austin and did not exercise its right to join in the prosecution of that claim. Although Andy's Tires could have sought a declaration that the eventual settlement agreement was void because it was entered into without Andy's Tires' written agreement, it did not do so. We conclude that under these circumstances, Andy's Tires is obligated under § 48-118 to reimburse Austin for reasonable attorney fees and expenses incurred in the recovery of the subrogation interest. We therefore reverse the judgment and remand the cause to the district court for determination of such amounts.

REVERSED AND REMANDED.

SONNIE P. HARMON, APPELLEE AND CROSS-APPELLANT, V. IRBY CONSTRUCTION CO. AND LIBERTY MUTUAL GROUP INS. CO., APPELLANTS AND CROSS-APPELLEES.

604 N.W.2d 813

Filed December 23, 1999. No. S-99-081.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of the court's powers; (2) the judgment, order, or award was procured by fraud; (3) there is insufficient 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. ___: ___. Upon appellate review, the findings of fact by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ___: ___. If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court.
4. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or

accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.

5. ___. Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact.
6. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Reissue 1998) precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
7. **Appeal and Error.** As to questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
8. **Workers' Compensation.** The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
9. **Attorney Fees.** The value of legal services rendered by an attorney is determined by considering the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas D. Wulff and Timothy G. Himes, Sr., of Welch, White & Wulff, for appellants.

Anne E. Winner, of Keating, O'Gara, Davis & Nedved, P.C., for appellee.

Joseph Dowding, of Dowding, Dowding & Dowding, for amicus curiae Nebraska Association of Trial Attorneys.

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

WRIGHT, J.

NATURE OF CASE

Sonnie P. Harmon sustained a work-related injury and was awarded workers' compensation benefits by a single judge of the Nebraska Workers' Compensation Court. A review panel affirmed the trial judge's award of permanent total disability benefits, reversed the trial judge's determination of Harmon's average weekly wage and remanded for a recalculation of the temporary total disability benefits, and reversed the award of

attorney fees and remanded for a determination of a reasonable attorney fee.

Harmon's employer, Irby Construction Co. (Irby), and its insurer, Liberty Mutual Group Ins. Co. (Liberty), appeal the review panel's decision affirming the trial judge's award of permanent total disability benefits and the trial judge's finding that Harmon's refusal to relocate did not constitute a failure to comply with his vocational rehabilitation plan. Harmon cross-appeals the review panel's reversal of the trial judge's calculation of his average weekly wage and the award of attorney fees.

SCOPE OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1998), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of the court's powers; (2) the judgment, order, or award was procured by fraud; (3) there is insufficient 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. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

[2] Upon appellate review, the findings of fact by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.*

[3] If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court. *Id.*

FACTS

Harmon petitioned the Workers' Compensation Court for benefits, seeking compensation for a low back injury sustained November 24, 1995, while Harmon was employed by Irby. Irby and Liberty (collectively the defendants) filed a joint answer in which they admitted that Harmon was employed by Irby on the date of his injury, that the injury arose out of and in the scope of his employment, and that they had paid Harmon some medical and indemnity benefits. The defendants denied all other allega-

tions and alleged that Harmon had not complied with his vocational rehabilitation counselor's recommendations.

At trial, it was established that Harmon had relocated from McKenney, Virginia, to Superior, Nebraska, 6 days prior to being injured. After his injury, Harmon sought medical treatment from Dr. Douglas Long, an Omaha neurosurgeon, who performed low back surgery and provided postsurgical care throughout 1996. Following surgery, Harmon complained of incapacitating back pain and lower extremity problems.

The parties stipulated that Harmon's total earnings were $487.21 per week, or $12,667.46, for the 26 weeks preceding his accident and injury. The parties, however, could not agree whether a $30 per diem payment should be added to the average weekly wage calculation. Harmon proved that he had worked for Irby since 1994 and that immediately before moving to Nebraska, he had worked in Virginia. According to Harmon, he left a project in Virginia and continued his employment with Irby by relocating to a worksite in Superior, Nebraska. The project in Nebraska provided for a $30 per diem payment which was characterized as an incentive to get workers to Nebraska, and Irby had structured the per diem payment so that Harmon paid income tax on it. The trial judge concluded that the per diem payment was income and, thus, should be included in calculating Harmon's average weekly wage. The trial judge found that Harmon's average weekly wage was $697.21, which was calculated by multiplying the $30 per diem times 7 days a week for a total of $210 and adding the per diem to the stipulated weekly earnings of $487.21.

The trial judge concluded that as a result of the November 24, 1995, accident, Harmon was temporarily totally disabled from and including December 5, 1995, to and including September 30, 1996, and again from and including March 17, 1997, through and including May 16, 1997, for a total period of 51⅘ weeks and that at all other times, Harmon was permanently totally disabled. The trial judge then awarded Harmon benefits of $350 per week for the 51⅘ weeks of temporary total disability and $350 per week for all times during which he was and continues to be permanently and totally disabled.

Next, the trial judge found that the defendants refused or neglected payment of a medical bill after 30 days' notice had been given to them of the obligation to pay the bill and that Harmon was therefore entitled to attorney fees in the amount of $3,904. The medical bill which the defendants were said not to have paid was a $165 bill due to the Lincoln Orthopedic & Sports Medicine Clinic.

Finally, the trial judge found that Harmon was unemployable because of his physical impairment and because of the depressed labor market in the Superior, Nebraska, area. Thus, the trial judge adjudged Harmon permanently totally disabled.

On appeal, the review panel concluded the trial judge erred as a matter of law regarding calculation of Harmon's average weekly wage because it had included a $30 per diem payment for the entire 26-week period prior to his injury when Harmon had been paid the per diem for only 6 days prior to his injury.

The review panel upheld the trial judge's finding that the defendants had failed to pay a bill due the Lincoln Orthopedic & Sports Medicine Clinic in the amount of $165 within 30 days after notice of the obligation for payment was given. Although the trial judge had awarded attorney fees based upon counsel's itemized statement of 36.2 hours of work on the case, the review panel's survey of the itemized statement showed that most of the time spent by the attorney and paralegal had nothing to do with collection of the $165 medical bill. The review panel concluded that Neb. Rev. Stat. § 48-125 (Reissue 1998) permitted a reasonable attorney fee for the collection of delinquent medical bills, but did not entitle a claimant to an automatic award of all attorney fees, and therefore remanded to the trial judge for a determination of what constituted a reasonable attorney fee.

ASSIGNMENTS OF ERROR

The defendants assign as error that the review panel erred in affirming the trial judge's award of permanent total disability benefits and in affirming the trial judge's finding that Harmon's refusal to relocate did not constitute a failure to comply with his vocational rehabilitation plan.

Harmon cross-appeals, assigning as error that the review panel erred in reversing the trial judge's calculation of average weekly wage and award of attorney fees.

ANALYSIS

[4,5] The defendants first argue that the review panel erred in affirming the trial judge's award of permanent total disability. Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform. *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991). Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact. *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991).

Upon appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998). In our review of the decision made by the review panel affirming the trial judge's finding that Harmon was entitled to an award of permanent total disability benefits, we may modify, reverse, or set aside the Workers' Compensation Court decision only if (1) the compensation court acted without or in excess of the court's power; (2) the judgment, order, or award was procured by fraud; (3) there is insufficient 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. See *id.*

The evidence establishes that Harmon was treated and observed by several doctors. In January 1996, he was evaluated by Long. An MRI scan of the lumbar spine dated December 28, 1995, showed that Harmon suffered from degenerative disk disease. Long recommended that Harmon undergo physical therapy, and when Harmon failed to improve, Long recommended that he have surgery. Following surgery, Harmon continued to complain of pain in his left leg, and Long recommended that another MRI be performed on Harmon's back. When no significant improvement was noted in Harmon's symptoms, Long recommended pursuing job retraining.

In July 1996, a functional capacity assessment was performed. The evaluation noted a limited ability to lift, stand, sit,

or walk. Six months after Harmon's back surgery, Long opined that Harmon had reached maximum medical improvement and concluded that Harmon suffered a 10-percent impairment of the body as a whole. It was Long's opinion that Harmon was "completely disabled from his previous employment" and that he should receive vocational rehabilitation.

Harmon was eventually sent to Patricia Conway, a rehabilitation consultant, for evaluation. Conway conducted a loss of earning capacity analysis, and based on the information in the functional capacity assessment, she reported that Harmon would be restricted to sedentary work activity with an alternate sit-stand option and that he would have a limited ability to bend, climb stairs, crouch, kneel, balance, and squat. Conway concluded that Harmon had no skills which could be transferred to light and sedentary work and therefore opined that any future jobs would be limited to unskilled and possibly semiskilled jobs within the sedentary work category. Conway estimated that Harmon's loss of access to the labor market was approximately 65 to 70 percent.

Conway opined that Harmon was best suited for a light assembly or packing job because he was limited to a 10-pound lifting restriction, and she suggested that he become involved in security work. She stated that Harmon could return to work with his present skills and ability at a pay rate between $5.50 and $7 per hour. Returning to the work force at this rate of pay would cause Harmon to suffer a 70-percent loss of wages.

Based upon this information, Conway opined that Harmon's permanent loss of earning capacity was approximately 75 to 80 percent and that this loss of earning capacity would not improve. Although Harmon qualified for vocational rehabilitation, Conway doubted that Harmon possessed the academic skills to benefit from such rehabilitation. Conway had repeatedly discussed with Harmon the possibility of moving to a community with a better job market, but Harmon had refused.

In summary, the evidence establishes that Harmon had worked as a lineman for Irby for 1 year at the time of his injury. He had minimal education and possessed no other training or skills. A functional capacity assessment indicated that he could sit for 30 minutes at a time if he took regular breaks to decrease

discomfort and that he could stand for 15 minutes with the use of a cane. The evidence also showed that he could tolerate only occasional short walks. The doctors who examined him agreed that after reaching maximum medical improvement, he suffered a 10-percent impairment to the body as a whole and was unable to return to his previous line of work.

[6] Although there is conflicting medical evidence, we conclude that the evidence is sufficient to support the finding of the trial judge that Harmon has a permanent total disability. Section 48-185 precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

The defendants also argue that the trial judge erred in considering Superior, Nebraska, to be Harmon's exclusive employment market because he might be employable in another community even with a 10-percent whole-body impairment. The defendants argue that Harmon's refusal to relocate is tantamount to a refusal to cooperate with his court-appointed rehabilitation program. We disagree and find that this argument has no merit.

[7] As previously stated, a determination of to what extent an employee suffers from a disability is a question of fact; however, a determination of what things might be considered in assessing disability involves statutory construction and thus is a question of law. See *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999). As to questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

The review panel found no error of law in the trial judge's refusal to consider relocation as a factor in assessing the degree of Harmon's disability. The trial judge's order provides:

> Finally, counsel for the defendant[s urge] that the Court should require the plaintiff and his family to move from Superior, Nebraska to an area that is more ripe with the fruits of employment possibilities. The Court declines to do so. Requiring injured workers to uproot themselves is not supported by law or the practicalities of life.

We also conclude that Harmon's refusal to move was not a failure to cooperate with his vocational rehabilitation plan, for failure to relocate cannot be considered in assessing the degree of a claimant's disability. Other jurisdictions which have addressed the issue of requiring a workers' compensation claimant to relocate have reached the same conclusion.

In *McMannis v. Mad-Ray Modulars, Inc.*, 289 So. 2d 715 (Fla. 1974), the rehabilitation department of the workers' compensation court had been unable to find the claimant a job and suggested that he move to a larger city where job opportunities would be better. The trial court rejected the suggestion that the claimant be asked to move and stated:

> "This contention is rejected as being speculative in that there is no existing job to which this claimant could be assured of receiving in the event that he did in fact move; impractical for the claimant has no funds, inclination, or place to move to; contrary to natural human rights in that the claimant resided in Okeechobee and intended to make it his home at the time of the accident and there is no compelling reason to conclude that he would be better off in a bigger city . . . ."

(Emphasis omitted.) *Id.* at 717. See, also, *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989); *Fredenburg v. Control Data Corp.*, 311 N.W.2d 860 (Minn. 1981); *Litzinger v. W.C.A.B. (Builders Transport)*, 731 A.2d 258 (Pa. Commw. 1999).

Here, Harmon expressed no interest in moving and has no guarantee of a job were he to move. Thus, we find that the trial judge and the review panel correctly concluded that Harmon cannot be required to move to find employment and correctly concluded that Harmon's failure to move is not a factor which may be considered in assessing his disability.

[8] We next address Harmon's cross-appeal, in which he attacks the review panel's reversal of the trial judge's calculation of his average weekly wage. Neb. Rev. Stat. § 48-126 (Reissue 1998) provides:

> In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour . . . [the employee's] weekly wages shall be taken to be his or

> her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer . . . .

The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law. *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996).

The trial judge included the $30 per diem Harmon was earning at the time of his injury as part of his average weekly wage and concluded that Harmon was receiving an average weekly wage of $697.21 for the 26 weeks preceding the accident. However, the record reveals that Harmon did not earn the $30 per diem each day for the 26 weeks preceding the injury. Thus, applying the $30 per diem to the preceding 26 weeks distorted the calculation of Harmon's average weekly wage. The review panel properly concluded that the $30 per diem should be considered income only for the 6 days which Harmon actually earned it. Therefore, we find Harmon's assignment of error on this issue to be without merit.

Finally, Harmon claims that the review panel erred in reversing the trial judge's award of attorney fees in the amount of $3,904. Pursuant to § 48-125(1), whenever an employer

> neglects to pay medical payments subject to [Neb. Rev. Stat. § 48-120 (Reissue 1998)] after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award.

[9] We have not previously defined what constitutes a reasonable attorney fee pursuant to § 48-125. In other contexts, the value of legal services rendered by an attorney is determined by considering the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and

the customary charges of the bar for similar services. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998).

In *Ward v. Phoenix Operating Co.*, 729 So. 2d 109, 113 (La. App. 1999), the court stated:

> The award of attorney fees is a type of penalty in workers' compensation matters. . . . However, the penalty for the behavior is the imposition of the attorney fee, rather than the amount of the attorney fee. The amount of the fee must be assessed in accordance with law, i.e., the fee must be reasonable. . . . Thus, the court must assess the degree of skill involved and the amount of time counsel spent representing the claimant to arrive at a reasonable attorney fee.

Thus, we conclude that an award of attorney fees pursuant to § 48-125 must be calculated on a case-by-case basis and that in this case, particular attention should be given to the amount of legal work performed in relation to the amount of the unpaid medical bill and the amount of the unpaid medical bill in relation to the workers' compensation award received.

Exhibit 15 is an itemized list of the hours which Harmon's attorney and his legal staff worked on this case. Of the 36.2 hours documented, only a fraction can be directly attributed to collection of the unpaid medical bill. Furthermore, the defendants made timely medical payments in excess of $50,000 before the case came to trial. In light of these facts, the review panel correctly remanded the award of attorney fees. Allowing a claimant to recover all of his or her attorney fees based on the failure of a defendant to pay such a bill would provide the claimant with a windfall. This is not a result dictated by the plain language of § 48-125.

CONCLUSION

With regard to the defendants' assignments of error, we find no error in the review panel's conclusion that Harmon is entitled to an award of permanent total disability benefits and that Harmon should not be compelled to relocate in order to receive those benefits. With regard to Harmon's cross-appeal, we find no merit to the claim that the review panel erred in remanding

for a recalculation of his average weekly wage and determination of a reasonable attorney fee. Thus, the judgment of the review panel is affirmed. We award Harmon the sum of $2,000 to apply toward the services of his attorney in this court.

AFFIRMED.

HENDRY, C.J., not participating.

GERRARD, J., concurring.

I concur in all respects with the result reached by the majority, but write separately regarding the issue of payment of attorney fees. I agree that attorney fees of $3,904, which represented all attorney time and paralegal time spent in prosecuting the entire case, is not a "reasonable attorney's fee" for the collection of the $165 medical bill. See Neb. Rev. Stat. § 48-125 (Reissue 1998). Even though the trial judge properly determined that the employer failed to pay the expense of Dr. Daniel Noble at Lincoln Orthopedic & Sports Medicine Clinic in the amount of $165 within 30 days after notice of the obligation for payment of that account, it is quite apparent from a review of the record that collection of this medical bill was incidental to the filing of Harmon's claim for permanent total disability benefits.

However, I would not hesitate to assess an entire attorney fee in those cases where one of the underlying reasons for the filing of the workers' compensation claim is to establish compensability for a delinquent medical bill. In such cases, of course, a workers' compensation claimant must prove all elements of compensability in order to successfully obtain an award on the medical payment. See § 48-125. See, also, Neb. Rev. Stat. § 48-101 (Reissue 1998).

The purpose of the provision for attorney fees in § 48-125 is to encourage prompt payment by making delay costly if an employer neglects to pay medical payments after 30 days' notice has been given of the obligation for the medical payments. Nonpayment of medical bills can have an extremely deleterious result for an injured worker. Necessary medical care may be delayed for months pending litigation, which in itself may cause more severe permanent injury. See *Ihm v. Crawford & Co.*, 254 Neb. 818, 580 N.W.2d 115 (1998). To limit the award of attorney fees in every case to only the amount of time expended in

recovering a specific, unpaid medical bill would (in the words of dissenting Workers' Compensation Court Judge Ronald L. Brown) effectively transform § 48-125 into nothing but "an annoying, yippy little porch dog of no real consequence." The payment of attorney fees provision in § 48-125 should not be given such a narrow interpretation.

Litigants should be on notice that in those cases in which one of the underlying reasons for the filing of the workers' compensation claim is to establish compensability for a delinquent medical bill, the assessment of an entire attorney fee is entirely appropriate and in keeping with the purpose of § 48-125. The circumstances of this particular case do not warrant such a result, and I, therefore, concur in the result reached by the majority.

McCormack, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V.
ROGER DALE BJORKLUND, APPELLANT.
604 N.W.2d 169

Filed January 7, 2000. Nos. S-94-856, S-94-994.

Opinion modified on denial of rehearing, 258 Neb. 864, 604 N.W.2d 169 (2000).

1. **Criminal Law: Judgments: Sentences: Words and Phrases.** In a criminal case, the judgment date is the date on which the defendant is sentenced.
2. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
3. ___: ___. A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
4. **Appeal and Error.** A notice of appeal from a nonappealable order does not render void for lack of jurisdiction the acts of the trial court taken in the interim between the filing of the notice of appeal and the dismissal of the appeal by the appellate court.
5. **Constitutional Law: Statutes: Appeal and Error.** The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court.

6. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Homicide: Lesser-Included Offenses.** Nebraska law provides no lesser-included homicide offenses to felony murder.
8. **Constitutional Law: Criminal Law: Homicide: Lesser-Included Offenses: Jury Instructions.** The U.S. Constitution does not require that the jury in a felony murder case be instructed as to lesser-included offenses where the crime, as defined by state law, does not include any lesser offenses.
9. **Constitutional Law: Homicide: Intent.** The U.S. Constitution does not require that the crime of felony murder include a specific intent to kill.
10. **Homicide: Intent: Presumptions.** The critical difference between felony murder and premeditated first degree murder is that the underlying felony takes the place of the intent to kill, or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intent required for the underlying felony.
11. **Homicide: Intent: Proof.** The effect of transferred intent inherent in felony murder is not to lessen the burden of the prosecution, but simply to alter what the prosecution must prove. Instead of proving an intent to kill, the State must prove the defendant's intent with respect to the underlying felony.
12. **Right to Counsel.** When a defendant becomes dissatisfied with court-appointed counsel, unless the defendant can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if competent to do so.
13. ___. The right of an indigent defendant to have counsel does not give the defendant the right to be represented by counsel of his or her own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
14. **Attorney and Client: Conflict of Interest: Words and Phrases.** A conflict of interest denotes a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties.
15. **Constitutional Law: Right to Counsel.** When counsel is court-appointed, the defendant does not have a constitutional right to counsel of his or her choice.
16. **Trial: Jurors: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
17. **Criminal Law: Trial: Juries: Appeal and Error.** Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.
18. ___: ___: ___: ___. To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant.
19. **Constitutional Law: Juror Qualifications: Death Penalty.** Neb. Rev. Stat. § 29-2006(3) (Reissue 1995) does not violate either the 6th or the 14th Amendment to the U.S. Constitution.
20. ___: ___: ___. Neb. Rev. Stat. § 29-2006(3) (Reissue 1995) does not violate article I, § 3, of the Nebraska Constitution.
21. ___: ___: ___. Neb. Rev. Stat. § 29-2006(3) (Reissue 1995) allows a juror to be successfully challenged for cause on the basis of his or her opinions regarding the death penalty only in those cases in which those opinions would prevent the juror from

impartially weighing the evidence and reaching a conclusion as to the defendant's guilt or innocence on the basis of the evidence presented.

22. ___: ___: ___. Neb. Rev. Stat. § 29-2006(3) (Reissue 1995) fully comports with the state constitutional provisions regarding impartial juries and due process found in article I, §§ 6 and 11.
23. ___: ___: ___. Death penalty opponents who testify that they can put aside their views and base their decision solely on the evidence are not a distinct or cognizable group whose successful peremptory challenge and removal from the jury is impermissible.
24. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on evidence presented in court.
25. ___. A juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his or her own personal views must be excused for cause.
26. **Juror Misconduct.** When a defendant causes jury misconduct, he or she cannot thereafter be heard to maintain that the conduct was prejudicial.
27. **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.
28. **Motions to Suppress: Appeal and Error.** In making a determination whether a trial court's ruling on a motion to suppress is to be upheld, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes that the trial court is the finder of fact and takes into consideration that it observed the witnesses.
29. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine the relevancy and weigh their probative value against their prejudicial effect.
30. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
31. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
32. **Confessions: Appeal and Error.** A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous.
33. **Constitutional Law: Right to Counsel: Waiver.** An accused may waive his or her Fifth Amendment rights to be assisted by counsel during custodial interrogation and against self-incrimination provided that waiver is made voluntarily, knowingly, and intelligently.
34. ___: ___: ___. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the accused has waived the Fifth Amendment right to counsel.

35. ___: ___: ___. A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege.
36. **Constitutional Law: Miranda Rights: Right to Counsel.** *Miranda* warnings which adequately inform a defendant of his or her Fifth Amendment rights are also adequate to inform a defendant of his or her Sixth Amendment rights.
37. **Constitutional Law: Right to Counsel: Waiver.** A waiver of counsel which is effective under the federal Constitution is sufficient to waive the right to counsel under the Nebraska Constitution.
38. **Homicide: Photographs.** If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome.
39. ___: ___. In homicide cases, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, to show the nature and extent of wounds or injuries, and to establish malice or intent.
40. **Videotapes.** Admission of videotapes is generally within the trial court's discretion, subject to the same requirements for admission of still photographs.
41. **Evidence: Words and Phrases.** Cumulative evidence is that evidence tending to prove the same point of which other evidence has been offered.
42. **Motions for Mistrial.** A motion for mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial.
43. ___. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences where the damaging effects may not be able to be removed by proper admonition or instruction to the jury.
44. **Trial: Attorneys at Law.** One is allowed considerable latitude in making an opening statement.
45. **Motions for Mistrial: Attorneys at Law.** In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence.
46. **Trial: Prosecuting Attorneys: Juries.** The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct.
47. **Trial: Waiver: Appeal and Error.** It is a well-settled principle that one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
48. **Trial: Appeal and Error.** Any objection to a prosecutor's arguments made after the jury has been instructed and has retired is untimely and will not be reviewed on appeal.
49. **Constitutional Law: Trial.** A defendant has a constitutionally protected right to be present at all critical stages of his or her trial.
50. ___: ___. The Confrontation Clause applies to every stage of a trial.
51. **Constitutional Law: Appeal and Error.** Generally, a constitutional question not properly raised in the trial court will not be considered on appeal.

52. **Trial: Testimony.** It is within the discretion of the trial court to control and limit cross-examination as necessary to prevent undue prejudice and thus produce a fair trial.
53. **Constitutional Law.** A constitutional right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion before a tribunal having jurisdiction to determine it.
54. **Constitutional Law: Trial: Witnesses.** The functional purpose of the Confrontation Clause is to ensure the integrity of the fact-finding process through the provision of an opportunity for effective cross-examination.
55. **Rules of Evidence: Trial: Witnesses.** Pursuant to Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 1995), courts limit cross-examination of witnesses to the subject matter of the direct examination and matters affecting the credibility of the witness.
56. ___: ___: ___. Pursuant to Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 1995), the scope of cross-examination is necessarily limited by the scope of direct examination.
57. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
58. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
59. **Homicide: Double Jeopardy: Sentences: Lesser-Included Offenses.** A predicate felony is a lesser-included offense of felony murder for sentencing purposes, such that a defendant cannot be convicted and sentenced for both felony murder and the underlying felony without violating the Double Jeopardy Clause.
60. **Jury Instructions: Lesser-Included Offenses: Evidence.** Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.
61. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
62. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
63. **Statutes: Judgments: 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 courts below.
64. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** The determination of whether mitigating circumstances approach or exceed the weight of aggravating circumstances is not a numerical process, but, rather, involves the reasoned judgment of the sentencing authority.
65. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court.

66. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
67. **Homicide: Sentences.** Neb. Rev. Stat. § 29-2520 (Reissue 1995) grants the trial judge discretion to conduct the sentencing with or without the assistance of two additional judges and a defendant's request for a three-judge panel does not make such a panel mandatory.
68. **Constitutional Law: Sentences: Aggravating and Mitigating Circumstances.** The U.S. Constitution does not require the sentencing judge or judges to make specific written findings with regard to nonstatutory mitigating factors.
69. **Death Penalty.** A proportionality review under Neb. Rev. Stat. § 29-2521.03 (Reissue 1995) looks only to other cases in which the death penalty has been imposed.
70. **Sentences: Rules of Evidence.** The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
71. **Courts: Sentences: Rules of Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
72. **Constitutional Law: Crime Victims: Sentences.** To the extent that victim impact statements go merely to showing the personal characteristics of the victim or the emotional impact of the crime on the family, their admission at sentencing does not violate the U.S. Constitution.
73. ___: ___: ___. The admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.
74. ___: ___: ___. The Eighth Amendment is not violated unless the sentencing body considers impermissible victim impact statements in reaching the sentencing decision.
75. **Judges: Juries: Crime Victims: Evidence: Presumptions.** While a jury will be assumed to have considered impermissible victim impact statements, the presumption for judges is the opposite.
76. **Judges: Evidence: Presumptions.** In the absence of evidence to the contrary, the presumption is that a judge will disregard evidence that should not have been admitted.
77. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** Aggravating circumstances must be proved beyond a reasonable doubt.
78. **Confessions: Proof: Corroboration: Convictions.** A voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to warrant a conviction.
79. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** After proof of at least one aggravating circumstance, the sentencing authority under Nebraska's capital sentencing scheme is granted the discretion to determine the weight to be given to aggravating and mitigating circumstances and make a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present.

80. **Constitutional Law: Death Penalty.** The death penalty by electrocution as punishment for crime is not cruel and unusual punishment within the meaning of the U.S. or Nebraska Constitutions.
81. **Homicide: Sentences: Death Penalty.** The sentencing procedure provided by Neb. Rev. Stat. § 29-2520 (Reissue 1995) provides appropriate standards for impaneling a three-judge panel.
82. **Constitutional Law: Sentences: Death Penalty.** Jury sentencing in a capital case is not required under either the U.S. or Nebraska Constitutions.
83. **Constitutional Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Notice.** The State is not constitutionally required to provide the defendant with notice of aggravating factors.
84. **Statutes: Death Penalty.** Nebraska's death penalty statutes, which include Neb. Rev. Stat. § 29-2523(1) (Reissue 1995), are neither vague nor overbroad.
85. **Statutes: Death Penalty: Words and Phrases.** The terms "substantial history"; "apparent effort"; and "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1) (Reissue 1995), are neither vague nor overbroad.
86. **Motions for New Trial: Appeal and Error.** A motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
87. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
88. **Constitutional Law: Convictions: Appeal and Error.** Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction.
89. **Trial: Judges: Appeal and Error.** A violation of the right to be present in the context of ex parte communications is subject to harmless error analysis.
90. **Constitutional Law: Jury Instructions.** A constitutionally deficient reasonable doubt instruction requires automatic reversal.
91. **Trial: Due Process: Appeal and Error.** A violation of a defendant's right to a fundamentally fair trial by an impartial jury in conjunction with due process of law must be evaluated on a harmless error basis.
92. **Rules of Evidence: Jurors: Testimony.** Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), provides two exceptions to the general prohibition against juror testimony regarding any effect on their mental state. A juror may testify regarding (1) whether extraneous prejudicial information was brought to the jury's attention or (2) whether any outside influence was improperly brought to bear upon any juror.
93. **Jurors: Testimony: Verdicts.** Juror testimony may be admitted if it regards whether any outside influence was brought to bear upon any juror such that they were incapable of rendering a fair and impartial verdict.
94. **Convictions: Words and Phrases: Appeal and Error.** Only a prejudicial error, that is, an error which cannot be said to have been harmless beyond a reasonable doubt, requires that a conviction be set aside.
95. **Trial: Judges: Verdicts: Appeal and Error.** Reversal is not required if the record affirmatively shows the ex parte communication had no tendency to influence the verdict.

96. **Trial: Judges: Records.** Ex parte communications should be avoided except in unusual circumstances where communication is essential and counsel cannot be reached. In such cases, a verbatim record should be made and counsel and the defendant advised on the record of the contact as soon as practical after it occurs.
97. **Rules of Evidence: Judges: Witnesses.** Neb. Evid. R. 614(2), Neb. Rev. Stat. § 27-614(2) (Reissue 1995), provides that the judge may interrogate witnesses, whether called by the judge or by a party; however, the trial judge should use this right sparingly.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge, and PAUL D. MERRITT, JR., Judge. Appeal in No. S-94-856 dismissed. Judgment in No. S-94-994 affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Richard L. Goos, and Alan G. Stoler, Steven E. Tennies, and Jerry M. Hug for appellant.

Roger D. Bjorklund, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown, and Gary E. Lacey, Lancaster County Attorney, and John A. Colborn for appellee.

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Chief Judge, and SIEVERS, Judge.

PER CURIAM.

I. NATURE OF CASE

Roger Dale Bjorklund, in two consolidated actions, appeals his convictions of and sentencing for murder in the first degree and use of a weapon to commit a felony. We affirm.

II. BACKGROUND

On September 22, 1992, 18-year-old Candice Harms, a freshman at the University of Nebraska-Lincoln, disappeared after leaving her boyfriend's house at approximately 11:40 p.m. The next day, Harms' abandoned vehicle was found north of Lincoln. The police found nothing at the scene of the vehicle to indicate what had happened to Harms, and although police launched a search for Harms, they could not locate her.

In December 1992, Scott A. Barney and Bjorklund were arrested for possession of a stolen vehicle. While in custody, Barney told police that he and Bjorklund had kidnapped, raped,

and murdered Harms. Barney then took law enforcement officials to the locations where Barney and Bjorklund had left Harms' vehicle, where they had assaulted her, and where they had murdered Harms and buried her body.

While in jail on the pending stolen vehicle charge, Bjorklund requested to speak with Det. Gregory H. Sorensen. When Sorensen arrived at the jail, Bjorklund confirmed that he still wanted to talk to Sorensen. Sorensen read Bjorklund his *Miranda* rights, and Bjorklund responded affirmatively to each question on the standard *Miranda* form.

In the statement he gave Sorensen, Bjorklund stated that he and Barney had planned a bank robbery; however, they were certain that they were going to be caught and so they decided, prior to the robbery, to fulfill their fantasy of abducting and raping a woman. Bjorklund stated that on September 22, 1992, after he and Barney had driven around for quite some time looking for a suitable victim, they saw Harms turn onto Vine Street at the 27th Street intersection in Lincoln. They followed Harms to her parents' home on 61st and Vine Streets where Bjorklund then approached Harms as she exited her vehicle in her parents' driveway and forced her back into her car. Bjorklund and Harms in Harms' car then followed Barney in Barney's car to a 27th Street and Bluff Road location where they abandoned Harms' car, bound her hands, wrapped her head with duct tape, and then placed her in Barney's car.

Bjorklund said that they then took Harms to 84th and Havelock Streets in Lincoln. At this location, Barney left Bjorklund and Harms to go fill his car with gas. While Barney was gone, Bjorklund sexually assaulted Harms. When Barney returned, Bjorklund observed Barney also sexually assault Harms.

Following the assault, Bjorklund stated that Harms was placed back into Barney's car and taken to 134th Street and Yankee Hill Road in Lincoln. There, Bjorklund removed Harms from the car, placed her in a choke hold to control her, and began walking with her out into the field. At this point, Bjorklund stated that he stumbled and fell on top of Harms and that Barney shot Harms twice in the head with a .380-caliber semi-automatic pistol immediately thereafter.

According to Bjorklund's statement, Bjorklund and Barney then left Harms lying in the field and drove away, returning when they realized that they had left behind their blanket. When Bjorklund located the blanket near Harms, he heard Harms still spasming or gasping for air. Bjorklund then fired five rounds from his .38-caliber revolver at Harms and left the scene.

Bjorklund stated that he and Barney then took the blanket and Harms' clothing and personal belongings back to the site of the assault and burned those items there. They threw the weapons and extra ammunition into Pawnee Lake and 2 days later went back and buried Harms' body in a shallow grave a short distance from where they shot her.

An autopsy determined that the cause of Harms' death was manual strangulation and multiple gunshot wounds to the head. The coroner's physician also determined that the various incisions on Harms' body, including the removal of the nipple of her left breast, were consistent with sexual sadism and torture.

In February 1993, an amended information was filed charging Bjorklund in count I with murder in the first degree under Neb. Rev. Stat. § 28-303 (Reissue 1995) and in count II with use of a weapon to commit a felony under Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). Count I alleged that Bjorklund, on or about September 22, 1992, killed Harms purposely and with deliberate and premeditated malice; or killed her in the perpetration of a first degree sexual assault or a kidnapping. Count II alleged that, on that same date, Bjorklund used a deadly weapon to commit a felony. At his arraignment, Bjorklund stood mute, and the trial court entered pleas of not guilty on his behalf.

Thereafter, numerous motions and other matters were heard by the trial court, including a lengthy suppression hearing involving the December 1992 statement and various other self-incriminating statements made by Bjorklund to Sorensen and other law enforcement personnel.

In October 1993, after a motion for change of venue, a jury was selected in Sidney, Cheyenne County, Nebraska. Twelve jurors and four alternates were sworn and impaneled on October 21. Trial began in Lincoln on October 25, and on November 17, the jury returned a unanimous verdict, finding Bjorklund guilty on both counts.

Prior to sentencing, on November 23, 1993, Bjorklund filed his first motion for new trial, which was overruled on December 13. Bjorklund subsequently filed a second motion for new trial on March 21, 1994, pertaining to information disclosed by the trial judge, Donald E. Endacott, to counsel after the trial. The information concerned an ex parte contact between Judge Endacott and the jury in Sidney. Judge Endacott overruled the second motion for new trial on March 23. The State filed a motion to reopen the hearing on Bjorklund's second motion for new trial, which was granted. Bjorklund also filed a "Motion for Disqualification/Motion to Recuse," and Judge Endacott assigned the issue of the ex parte contact presented in the second motion for new trial to Judge Paul D. Merritt.

The hearing was held before Judge Merritt in Sidney in May 1994. Judge Merritt found that while in Sidney and following the selection of the 12 jurors, Judge Endacott, in the presence of Bjorklund and all counsel, informed the jurors that he would be joining them in the jury room to make a few brief comments. In the jury room, Judge Endacott took care of several housekeeping matters and then asked those jurors who wished to join hands and bow their heads to do so. Judge Endacott then said, "God be with us" or words to that effect; his voice cracked; and he left the jury room. When the four alternates were chosen, the same thing occurred, except that Judge Endacott apparently also hugged some or all four of the alternate jurors.

Judge Merritt found that Bjorklund had not waived his right to complain about this action by Judge Endacott and had timely filed his second motion for new trial. Judge Merritt then found that Judge Endacott's actions were inappropriate and that " 'misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.' " Although Judge Endacott refused to testify, Judge Merritt found that his testimony was unnecessary because the relevant question was whether Bjorklund's right to a fair and impartial trial was prejudiced by Judge Endacott's actions, and Judge Endacott's reasons for acting as he did had no bearing on that question. Judge Merritt found that the State established beyond a reasonable doubt that the ex parte contact by Judge Endacott was made prior to opening statements, the presentation of any evidence,

and the commencement of deliberations and was therefore harmless. Judge Merritt stated:

> The prayers were very short in nature and were not interpreted by the jurors as being comments by Judge Endacott on the evidence to be presented in the case or on how the case should be decided. From the time the twelve jurors were selected and sworn up to the time the case was submitted to the jurors for their deliberation, Judge Endacott continued to remind the jurors of their duty to keep open minds and base their verdict only on the evidence presented.

Sentencing was ultimately reset for September 20, 1994. On September 9, Bjorklund appealed the denial of his motion for new trial (case No. S-94-856) and filed a motion to stay sentencing until that appeal was decided. Judge Endacott denied this motion to stay. After discussing individually the statutory aggravating and mitigating factors and stating in his order that he had considered all nonstatutory mitigating evidence, Judge Endacott sentenced Bjorklund to death. In May 1996, we deferred ruling on case No. S-94-856 and consolidated that case with case No. S-94-994, Bjorklund's timely filed direct appeal.

In the brief in the direct appeal, case No. S-94-994, under "Cumulative Error," Bjorklund has raised the ex parte judicial contact, and therefore, the assignments of error issues of case No. S-94-856 are incorporated in the appeal docketed as case No. S-94-994.

III. ASSIGNMENTS OF ERROR AND STANDARD OF REVIEW

Due to the large number of assignments of error presented to this court and the variety of standards of review which apply to those assigned errors, we will specifically list and address the assignments of error and applicable standards of review within each categorical heading set forth below.

IV. ANALYSIS

1. JURISDICTION

In his first assignment of error, Bjorklund argues that the trial court lacked jurisdiction to sentence him when an appeal from

the overruling of his second motion for new trial had been perfected to this court prior to sentencing. We disagree.

Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994) states in pertinent part:

> [T]he proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies . . . shall be by filing . . . within thirty days after the rendition of such judgment . . . a notice of intention to prosecute such appeal . . . .

On November 23, 1993, Bjorklund filed a motion for new trial. This motion was heard on December 13 and overruled the same day. Bjorklund filed a second motion for new trial on March 21, 1994, after discovering the ex parte contact between Judge Endacott and the jury at the time of trial. The second motion for new trial dealt with this ex parte contact. This motion was heard by Judge Endacott on March 23, 1994, and overruled the same day. On April 14, the State filed a motion to reopen the hearing on Bjorklund's second motion for new trial (ex parte contact), which motion was granted on April 18, and Judge Merritt was assigned to hear this reopened motion. Judge Merritt overruled this motion on September 1, and Bjorklund appealed the denial of the second motion for new trial, which is docketed as case No. S-94-856. Bjorklund was then sentenced to death by Judge Endacott on September 20, and Bjorklund filed a direct appeal, which is docketed as case No. S-94-994.

[1] The first task we have is to determine whether or not we have jurisdiction to hear the appeal docketed as case No. S-94-856. The motion for new trial and the notice of appeal were filed prior to sentencing. We held in *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988), that in a criminal case, the judgment date is the date on which the defendant is sentenced.

[2] The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a sub-

stantial right made on summary application in an action after a judgment is rendered. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). It is clear that in the instant case, the overruling of Bjorklund's motion for new trial neither determined the action and prevented a judgment nor was made on summary application after judgment was rendered. Consequently, we must determine if the trial court's order affected a substantial right in the context of a special proceeding.

[3] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *State v. Jacques, supra.* In the instant case, it is apparent that such a standard is not met. The claims advanced in Bjorklund's motion for new trial may be addressed and disposed of on appeal after the sentencing. This is illustrated by the fact that the issues presented by Bjorklund's motion in this case have been presented for review in his postjudgment appeal.

As Bjorklund suffered no prejudice from the overruling of his motion for new trial that could not be effectively mitigated by a timely appeal taken after the final judgment, we determine that no substantial right of Bjorklund was affected by the overruling of his motion for new trial. Such overruling was not a final, appealable order, and Bjorklund's notice of appeal was premature. Bjorklund's appeal in case No. S-94-856 must be dismissed.

[4] In *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999), we held that a notice of appeal from a nonappealable order does not render void for lack of jurisdiction the acts of the trial court taken in the interim between the filing of the notice of appeal and the dismissal of the appeal by the appellate court. We stated in *Holste v. Burlington Northern RR. Co.*, 256 Neb. at 729, 592 N.W.2d at 906:

> "[A]ny other rule would be utterly unthinkable. Any party would then be able, at any time before final judgment, to bring the trial of a case to an abrupt halt by merely filing an order for appeal from any ruling of the court. Control of the judicial process would thus pass from the courts to the

> parties and their counsel. Mistrials and continuances would be available without limitation at the whim of any party. The trial court must have, and does have, the power to determine whether its jurisdiction to proceed has been ousted. Should any abuse of that power ever arise, such abuse could undoubtedly be corrected by prompt appellate action."

Quoting *Smiley v. Atkinson*, 12 Md. App. 543, 280 A.2d 277 (1971).

Therefore, under the holding of *Holste v. Burlington Northern RR. Co., supra*, the trial court retained jurisdiction to sentence Bjorklund even though a premature appeal had been filed.

We conclude that Bjorklund's assignment of error claiming that the trial court lacked jurisdiction to sentence him when an appeal from the overruling of Bjorklund's second motion for new trial had been perfected prior to the sentencing is without merit.

2. Dismissal of Felony Murder Count

(a) Assignment of Error

Bjorklund assigns as his only error in this section that the trial court erred in failing to dismiss those portions of count I of the information that charged Bjorklund with felony murder.

(b) Standard of Review

[5,6] The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court. *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997); *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

(c) Analysis

In this assignment of error, Bjorklund argues essentially that the felony murder statute, § 28-303(2), is unconstitutional in that it deprives him of the right to lesser-included offense

instructions, does not require an intent to kill or mens rea element, permits one to be punished for a killing when the only intent he or she had was to commit the underlying felony, and creates a conclusive and nonrebuttable presumption of transferred intent that eases the State's burden of proof and evidentiary responsibilities. We reject each of these arguments.

(i) Lesser-Included Offenses

[7,8] We have repeatedly held that Nebraska law provides no lesser-included homicide offenses to felony murder. See, e.g., *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). We recently noted that the U.S. Constitution does not require that the jury in a felony murder case be instructed as to lesser-included offenses where the crime, as defined by state law, does not include any lesser offenses. *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999), *cert. denied Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370, citing *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998), *rehearing denied* 524 U.S. 968, 119 S. Ct. 5, 141 L. Ed. 2d 766.

Bjorklund claims that this absence of lesser-included offenses is somehow intrinsically violative of his constitutional rights. In *Hopkins v. Reeves*, 524 U.S. at 96-97, however, the U.S. Supreme Court stated that "[a]lmost all States, including Nebraska, provide instructions only on those offenses that have been deemed to constitute lesser included offenses of the charged crime. . . . We have never suggested that the Constitution requires anything more." The Supreme Court concluded that a defendant is not, under Nebraska's felony murder law, constitutionally entitled to a lesser-included offense instruction in a capital case. *Id.* This determination is dispositive in the present case. Consequently, Bjorklund's argument is without merit.

(ii) Intent to Kill

Bjorklund charges that § 28-303(2) is unconstitutional in that it does not require the State to prove an intent to kill and permits one to be punished for a killing where the only intent proved was to commit the underlying felony.

Bjorklund's arguments are hardly unique. We have repeatedly rejected such constitutional claims in the past. See, *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986), *cert. denied* 481 U.S. 1042, 107 S. Ct. 1987, 95 L. Ed. 2d 826 (1987); *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982). "[T]he constitutionality of felony murder statutes is well settled, and 'that states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge.'" *Perkins v. Grammer*, 838 F.2d 294, 295 (8th Cir.) (1988), *cert. denied* 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911, quoting *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

In the context of capital felony murder, the U.S. Supreme Court has said that

> some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders. See, *e. g.*, G. Fletcher, Rethinking Criminal Law § 6.5, pp. 447-448 (1978) ("[I]n the common law, intentional killing is not the only basis for establishing the most egregious form of criminal homicide . . . . For example, the Model Penal Code treats reckless killing, 'manifesting extreme indifference to the value of human life,' as equivalent to purposeful and knowing killing").

Tison v. Arizona, 481 U.S. 137, 157, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), *rehearing denied* 482 U.S. 921, 107 S. Ct. 3201, 96 L. Ed. 2d 688.

[9] We agree with the Supreme Court's analysis and reaffirm our prior holding that the U.S. Constitution does not require that

the crime of felony murder include a specific intent to kill. Bjorklund's argument is without merit.

(iii) Transferred Intent

Bjorklund argues that the presumption of transferred intent, inherent in felony murder, is unconstitutional in that it eases the State's burden of proof and evidentiary responsibilities. This argument, however, is premised on a misunderstanding of felony murder and, in reality, presents little more than a recharacterization of the "intent to kill" argument we have previously rejected.

[10] The critical difference between felony murder and premeditated first degree murder is that the underlying felony takes the place of the intent to kill, or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intent required for the underlying felony. See *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997). The U.S. Supreme Court has noted:

> At common law, murder was defined as the unlawful killing of another human being with "malice aforethought." The intent to kill and the intent to commit a felony were alternative aspects of the single concept of "malice aforethought." See 3 J. Stephen, History of the Criminal Law of England 21-22 (1883). Although American jurisdictions have modified the common law by legislation classifying murder by degrees, the resulting statutes have in most cases retained premeditated murder and some form of felony murder (invariably including murder committed in perpetrating or attempting to perpetrate a robbery) as alternative means of satisfying the mental state that first-degree murder presupposes.

Schad v. Arizona, 501 U.S. 624, 640-41, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), *rehearing denied* 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1109. The Supreme Court in that case concluded:

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating

> them as alternative means to satisfy the mental element of a single offense.

501 U.S. at 644.

[11] The effect of transferred intent, then, is not to lessen the burden of the prosecution, but simply to alter what the prosecution must prove. Instead of proving an intent to kill, the State must prove the defendant's intent with respect to the underlying felony. Consequently, Bjorklund's constitutional challenge fails on its premise, and his assignment of error is without merit.

3. Conflict of Interest

(a) Assignments of Error

On appeal, Bjorklund alleges that the trial court erred in not conducting (1) an evidentiary hearing to address the validity of Bjorklund's claims of a conflict of interest between the public defender's office and the county attorney's office and (2) hearings regarding Bjorklund's dissatisfaction with appointed counsel, thus violating his rights under the 6th, 8th, and 14th Amendments to the U.S. Constitution.

(b) Standard of Review

[12,13] When a defendant becomes dissatisfied with court-appointed counsel, unless the defendant can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if competent to do so. *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988). The right of an indigent defendant to have counsel does not give the defendant the right to be represented by counsel of his or her own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. *Id.*

(c) Analysis

In his first assignment of error in this section, Bjorklund argues that the trial court erred in failing to conduct hearings to address the validity of Bjorklund's claims of a conflict of interest between the public defender's office and the county attorney's office. We conclude this assignment of error to be without merit.

On April 26, 1993, Bjorklund filed a motion to proceed pro se. During the hearing on that motion, the trial court asked

Bjorklund, "[w]hat are the reasons that you wish to represent yourself and wish to have the Public Defender withdraw?" Bjorklund stated that he was able to defend himself and that he noted a lack of aggressiveness in his case. He also stated that although he was "quite impressed" with his court-appointed attorney's capabilities, he sometimes

> felt that, perhaps, there was a conflict of interest between the — the County Attorney's Office and the Public Defender's Office, due to the fact that they are both county agencies and the fact that the County Attorney's Office is usually looked at as the superior office of the two offices.

As evidence of the conflict of interest alleged, Bjorklund stated that he was aware that members of the two offices sometimes had "off-the-cuff" meetings and that "when [he] had a problem at the Lancaster County Jail or when [he] needed to have something really done, it took the intervention of the prosecutor's office when [his own attorney] was not able to take care" of the problem. Both the public defender and the county attorney stated at that hearing there was no conflict of interest between their two offices.

In June 1993, a hearing was held on Bjorklund's motion to appoint counsel or to restore former counsel. In his motion, Bjorklund requested either the appointment of someone outside the public defender's office or "IF NOT THAT then restore his former counsel." On June 18, 1993, the court reappointed the public defender's office after a lengthy hearing in which Bjorklund presented his concerns about proceeding pro se as a jailed litigant and in which the State presented evidence rebutting Bjorklund's allegations.

Bjorklund argues in this assignment of error that the trial court erred in failing to conduct an evidentiary hearing to address the validity of Bjorklund's complaints regarding an alleged conflict of interest between the county attorney's office and the public defender's office. The simple fact of the matter is that the trial court did hold a hearing in which the trial court questioned Bjorklund's reasons for wanting to proceed pro se and in which Bjorklund discussed at length his bases for alleging the conflict of interest.

[14] We have repeatedly stated that a conflict of interest denotes a situation in which regard for one duty tends to lead to disregard of another; a conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991). See, also, *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994). It is clear from the record made at the hearing on the motion to proceed pro se that no real conflict of interest existed in this case and that such a claim was patently frivolous. No separate hearing regarding the alleged conflict of interest, beyond the hearing on the motion to proceed pro se, was required in this case because this is a situation in which "there is clearly no possibility of antagonistic defenses" and in which there was no conflict of interest. *State v. Marchese*, 245 Neb. at 979, 515 N.W.2d at 673. Given that the trial court did hold a hearing in which it was adduced that there was no conflict of interest between the county attorney's office and the public defender's office, we conclude that this assignment of error is without merit.

In his second assignment of error in this section, Bjorklund argues that the trial court erred in failing to conduct hearings regarding Bjorklund's dissatisfaction with appointed counsel, thus violating his rights under the 6th, 8th, and 14th Amendments to the U.S. Constitution. We disagree.

Bjorklund argues that during the course of the criminal proceedings, he brought to the trial court's attention that he was unhappy with his appointed counsel's representation, that he had filed a bar complaint against his counsel, and that he had asked that other counsel be appointed. As a result, Bjorklund claims that the hearings should have been held to further investigate this matter or that the trial court should have appointed different counsel.

[15] We have stated that when counsel is court-appointed, the defendant does not have a constitutional right to counsel of his or her choice. *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996). Bjorklund stated to the trial court at the hearing on his motion to proceed pro se that he had always been quite impressed with his counsel's capabilities and that it was "not that [Bjorklund felt] that [his appointed counsel was] lacking in any way as an attorney." There is nothing in this record to

demonstrate that the trial court should have held an additional evidentiary hearing on the issue of Bjorklund's dissatisfaction with his appointed counsel, beyond the hearing held on the motion to proceed pro se. The record demonstrates that Bjorklund himself told the trial court that he was proceeding pro se because he felt that he was able to intelligently defend himself, that he wanted to represent himself and not have to worry about any alleged conflict of interest, and that he was satisfied with his appointed counsel's performance. The record also demonstrates that at the motion to appoint counsel or restore former counsel, Bjorklund asked for either counsel outside the public defender's office or the reinstatement of his former counsel. Bjorklund does not have a constitutional right to appointment of counsel of his own choosing. Once Bjorklund determined that he no longer wished to proceed pro se, the trial court could, and did, properly appoint Bjorklund's former counsel.

We have also repeatedly held that a criminal defendant's mere distrust of, or dissatisfaction with, his or her attorney is not a sufficient reason to require appointment of substitute counsel. *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988). See, also, *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992). Bjorklund did indeed file complaints with the bar association regarding his appointed counsel. The complaints involved his counsel's inability to change Bjorklund's segregated housing status, his counsel's unwillingness to file a motion that his counsel apparently deemed to be frivolous, and the policy of the public defender's office of not corresponding with clients through the mail. The bar complaints at issue are simply an expression of Bjorklund's dissatisfaction with his appointed counsel. Interestingly enough, as noted above, Bjorklund himself told the trial court after filing these complaints that although he wished to proceed pro se, he was not dissatisfied with his counsel's performance. Dissatisfaction that subsequently dissipates is not a sufficient reason to appoint substitute counsel and is certainly not a sufficient reason to require the trial court to conduct further hearings into Bjorklund's "dissatisfaction" with his appointed counsel. Bjorklund's assignment of error in this regard is without merit.

4. Jury Selection and Sequestration

(a) Assignments of Error

On appeal, Bjorklund alleges that the trial court also erred in (1) failing to declare Neb. Rev. Stat. § 29-2006 (Reissue 1995) unconstitutional; (2) failing to conduct a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), concerning the State's removal of venireperson C.H. from the panel; (3) failing to grant Bjorklund's challenge for cause to venirepersons D.F., M.M., C.W., M.H., E.W., and K.L.; (4) allowing the clerk of the Cheyenne County District Court to dismiss venireperson E.B. in violation of Neb. Rev. Stat. § 25-1601(2) (Reissue 1995); and (5) failing to order complete sequestration of the jury during the trial and so abusing its discretion.

(b) Standard of Review

The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court. *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997); *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

[16] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999).

[17,18] Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court. *Id.* To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant. *Id.*

(c) Analysis

(i) Constitutionality

In his first assignment of error in this section, Bjorklund alleges that the trial court erred in failing to declare § 29-2006

unconstitutional. Bjorklund limits his argument to subsection (3) of § 29-2006, and we will likewise limit our discussion and disposition of his claim. Specifically, Bjorklund argues that this provision violates his rights under the 6th and 14th Amendments to the U.S. Constitution and his rights under article I, §§ 3, 6, and 11, of the Nebraska Constitution. We disagree.

[19] Section 29-2006(3) states that "in indictments for an offense the punishment whereof is capital, [a juror's statement] that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death" constitutes good cause to challenge the juror. We have previously held in *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993), and *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986), that § 29-2006(3) does not violate either the 6th or the 14th Amendment to the U.S. Constitution. Bjorklund has presented no new arguments with relation to this federal constitutional claim, and we affirm our previous holdings in this regard.

[20] Bjorklund also argues that § 29-2006(3) violates the impartial jury and due process provisions of the Nebraska Constitution found in article I, §§ 3, 6, and 11. In *State v. Peery, supra*, we held that § 29-2006(3) does not violate article I, § 3, and we affirm that holding in this case.

[21,22] With regard to Bjorklund's claims relating to article I, §§ 6 and 11, we have also stated:

> While it was up to the court to determine the appropriate sentence in the event of a finding of guilt, the State, like [the defendant], was entitled to a jury which would be impartial regardless of the potential punishment to be imposed. It is entirely permissible to exclude from jury service venirepersons whose views on capital punishment are such as to prevent or substantially impair their ability to impartially apply the law to the evidence.

State v. Bradley, 236 Neb. 371, 387, 461 N.W.2d 524, 537 (1990). Section 29-2006(3) allows a juror to be successfully challenged for cause on the basis of his or her opinions regarding the death penalty *only* in those cases in which those opinions would prevent the juror from impartially weighing the evidence and reaching a conclusion as to the defendant's guilt or innocence on the basis of the evidence presented. As such,

§ 29-2006(3) fully comports with the state constitutional provisions regarding impartial juries and due process found in article I, §§ 6 and 11. Because we conclude that § 29-2006(3) does not violate Bjorklund's rights under the 6th and 14th Amendments to the U.S. Constitution or under article I, §§ 3, 6, and 11, of the Nebraska Constitution, we conclude this assignment of error to be without merit.

(ii) Selection

In his second assignment of error in this section, Bjorklund argues that the trial court erred in not conducting a *Batson* hearing concerning the State's removal of venireperson C.H. from the panel. We do not agree.

The U.S. Supreme Court's holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), forbids race-related discrimination in the use of peremptory challenges and has been extended only to gender-related discrimination in *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). In the instant case, Judge Endacott explained to venireperson C.H. that there were two possibilities for first degree murder in regard to sentencing: life imprisonment and the death penalty. Judge Endacott further explained that if the jury convicted Bjorklund, the jury had nothing whatsoever to do with the punishment and must not consider punishment in arriving at a verdict as to whether Bjorklund is guilty. Judge Endacott then asked venireperson C.H. if he had any reservations, feelings, or convictions about the death penalty which would prevent or substantially impair his ability to make an impartial decision as to Bjorklund's guilt, and venireperson C.H. replied "[i]t wouldn't be established in that way, but I would feel guilty after the fact if he was sentenced to the death penalty, to myself, I would. It wouldn't make any difference in my decision, but I would feel guilty afterward." The State's challenge for cause was overruled, and the State later used one of its peremptory challenges to remove venireperson C.H. Bjorklund argues that the trial court should have conducted a *Batson* hearing pursuant to his request at that point, because "people opposed to capital punishment represent a segment of society, much like a minority or a male-female; and that striking

[venireperson C.H.] is a violation of Batson." Brief for appellant at 114.

[23] Both this court and the U.S. Supreme Court have previously stated that death penalty opponents who testify that they can put aside their views and base their decision solely on the evidence are not a distinct or cognizable group whose successful peremptory challenge and removal from the jury is impermissible. *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986) (citing *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986)). We reaffirm our holding in *State v. Burchett, supra*, and decline to extend the race and gender limitations of *Batson v. Kentucky, supra*, to include situations such as the one presented here. This assignment of error is also without merit.

In his third assignment of error, Bjorklund alleges that the trial court erred in failing to grant Bjorklund's challenges for cause to venirepersons D.F., M.M., C.W., M.H., E.W., and K.L. We disagree.

During voir dire, venireperson D.F. testified that he had previously expressed the opinion that Bjorklund should be charged as a murderer. However, after the court and counsel explained to venireperson D.F. that a person is not guilty until he is proven guilty beyond a reasonable doubt, venireperson D.F. testified that he could be a fair and impartial juror in the case.

In the jury questionnaire, venireperson M.M. stated, "I assume the defendant . . . is guilty since he was the one that was arrested." However, venireperson M.M. stated during voir dire that she now understood that Bjorklund was presumed innocent until proven guilty, that she could put aside her own feelings and follow the judge's instructions, and that she could be a fair and impartial juror.

Venireperson C.W. stated during voir dire that he believed that, as a general rule, people are not punished severely enough. However, venireperson C.W. later stated that despite this opinion, he could still be a fair and impartial juror.

Venireperson M.H. indicated in her jury questionnaire that she thought Bjorklund was guilty because his friend "snitched him off." However, venireperson M.H. stated during voir dire that she could be a fair and impartial juror because she now

understood that she must base her decision on the evidence and nothing else.

Venireperson E.W. stated that she had conversed about the case with her son and his friend, both of whom were Lincoln residents, and that she believed, after these conversations, that Bjorklund was guilty. However, during voir dire, venireperson E.W. stated that she could set aside what her son and his friend had said and that she could be a fair and impartial juror.

Venireperson K.L. stated that her husband was the Cheyenne County Attorney and that she had answered the telephone when the Lancaster County Attorney prosecuting Bjorklund had contacted her husband in his official capacity upon arriving in Cheyenne County for jury selection. However, venireperson K.L. also stated that she could decide the case based solely on the evidence and that she could be a fair and impartial juror.

[24,25] The trial court overruled Bjorklund's challenges for cause as to each of these venirepersons. Section 29-2006(2) states that where a juror has expressed or formed an opinion as to the guilt or innocence of the person charged in a case and where the juror upon examination "shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror . . . is impartial and will render such verdict, may, in its discretion, admit such juror . . . to serve in such case." Additionally, the law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on evidence presented in court. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999). A juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his or her own personal views must be excused for cause. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995).

Here, the record clearly demonstrates that each of these jurors could lay aside his or her impressions or opinions and base a verdict solely on the evidence and facts presented at trial. The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Lotter, supra*. We conclude that the

trial court was not clearly wrong in failing to grant Bjorklund's challenges for cause to each of these venirepersons. This assignment of error is without merit.

In his fourth assignment of error, Bjorklund alleges that the trial court erred in allowing the clerk of the Cheyenne County District Court to dismiss venireperson E.B. in violation of § 25-1601(2). We disagree.

Section 25-1601(2) states, "The district court or any judge thereof may exercise the power of excusing any grand or petit juror or any person summoned for grand or petit jury service upon a showing of undue hardship, extreme inconvenience, or public necessity for such period as the court deems necessary." Here, the record indicates that the clerk of the Cheyenne County District Court spoke with venireperson E.B. and informed her that she was excused from jury duty due to her recent hospital stay. Bjorklund alleges that this act violated § 25-1601(2). However, the record demonstrates that the clerk spoke to venireperson E.B. and excused her at the judge's behest. The statute in question does not require that the judge speak personally with a venireperson seeking excusal from service, but only that the trial court officially excuse venireperson E.B. The statute was not violated in this case because the judge did officially excuse venireperson E.B. This assignment of error is without merit.

(iii) Sequestration

In his last assignment of error in this section, Bjorklund argues that the trial court abused its discretion in failing to order complete sequestration of the jury during the trial. Again, we disagree.

In the instant case, the jurors stayed together at a hotel in Lincoln during the trial and were prohibited from reading or listening to any news accounts concerning the trial. However, the jurors were not required to eat together, were allowed to return to Sidney on the weekends, and could freely travel around Lincoln during the week.

Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court. *State v. Lotter, supra.* To warrant reversal, denial of a motion to

sequester the jury before submission of the cause must be shown to have prejudiced the defendant. *Id.* Here, the record clearly demonstrates that the trial court did not abuse its discretion in refusing to order complete sequestration of the jury prior to deliberations. The trial judge repeatedly admonished the jurors to avoid discussing the case among themselves or with anyone else, not to read or listen to news reports about the case, and not to form or express any opinions about the case.

During the trial, several of the jurors received letters which threatened the jurors' families in the event that the jury did not find Bjorklund guilty. Several of the jurors did open the threatening letters and at least one of those jurors read the letter. In a tape-recorded statement taken by the Lincoln Police Department on November 22, 1993, Bjorklund admitted that he, together with others, was the source of these threatening letters and that he gave them to a minister to mail to the Cornhusker Hotel, where the jury was staying. Bjorklund then moved for a mistrial. At the hearing on that motion, each juror testified that the letters would not influence their ability to be fair and impartial and that they could still render a verdict based solely on the evidence presented at trial.

[26] Bjorklund, by initiating these threatening letters, is now estopped from claiming that these letters entitle him to a new trial. When the defendant causes jury misconduct, he or she cannot thereafter be heard to maintain that the conduct was prejudicial. *State v. Bonaparte*, 222 Neb. 469, 384 N.W.2d 304 (1986).

For these reasons, we conclude that this assignment of error is also without merit.

5. Evidentiary Rulings

(a) Assignments of Error

On appeal, Bjorklund alleges that the trial court erred in (1) failing to grant Bjorklund's motions to suppress statements given to law enforcement personnel on December 6, 1992, and on May 25, June 5, and November 22, 1993, and in so doing violated his rights under the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and article I, §§ 1, 3, 7, 11, and 12, of the Nebraska Constitution; (2) admitting highly

prejudicial and cumulative photographs, slides, and videotapes into evidence; and (3) failing to grant Bjorklund's motion for mistrial after the prosecutor used evidence not approved prior to trial, thus violating Bjorklund's rights under the 5th, 8th, and 14th Amendments to the U.S. Constitution and article I, §§ 1, 3, 9, 15, and 26, of the Nebraska Constitution.

(b) Standard of Review

[27,28] 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 that the trial court is the finder of fact and takes into consideration that it observed the witnesses. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

[29] The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine the relevancy and weigh their probative value against their prejudicial effect. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[30,31] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

(c) Analysis

(i) Motions to Suppress

In his first assignment of error in this section, Bjorklund alleges that the trial court erred in failing to grant his motions to suppress statements given to law enforcement personnel on December 6, 1992, and on May 25, June 5, and November 22, 1993, and in so doing violated Bjorklund's 4th, 5th, 6th, 8th, and

14th Amendment rights under the U.S. Constitution as well as his rights under article I, §§ 1, 3, 7, 11, and 12, of the Nebraska Constitution. We disagree.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Strohl, supra*; *State v. Konfrst, supra.* In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Strohl, supra*; *State v. Konfrst, supra.*

[32] A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous. *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993).

[33,34] An accused may waive his or her Fifth Amendment rights to be assisted by counsel during custodial interrogation and against self-incrimination provided that waiver is made voluntarily, knowingly, and intelligently. *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the accused has waived the Fifth Amendment right to counsel. *Moran v. Burbine, supra*; *Miranda v. Arizona, supra*; *State v. Dean, supra.*

[35-37] A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *State v. Dean, supra. Miranda* warnings which adequately inform a defendant of his or her Fifth Amendment rights are also adequate to inform a defendant of his or her Sixth Amendment rights. *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101

L. Ed. 2d 261 (1988); *State v. Dean, supra.* A waiver of counsel which is effective under the federal Constitution is sufficient to waive the right to counsel under the Nebraska Constitution. *State v. Dean, supra.*

In the instant case, Bjorklund argues that the trial court should have suppressed four statements given by him to law enforcement officials. Specifically, Bjorklund argues that prior to giving his statements to law enforcement officials, he did not receive proper *Miranda* warnings; that the statements should not have been taken because he had invoked his right to counsel on December 2, 1992; that several of his statements were surreptitiously recorded and therefore were invalid; and that he was induced into confessing to these crimes by offers of cigarettes and soda pop.

Regarding the December 6, 1992, statement, the trial court found beyond a reasonable doubt that the contact was initiated by Bjorklund; Bjorklund was advised of his *Miranda* rights and freely, voluntarily, and intelligently waived those rights; Bjorklund freely, voluntarily, and intelligently waived his privilege against self-incrimination and his right to counsel prior to making such statements; Bjorklund's statements were not procured or induced, directly or indirectly, by promises, and were not obtained as a result of force, fear, oppression, or coercion; and the statements were not tainted in any way by previous statements made by Bjorklund to law enforcement officials. The trial court then overruled the motion to suppress the December 6 statement.

As to Bjorklund's statements on May 25 and June 5, 1993, the trial court found beyond a reasonable doubt that at the time of those statements, Bjorklund was representing himself and had validly waived his right to court-appointed counsel; the statements were initiated by Bjorklund; Bjorklund was clearly and unequivocally advised of his *Miranda* rights prior to giving the statements at issue; Bjorklund freely, voluntarily, and intelligently waived his privilege against self-incrimination and his right to counsel; Bjorklund freely, voluntarily, and intelligently made these statements; Bjorklund's statements were not procured or induced, directly or indirectly, by promises and were not obtained as a result of force, fear, oppression, or coercion;

and the statements were not tainted in any way by previous statements made by Bjorklund to law enforcement officials. The trial court then overruled the motions to suppress the May 25 and June 5 statements.

On November 22, 1993, following the trial in this matter, Bjorklund again gave a statement to law enforcement officials and subsequently moved to suppress that statement. After a hearing, the trial court overruled the motion. In so doing, the trial court found beyond a reasonable doubt that Bjorklund's statement was freely, voluntarily, and intelligently made by him; the statement was not procured or induced, directly or indirectly, by persons in authority or by force, fear, oppression, or coercion; Bjorklund was clearly and unequivocally advised and warned of his *Miranda* rights; and he voluntarily, knowingly, and intelligently waived his privilege against self-incrimination and right to counsel.

Here, the evidence is such that the trial court could reasonably conclude that Bjorklund initiated the interviews with law enforcement officials which resulted in the statements at issue, that Bjorklund was given the *Miranda* warnings, and that at no time during these statements did Bjorklund request counsel. There being no evidence of coercion or force in obtaining the statements, under the totality of the circumstances, it cannot be said that the trial court's findings or its overruling of the motions to suppress were clearly erroneous. Thus, this assignment of error is without merit.

(ii) Photographs

In his second assignment of error in this section, Bjorklund alleges that the trial court erred in admitting into evidence highly prejudicial and cumulative photographs, slides, and videotapes. Specifically, Bjorklund argues that the probative value of the videotapes, photographs, and slides of the crime scene, the excavation of the body, and the autopsy was outweighed by the prejudicial effect created as a result of the gruesomeness of many of the depictions. We disagree.

[38-40] The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine the relevancy and weigh their probative value against

their prejudicial effect. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome. *State v. McBride, supra*. In homicide cases, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, to show the nature and extent of wounds or injuries, and to establish malice or intent. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998); *State v. McBride, supra*. Admission of videotapes is generally within the trial court's discretion, subject to the same requirements for admission of still photographs. *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983).

Bjorklund does not challenge the foundation laid for the admission of the photographs, videotapes, and slides. Each of the photographs, videotapes, and slides that were admitted into evidence were relevant to prove the condition of the victim's body, the cause of death, intent and malice, or corroboration of Bjorklund's confessions and statements about the kidnapping, rape, and murder. They were highly relevant to the issues in this case, and although many were indeed gruesome, their probative value was not outweighed by their prejudicial effect. As we have stated previously, " '[g]ruesome crimes produce gruesome photographs.' " *State v. McBride*, 250 Neb. at 661, 550 N.W.2d at 677.

[41] Bjorklund also argues that the photographs, videotapes, and slides were cumulative. Cumulative evidence is that evidence tending to prove the same point of which other evidence has been offered. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997). The crime scene photographs were offered for materially different reasons (corroboration of Bjorklund's statements, intent, and condition of Harms' body) than were the autopsy slides (expert opinion on the manner and cause of death) or the videotapes (depiction of the scene and real-time portrayal of the excavation and autopsy). Thus, they did not tend to prove the same point and were not cumulative.

The trial court did not abuse its discretion in admitting the photographs, slides, and videotapes. Thus, Bjorklund's assignment of error in this regard is without merit.

(iii) Motion for Mistrial

In his third assignment of error in this section, Bjorklund argues that the trial court erred in failing to grant his motion for mistrial after the prosecution used evidence not approved prior to trial, thus violating Bjorklund's rights under the 5th, 8th, and 14th Amendments to the U.S. Constitution and his rights under article I, §§ 1, 3, 9, 15, and 26, of the Nebraska Constitution. We disagree.

[42,43] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of that discretion. *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). A motion for mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. *State v. Groves, supra.*

In the instant case, Bjorklund argues that the prosecutor's use of charts which were essentially enlargements of the amended information filed in this case amounted to preliminary instructions which were highly prejudicial and inflammatory. Bjorklund also argues that the charts were admitted into evidence despite the fact that they were not approved prior to trial.

However, we conclude that the trial court did not abuse its discretion in allowing the prosecutor to use the charts at issue in his opening statement or in refusing to grant Bjorklund's motion for mistrial. Here, the charts represented the amended information filed in this case and did not constitute any kind of comment on the evidence, prejudicial evidence, or introduction of incompetent matters to the jury. Additionally, while the charts were admitted into evidence, they were admitted solely for the purposes of preserving the record for appeal on the issue of the motion for mistrial. We also note that the allegations of the amended information were discussed with the jury during voir dire in this case.

[44] We have stated that one is allowed considerable latitude in making an opening statement. *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). While we conclude that the prosecutor committed no error in using the charts in the instant case, any harm that might conceivably have occurred as a result of the use of the charts was removed by the repeated statements of defense counsel, the prosecutor, and the trial judge that nothing counsel said during their opening statements was evidence and could not be considered by the jury. Because we determine that the trial court did not abuse its discretion in overruling the motion for mistrial, we conclude that this assignment of error is also without merit.

6. Prosecutorial Improprieties

(a) Assignment of Error

On appeal, Bjorklund alleges that he was deprived of a fair trial due to prosecutorial improprieties in violation of his rights under the 5th, 8th, and 14th Amendments to the U.S. Constitution and article I, §§ 1, 3, 9, 15, and 26, of the Nebraska Constitution.

(b) Standard of Review

[45,46] In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995). The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991).

(c) Analysis

In this assignment of error, Bjorklund alleges that he was deprived of a fair trial due to prosecutorial improprieties. Specifically, he argues that his rights were violated because the Lancaster County Attorney refused to recuse himself from the case although he was involved in the investigation, because the

prosecution asked fact-specific questions during voir dire, because the prosecutor misstated the law during closing argument, because the prosecutor used charts during his opening statement, and because of the cumulative effect of all these errors. We conclude Bjorklund's arguments are unpersuasive.

[47,48] At the outset, we note that Bjorklund failed to object to the prosecutor's questions during voir dire or to his comments during closing argument. It is a well-settled principle that one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). Additionally, any objection to a prosecutor's arguments made after the jury has been instructed and has retired is untimely and will not be reviewed on appeal. *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). We decline to address these arguments as they were not properly presented for our review.

In the instant case, the simple fact is that the county attorney was not called by the prosecution or the defense as a witness. Therefore, he was not required to withdraw himself from prosecution of this case.

Regarding Bjorklund's arguments concerning the prosecutor's use of charts during his opening statement, we addressed this issue above and found that the use of the charts did not prejudice Bjorklund in any way. We decline to address this argument further in this assignment of error. This assignment of error is without merit.

The prosecutor having committed no improprieties, we need not address Bjorklund's cumulative effect assignment of error in this section.

7. Confrontation Issues

(a) Assignments of Error

On appeal, Bjorklund alleges that the trial court (1) erred in failing to have him present at all critical stages of his trial and (2) denied him his constitutional right to confrontation by precluding effective cross-examination of Sorensen.

(b) Standard of Review

[49,50] A defendant has a constitutionally protected right to be present at all critical stages of his or her trial. *Kentucky v.*

Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). The Confrontation Clause applies to every stage of a trial. *Id.*

[51] Generally, a constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996).

[52] It is within the discretion of the trial court to control and limit cross-examination as necessary to prevent undue prejudice and thus produce a fair trial. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997).

(c) Analysis

In his first assignment of error in this section, Bjorklund alleges that the trial court erred in failing to have him present at all critical stages of his trial. Specifically, Bjorklund alleges that he was denied his right to confront, cross-examine, and be present during the ex parte contact which occurred between the trial judge and the jurors, when Barney tendered his plea, and at Bjorklund's first motion to recuse the trial judge and stay sentencing. We disagree.

In *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), Lotter claimed that the prosecutor and the trial court erroneously engaged in an ex parte communication to obtain assurances from the trial court that Nissen, who was also charged with first degree murder arising out of the same facts, would receive a life sentence if he testified against Lotter. We held in that case that while the communication between the trial court and Nissen was ex parte, a criminal defendant does not have standing to assert the illegality of a codefendant's sentencing agreement. Simply put, Bjorklund does not have standing to assign as error in this case that he was not allowed to be present at or to participate in Barney's plea hearing. This assignment of error is without merit.

[53] Bjorklund also argues that his absence from the hearing on his first motion to recuse Judge Endacott from sentencing was error and violative of his rights to be present and to confrontation. However, we note that Bjorklund's counsel was present at this hearing and never registered any objection regarding Bjorklund's absence. Both this court and the U.S. Supreme Court have noted that a constitutional right may be forfeited in

criminal as well as civil cases by the failure to make a timely assertion before a tribunal having jurisdiction to determine it. *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (holding that defendant must assert right of confrontation and right to be present at time of alleged violation and cannot claim those rights for first time on appeal); *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995), *questioned on other grounds, State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998). Bjorklund has thus failed to preserve this question for our review.

Because we determine that Bjorklund's rights to confrontation and to be present were not implicated with regard to the hearing at which Barney tendered his plea, were not properly raised for our review with regard to the motion for recusal, and were properly disposed of below with regard to the ex parte communication, we conclude this assignment of error to be without merit.

[54,55] In his second assignment of error in this section, Bjorklund argues that the trial court denied him his constitutional right to confrontation by precluding effective cross-examination of Sorensen. As we noted above, the functional purpose of the Confrontation Clause is to ensure the integrity of the fact-finding process through the provision of an opportunity for effective cross-examination. *Kentucky v. Stincer*, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). Under the Nebraska rules of evidence, courts limit cross-examination of witnesses to the subject matter of the direct examination and matters affecting the credibility of the witness. Neb. Evid. R. 611(2), Neb. Rev. Stat. § 27-611(2) (Reissue 1995).

Here, the State filed a motion in limine prohibiting any reference to polygraph examinations or to the fact that Bjorklund offered to take a polygraph examination. The trial court granted that motion, and, at trial, defense counsel sought to have the trial court reconsider its ruling and allow him to cross-examine Sorensen regarding Bjorklund's offer to take the polygraph. However, during his exchange with the trial court, defense counsel stated, "The State did question the detective concerning delivering a message to Mr. Bjorklund, [but] did not say what that message was."

[56] The scope of cross-examination is necessarily limited by the scope of direct examination. § 27-611. The record is clear, and defense counsel by his own admission stated, that the prosecution did not open the door by mentioning polygraphs or by questioning Sorensen as to the content of the message delivered by him to Bjorklund. The trial court did not abuse its discretion in controlling and limiting cross-examination to the subject matter of direct examination, nor did the trial court infringe upon Bjorklund's right to confront Sorensen regarding all matters to which he testified on direct examination. This assignment of error is also without merit.

8. Jury Instructions

(a) Assignments of Error

Bjorklund next alleges that the trial court erred in failing to (1) instruct the jury on first degree sexual assault, attempted first degree sexual assault, and kidnapping as lesser-included offenses of first degree felony murder and (2) include malice as an essential element of second degree murder.

(b) Standard of Review

[57] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997).

[58] Whether jury instructions given by a trial court are correct is a question of law. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997).

(c) Analysis

In his first assignment of error in this section, Bjorklund alleges that the trial court erred in failing to instruct the jury on first degree sexual assault, attempted first degree sexual assault, and kidnapping as lesser-included offenses of first degree felony murder. We disagree because the evidence produced no rational

basis for acquitting Bjorklund of the greater offense while convicting him of one of the lesser offenses for which instructions were requested.

As noted above, we have repeatedly indicated that in Nebraska, felony murder contains no lesser-included homicide offenses. See, e.g., *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982). Those cases all presented felony murder cases in which the defendant requested an instruction on a lesser homicide offense, and not an instruction relating to the predicate felony.

[59] We have stated that a predicate felony is a lesser-included offense of felony murder for sentencing purposes, such that a defendant cannot be convicted and sentenced for both felony murder and the underlying felony without violating the Double Jeopardy Clause. See, *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). However, we have not directly confronted the question of whether a defendant in a felony murder case may be entitled to a lesser-included offense instruction on the underlying felony.

We do not need to decide the question in the instant case because the record in this case provides no basis for the giving of a lesser-included offense instruction. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998); *State v. Becerra, supra.*

Even assuming that the first prong of this test has been satisfied, it is evident that the second prong has not. In the instant case, it is impossible to rationally conclude that the killing of Harms did not occur in the perpetration of a sexual assault and kidnapping. Consequently, while Bjorklund could certainly have been convicted of sexual assault, attempted sexual assault, or kidnapping, there was no rational basis for convicting Bjorklund

of these offenses and yet acquitting him of the greater offense of felony murder.

[60] Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction. *State v. Parks, supra*; *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *questioned on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). Thus, even assuming that a predicate felony may be a lesser-included offense of felony murder, Bjorklund was not entitled to a lesser-included offense instruction.

Bjorklund also argues that failure to give a lesser-included offense instruction violated the holding of *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). This argument is similarly without merit. In *Beck*, the U.S. Supreme Court held that Alabama's failure to afford capital defendants the protection provided by lesser-included offense instructions violated the defendant's due process rights. *Beck* was predicated on the basic rule of law that " 'the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " 447 U.S. at 635. The Court thus concluded that

> when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

447 U.S. at 637.

Such circumstances are not present in the instant case because, as noted above, the record would not permit a rational jury to find Bjorklund guilty of the lesser underlying felonies and acquit him of the greater offense of first degree murder. Consequently, if the jury credited the evidence establishing Bjorklund's guilt of an underlying felony, there could be no rea-

sonable doubt with respect to the element that would justify conviction for felony murder—that the victim was killed in perpetration of the underlying felony.

We also note that Bjorklund was charged with first degree murder under both a felony murder theory and a premeditation theory. Pursuant to the premeditation theory, the jury was instructed that they could find Bjorklund guilty of second degree murder or manslaughter as lesser-included offenses of premeditated first degree murder. The "all-or-nothing" situation contemplated by *Beck v. Alabama, supra*, is simply not present in the instant case. In short, *Beck* does not support Bjorklund's argument. His assignment of error is meritless.

In his second assignment of error in this section, Bjorklund argues that the trial court erred in failing to include malice as an essential element of second degree murder. In light of our holding in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), such an instruction would also be an incorrect statement of the law because malice is not an element of second degree murder. We conclude this assignment of error to be without merit.

9. Sentencing

(a) Assignments of Error

Bjorklund alleges, summarized, as follows:

(1) The trial court erred in overruling his motions to exclude death as a possible sentence.

(2) The death penalty should not be imposed when a jury makes no finding that the defendant intended to kill, attempted to kill, or actually did kill the victim; had a major personal involvement in any underlying felony during which the victim was killed; or showed a reckless indifference to human life.

(3) The trial judge erred in failing to recuse himself from sentencing when there was evidence of bias or prejudice and when he initiated and received ex parte communications.

(4) The trial court erred in failing to call a three-judge panel as requested by Bjorklund when there were specific and compelling reasons why a three-judge panel was required.

(5) The trial court erred in failing to make specific, written findings of fact on nonstatutory mitigating circumstances and in

failing to enunciate which nonstatutory mitigating factors were considered.

(6) The trial court erred in failing to conduct a proper proportionality review pursuant to Neb. Rev. Stat. § 29-2521.02 (Reissue 1995).

(7) The trial court erred in imposing the death penalty when that penalty was more excessive than that imposed in factually similar cases, including that of Bjorklund's equally culpable codefendant.

(8) The trial court erred in not conducting a fair comparative review, mandatory under Neb. Rev. Stat. § 29-2522(3) (Reissue 1995).

(9) The trial court erred in allowing the presentence investigation report to be entered into evidence at sentencing.

(10) The trial court erred in allowing victim impact statements which contained advocacy of the type of punishment which should be imposed to be included in the presentence investigation report.

(11) The trial court erred in finding that the evidence offered by the State proved aggravators beyond a reasonable doubt.

(12) The trial court erred in not finding that the statutory and nonstatutory mitigating circumstances approached or exceeded the weight of the aggravating circumstances.

(13) Death by electrocution constitutes cruel and unusual punishment.

(14) Neb. Rev. Stat. § 29-2520 (Reissue 1995) lacks appropriate standards for impaneling a three-judge panel.

(15) Section 29-2520 is unconstitutional because a defendant is denied the right to have a jury determine death eligibility.

(16) Section 29-2521 fails to give the defendant adequate notice of aggravating circumstances.

(17) Neb. Rev. Stat. §§ 29-2521 through 29-2524 (Reissue 1995) are unconstitutional because a sentencing panel is not required to enunciate which nonstatutory mitigating factors were considered and found to exist.

(18) Section 29-2522 provides insufficient guidance as to the manner in which the sentencer should weigh aggravating and mitigating circumstances.

(19) Sections 29-2521.03 and 29-2522(3), as interpreted by *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), and *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), excessively limit comparative proportionality review and contravene the plain meaning of the statute.

(20) The holdings of this court regarding § 29-2521.03 are unconstitutional and violate the clear mandatory language of the statute.

(21) Section 29-2522(3) deprives a defendant of an accurate and consistent proportionality review.

(22) The manner in which the then applicable version of § 29-2523(1)(a) through (c) utilized the terms "substantial history," "apparent effort," and "especially heinous, atrocious, cruel" was vague and overbroad.

(23) Nebraska's death penalty statutes are not sufficiently principled, have not been consistently followed and enforced by the courts, and are unconstitutionally vague and overbroad.

(b) Standard of Review

[61] A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995); *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992).

[62,63] It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996). 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 courts below. *State v. Burlison, supra*; *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997).

[64] The determination of whether mitigating circumstances approach or exceed the weight of aggravating circumstances is not a numerical process, but, rather, involves the reasoned judg-

ment of the sentencing authority. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996).

The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by a trial court. *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997); *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997); *State ex rel. Shepherd v. Neb. Equal Opp. Comm.*, 251 Neb. 517, 557 N.W.2d 684 (1997).

(c) Analysis

[65] Bjorklund's first assignment of error in this section is that the trial court erred in overruling his motions to exclude death as a possible sentence. Bjorklund failed, however, to argue this assignment in his brief. We have repeatedly stated that absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Thieszen, supra*. We see no reason to alter this rule in the present case and decline to address this assignment of error.

In his second assignment of error, Bjorklund argues that the death penalty should not be imposed when a jury makes no finding that the defendant intended to kill, attempted to kill, or actually did kill the victim; had a major personal involvement in any underlying felony during which the victim was killed; or showed a reckless indifference to human life. We disagree.

Specifically, Bjorklund argues that the jury's failure to make specific findings in its verdict and the subsequent imposition of the death penalty violated the U.S. Supreme Court's holding in *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). In *Enmund*, the Court struck down the imposition of the death penalty in a case in which the defendant, who drove the getaway car, did not himself kill or intend to kill the victims and was not present at the killings. The Court held that the death penalty violated the 8th and 14th Amendments to the U.S. Constitution when imposed upon a defendant who was not equally culpable with his codefendants who actually killed the victim.

The Supreme Court subsequently clarified the holding of *Enmund* in *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). The Court stated:

> *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence—the taking of human life—the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

481 U.S. at 157-58.

The Court concluded:

> Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required. We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.

481 U.S. at 158.

Bjorklund argues that without a specific finding by the jury, we cannot know whether he was "death eligible," brief for appellant at 72, because he might be simply an aider and abettor for whom the death penalty, under *Enmund v. Florida, supra*, would be inapplicable. We determine that the concerns of the Court in *Enmund* are simply not present in this case. Bjorklund, in his statement to police on December 6, 1992, said, "We're both responsible. I was as responsible as he was, and he's as responsible as I am." In another statement given to police on June 5, 1993, Bjorklund stated that "whatever went on, whatever you say, I said whatever's happening it's 50/50, did I not say that. . . . So I didn't try to minimize anything. I told you the way

it was and I informed you that I felt it was 50/50." Bjorklund stated he was equally responsible. Bjorklund admitted he had a choke hold on Harms when he stumbled and fell on top of her. Dr. Matthias I. Okoye, a forensic pathologist, testified that one of the causes of Harms' death was a broken hyoid bone and strangulation. Bjorklund admitted shooting Harms five times with a .38-caliber revolver.

Additionally, we note that it is not the province of the jury to make the findings posited by Bjorklund in this assignment of error. The lack of a jury finding in this regard has no impact on sentencing because the *Enmund v. Florida, supra*, question is addressed as a mitigating circumstance during the sentencing phase of a capital case. It is, by statute, a mitigating circumstance that "[t]he offender was an accomplice in the crime committed by another person and his participation was relatively minor." § 29-2523(2)(e). The trial court found during sentencing that Bjorklund failed to establish this mitigator by a preponderance of the evidence, and we agree. For these reasons, we conclude that this assignment of error is without merit.

In his third assignment of error, Bjorklund argues that the trial judge erred in failing to recuse himself from sentencing when there was evidence of bias or prejudice and when the judge initiated and received ex parte communications. We disagree.

[66] A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995); *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992). A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

In support of his argument, Bjorklund points to a letter from the trial judge published in the jury's local newspaper thanking

them for their service, a letter addressed to the trial judge from faculty at Harms' high school, the failure of Bjorklund to be present or confront Barney at his plea proceeding, and certain other ex parte communications. Initially, we note that we have discussed in detail above the lack of error in Bjorklund's absence from Barney's plea proceeding in that Bjorklund did not have standing with regard to Barney's plea agreement and that further, there was no justiciable controversy. We decline to address the issue further here, beyond noting that Bjorklund presents no evidence or authority to suggest that a trial judge who presides over one defendant's plea proceedings is biased and prejudiced as a result and cannot preside over a codefendant's trial and sentencing. See *State v. Lotter, supra.*

The ex parte communications noted by Bjorklund involved hugs given by the trial judge to some of the jurors after the verdict was handed down and the prayer which occurred prior to the trial of the case. The record is clear that neither of these communications either were or were perceived to be comments regarding Bjorklund, the evidence, or the attorneys. We address this matter in detail in response to Bjorklund's other assignments of error.

Regarding the letter to the jury's local newspaper, the trial judge in that letter thanked the jurors for their service and stated that he could not and did not intend to comment in any way on their verdict or the evidence. As for the letter from Harms' high school which stated that it had been solicited by the trial judge, the trial judge indicated on the record that neither he nor his staff had solicited the letter. Bjorklund offered no evidence to indicate bias or prejudice on the trial judge's part and thus did not meet his heavy burden of overcoming the presumption of judicial impartiality. See, *State v. Ryan, supra*; *State v. Lotter, supra*; *Dyas v. Lockhart*, 705 F.2d 993 (8th Cir. 1983), *cert. denied* 464 U.S. 982, 104 S. Ct. 424, 78 L. Ed. 2d 359. See, also, *Dyas v. Lockhart*, 771 F.2d 1144 (8th Cir. 1985) (appeal after remand), and 878 F.2d 1105 (8th Cir. 1989) (second appeal after remand). Therefore, we conclude there is no merit to this assignment of error.

In his fourth assignment of error, Bjorklund argues that the trial court erred in failing to call a three-judge panel after

Bjorklund requested it and when there were specific and compelling reasons why a three-judge panel was required. We disagree.

[67] Section 29-2520 provides that when a person is found guilty under § 28-303, sentencing shall be determined by the trial judge, a panel of three judges including the trial judge, or a panel of three judges excluding the trial judge. We have held that this statute grants the trial judge discretion to conduct the sentencing with or without the assistance of two additional judges and that a defendant's request for a three-judge panel does not make such a panel mandatory. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). The trial judge elected not to request a three-judge sentencing panel based in part on the voluminous record, and we cannot say that this decision constituted an abuse of discretion. This assignment of error is without merit.

[68] In his fifth assignment of error, Bjorklund argues that the trial court erred in failing to make specific, written factual findings on nonstatutory mitigating circumstances and in failing to enunciate which nonstatutory mitigating factors were considered. Bjorklund alleges that this failure deprived him of a rational and intelligent review of the record and findings, and violated his 8th and 14th Amendment rights and his state-created liberty interest rights. We disagree.

Section 29-2522 states:

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

Regarding the constitutionality of § 29-2522, we have previously stated that "[t]he Constitution does not require the sentencing judge or judges to make specific written findings with regard to nonstatutory mitigating factors." *State v. Reeves*, 234 Neb. 711, 741, 453 N.W.2d 359, 379 (1990), *judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409.

In the instant case, the trial judge clearly abided by the statutory mandates found in § 29-2522. The trial judge made written

findings of fact and set forth individually each statutory aggravating and mitigating circumstance involved in the case. The trial judge then stated that "the court has considered all nonstatutory mitigating evidence offered by defendant, including but not limited to evidence relating to the character and background of defendant, as well as the circumstances of the offense. The court has given such evidence that weight, if any, to which it is entitled."

We conclude that this is a reference sufficient to satisfy the statute, given that we have previously stated that more specific references to nonstatutory mitigating factors are not required. Therefore, this assignment of error is also without merit.

In his sixth assignment of error, Bjorklund argues that the trial court erred in failing to conduct a proper proportionality review pursuant to § 29-2521.03. This court recognizes that in *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), there was discussion by some members of the court regarding the scope of proportionality review, but in this case, we need not revisit that issue because regardless of what kind of proportionality review is conducted, we conclude that Bjorklund would still be eligible for the death penalty. We conclude that this assignment of error is without merit because the statute cited concerns the proportionality review conducted by this court and does not involve review by the sentencing court.

In his seventh assignment of error, Bjorklund argues that the trial court erred in imposing the death penalty on Bjorklund when that penalty was more excessive than that imposed in factually similar cases, including that of his equally culpable codefendant. We disagree.

Section 29-2521.03 states that "[n]o sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." Bjorklund cites *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (1991); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); and *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985), *overruled on other grounds, State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), as examples of factually similar cases in which life imprisonment, rather than the death penalty, was imposed. Bjorklund also argues that his

codefendant, Barney, was equally culpable and yet received a sentence of life imprisonment.

[69] We have, however, repeatedly held that proportionality review under § 29-2521.03 looks only to other cases in which the death penalty has been imposed. *State v. Lotter, supra*; *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996); *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

In his eighth assignment of error in this section, Bjorklund alleges that the trial court erred in not conducting a fair comparative review which is mandatory under § 29-2522(3), violating Bjorklund's Eighth Amendment and due process rights and his state-created liberty interest rights. We disagree.

In this assignment of error, Bjorklund reiterates the arguments presented in the previous assignment of error. As we stated in dismissing that assignment, "similar cases" for purposes of proportionality review means only other cases in which the death penalty is imposed. The sentencing court, like this court, could not have found that imposing the death penalty in this case would be excessive or disproportionate to the imposition of the same penalty in other cases. Accordingly, we conclude this assignment of error to be without merit.

In his ninth assignment of error, Bjorklund alleges that the court erred in allowing the presentence investigation report to be entered into evidence at sentencing. Again, we disagree.

[70,71] In resolution of this assignment of error, we note that the sentencing phase is separate and apart from the trial phase and that the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Strohl, supra*; *State v. Ryan, supra*; § 29-2521.

This court has previously stated:

> "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the sourse [sic] and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning the defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue."

State v. Ritsch, 232 Neb. 407, 408-09, 440 N.W.2d 689, 691 (1989).

While it is clear that the presentence investigation report was indeed admissible during sentencing in Bjorklund's case, we also note that the admission of the report worked solely to Bjorklund's advantage. The State requested and the trial court agreed that the report could be used to establish any statutory or nonstatutory mitigating factor, but not aggravating factors. Thus, we conclude Bjorklund's arguments in this regard to be meritless.

In his 10th assignment of error, Bjorklund alleges that the trial court erred in allowing victim impact statements which contained advocacy of the type of punishment which should be imposed to be included in the presentence investigation report. We disagree.

[72] With regard to the admission of victim impact statements to a sentencing body, the U.S. Supreme Court has stated:

> "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Payne v. Tennessee, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (quoting *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) (White, J., dissenting)). Thus, to the extent that victim impact statements go merely to showing the personal characteristics of the victim or the emotional impact of the crime on the family, their admission at sentencing has been expressly held not to violate the U.S. Constitution.

[73] There remains, however, one category of victim impact statements that may not be admitted at a capital sentencing even after *Payne v. Tennessee, supra*. *Payne* did not overrule the holding in *Booth v. Maryland, supra*, that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. *Payne v. Tennessee, supra*. Therefore, to the extent that such evidence was admitted at the sentencing, it should not have been.

[74,75] Nevertheless, the Eighth Amendment is not violated unless the sentencing body considers impermissible statements in reaching the sentencing decision. While, as *Booth v. Maryland, supra*, made clear, a jury will be assumed to have considered such impermissible statements, the presumption for judges is the opposite. As we stated in *State v. Joubert*, 235 Neb. 230, 249, 455 N.W.2d 117, 130 (1990):

> The situation is no different than that presented in a bench trial where the judge suppresses a confession, presides over the trial, and then imposes sentence. The fact that a judge reviews a confession does not disqualify him from continuing to preside over the remaining phases of the trial. This is so because it is presumed that judges disregard evidence which should not have been admitted.

[76] Unlike the three-judge panel in *State v. Joubert, supra*, the sentencing judge in this case did not explicitly state that he did not consider statements by the victim's family. Neither, however, has Bjorklund presented any evidence that the sentencing judge considered victim impact statements. In the absence of evidence to the contrary, the presumption is that a judge will disregard evidence that should not have been admit-

ted. *State v. Joubert, supra*; *State v. Sheridan*, 230 Neb. 979, 434 N.W.2d 338 (1989).

In our recent opinion in *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999), we determined that the sentencing judge in a capital case committed error in meeting with members of the victim's family prior to sentencing. However, the error in that case was based on the fact that the trial judge met with the family privately, in an ex parte communication. *Id.* That error is not present in the instant case, as the victim impact statements were offered into evidence as part of the presentence investigation report. Defense counsel was thus aware of the victim impact statements and had a fair opportunity to respond, so there was no improper ex parte communication with the victim's family as in *State v. Ryan, supra.*

Bjorklund's arguments with regard to this assignment of error are without merit.

In his 11th assignment of error in this section, Bjorklund argues that the trial court erred in finding that the State proved the relevant aggravating circumstances beyond a reasonable doubt and in not finding that the statutory and nonstatutory mitigating circumstances approached or exceeded the weight of the aggravating circumstances, thus violating Bjorklund's 8th and 14th Amendment rights under the U.S. Constitution. We disagree.

[77,78] Aggravating circumstances must be proved beyond a reasonable doubt. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996). Bjorklund argues that the State failed to prove beyond a reasonable doubt the statutory aggravators found in § 29-2523(1)(a), (b), and (d). The crux of Bjorklund's argument is that the trial court relied solely on Bjorklund's statements to demonstrate the required proof and that uncorroborated statements are insufficient to provide that proof. It is true that a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, but it is competent evidence of that fact and may, with slight corroborative circumstances, be sufficient to warrant a conviction. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). A de novo review of the record as well as an examination of the sentencing order in this case demonstrates that each aggravating factor was proved beyond a rea-

sonable doubt through the use of Bjorklund's own statements in conjunction with the testimony of other witnesses and the physical evidence admitted.

Section 29-2523(1)(a) provides as an aggravating circumstance that "[t]he offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity." The trial court found, and the evidence supports a finding, that this aggravating circumstance applies to Bjorklund only with regard to the "substantial history of serious assaultive or terrorizing criminal activity." § 29-2523(1)(a). The State proved beyond a reasonable doubt that from August to September 1992, Bjorklund committed three robberies in which he threatened the victims or struck them with a gun and that he aided and abetted Barney in committing two other robberies in which Barney brandished a weapon. The record amply demonstrates that the aggravating circumstance of a substantial history of terrorizing or assaultive criminal behavior is present in this case.

The version of § 29-2523(1)(b) effective at the time of Bjorklund's sentencing provided as an aggravating circumstance that "[t]he murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." The trial court found, and the evidence supports beyond a reasonable doubt, that this aggravating circumstance is present in this case. The evidence demonstrates that when Harms was abducted by Bjorklund, Bjorklund made no attempt to conceal his identity and that when the duct tape was placed over her eyes and mouth, Harms had already clearly seen and could identify each of her abductors. In his December 6, 1992, statement to the police, Bjorklund admitted, "I said what are we gonna do and [Barney] said well she can't talk. . . . He says well, we're gonna have to do, we're gonna have to shut her up. . . . So then, I said, well where do we go . . . ." Bjorklund also stated that the duct tape was applied in such a manner that Harms could still see some of what was happening around her and that he would have been at a significant risk of being identified if Harms had not been killed. The record amply

demonstrates that the aggravating circumstance of murder to conceal one's identity is present in this case.

Section 29-2523(1)(d) provides as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." The trial court found, and the evidence supports beyond a reasonable doubt, that this aggravating circumstance is present in this case. The evidence, which includes Bjorklund's statements, the physical evidence, and the expert testimony in this case, establishes that Harms was abducted, bound with duct tape, sexually assaulted by Bjorklund, and sexually assaulted by Barney. Harms was taken to a remote location, choked by Bjorklund, shot in the head by Barney, and left in a field to die. Bjorklund and Barney returned to retrieve a blanket, and when Bjorklund realized that Harms was not dead, he shot her several more times in the head.

The evidence also establishes that Bjorklund told a fellow inmate that he and Barney subjected Harms to sexual intercourse "in every way," that they forced her to perform oral sex on one of them while the other was having sexual intercourse with her, that they made her say "how good they were," that they forced her to do "all kinds of nasty things," that they "beat her around," and that they did "just anything to make her do what they wanted her to do."

Finally, although the trial court did not rely on the following evidence to establish the existence of this aggravating circumstance, the record also demonstrates beyond a reasonable doubt that Harms received numerous incised wounds above, below, and on her left breast as well as on her upper right arm adjacent to her right breast which were consistent with sexual sadism and torture.

In summary, we conclude that the evidence amply demonstrates a murder that was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence and thus, that the trial court properly found that aggravating circumstance.

Because we have concluded that each of the aggravating circumstances found by the trial court was established beyond a reasonable doubt and that those portions established through use

of Bjorklund's statements were also sufficiently corroborated by other evidence in this case, Bjorklund's 11th assignment of error has no merit.

In his 12th assignment of error, Bjorklund argues that the trial court erred in not finding that the statutory and nonstatutory mitigators approached or exceeded the weight of the aggravators and in so doing, violated Bjorklund's rights under the 8th and 14th Amendments to the U.S. Constitution. We disagree.

[79] The determination of whether mitigating circumstances approach or exceed the weight of aggravating circumstances is not a numerical process, but, rather, involves the reasoned judgment of the sentencing authority. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996). After proof of at least one aggravating circumstance, the sentencing authority under Nebraska's capital sentencing scheme is granted the discretion to determine the weight to be given to aggravating and mitigating circumstances and make a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of circumstances present. *State v. Moore, supra.*

The trial court found and considered as a mitigating circumstance that Bjorklund's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was impaired as a result of mental illness, mental defect, or intoxication. The trial court also considered nonstatutory mitigating factors in its determination of Bjorklund's sentences.

Based upon our de novo review of the aggravating and mitigating circumstances in this case, we determine that the aggravating circumstances proven to exist far outweigh the mitigating circumstances and that therefore the imposition of the death penalty in this case is appropriate. Accordingly, Bjorklund's 12th assignment of error is without merit.

[80] In his 13th assignment of error, Bjorklund alleges that death by electrocution constitutes cruel and unusual punishment. We have previously held that the death penalty by electrocution as punishment for crime is not cruel and unusual punishment within the meaning of the U.S. or Nebraska Constitutions. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766

(1995). We reaffirm our holding in *State v. Ryan, supra*, and conclude this assignment of error to be without merit.

[81] Bjorklund contends in his 14th assignment of error that § 29-2520 lacks appropriate standards for impaneling a three-judge panel. We have previously addressed this very issue in *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), and *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409. We reaffirm the holdings in *State v. Ryan, supra*, and *State v. Reeves, supra*, wherein we held that the sentencing procedure provided by § 29-2520 provides appropriate standards for impaneling a three-judge panel. Bjorklund's contention is, therefore, without merit.

[82] In his 15th assignment of error, Bjorklund argues that § 29-2520 is unconstitutional because a defendant is denied the right to have a jury determine death eligibility. Jury sentencing in a capital case is not, however, required under either the U.S. or Nebraska Constitutions. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); *State v. Ryan, supra*; *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). We reaffirm these previous decisions and thus conclude this assignment of error to be without merit.

Bjorklund proposes in his 16th assignment of error that § 29-2521 fails to give defendants adequate notice of aggravating circumstances. Bjorklund is essentially arguing that he was denied adequate notice as to nonstatutory aggravating circumstances. However, in the instant case, the State did not attempt to prove, nor did the trial judge find, nonstatutory aggravating factors. Instead, the State specifically identified aggravating circumstances as provided in § 29-2523(1)(a), (b), and (d).

[83] As we previously stated in *State v. Reeves, supra*, the State is not constitutionally required to provide the defendant with such notice. Notice was, however, afforded in this case. This assignment of error is without merit.

In Bjorklund's 17th assignment of error, he contends that §§ 29-2521 through 29-2524 are unconstitutional because a sentencing panel is not required to enunciate which nonstatutory mitigating factors were considered and found to exist. We reject

Bjorklund's argument in recognition of our previous holding in *State v. Reeves, supra.*

Bjorklund contends in his 18th assignment of error that § 29-2522 provides insufficient guidance as to the manner in which the sentencer should weigh aggravating and mitigating circumstances. As we held in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), the argument that the sentencing judge is given too much discretion under the Nebraska scheme has been foreclosed by the U.S. Supreme Court. See *Proffitt v. Florida, supra.* Therefore, this assignment of error is without merit.

Bjorklund's 19th, 20th, and 21st assignments of error pertain to the appropriateness of Nebraska's proportionality review guidelines. We have previously addressed these issues and reaffirm our holdings in *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), and *State v. Palmer, supra.* These assignments of error are without merit.

[84] In his 22d assignment of error, Bjorklund challenges the manner in which § 29-2523(1) utilizes the terms "substantial history" found in subsection (a); "apparent effort" found in subsection (b); and "especially heinous, atrocious, cruel" found in subsection (d). We have consistently held that Nebraska's death penalty statutes, which include § 29-2523(1), are neither vague nor overbroad. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), citing *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), and *State v. Simants, supra.*

We have also previously analyzed the specific terms Bjorklund challenges. In *State v. Rust*, 197 Neb. 528, 535, 250 N.W.2d 867, 872-73 (1977), we determined that the aggravating circumstance found in § 29-2523(1)(a) applied where the defendant had a prior conviction for assault with intent to inflict great bodily harm, and we stated that "[w]e interpret '*substantial history* of serious assaultive or terrorizing criminal activity' to refer to events and incidents prior to and not part of the events out of which the current charge arises. The use of the term 'history' clearly implies earlier events." (Emphasis in original.)

In *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), we found the existence of circumstance (1)(a) of § 29-2523, where the defendant had convictions for armed robbery and first-degree assault and three convictions for bank robbery. We stated in *State v. Holtan*, 197 Neb. at 546, 250 N.W.2d at 879:

> The words "serious," "assaultive," and "terrorizing" are words in common usage with meanings well-fixed and generally clearly understood. The term "substantial history" is likewise reasonably clear. "History" refers to the individual's past acts preceding the incident for which he is on trial and "substantial," as here used, refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence.

In *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), we considered whether this court's interpretation and application of § 29-2523(1)(a) are unconstitutionally vague or overbroad under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Under the rationale of *Furman v. Georgia, supra*, statutory aggravating circumstances must be clearly defined and applied by a court so as to prevent a sentencing body from exercising discretion that may lead to arbitrary or inconsistent results. We concluded in *State v. Ryan, supra*, that the *Furman* standard is met by our interpretation and application of § 29-2523(1)(a) and that it is, therefore, not unconstitutionally vague or overbroad.

In *State v. Reeves*, 234 Neb. 711, 754, 453 N.W.2d 359, 386 (1990), *judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409, we held that the term "apparent" as used in § 29-2523(1)(b) means " 'readily perceptible' " and therefore that the provision cannot be applied in speculative situations or where a strained construction is necessary to fulfill it. In *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), we broke down the phrase "readily perceptible" in an effort to further define the term "apparent." We determined that "readily perceptible" means " 'capable of being easily noted' " or " 'capable of being noted

without trouble.' " *Id.* at 521, 586 N.W.2d at 635. We concluded that for a "sentencing panel to conclude that [the defendant] murdered [the victims] in an '"'apparent effort to conceal the commission of a crime,'"' it must have been obvious to the panel that that was [the defendant's] purpose. If it were not obvious, it would not have been 'easily capable of being noticed.' " *Id.* at 521-22, 586 N.W.2d at 635.

In *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), we determined that § 29-2523(1)(b) is not overbroad.

In *State v. Rust*, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977), we analyzed the "especially heinous, atrocious, cruel" language and adopted the following statement made by the sentencing panel:

> "We recognize that all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed [in § 29-2523(1)(d)], but by the use of the [word] 'especially' . . . the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering."

We have further held that an "especially heinous, atrocious, cruel" murder includes a " 'pitiless crime which is unnecessarily torturous to the victim' and to cases where torture, sadism, or the imposition of extreme suffering exists," *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982), *habeas corpus granted on other grounds, Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), or where the murder was preceded by acts "performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time," *State v. Hunt*, 220 Neb. 707, 725, 371 N.W.2d 708, 721 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

We conclude, as we did in *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), that this court has adopted a limiting construction on the aggravating circumstance of § 29-2523(1)(d), and further affirm our holding in *State v. Ryan, supra*, that this limiting construction comports with U.S. Constitutional require-

ments and thus, the language in subsection (1)(d) is not vague or overbroad. See, also, *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990).

[85] This court has previously analyzed the terms "substantial history"; "apparent effort"; and "especially heinous, atrocious, cruel," as used in § 29-2523(1)(a), (b), and (d), and after reviewing our past analysis, we hold that these terms as utilized are neither vague nor overbroad. Accordingly, Bjorklund's assignment of error in this section is without merit.

Finally, in his 23d assignment of error, Bjorklund contends that Nebraska's death penalty statutes are not sufficiently principled, have not been consistently followed and enforced by the courts, and are unconstitutionally vague and overbroad. We hold that such an argument has sufficiently been addressed above and decline to address it further here. Accordingly, Bjorklund's last assignment of error in this section is also without merit.

10. Ex Parte Communications Between Judge and Jury

(a) Assignments of Error

Bjorklund next alleges in multiple assignments of error that the trial court erred in conducting what he characterizes as ex parte judicial prayer sessions with the jury and that the trial judge reviewing Bjorklund's second motion for new trial filed on those grounds erred in overruling the motion. Specifically, Bjorklund alleges:

(1) The reviewing judge erred in failing to find that the ex parte contact constituted a violation of Bjorklund's rights to freedom of religion and freedom from excessive entanglement of religion with the state as guaranteed by the 1st and 14th Amendments to the U.S. Constitution and article I, § 4, of the Nebraska Constitution and that this violation is not subject to harmless error analysis.

(2) The reviewing judge erred in failing to find that the ex parte contact violated Bjorklund's right to be present as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution, and by article I, § 11, of the Nebraska Constitution, and by Neb. Rev. Stat. § 29-2001 (Reissue 1995) and that this violation is not subject to harmless error analysis

under the authority of *Strasheim v. State*, 138 Neb. 651, 294 N.W. 433 (1940).

(3) The reviewing judge erred in failing to find that the ex parte contact violated Bjorklund's right to counsel as guaranteed by the 6th and 14th Amendments to the U.S. Constitution and by article I, § 11, of the Nebraska Constitution and that this violation is not subject to harmless error analysis.

(4) The reviewing judge erred in failing to find that the ex parte contact violated Bjorklund's right to be free from conviction except upon proof of guilt beyond a reasonable doubt as guaranteed by the due process provisions of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution and that this violation cannot be subject to harmless error analysis.

(5) The reviewing judge erred in failing to find that the ex parte contact violated Bjorklund's rights to a fundamentally fair trial by an impartial jury and to due process of law as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution and by article I, §§ 3 and 6, of the Nebraska Constitution and that this violation is not subject to harmless error analysis.

(6) The reviewing judge erred in failing to find that the ex parte contact was a structural error within the meaning of *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), and therefore not subject to harmless error analysis.

(7) The reviewing judge erred in failing to find that the constitutional rights violated by the ex parte communication are so basic to a fair trial that their violation can never be considered harmless.

(8) The reviewing judge erred in applying the presumption-of-prejudice test to the ex parte contact because the contact violated rights guaranteed to Bjorklund by the 1st, 5th, 6th, and 14th Amendments to the U.S. Constitution and by article I, §§ 3, 4, 6, and 11, of the Nebraska Constitution.

(9) The reviewing judge erred in admitting juror testimony, over Bjorklund's objections, concerning the effect of the trial court's ex parte contact on the jurors' thoughts, minds, and mental processes.

(10) The reviewing judge erred in finding that the presumption of prejudice created by the ex parte contact was rebutted by the State with proof beyond a reasonable doubt that the constitutional error was harmless.

(b) Standard of Review

[86] A motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994).

[87,88] In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996); *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

(c) Analysis

(i) Freedom of Religion

In his first assignment of error in this section, Bjorklund argues that the ex parte contact which occurred between the trial judge and the regular and alternate jurors violated Bjorklund's rights to freedom of religion and freedom from excessive entanglement of religion with the State under the Establishment Clause of the First Amendment to the U.S. Constitution and the religious freedom clause of the Nebraska Constitution and that this error is not subject to harmless error analysis. We disagree.

In *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), the petitioner sued for declaratory and injunctive relief against the transfer of government property to a religious organization without payment. The property was part of an Army hospital, and under a plan to

reduce the number of military installations, the Secretary of Defense proposed to close the hospital and the General Services Administration declared it to be " 'surplus property.' " 454 U.S. at 468. The government eventually conveyed the 77-acre tract of land to Valley Forge Christian College, a nonprofit educational institution operating under a religious order known as the Assemblies of God, and the deed required the college to use the property for 30 years solely for systematic training on the collegiate level of men and women for Christian services either as ministers or laymen. The respondents described themselves as a nonprofit organization composed of 90,000 taxpayer members and claimed that each member would be deprived of the fair use of his or her tax dollar. The U.S. Supreme Court stated:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[T]hat concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S., at 204, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

(Emphasis omitted.) 454 U.S. at 485-86.

We do not agree that the ex parte communication infringed on Bjorklund's religious rights. Bjorklund's rights to freedom of religion and to worship as he pleases did not suffer in any way due to the trial court's ex parte contact with the jury, and Bjorklund does not claim to have suffered such effect.

Therefore, we determine that Bjorklund failed to identify any personal injury suffered by him as a consequence to the ex parte contact, and we therefore conclude that Bjorklund does not have

standing to raise a claim under the Establishment Clause, and this assignment of error is without merit.

We are aware that the U.S. Court of Appeals for the Fourth Circuit has addressed an issue somewhat similar to this case in *North Carolina Civil Liberties v. Constangy*, 947 F.2d 1145 (4th Cir. 1991), and found that the judge's conduct in that instance violated the three-part test for separation of church and state set forth by the U.S. Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). In that case, the judge engaged in a lengthy prayer from the bench at the beginning of court each day. The Fourth Circuit found that the judge's actions served a wholly religious purpose, that the content of the prayer clearly conveyed a message of endorsement of religion, and that to start each day with a prayer injected religion into the judicial process in such a manner as to destroy the appearance of neutrality.

We conclude that *North Carolina Civil Liberties v. Constangy, supra*, does not apply to the instant case. In that case, the plaintiffs were several of the attorneys who were required to be present during the judge's prayers. *Id.* The standing question was squarely presented because the lawyers involved were subject to the judge's religious activity. However, in the instant case, Bjorklund was not subject to the judge's ex parte contact, and therefore, he lacked standing to raise a freedom of religion claim. We find, pursuant to *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), that Bjorklund lacks standing to raise a freedom of religion claim in the instant case. Thus, we do not reach the question of whether the judge's actions violated the holding of *Lemon v. Kurtzman, supra.*

Bjorklund also argues that this ex parte communication violated his rights under the religious freedom clause of the Nebraska Constitution. This provision specifically protects an individual's right to worship according to his or her own conscience and prevents government from compelling worship against an individual's consent. Neb. Const. art. I, § 4. For the reasons discussed above, we also conclude that Bjorklund's rights under this provision were not violated.

Because we conclude that Bjorklund does not have standing to raise an Establishment Clause claim, we decline to address Bjorklund's argument that violations of the Establishment Clause are not subject to harmless error analysis.

(ii) Right to be Present and Right to Counsel

In his second assignment of error, Bjorklund argues that the ex parte communication violated his right to be present as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution, by article I, § 11, of the Nebraska Constitution, and by § 29-2001 and that this violation is not subject to harmless error analysis under the authority of *Strasheim v. State*, 138 Neb. 651, 294 N.W. 433 (1940).

In his third assignment of error, Bjorklund argues that the ex parte communication violated his right to counsel as guaranteed by the 6th and 14th Amendments to the U.S. Constitution and by article I, § 11, of the Nebraska Constitution and that this violation is not subject to harmless error analysis for the reason that deprivation of the right to counsel during a critical stage of a criminal prosecution which pervades the entire proceeding can never be considered harmless. Because we determine that the same analysis disposes of both of these assignments of error, we will address them together.

Bjorklund argues that both he and his attorney had a right to be present during the ex parte communications between the trial judge and the jury. Bjorklund is correct, and it was error to conduct this communication without the presence of Bjorklund and his counsel.

[89] A violation of the right to be present in the context of ex parte communications is subject to a harmless error analysis as set forth in *Rushen v. Spain*, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). In *Rushen*, a prospective juror stated that she had no personal knowledge of violent crimes and did not associate the Black Panther Party with any form of violence. At trial, evidence was adduced about an unrelated murder by a member of the Black Panther Party, and this triggered the juror's memory that in the unrelated murder the victim had been the juror's childhood friend. The juror went to the trial judge's chambers to tell him of this. No record was made of this contact, and the trial judge did not inform the attorneys of this contact. The U.S.

Supreme Court upheld the lower court's finding that the unreported ex parte contact between the trial judge and the juror was erroneous, but reversed the lower court's finding that it could never be harmless error. The Supreme Court determined that the communication and its effect on juror impartiality are questions of historical fact and entitled to a presumption of correctness in the absence of " 'convincing evidence' " to the contrary. 464 U.S. at 120. The Supreme Court went on to determine that the contact in this case was harmless error beyond a reasonable doubt. *Id.*

Bjorklund argues that the case *Strasheim v. State*, 138 Neb. 651, 294 N.W. 433 (1940), precludes harmless error analysis of the state constitutional violations alleged in these assignments of error. In *Strasheim*, the judge engaged in a prolonged discourse with jurors who had reported to the courtroom during their deliberations and without the defendant or counsel present. This court found that the defendant had a right to be present and to have his counsel present and that it was the trial court's duty not to resume the proceedings of the trial in their absence. *Id.* In finding that the error was not harmless and remanding the cause, we stated that "[o]ur task is to determine whether or not a fair trial has been had and whether or not prejudicial error has been committed. It [is] manifest that a substantial invasion of defendant's rights has occurred, and that prejudicial error was committed . . . ." 138 Neb. at 656, 294 N.W. at 436.

However, contrary to Bjorklund's position, *Strasheim* undoubtedly stands for the proposition that such errors are subject to harmless error analysis, a result that has been affirmed in our more recent decisions. See, *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991). Thus, we determine that any violation of Bjorklund's right to counsel or presence at the ex parte communication is properly subject to harmless error analysis. The merits of the harmless error analysis performed by the reviewing court in this case will be discussed below.

(iii) Deficient Suggestions as to Burden of Proof

In his fourth assignment of error in this section, Bjorklund argues that the ex parte communication violated his right to be free from conviction except upon proof of guilt beyond a rea-

sonable doubt as guaranteed by the due process provisions of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution and that this violation cannot be subject to harmless error analysis. Specifically, Bjorklund argues that the trial judge suggested through the ex parte communication that the jury could use God's help in reaching their decision and that this suggestion was a "preliminary instruction" violative of due process. We disagree that the ex parte communication constituted any sort of suggestion or preliminary instruction on the burden of proof.

Although neither this court nor the U.S. Supreme Court has dealt with this issue in the context of a similar fact situation, we find particularly persuasive in the disposition of this assignment of error the opinion of the Fifth Circuit in *U.S. v. Ornelas-Rodriguez*, 12 F.3d 1339 (5th Cir. 1994). During voir dire, the trial court in that case told the jury, "'you can go to church on Friday and Sunday of Easter Holy Week and pray that you made all the right decisions . . . .'" *Id.* at 1348. The defendant argued that this statement affected the jury's consideration of the burden of proof because the invitation to pray suggested that the jury could rely on a standard of judgment outside of the formal instructions given. The Fifth Circuit stated:

> Any error which may have occurred as a result of this casual remark was cured by the passage of time [11 days passed between the statement and the submission of the case to the jury] and the trial court's detailed instruction on the presumption of innocence and the burden of proof. There is no evidence that the statement in question deprived [the defendant] of a fair trial.

Id. at 1349.

In the instant case, more than 25 days after the ex parte communication occurred, the trial judge instructed the jury fully on the appropriate burden of proof to be met and that they could not consider anything outside the evidence presented in reaching their verdicts. The jurors at the hearing on the second motion for new trial clearly testified that they did not view the ex parte communication as a comment on the evidence or on Bjorklund's guilt or innocence. The record is clear that the communication which occurred between the trial judge and the jurors could not

and did not constitute any kind of additional instruction on the burden of proof.

[90] We recognize that the U.S. Supreme Court has stated that a constitutionally deficient reasonable doubt instruction requires automatic reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Thus, Bjorklund is correct in arguing that a constitutionally deficient reasonable doubt instruction could not be subject to harmless error analysis. However, because we determine that the ex parte communication in this instance did not constitute such an instruction, we conclude this assignment of error to be without merit. See, also, *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

(iv) Impartial Jury

In his fifth assignment of error, Bjorklund alleges that the ex parte communication violated his right to a fundamentally fair trial by an impartial jury and to due process of law as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution and by article I, §§ 3 and 6, of the Nebraska Constitution and that this violation is not subject to harmless error analysis. We disagree.

The U.S. Supreme Court addressed this issue in *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965), and in *Parker v. Gladden*, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966). In *Turner*, the Court overturned a jury's verdict where the jurors were chaperoned by two deputy sheriffs who were also key witnesses in the case. The Court found that the defendant's right to a fundamentally fair trial by an impartial jury was violated because the deputies' dual roles enhanced their credibility and increased the likelihood of outside discussion. *Turner v. Louisiana, supra*. The Court found that extreme prejudice was inherent in the continual association between key witnesses and the jurors throughout the trial; however, the Court distinguished between its situation and ones such as that presented by Bjorklund when it said that in *Turner*, it dealt not with a brief encounter but with a continuous and intimate association throughout a 3-day trial. *Id.*

In *Parker v. Gladden, supra*, the bailiff told one juror during the trial that the defendant was guilty and told another juror that any errors made by the jurors in convicting the defendant would be corrected by the Supreme Court. In overturning the verdict, the Supreme Court found that such statements were private talk tending to reach the jury by outside influence and that the unauthorized conduct of the bailiff involved such a probability that prejudice could result that it was deemed inherently lacking in due process. *Id.*

This court has also addressed this issue. In *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979), this court found that three contacts between the jurors and the sheriff who was also a key witness in the case implicated the defendant's rights to a fair trial before a fair and impartial jury and to due process of law. *Id.* In that instance, we determined that the contact must be evaluated on a harmless error basis and that, in that instance, the State had not overcome its burden of proving harmlessness beyond a reasonable doubt. *Id.*

[91] Here, while it is clear that a violation of a defendant's right to a fundamentally fair trial by an impartial jury in conjunction with due process of law must be evaluated on a harmless error basis according to both the U.S. Supreme Court and the Nebraska Supreme Court, we conclude that no such violation took place. The contact which occurred between the trial judge and the jurors was not of the nature implicated in the cases discussed above. The trial judge made no comment on the evidence, the law, or the defendant, and, as noted in the reviewing judge's findings, the jurors did not interpret his words as such. The phrase "God be with us" did not enhance the credibility of any witness, serve as an instruction on reasonable doubt, or in any way suggest to the jurors what an appropriate verdict would be in this case. Therefore, we conclude this assignment of error to be without merit.

(v) Structural Error

In his sixth assignment of error, Bjorklund argues that the ex parte contact was a structural error within the meaning of *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.

Ed. 2d 302 (1991), and therefore was not subject to harmless error analysis. We disagree.

In *Arizona v. Fulminante, supra*, the U.S. Supreme Court defined structural errors as those so "affecting the framework within which the trial proceeds," 499 U.S. at 310, that they demand automatic reversal and defined trial errors as those "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt," 499 U.S. at 307-08. The Supreme Court limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. *Id.*

The Court also listed a multitude of errors, many of constitutional magnitude, which were properly termed trial errors and subject to harmless error review. Among those listed were the denial of counsel at a preliminary hearing, the admission of a defendant's coerced statement, and a jury instruction containing an erroneous conclusive presumption. *Id.* In noting that harmless error analysis was appropriate to evaluating many constitutional violations, the Court stated:

> [We] have been faithful to the belief that the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

Arizona v. Fulminante, 499 U.S. at 308.

In *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), Neder was convicted of filing false federal income tax returns and of federal mail fraud, wire fraud, and bank fraud. The trial court instructed the jury that to commit the tax offense, it need not consider the materiality of any false statements even though that language is used in the indictment. The trial court gave a similar instruction on bank fraud. The

Supreme Court accepted certiorari on whether and under what circumstances the omission of an element from the trial judge's charge to the jury can be harmless error. The Supreme Court recognized that most constitutional errors may be harmless, citing *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The Supreme Court held that Neder received a fair trial and that although the trial court committed error in failing to instruct the jury on the element of materiality, that error did not render Neder's trial fundamentally unfair.

We conclude that the ex parte contact which occurred in this case was error, but did not so vitiate all the jury's factual findings as to require automatic reversal. Instead, we conclude that any error which may have occurred is trial error within the meaning of *Neder v. U.S.*, *supra*, and *Arizona v. Fulminante*, *supra*, and not structural error. See *Rushen v. Spain*, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). Therefore, we determine this assignment of error to be without merit.

(vi) Basic to Fair Trial and Presumption of Prejudice Test Does Not Apply

In his seventh and eighth assignments of error in this section, Bjorklund argues that the constitutional rights violated by the ex parte contact are so basic to a fair trial that their violation can never be considered harmless and that the reviewing judge erred in applying the presumption of prejudice test to the ex parte contact because the contact so violated rights guaranteed to Bjorklund by the 1st, 5th, 6th, and 14th Amendments to the U.S. Constitution and by article I, §§ 3, 4, 6, and 11, of the Nebraska Constitution. We determine these assignments of error to be duplicative of those discussed above and conclude that the analysis employed above leads to the conclusion that these assignments of error are without merit.

(vii) Admission of Juror Testimony

In his ninth assignment of error, Bjorklund argues that Judge Merritt erred in admitting testimony over objection concerning the effect of the trial court's ex parte contact on the juror's thoughts, minds, and mental processes. We disagree.

To support his argument, Bjorklund states that the testimony presented at the evidentiary hearing held before Judge Merritt violated Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995). Section 27-606(2) states:

> Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

[92] Section 27-606(2) thus provides two exceptions to the general prohibition against juror testimony regarding any effect on their mental state. A juror may testify regarding (1) whether extraneous prejudicial information was brought to the jury's attention or (2) whether any outside influence was improperly brought to bear upon any juror. See *id.* Consequently, we must determine whether the testimony in the instant case falls within the scope of either of those exceptions.

[93] Juror testimony may be admitted if it regards whether any outside influence was brought to bear upon any juror such that they were incapable of rendering a fair and impartial verdict. See, e.g., *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991); *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984); *State v. Robinson*, 198 Neb. 785, 255 N.W.2d 835 (1977).

In *State v. Menuey, supra*, this court faced a situation in which an alternate juror was mistakenly present in the jury room during some of the jury's deliberations. The trial court received testimony from the jurors that the presence of the alternate juror had not influenced the deliberations. This court stated:

> Neb. Rev. Stat. § 27-606(2) (Reissue 1989) provides that a juror may not be questioned about any "matter or statement occurring during the course of the jury's delibera-

> tions," but may testify regarding whether any "outside influence was improperly brought to bear upon any juror." In *State v. Roberts*, 227 Neb. 489, 493, 418 N.W.2d 246, 249 (1988), we held that § 27-606(2) "controls inquiries into the validity of a verdict reached by a jury." The trial judge in *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), upon discovering [that two jurors overheard a conversation between the judge and his law clerk discussing the case,] examined the jurors to determine whether they were nonetheless capable of rendering a fair and impartial verdict and, in refusing to declare a mistrial, concluded that there was no prejudice to LeBron. We affirmed. . . .
>
> We thus conclude that the evidence concerning the effect of the discharged juror's unauthorized presence was properly received.

Menuey, 239 Neb. at 524, 476 N.W.2d at 853-54.

Similarly, in the instant case, the jurors testified regarding what was said and done during the ex parte contact and their subsequent capability, at the time of the ex parte contact, to act as fair and impartial jurors. The State pointedly instructed the jurors not to disclose, while testifying, any information regarding their thought processes, statements, or emotions during their deliberations. The jurors' testimony simply established that the trial judge's ex parte contact was not, on its face or in effect, an outside influence, brought to bear on them, which prevented them from exercising their function fairly and impartially.

The jurors' testimony regarding the ex parte conduct was correctly focused on whether the trial judge's contact with them served as an outside influence brought to bear on the jury. This testimony was necessary to determine if the jury was able to act fairly and impartially and was within the limitations of Neb. Evid. R. 602(2), Neb. Rev. Stat. § 27-602(2) (Reissue 1995). Bjorklund's assignment of error is without merit.

(viii) Rebuttal of Presumption of Prejudice

In his 10th assignment of error, Bjorklund argues that the reviewing judge erred in finding that the presumption of prejudice created by the ex parte contact was rebutted by the State

with proof beyond a reasonable doubt that the constitutional error was harmless. We disagree.

[94,95] As the reviewing judge correctly noted in his order, it is " 'only a prejudicial error, that is, an error which cannot be said to have been harmless beyond a reasonable doubt, which requires that a conviction be set aside.' " See *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991). As we have previously stated, reversal is not required if the record affirmatively shows the ex parte communication had no tendency to influence the verdict. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991); *State v. White*, 191 Neb. 772, 217 N.W.2d 916 (1974).

In this case, as the reviewing judge found:

> The prayers were very short in nature and were not interpreted by the jurors as being comments by Judge Endacott on the evidence to be presented in the case or on how the case should be decided. From the time the twelve jurors were selected and sworn up to the time the case was submitted to the jurors for their deliberation, Judge Endacott continued to remind the jurors of their duty to keep open minds and base their verdict only on the evidence presented.

As noted above, every juror testified that at the time of the communication, they did not believe that the trial judge was commenting on the evidence or trying to influence their verdict. The ex parte contact occurred over 25 days prior to the submission of the case to the jury; the trial judge fully and properly instructed the jury on the burden of proof and on the fact that the jurors "must not construe any statements, actions, or rulings of the court in the trial of this case . . . as reflecting an opinion of the court as to how this case should be decided"; and the trial judge consistently reminded them throughout the trial to keep an open mind and to base their verdicts solely on the evidence produced. The record affirmatively demonstrates that the communication had no tendency to affect the verdict and that the State rebutted the presumption of prejudice with proof beyond a reasonable doubt that the error that did occur was harmless. Thus, we conclude this assignment of error to be without merit.

Additionally, we note that Judge Merritt did not err in overruling Bjorklund's second motion for new trial. A motion for

new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994). We conclude that any error committed by the trial judge in engaging in this ex parte contact with the jury was harmless beyond a reasonable doubt. Bjorklund, in his statement to Sorensen, admitted that he and Barney were carrying out their fantasy of raping a woman, that they abducted Harms, that they each raped her, that Bjorklund then choked her, and that he then fired five rounds from a .38-caliber revolver into her head. We also conclude that the reviewing judge did not abuse his discretion in refusing to grant Bjorklund a new trial on the basis of that ex parte contact.

[96] Despite our conclusion that any error regarding the ex parte communication in this case was harmless, ex parte communications should be avoided except in unusual circumstances where communication is essential and counsel cannot be reached. In such cases, a verbatim record should be made and counsel and the defendant advised on the record of the contact as soon as practical after it occurs.

11. Cumulative Error

(a) Assignments of Error

Bjorklund alleges that the following, taken cumulatively, result in a level of error that necessitates the reversal of his convictions or vacation of the sentence of death imposed:

(1) The trial judge erred in overstepping his bounds and transcending his role as a neutral and detached overseer, and the trial judge violated Bjorklund's right to a fair trial.

(2) The trial court erred in conducting ex parte judicial prayer sessions with the jury.

(3) The trial court erred in failing to inquire into the alleged conflict of interest in representation.

(4) The trial court erred in acting as a fact finder.

(5) The trial court erred in making erroneous rulings on evidentiary issues.

(6) The trial court erred in the manner that the trial and sentencing were conducted such that Bjorklund's rights under the

4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and the equal protection provisions of the Nebraska Constitution and his state-created liberty interest rights were violated.

(7) The trial judge erred in failing to recuse himself because the multitude of sentencing errors he committed created a reasonable inference that he could not be impartial in determining the sentence to be imposed.

(8) The trial court erred in failing to find that the cumulative effect of all the errors deprived Bjorklund of a fair trial.

(9) Bjorklund was denied all his applicable constitutional rights.

(b) Analysis

We note at the outset that regarding assignments of error numbered 1 through 3 and 5 through 9, Bjorklund has failed to make any specific argument. In several of these assignments of error, Bjorklund has set forth generic examples of the errors claimed without any discussion or direction to this court as to what exactly the error was which he alleged had occurred. As to other assignments of error, there is no discussion at all. Several of these assignments of error are exactly the same as those fully addressed above. We have repeatedly held that absent plain error, assignments of error not discussed in the briefs will not be addressed by this court. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997); *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). This rule has particular applicability in this section of Bjorklund's appeal, and we decline to address these assignments of error further.

That said, there remains one assignment of error in this section that Bjorklund did discuss, which is his allegation that the trial court erred in acting as a fact finder. Bjorklund argues specifically that the trial court acted as a fact finder by asking what he calls "clarifying questions" of witnesses throughout the trial. We disagree.

[97] Nebraska's rules of evidence provide that "[t]he judge may interrogate witnesses, whether called by himself or by a party." Neb. Evid. R. 614(2), Neb. Rev. Stat. § 27-614(2) (Reissue 1995). We held in *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982), that the trial judge should use this right sparingly, and we conclude that the trial judge quite carefully

limited his questions to points of clarification in a few instances throughout the course of this lengthy trial. The trial judge acted appropriately with regard to the questions he asked of witnesses in this case, and we conclude that Bjorklund's last assignment of error is without merit.

V. CONCLUSION

Having carefully reviewed all assignments of error raised by Bjorklund's counsel and by Bjorklund in his pro se briefs and pleadings, we dismiss the appeal in case No. S-94-856 and affirm the judgments of conviction and sentences in case No. S-94-994.

APPEAL IN NO. S-94-856 DISMISSED.
JUDGMENT IN NO. S-94-994 AFFIRMED.

HENDRY, C.J., and WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RANDOLPH K. REEVES, APPELLANT.
604 N.W.2d 151

Filed January 7, 2000. No. S-99-064.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Postconviction.** Postconviction proceedings are civil in nature.
4. ___. For relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the claimed infringement must be constitutional in dimension.
5. **Constitutional Law: Postconviction: Proof: Records.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Constitutions of Nebraska and the United States. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
6. **Constitutional Law: Intent.** A constitutional amendment operates prospectively only, unless the words employed show a clear intention that it should have a retrospective effect.

7. **Constitutional Law: Equal Protection.** The amendment to Neb. Const. art. I, § 3, providing that "no person shall . . . be denied equal protection of the laws" operates prospectively only.
8. **Constitutional Law: Civil Rights: Death Penalty: Proof.** In order to prove that a defendant's race unconstitutionally taints enforcement of the death penalty, the defendant must at a minimum establish that the decision to enforce the death penalty is based on a conscious discriminatory purpose, resulting in a discriminatory effect suffered by the defendant.
9. ___: ___: ___: ___. To successfully prove that a defendant's race unconstitutionally tainted his or her capital sentencing, the defendant must at a minimum establish that the decisionmaker in the case acted with a discriminatory purpose, resulting in a discriminatory effect suffered by the defendant.
10. **Criminal Law: Judgments: Sentences: Death Penalty.** The judgment in a criminal case is the sentence. By vacating the judgment of the Nebraska Supreme Court, the U.S. Supreme Court expressly invalidates a death sentence imposed, thus requiring resentencing.
11. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.
12. ___: ___. A defendant's failure to diligently prosecute an appeal from a denial of a prior motion for postconviction relief results in a procedural default that bars later action on the claim.
13. **Death Penalty: Due Process.** A defendant has a life interest in connection with the imposition of the death penalty and is entitled to due process in the imposition of the sentence.
14. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
15. **Constitutional Law: Aggravating and Mitigating Circumstances: Appeal and Error.** When an aggravating circumstance has been found invalid, a state appellate court may reweigh the aggravating and mitigating circumstances or undertake a harmless error analysis without offending federal constitutional principles; however, there must be authority under state law for an appellate court to take such action.
16. **Constitutional Law: Supreme Court: Jurisdiction: Appeal and Error.** The Nebraska Supreme Court, except in those cases wherein original jurisdiction is specially conferred by article V, § 2, of the Nebraska Constitution, exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute.
17. **Constitutional Law: Supreme Court: Courts: Sentences.** The Nebraska Constitution places original sentencing authority in the district courts and does not provide sentencing as one of the Nebraska Supreme Court's powers.
18. **Statutes: Supreme Court: Sentences.** The Nebraska statutory sections pertaining to the state's Special Procedure in Cases of Homicide, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1995), create a two-tier sentencing process and differentiate between the role performed by the district court judge or a three-judge district court panel in sentencing as compared to the role of the Supreme Court in reviewing that

sentence. The statutes are specific regarding the sentencing procedures, and nowhere do they give the Supreme Court authority to resentence when it has found error on the part of the sentencing court that is not minor and not harmless.

19. **Supreme Court: Courts: Death Penalty.** Not only does the Supreme Court lack statutory authority to engage in resentencing in cases involving a death sentence, it is also not the best equipped court to do so.

20. **Supreme Court: Homicide: Sentences: Case Overruled: Case Disapproved.** *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992), is overruled to the extent it held that state law authorized the Nebraska Supreme Court to resentence a defendant in a homicide case, because such holding was clearly erroneous. To the extent *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), and *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993), endorsed such conclusion, they are disapproved.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed, sentences vacated, and cause remanded for resentencing.

Paula Hutchinson and Timothy K. Ford, of Counsel, for appellant.

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

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

PER CURIAM.

I. NATURE OF CASE

Randolph K. Reeves appeals the order of the district court for Lancaster County denying his "Motion for Postconviction Relief." We reverse the order of the district court, vacate the sentences of death, and remand the cause for resentencing.

II. STATEMENT OF FACTS

Reeves was convicted of two counts of felony murder committed in the course of committing or attempting to commit first degree sexual assault and was sentenced to death on both counts. His convictions and sentences were affirmed on direct appeal. See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433, *cert. denied* 469 U.S. 1028, 105 S. Ct. 447, 83 L. Ed. 2d 372 (1984) (*Reeves I*).

The details of the murders underlying Reeves' convictions are set forth in *Reeves I* and subsequent opinions of this court, and we do not repeat them here. We briefly describe the procedural history of this case in this statement of facts and further discuss the procedural history as necessary to our analysis of Reeves' claims.

Following the affirmance of his convictions and sentences in his direct appeal, Reeves filed a petition in state district court for postconviction relief, which was denied. That denial was affirmed by this court on appeal. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990) (*Reeves II*). Reeves successfully petitioned the U.S. Supreme Court for a writ of certiorari. *Reeves v. Nebraska*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990). Upon granting the petition for a writ of certiorari, the U.S. Supreme Court stated, "judgment vacated, and case remanded for further consideration in light of *Clemons v. Mississippi*, 494 U. S. 738 (1990)." For our purposes, *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), generally held that where a death sentence was imposed upon a criminal defendant based in part upon an invalid or inappropriate conclusion as to the existence of an aggravating circumstance, federal constitutional principles did not prevent a state appellate court from conducting a harmless error review or, alternatively, reweighing the trial evidence to determine if the death sentence was nonetheless appropriate, if the state's law empowered the appellate court to reweigh evidence and the reweighing was performed consistent with that law.

Before the U.S. Supreme Court had announced its decision in *Clemons* on March 28, 1990, this court had determined in *Reeves I* on January 20, 1984, that the trial court sentencing panel had erred in its consideration of aggravating and mitigating circumstances but that the death sentence was, nevertheless, justified as to each count. More specifically, in *Reeves I*, this court concluded that the sentencing panel had erroneously considered a statutory aggravating factor as to one victim, Victoria Lamm, which should not have been applied and failed to consider one mitigating factor as to each victim, Lamm and Janet Mesner.

Following the remand from the U.S. Supreme Court in 1990 but prior to this court's consideration of the case in light of *Clemons*, Reeves moved this court for an evidentiary hearing, which was denied. Upon remand, this court examined the trial and sentencing evidence and resentenced Reeves to death. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied* 506 U.S. 837, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992) (*Reeves III*).

Reeves moved this court for a rehearing and a reconsideration of *Reeves III*, both of which were denied. It is the resentencing by this court in *Reeves III* stemming from his first postconviction case which was challenged in the instant second postconviction proceeding and is the subject of the current appeal.

Following this court's decision in *Reeves III*, Reeves sought a writ of habeas corpus in the U.S. District Court for the District of Nebraska challenging, inter alia, the resentencing procedure in *Reeves III*. Relief was granted, see *Reeves v. Hopkins*, 871 F. Supp. 1182 (D. Neb. 1994), but was reversed in part on appeal to the U.S. Court of Appeals for the Eighth Circuit, see *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996). In *Reeves v. Hopkins*, 871 F. Supp. 1182 (D. Neb. 1994), the federal district court granted habeas relief to Reeves on the basis that this court lacked authority to resentence Reeves in *Reeves III*, thus violating his right to due process. In reaching this conclusion, the district court concluded that this court wrongly read *Clemons* to hold that if federal law allowed appellate resentencing, state law also allowed it. The district court then extensively considered the Nebraska statutory scheme relating to death sentences and concluded that Nebraska statutes did not provide this court with authority to resentence in *Reeves III*. In particular, the federal district court stated:

> The Nebraska Supreme Court assumed that if federal law allowed appellate reweighing (resentencing), state law also allowed appellate resentencing. When the Nebraska Supreme court made this assumption, it created a state procedure that had not been authorized by the Nebraska Legislature. Even more disturbing, the *Reeves III* court created and implemented for the first time a sentencing procedure that directly conflicted with the provisions of

> Nebraska law and arbitrarily deprived Reeves of two important state-created rights: (a) the right to have a sentencing panel including his trial judge make the initial determination of the appropriateness of the death penalty by *properly* applying aggravating and mitigating factors and thereafter impose the death sentence, and (b) the right to have the decision of the sentencing panel "reviewed" but not supplanted by appellate resentencing.

871 F. Supp. at 1194. The federal district court also relied on *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied* 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697, for further support that this court lacked statutory authority to reweigh and resentence. *Rust* generally held that *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), allows appellate resentencing only if state law authorizes resentencing at the appellate level. In discussing *Rust*, the federal district court noted that this court went even further in *Reeves III* than in *Rust* by striking one aggravating factor with respect to Lamm and finding the existence of a mitigating factor in the deaths of both Lamm and Mesner. The federal district court concluded that as in *Rust*, this court's actions in *Reeves III* invalidated the entire first tier of the sentencing process. Thus, the federal district court concluded that this court's actions in *Reeves III* deprived Reeves of his rights (1) to be sentenced by a panel that did not commit harmful error and (2) to have that sentence reviewed on appeal.

The U.S. Court of Appeals for the Eighth Circuit in *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996), reversed the district court's decision on the basis that the federal district court had exceeded the bounds of its authority by rejecting this court's interpretation of Nebraska state law. Although the Eighth Circuit recognized that this court's assertion of authority to reweigh was "somewhat cryptic" and referred to the district court's analysis as "thoughtful," the Eighth Circuit interpreted this court's action of resentencing in *Reeves III* to be an assertion of this court's authority under state law to resentence. 76 F.3d at 1429 n.7. As the existence of such authority was a matter of state law, the Eighth Circuit concluded that the federal courts did not have the power to reverse this court's holding on an issue of state law.

Id. at 1427. The Eighth Circuit distinguished *Rust* on the basis that under *Rust*, this court could, consistent with federal due process, reweigh aggravating and mitigating circumstances to cure " 'minor' " sentencing errors such as those in *Clemons*. 76 F.3d at 1429. *Rust* was limited "based on the invalidity of the entire sentencing proceeding." 76 F.3d at 1430.

In a dissent to *Reeves v. Hopkins*, 76 F.3d 1424, 1434 (8th Cir. 1996), Judge Bright of the Eighth Circuit noted that "the Nebraska Supreme Court has never referred to state law as a basis for its reweighing function" and stated his agreement with the federal district court that Nebraska's statutory scheme does not provide authority for this court to perform reweighing and resentencing in cases involving a death sentence. Judge Bright further stated that the crucial underpinning of *Rust* was that Nebraska follows a two-tier sentencing procedure, giving a defendant the due process right to be sentenced or resentenced by the trial judge or a three-judge district court panel and to receive meaningful appellate review.

On remand, the U.S. District Court again granted Reeves relief based on Reeves' challenge to this court's resentencing methodology in *Reeves III*, specifically, lack of notice and an opportunity to be heard. *Reeves v. Hopkins*, 928 F. Supp. 941 (D. Neb. 1996). The U.S. District Court's ruling pertaining to the sentencing methodology in *Reeves III* was again reversed on appeal. The Eighth Circuit further determined, however, that Reeves was entitled to habeas corpus relief on an unrelated basis pertaining to jury instructions and, therefore, granted his petition. *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996). The U.S. Supreme Court reviewed the jury instruction issue and reversed the decision of the U.S. Court of Appeals for the Eighth Circuit, thus, in effect, concluding Reeves' first postconviction proceedings in the summer of 1998. *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998).

On December 15, 1998, Reeves filed a second petition for postconviction relief in the district court for Lancaster County. It is the district court's denial of relief from this second postconviction petition which is the subject of this appeal. The focus of this petition was a challenge to this court's resentencing of Reeves in *Reeves III* in connection with his first postconviction case.

In his current postconviction petition, Reeves alleges that both the newly enacted amendment to Neb. Const. art. I, § 3, effective December 9, 1998, creating a state constitutional right to equal protection of the laws and the federal guarantee of equal protection, U.S. Const. amend. XIV, preclude application of the death penalty to him, because he is the only capital defendant in Nebraska who has been resentenced by the Nebraska Supreme Court, and the imposition of such sentence and the pending enforcement thereof are the result of an unconstitutional pattern of racial discrimination. Reeves is Native American. Reeves further alleges in his petition that when the Nebraska Supreme Court resentenced him to death in *Reeves III* after his death sentences were vacated by the U.S. Supreme Court in *Reeves v. Nebraska*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990), this court failed to follow the terms of the death penalty sentencing statutes, Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1989) (now found in Reissue 1995 & Cum. Supp. 1998), by resentencing Reeves rather than remanding the cause for resentencing by the trial court. Reeves alleges that this court's resentencing in *Reeves III* was a "Denial of a Lawful and Constitutional Trial Level Sentencing." As pled in his second petition for postconviction relief, we understand this allegation of failure to adhere to the Nebraska death penalty statutes in *Reeves III* to be a claim of a violation of a life interest and a denial of due process. Reeves also alleges in his second postconviction petition that death by electrocution as prescribed by § 29-2532 is cruel and unusual punishment prohibited by U.S. Const. amend. VIII and Neb. Const. art. I, § 9.

The district court denied Reeves' petition for postconviction relief on January 5, 1999, without an evidentiary hearing. In its order, the district court concluded that "each and every one of the defendant's claims was, or could have been, raised on direct appeal or in an earlier post conviction proceeding," but, nevertheless, ruled on Reeves' claims because "both parties raised substantive arguments." The district court concluded that the newly passed equal protection amendment to Nebraska's Constitution could not be applied retroactively to grant Reeves postconviction relief. The district court found no merit to Reeves' allegations based on federal equal protection guarantees

pertaining to disparate racial treatment in connection with Reeves' resentencing or that Reeves was subject to cruel and unusual punishment. Reeves appeals from the district court's order denying him relief in this second postconviction case.

III. ASSIGNMENTS OF ERROR

Reeves claims, restated, that the district court erred in refusing to apply the newly created equal protection amendment to the Nebraska Constitution to invalidate his death sentence and that under a variety of theories, his equal protection and due process rights under the state and federal Constitutions were violated in connection with his resentencing in *Reeves III*. Reeves claims the district court erred in finding that he was procedurally barred from raising his claims challenging the resentencing in *Reeves III*. Reeves also claims that the district court erred in refusing to grant him relief on his claim that enforcement of the death penalty by electrocution is cruel and unusual punishment.

IV. STANDARDS OF REVIEW

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

[2] Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

V. ANALYSIS

[3-5] Reeves filed his second petition for postconviction relief pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995). Postconviction proceedings under the act are civil in nature. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). For relief to be granted under the act, the claimed infringement must be constitutional in dimension. *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998). An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Constitution of either Nebraska or the

United States. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required. *State v. Smith, supra.*

1. Equal Protection Claims

(a) Nebraska Equal Protection

On November 3, 1998, Nebraska voters approved L.R. 20CA, an amendment to Neb. Const. art. I, § 3, adding the following language, delineated herein by underlining: "No person shall be deprived of life, liberty or property, without due process of law, nor be denied equal protection of the laws." 95th Leg., 1st Sess. 4 (May 21, 1997). On December 15, 1998, Reeves filed his second motion for postconviction relief, seeking to set aside his death sentences based, in part, upon this recently enacted constitutional amendment. Reeves claims he was denied equal protection based on race under the state Constitution in connection with his resentencing in *Reeves III* and in enforcement of the death penalty. The State argues on appeal that as the district court concluded, the constitutional amendment should not be applied retroactively.

[6] Under Nebraska law, a "constitutional amendment operates prospectively only, unless the words employed show a clear intention that it should have a retrospective effect." *Luikart v. Higgins*, 130 Neb. 395, 400, 264 N.W. 903, 905 (1936). This court stated in *Luikart* that constitutional amendments are like statutory amendments and absent " 'something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively,' " a constitutional amendment has prospective operation only. *Id.* (quoting 1 Thomas M. Cooley, Constitutional Limitations at 136 (8th ed. 1927)). Similarly, the U.S. Supreme Court has held, in *Shreveport v. Cole*, 129 U.S. 36, 43, 9 S. Ct. 210, 32 L. Ed. 589 (1889), that "[c]onstitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question." Our review of the current case law in this area leads us to conclude that the general rule remains unchanged. See, e.g., *People v. Dean*, 175 Ill. 2d 244, 677 N.E.2d 947, 222 Ill. Dec. 413 (1997) (holding

that constitutional amendment operates prospectively unless language of amendment clearly indicates intent to apply amendment retroactively); *State v. Cousan*, 684 So. 2d 382 (La. 1996); *People v Gornbein*, 407 Mich. 330, 285 N.W.2d 41 (1979); *State ex rel. Moore v. Molpus*, 578 So. 2d 624 (Miss. 1991).

[7] Nothing in the language of Nebraska's equal protection amendment indicates an intention, much less an intention beyond doubt, see *Luikart, supra*, that the amendment operate retroactively. Accordingly, we hold that the amendment to Neb. Const. art. I, § 3, providing that "no person shall . . . be denied equal protection of the laws" operates prospectively only. Thus, Nebraska's equal protection amendment is inapplicable to Reeves' claim of denial of equal protection under the state Constitution in connection with the 1991 resentencing in *Reeves III*.

[8] Reeves argues that his claim of denial of equal protection based on alleged racial disparity is also addressed to his unenforced death penalty. Reeves argues that the application of the Nebraska constitutional amendment as to this claim is therefore prospective. We agree that the Nebraska equal protection amendment applies to this claim. However, Reeves further alleges that "it cannot be proved that these racial disparities are the result of conscious racial discrimination by any particular state actor or group of state actors." In order to prove that a defendant's race unconstitutionally taints enforcement of the death penalty, the defendant must at a minimum establish that the decision to enforce the death penalty is based on a conscious discriminatory purpose, resulting in a discriminatory effect suffered by the defendant. *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). We apply the principles enunciated in *McCleskey* here. Reeves has failed to plead facts which under *McCleskey* entitle him to relief, admits that he cannot establish the facts to show he is entitled to relief on his claim of denial of equal protection in enforcement of the death penalty, and has pled merely conclusions. Accordingly, he is not entitled to relief on his claim of racial disparity in the enforcement of the death penalty under the state equal protection constitutional provision. See *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999). See, also, *McCleskey, supra*. The district

court's order denying Reeves postconviction relief based upon Nebraska's equal protection clause without an evidentiary hearing was correct as a matter of law and is affirmed.

(b) Federal Equal Protection

Reeves argues that he was denied equal protection in the imposition of his death sentences in contravention of federal constitutional guarantees. The district court properly rejected this claim.

In his petition for postconviction relief, Reeves asserts that since 1980, a disproportionately high number of nonwhite defendants including Native Americans and African-Americans have been sentenced to death. Reeves alleges that since 1973, no Native American and no African-American has been appointed to serve as a state district court judge, Nebraska Supreme Court justice, or member of the State Board of Pardons. Reeves alleges that "[m]itigating circumstances arising from a person's background or character are less well understood by persons of different racial and cultural groups. The decision of the sentencing panel in this case is an example of this [systemic condition,]" and, therefore, "[t]he high proportion of Native Americans and African Americans on Nebraska's death row, and among those selected for execution, is a reflection of this phenomenon."

[9] *McCleskey v. Kemp, supra*, is the leading case addressing alleged racial discrimination in imposition of the death penalty, and we apply its principles here. Under *McCleskey*, to successfully prove that a defendant's race unconstitutionally tainted his or her capital sentencing, the defendant must at a minimum establish that the decisionmaker in the case acted with a discriminatory purpose, resulting in a discriminatory effect suffered by the defendant.

Reeves' petition did not plead factual allegations which, if proved true, would show an unconstitutional deprivation of Reeves' federal equal protection rights as announced in *McCleskey* or elsewhere. To the contrary, as noted above, in his petition Reeves admitted that "it cannot be proved that these racial disparities are the result of conscious racial discrimination by any particular state actor or group of state actors."

It is clear on the face of Reeves' petition that as to his claims, based on federal equal protection grounds of racially disparate

treatment in sentencing and enforcement, he is not entitled to relief because he failed to allege facts which entitle him to relief and he further admits that he cannot establish the elements required to show a deprivation of federal equal protection principles. Reeves' petition alleges only conclusions, and such a petition may properly be denied without an evidentiary hearing. See *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999). We thus find no error in the district court's order refusing to grant Reeves postconviction relief on his federal equal protection claims without an evidentiary hearing.

2. DUE PROCESS CLAIM: ALLEGED DENIAL OF LIFE INTEREST

On appeal, Reeves claims, as he alleged in district court in his second postconviction petition, that upon remand from the U.S. Supreme Court, this court improperly resentenced him in *Reeves III*. Reeves claims generally that this court resentenced him in *Reeves III* and that in so doing, denied him the proper trial level sentencing and appellate review required under Nebraska's statutory death penalty sentencing scheme. Reeves argues, in effect, that he had a life interest in connection with his resentencing in *Reeves III* and that his challenge is, therefore, equivalent to a claim that he was denied due process in the imposition of the death penalty in *Reeves III*.

In response, the State argues that new sentences were not imposed in *Reeves III*, but, rather, *Reeves III* simply reaffirmed the death sentences imposed by the trial court which were earlier affirmed in *Reeves I* and *Reeves II*, and no appeal lies from a mere reaffirmation of existing sentences. The State asserts that Reeves' claim challenging the methodology in *Reeves III* is procedurally barred. We determine that *Reeves III* was a resentencing for *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), and Nebraska statutory purposes and that Reeves' claim is not procedurally barred. We further conclude that the methodology in resentencing Reeves in *Reeves III* denied Reeves of due process.

(a) Reeves Was Resentenced in *Reeves III*

Reeves III occurred as a result of the U.S. Supreme Court's order vacating this court's affirmance of the denial of Reeves' first petition for postconviction relief in *Reeves II*. Prior to

Reeves II, in *Reeves I* this court found sentencing errors, but upon reevaluation, this court concluded the death sentences were proper.

The full text of the U.S. Supreme Court's order stated: "Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, *judgment vacated*, and case remanded for further consideration in light of *Clemons v. Mississippi*, 494 U. S. 738 (1990)." (Emphasis supplied.) *Reeves v. Nebraska*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990). By its terms, the U.S. Supreme Court vacated the judgments and directed this court to consider Reeves' claim challenging the propriety of appellate sentencing in light of *Clemons*.

[10] In its order of remand, the U.S. Supreme Court "vacated" the judgments in Reeves' prior cases. The judgment in a criminal case is the sentence. See *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). By vacating the judgment of this court, the U.S. Supreme Court expressly invalidated Reeves' death sentences as reflected in *Reeves I* and *Reeves II*, thus requiring resentencing. Vacating a judgment renders it ineffective and incapable of enforcement. See, e.g., Black's Law Dictionary 1388 (5th ed. 1979) (defining "vacate" as "[t]o annul; to set aside; to cancel or rescind. . . . As applied to a judgment or decree it is *not* synonymous with 'suspend' which means to stay enforcement of judgment or decree" (emphasis supplied)). Accordingly, although Reeves remained convicted of two murders, the sentences imposed on him ceased to be effective or capable of enforcement upon order of the U.S. Supreme Court. Thus, upon remand, this court's action in *Reeves III* was a resentencing.

(b) Reeves' Current Postconviction Claim Based on Nebraska Supreme Court's Failure to Comply With Proper Sentencing Procedure in *Reeves III* Is Not Procedurally Barred

The State argues that Reeves' claim regarding this court's resentencing in *Reeves III* is procedurally barred. We do not agree and determine that the district court erred in so concluding.

[11,12] It is well settled that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal. *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999). In *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), we recently observed that generally, a defendant's failure to diligently prosecute an appeal from a denial of a prior motion for postconviction relief results in a procedural default that bars later action on the claim.

As noted above, upon remand from the U.S. Supreme Court and prior to this court's opinion in *Reeves III*, Reeves sought to clarify the methodology to be applied upon remand. In this regard, we note that Reeves requested an evidentiary hearing in connection with the resentencing upon remand, which was denied by this court. After the issuance of *Reeves III*, Reeves sought a rehearing and reconsideration, which requests were denied. Reeves thereafter filed for a writ of habeas corpus in federal court, asserting various errors resulting from the resentencing in *Reeves III*. Throughout the ensuing litigation on Reeves' habeas corpus petition, the federal courts considered this court's resentencing of Reeves in *Reeves III* and concluded in *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996), that this court had asserted its authority under state law to resentence in *Reeves III* and that because such assertion was a determination of state law, it was beyond the bounds of the federal courts' authority to reject this court's interpretation of Nebraska state law. *Id.* The U.S. Court of Appeals for the Eighth Circuit specifically noted that by virtue of its conclusion it "in no way intend[ed] to imply that the Nebraska Supreme Court could not . . . reconsider its somewhat cryptic assertion of authority [to resentence in *Reeves III*]." 76 F.3d at 1429 n.7. Therefore, the precise issue of whether this court properly complied with state law pertaining to sentencing in homicides in performing the resentencing in *Reeves III* has not yet been considered by an appellate court with the authority to determine this question of state law.

The instant petition for postconviction relief cannot be deemed an invalid attempt to substitute postconviction relief for that which Reeves could have obtained in a direct or prior

appeal, nor is it an attempt to relitigate a question which has already been finally decided. Obviously, because the claimed errors in *Reeves III* occurred after direct appeal, Reeves could not have complained on direct appeal. The claimed errors in *Reeves III* were pursued following *Reeves III* and were embodied in the continuation of that postconviction case turned federal habeas corpus action until the U.S. Supreme Court had concluded *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998). In this connection, we observe that because Reeves' claim that his life interest was violated and that he was denied due process in connection with imposition of the death penalty in violation of his 14th Amendment rights in *Reeves III*, there is a basis to conclude that Reeves could have obtained relief in these continued federal proceedings, thus excusing Reeves from initiating a second postconviction action in state court prior to the decision in *Hopkins v. Reeves, supra.* See, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998); *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991); *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Throughout the history of Reeves' federal litigation following this court's decision in *Reeves III* about which he complains, it cannot be said that Reeves failed to diligently pursue his claim. See *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

After the conclusion of his federal habeas corpus claim in the U.S. Supreme Court in *Hopkins v. Reeves, supra*, in the summer of 1998, which action stemmed from his first postconviction case and procedurally included the *Reeves III* decision and the subsequent challenges thereto, Reeves filed his second petition for postconviction relief in the district court for Lancaster County in December 1998. Although the instant appeal stems from Reeves' second petition for postconviction relief, it is the first postconviction proceeding initiated after the *Reeves III* decision. On these facts, we conclude that Reeves is not procedurally barred from raising his claim regarding the alleged improper resentencing in *Reeves III* in the instant postconviction case. The district court's ruling to the contrary was error. We thus proceed to the merits of Reeves' due process claim.

(c) Due Process Claim Based on Improper Resentencing in *Reeves III*

[13] Reeves had a life interest in connection with the imposition of the death penalty in *Reeves III* and was entitled to due process in the imposition of the sentence therein. See, *Ohio Adult Parole Authority v. Woodard, supra* (holding that death penalty inmate's due process rights were not violated in clemency proceedings with majority of justices in their opinions basing due process analysis on life interest under 14th Amendment); *Lankford v. Idaho*, 500 U.S. at 111 n.1. (holding that sentencing process in capital case must satisfy requirements of due process clause of 14th Amendment which provides, " 'No State shall . . . deprive any person of life . . . without due process of law' "); *Gardner v. Florida, supra* (holding that capital sentencing procedure must satisfy constitutional command that no person shall be deprived of life without due process of law). The underlying constitutional principle embodied in the Nebraska death penalty statutes on which Reeves relies, §§ 29-2519 to 29-2546, is that given the life interest at stake, the death penalty shall not be imposed without due process. *Ohio Adult Parole Authority v. Woodard, supra*; *Lankford v. Idaho, supra*; *Gardner v. Florida, supra*. Thus, our evaluation of Reeves' claim is a due process analysis.

Reeves argues, in effect, that he was denied due process when this court resentenced him to death in *Reeves III*. In particular, Reeves claims this court's resentencing in *Reeves III* denied him the trial level sentencing required by state law. Because of the life interest at stake, Reeves was denied due process if he was resentenced in violation of the sentencing procedures required by state law. Accordingly, we analyze this court's authority under state law to resentence Reeves in *Reeves III*.

[14] In *Reeves III*, this court asserted its authority under state law to resentence Reeves. The doctrine of stare decisis would ordinarily bind us to follow such decision. However, we have observed:

> " 'The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to, *unless* the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and

> mischievous or unless more harm than good will result from doing so.' "

(Emphasis supplied.) *State v. Burlison*, 255 Neb. 190, 195, 583 N.W.2d 31, 36 (1998) (quoting *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N.W.2d 86 (1955), *overruled in part, Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966)). As we further explain below, we conclude that this court's assertion of authority under state law to resentence in *Reeves III* was clearly erroneous. Because of the life interest and due process rights at stake, it would do more harm than good to adhere to this court's clearly erroneous decision in *Reeves III*.

[15] A review of the Nebraska statutory scheme regarding the state's Special Procedure in Cases of Homicide, §§ 29-2519 to 29-2546, shows that this court (1) lacked the necessary statutory authority under state law to resentence Reeves in *Reeves III* and (2) acted as an unreviewable sentencing panel in violation of state law, thus denying Reeves his right to due process. This court resentenced Reeves in *Reeves III* pursuant to the mandate of the U.S. Supreme Court in *Reeves v. Nebraska*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990), in which the U.S. Supreme Court stated, "judgment vacated, and case remanded for further consideration in light of *Clemons v. Mississippi*, 494 U. S. 738 (1990)." *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), made clear that when an aggravating circumstance has been found invalid, a state appellate court may reweigh the aggravating and mitigating circumstances or undertake a harmless error analysis without offending *federal* constitutional principles. However, under *Clemons* there must be authority under *state law* for an appellate court to take such action.

Some state appellate courts, including the Mississippi Supreme Court on remand from *Clemons*, have concluded that their respective state laws do not provide them with authority to carry out reweighing and resentencing. Under such circumstances, these courts have found they must remand to their state trial courts for resentencing. See, e.g., *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993) (declining to reweigh and resentence with indication that to do so would be contrary to state law); *People v. Shaw*, 186 Ill. 2d 301, 713 N.E.2d 1161, 239 Ill. Dec.

311 (1999) (state law does not allow for appellate resentencing without offending 14th Amendment due process rights); *Stringer v. State*, 638 So. 2d 1285 (Miss. 1994); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992); *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992) (holding that remand to trial court for jury determination for resentencing was necessary due to lack of authority for appellate court to resentence under state law; superseded by statute as stated in *Cole v. State*, 666 So. 2d 767 (1995)).

When this court resentenced Reeves to death in *Reeves III*, this court did not state the source of such authority under state law to do so. Rather, this court simply cited *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), as the basis of such authority and did not discuss the implications of state law. Although this court again stated in *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993), and *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), that this court had authority to resentence, this court merely cited *Reeves III* and *Clemons* without analysis as to the source of such authority. That approach was clearly erroneous because it misinterpreted *Clemons* as providing the only authority necessary in order for a state appellate court to resentence. *Clemons* held that reweighing and resentencing would not offend federal constitutional principles. However, whether there was state statutory authority for a state appellate court to resentence was not analyzed by the U.S. Supreme Court because that determination was a matter of state law.

[16,17] As a general matter, this court, except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute. *Larson v. Wegner*, 120 Neb. 449, 233 N.W. 253 (1930). Further, the Nebraska Constitution places original sentencing authority in the district courts and does not provide sentencing as one of this court's powers. Compare Neb. Const. art. V, §§ 2 and 9.

[18] The Nebraska statutory sections pertaining to the state's Special Procedure in Cases of Homicide provide specific instructions for the manner in which sentencing determinations

are to be made in cases involving the possible imposition of a death sentence. These statutes create a two-tier sentencing process and differentiate between the role performed by the district court judge or a three-judge district court panel in sentencing as compared to the role of this court in reviewing that sentence. See §§ 29-2519 to 29-2546. The statutes are specific regarding the sentencing procedures, and nowhere do they give this court authority to resentence when we have found error on the part of the sentencing court that is not minor and not harmless.

Section 29-2520 states that sentencing determinations following a conviction for first degree murder are to be made by the judge who presided over the trial or who accepted the guilty plea or by a three-judge panel that includes the trial judge. The decision of whether to convene a three-judge panel is left to the discretion of the district court trial judge. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *cert. denied* 498 U.S. 881, 111 S. Ct. 216, 112 L. Ed. 2d 176 (1990). Section 29-2520(3) further provides that where the presiding judge is disabled or disqualified, the Chief Justice of the Nebraska Supreme Court shall name a panel of three district court judges to determine the sentence to be imposed.

Section 29-2522 provides as follows:

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and

> referring to the aggravating and mitigating circumstances involved in its determination.
>
> If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525.

It should be noted that the statutory section pertaining to sentencing procedures in homicide cases utilizes the term "judge or judges" when referring to the sentencing judge or three-judge panel at the district court level and "The Supreme Court" when referring to this court. See §§ 29-2521.02 to 29-2521.04 and 29-2528 (regarding duties of "the Supreme Court"). Thus, the statutory sections regarding the weighing of aggravating and mitigating circumstances and the determination of the sentence specifically place that role in the district court, with the judge who presided at trial included in the sentencing determination except where he or she is disabled or disqualified as provided for in § 29-2520(3), in which case a three-judge district court panel shall determine the sentence. There is no similar provision in the statutes authorizing sentencing by this court. The Nebraska Legislature did not authorize this court to perform the same function as the sentencing judge or sentencing panel.

Further, the statutory sections pertaining to appellate review of death sentences provide this court with only the power to reduce a sentence of death to one of life imprisonment. See §§ 29-2521.03 and 29-2524. Thus, the powers of this court are limited. Section 29-2528 specifically provides that "[i]n all cases when the death penalty has been imposed by the district court, the Supreme Court shall, after consideration of the appeal, order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence." Nothing in the Nebraska statutory scheme provides this court with the power to resentence a criminal defendant to death in a homicide case when we have found a reversible error in the sentencing proceedings conducted at the district court level. Rather, the only statute in which the Legislature has authorized any court to impose a death sentence is § 29-2520, which specifically states that the trial judge or a panel of district court judges makes such a determination.

In *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied* 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697, the district court sentencing panel found the existence of aggravating circumstances by a standard of proof of less than beyond a reasonable doubt. This court then reweighed the proof and determined that each circumstance was proved beyond a reasonable doubt. Thus, this court reinstated the death sentence in that case. The U.S. Court of Appeals for the Eighth Circuit reversed on the basis that Rust had a statutory right to (1) have his trial judge or a three-judge panel consider whether aggravating facts were proved beyond a reasonable doubt and to be sentenced based on those findings and (2) have the determination of that sentencing judge or panel reviewed by the Nebraska Supreme Court. The Eighth Circuit stated that "[w]hile created by state law, these are not 'procedural right[s] of exclusively state concern,' they are liberty interests protected by the Fourteenth Amendment." *Id.* at 1493. The Eighth Circuit further stated that "[t]he whole point of the two-tier sentencing procedure is that the initial determination is reviewed by an independent appellate court. The two-tier process would be subverted if the Nebraska Supreme Court could step in and fully perform the work of the sentencing panel." *Id.* Following *Rust*, this court determined in *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993), that this court would no longer engage in appellate reweighing, noting that any such reweighing would likely be reversible. See, also, *State v. Ryan*, 248 Neb. 405, 452, 534 N.W.2d 766, 796 (1995) (recognizing Eighth Circuit's holding that "appellate reweighing violates a defendant's right to due process under Nebraska's death penalty sentencing statutes").

Although factually different, we find the analysis in *Rust v. Hopkins, supra*, to be relevant to this case. In *Rust*, the U.S. Court of Appeals for the Eighth Circuit noted the importance of the two-tier sentencing scheme in Nebraska. In the instant case, significant error occurred at the first tier where Reeves' sentencing panel, inter alia, failed to consider intoxication as a mitigating factor in the deaths of both Lamm and Mesner. In *Reeves III*, this court specifically stated:

> We are unable to determine that the weighing analysis in the minds of the three-judge panel would have been the

> same if [intoxication] had been factored into the balance. We do not know what weight the judges may have given this circumstance if they had found it to exist.

239 Neb. at 428, 476 N.W.2d at 837. Notwithstanding this observation, instead of remanding in order to allow the three-judge panel to consider the intoxication factor, this court made its own determination. Thus, this court was not acting in *Reeves III* in a manner that would merely cure a minor sentencing error; rather, as the comments in *Reeves III* illustrate, this court stepped into the sentencing panel's shoes by considering and weighing a factor that the panel had not considered. When this court determined in *Reeves III* that the error involved was not harmless beyond a reasonable doubt and then resentenced Reeves based on factors not considered by the sentencing panel, this court acted as an independent and unreviewable sentencing panel. This action deprived Reeves of a proper sentencing procedure before the district court, thus committing an error comparable to that which led to a reversal in *Rust v. Hopkins*, 984 F.2d 1486 (8th Cir. 1993), *cert. denied* 508 U.S. 967, 113 S. Ct. 2950, 124 L. Ed. 2d 697. This court's action in *Reeves III* effectively deprived Reeves of the entire first tier of the sentencing procedures set forth by the Legislature in §§ 29-2520, 29-2521, and 29-2522, and further deprived him of the second tier of appellate review set forth in §§ 29-2521.02 and 29-2521.03.

[19] Not only is it contrary to the Nebraska statutory sentencing scheme for this court to resentence in homicide cases, it is the better rule that this court refrain from resentencing in homicide cases. As the Supreme Court of Arizona, en banc, has stated:

> In any capital case where additional evidence is to be received, remand is required. "[W]e perform as an appellate court, not as a trial court.". . .
>
> Some cases will not require submission of additional evidence but only the reweighing and balancing of the evidence. Many of these cases will involve situations in which the trial judge erred with respect to aggravating or mitigating circumstances and in which there is mitigating evidence of some weight. In these cases too, remand for resentencing is the better rule. As the United States

> Supreme Court noted, we have an appellate task in reviewing death sentences and have placed the sentencing authority in all criminal cases, and especially capital cases, with the trial judge. . . . "Law and policy would indicate that the trial judge should again make the [sentencing] determination." . . . There are important reasons for this procedural rule.
>
> First, this court's jurisdiction is appellate. . . . We have very limited original jurisdiction. . . .
>
> On appeal, in many cases it is simply impossible to determine how the trial judge—who heard the evidence and saw the witnesses—evaluated and weighed that evidence and testimony. Without these imperative determinations, the aggravating and mitigating factors cannot be balanced. . . .
>
> Even if this court could somehow recreate the many valuable intangibles accompanying live testimony, the practicalities of our docket do not allow us to do so. . . .
>
> . . . Other than the defendant and the attorneys, the trial judge—the one individual who received every single exhibit and heard every word uttered in court—is by far a better tool of justice to determine the appropriate sentence. . . .
>
> . . . .
>
> Finally, as is often said, the death sentence is different from any other criminal penalty. . . . No system based on human judgment is infallible. Thus, with the death penalty, we have taken, and should continue to take, the extra step—indeed walk the extra mile—to ensure fairness and accuracy in criminal cases. In light of the trial judge's unique familiarity with the facts of the case, remand is an extra step that should be taken . . . .

State v. Bible, 175 Ariz. 549, 608-09, 858 P.2d 1152, 1211-12 (1993). Similar to the Arizona statutes, § 29-2520 provides for the trial judge to be involved in the sentencing process, whether alone or as part of a sentencing panel, as long as the trial judge is not disabled or disqualified. The Arizona Supreme Court noted that such a directive "certainly reflects a legislative desire that, when possible, the same judge who personally saw and

heard all of the evidence must evaluate and weigh that evidence for sentencing." 175 Ariz. at 608, 858 P.2d at 1211. As in the Arizona system, not only does this court lack statutory authority to engage in resentencing in cases involving a death sentence, we are also not the best equipped court to do so. Our state statutory scheme recognizes this.

[20] In summary, Reeves had a state statutory right to be sentenced by his trial judge or by a panel of three district judges and then had a right to have that sentence reviewed by this court. When this court resentenced Reeves in *Reeves III*, this court did so in contravention of state law. Given the life interest involved, such erroneous resentencing in *Reeves III* denied Reeves of due process. In *Reeves III*, this court acted as an unreviewable sentencing panel in violation of state law. *Reeves III* is therefore overruled to the extent it held that state law authorized this court to resentence a defendant in a homicide case, because such holding was clearly erroneous. To the extent *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), and *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993), endorsed such conclusion found in *Reeves III*, they are disapproved. This court's resentencing in *Reeves III* denied Reeves of his due process right to the separate and distinct sentencing and review procedures set forth in the state statutes. Accordingly, the proper action of this court is to vacate Reeves' sentences and remand the cause to the proper sentencing authority, the district court, for resentencing.

3. Cruel and Unusual Punishment

In his petition, Reeves sought to have his death sentences vacated on the basis that enforcement of the death penalty by electrocution constitutes cruel and unusual punishment under the Eighth Amendment and Neb. Const. art. I, § 9. The trial court rejected this argument. Because we have determined that Reeves' sentences must be vacated and the cause remanded for resentencing, we need not consider this assignment of error.

VI. CONCLUSION

Reeves was convicted of two counts of felony murder and sentenced to death. The district court denied him relief on his second postconviction petition from which denial this appeal is

taken. As set forth above in this opinion, Reeves remains convicted of two counts of felony murder; however, with respect to the sentence of death, we reverse the order of the district court, vacate the sentences of death, and remand the cause for resentencing.

In this appeal from the denial of postconviction relief, we determine that the district court correctly concluded that the equal protection amendment to Neb. Const. art. I, § 3, cannot be applied retroactively and that Reeves was not entitled to relief based on this amendment to the Nebraska Constitution. However, we conclude that in a properly pleaded death penalty case, the equal protection amendment to Neb. Const. art. I, § 3, can be applied prospectively to a claim pertaining to the enforcement of the death penalty. The district court properly rejected Reeves' equal protection claim based on federal grounds. The district court's conclusion that Reeves' claims were procedurally barred was error. Reeves' claim that he was denied due process due to this court's violation of his life interest in the proper application of the statutory procedures required in imposing the death penalty is well founded.

We conclude as a matter of law that this court lacked the authority to resentence Reeves to death in 1991 in *Reeves III* upon remand from the U.S. Supreme Court. The Nebraska statutory sentencing scheme in capital cases provides for two tiers, the first tier being a sentence imposed by the district court trial judge who heard the evidence or by a three-judge district court panel, to be followed by a second tier which is appellate review by this court. The resentencing of Reeves to death by this court in *Reeves III* deprived him of the two-tier statutory sentencing structure, resulting in an unconstitutional denial of the process to which Reeves was due in the imposition of a death sentence. The death sentences imposed upon Reeves for both counts of which he remains convicted are vacated. We remand this cause to the trial court for resentencing in accordance with §§ 29-2519 to 29-2546.

REVERSED, SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.