Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
07/13/2026 08:47 PM CDT

REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 14, 1993 and AUGUST 8, 1994

IN THE

Nebraska Court of Appeals

VOLUME II

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1995

Copyright A. D. 1995

By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

RICHARD D. SIEVERS, Chief Judge
WILLIAM M. CONNOLLY, Associate Judge
EDWARD E. HANNON, Associate Judge
JOHN F. IRWIN, Associate Judge
LINDSEY MILLER-LERMAN, Associate Judge
JOHN F. WRIGHT, Associate Judge[1]
WESLEY C. MUES, Associate Judge[2]

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

[1]Until January 26, 1994
[2]Appointed April 22, 1994

TABLE OF CASES REPORTED

A.D.S. and A.D.S., In re Interest of 469
A.K., In re Interest of 662
Ambroz; Luellman v. 855
American Family Mut. Ins. Co.; Shkolnick v. 61
Anderson; Phelps County v. 236
Ashwill; York Equip., Inc. v. 374
Association of Commonwealth Claimants v. Hake 123
Ayars & Ayars, Inc.; Shade v. 730

Balka; Nucor Steel v. 138
Ballard v. Nebraska Dept. of Soc. Servs. 809
Barthel v. Liermann 347
Bartunek v. Geo. A. Hormel & Co. 598
Bay Constr. Co. v. Dolan 739
Bennett; State v. 188
Bennett v. Board of Equal. of City of Lincoln 161
Beverly Enter. - Nebraska v. Columbus Health Care 410
Blanco v. Tonniges 520
Blomstedt; Howard Kool Chevrolet, Inc. v. 493
Bloomquist, In re Guardianship & Conservatorship of 756
Blue Cross Blue Shield; Weatherly v. 669
Board of Equal. of City of Lincoln; Bennett v. 161
Boyles v. Hausmann 388
Buda v. Humble 872
Burns v. Burns 795
Burts; County of Douglas v. 90

Caton; State v. 908
Centamore v. Cocanougher 756
Central Ice Machine Co. v. Cole 282
Central States Health & Life Co.; Freeman v. 803
Christian Homes, Inc.; White v. 213
City of Lincoln, Board of Equal. of; Bennett v. 161
City of Omaha; Dowd v. 958
City of Omaha; Old Omaha Assn. v. 618
Clarke; Richardson v. 575
Clarke; Sterling v. 575
Cocanougher; Centamore v. 756
Cole; Central Ice Machine Co. v. 282
Columbia Ins. Group; Jacob v. 473
Columbus Health Care; Beverly Enter. - Nebraska v. 410

Continental Western Ins. Co. v. Farm Bureau Ins. Co. 527
Cooper, State on behalf of v. Harmon 612
Coopers & Lybrand; World Radio Lab. v. 747
Coppi v. West Am. Ins. Co. 834
Cotton; State v. 901
Countryside of Hastings; Thomas v. 590
County of Douglas v. Burts 90
Cronin; State v. 368
Cummings; State on behalf of Yankton v. 820

Daggett; Monument Farms, Inc. v. 988
Dean; State v. 396
Deutsch; State v. 186
Dolan; Bay Constr. Co. v. 739
Doremus; State v. 784
Douglas, County of v. Burts 90
Dowd v. City of Omaha 958
Dunham v. Hunt Midwest Entertainment 969
Dunn, State on behalf of v. Wiegand 580

Edwards; State v. 149
Elton Schmidt & Sons Farm Co. v. Kneib 12
Estate of Hannan, In re 636
Estate of Marsh, In re 649
Estate of Ziegenbein, In re 923

Fahlk; State v. 421
Farm Bureau Ins. Co.; Continental Western Ins. Co. v. 527
Flye; State v. 96
Fordham v. West Lumber Co. 716
Freeman v. Central States Health & Life Co. 803
Futura Coatings, Inc.; T.O. Haas Tire Co. v. 1

Geo. A. Hormel & Co.; Bartunek v. 598
Ginn; Kroupa v. 532

Hake; Association of Commonwealth Claimants v. 123
Hannan, In re Estate of 636
Harmon; State on behalf of Cooper v. 612
Harper; State v. 220
Harris; State v. 692
Hausmann; Boyles v. 388
Hinky Dinky; Newman v. 555
Hoover v. Hoover 239
Howard Kool Chevrolet, Inc. v. Blomstedt 493
Howe; State v. 766
Huffman; Metco, Inc. v. 506
Humble; Buda v. 872

Hunt Midwest Entertainment; Dunham v. 969

In re Estate of Hannan 636
In re Estate of Marsh 649
In re Estate of Ziegenbein 923
In re Guardianship & Conservatorship of Bloomquist 756
In re Interest of A.D.S. and A.D.S. 469
In re Interest of A.K. 662
In re Interest of J.L.H., J.L.H., and R.H. 40
In re Interest of R.W., M.W., and D.W. 297

J.L.H., J.L.H., and R.H., In re Interest of 40
Jacob v. Columbia Ins. Group 473
Johnson v. Nebraska Environmental Control Council 263

Kelly v. Kelly 399
Kneib; Elton Schmidt & Sons Farm Co. v. 12
Kroupa v. Ginn 532

Lemburg; State v. 313
Leu v. Littell 323
Liermann; Barthel v. 347
Lincoln, Board of Equal. of City of; Bennett v. 161
Lincoln Telephone Co.; Pearson v. 703
Littell; Leu v. 323
Long; State v. 847
Luellman v. Ambroz 855

Marsh, In re Estate of 649
Mastrocesare v. Mastrocesare 231
McGinnis; State v. 77
McIntyre; National Acct. Sys. of Omaha v. 884
Metco, Inc. v. Huffman 506
Monument Farms, Inc. v. Daggett 988
Moore; State v. 206
Morris; State v. 887

National Acct. Sys. of Omaha v. McIntyre 884
Nearhood; State v. 915
Nebraska Dept. of Soc. Servs.; Ballard v. 809
Nebraska Environmental Control Council; Johnson v. 263
Nelson; State v. 289
New Light Co. v. Wells Fargo Alarm Servs. 828
Newman v. Hinky Dinky 555
Noll; State v. 73
Norris v. Norris 570
Northern States Beef v. Stennis 340
Novak v. Novak 21
Nucor Steel v. Balka 138

Oakley; Rhoden Auto Center v. 84
Old Omaha Assn. v. City of Omaha 618
Olmer v. Olmer 178
Omaha, City of; Dowd v. 958
Omaha, City of; Old Omaha Assn. v. 618
Omaha Pub. Power Dist.; Thorne v. 437
Owen; State v. 195

Pearson v. Lincoln Telephone Co. 703
Phelps County v. Anderson 236

R.W., M.W., and D.W., In re Interest of 297
Ramold; State v. 545
Rhoden Auto Center v. Oakley 84
Richardson v. Clarke 575
Roche, Inc.; State v. 445
Rodgers; State v. 360
Roseberry v. Wright 248

Sanchez; State v. 1008
Shade v. Ayars & Ayars, Inc. 730
Shkolnick v. American Family Mut. Ins. Co. 61
Shoemaker; Sutherland v. 845
Sievers; State v. 463
Simon v. Wilkinson Agency 877
Sobieszczyk; State v. 116
Sorenson; State v. 998
State on behalf of Cooper v. Harmon 612
State on behalf of Dunn v. Wiegand 580
State on behalf of Yankton v. Cummings 820
State v. Bennett 188
State v. Caton 908
State v. Cotton 901
State v. Cronin 368
State v. Dean 396
State v. Deutsch 186
State v. Doremus 784
State v. Edwards 149
State v. Fahlk 421
State v. Flye 96
State v. Harper 220
State v. Harris 692
State v. Howe 766
State v. Lemburg 313
State v. Long 847
State v. McGinnis 77
State v. Moore 206
State v. Morris 887

State v. Nearhood 915
State v. Nelson 289
State v. Noll 73
State v. Owen 195
State v. Ramold 545
State v. Roche, Inc. 445
State v. Rodgers 360
State v. Sanchez 1008
State v. Sievers 463
State v. Sobieszczyk 116
State v. Sorenson 998
State v. Stubblefield 307
State v. Stuthman 317
State v. Thalken 867
State v. Vann 946
State v. Vice 930
State v. White 106
Stennis; Northern States Beef v. 340
Sterling v. Clarke 575
Stubblefield; State v. 307
Stuthman; State v. 317
Stuthman v. Stuthman 173
Sutherland v. Shoemaker 845

T.O. Haas Tire Co. v. Futura Coatings, Inc. 1
Thalken; State v. 867
Thomas v. Countryside of Hastings 590
Thorne v. Omaha Pub. Power Dist. 437
Tonniges; Blanco v. 520
Toulousaine de Distrib. v. Tri-State Seed & Grain 937
Tri-State Seed & Grain; Toulousaine de Distrib. v. 937

Vann; State v. 946
Vice; State v. 930
Vorderstrasse v. Vorderstrasse 256

Weatherly v. Blue Cross Blue Shield 669
Wells Fargo Alarm Servs.; New Light Co. v. 828
West Am. Ins. Co.; Coppi v. 834
West Lumber Co.; Fordham v. 716
White; State v. 106
White v. Christian Homes, Inc. 213
Wiegand; State on behalf of Dunn v. 580
Wilkinson Agency; Simon v. 877
World Radio Lab. v. Coopers & Lybrand 747
Wright; Roseberry v. 248

Yankton, State on behalf of v. Cummings 820

York Equip., Inc. v. Ashwill 374

Ziegenbein, In re Estate of 923
Zoet v. Zoet 71

LIST OF CASES DISPOSED OF BY MEMORANDUM OPINION AND JUDGMENT ON APPEAL

No. A-91-1102: **Ewing v. Stafford.** Affirmed. Miller-Lerman, Judge.

No. A-91-1141: **Winkler v. Bartels.** Affirmed. Connolly, Judge.

No. A-91-1171: **Smith v. Smith.** Affirmed. Connolly, Judge.

No. A-91-1177: **Rosenberry v. Rosenberry.** Affirmed as modified. Wright, Judge.

No. A-92-018: **Geddings v. Geddings.** Affirmed as modified. Sievers, Chief Judge.

No. A-92-025: **Perez v. Perez.** Affirmed as modified. Connolly, Judge.

No. A-92-127: **7000 Corp. v. Kemper Nat. Ins. Cos.** Reversed and dismissed. Sievers, Chief Judge.

No. A-92-299: **Humble v. Buda.** Affirmed. Sievers, Chief Judge.

No. A-92-364: **State ex rel. Abdullah v. Clarke.** Affirmed. Irwin, Judge.

No. A-92-368: **Loy v. Wright.** Affirmed. Wright, Judge.

No. A-92-371: **State v. Hall.** Appeal dismissed. Miller-Lerman, Judge.

No. A-92-504: **Waltman v. Waltman.** Affirmed in part, and in part reversed and remanded with directions. Connolly, Judge.

No. A-92-517: **Dixon v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. Wright, Judge.

No. A-92-530: **State v. Axmann.** Affirmed. Irwin, Judge.

No. A-92-535: **Lincoln Lumber Co. v. Anderson.** Affirmed. Irwin, Judge.

No. A-92-544: **State v. Nazeck.** Affirmed. Irwin, Judge.

No. A-92-593: **Davenport v. Mattley.** Appeal dismissed. Per Curiam.

No. A-92-657: **Jones v. Department of Corr. Servs. Appeal Bd.** Affirmed. Connolly, Judge.

No. A-92-675: **Whitlow v. Nebraska Dept. of Corr. Servs.** Affirmed. Irwin, Judge.

No. A-92-677: **Hayes v. Nebraska Dept. of Corr. Servs.** Affirmed. Irwin, Judge.

No. A-92-688: **County of Nance v. Stuthman.** Affirmed. Wright, Judge.

No. A-92-778: **Garza v. T.V.R. Constr.** Affirmed. Hannon, Judge.

No. A-92-828: **State v. Atkinson.** Affirmed. Hannon, Judge.

No. A-92-872: **State v. McCaslin.** Affirmed. Sievers, Chief Judge.

No. A-92-909: **Sorensen v. City of Omaha.** Affirmed. Per Curiam.

No. A-92-912: **State v. Curry.** Affirmed. Hannon, Judge.

No. A-92-913: **State v. Curry.** Affirmed. Hannon, Judge.

No. A-92-914: **State v. Curry.** Affirmed. Hannon, Judge.

No. A-92-917: **Plymale v. Benefit Trust Life Ins. Co.** Affirmed. Irwin, Judge.

No. A-92-964: **Federal Deposit Ins. Corp. v. Slangal.** Affirmed. Hannon, Judge.

No. A-92-1142: **State v. Vachal.** Affirmed. Irwin, Judge.

No. A-92-1154: **Dixon v. Withem.** Affirmed. Connolly, Judge.

No. A-92-1163: **State v. Dykes.** Affirmed. Hannon, Judge.

No. A-92-1172: **State v. McGee.** Affirmed. Hannon, Judge.

No. A-93-046: **Johnson v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. Irwin, Judge.

No. A-93-066: **Eichorn v. Eichorn Trucking.** Vacated and remanded with directions. Connolly, Judge.

No. A-93-070: **Sudik v. City of Wahoo.** Affirmed. Irwin, Judge.

No. A-93-080: **State v. Rabbass.** Sentence vacated and cause remanded for a new hearing on enhancement in accordance with the opinion. Wright, Judge.

No. A-93-136: **State v. Ridgeway.** Affirmed. Connolly, Judge.

No. A-93-194: **State v. Kamp.** Affirmed. Irwin, Judge.

No. A-93-204: **State v. Jenista.** Affirmed. Connolly, Judge.

No. A-93-267: **Brown v. University of Nebraska- Lincoln.** Affirmed. Wright, Judge.

No. A-93-309: **In re Interest of Ammons.** Affirmed. Sievers, Chief Judge.

No. A-93-347: **Noell v. Runza.** Affirmed. Sievers, Chief Judge.

No. A-93-354: **Zika v. Asarco Inc.** Affirmed. Hannon, Judge.

No. A-93-359: **State v. Olson.** Objection sustained. Wright, Judge.

No. A-93-374: **State v. Grotzky.** Affirmed. Irwin, Judge.

No. A-93-388: **State v. McMurray.** Affirmed. Per Curiam.

No. A-93-419: **State v. Kolar.** Affirmed. Miller- Lerman, Judge.

No. A-93-425: **State v. Locket.** Affirmed. Connolly, Judge.

No. A-93-523: **In re Interest of Stunkel.** Affirmed. Connolly, Judge.

No. A-93-549: **State v. Long.** Affirmed. Hannon, Judge.

No. A-93-582: **State v. Page.** Affirmed. Hannon, Judge.

No. A-93-596: **State v. Christensen.** Affirmed. Sievers, Chief Judge.

No. A-93-597: **State v. CMT Enters.** Affirmed. Sievers, Chief Judge.

No. A-93-651: **State v. Roth.** Affirmed. Sievers, Chief Judge.

No. A-93-706: **State v. Vavra.** Affirmed. Hannon, Judge.

No. A-93-714: **Harder v. Harder.** Affirmed. Sievers, Chief Judge.

No. A-93-766: **Haiston Oil Co. v. Buchhammer.** Reversed and dismissed. Sievers, Chief Judge.

Nos. A-93-811, A-93-812: **State v. Kizzire.** Affirmed. Sievers, Chief Judge.

No. A-93-833: **State v. Walton.** Reversed and dismissed. Hannon, Judge.

No. A-93-840: **State v. Eadie.** Appeal dismissed. Mues, Judge.

No. A-93-841: **State v. Green.** Affirmed. Hannon, Judge.

No. A-93-843: **In re Interest of Dickson.** Affirmed. Sievers, Chief Judge.

No. A-93-896: **State v. Felder.** Affirmed. Hannon, Judge.

No. A-93-936: **State v. Martin.** Affirmed. Per Curiam.

No. A-93-939: **McKern v. American Community Stores.** Affirmed. Sievers, Chief Judge.

No. A-94-091: **In re Interest of Hall.** Affirmed. Hannon, Judge.

No. A-94-182: **State v. Barrientos.** Affirmed. Connolly, Judge.

No. A-94-393: **State v. Marley.** Appeal dismissed. Sievers, Chief Judge.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-91-828: **Moore v. Conrad.** Appeal dismissed.

No. A-91-1274: **Kite v. Cordell.** Stipulation allowed; appeal dismissed.

No. A-92-017: **Levendofsky v. Chester Farmers Grain.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-92-193: **Swoboda v. Swoboda.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-92-201: **Jacobson v. Jacobson.** Stipulation allowed; appeal dismissed.

No. A-92-318: **Hake v. Hake.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-92-388: **First Nat. Bank of Omaha v. Executive Fin. Concepts.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-92-514: **Rideout v. Gould, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-92-516: **Jones v. Gould, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-92-528: **Turrentine v. Gould, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-92-588: **Albracht v. Albracht.** Cause having not been shown pursuant to order of March 25, 1994, appeal dismissed.

No. A-92-626: **Hudson v. Gould, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-92-628: **Clinkscale v. Gould, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-92-655: **Beckmann v. Pierce Cty. Farmers Mut. Ins. Co.** Stipulation allowed; appeal dismissed in accordance with the stipulation of the parties.

No. A-92-663: **Spencer v. Snoke.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-92-747: **McCook Nat. Bank v. G & F Homestead Living Trust.** Affirmed. See Rule 7A(1).

No. A-92-781: **In re Interest of Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-92-796: **Pipe & Piling Supplies (USA) Ltd. v. Wood.** Cause to avoid dismissal under the court's order of August 18, 1993, has not been shown; therefore, the appeal is dismissed.

No. A-92-818: **Hood v. Cerny.** Appeal dismissed. See Rule 7A(2).

No. A-92-1072: **Schmidt v. Schmidt.** Motion of appellee for summary dismissal sustained. See Rule 10A.

No. A-92-1120: **Bell v. H. P. Smith Motors, Inc.** Stipulation allowed; appeal and cross-appeal dismissed.

No. A-92-1161: **Esch v. Perry.** Motion sustained; appeal and cross-appeal dismissed.

No. A-92-1179: **State v. Husak.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-93-058: **In re Interest of Reibold.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-074: **General Serv. Bureau v. Andera.** Stipulation allowed; appeal dismissed.

No. A-93-088: **Bell v. H. P. Smith Motors, Inc.** Stipulation allowed; appeal and cross-appeal dismissed.

No. A-93-096: **Salt Creek Holding Co. v. Rohloff.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No. A-93-124: **State v. Packett.** Affirmed. See Rule 7A(1).

No. A-93-144: **State v. Trantum.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-178: **Muhannad v. Nebraska Dept. of Corr. Servs.** Cause having not been shown, appeal dismissed as moot.

No. A-93-188: **In re Interest of Morey.** Motion of appellee to dismiss cross-appeal sustained; appeal dismissed without prejudice.

No. A-93-188: **In re Interest of Morey.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-93-223: **Sweet v. State ex rel. Stenberg.** Appeal dismissed. See Rule 7A(2).

No. A-93-232: **State v. Suer.** Affirmed. See Rule 7A(1).

No. A-93-234: **Martinez v. Champion Home Builders.** Stipulation allowed; appeal dismissed.

No. A-93-240: **Vopalka v. United Phone Book Advertisers.** Stipulation allowed; appeal dismissed.

No. A-93-248: **Peterson v. Peterson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-252: **Maldonado v. Heilbrun.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-93-258: **State v. Braggs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-259: **Strunk v. Strunk.** Affirmed. See Rule 7A(1).

No. A-93-268: **Uhing v. Heimes.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-280: **Holsten v. Holsten.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-293: **Taylor v. Cochran.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-306: **Backens v. Backens.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-331: **State v. Mercer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-335: **State v. Valerio.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-337: **State v. Fullerton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-348: **State v. Ewoldt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-357: **Bank of Madison v. Producers Hybrids.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. A-93-362: **State v. Brooks.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-366: **State v. Kramer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-370: **State v. Sellers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-371: **State v. Sellers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-372: **State v. Rodwell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-376: **Fieldgrove v. Donscheski.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-382: **In re Interest of Dahlberg.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-382: **In re Interest of Dahlberg.** Motion sustained; appeal reinstated.

No. A-93-388: **State v. McMurray.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-388: **State v. McMurray.** Motion sustained; appeal reinstated.

No. A-93-394: **State v. Blanton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-396: **State v. Dawn.** Appeal considered; conviction affirmed. See *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

No. A-93-401: **State v. Rector.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-408: **Gill v. Gill.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-410: **State v. Carter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-415: **State v. Kern.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-416: **State v. Rigby.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-417: **State v. Creighton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-420: **Oliver v. Oliver.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-433: **State v. Seamann.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-434: **Navrkal v. Mills.** Motion of appellee for summary dismissal sustained. Appeal dismissed for failure to file briefs.

No. A-93-440: **State v. Torres.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-442: **State v. Wilson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-443: **State v. Variano.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-463: **State v. Ross.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-464: **State v. Pilcher.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-465: **State v. Flowers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-469: **Knapp v. Knapp.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-93-471: **Yanda v. Yanda.** Stipulation allowed; appeal dismissed.

No. A-93-473: **Saltzman v. Saltzman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-480: **State v. Farrens.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-486: **State on behalf of Hermsmeier v. Pinkerton.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-497: **State v. Distefano.** Motion of appellee for summary affirmanee sustained; judgment affirmed. See Rule 7B(2).

No. A-93-499: **Bodman v. Bodman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-501: **Mendoza v. Department of Motor Vehicles.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-502: **Luna v. Clarke.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-503: **State v. Wiley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-504: **State v. Foral.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-506: **State v. Jacobson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-514: **Dent v. Packerland Packing Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-517: **Dafney v. Dafney.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-527: **State v. Robinson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-529: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-531: **State v. Edwards.** Affirmed. See Rule 7A(1).

No. A-93-532: **State v. Beyersdorf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-533: **State v. Brunow.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-535: **State v. Penn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-538: **State v. Hartshaw.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-539: **State v. Booth.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-547: **Hightower v. Davitt.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-93-548: **Carney v. Carney.** Parties having stipulated to summary dismissal, appeal dismissed.

No. A-93-550: **State v. Deauville.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-553: **In re Interest of Dickey.** Affirmed. See Rule 7A(1).

No. A-93-554: **State v. Ashburn.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-93-555: **Amman v. Adams.** Stipulation allowed; appeal dismissed with prejudice.

No. A-93-556: **Rudnick v. Adams.** Stipulation allowed; appeal dismissed with prejudice.

No. A-93-561: **In re Interest of Kuhn.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-563: **State v. Lott.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-567: **Larsen v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-575: **State v. Barfield.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-576: **State v. Barfield.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-577: **Alkire v. Richard Macku Trucking.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-583: **Payne v. American Bldg. Components.** Stipulation allowed; appeal dismissed with prejudice.

No. A-93-584: **Lingle v. Lingle.** Stipulation allowed; appeal dismissed.

No. A-93-586: **Hall v. Hall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-587: **Williams v. Telenational Communications.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-607: **Reay v. Humedco Corp.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-608: **State v. Tanksley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-611: **State v. Taylor.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-615: **State v. Lunderville.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-616: **State v. Dubray.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-620: **Gas 'N Shop v. Scotts Bluff Cty. Bd. of Equal.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-93-624: **State v. Shandera.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-629: **State v. Costello.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-632: **Dittrich v. Dittrich.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-634: **Bergman v. Rogers.** Stipulation allowed; appeal dismissed without prejudice.

No. A-93-635: **Palmer v. Pamida, Inc.** Stipulation allowed; appeal dismissed.

No. A-93-640: **State v. Harm.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-641: **State v. Hillyard.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-642: **Bellevue Police Officers Assn. v. Nebraska Dept. of Revenue.** Stipulation allowed; appeal dimissed; each party to pay own costs.

No. A-93-644: **State v. Broadstone.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-645: **State v. Hochstetler.** Appeal dismissed. See Rule 7A(2).

No. A-93-646: **State v. Holliday.** Appeal dismissed. See Rule 7A(2).

No. A-93-647: **State v. Holliday.** Appeal dismissed. See Rule 7A(2).

No. A-93-650: **Adkins v. Employers Mut. Cas. Co.** Stipulation allowed; appeal dismissed with prejudice.

No. A-93-659: **Schrage v. Schrage.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-661: **State v. Tipton.** Appeal dismissed. See Rule 7A(2).

No. A-93-662: **State v. Tipton.** Appeal dismissed. See Rule 7A(2).

No. A-93-663: **State v. Tipton.** Appeal dismissed. See Rule 7A(2).

No. A-93-664: **State v. Tipton.** Appeal dismissed. See Rule 7A(2).

No. A-93-665: **State v. Illig.** Appeal dismissed. See Rule 7A(2) and Neb. Rev. Stat. § 29-2306 (Cum. Supp. 1992).

No. A-93-667: **State v. Hightower.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-669: **State v. Jones.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-676: **State v. Duis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-677: **State v. Fries.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-679: **State v. Peterson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-683: **State v. Mite.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-685: **Jackson v. S & B Enterprises.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-686: **State v. Mitchell.** Stipulation allowed; appeal dismissed.

No. A-93-688: **State v. Brewer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-689: **State v. Brewer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-694: **State v. Fritz.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-695: **State v. McCaslin.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-710: **Matheson v. Omaha Pub. Power Dist.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-711: **Buckley v. Gates Rubber Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-712: **Turner v. Community Hosp. Assn.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-93-715: **Kleinschmit v. State.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-722: **Brizendine v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-724: **Kramer v. Miskell.** Appeal dismissed. See Rule 7A(2).

No. A-93-725: **State v. Roberts.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-726: **State v. Roberts.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-727: **State v. Zemunski.** Appeal dismissed. See Rule 7A(2).

No. A-93-734: **State v. Vaughn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-738: **Halbmaier v. Halbmaier.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-741: **Anderson v. Anderson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-745: **Escamilla v. Metzger.** Stipulation allowed; appeal dismissed.

No. A-93-752: **Lacy v. Lacy.** Appeal dismissed. See Rule 7A(2).

No. A-93-754: **State v. Crawford.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-758: **Chase v. Chase.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-93-764: **Dial Reit, Inc. v. State.** Stipulation allowed; appeal dismissed.

No. A-93-767: **Joplin Regional Stockyards v. Sutton Livestock Comm. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-772: **State v. Cazares.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-773: **State v. Cazares.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-775: **State v. Kennedy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-776: **Heydenreich v. Heydenreich.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-778: **Miller v. Loostrum.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-93-782: **Strong Constr. Co. v. City of Ogallala.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-93-786: **Cole v. McCall.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-787: **McCaslin v. McBride.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-788: **State v. Johnson.** Appeal dismissed. See Rule 7A(2).

No. A-93-790: **State v. Kleinberg.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-792: **First Nat. Bank of York v. Critel.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-93-793: **Critel v. First Nat. Bank of York.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-93-794: **Juranek v. Farm Credit Bank of Omaha.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-795: **Jensen v. First Nat. Bank of Utica.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-801: **Nelson v. Nelson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-814: **Nelson v. Production Credit Assn. of the Midlands.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-815: **State v. Kush.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-820: **State v. Zierke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-821: **State v. Zierke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-822: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-823: **In re Adoption of Bechtold.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-824: **Doty v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-93-826: **Henderson v. Stenberg.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-829: **Omaha Restaurant Properties v. Mother Tucker's Food Experience.** Appeal dismissed. See Rule 7A(2).

No. A-93-832: **Schelbitzki v. Blanke.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-93-837: **Naviaux v. Continental Cas. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-839: **State v. Coleman.** Appeal dismissed. See Rule 7A(2).

No. A-93-842: **Jensen v. City of Lincoln.** Stipulation allowed; appeal dismissed.

No. A-93-848: **Houchin v. Diamond Eng. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-849: **Creighton v. Creighton.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-850: **State v. Welch.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-854: **Russell v. Berglund.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-859: **State v. Moore.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-93-861: **Zvacek v. Kai.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-863: **Kohout v. Kohout.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-864: **State v. Dittmer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-872: **McGinley v. Christensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-93-876: **State v. Jax.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-93-880: **Reisdorff v. Nebraska Dept. of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-884: **State v. Sitton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-885: **State v. Bartlett.** Motion of appellant for rehearing considered; order of November 10, 1993, vacated; appeal reinstated.

No. A-93-885: **State v. Bartlett.** Appeal dismissed. See Rule 7A(2) and *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980).

No. A-93-886: **State ex rel. Hackbarth v. Hackbarth.** Appeal dismissed. See Rule 7A(2).

No. A-93-894: **State v. Ponce.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-895: **Cole v. Hendrickson.** Appeal dismissed. See Rule 7A(2).

No. A-93-899: **State v. Cudmore.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-902: **State v. Hohenstein.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-904: **State v. Sandbothe.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-905: **State v. West.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-906: **Schafer v. Schafer.** Appeal dismissed. See Rule 7A(2).

No. A-93-913: **State v. Cullum.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-914: **State v. Leon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-915: **State v. Burnett.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-917: **State v. Rodgers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-920: **Johnson v. Johnson.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-927: **Fitch v. Fitch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-928: **State v. Shepard.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-931: **State v. Colbert.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-932: **Business Props. v. KVI Assocs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-940: **Douthit-Kitten v. Kitten.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-942: **Peterson v. Peterson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-943: **Weise v. Supreme Court of Nebraska.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-949: **The Equitable Life Assurance Soc. v. Placzek.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-950: **State v. Avery.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-955: **State v. Nyffler.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-956: **State v. Jenkins.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-959: **Northern Bank v. Dowd.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-961: **State v. Walton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-965: **Nisley v. Nisley.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-967: **State v. Raber.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-968: **Tracy Corp. IV v. Jay.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-969: **Tracy Corp. IV v. Jay.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-977: **Kelly v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-978: **State v. Oligmueller.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-93-984: **State ex rel. Western Neb. Resources Council v. Beerman.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-93-995: **State v. Jackson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-996: **Thompson v. Henney.** Appeal dismissed. See Rule 7A(2).

No. A-93-997: **Barrett v. Semin.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-999: **State v. Sampson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1000: **State v. Irish.** Appeal dismissed. See Rule 7A(2).

No. A-93-1002: **State v. Schuller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1003: **Grudzinski v. Stanczyk.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-1011: **Hoevet v. Hoevet.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-1015: **Kelly v. Gentry.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-93-1019: **State v. Leiding.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1022: **Stephenson v. Stephenson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1023: **Farm Credit Bank of Omaha v. Schwenk.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-1024: **In re Estate of Sutter.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-1026: **State v. Powers.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1038: **Hughes v. Capital Media Co.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-1042: **State v. Wurgler.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. S-93-1045: **State v. Garza.** Appeal dismissed. See Rule 7A(2).

No. A-93-1048: **D.B.C. Inc. v. Keyes.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1050: **State v. Almond.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1051: **State v. Adams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-93-1054, A-93-1055: **In re Interest of Harig.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-1058: **State v. Odo.** Affirmed. See Rule 7A(1).

No. A-93-1062: **Controlled Rain, Inc. v. Uher.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1064: **State v. Rokus.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-1069: **State v. Graves.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1070: **State v. Graves.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1071: **State v. Graves.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1072: **State v. Graves.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1074: **State v. Sands.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1076: **State v. Murphy.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1090: **Knecht v. O'Neill.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-93-1093: **Arkwright Mut. Ins. Co. v. Central Ice Mach. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-93-1098: **State v. Mite.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1108: **Jensen v. City of Lincoln.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-1110: **State on behalf of Call v. Fulmer.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-1111: **State v. Santoyo-Lopez.** Appeal dismissed. See Rule 7A(2).

No. A-93-1115: **Peterson v. Leonard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-1116: **Kirshen v. Kirshen.** Stipulation allowed; appeal dismissed.

No. A-93-1117: **Soden v. Fletcher Farm Serv.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-1118: **State v. Hernandez.** By order of the court, appeal dismissed for failure to file briefs.

No. A-93-1119: **State v. Wilczynski.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-1120: **State v. Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-93-1126: **Russell v. Department of Corr. Servs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-93-1137: **State v. Sutton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-004: **McCaffrey v. Quast.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-94-007, A-94-008: **Harrold v. Schleich.** Stipulation allowed; appeal dismissed.

No. A-94-011: **State v. Terry.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-015: **State v. Miller.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-94-018: **McCarty v. Plaza 370 Partners.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-020: **In re Interest of Varela.** Stipulation allowed; appeal dismissed.

No. A-94-021: **Jones v. Winkler.** Stipulation allowed; appeal dismissed.

No. A-94-023: **In re Proposed S.I.D. No. 2.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-94-025: **Tomlin v. Department of Corr. Servs.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-027: **Nelson v. Production Credit Assn. of the Midlands.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-029: **Anderson v. McKenzie.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-032: **State v. Cohen.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-035: **State v. Anderson.** Appeal dismissed. See Rule 7A(2).

No. A-94-039: **Department of Health v. Lorenz.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-94-040: **State v. Devers.** Appeal dismissed. See Rule 7A(2).

No. A-94-041: **State v. Clason.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-046: **State v. Kelley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-048: **Tyler v. Wax.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-050: **Watkins v. Department of Corr. Servs.** Appeal dismissed. See Rule 7A(2).

No. A-94-051: **State v. Fries.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-056: **National Ins. Assn. v. Armell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-057: **Cole v. Houston.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-061: **Wertz v. Purdy.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-074: **State v. Ruiz.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-076: **Harris v. Harris.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-94-080: **State v. Kotz.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-081: **State v. Bader.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-082: **State v. Byrd.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-084: **Isley v. Kreitman.** Appeal dismissed. See Rule 7A(2).

No. A-94-086: **Tinker v. Meyers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-087: **State v. Miller.** Stipulation allowed; appeal dismissed.

No. A-94-094: **Diversified Fin. Servs. v. Juranek.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-105: **Jennings v. Department of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-106: **State v. Estwick.** Affirmed. See Rule 7A(1).

No. A-94-110: **Lueras v. Kautz.** Stipulation allowed; appeal dismissed.

No. A-94-113: **Cole v. West.** Appeal dismissed. See Rule 7A(2).

No. A-94-119: **State v. Reineke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

Nos. A-94-121, A-94-129, A-94-130: **State v. Meis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-125: **Finkral v. Kosch.** Stipulation allowed; appeal dismissed.

No. A-94-131: **Stritt v. Stritt.** Motion sustained; appeal dismissed without prejudice.

No. A-94-138: **Cain v. Cain.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-94-139: **State v. Vanderboom.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-143: **State v. Menke.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-146: **State v. Malcom.** Appeal dismissed. See Rule 7A(2).

No. A-94-149: **State v. Arlt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-153: **Crabb v. Moore.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-157: **In re Interest of Nelson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-159: **In re Interest of Pelowski.** Appeal dismissed. See Rule 7A(2).

No. A-94-164: **Witherby v. Black.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-169: **State v. Deloa.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-170: **State v. Miles.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-176: **Juranek v. Farm Credit Bank of Omaha.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-178: **Schilke v. Nebraska Methodist Hosp.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-94-192: **Kay v. Board of Ed. of Dawes Cty. Sch. Dist. No. 92.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-94-197: **State v. Hittle.** Appeal dismissed. See Rule 7A(2).

No. A-94-198: **State v. Hittle.** Appeal dismissed. See Rule 7A(2).

No. A-94-200: **White v. White.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-201: **Vasa v. Schmidt.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. A-94-209: **State v. 1988 Volkswagen Jetta.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-211: **Van De Mark v. Hall County.** Appeal dismissed. See Rule 7A(2).

No. A-94-212: **Rada v. Rada.** By order of the court, appeal dismissed for failure to file briefs.

No. A-94-213: **Russell v. Nelson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No. A-94-217: **Lincoln-Lancaster Cty. Pub. Bldg. Commn. v. Breslow.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-218: **Kahland v. Valentine Motel.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-241: **Cole v. Donahue.** Appeal dismissed. See Rule 7B(2).

No. A-94-248: **Heinen v. Phoenix Sign Corp.** Stipulation allowed; appeal dismissed with prejudice.

No. A-94-252: **Jordon v. Jordon.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-258: **ConAgra, Inc. v. Central Ice Mach. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-94-266: **State v. Lamm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-269: **Workman v. Nebraska Dept. of Banking & Finance.** Appeal dismissed. See Rule 7A(2).

No. A-94-271: **Aubert v. Clarke.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-276: **State v. Perry.** Stipulation allowed; appeal dismissed without prejudice.

No. A-94-286: **State v. Corbin.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-94-289: **Swain Constr. v. Ready Mixed Concrete Co.** Appeal dismissed. See Rule 7A(2).

No. A-94-296: **Taylor v. Clarke.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-300: **Grey v. Grey.** Appeal dismissed. See Rule 7A(2).

No. A-94-302: **State v. Arias.** Stipulation allowed; appeal dismissed.

No. A-94-306: **State v. Davis.** Appeal dismissed. See Rule 7A(2).

No. A-94-309: **Peter Kiewit Sons, Inc. v. Cole.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-316: **Breitenfeldt v. Breitenfeldt.** Stipulation allowed; appeal dismissed.

No. A-94-317: **Nwachukwu v. Nwachukwu.** Appeal dismissed. See Rule 7A(2).

No. A-94-329: **Papio-Missouri River Resources Dist. v. Smith.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-332: **Allemang v. Kearney Farm Ctr.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-336: **State v. Matthies.** Appeal dismissed. See Rule 7A(2) and *State v. Barnett*, 1 Neb. App. 708, 511 N.W.2d 150 (1993).

No. A-94-361: **Seng v. Board of Equal. of York Cty.** Appeal dismissed. See Rule 7A(2).

No. A-94-362: **Folsom v. Folsom.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-365: **Nielsen Oil & Propane v. Williams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-381: **In re Application of Neb. Pub. Power Dist.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-383: **Metropolitan Fed. Bank v. College Assocs.** Stipulation allowed; appeal dismissed with prejudice.

No. A-94-384: **State v. Duncan.** Appeal dismissed. See Rule 7A(2) and *State v. Bailey*, 225 Neb. 66, 402 N.W.2d 319 (1987).

No. A-94-391: **Runnels v. Runnels.** Stipulation allowed; appeal dismissed.

No. A-94-399: **State v. Heckman.** Appeal dismissed. See Rule 7A(2) and *State v. Barnett*, 1 Neb. App. 708, 511 N.W.2d 150 (1993).

No. A-94-402: **Sherrets v. Sherrets.** Stipulation allowed; appeal dismissed without prejudice.

No. A-94-434: **State v. Snow.** Appeal dismissed. See Rule 7A(2).

No. A-94-435: **Nagle v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-439: **Clark v. Clark.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-458: **State v. Schall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-466: **State v. Morris.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A094-482: **State ex rel. Yawn v. Garber.** Appeal dismissed. See Rule 7A(2).

No. A-94-492: **State v. Sheppard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-509: **State v. Olson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-510: **State v. Olson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-511: **State v. Olson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-518: **State v. Burling.** Appeal dismissed. See Rule 7A(2).

No. A-94-523: **State v. Barnes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-524: **State v. Barnes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-94-550: **State v. Holland.** Appeal dismissed. See Rule 7A(2).

No. A-94-569: **United Nebraska Bank v. Burnett.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. A-94-620: **State v. King.** Appeal dismissed. See Rule 7A(2).

No. A-94-638: **Gasseling v. Gasseling.** Appeal dismissed. See Rule 7A(2) and *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991).

No. A-94-694: **State v. Peterson.** Appeal dismissed. See Rule 7A(2) and *State v. Barnett*, 1 Neb. App. 708, 511 N.W.2d 150 (1993).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-33-940007: **State v. Martinez** (not previously docketed). Petition of appellant for further review overruled on May 18, 1994, for want of jurisdiction.

No. A-33-940008: **State v. Martinez** (not previously docketed). Petition of appellant for further review overruled on May 18, 1994, for want of jurisdiction.

No. A-88-523: **State v. King**, 94 NCA No. 2. Petition of appellant for further review overruled on March 16, 1994.

No. A-91-299: **Murrish v. Burkey**, 1 Neb. App. 650 (1993). Petition of appellee for further review overruled on October 20, 1993.

No. A-91-437: **Adams v. Adams**, 3 NCA 352 (1993). Petition of appellee for further review overruled on October 20, 1993.

No. A-91-623: **Mitchell v. Shallenberger**, 4 NCA 605 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-91-624: **Woods v. Shallenberger**, 4 NCA 605 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. S-91-747: **Plambeck v. Union Pacific RR. Co.** Petition of appellant for further review sustained on September 9, 1993.

No. A-91-836: **State v. Owen**, 1 Neb. App. 1060 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-91-836: **State v. Owen**, 1 Neb. App. 1060 (1993). Petition of appellee for further review overruled on January 12, 1994.

No. S-91-901: **Old Omaha Assn. v. City of Omaha**, 2 Neb. App. 618 (1994). Petition of amicus curiae First National Bank for further review overruled on July 20, 1994.

No. S-91-901: **Old Omaha Assn. v. City of Omaha**, 2 Neb. App. 618 (1994). Petition of appellant for further review sustained on July 20, 1994.

No. A-91-908: **State v. One 1986 Toyota 4-Runner**, 1 Neb. App. 1138 (1993). Petition of appellant for further review overruled for lack of jurisdiction on October 20, 1993.

No. A-91-930: **Amick v. Welsh**, 94 NCA No. 8. Petition of appellant for further review overruled on April 13, 1994.

No. A-91-971: **Coran v. Board of Regents**, 3 NCA 967 (1993). Petition of appellant for further review overruled on September 9, 1993.

No. A-91-995: **Eggers Personnel, Inc. v. Hawbaker.** Petition of appellant for further review overruled on October 6, 1993.

No. A-91-1014: **Keating v. Wiese**, 1 Neb. App. 865 (1993). Petition of appellee for further review overruled on September 9, 1993.

No. A-91-1023: **Christen v. Christen**, 4 NCA 132 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-91-1125: **Wisnieski v. Rolf**, 93 NCA No. 42. Petition of appellant for further review overruled on December 15, 1993.

No. A-91-1125: **Wisnieski v. Rolf**, 93 NCA No. 42. Petition of appellee for further review overruled on December 15, 1993.

No. S-91-1142: **Novak v. Novak**, 2 Neb. App. 21 (1993). Petition of appellant for further review sustained on November 17, 1993.

No. S-91-1155: **Macholan v. Wynegar.** Petition of appellant for further review sustained on October 20, 1993.

No. A-91-1171: **Smith v. Smith.** Petition of appellant for further review overruled on February 10, 1994.

No. A-91-1177: **Rosenberry v. Rosenberry.** Petition of appellee for further review overruled on December 8, 1993.

No. A-91-1178: **State v. One 1986 Mercury Lynx**, 4 NCA 675 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. S-91-1207: **Long v. Hacker**, 93 NCA No. 42. Petition of appellant for further review sustained on January 26, 1994.

No. A-91-1229: **State v. Thompson,** 93 NCA No. 50. Petition of appellant for further review overruled on February 16, 1994.

No. A-91-1233: **Brown v. Hansen,** 1 Neb. App. 962 (1993). Petition of appellee for further review overruled on October 6, 1993.

No. A-91-1239: **State v. Harper,** 2 Neb. App. 220 (1993). Petition of appellant for further review overruled on January 26, 1994.

No. A-91-1239: **State v. Harper,** 2 Neb. App. 220 (1993). Petition of appellee for further review overruled on January 26, 1994.

No. S-91-1242: **Rohde v. Farmers Alliance Mut. Ins. Co.,** 4 NCA 69 (1993). Petition of appellant for further review sustained on September 9, 1993.

No. A-91-1245: **Vogel v. Bartels,** 1 Neb. App. 1113 (1993). Petition of appellant for further review overruled on October 6, 1993.

No. S-91-1247: **Morgan v. Morgan,** 93 NCA No. 42. Petition of appellee for further review sustained on December 15, 1993.

No. A-91-1249: **Mitchell v. Caldwell,** 4 NCA 176 (1993). Petition of appellant for further review overruled on October 6, 1993.

No. A-92-005: **Bauermeister v. Bauermeister.** Petition of appellant for further review overruled on September 9, 1993.

No. A-92-020: **Coates v. Coates,** 93 NCA No. 38. Petition of appellant for further review overruled on December 8, 1993.

No. A-92-036: **Shkolnick v. American Family Mut. Ins. Co.,** 2 Neb. App. 61 (1993). Petition of appellant for further review overruled on November 17, 1993.

No. S-92-038: **In re Application of Jantzen,** 1 Neb. App. 1015 (1993). Petition of appellant for further review sustained on September 15, 1993.

No. A-92-039: **Association of Commonwealth Claimants v. Hake,** 2 Neb. App. 123 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-92-041: **City of Omaha v. Wade,** 1 Neb. App. 1168 (1993). Petition of appellant for further review overruled on October 27, 1993.

No. S-92-043: **Stuthman v. Stuthman**, 2 Neb. App. 173 (1993). Petition of appellee for further review sustained on December 22, 1993.

No. A-92-055: **Leu v. Littell**, 2 Neb. App. 323 (1993). Petition of appellant for further review overruled on February 16, 1994.

No. A-92-055: **Leu v. Littell**, 2 Neb. App. 323 (1993). Petition of appellee for further review overruled on February 16, 1994.

No. A-92-067: **Lawrence v. Ellsworth**, 93 NCA No. 39. Petition of appellee for further review overruled on December 22, 1993.

No. A-92-090: **Houston v. Nebraska Liquor Control Comm.**, 94 NCA No. 10. Petition of appellant for further review overruled on April 27, 1994.

No. S-92-092: **Knaub v. Knaub**, 4 NCA 638 (1993). Petition of appellee Michael Knaub and appellant for further review sustained on October 20, 1993.

No. A-92-096: **Luster v. Lancaster Cty.**, 93 NCA No. 47. Petition of appellant for further review overruled on March 2, 1994.

No. A-92-097: **Central Ice Machine Co. v. Cole**, 2 Neb. App. 282 (1993). Petition of appellant for further review overruled on February 10, 1994.

No. A-92-116: **Venditte v. Civil Serv. Comm.**, 93 NCA No. 40. Petition of appellant for further review overruled on December 29, 1993.

No. S-92-183: **State v. Wordekemper**, 3 NCA 256 (1993). Nebraska Supreme Court order dated June 3, 1993, granting further review vacated. Further review denied by the Nebraska Supreme Court on November 10, 1993.

No. S-92-204: **Boyles v. Hausmann**, 2 Neb. App. 388 (1993). Petition of appellees for further review sustained on February 16, 1994.

No. S-92-209: **Berumen v. Casady**, 93 NCA No. 49. Petition of appellant for further review sustained on January 26, 1994.

No. A-92-224: **Moxham v. Moxham**, 94 NCA No. 8. Petition of appellee for further review overruled on June 2, 1994.

No. A-92-238: **Weatherly v. Blue Cross Blue Shield**, 2 Neb. App. 669 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-92-248: **Newquist v. Palliser Furniture Corp.**, 93 NCA No. 47. Petition of appellant for further review overruled on January 12, 1994.

No. A-92-257: **Nucor Steel v. Balka**, 2 Neb. App. 138 (1993). Petition of appellant for further review overruled on March 30, 1994.

No. A-92-265: **Phelps County v. Anderson**, 2 Neb. App. 236 (1993). Petition of appellant for further review overruled on March 23, 1994.

No. A-92-281: **Thorne v. Omaha Pub. Power Dist.**, 2 Neb. App. 437 (1994). Petition of appellee Fuel Economy Contracting Co. for further review overruled on March 23, 1994.

No. A-92-281: **Thorne v. Omaha Pub. Power Dist.**, 2 Neb. App. 437 (1994). Petition of appellee Omaha Public Power District for further review overruled on March 23, 1994.

No. A-92-293: **Barthel v. Liermann**, 2 Neb. App. 347 (1993). Petition of appellee for further review overruled on March 23, 1994.

No. A-92-295: **Bode v. Monahan, Inc.**, 94 NCA No. 7. Petition of appellant for further review overruled on March 30, 1994.

No. A-92-297: **State v. Kowalski**, 4 NCA 289 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. S-92-317: **Trailblazer Pipeline Co. v. Balka**, 93 NCA No. 49. Petition of appellants for further review sustained on March 16, 1994.

No. A-92-339: **Empire Fire & Marine Ins. Co. v. Michigan Mut. Ins. Co.**, 93 NCA No. 52. Petition of appellant for further review overruled on February 10, 1994.

No. A-92-346: **Newman v. Hinky Dinky**, 2 Neb. App. 555 (1994). Petition of appellee for further review overruled on July 7, 1994.

No. A-92-359: **Beverly Enter. - Nebraska v. Columbus Health Care**, 2 Neb. App. 410 (1993). Petition of appellant for further review overruled on May 25, 1994.

No. A-92-376: **State v. Copeland**, 3 NCA 296 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. S-92-380: **In re Interest of White.** Petition of appellant for further review sustained on September 9, 1993.

No. S-92-380: **In re Interest of White.** Petition of appellant for further review improvidently granted; order dated September 9, 1993, vacated and set aside on December 8, 1993.

No. S-92-392: **Freeman v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review sustained on June 15, 1994.

No. S-92-393: **Schmidt v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review sustained on June 15, 1994.

No. S-92-463: **Dalton Buick v. Universal Underwriters Ins. Co.**, 1 Neb. App. 1104 (1993). Petition of appellant for further review sustained on November 17, 1993.

No. S-92-470: **State v. Keith**, 4 NCA 313 (1993). Petition of appellee for further review sustained on September 15, 1993.

No. S-92-470: **State v. Keith**, 4 NCA 313 (1993). Petition of appellee for further review dismissed on March 16, 1994, as having been improvidently granted.

No. A-92-471: **Zyburo v. Board of Education**, 94 NCA No. 9. Petition of appellant for further review overruled on April 13, 1994.

No. S-92-475: **State v. Anderson**, 1 Neb. App. 914 (1993). Petition of appellant for further review sustained on October 27, 1993, but review is limited to the admissibility of appellant's tape-recorded statement to police.

No. A-92-476: **State v. Bennett**, 2 Neb. App. 188 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-92-483: **Gramercy Hill Enters. v. Westmark Fin. Corp.**, 94 NCA No. 4. Petition of appellee for further review overruled on June 2, 1994.

No. A-92-521: **Whetstone v. Cornhusker Cas. Co.**, 94 NCA No. 17. Petition of appellant for further review overruled on July 20, 1994.

No. A-92-524: **Thies v. City of Norfolk**, 94 NCA No. 14. Petition of appellant for further review overruled on May 18, 1994.

No. S-92-534: **In re Estate of Hannan**, 2 Neb. App. 636 (1994). Petition of appellee for further review sustained on May 11, 1994.

No. A-92-537: **Hood v. Cerny**, 93 NCA No. 47. Petition of appellant for further review overruled on February 10, 1994.

No. A-92-543: **State v. Prater**, 3 NCA 730 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-544: **State v. Nazeck.** Petition of appellant for further review overruled on January 20, 1994.

No. A-92-545: **State v. Fort**, 1 Neb. App. 940 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-546: **State v. Blue**, 3 NCA 638 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-592: **Metco, Inc. v. Huffman**, 2 Neb. App. 506 (1994). Petition of appellee for further review overruled on April 20, 1994.

No. S-92-611: **State v. Hirsch**, 4 NCA 486 (1993). Petition of appellee for further review sustained on October 6, 1993.

No. S-92-634: **McGowan v. Lockwood Corp.** Petition of appellant for further review sustained on September 9, 1993.

No. A-92-642: **In re Interest of C.B.**, 4 NCA 767 (1993). Petition of appellant for further review overruled on October 20, 1993.

Nos. S-92-647, S-92-648, S-92-649: **Thomas v. Countryside of Hastings**, 2 Neb. App. 590 (1994). Petitions of appellants for further review sustained on June 15, 1994.

No. S-92-664: **In re Applications A-17004 et al.**, 1 Neb. App. 974 (1993). Petition of appellant for further review sustained on September 9, 1993.

No. A-92-684: **Alvis v. Alvis**, 94 NCA No. 15. Petition of appellant for further review overruled on June 15, 1994.

No. S-92-694: **New Light Co. v. Wells Fargo Alarm Servs.**, 2 Neb. App. 828 (1994). Petition of appellant for further review sustained on July 20, 1994.

No. A-92-695: **State v. Cullen**, 94 NCA No. 6. Petition of appellant for further review overruled on April 27, 1994.

No. S-92-704: **Coppi v. West Am. Ins. Co.**, 2 Neb. App. 834 (1994). Petition of appellee for further review sustained on July 20, 1994.

No. A-92-706: **In re Estate of Baright**, 94 NCA No. 15. Petition of appellant for further review overruled on June 2, 1994.

No. A-92-712: **Hibberd v. City of Lincoln**, 94 NCA No. 12. Petition of appellant for further review overruled on May 18, 1994.

No. A-92-716: **Pierce v. Shera**, 94 NCA No. 10. Petition of appellant for further review overruled on March 30, 1994.

No. S-92-752: **In re Guardianship & Conservatorship of Bloomquist**, 2 Neb. App. 756 (1994). Petition of appellant for further review sustained on May 18, 1994.

No. A-92-753: **State v. Kumpula**, 4 NCA 320 (1993). Petition of appellant for further review overruled on September 9, 1993.

No. A-92-758: **Cotton v. Gering Pub. Sch.**, 1 Neb. App. 1036 (1993). Petition of appellee for further review overruled on November 24, 1993.

No. A-92-771: **State v. Peery**, 4 NCA 497 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. S-92-772: **In re Estate of Marsh**, 2 Neb. App. 649 (1994). Petition of appellee Buckles for further review sustained on June 15, 1994.

No. S-92-772: **In re Estate of Marsh**, 2 Neb. App. 649 (1994). Petition of appellee Kenner for further review sustained on June 15, 1994.

No. A-92-794: **Hagerbaumer v. Hagerbaumer**, 94 NCA No. 17. Petition of appellant for further review overruled on June 23, 1994.

No. S-92-808: **State v. Flye**, 2 Neb. App. 96 (1993). Petition of appellee for further review sustained on December 8, 1993.

No. A-92-818: **Hood v. Cerny.** Petition of appellant for further review overruled as moot on February 10, 1994.

No. A-92-821: **Koterzina v. Copple Chevrolet**, 1 Neb. App. 1000 (1993). Petition of appellant for further review overruled on October 6, 1993.

No. A-92-822: **Brosius Cattle Co. v. Philadelphia Life Ins. Co.**, 94 NCA No. 18. Petition of appellant for further review overruled on July 27, 1994.

No. S-92-825: **Centamore v. Cocanougher**, 2 Neb. App. 756 (1994). Petition of appellant for further review sustained on May 18, 1994.

No. A-92-826: **State v. White**, 2 Neb. App. 106 (1993). Petition of appellant for further review overruled on November 24, 1993.

No. A-92-828: **State v. Atkinson.** Petition of appellant for further review overruled on June 15, 1994.

No. A-92-861: **McFarland v. Detlefsen Oil Co.** Petition of appellant for further review overruled on October 27, 1993.

No. A-92-864: **State v. McDonald.** Petition of appellant for further review overruled on September 15, 1993.

No. A-92-866: **State v. Owen**, 2 Neb. App. 195 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-92-869: **State v. Lyons**, 4 NCA 448 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-870: **State v. Matlock**, 93 NCA No. 49. Petition of appellant for further review overruled on December 29, 1993.

No. A-92-904: **In re Interest of J.L.H., J.L.H., and R.H.**, 2 Neb. App. 40 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-92-912: **State v. Curry.** Petition of appellant for further review sustained on January 12, 1994.

No. A-92-913: **State v. Curry.** Petition of appellant for further review sustained on January 12, 1994.

No. A-92-914: **State v. Curry.** Petition of appellant for further review sustained on January 12, 1994.

No. S-92-954: **State v. Edwards**, 2 Neb. App. 149 (1993). Petition of appellee for further review sustained on January 12, 1994.

No. S-92-954: **State v. Edwards**, 2 Neb. App. 149 (1993). Petition of appellee for further review dismissed on May 4, 1994, as having been improvidently granted.

No. A-92-956: **In re Interest of D.H.**, 94 NCA No. 7. Petition of appellant for further review overruled on April 27, 1994, as filed out of time.

No. A-92-998: **State v. Hollie**, 93 NCA No. 46. Petition of appellant for further review overruled on January 12, 1994.

No. S-92-1039: **State v. Roche, Inc.**, 2 Neb. App. 445 (1994). Petition of appellant for further review sustained on March 30, 1994.

No. S-92-1039: **State v. Roche, Inc.**, 2 Neb. App. 445 (1994). Petition of appellee for further review sustained on March 30, 1994.

No. A-92-1043: **Herboldsheimer v. Herboldsheimer**, 4 NCA 531 (1993). Petition of appellant for further review overruled on October 20, 1993.

No. A-92-1053: **State v. Liu**, 93 NCA No. 45. Petition of appellant for further review overruled on December 29, 1993.

No. A-92-1062: **State v. Williams**, 93 NCA No. 37. Petition of appellant for further review overruled on November 17, 1993.

No. A-92-1091: **State v. Sobieszczyk**, 2 Neb. App. 116 (1993). Petition of appellant for further review overruled on November 19, 1993.

No. S-92-1095: **State v. Woods**, 94 NCA No. 8. Petition of appellant for further review sustained on April 27, 1994.

No. A-92-1126: **State v. Bundy**, 94 NCA No. 1. Petition of appellant for further review overruled on February 24, 1994.

No. A-92-1128: **Hansen v. Hammer**, 94 NCA No. 23. Petition of appellee for further review overruled on July 27, 1994.

No. A-92-1136: **State v. Moore**, 2 Neb. App. 206 (1993). Petition of appellant for further review overruled on March 23, 1994.

No. A-92-1140: **Wiese v. Becton-Dickinson**, 4 NCA 700 (1993). Petition of appellant for further review overruled on November 10, 1993.

No. A-92-1172: **State v. McGee.** Petition of appellant for further review overruled on February 16, 1994.

No. S-92-1180: **State v. Fahlk**, 2 Neb. App. 421 (1993). Petition of appellant for further review sustained on April 20, 1994.

No. A-93-056: **State v. Ackelson.** Petition of appellant for further review overruled on October 6, 1993.

No. A-93-057: **State v. Rodgers**, 2 Neb. App. 360 (1993). Petition of appellant for further review overruled on February 10, 1994.

No. A-93-066: **Eichorn v. Eichorn Trucking.** Petition of appellee Eichorn Trucking for further review overruled on February 16, 1994.

No. A-93-066: **Eichorn v. Eichorn Trucking.** Petition of appellee Second Injury Fund for further review overruled on February 16, 1994.

No. A-93-070: **Sudik v. City of Wahoo.** Petition of appellant for further review overruled on July 27, 1994.

No. A-93-092: **State v. Maxwell.** Petition of appellant for further review overruled on October 20, 1993.

No. S-93-104: **132nd Street Ltd. v. Fellman.** Petition of appellant for further review sustained on October 20, 1993.

No. S-93-114: **Kelly v. Kelly**, 2 Neb. App. 399 (1993). Petition of appellant for further review sustained on February 10, 1994.

No. A-93-133: **State v. Ogden**, 93 NCA No. 43. Petition of appellant for further review overruled on January 12, 1994.

No. A-93-137: **State v. Deutsch**, 2 Neb. App. 186 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-93-149: **State on behalf of Yankton v. Cummings**, 2 Neb. App. 820 (1994). Petition of appellant for further review overruled on July 7, 1994.

No. A-93-157: **State v. Jones**, 93 NCA No. 45. Petition of appellant for further review overruled on December 29, 1993.

No. S-93-196: **In re Application of Allen.** Petition of appellant for further review sustained on October 20, 1993.

No. A-93-206: **State v. Richmond**, 93 NCA No. 50. Petition of appellant for further review overruled on February 10, 1994.

No. A-93-219: **State v. Harris**, 2 Neb. App. 692 (1994). Petition of appellant for further review overruled on May 11, 1994.

No. A-93-222: **State v. Stuthman**, 2 Neb. App. 317 (1993). Petition of appellant for further review overruled on January 12, 1994.

No. A-93-266: **State v. Maisch**, 94 NCA No. 9. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-268: **Uhing v. Heimes.** Petition of appellant for further review overruled on February 24, 1994.

No. A-93-291: **Behrens v. American Stores Packing Co.**, 94 NCA No. 9. Petition of appellant for further review overruled on April 20, 1994.

No. A-93-292: **Ballard v. Nebraska Dept. of Soc. Servs.**, 2 Neb. App. 809 (1994). Petition of appellant for further review overruled on July 7, 1994.

Nos. A-93-298, A-93-299: **State v. Rath**, 94 NCA No. 6. Petition of appellant for further review overruled on March 30, 1994.

No. A-93-307: **Cole v. Hendrickson.** Petition of appellant for further review overruled on October 20, 1993.

No. A-93-309: **In re Interest of Ammons.** Petition of appellant for further review overruled on March 16, 1994.

No. A-93-355: **In re Interest of Joshua B. et al.**, 94 NCA No. 14. Petition of appellee and guardian ad litem for further review overruled on May 18, 1994.

No. S-93-364: **State v. Null**, 94 NCA No. 20. Petition of appellant for further review sustained on June 30, 1994.

No. A-93-374: **State v. Grotzky.** Petition of appellant for further review overruled on January 20, 1994.

No. A-93-376: **Fieldgrove v. Donscheski.** Petition of appellant for further review overruled on March 23, 1994.

No. A-93-385: **State v. Trackwell**, 94 NCA No. 5. Petition of appellant for further review overruled on March 30, 1994.

No. A-93-386: **Jacob v. Columbia Ins. Group**, 2 Neb. App. 473 (1994). Petition of appellee for further review overruled on April 20, 1994.

No. A-93-387: **State v. Cross**, 94 NCA No. 10. Petition of appellant for further review overruled on April 20, 1994.

No. S-93-396: **State v. Dawn.** Petition of appellant for further review sustained on March 30, 1994.

No. A-93-401: **State v. Rector.** Petition of appellant for further review overruled on November 10, 1993.

No. A-93-406: **State v. Scaglione**, 94 NCA No. 4. Petition of appellant for further review overruled on March 2, 1994.

No. A-93-419: **State v. Kolar.** Petition of appellant for further review overruled on March 30, 1994.

No. A-93-430: **Bridgeport Irr. Dist. v. Department of Water Res.**, 94 NCA No. 17. Petition of appellant for further review overruled on June 30, 1994.

No. A-93-432: **Stevens v. Luick**, 94 NCA No. 14. Petition of appellant for further review overruled on May 25, 1994.

No. A-93-436: **Bartunek v. Geo. A. Hormel & Co.**, 2 Neb. App. 598 (1994). Petition of appellant for further review overruled on April 20, 1994.

No. S-93-454: **State ex rel. Grape v. Zach**, 94 NCA No. 13. Petition of appellee for further review sustained on June 15, 1994.

No. A-93-459: **State v. Martinez**, 4 NCA 718 (1993). Petition of appellant for further review overruled for lack of jurisdiction on October 20, 1993.

No. A-93-460: **State v. Martinez**, 4 NCA 718 (1993). Petition of appellant for further review overruled for lack of jurisdiction on October 20, 1993.

No. S-93-487: **Jirkovsky v. Jirkovsky**, 94 NCA No. 22. Petition of appellant for further review sustained on July 20, 1994.

No. A-93-512: **State v. Schmidt**, 94 NCA No. 6. Petition of appellant for further review overruled on March 23, 1994.

No. A-93-531: **State v. Edwards.** Petition of appellant for further review overruled on March 16, 1994.

No. A-93-540: **McLaughlin v. Swift-Eckrich, Inc.**, 94 NCA No. 4. Petition of appellant for further review overruled on March 30, 1994.

No. S-93-549: **State v. Long.** Petition of appellant for further review sustained on December 29, 1993.

No. S-93-549: **State v. Long.** Petition of appellant for further review dismissed on April 13, 1994, as having been improvidently granted.

No. A-93-553: **In re Interest of Dickey.** Petition of appellant for further review overruled on January 20, 1994.

No. A-93-562: **State v. Doremus**, 2 Neb. App. 784 (1994). Petition of appellee for further review overruled on June 15, 1994.

No. A-93-571: **State v. Carman**, 94 NCA No. 6. Petition of appellee for further review overruled on March 30, 1994.

No. A-93-574: **State v. Schumacher**, 94 NCA No. 14. Petition of appellant for further review overruled on June 15, 1994.

No. A-93-578: **In re Interest of Maurice S.**, 94 NCA No. 17. Petition of appellant for further review overruled on June 15, 1994.

No. A-93-588: **State v. Picket Pin**, 94 NCA No. 10. Petition of appellant for further review overruled on April 27, 1994.

No. S-93-592: **State v. Skalberg**, 94 NCA No. 11. Petition of appellee for further review sustained on May 18, 1994.

No. A-93-598: **State v. Swanson**, 94 NCA No. 14. Petition of appellee for further review overruled on June 15, 1994.

No. A-93-602: **State v. Barfield**, 94 NCA No. 18. Petition of appellant for further review overruled on July 20, 1994.

No. S-93-606: **Bennett v. Board of Equal. of City of Lincoln**, 2 Neb. App. 161 (1993). Petition of appellant for further review sustained on December 29, 1993.

No. A-93-626: **Richardson v. Clarke**, 2 Neb. App. 575 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-93-627: **Sterling v. Clarke**, 2 Neb. App. 575 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-93-631: **State v. White**, 94 NCA No. 15. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-636: **State v. Cariker**, 94 NCA No. 21. Petition of appellant for further review overruled on July 7, 1994.

No. A-93-639: **State v. Perez**, 94 NCA No. 15. Petition of appellant for further review overruled on June 2, 1994.

No. A-93-656: **Pearson v. Lincoln Telephone Co.**, 2 Neb. App. 703 (1994). Petition of appellee for further review overruled on May 11, 1994.

No. A-93-657: **Fordham v. West Lumber Co.**, 2 Neb. App. 716 (1994). Petition of appellant for further review overruled on May 18, 1994.

No. A-93-661: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-662: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-663: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-664: **State v. Tipton.** Petition of appellant for further review overruled on November 8, 1993.

No. A-93-665: **State v. Illig.** Petition of appellant for further review overruled on December 15, 1993.

No. S-93-666: **State v. Reynolds**, 94 NCA No. 11. Petition of appellant for further review sustained on May 11, 1994.

No. A-93-688: **State v. Brewer.** Petition of appellant for further review overruled on February 16, 1994.

No. A-93-689: **State v. Brewer.** Petition of appellant for further review overruled on February 16, 1994.

No. A-93-700: **Ostergaard v. Clarkson Hospital,** 94 NCA No. 20. Petition of appellee for further review overruled on July 20, 1994.

No. A-93-702: **In re Interest of Eva W.,** 94 NCA No. 20. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-706: **State v. Vavra**. Petition of appellant for further review overruled on July 20, 1994.

No. S-93-714: **Harder v. Harder.** Petition of appellant for further review sustained on May 18, 1994.

No. A-93-720: **In re Interest of Krystal K. et al.,** 94 NCA No. 21. Petition of appellant for further review overruled on June 23, 1994.

No. S-93-728: **Shade v. Ayars & Ayars, Inc.,** 2 Neb. App. 730 (1994). Petition of appellant for further review sustained on June 15, 1994.

No. A-93-739: **World Radio Lab. v. Coopers & Lybrand,** 2 Neb. App. 747 (1994). Petition of appellant for further review overruled on July 20, 1994.

No. A-93-770: **Filbert v. Globe Cleaners,** 94 NCA No. 17. Petition of appellant for further review overruled on June 23, 1994.

No. A-93-786: **Cole v. McCall.** Petition of appellant for further review overruled on February 16, 1994.

Nos. A-93-811, A-93-812: **State v. Kizzire.** Petition of appellant for further review overruled on June 23, 1994.

No. A-93-830: **Chism v. Charles Vrana & Son Constr. Co.,** 94 NCA No. 19. Petition of appellant for further review overruled on July 27, 1994.

No. A-93-838: **State v. Reynolds,** 94 NCA No. 20. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-839: **State v. Coleman.** Petition of appellant for further review overruled on December 29, 1993.

No. A-93-843: **In re Interest of Dickson.** Petition of appellant for further review overruled on May 11, 1994.

No. S-93-897: **State v. Wragge**, 94 NCA No. 23. Petition of appellant for further review sustained on July 27, 1994.

No. A-93-912: **State v. Ziemba**, 94 NCA No. 17. Petition of appellee for further review overruled on June 23, 1994.

No. A-93-915: **State v. Burnett.** Petition of appellant for further review overruled on June 2, 1994.

No. A-93-959: **Northern Bank v. Dowd.** Petition of appellant for further review overruled on February 10, 1994.

No. A-93-961: **State v. Walton.** Petition of appellant for further review overruled on May 18, 1994.

No. S-93-1065: **State v. McCormick.** Petition of plaintiff for further review sustained on December 8, 1993; application to docket error proceedings allowed in the Supreme Court.

No. S-93-1066: **State v. Radden.** Petition of plaintiff for further review sustained on December 8, 1993; application to docket error proceedings allowed in the Supreme Court.

No. S-93-1067: **State v. Hall.** Petition of plaintiff for further review sustained on December 8, 1993; application to docket error proceedings allowed in the Supreme Court.

No. A-93-1098: **State v. Mite.** Petition of appellant for further review overruled on May 25, 1994.

No. A-93-1126: **Russell v. Department of Corr. Servs.** Petition of appellant for further review overruled on July 20, 1994.

No. A-94-025: **Tomlin v. Department of Corr. Servs.** Petition of appellant for further review overruled on March 2, 1994.

No. A-94-146: **State v. Malcom.** Petition of appellant for further review overruled on May 18, 1994.

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-88-523: **State v. King.** 94 NCA No. 2. Affirmed. Wright, Judge.

No. A-91-863: **Seldin v. City of Omaha.** 93 NCA No. 37. Reversed and remanded for further proceedings. Wright, Judge.

No. A-91-930: **Amick v. Welsh.** 94 NCA No. 8. Affirmed. Hannon, Judge.

No. A-91-1125: **Wisnieski v. Rolf.** 93 NCA No. 42. Affirmed as modified. Hannon, Judge.

No. A-91-1154: **Harmon Cable Communications v. Scope Cable Television.** 93 NCA No. 40. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-91-1207: **Long v. Hacker.** 93 NCA No. 42. Affirmed. Miller-Lerman, Judge.

No. A-91-1229: **State v. Thompson.** 93 NCA No. 50. Affirmed. Sievers, Chief Judge.

No. A-91-1247: **Morgan v. Morgan.** 93 NCA No. 42. Affirmed as modified. Miller-Lerman, Judge.

No. A-91-1276: **Cohoon v. Wilcoxen.** 93 NCA No. 41. Affirmed. Sievers, Chief Judge.

No. A-92-001: **Schmidt v. Schmidt.** 93 NCA No. 39. Affirmed. Connolly, Judge.

No. A-92-020: **Coates v. Coates.** 93 NCA No. 38. Affirmed as modified. Hannon, Judge.

No. A-92-050: **Wagner v. Wagner.** 93 NCA No. 50. Affirmed as modified. Sievers, Chief Judge.

No. A-92-067: **Lawrence v. Ellsworth.** 93 NCA No. 39. Reversed and remanded with directions. Hannon, Judge.

No. A-92-090: **Houston v. Nebraska Liquor Control Comm.** 94 NCA No. 10. Affirmed. Wright, Judge.

No. A-92-090: **Houston v. Nebraska Liquor Control Comm.** 93 NCA No. 39. Appeal dismissed. Wright, Judge.

No. A-92-096: **Luster v. Lancaster County.** 93 NCA No. 47. Affirmed. Sievers, Chief Judge.

No. A-92-112: **Wilke v. Village of Craig.** 93 NCA No. 39. Affirmed. Wright, Judge.

No. A-92-116: **Venditte v. Civil Serv. Comm.** 93 NCA No. 40. Affirmed. Miller-Lerman, Judge.

No. A-92-136: **First Westroads Bank v. Opstein.** 94 NCA No. 28. Affirmed. Irwin, Judge.

No. A-92-155: **Smith v. Manire.** 94 NCA No. 5. Affirmed. Miller-Lerman, Judge.

No. A-92-192: **State v. Roberts.** 94 NCA No. 8. Reversed and remanded with directions. Hannon, Judge.

No. A-92-197: **Wedding Info. Network v. Wedding Pages Ltd.** 94 NCA No. 1. Affirmed. Miller-Lerman, Judge.

No. A-92-209: **Berumen v. Casady.** 93 NCA No. 49. Affirmed. Wright, Judge.

No. A-92-224: **Moxham v. Moxham.** 94 NCA No. 8. Reversed and remanded with directions. Hannon, Judge.

No. A-92-237: **John Kraft Chevrolet v. Hawkeye-Security Ins. Co.** 93 NCA No. 40. Affirmed. Miller-Lerman, Judge.

No. A-92-248: **Newquist v. Palliser Furniture Corp.** 93 NCA No. 47. Affirmed. Sievers, Chief Judge.

No. A-92-261: **McAllister v. McAllister.** 93 NCA No. 45. Sentence vacated, and cause remanded for resentencing. Wright, Judge.

No. A-92-278: **Bodman v. Bodman.** 94 NCA No. 4. Affirmed as modified. Hannon, Judge.

No. A-92-295: **Bode v. Monahan, Inc.** 94 NCA No. 7. Affirmed. Irwin, Judge.

No. A-92-317: **Trailblazer Pipeline Co. v. Balka.** 93 NCA No. 49. Affirmed. Hannon, Judge.

No. A-92-320: **LaPorte v. Happy Hollow Club.** 93 NCA No. 47. Reversed and remanded for further proceedings. Miller-Lerman, Judge.

No. A-92-321: **Schwenk v. Production Credit Assn. of the Midlands.** 93 NCA No. 46. Affirmed. Wright, Judge.

No. A-92-339: **Empire Fire & Marine Ins. Co. v. Michigan Mut. Ins. Co.** 93 NCA No. 52. Affirmed. Irwin, Judge.

No. A-92-348: **Stanko v. Fairbanks.** 93 NCA No. 51. Affirmed. Miller-Lerman, Judge.

No. A-92-366: **Finney v. Loma, Inc.** 94 NCA No. 25. Reversed and remanded for a new trial. Norton, District Judge, Retired.

No. A-92-394: **Linley v. Gibbon Packing, Inc.** 93 NCA No. 43. Remanded with directions. Hannon, Judge.

No. A-92-400: **Kokrda v. Kokrda.** 93 NCA No. 46. Affirmed in part, and in part reversed and remanded with directions to dismiss. Miller-Lerman, Judge.

No. A-92-407: **Hennek v. Lexington State Bank.** 94 NCA No. 30. Affirmed. Sievers, Chief Judge.

No. A-92-408: **Hendricks v. Hendricks Sodding & Landscaping.** 93 NCA No. 50. Reversed and dismissed. Connolly, Judge.

No. A-92-410: **Dorn v. Boehringer Ingelheim Animal Health.** 94 NCA No. 6. Affirmed. Wright, Judge.

No. A-92-411: **Rehovsky v. Hall Cty. Housing Auth.** 93 NCA No. 46. Appeal dismissed. Connolly, Judge.

No. A-92-454: **Dodge County v. Hansen.** 94 NCA No. 11. Affirmed in part, and in part reversed. Connolly, Judge.

No. A-92-471: **Zyburo v. Board of Education.** 94 NCA No. 9. Affirmed. Hannon, Judge.

No. A-92-483: **Gramercy Hill Enters. v. Westmark Fin. Corp.** 94 NCA No. 4. Reversed and remanded with directions. Connolly, Judge.

No. A-92-499: **Schuett v. Schuett.** 93 NCA No. 45. Reversed and remanded with directions. Irwin, Judge.

No. A-92-502: **In re Application of Rochester Armored Car Co.** 94 NCA No. 12. Affirmed. Connolly, Judge.

No. A-92-521: **Whetstone v. Cornhusker Cas. Co.** 94 NCA No. 17. Affirmed. Miller-Lerman, Judge.

No. A-92-524: **Thies v. City of Norfolk.** 94 NCA No. 14. Appeal dismissed, and cause remanded with directions. Hannon, Judge.

No. A-92-537: **Hood v. Cerny.** 93 NCA No. 47. Affirmed. Per Curiam.

No. A-92-571: **Wright v. Kiger.** 94 NCA No. 10. Reversed and remanded for further proceedings. Sievers, Chief Judge.

No. A-92-572: **Shramek v. Metro Area Transit.** 94 NCA No. 6. Affirmed. Hannon, Judge.

No. A-92-590: **Behlen Mfg., Inc. v. McVey.** 94 NCA No. 3. Reversed and remanded for a new trial. Irwin, Judge.

No. A-92-609: **Sloup v. Berten.** 94 NCA No. 3. Affirmed as modified. Irwin, Judge.

No. A-92-616: **State v. Sullivan.** 94 NCA No. 1. Affirmed. Sievers, Chief Judge.

No. A-92-627: **Easter v. Gould, Inc.** 94 NCA No. 2. Affirmed. Wright, Judge.

No. A-92-659: **Dowis v. City of Omaha.** 94 NCA No. 2. Affirmed. Miller-Lerman, Judge.

No. A-92-666: **Allen v. Allen.** 94 NCA No. 5. Reversed and remanded with directions. Sievers, Chief Judge.

No. A-92-678: **Rediger v. Rediger.** 94 NCA No. 14. Affirmed. Hannon, Judge.

No. A-92-682: **Arens v. Arens.** 94 NCA No. 5. Affirmed as modified. Miller-Lerman, Judge.

No. A-92-684: **Alvis v. Alvis.** 94 NCA No. 15. Affirmed. Connolly, Judge.

No. A-92-692: **Matthis v. Anderson.** 94 NCA No. 12. Appeal dismissed. Miller-Lerman, Judge.

No. A-92-695: **State v. Cullen.** 94 NCA No. 6. Affirmed. Irwin, Judge.

No. A-92-703: **Ginger Woods II Home Assn. v. Lamp.** 94 NCA No. 15. Affirmed. Sievers, Chief Judge.

No. A-92-705: **In re Estate of Reese.** 94 NCA No. 2. Affirmed. Sievers, Chief Judge.

No. A-92-706: **In re Estate of Baright.** 94 NCA No. 15. Affirmed. Miller-Lerman, Judge.

No. A-92-712: **Hibberd v. City of Lincoln.** 94 NCA No. 12. Affirmed. Miller-Lerman, Judge.

No. A-92-716: **Pierce v. Shera.** 94 NCA No. 10. Affirmed. Miller-Lerman, Judge.

No. A-92-725: **State v. Bedke.** 93 NCA No. 45. Affirmed. Sievers, Chief Judge.

No. A-92-731: **Meints v. Store Kraft Mfg. Co.** 94 NCA No. 10. Affirmed. Wright, Judge.

No. A-92-735: **Gardiner v. Fanning.** 94 NCA No. 19. Affirmed as modified. Miller-Lerman, Judge.

No. A-92-736: **Billingsley v. Prudential Ins. Co.** 94 NCA No. 15. Affirmed. Irwin, Judge.

No. A-92-760: **Packers Bank & Trust v. First Nat. Bank of Kearney.** 94 NCA No. 25. Affirmed. Sievers, Chief Judge.

No. A-92-762: **Pavusa v. Woerner.** 94 NCA No. 8. Affirmed. Wright, Judge.

No. A-92-769: **LDC, Inc. v. County of Holt.** 94 NCA No. 21. Affirmed. Irwin, Judge.

No. A-92-793: **Hekmati v. Tegt.** 94 NCA No. 21. Affirmed. Hannon, Judge.

No. A-92-794: **Hagerbaumer v. Hagerbaumer.** 94 NCA No. 17. Affirmed. Warren, District Judge, Retired.

No. A-92-811: **Thiltges v. Thiltges.** 94 NCA No. 24. Affirmed as modified. Miller-Lerman, Judge.

No. A-92-822: **Brosius Cattle Co. v. Philadelphia Life Ins. Co.** 94 NCA No. 18. Affirmed. Hannon, Judge.

No. A-92-824: **Ricceri v. Ricceri.** 94 NCA No. 14. Affirmed. Per Curiam.

No. A-92-841: **M & M Grain Co. v. Axmann.** 94 NCA No. 14. Affirmed. Miller-Lerman, Judge.

No. A-92-857: **In re Guardianship & Conservatorship of Piller.** 94 NCA No. 17. Affirmed. Irwin, Judge.

No. A-92-858: **Gage v. Hodge.** 94 NCA No. 29. Affirmed. Hannon, Judge.

No. A-92-870: **State v. Matlock.** 93 NCA No. 49. Affirmed. Miller-Lerman, Judge.

No. A-92-903: **Schaad v. Sims.** 94 NCA No. 16. Affirmed. Miller-Lerman, Judge.

No. A-92-906: **State v. Moore.** 93 NCA No. 39. Appeal dismissed. Miller-Lerman, Judge.

Nos. A-92-912, A-92-913, A-92-914: **State v. Curry.** 94 NCA No. 12. Reversed and remanded for further proceedings. Hannon, Judge.

No. A-92-918: **State v. Young.** 93 NCA No. 41. Affirmed. Sievers, Chief Judge.

No. A-92-932: **Johnson v. Telenational Communications.** 94 NCA No. 22. Appeal dismissed. Miller- Lerman, Judge.

No. A-92-951: **Eggers v. Rittscher.** 94 NCA No. 20. Affirmed. Sievers, Chief Judge.

No. A-92-953: **In re Interest of A.Z.** 93 NCA No. 50. Affirmed. Miller-Lerman, Judge.

No. A-92-956: **In re Interest of D.H.** 94 NCA No. 7. Affirmed. Connolly, Judge.

No. A-92-968: **State v. Gatson.** 94 NCA No. 19. Affirmed in part, and in part vacated and remanded for resentencing. Connolly, Judge.

No. A-92-975: **Ruch v. Conrad.** 94 NCA No. 25. Affirmed. Connolly, Judge.

No. A-92-976: **Grand Island Express v. Dolan.** 94 NCA No. 20. Affirmed. Norton, District Judge, Retired.

No. A-92-987: **State v. Carlson.** 93 NCA No. 39. Affirmed. Wright, Judge.

No. A-92-988: **Higgins v. City of Lincoln.** 93 NCA No. 51. Affirmed in part, and in part reversed and remanded with directions. Miller-Lerman, Judge.

No. A-92-996: **State v. Vach.** 93 NCA No. 51. Reversed and remanded with directions. Hannon, Judge.

No. A-92-997: **State v. Maeder.** 94 NCA No. 30. Affirmed. Miller-Lerman, Judge.

No. A-92-998: **State v. Hollie.** 93 NCA No. 46. Affirmed. Connolly, Judge.

No. A-92-1011: **Johnson v. Castle Rock Irr. Dist.** 94 NCA No. 21. Reversed and remanded for further proceedings. Connolly, Judge.

No. A-92-1034: **In re Interest of J.B.** 93 NCA No. 48. Affirmed. Sievers, Chief Judge.

No. A-92-1044: **Cedars Corp. v. Sun Valley Dev. Co.** 94 NCA No. 26. Affirmed in part, and in part reversed and remanded with directions. Connolly, Judge.

No. A-92-1053: **State v. Liu.** 93 NCA No. 45. Affirmed. Sievers, Chief Judge.

No. A-92-1062: **State v. Williams.** 93 NCA No. 37. Affirmed. Connolly, Judge.

No. A-92-1064: **Carman v. Ravenna Bank.** 94 NCA No. 26. Affirmed. Irwin, Judge.

No. A-92-1073: **American Economy Ins. Co. v. Modern Eye Wear.** 94 NCA No. 26. Affirmed. Irwin, Judge.

No. A-92-1089: **Lundy v. Lundy.** 94 NCA No. 29. Affirmed. Miller-Lerman, Judge.

No. A-92-1095: **State v. Woods.** 94 NCA No. 8. Affirmed. Wright, Judge.

No. A-92-1100: **Bates v. Bates.** 94 NCA No. 27. Affirmed. Per Curiam.

No. A-92-1101: **K & K Farms v. Norwest Bank Norfolk.** 94 NCA No. 31. Affirmed. Irwin, Judge.

No. A-92-1112: **State v. Dieringer.** 94 NCA No. 30. Affirmed. Miller-Lerman, Judge.

No. A-92-1126: **State v. Bundy.** 94 NCA No. 1. Affirmed. Hannon, Judge.

No. A-92-1127: **State v. Svoboda.** 93 NCA No. 46. Affirmed. Connolly, Judge.

No. A-92-1128: **Hansen v. Hammer.** 94 NCA No. 23. Affirmed as modified. Norton, District Judge, Retired.

No. A-92-1131: **Allen v. Greeley Cty. Sch. Dist. No. 501.** 94 NCA No. 25. Affirmed. Hannon, Judge.

No. A-92-1150: **Tompkins, Inc. v. Walston.** 94 NCA No. 15. Affirmed. Hannon, Judge.

No. A-92-1153: **McCandless v. Conrad.** 94 NCA No. 28. Reversed and remanded with directions. Connolly, Judge.

No. A-92-1168: **Sutton v. Orion Corp.** 93 NCA No. 44. Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge.

No. A-92-1183: **Nebraska Nat. Bank v. NEBCO.** 94 NCA No. 30. Affirmed. Connolly, Judge.

Nos. A-93-005, A-93-125: **State v. Zierke.** 94 NCA No. 22. Judgment in No. A-93-005 affirmed as modified. Judgment in No. A-93-125 affirmed. Hannon, Judge.

No. A-93-022: **Scott v. Scott.** 94 NCA No. 28. Affirmed. Miller-Lerman, Judge.

No. A-93-043: **State v. Stithem.** 93 NCA No. 49. Affirmed. Hannon, Judge.

No. A-93-049: **Bolton v. McBride.** 93 NCA No. 49. Affirmed. Irwin, Judge.

No. A-93-052: **State v. Lieb.** 94 NCA No. 4. Affirmed. Hannon, Judge.

No. A-93-078: **Wear v. American Fire & Cas. Co.** 94 NCA No. 26. Affirmed. Connolly, Judge.

No. A-93-081: **Saunders v. Square D Co.** 93 NCA No. 45. Affirmed. Hannon, Judge.

No. A-93-091: **Nelson v. Nelson.** 93 NCA No. 46. Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge.

No. A-93-095: **Pivots Ltd. v. Vint.** 94 NCA No. 24. Affirmed. Howard, District Judge, Retired.

No. A-93-099: **State Farm Mut. Auto. Ins. v. Empire Fire & Marine Ins.** 94 NCA No. 28. Affirmed. Miller-Lerman, Judge.

No. A-93-119: **In re Interest of R.F.L.** 93 NCA No. 45. Affirmed. Wright, Judge.

No. A-93-129: **State ex rel. Scherer v. Madison Cty. Comrs.** 94 NCA No. 27. Affirmed. Hannon, Judge.

No. A-93-133: **State v. Ogden.** 93 NCA No. 43. Affirmed. Sievers, Chief Judge.

No. A-93-157: **State v. Jones.** 93 NCA No. 45. Affirmed. Miller-Lerman, Judge.

No. A-93-162: **McBride v. Metz Baking Co.** 93 NCA No. 49. Affirmed. Sievers, Chief Judge.

No. A-93-166: **State v. Reha.** 94 NCA No. 8. Affirmed. Wright, Judge.

No. A-93-171: **Evans v. Square D Co.** 93 NCA No. 44. Affirmed. Miller-Lerman, Judge.

No. A-93-193: **In re Applications T-141 et al.** 93 NCA. No. 51. Affirmed. Sievers, Chief Judge.

No. A-93-199: **Chalupa v. Chalupa.** 94 NCA No. 31. Reversed. Connolly, Judge.

No. A-93-205: **State v. Jackson.** 93 NCA No. 50. Affirmed. Hannon, Judge.

No. A-93-206: **State v. Richmond.** 93 NCA No. 50. Affirmed. Sievers, Chief Judge.

No. A-93-210: **Marsh v. CIGNA Prop. & Cas. Ins. Co.** 94 NCA No. 27. Affirmed. Sievers, Chief Judge.

No. A-93-211: **State v. Frame.** 94 NCA No. 2. Affirmed. Miller-Lerman, Judge.

No. A-93-235: **State v. Hoffman.** 93 NCA No. 41. Affirmed. Miller-Lerman, Judge.

No. A-93-257: **State v. Edwards.** 94 NCA No. 28. Affirmed. Irwin, Judge.

Nos. A-93-260, A-93-261: **In re Interest of G.W.P. et al.** 94 NCA No. 3. Affirmed. Irwin, Judge.

No. A-93-266: **State v. Maisch.** 94 NCA No. 9. Affirmed. Per Curiam.

No. A-93-270: **In re Interest of C.A.** 94 NCA No. 2. Affirmed. Per Curiam.

Nos. A-93-272 through A-93-275: **Beverly Enterprises v. Custer Cty. Bd. of Equal.** 94 NCA No. 28. Affirmed. Connolly, Judge.

No. A-93-276: **Molczyk v. American Tool Co.** 93 NCA No. 49. Affirmed. Connolly, Judge.

No. A-93-282: **In re Estate of Dudek.** 94 NCA No. 30. Affirmed. Sievers, Chief Judge.

No. A-93-283: **Meyers v. Meyers.** 94 NCA No. 5. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-93-284: **State v. Payne.** 93 NCA No. 39. Sentence vacated, and cause remanded for resentencing. Miller- Lerman, Judge.

No. A-93-291: **Behrens v. American Stores Packing Co.** 94 NCA No. 9. Affirmed. Hannon, Judge.

Nos. A-93-298, A-93-299: **State v. Rath.** 94 NCA No. 6. Affirmed. Miller-Lerman, Judge.

No. A-93-338: **Marrill v. Charles Indus., Ltd.** 93 NCA No. 50. Affirmed as modified. Sievers, Chief Judge.

No. A-93-349: **Kroese v. Ferret Exploration of Neb.** 94 NCA No. 31. Affirmed. Hannon, Judge.

No. A-93-355: **In re Interest of Joshua B. et al.** 94 NCA No. 14. Reversed and remanded with directions. Hannon, Judge.

No. A-93-364: **State v. Null.** 94 NCA No. 20. Affirmed. Sievers, Chief Judge.

No. A-93-365: **State v. Vogel.** 94 NCA No. 20. Reversed and remanded for further proceedings. Sievers, Chief Judge.

No. A-93-382: **In re Interest of Robert D. et al.** 94 NCA No. 26. Affirmed. Irwin, Judge.

No. A-93-385: **State v. Trackwell.** 94 NCA No. 5. Affirmed. Sievers, Chief Judge.

No. A-93-387: **State v. Cross.** 94 NCA No. 10. Affirmed. Hannon, Judge.

No. A-93-395: **Magrath v. Springer.** 94 NCA No. 28. Affirmed as modified. Hannon, Judge.

No. A-93-400: **Langer Biomechanics v. Ambulatory Foot Ctr.** 94 NCA No. 15. Reversed. Connolly, Judge.

No. A-93-406: **State v. Scaglione.** 94 NCA No. 4. Affirmed. Irwin, Judge.

No. A-93-409: **State v. Nincehelser.** 94 NCA No. 12. Affirmed. Connolly, Judge.

No. A-93-428: **Allen v. Nebraska Dept. of Corr. Servs.** 93 NCA No. 48. Affirmed. Hannon, Judge.

No. A-93-430: **Bridgeport Irr. Dist. v. Department of Water Res.** 94 NCA No. 17. Affirmed. Irwin, Judge.

No. A-93-432: **Stevens v. Luick.** 94 NCA No. 14. Affirmed. Hannon, Judge.

No. A-93-435: **State v. CMT Enters.** 94 NCA No. 6. Affirmed. Wright, Judge.

No. A-93-438: **Stansbury v. Excel.** 94 NCA No. 2. Affirmed. Wright, Judge.

No. A-93-454: **State ex rel. Grape v. Zach.** 94 NCA No. 13. Reversed with directions to dismiss. Miller-Lerman, Judge.

Nos. A-93-455 through A-93-458: **State v. Daniels.** 94 NCA No. 31. Affirmed. Irwin, Judge.

No. A-93-468: **State v. Gonzalez.** 94 NCA No. 1. Affirmed and remanded with directions. Sievers, Chief Judge.

No. A-93-474: **State v. Messbarger.** 93 NCA No. 39. Affirmed. Miller-Lerman, Judge.

No. A-93-487: **Jirkovsky v. Jirkovsky.** 94 NCA No. 22. Affirmed as modified. Sievers, Chief Judge.

No. A-93-490: **State v. Eagle Deer.** 94 NCA No. 18. Affirmed as modified. Hannon, Judge.

No. A-93-512: **State v. Schmidt.** 94 NCA No. 6. Affirmed. Irwin, Judge.

No. A-93-522: **State v. Rogers.** 94 NCA No. 5. Affirmed. Sievers, Chief Judge.

No. A-93-540: **McLaughlin v. Swift-Eckrich, Inc.** 94 NCA No. 4. Affirmed. Connolly, Judge.

No. A-93-565: **State v. Woolman.** 94 NCA No. 10. Affirmed. Miller-Lerman, Judge.

No. A-93-571: **State v. Carman.** 94 NCA No. 6. Reversed and remanded for a new trial. Irwin, Judge.

No. A-93-572: **Saltz v. Rose Lane Home.** 94 NCA No. 13. Affirmed. Connolly, Judge.

No. A-93-574: **State v. Schumacher.** 94 NCA No. 14. Affirmed. Hannon, Judge.

Nos. A-93-578, A-93-721: **In re Interest of Maurice S.** 94 NCA No. 17. Judgment in No. A-93-578 affirmed. Judgment in No. A-93-721 reversed, and cause remanded for further proceedings. Miller-Lerman, Judge.

No. A-93-580: **State v. Nauslar.** 94 NCA No. 24. Affirmed. Irwin, Judge.

No. A-93-588: **State v. Picket Pin.** 94 NCA No. 10. Affirmed. Miller-Lerman, Judge.

No. A-93-592: **State v. Skalberg.** 94 NCA No. 11. Reversed and remanded with directions to dismiss. Sievers, Chief Judge.

No. A-93-598: **State v. Swanson.** 94 NCA No. 14. Affirmed. Hannon, Judge.

No. A-93-602: **State v. Barfield.** 94 NCA No. 18. Affirmed in part, and in part reversed and remanded for resentencing. Sievers, Chief Judge.

No. A-93-603: **State v. Battle.** 94 NCA No. 18. Reversed and remanded with directions to dismiss. Sievers, Chief Judge.

No. A-93-609: **In re Interest of Tina W. and Robert W.** 94 NCA No. 15. Affirmed. Connolly, Judge.

No. A-93-610: **State v. Cappel.** 94 NCA No. 26. Affirmed. Howard, District Judge, Retired.

No. A-93-619: **State v. Jones.** 94 NCA No. 24. Affirmed. Sievers, Chief Judge.

No. A-93-628: **In re Interest of Edith M.** 94 NCA No. 19. Reversed. Miller-Lerman, Judge.

No. A-93-631: **State v. White.** 94 NCA No. 15. Affirmed. Connolly, Judge.

No. A-93-636: **State v. Cariker.** 94 NCA No. 21. Affirmed. Irwin, Judge.

No. A-93-637: **McCune v. McCune.** 94 NCA No. 29. Affirmed and remanded with directions. Connolly, Judge.

No. A-93-638: **State v. Cole.** 94 NCA No. 19. Affirmed. Warren, District Judge, Retired.

No. A-93-639: **State v. Perez.** 94 NCA No. 15. Affirmed. Hannon, Judge.

No. A-93-655: **State v. Reed-Burbach.** 93 NCA No. 46. Reversed. Connolly, Judge.

No. A-93-660: **Crary v. Crary.** 94 NCA No. 29. Affirmed. Connolly, Judge.

No. A-93-666: **State v. Reynolds.** 94 NCA No. 11. Affirmed. Connolly, Judge.

No. A-93-674: **Paris v. Crawford State Bank.** 94 NCA No. 23. Affirmed. Sievers, Chief Judge.

No. A-93-690: **Cabrera v. Swift-Eckrich, Inc.** 94 NCA No. 19. Affirmed in part, and in part reversed. Connolly, Judge.

No. A-93-693: **State v. Hess.** 94 NCA No. 16. Affirmed. Warren, District Judge, Retired.

No. A-93-700: **Ostergaard v. Clarkson Hospital.** 94 NCA No. 20. Reversed and remanded for further proceedings. Miller-Lerman, Judge.

No. A-93-702: **In re Interest of Eva W.** 94 NCA No. 20. Affirmed. Connolly, Judge.

No. A-93-708: **State v. Anderson.** 94 NCA No. 24. Affirmed. Howard, District Judge, Retired.

No. A-93-709: **State v. Brockman.** 94 NCA No. 16. Affirmed. Irwin, Judge.

No. A-93-713: **State v. Rodriguez.** 94 NCA No. 23. Affirmed. Sievers, Chief Judge.

No. A-93-717: **State v. Ziemba.** 94 NCA No. 21. Affirmed. Norton, District Judge, Retired.

No. A-93-720: **In re Interest of Krystal K. et al.** 94 NCA No. 21. Affirmed. Miller-Lerman, Judge.

No. A-93-746: **State v. Anderson.** 94 NCA No. 16. Affirmed. Miller-Lerman, Judge.

No. A-93-756: **Davis v. Davis.** 94 NCA No. 16. Affirmed as modified. Hannon, Judge.

No. A-93-759: **In re Interest of Shaeffer.** 94 NCA No. 21. Affirmed. Miller-Lerman, Judge.

No. A-93-761: **Cooper v. Cooper.** 94 NCA No. 19. Affirmed. Per Curiam.

No. A-93-770: **Filbert v. Globe Cleaners.** 94 NCA No. 17. Affirmed. Irwin, Judge.

No. A-93-783: **Jeffers v. Jeffers.** 94 NCA No. 30. Affirmed. Sievers, Chief Judge.

No. A-93-799: **State v. Lara.** 93 NCA No. 51. Affirmed. Sievers, Chief Judge.

No. A-93-813: **Nieveen v. City of Lincoln.** 94 NCA No. 20. Affirmed. Connolly, Judge.

No. A-93-816: **State v. Spencer.** 94 NCA No. 23. Affirmed. Connolly, Judge.

No. A-93-830: **Chism v. Charles Vrana & Son Constr. Co.** 94 NCA No. 19. Affirmed. Norton, District Judge, Retired.

No. A-93-838: **State v. Reynolds.** 94 NCA No. 20. Affirmed. Sievers, Chief Judge.

No. A-93-852: **State v. Nist.** 94 NCA No. 28. Affirmed. Miller-Lerman, Judge.

No. A-93-858: **Gering State Bank v. Estrada.** 94 NCA No. 28. Affirmed. Hannon, Judge.

No. A-93-862: **State v. Rayes.** 94 NCA No. 24. Affirmed. Irwin, Judge.

No. A-93-868: **In re Interest of David C.** 94 NCA No. 19. Reversed and remanded for further proceedings. Sievers, Chief Judge.

No. A-93-873: **In re Interest of David B.** 94 NCA No. 25. Affirmed. Hannon, Judge.

No. A-93-897: **State v. Wragge.** 94 NCA No. 23. Affirmed. Hannon, Judge.

No. A-93-901: **In re Interest of Peter P.** 94 NCA No. 20. Affirmed. Sievers, Chief Judge.

No. A-93-912: **State v. Ziemba.** 94 NCA No. 17. Reversed and dismissed. Norton, District Judge, Retired.

No. A-93-916: **In re Interest of Mark B.** 94 NCA No. 22. Affirmed. Hannon, Judge.

No. A-93-921: **Peterson v. State.** 94 NCA No. 28. Affirmed. Miller-Lerman, Judge.

No. A-93-937: **Manzer v. Washington County.** 94 NCA No. 26. Affirmed. Hannon, Judge.

No. A-93-941: **Snyder v. Allied Mut. Ins. Co.** 94 NCA No. 25. Affirmed. Hannon, Judge.

No. A-93-944: **Martin v. County of Douglas.** 94 NCA No. 23. Affirmed. Miller-Lerman, Judge.

No. A-93-975: **State v. Scott.** 94 NCA No. 29. Reversed. Miller-Lerman, Judge.

No. A-93-985: **In re Interest of Amanda M.** 94 NCA No. 25. Reversed. Connolly, Judge.

No. A-93-998: **Edson v. Lutheran Community Hosp.** 94 NCA No. 28. Affirmed. Irwin, Judge.

No. A-93-1004: **State v. Greenberg.** 94 NCA No. 30. Affirmed. Hannon, Judge.

No. A-93-1013: **State v. Estrada.** 94 NCA No. 27. Affirmed as modified. Sievers, Chief Judge.

No. A-93-1029: **State v. Rosenthal.** 94 NCA No. 30. Affirmed. Sievers, Chief Judge.

No. A-93-1088: **Cunningham v. K-B Foods.** 94 NCA No. 28. Affirmed. Irwin, Judge.

No. A-93-1099: **In re Interest of Tiffany M.** 94 NCA No. 29. Affirmed in part, and in part reversed. Connolly, Judge.

No. A-93-1104: **In re Interest of Louie R.** 94 NCA No. 28. Affirmed. Irwin, Judge.

No. A-94-010: **State v. Collins.** 94 NCA No. 31. Affirmed. Connolly, Judge.

No. A-94-012: **State v. Adams.** 94 NCA No. 29. Affirmed. Miller-Lerman, Judge.

No. A-94-068: **State v. Forman.** 94 NCA No. 16. Affirmed. Hannon, Judge.

No. A-94-100: **Rodriguez v. Millard Processing Servs.** 94 NCA No. 31. Judgment vacated, and cause remanded with direction. Sievers, Chief Judge.

No. A-94-274: **State v. Sakalosky.** 94 NCA No. 26. Affirmed. Connolly, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

T.O. HAAS TIRE COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. FUTURA COATINGS, INC., A FOREIGN CORPORATION, APPELLEE AND CROSS-APPELLANT.

507 N.W.2d 297

Filed September 14, 1993. No. A-91-056.

1. **Judgments: Appeal and Error.** In reviewing a judgment under appeal regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
2. **Evidence: Witnesses: Appeal and Error.** Where the evidence is in conflict, an appellate court will give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judgments: Appeal and Error.** In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh evidence but considers the evidence in the 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.
4. _____: _____. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
5. **Uniform Commercial Code: Sales: Warranty.** An express warranty may be created by a seller as follows: (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise, (2) any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description, and (3) any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
6. **Uniform Commercial Code: Warranty: Appeal and Error.** The existence and scope of an express warranty under the Uniform Commercial Code are ordinarily questions to be determined by the trier of fact; and if the court is the trier of fact, its factual findings will not be set aside unless clearly wrong.
7. **Breach of Warranty: Proof: Products Liability.** In order for a plaintiff to recover on a breach of express warranty, he must show that the goods did not comply with the warranty, that is, that they were defective, and that his injury was

caused by the defective nature of the goods.

8. **Proximate Cause.** Generally, the issue of proximate cause is for the finder of fact.
9. **Uniform Commercial Code: Breach of Warranty: Damages.** Under the Uniform Commercial Code, the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
10. **Appeal and Error.** Plain error, to be noted, must be of such a nature that it prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Steven E. Guenzel, of Barlow, Johnson, DeMars & Flodman, for appellant.

R. Kent Radke for appellee.

MILLER-LERMAN and WRIGHT, Judges, and NORTON, District Judge, Retired.

NORTON, District Judge, Retired.

T.O. Haas Tire Company, Inc. (Haas), plaintiff in the original action, appeals from an award of $6,000 against Futura Coatings, Inc. (Futura), by the district court for Lancaster County, Nebraska, in which the trial court found a breach of an express warranty on Futura's roof materials used by Haas to coat the roof on a new building. Haas alleges two errors: (1) the trial court's finding that the roof could have been repaired at any time at a cost of $6,000 and (2) the trial court's refusal to find that the actual cost of repair, that being $46,000 plus $6,000 for comparable insulation, was the proper measure of damages. Futura cross-appeals, alleging four errors: (1) the trial court's finding that the greater weight of the evidence in this case indicates that Walter Stansky did inspect the roof and that he approved the installation; (2) the trial court's finding that all conditions precedent for the creation of an express warranty were met; (3) the trial court's finding that the defective workmanship should have been discovered by Stansky when he

inspected the roof, at which time the defect could have been corrected; and (4) the trial court's finding that because Stansky approved the installation of the coating, Futura cannot complain that the installation workmanship was poor. We affirm in part, and in part reverse and remand for a new trial on the issue of damages.

During the summer of 1983, Haas constructed a warehouse and office building at 640 West O Street in Lincoln, Nebraska. During construction, Haas engaged PMS, Inc., a roofing business which is no longer operational, to complete the roof of the building, which measured 120 feet by 220 feet. PMS was to cover the steel decking of the roof with approximately 1 inch of urethane foam and then apply a substance called 500/550, manufactured by Futura, over the foam. The purpose of the final application was to provide a watertight film or shield. The steel decking was supported by steel bar joists. The flutes, or ridges, in the decking ran perpendicular to the slope of the roof. PMS was a qualified applicator for Futura products.

Kerry Donovan, former president of PMS, testified that he recommended using the Futura 500/550 coating because it was supposed to be resistant to ponding and because the horizontal flutes in the steel decking were prone to pond water. In addition, Donovan stated that he would not have recommended the Futura system without the warranty, which appears to have been for a 5-year term, renewable for another 5 years under certain terms and conditions.

Donovan testified that Futura was aware that the Haas building had flutes running perpendicular to the slope of the roof. Haas submitted a proposed design of the roof to Futura with its request-for-warranty form. Donovan further testified that while installing the roof, his work crew followed the recommendations from Futura, which included removing the oily protective finish from the metal decking so that the foam would adhere and installing foam in the lower areas of the flutes to avoid crevice or crack creation. He also testified that during the application of the 500/550, and in compliance with the warranty process, Stansky, an employee of Foam Enterprises, Inc., which furnished products used in this project, made the required inspection for Futura. This

particular testimony was substantiated by other witnesses. Stansky regularly acted as a representative of Futura in making roof inspections. According to some of the evidence, Stansky was in Nebraska in August 1983 to visit another PMS project site. At that time, approximately 90 percent of the 500/550 coating had been applied. The evidence further indicates that Stansky "walked around and he took several slit samples and measured with some type of a device, a micrometer, or something. He measured the thickness of the coating, the [sic] measured the foam, he checked the foam for adhesion, et cetera." According to Donovan, Stansky indicated that some additional coating was needed and Donovan was given the impression that the roof would be "fine" after the corrective action was taken. The roof coating was completed in 1983.

Stansky, who was present and testified at trial, said that the inspection never occurred, alleging that the only trip he made to the Haas building was in July 1983, at which time only 75 percent of the steel decking had been installed. He also testified that he was personally unaware of the direction in which the flutes on the deck were running. Additionally, he testified that it was the policy of Futura not to perform a final warranty inspection until the company had been paid moneys owed to it and that PMS had an outstanding balance due to Futura at the time of the alleged inspection because of a returned check. A written warranty was never received by Haas.

During the summer of 1984, moisture apparently penetrated the 500/550 covering and the foam and leaked into the interior of the Haas building. Haas contacted Futura requesting an inspection of the roof for warranty purposes. Jeff Jarboe, from Futura, responded by coming to Lincoln in July 1984. At that time, he inspected the roof, identified certain problems, and denied that Futura had any responsibility because no warranty had ever been issued.

Between 1984 and 1989, and after Jarboe had informed Haas that Futura would assume no responsibility, Haas looked into various alternatives for repairing the roof. Each of the several contractors who were contacted recommended removing the existing roof and beginning again, based on the reason that no one would issue a warranty if the roof were simply patched or

repaired.

In 1986, Donovan inspected the roof. He testified that the problems he observed were the result of the failure of the 500/550 coating. He came to this conclusion because rust holes in the steel decking corresponded with ponded water areas. He also testified that the water rendered the entire roof useless because water-saturated insulation loses all of its insulating value.

In 1988, Michael Applegarth, a contractor, inspected the roof. He testified that he determined from the inspection that the coating "was leaking and the whole roof was a problem. It was leaking all over and it wasn't doing what it was supposed to be doing, which was shedding the water." He further testified that the coating was breathing, i.e., water and air were being taken in and pushed out through the coating, the foam acting as a sponge. It was his recommendation that the covering and wet foam be stripped from the roof, that stockboard be installed over the decking, and that a modified membrane be installed over the stockboard. Haas entered into a contract with Applegarth to replace the roof for $46,000.

According to Applegarth, once he began removing the wet foam, he discovered rust holes in the steel decking, some "as large as your foot," and "there was [sic] as many as 15 or 20 in an area half the size of this [court]room." He also noted that there were stress cracks in the foam directly above the seams where the steel decking had been spliced. These cracks were probably formed when the decking expanded and contracted with changes in temperature. He felt that the rust under the foam was caused by water "coming in through that stress crack."

Charles Stokes, a urethane contractor who examined the roof in 1984, and Jarboe gave additional testimony suggesting that PMS had applied the foam in an inadequate fashion and had mixed and applied the 500/550 coating improperly.

At the conclusion of the trial, the district court specifically found that "Futura offered an express warranty against the failure of its coating system for five years." Further, the court found that this warranty required two conditions precedent: (1) Before construction, the contractor was required to provide

Futura with construction information and (2) the installation of the Futura coating system had to be inspected and approved by a representative of Futura.

[1-4] Initially, we note several rules with regard to our scope of review. In reviewing a judgment under appeal regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. See *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992). Where the evidence is in conflict, an appellate court will give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Miles v. Miles*, 231 Neb. 782, 438 N.W.2d 139 (1989). In reviewing a judgment in a bench trial of a law action, an appellate court does not reweigh evidence but considers the evidence in the 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. *City of LaVista v. Andersen*, 240 Neb. 3, 480 N.W.2d 185 (1992); *Nebraska Builders Prod. Co. v. Industrial Erectors, supra*; *Metropolitan Utilities Dist. v. Pelton*, 236 Neb. 66, 459 N.W.2d 193 (1990). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *City of LaVista v. Andersen, supra*; *Nelson-Holst v. Iverson*, 239 Neb. 911, 479 N.W.2d 759 (1992); *Nebraska Builders Prod. Co. v. Industrial Erectors, supra*.

There are three principal issues involved in this case, i.e., whether or not a warranty existed, the proximate cause of the damage to the roof, and the amount of damages involved.

[5] With respect to the warranty, we conclude that the Futura 500/550 coating meets the definition of "goods" under the Uniform Commercial Code-Sales and is, therefore, subject to the rules and regulations therein. See, Neb. U.C.C. § 2-102 (Reissue 1992); *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985) (U.C.C. applied to a warranty for a roofing system because the principal purpose of the contract was the sale of goods, even though some installation was required for the goods to be utilized). By

the terms of Neb. U.C.C. § 2-313(1) (Reissue 1992), an express warranty may be created by a seller as follows:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

[6] The existence and scope of an express warranty under the U.C.C. are ordinarily questions to be determined by the trier of fact. *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990). In this case, the court was the trier of fact, and its factual findings will not be set aside unless clearly wrong. See *Howells Elevator v. Stanco Farm Supply Co.*, 235 Neb. 456, 455 N.W.2d 777 (1990).

As previously noted, following trial the court specifically held that Futura had conferred an express warranty against the failure of its coating system. In finding an express warranty, the court impliedly found that the warranty was the basis of the bargain, as required in § 2-313, and explicitly found that the two conditions precedent had been met. We review these findings only to determine whether they are clearly wrong, and we give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Miles v. Miles, supra*.

The evidence would indicate that PMS and Haas chose to use the Futura 500/550 system, at a greater expense to Haas, specifically because it was warranted to resist ponding and to bear up well under the elements and because the total warranty was for a 10-year term. This evidence is sufficient to support the trial court's finding that PMS and Haas provided Futura with construction information. This point is not in dispute. The evidence shows that Futura approved the plans sent to it, with some suggestions added. Next, the trial court considered the

issue of whether or not the roof had been inspected and approved in August 1983. While the record reflects conflict with regard to whether or not Stansky, as an inspector for and a representative of Futura, was in Lincoln and actually performed the inspection as claimed, there is testimony that supports the finding by the trial court that he did inspect and approve the roof. The trial court heard the evidence and observed the witnesses, and we cannot say that its finding is clearly wrong. Therefore, we find that the trial court did not err when it determined that the roof was under an express warranty from Futura.

[7] The second issue relates to the question of proximate cause. In order for a plaintiff to recover on a breach of express warranty, he must show, among other things, that " 'the goods did not comply with the warranty, that is, that they were defective, and that his injury was caused by the defective nature of the goods.' " *Delgado v. Inryco, Inc.*, 230 Neb. 662, 666-67, 433 N.W.2d 179, 183 (1988), quoting *Durrett v. Baxter Chrysler-Plymouth, Inc.*, 198 Neb. 392, 253 N.W.2d 37 (1977).

Haas alleged that Futura breached the following express warranties:

> a. That the Futura Flex 500, with Futura Flex 550, was resistent [sic] to hail, mechanical damage, and roof traffic;
>
> b. That the Futura coatings system would have excellent resistence [sic] to the elements and retention of properties over long periods of time; and
>
> c. The coating system was warranted against failure for a period of ten years.

Futura argues that the failure of the roof was not caused by a breakdown of the 500/550 coating, but, rather, by improper mixture and application of the coating and a faulty roof design. Haas provided conflicting evidence that the damage to the roof was directly related to the failure of the Futura coating.

[8] Generally, the issue of proximate cause is for the finder of fact. See *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986). Two plausible alternative and conflicting theories of causation were presented by the evidence, and the district court was not clearly wrong in adopting one version over the other.

Therefore, even if the evidence could support a finding that the damage was caused by faulty design, the trial court had sufficient evidence upon which to base its decision that it was the failure of the 500/550 coating that proximately caused the damage to the roof.

By reason of the fact that we have determined that there was sufficient evidence to find proximate cause, we do not need to address the question of whether Futura waived its right to object to the application of its coating and the structure by approving a warranty. We once again note *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985), which addressed this issue. Also, by analogy, because of the fact that the court determined that an inspector approved the roof before the issuance of a warranty, we find sufficient evidence for the conclusion that Futura expressly warranted adequacy of the structure and the application of the 500/550 coating. As in *Mennonite Deaconess Home & Hosp.*, Haas "was not purchasing raw material. It was purchasing a roofing system which was partially dependent upon proper installation." See *id.* at 314, 363 N.W.2d at 163.

[9] Turning to the issue of damages, we must determine the proper measure in this case. The roof was warranted under a contract for goods. The measure for such a matter is found in Neb. U.C.C. § 2-714 (Reissue 1992):

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

An examination of the evidence disclosed no special circumstances to change the measure set forth above. Reference is had to *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990), where the Supreme Court found no special circumstances, despite the fact that the parties had agreed to a different measure of damages at a pretrial conference and were bound to use that standard.

[10] In this case, the trial court measured damages as "[t]he cost of repair of the roof at the time nearest to the time of

completion and discovery of the defects." However, the court made no specific findings with regard to why this measure was appropriate, and we conclude that the proper measure is that set forth in § 2-714. Having so found, we must then determine what the difference was between the value of the roof at the time of acceptance in August 1983 and the value of the roof if it had been as warranted. In connection with this, we note that the district court concluded that the *cost* of the roof when completed was $33,000. (See exhibit 1.) However, exhibit 2 sets forth the proposal of PMS which was eventually accepted by Haas. This obvious error combined with other determinations by the trial court might have had a tendency to prejudicially affect Haas' interests in this case. Plain error, to be noted, must be of such a nature that it prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process. See *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992). We note the error and find that the *cost* of the roof, as opposed to the value of the roof as warranted, was $50,800.

Obviously, the problem in this case lies in determining the value of the roof at the time of acceptance. While the cost was $50,800, Haas urges us to find that the roof had no value whatsoever for the purpose for which it had been built when it was completed. Haas relies on *Moss v. Speck*, 209 Neb. 46, 306 N.W.2d 156 (1981). In that case, a house could not be issued an occupancy permit because the roof was faulty and the house was totally without value for the purpose for which it was intended. However, unlike *Moss*, in this case the Haas building served its function as a warehouse for tires for approximately 5 years before the roof was reconstructed. In addition, *Moss* was based on a construction contract and, therefore, was not governed by the U.C.C.

The measure set forth in § 2-714 is the equivalent of what is known as the diminished value rule. In order to determine the diminished value of a structure, the cost of replacement or repair is an element to take into consideration in arriving at the value under some circumstances. See *Plante v. Jacobs*, 10 Wis. 2d 567, 103 N.W.2d 296 (1960). In this case, the cost of

replacement at the time of acceptance would be the contract price of $50,800. However, using replacement value as a measure of damages would unjustly enrich Haas because the building did, in fact, have some value for warehouse purposes and had apparently served that purpose for a period of time.

There is some evidence that the cost to repair the roof at the time it began to leak was $6,000. At trial in 1990, Jarboe, an officer of Futura, testified that in his opinion it would have cost that amount to repair the roof when the defects were first discovered. This opinion was based on his visual inspection in 1984, at the time Futura disclaimed liability. Jarboe was the only witness to give such a low cost estimate. Jarboe testified that in his opinion the roof structure was "85 to 90 percent in good shape" at the time of the inspection and that to repair 15 percent of the area would cost about $6,000. However, he also admitted that when he inspected the roof he was looking for mixing problems and pinhole problems in the coating and that he was not aware of or did not notice the more serious problems presented by the failure of the coating system on the sides of the flutes or the stress cracks. On cross-examination, he stated that if the problems addressed at trial prevailed throughout the entire roof, the situation would have been larger and that $6,000 would not correct the matter. Jarboe did acknowledge that any foam that was wet would have to be removed. All of the other contractors who subsequently inspected the roof recommended tearing off the foam covering and constructing a new roof over the decking. Haas now argues that the weight of the evidence goes against Jarboe's testimony.

It is well established that the factual findings of a trial court in a law action tried without a jury have the effect of a finding of a jury on appeal and will not be set aside unless clearly erroneous. After a review of the entire damage issue, it would appear that the trial court's finding that $6,000 would have effectively repaired the roof in 1984 was based on clearly erroneous evidence, and therefore, the judgment awarded was also erroneous. On that basis, we cannot affirm the conclusions of the trial court as to the damage suffered by Haas. Neither can we find credible evidence in the record on which we could base any estimate of the actual amount which might have been

required to return the roof to its warranted value at the time of discovery of the damage. Any determination by this court in that regard would be speculative in nature. For that reason, we reverse on the issue of damages and remand the cause for retrial on the question of the amount required to return the roof to its warranted value ($50,800) at the time of the discovery of the damage.

Turning to the question of the cross-appeal, we find no merit in the four errors assigned. All are addressed in the preceding discussion, either specifically or by implication. It would serve no useful purpose to restate each in detail. The cross-appeal is dismissed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

ELTON SCHMIDT & SONS FARM COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. JOSEPH A. KNEIB, APPELLANT.

507 N.W.2d 305

Filed September 14, 1993. No. A-91-976.

1. **Quiet Title: Equity.** A quiet title action is an equity action.
2. **Equity: Appeal and Error.** In an equity action, an appellate court reviews the record de novo; as to questions of law, the appellate court has an obligation to reach its own independent conclusions.
3. **Deeds: Intent.** The primary rule for interpreting an instrument is that the intention of the parties as determined from the whole instrument shall govern, and only when the intention is obscure or uncertain can a court look at the surrounding circumstances.
4. **Real Estate: Conveyances: Intent: Words and Phrases.** Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used.
5. **Real Estate: Deeds: Railroads.** Limiting purposes, such as for the purpose of constructing a railroad, can be read to convey less than a fee simple.
6. **Real Estate: Easements: Intent: Words and Phrases.** A grantor is charged with knowledge of the intent statute, and if he desires to create a mere easement or to convey a determinable fee, he can easily use appropriate language for this purpose.

7. **Deeds: Consideration.** While nominal monetary consideration may be given in a deed, other good and valuable consideration may exist as well.
8. **Deeds: Consideration: Easements.** Nominal monetary consideration, alone, does not make an instrument ambiguous, nor does it create an easement.
9. **Deeds.** In the event of repugnancy and inconsistency between the granting, habendum, and description clauses of a deed, the granting clause will prevail.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Reversed and remanded with directions.

Paul J. Peter, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Arnold E. Wullschleger, of Everson, Wullschleger, Sutter, Korslund & Willet, for appellee.

CONNOLLY, MILLER-LERMAN, and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal is from a quiet title action in which the district court quieted title in Elton Schmidt & Sons Farm Company (Schmidt). The property involved is a railroad corridor, approximately 120 feet wide, which runs through the "Northeast Quarter (NE 1/4) of Section Thirty-six (36), Township Three (3) North of Range Three (3) East of the 6th P.M., Jefferson County, Nebraska." Joseph A. Kneib has appealed the district court's judgment. We reverse, and remand with directions.

BACKGROUND

On or about June 29, 1898, the Chicago, Rock Island & Pacific Railway Company (Chicago Railway) purchased the corridor and received a warranty deed for the property from the grantors, Peter and Gertrude Jansen. On March 1, 1986, Kneib purchased the corridor of land and received a quitclaim deed from Chicago Railway's successor, the Chicago Pacific Corporation (Chicago Pacific).

The railroad corridor in question is abutted on both sides by real estate owned by Schmidt. Schmidt alleged in its quiet title action that Chicago Railway had attained a mere easement from the original grantors in 1898, which easement was

effectively extinguished once Chicago Railway was granted permission by the Interstate Commerce Commission to abandon the corridor in 1979. Kneib counterclaimed, asserting that Chicago Railway attained fee simple absolute from the Jansens and that therefore Chicago Railway's successor, Chicago Pacific, conveyed valid fee title to Kneib.

The district court found that Chicago Railway had acquired a mere easement for right-of-way purposes by deed and that the right-of-way use ceased to exist upon the abandonment of the corridor. The court also found that upon such abandonment, the property reverted to the owner of the servient estate. The court further found that Schmidt was in fact the owner of the servient estate and that Schmidt therefore acquired title to the corridor upon such abandonment.

The threshold question in this case is whether Chicago Railway obtained a fee simple or a mere easement from the Jansens, the grantors, in 1898. If the estates conveyed to Kneib's predecessor were easements, the law of Nebraska is clear that once the railroad abandons its use of such easement, title to the land contained within the right-of-way reverts to the adjoining landowner. See, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *modified on other grounds* 242 Neb. 97, 490 N.W.2d 461; *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982). Therefore, if all Chicago Railway obtained from the Jansens was a right-of-way, once the railroad company abandoned the right-of-way, the right-of-way would revert to Schmidt. On the other hand, if Chicago Railway obtained a fee simple title in the land from the Jansens, then its ultimate successor in interest, Kneib, would own the land in fee simple.

ASSIGNMENTS OF ERROR

Kneib asserts that the trial court erred when it found that the warranty deed executed by the Jansens in 1898 was ambiguous, and that as a result, the court looked to the surrounding circumstances at the time the instrument was executed and determined that the instrument conveyed only an easement in the property to be used as a railroad right-of-way.

SCOPE OF REVIEW

[1,2] A quiet title action is an equity action. *Wahrman v. Wahrman*, 243 Neb. 673, 502 N.W.2d 95 (1993); *State v. Union Pacific RR. Co., supra*; *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992). In an equity action, an appellate court reviews the record de novo; as to questions of law, the appellate court has an obligation to reach its own independent conclusions. *Id.*

THE DEED

On June 29, 1898, the Jansens executed a warranty deed conveying title from them to Chicago Railway. The deed provided in pertinent part:

> That Peter Jansen and Gertrude Jansen[,] his wife[,] of Jefferson County and State of Nebraska, in consideration of the sum of One 00/100 Dollars [sic] in hand paid by The Chicago, Rock Island, & Pacific Railway Company, a corporation, do hereby sell and convey unto the said Railway Company, its successors and assigns, the following-described premises, situated in the County of Jefferson, and State of Nebraska, to-wit: A strip of land one hundred and twenty-five feet wide, of which the center line of the route and line of The Chicago, Rock Island & Pacific Railway Company, as the same is now surveyed, staked, and located, is the center, being seventy-five feet on [the] south side and fifty feet on the north side of the center line of said route, over, across, and through the following-described tracts of land, as said route and line of said railway passes through the same, to-wit:
>
> The North East quarter (NE¼) Section Thirty-six (36) Township three (3) North of Range three (3) East.

Chicago Railway used the corridor in conjunction with other linear corridors to serve communities between Jansen and Beatrice, Nebraska. Beginning in early 1970, Chicago Railway began handling a decreasing number of cars over the track line. The railroad company suffered financial losses in 1976, 1977, and 1978. As a result of the losses, coupled with the employment of a bankruptcy restructuring plan, Chicago Railway

sought to abandon the line before the Interstate Commerce Commission. On October 6, 1979, the commission formally allowed the railroad company to abandon the trackage pursuant to federal law.

On March 1, 1986, Chicago Pacific, bankruptcy successor to Chicago Railway, conveyed the railroad corridor to Kneib by quitclaim deed. On or about November 29, 1990, Schmidt purchased by warranty deed the real estate which abutted both sides of the railroad corridor.

Schmidt acknowledged throughout the course of the litigation that Kneib asserted an ownership claim to the railroad corridor. Kneib likewise acknowledged that Schmidt had an ownership interest in the quarter section of property that abutted both sides of the railroad corridor. The issue at trial centered around the quantum of the estate Chicago Railway had purchased from the Jansens in 1898. If the railroad company acquired fee title in 1898 from the Jansens, then the corridor of land belongs in fee to Kneib pursuant to the original warranty deed to Kneib's predecessor in title. Schmidt's position is that Kneib's predecessor in title acquired a right-of-way which is an easement and which once abandoned, reverted to the owners of the land adjoining the easement.

ANALYSIS

[3] The primary rule for interpreting an instrument is that the intention of the parties as determined from the whole instrument shall govern, and only when the intention is obscure or uncertain can a court look at the surrounding circumstances. *Elrod v. Heirs, Devisees, etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952). For the reasons stated below, we find that there is no ambiguity or obscurity in the language used in the warranty deed and that the intention of the parties can be determined by examining the instrument itself. The question before us, then, is what interest was conveyed by the 1898 instrument.

[4] The rule of law today is the same as the law in effect at the time the conveyance was made in 1898, Comp. Stat. ch. 73, § 50 (1897). That law stated that "[e]very conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms

used." See, *Sun Oil Co. v. Emery*, 183 Neb. 793, 164 N.W.2d 644 (1969); *City of Gering v. Jones*, 175 Neb. 626, 122 N.W.2d 503 (1963). We must determine, using reasonable inferences drawn from the terms within the instrument, whether the Jansens intended to convey a fee simple to Chicago Railway or whether they intended to create a right-of-way easement.

Granting Clause.

[5] To determine what the Jansens conveyed to Chicago Railway, we must first examine the granting clause. In *State v. Union Pacific RR. Co.*, 241 Neb. 675, 680, 490 N.W.2d 461, 465 (1992), *modified on other grounds* 242 Neb. 97, 490 N.W.2d 461, the court held that an instrument in which the grantors " ' "hereby GRANT and CONVEY unto the said Railroad Company and to their [sic] successors and assigns forever, the following piece or parcel of land" ' " contained no exceptions, reservations, or specifications for use of the land and therefore conveyed a fee simple, not an easement. In contrast, in *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 490, 249 N.W.2d 750, 752 (1977) (overruled in *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982), to the extent the court determined in *Bode* that a grantor who excepts from conveyance a railroad right-of-way retains fee title to the property underlying the easement), the instrument in question conveyed to the Missouri Valley Railroad Company " 'for the purpose of constructing a railroad thereon, and for all uses and purposes connected with the construction and use of said railroad, a strip of land . . . .' " (Emphasis omitted.) The instrument's habendum clause stated that the railroad was granted the land

> "[t]o have, hold, and enjoy . . . and the right to use the said land and material of whatsoever kind within the limits of the said one hundred feet above conveyed . . . unto the said party of the second part . . . and its successors and assigns, forever, for any and all uses and purposes connected with the construction, preservation, occupation and enjoyment of said railroad."

(Emphasis omitted.) *Bode*, 197 Neb. at 490-91, 249 N.W.2d at 752. Such a clause which limits the purpose, such as for the

purpose of constructing a railroad, can be read to convey less than a fee simple. *State v. Union Pacific RR. Co., supra.*

However, in *Carr v. Miller*, 105 Neb. 623, 628, 181 N.W. 557, 559 (1921), the court found that the language " 'does hereby grant, bargain, sell, and convey unto the said Omaha Bridge and Terminal Railway Company, its successors and assigns, for terminal and railway purposes and uses, the following described real estate' " described only the use to which the land was to be put. The *Carr* court stated that "[w]e find nothing in the words, 'for terminal and railway purposes and uses,' which indicates that the grantor intended to reserve in itself any interest whatsoever in the land granted." *Id.* at 632, 181 N.W. at 560. As in *Union Pacific RR. Co.*, in the case at hand, the instrument's granting clause makes no exceptions, reservations, or specifications for use of the land conveyed. No conditions are placed upon the property. The granting clause appears to convey a fee simple.

[6] The paragraph following the description clause, in which Chicago Railway acquired the right to erect and maintain snow fences "on the lands now owned by said grantor or grantors not more than two hundred feet north or west of the center line of said railroad," *does* describe an easement, *off* the conveyed land. The easement contains conditions and limits as follows:

> at any and all times between the first day of November and the fifteenth day of March of each year, erect and maintain snow fences . . . and may remove such snow fences at pleasure; but shall only suffer them to remain on the lands of such grantor or grantors during the time herein limited.

It appears that the grantors knew how to create an easement, as they did so within the instrument when they conveyed a snow fence easement on property on either side of the strip conveyed. The intent statute in effect at the time of the conveyance stated that unless the terms state otherwise, all conveyances of real estate passed on the entire interest of the grantor. See Comp. Stat. ch. 73, § 50 (1897). A grantor is charged with knowledge of the intent statute, and if he desires to create a mere easement or to convey a determinable fee, he can easily use appropriate language for this purpose. *Sun Oil Co. v. Emery*, 183 Neb. 793,

164 N.W.2d 644 (1969). The Jansens did use appropriate language for the purpose of creating a snow fence easement. If they desired to convey less than a fee simple in the strip conveyed in the instrument, the Jansens knew how to do it.

Consideration.

[7,8] Schmidt claims that the consideration rendered for conveyance of the strip of property, namely $1, renders the instrument ambiguous and establishes the granting of an easement. While nominal monetary consideration may be given in a deed, "other good and valuable consideration may exist as well." *Coleman v. Missouri Pac. R.R.*, 294 Ark. 633, 638, 745 S.W.2d 622, 625 (1988). The *Coleman* court found that other valuable consideration to the grantors could have been the benefits to the abutting landowners in 1902 of the building of a railroad. The court concluded that the recited nominal consideration in the deed in question was not enough to suggest that the grantors intended only a right-of-way conveyance. Similar benefits could have enured to the Jansens in 1898. We find that nominal monetary consideration, alone, does not make the instrument ambiguous, nor does it create an easement.

Description Clause.

[9] Schmidt argues that because the conveyed premises is described as a "strip of land" located where the Chicago Railway tracks ran "over, across, and through" a tract of land, the Jansens intended to grant only an easement to Chicago Railway. In the event of repugnancy and inconsistency between the granting, habendum, and description clauses of a deed, the granting clause will prevail. *City of Gering v. Jones*, 175 Neb. 626, 122 N.W.2d 503 (1963). In *City of Gering*, the description clause in the instrument at issue described the location of the premises conveyed, which description was followed by a phrase stating that the property was " 'to be used for the use and benefit of the Citizens of the said City of Gering, Nebraska.' " *Id.* at 627, 122 N.W.2d at 505. The court found that both the granting and habendum clauses were without limitation and, further, that there was no conflict between the description clause and the granting and habendum clauses, as the

description merely directed the city to do what it was created to do: benefit its citizens. Therefore, the court found that the instrument in question conveyed a fee simple absolute in the city of Gering. See, also, *Carr v. Miller*, 105 Neb. 623, 181 N.W. 557 (1921). We find that the description of a strip of land, located where railroad tracks run across, over, and through a tract of land, simply describes where the land conveyed was located. Such language does not create ambiguity, nor does it create an easement.

Covenant to Warrant.

After the clause which created an easement for snow fences, the Jansens covenanted good and perfect title and "covenant[ed] to warrant and defend the said premises against the lawful claims of all persons whomsoever." In *Meyerink v. Northwestern Public Service Co.*, 391 N.W.2d 180, 182 (S.D. 1986), the instrument at issue was entitled "right-of-way deed," but contained a clause in which the grantors promised to " 'forever Warrant and Defend the title to the premises hereby conveyed. . . .' " The court found that "[t]hat is clearly the language of a conveyance in fee or, more specifically, a warranty deed. [Citation omitted.] Easements are not so phrased. No ambiguity exists and we need not further examine the intention of the parties, consideration given, or circumstances at the time of execution." *Id.* at 182-83. We find that a conveyance in which the grantors covenant to warrant and defend title to the premises is the language used to convey a fee simple, that the instrument is not ambiguous, and that from the language used in the instrument, the Jansens intended to convey a warranty deed to Chicago Railway.

Dower.

Finally, at the end of the instrument, Gertrude Jansen relinquished her right of dower to the premises. Under Comp. Stat. ch. 73, § 43 (1897), a married woman, "[t]o convey her right of dower . . . must execute a deed with or without her husband." A right-of-way is an easement, not a title, and can be conveyed without the relinquishment of dower rights of a wife. *Coleman v. Missouri Pac. R.R.*, 294 Ark. 633, 745 S.W.2d 622 (1988). Therefore, we can infer that because Gertrude Jansen

relinquished her dower rights, the Jansens intended to convey fee simple title to the property, rather than an easement.

CONCLUSION

In sum, we find that the intention of the parties, when one examines the whole instrument, is neither ambiguous nor obscure. The Jansens intended to grant a fee simple to Chicago Railway. Kneib, as Chicago Railway's successor in interest, owns the railroad corridor in question in fee simple. Therefore, we reverse the judgment of the trial court and remand the cause with directions that the trial court enter a judgment in conformity with the opinion herein.

REVERSED AND REMANDED WITH DIRECTIONS.

LINDA NOVAK, APPELLEE AND CROSS-APPELLANT, V. GERALD H. NOVAK, APPELLANT AND CROSS-APPELLEE.

508 N.W.2d 283

Filed September 14, 1993. No. A-91-1142.

1. **Demurrer: Pleadings.** When ruling on a demurrer, the petition is to be liberally construed, as a demurrer tests the substantive legal rights of the parties, based on facts and reasonable inferences set forth in the petition seeking relief, and does not test conclusions to be drawn therefrom.
2. **Divorce: Time: Appeal and Error.** During the first 6 months following the entry of a divorce decree, in the absence of an appeal, control of the decree remains in the judicial discretion of the district court.
3. **Modification of Decree: Time: Good Cause.** Modification or vacation of a divorce decree within the first 6 months after entry requires a showing of good cause.
4. **Modification of Decree: Good Cause: Proof.** Good cause to justify modification of a divorce decree requires a showing of a material change in circumstances after the entry of the decree, and it is contemplated that alteration and passage from one condition to another is essential for a material change of circumstances.
5. **Modification of Decree: Time.** Proceedings to modify a divorce decree under Neb. Rev. Stat. § 42-372 (Reissue 1988) may continue and be finally decided after the first 6 months following entry of the decree, so long as the original request was filed within 6 months.
6. **Contempt.** Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such action

is ordinarily a mere civil contempt and thus the rules for criminal contempt are not applicable.

7. **Contempt: Proof.** An action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable to civil actions, not the stricter "proof beyond a reasonable doubt" standard applied to criminal contempt.
8. **Contempt: Appeal and Error.** The standard of review in a contempt case is whether there has been an abuse of discretion.
9. **Contempt: Property Division.** A party is not in contempt of court for a failure to comply with an order for payment of property division unless it is shown that he had sufficient ability to pay and that his refusal was willful and contumacious and without just and reasonable ground.
10. **Debtors and Creditors: Attachments: Garnishment.** An individual retirement account is exempt from attachment and garnishment under Neb. Rev. Stat. § 25-1563.01 (Reissue 1989) to the extent that the funds contained therein are reasonably necessary for the support of the debtor or any dependent of the debtor.
11. **Debtors and Creditors: Attachments: Garnishment: Proof.** When the owner of an individual retirement account resists attachment or garnishment thereof, the burden of proof is upon the owner to establish the extent of the exemption under Neb. Rev. Stat. § 25-1563.01 (Reissue 1989) by establishing the extent of the funds in such account which are reasonably necessary for the support of the debtor-owner and any of his or her dependents.
12. **Records: Appeal and Error.** Where a transcript and bill of exceptions filed with an appellate court are sufficient to present all issues, and the case is one for determination solely on the matters contained therein, no further bill of exceptions is required for preservation of any error of law on appeal.
13. **Debtors and Creditors: Garnishment.** Neb. Rev. Stat. § 25-1030 (Reissue 1989) sets forth the procedure to be used when a garnisher is dissatisfied with the answer of the garnishee as to whether a debt is owed by the garnishee to the judgment debtor or whether the garnishee holds property, funds, or credits of the debtor.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Timothy K. Kelso and Albert L. Feldman, of Harris, Feldman, Stumpf Law Offices, for appellant.

Patricia A. Lamberty, of Zweiback, Hotz & Lamberty, P.C., for appellee.

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

SIEVERS, Chief Judge.

On August 21, 1990, the district court for Douglas County

entered a decree of divorce concerning Gerald H. Novak and Linda Novak. Gerald was ordered to pay child support of $455 per month for each of two children, together with alimony for 6 months at $1,200 per month and then $1,000 per month for 54 months. Additionally, Gerald was ordered to pay Linda a total property settlement of $228,400, of which $165,000 was to be paid in 15 semiannual installments of $11,000 each on March 1 and September 1 of each year beginning in March 1991, the balance being paid by property transfers which have occurred.

Gerald has made the required payments of child support and alimony, but has not made any of the cash property settlement payments. Four months after the entry of the decree, Gerald filed an application to modify with respect to alimony, child support, the property award, attorney fees, and court costs. After an amended application to modify was filed, Linda's demurrer to that application was sustained, and the application was dismissed. Gerald appeals that ruling.

For her part, Linda has attempted to collect the unpaid property settlement amounts by contempt proceedings and garnishments, including attachment of Gerald's individual retirement account (IRA). At the same time that it ruled on the demurrer, the district court found that Gerald was not in contempt, denied Linda's attempt to establish garnishee liability, and found that Gerald's IRA was exempt from attachment. Linda cross-appeals those rulings, which cross-appeal presents the first impression issue of whether an IRA is subject to attachment under the laws of this state.

DEMURRER TO APPLICATION TO MODIFY

Gerald's amended application to modify alleged that his only source of income was his salary of $2,600 per month from Novak & Sons, Inc., which was $200 per month less than his salary at the time of trial. Gerald alleged that there had been "material and substantial changes in the marital estate, the financial condition of the respondent [husband], and/or other facts and circumstances . . . constitut[ing] good cause to modify the decree of dissolution of marriage . . . ." The application specifically alleged the sale of the Chalet Motor Lodge at an estimated $500,000 loss, as well as pending negotiations with

the Resolution Trust Company to mitigate "the ever-increasing losses being incurred as a result of owning and operating the Park Avenue Health Club (and apartments)."

In the prayer, the application asked for a finding of material and substantial changes in the marital estate and financial condition of the husband constituting good cause to modify the divorce decree and grant relief in three respects: (1) that the property settlement award of $165,000 be terminated and canceled in full, (2) that the alimony and child support provisions be revised to conform to the Nebraska Child Support Guidelines and Gerald's current income, and (3) that the attorney fees and court costs awarded in the decree be reduced to a figure "commensurate with respondent's current economic condition and ability to pay."

Linda demurred on the ground that the amended application did not state facts sufficient to constitute a cause of action. The district court ruled that the demurrer should be sustained, "in that it attempts to modify a judgment of this Court that is final and is not subject to modification, and [the] application to modify shall be dismissed." No further explanation for the ruling was given, nor was Gerald provided an opportunity to amend.

[1] As we review that ruling, we bear in mind the often stated proposition of law that when ruling on a demurrer, the petition is to be liberally construed, as a demurrer tests the substantive legal rights of the parties, based on facts and reasonable inferences set forth in the petition seeking relief, and does not test conclusions to be drawn therefrom. See *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991).

[2-4] A divorce decree, except for purposes of appeal, does not become final for 6 months after its entry. Neb. Rev. Stat. § 42-363 (Cum. Supp. 1992). There was no direct appeal filed from the entry of this decree on August 21, 1990, and Gerald filed his application for modification within the statutory 6-month waiting period. During the first 6 months following the entry of a divorce decree, in the absence of an appeal, control of the decree remains in the judicial discretion of the district court. *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985). Modification or vacation of a divorce decree within

the first 6 months after entry requires a showing of good cause. *Miller v. Miller*, 190 Neb. 816, 212 N.W.2d 646 (1973) (holding that Neb. Rev. Stat. § 42-372 (Cum. Supp. 1972) permitting the trial court to modify its decree within 6 months impliedly requires a showing of good cause). Good cause to justify modification of a divorce decree requires a showing of a material change in circumstances after the entry of the decree. See *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984). Additionally, the change must be one that was not within the reasonable contemplation of the parties. *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988). The $165,000 property division award was not yet final when Gerald's application to modify was filed. Therefore, the issue becomes whether good cause exists to justify such a change and, furthermore, whether Gerald's changed circumstances were contemplated at the time of the original decree.

Neb. Rev. Stat. § 42-366(7) (Reissue 1988) provides that "[e]xcept for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree." However, there is no such limitation expressly set forth in the decree of August 21, 1990. Therefore, we can rule out any express restriction on modification in the original decree as a basis for the district court's sustaining of the demurrer.

With respect to Gerald's request to modify alimony, Neb. Rev. Stat. § 42-365 (Reissue 1988) states: "Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown . . . ." Consequently, since future alimony payments had not yet accrued, those remaining payments were subject to modification upon good cause shown. Child support is likewise modifiable for good cause shown, although the Nebraska Child Support Guidelines must be followed unless the presumption for their application is properly rebutted.

We observe that the amended application alleged the factual prerequisites from *Pascale* and *Morisch* by setting forth specific facts, including a decrease in salary, the sale of a business property at a large loss, and escalating losses incurred by Gerald in the operation of the Park Avenue Health Club and

apartments. The allegations were factually sufficient to withstand the demurrer.

[5] The Novaks' divorce decree was subject to modification, assuming a proper proven evidentiary basis, in all respects when Gerald filed his application to modify or vacate 4 months after its entry, and therefore the district court's ruling that the judgment was final and not subject to modification was simply wrong. In this regard, we have considered whether the district court's ruling could have its basis in the fact that the amended application to modify was filed May 22, 1991, more than 6 months after the entry of the decree, thereby changing the statutory authority for modification from § 42-372 (Reissue 1988) to § 42-365. Although the Supreme Court does not appear to have spoken directly on the issue, we believe that proceedings to modify a divorce decree under § 42-372 may continue and be finally decided after the first 6 months following entry of the decree, so long as the original request was filed within 6 months. See, *Younkin v. Younkin, supra* (Supreme Court remanded to district court for further proceedings well after the 6 months on husband's application to modify decree regarding paternity and support of a child born after the divorce trial); *Miller v. Miller, supra* (motion to set aside and vacate divorce decree filed within 6 months, but hearing and ruling thereupon held in the seventh month).

Accordingly, since Gerald filed his application within 6 months, the fact that an amended application was filed in response to Linda's motion to make more definite and certain, which amended application's filing was outside of the first 6 months, does not make the decree "not subject to modification." We hold that the decree was subject to modification and that the petition's allegations were factually sufficient to withstand the demurrer. Accordingly, we reverse the court's sustaining of the demurrer and dismissal of Gerald's amended application, and we remand the matter for further proceedings.

CONTEMPT PROCEEDINGS

On October 16, 1991, Linda filed an application for Gerald to show cause why he should not be held in contempt of court, principally for his failure to pay the March and September 1991

property settlement installments of $11,000. Gerald's response to the application for contempt was to allege many of the same matters set forth in his application to vacate or modify the decree, including that he was "unable to pay said property settlement with his current income and existing assets." The contempt matter was heard October 31, 1991, and the trial court ruled that Gerald "has not willfully or contumaciously violated any of the Court's orders as alleged by petitioner." The court made no further findings of fact and gave no explanation for its decision. Linda cross-appeals, arguing that Gerald had the means to pay, but willfully and contumaciously refused to comply with the court's order. Gerald argues that we should affirm the ruling in the absence of an abuse of discretion.

[6] We briefly examine the nature of contempt proceedings. In *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980), the Supreme Court explained the difference between civil and criminal contempt, saying that where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such action is ordinarily a mere civil contempt and thus the rules for criminal contempt are not applicable.

[7] Citing *Eliker*, the court held in *Grady v. Grady*, 209 Neb. 311, 307 N.W.2d 780 (1981), that an action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable to civil actions, not the stricter "proof beyond a reasonable doubt" standard applied to criminal contempt. The standard of proof for this case is, therefore, by a preponderance of the evidence, or as is now said, "by the greater weight of the evidence." See NJI2d Civ. 2.12A.

At the time of these contempt proceedings, Gerald was current on alimony and support payments. However, *Grady* involves the use of contempt proceedings to enforce the property division aspects of a divorce decree, including the alleged failure of the husband to secure the release of secondary mortgages. Thus, we view contempt proceedings as an appropriate vehicle for Linda to enforce the property division provisions of this decree requiring Gerald to pay $11,000 on March 1 and September 1, 1991. Contra *Burgardt v. Burgardt*,

474 N.W.2d 235 (Minn. App. 1991).

[8] The standard of review in a contempt case is whether there has been an abuse of discretion. See *Curtis v. Millard School Dist. No. 17*, 217 Neb. 502, 349 N.W.2d 379 (1984). Accordingly, we review the evidence to determine if the district court abused its discretion in finding that Gerald was not in contempt for failure to make payments required by the decree. An abuse of discretion is a ruling of the trial judge which is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result. *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992).

[9] We note at the outset that there is no controversy about the existence of the decree or that Gerald had not made the property settlement payments at issue. Accordingly, the essence of the inquiry is whether he had the means and ability to pay. The fundamental rule at work here is that " '[a] party is not in contempt of court for a failure to comply with an order to pay alimony unless it is shown that he had sufficient ability to pay and that his refusal was wilful and contumacious and without just and reasonable ground.' " *Thuman v. Thuman*, 144 Neb. 177, 179, 13 N.W.2d 117, 118 (1944) (quoting *Wright v. Wright*, 132 Neb. 619, 272 N.W. 568 (1937)). Although *Thuman* speaks of a failure to pay alimony, we think the rule is clearly the same in the instance of a failure to pay property division moneys. We now turn to the evidence on Gerald's ability to pay.

The evidence establishes that Gerald is a 53.5-percent owner of Novak & Sons, Inc., which deals in real estate. Gerald has no personal bank account and has no stocks or bonds except the stock of Novak & Sons, which corporation has not declared dividends or bonuses. At the time of the hearing, his net monthly income from Novak & Sons was $2,092.12. His testimony was that upon receipt of his paycheck, he converts $1,910 to a cashier's check for alimony and child support and transfers it to the clerk of the district court. Gerald's testimony was that he has $182 to live on each month after making child support and alimony payments. He drives a new Ford Explorer, which was procured by the trade-in of his 1988 Jeep plus $14,000 paid by Novak & Sons in July 1991. Gerald has an IRA at Conservative Savings comprised of various certificates of

deposit which, at the time of trial, totaled $54,516.73. Gerald testified that he lives in a condominium for which his parents pay the fees, and his parents also pay his other "miscellaneous living expenses." Gerald testified as follows: "Q. Very well. Have you made any attempt, sir, to obtain the funds from your property to pay any amount due pursuant to the decree entered in this case that have not been paid to date? A. No, I haven't."

On February 4, 1991, approximately 4 weeks before the due date of the first property division payment, the Novak & Sons' Franklin U.S. Government Securities Fund account at Piper, Jaffray & Hopwood, Inc., was worth $47,240.75. On September 4, 1991, that same account was worth $43,370.05.

On February 22, 1991, shortly before the first property settlement payment came due, a second Novak & Sons account at Piper, Jaffray & Hopwood had a balance of $18,685.89. On August 30, 2 days before the due date of the second property settlement payment, the account had $5,103.71. By September 27, the account had $8,132.64. Additionally, Security National Bank of Omaha maintained a Novak & Sons regular account, a Novak & Sons payroll account, and a Park Avenue Health Club account. Gerald signs each of those accounts.

Park Avenue Health Club, which is a division of Novak & Sons, had an account balance of $3,873.84 on February 28, 1991, and $4,820.40 on August 30. The Novak & Sons account had a balance of $19,655.12 on February 28 and $13,060.09 on August 30. The Novak and Sons payroll account had a balance of $1,493.41 on February 28 and $746.44 on August 30.

The Park Avenue Health Club had equity of $600,000 to $700,000 as of the divorce trial, according to the testimony of Gerald in this proceeding. Although Gerald testified that Novak & Sons was not able to pay the total monthly payment of $16,400 on that property, the corporation was paying approximately $2,000 per month for taxes and insurance on it.

When considering the trial judge's decision finding that Gerald was not in contempt, in light of the foregoing evidence, we frankly are at a loss to understand why the trial court would not hold him in contempt. In his testimony, Gerald did not state why he had not made the payments at issue in the contempt

proceeding. Furthermore, he did not prove that the funds of Novak & Sons, which we have detailed, were not available for payment of the obligation to Linda, except that he did testify that he was holding about $25,000 for the installation or repair of a boiler and installation of an alarm system at an apartment complex.

BURDEN OF PROOF

It is clear beyond dispute that in March and September 1991, the corporation of which Gerald owned 53.5-percent interest had substantial funds. We find that accounts to which Gerald had access or control, as recited above, held $90,949.01 in February 1991 and $67,100.69 in late August 1991. Additionally, Gerald had an IRA worth in excess of $54,000. Although a withdrawal from the IRA means income tax liability and a 10-percent penalty, Gerald is free to access the funds therein at any time, for any reason, including paying his former wife what he owes her under the divorce decree. That Gerald claims a statutory exemption for the IRA, which we will address momentarily, is a different question than assessing whether he had the means to pay in a contempt proceeding, which could include tapping the cash in his IRA.

The decree of the district court awards Linda a total property settlement of $228,400, of which $165,000 is to be paid in cash by the periodic payments involved here and the balance by immediate transfer of property. We believe it is a reasonable inference from the then well-established law that Gerald received at least a like amount of cash or property as his sole property. See *Blaser v. Blaser*, 225 Neb. 104, 402 N.W.2d 875 (1987) (holding that a property division of 1/3 to 1/2 as a general rule is an appropriate division). Thus, although we have heard Gerald's plea that he has only $182 per month to live on after paying alimony and child support, the payments at issue reflect a division of the marital estate of the Novaks', not what Gerald should or can pay to Linda from his monthly paycheck. We find it noteworthy that the trial judge, at the time of the decree, awarded fees of $30,064.13 to Linda's attorney, finding that although large, the fees were "reasonably and necessarily incurred in great part as a result of the Husband's

obstructionism . . . ."

We find that Gerald had the means in March and September 1991 to pay the obligation to his former wife through his controlling power, which he did not dispute by evidence, over the Novak & Sons accounts which obviously contained substantial funds, as we have recited. Gerald had the burden to show why he could not pay, given the ample means to do so under his control, but he did not carry that burden. His failure to pay Linda is therefore willful and contumacious contempt of the court's order, which constitutes obstructionism. Accordingly, we find that the district court for Douglas County abused its discretion in not finding Gerald in contempt, and we remand this matter to the district court for further proceedings which shall involve the imposition of coercive sanctions, the exact nature of which the district court shall determine. Our finding that Gerald should have been found in contempt for failing to pay the first two $11,000 installments also includes his failure to pay the sum of $1,067 assessed against him as court costs and attorney fees in the Supreme Court (stemming from contempt proceedings to collect the original award of attorney fees from him, which is referenced in the section of this opinion concerning the IRA), as well as the bill in the amount of $1,052.50 for counseling of the Novaks' children. We find that Gerald had sufficient funds to pay these items and has willfully and contumaciously failed to do so, in violation of the court's order. The district court abused its discretion in finding that Gerald was not in contempt, as there was no tenable reason not to so find.

ATTACHMENT OF IRA

Linda also cross-appeals that portion of the trial court's decision which held that Gerald's IRA funds were exempt from attachment pursuant to Neb. Rev. Stat. § 25-1563.01 (Reissue 1989). That statute states in relevant part:

> In bankruptcy and in the collection of a money judgment, the following benefits shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors: To the extent reasonably necessary for the support of the debtor and

> any dependent of the debtor, an interest held under a stock bonus, pension, profit-sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service unless:
>
> . . . .
>
> (2) Such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986 or the successors of such sections.

[10] Linda argues that the legislative history of that statute indicates that IRA's were considered one of the exemptions under the statute when it was introduced and were specifically identified in the earlier drafts of the bill. However, Linda suggests that since the final form of the statute no longer expressly references IRA's, the inference to be drawn is that the Legislature chose not to include them under § 25-1563.01's protective umbrella. However, such an inference ignores the remaining language of the statute, as well as the continual references to IRA's throughout its legislative history. See, e.g., Floor Debate, L.B. 335, Banking, Commerce, and Insurance Committee, 90th Leg., 1st Sess. 6353 (May 27, 1987) ("[w]hat we have written into the bill is an exemption for retirement vehicles, including not only corporate sponsored plans but Keogh plans and IRAs which are consistent with IRS credits and which are capped by the equitable cap of that amount necessary for . . . reasonably necessary to support the debtor or the debtor's dependents").

The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

The plain language of § 25-1563.01(2) does not protect plans or contracts from exemption unless they qualify under I.R.C. §§ 401(a), 403(a), 403(b), or 408 (1988). Therefore, these code sections control the types of plans available for exemption under the statute. Section 401(a) of the code discusses qualified pension, profit-sharing, and stock bonus plans. Section 403(a)

and (b) deals with employee annuities—qualified annuity plans, 501(c)(3) annuities (nonprofit organizations), and public school annuities. Finally, § 408 specifically addresses IRA's. Thus, Gerald's IRA qualifies under § 408 and is eligible for exemption to the extent provided by the statute.

Linda's argument that IRA's are not exempt under § 25-1563.01 is without merit. However, the fact that IRA's are generally protected under the statute does not mean an IRA can never be attached or garnished. This is where the trial court erred in its ruling on this issue, and on questions of law, this court is obliged to reach a conclusion independent of the decision reached by the trial court. *State ex rel. Grams v. Beach*, 243 Neb. 126, 498 N.W.2d 83 (1993). The court properly found that IRA's were exempt under the statute, but ended its analysis at that point, thereby failing to recognize that the exemption is limited. The plans and contracts protected under § 25-1563.01 are shielded from attachment and garnishment only "[t]o the extent reasonably necessary for the support of the debtor and any dependent of the debtor." A factual finding must be made by the trial court as to whether Gerald's IRA funds are reasonably necessary for his support or the support of his dependents, because if not, the IRA is not exempt from attachment.

[11] We believe it is necessary to remand this matter for additional evidence and the necessary factual determination by the district court. Our rationale is that the district court had previously ruled that Gerald's IRA was exempt from garnishment when Linda's attorneys were attempting to enforce the $30,000 order against Gerald for attorney fees. That separate case was docketed in the Supreme Court as case No. S-91-026. No ruling was made by the Supreme Court on the merits of the district court's holding that the IRA was exempt, as the matter was made moot by Gerald's payment of attorney fees. Accordingly, in these later proceedings, the parties, and particularly Gerald, may have believed that the exemption was absolute and that no evidentiary record was needed on the question of whether the IRA funds were "reasonably necessary" for his support. Consequently, the record is incomplete, and we remand the matter concerning Linda's

attachment of the IRA for further proceedings consistent with this opinion. If Gerald resists attachment, it is reasonable that the burden of proof be imposed upon him as the person in possession of the needed information and the one seeking the exemption. The one who seeks the exemption should prove entitlement to the exemption.

LINDA'S APPLICATION TO DETERMINE GARNISHEE LIABILITY

After Gerald's failure to pay Linda the first $11,000 payment due March 1, 1991, Linda instituted garnishment proceedings. As a result, a summons and order of garnishment and interrogatories were issued by the district court for Douglas County and directed to the garnishee, Property Investment Co., stating that the judgment debtor was Gerald and that he was indebted to the creditor, Linda, in the amount of $11,236.21. That order of garnishment to Property Investment specifically stated: "You are obligated to hold all of the property and credits of every description of the judgment debtor now in your possession or under your control until further order of this court . . . ."

On May 9, 1991, Property Investment, by "Gerald H. Novak, Partner," answered affirmatively that it held property belonging to the judgment debtor and specified, "Judgment debtor is a partner in garnishee company. The partnership currently holds one asset, real property located at 1112 Arbor Street, Omaha, Nebraska. The partnership has no other assets."

On August 13, 1991, Linda filed an "Application to Determine Garnishee Liability," alleging that on July 27, she learned through a pleading filed by Gerald in a matter unrelated to this appeal that the garnishee, Property Investment, had transferred the property at 1112 Arbor Street to Novak & Sons sometime "[s]ince the answer to said garnishment was made." The hearing held by the district court on October 31, 1991, included Linda's application to determine garnishee liability.

In the trial court's order dated November 8, 1991, it held that the application to determine the liability of the garnishee, Property Investment, was not filed "within the statutory period

as required by Sec. 25-1030 R.R.S. Neb 1989, and therefore the garnishee is released from any liability as provided for by the statute." Linda cross-appeals from this order, asserting that the district court erred in the above-quoted finding. Gerald asserts that the pleadings involved in this issue are not found in the transcript, implying that the record is not adequate for this court to rule on the issue.

[12] We dispose of that contention by observing that copies of all relevant pleadings mentioned in the foregoing recitation of the procedural background are found in Linda's exhibit 4, which was offered at the October 31, 1991, hearing and which was received by the court without objection from Gerald. Where a transcript and bill of exceptions filed with an appellate court are sufficient to present all issues, and the case is one for determination solely on the matters contained therein, no further bill of exceptions is required for preservation of any error of law on appeal. *Beeder v. Fleer*, 211 Neb. 294, 318 N.W.2d 708 (1982). The bill of exceptions and the transcript contain what we need to resolve Linda's assignment of error.

At the time the garnishee answered the interrogatories, stating that Gerald, the judgment debtor, was a partner in the garnishee, which held real estate at 1112 Arbor Street, the liability of the garnishee was fixed by statute. Neb. Rev. Stat. § 25-1056(1) (Reissue 1989) provides in part that "[e]xcept when wages are involved, the garnishee shall hold the property of every description and the credits of the defendant in his or her possession or under his or her control at the time of the service of the summons and interrogatories *until the further order of the court*." (Emphasis supplied.) The order of garnishment served on Property Investment contained this statutory language.

When Linda learned that Property Investment had conveyed the property at 1112 Arbor Street to Novak & Sons, she chose the wrong remedy by attempting to determine garnishee liability under Neb. Rev. Stat. § 25-1030 (Reissue 1989). *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985), is the definitive case on the meaning and application of § 25-1030. In that case, NC+ obtained a judgment against Growers Seed Association for damages. On May 17, 1982, a

summons in garnishment was served on Steven Booker, and on June 8, he filed his answers to interrogatories, admitting the existence of insurance policies in the form of a " 'Seedsmen's Errors and Omissions, Claims Made Indemnity policy.' " *NC+ Hybrids*, 219 Neb. at 297, 363 N.W.2d at 363. However, the answer further provided that " 'there is no debt owing or other obligation owed by the Garnishee to the judgment debtor . . . .' " *Id.* at 297, 363 N.W.2d at 364. NC+ took no further action until 15 months after the answers to interrogatories, when NC+ filed a request for production of documents, thereby prompting Booker to move for discharge as a garnishee on the basis of § 25-1030. The district court granted Booker's request for discharge, finding that the 20-day requirement of § 25-1030 was mandatory. NC+ appealed, causing the Supreme Court to author the definitive interpretation of § 25-1030.

In *NC+ Hybrids*, the court referred to the garnishee as a stakeholder or custodian holding property of another who is a party to a lawsuit which produced the judgment for which execution is sought. Normally, such a garnishee is an innocent third party exposed to the inconvenience, hazards, and expense of extended litigation. That Property Investment, a partnership, has Gerald as one of its partners does not affect the application of *NC+ Hybrids* to this case. The Supreme Court reasoned as follows:

> In view of the nature of garnishment demanding an expeditious disposition of proceedings, it is reasonable that the Nebraska Legislature sought to protect a garnishee from often unnecessary and sometimes oppressive litigation. See *DeSuno v. Safeco Ins. Co. of America*, 118 Ariz. 553, 578 P.2d 634 (1978). To achieve prompt disposition the Legislature has specified a relatively short time for counteraction by a judgment creditor or garnisher in the *event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories*, namely, a written application filed within 20 days in order to determine liability where a garnishee's answers negate a debt, property, or credit due the judgment debtor from the garnishee.
>
> In the application the garnisher may controvert or

> traverse the garnishee's response or may allege facts demonstrating that the garnishee owes a debt to the judgment debtor or that the garnishee holds property or a credit of the judgment debtor. By the application the garnisher frames the issue: Does the garnishee owe a debt to the judgment debtor or hold property, funds, or credits of a judgment debtor? The answers of the garnishee and the controverted answers or factual allegations in the garnisher's application constitute the pleading for disposition of the liability issue under § 25-1030. See *Assurance Corp. v. Mitchell*, 120 Colo. 531, 211 P.2d 551 (1949). Contrary to the interpretation suggested by NC+, § 25-1030 does not differentiate types of dissatisfaction requiring an application to determine liability or exonerating the garnisher from filing such application, that is, dissatisfaction with facts vis-a-vis dissatisfaction with conclusions. We are not at liberty to insert into § 25-1030 any language qualifying the dissatisfaction a garnishee may experience for dispensation from the statutory requirements.

(Emphasis supplied.) *NC+ Hybrids*, 219 Neb. at 300-01, 363 N.W.2d at 365-66. NC+ argued from a line of cases relieving a garnisher from filing an application for determination of liability. Cf., *Grain Dealers Mutual Insurance Company v. Quarrier*, 175 So. 2d 83 (Fla. App. 1965); *Dunckelman Distributing Company, Inc. v. Hyde*, 334 So. 2d 236 (La. App. 1976). However, the Supreme Court distinguished those cases on the ground that they indicate that a garnisher's counteraction is not necessary where the garnishee's answer admits facts establishing the garnishee's obligation to a judgment debtor.

[13] This is precisely the situation present in this case. Property Investment admitted having property of Gerald's and defined what it was: real property located at 1112 Arbor Street in Omaha. Section 25-1030 sets forth the procedure to be used when a garnisher is dissatisfied with the answer as to whether a debt is owed by the garnishee to the judgment debtor or whether the garnishee holds property, funds, or credits of the debtor. In other words, § 25-1030 sets forth the procedure for

litigation between the garnishee and the garnisher over whether a debt is owed or property or funds held, and the extent thereof. Here, the garnishee admitted that it held real property in which Gerald had an interest as a partner.

NC+ Hybrids holds that the issues in a § 25-1030 proceeding are formed by the garnishee's answers to interrogatories and the garnisher's application, which controverts or traverses those answers. The § 25-1030 proceeding brought by Linda was not an appropriate proceeding, given the unqualified admission by Property Investment that it held property in which Gerald had an interest. Linda was not dissatisfied with this answer, but, rather, was understandably dissatisfied when she learned that the garnishee, Property Investment, had conveyed the real estate at 1112 Arbor Street to Novak & Sons after answering the interrogatories. This conveyance was in blatant disregard of the court's order and the provisions of § 25-1056 requiring that the property be held by the garnishee *until further order of the court*.

Linda's remedies included an attempt to set aside the conveyance, as well as to hold the garnishee and Gerald in contempt. Her remedy did not include proceedings under § 25-1030, as there was no dissatisfaction with the garnishee's answers to interrogatories. This is why Linda's application should have been dismissed. Thus, we affirm the district court's dismissal of the application, but for a different reason. The law is clear that a right result will be affirmed, even if the appellate court disagrees with the reason given by the lower court. See *Wymore v. Wymore*, 239 Neb. 940, 479 N.W.2d 778 (1992).

CONCLUSION

We have found that the district court improperly sustained the demurrer to Gerald's application to modify the provisions of the divorce decree. At the same time, we have found that Gerald was in contempt of court for failure to make the two property division payments due his former wife at a time when he had the means to do so. Those two results may seem superficially anomalous. However, the evidence is clear that Gerald had the means to pay the March 1 and September 1, 1991, payments of $11,000 each, irrespective of what his

financial condition might have been with respect to his ability to carry the full burden of the $165,000 over 7 1/2 years, as well as to pay the child support and alimony which were also ordered. Thus, separate issues are presented by the contempt proceedings with respect to the first two payments, when contrasted with Gerald's attempt to modify the full range of long-term financial obligations imposed upon him by the decree.

Nonetheless, Gerald was entitled to introduce, in defense of Linda's action to hold him in contempt, any evidence bearing on his financial condition and whether he had the means to pay the two $11,000 payments at issue when they were due. Some of that same evidence would obviously also go to the question of Gerald's entitlement to a modification of the decree. However, Gerald's evidentiary showing was clearly insufficient to prevent a finding that he had the means to make the first two payments. Thus, although a different result might eventually occur regarding future payments of alimony, child support, and the balance of the property division payments, depending upon the ultimate outcome of his application to modify, which we have remanded for further proceedings, Gerald clearly was willfully in contempt of court with respect to the first two payments.

The district court was correct in dismissing Linda's application to establish garnishee liability, but erred in its decision that Gerald's IRA was unconditionally exempt from attachment. Accordingly, we also remand to the district court the attempted attachment of the IRA for further proceedings to determine whether the funds contained in that account are reasonably necessary for Gerald's support or the support of his dependents, which is the basis for the limited exemption under § 25-1563.01.

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

IN RE INTEREST OF J.L.H., J.L.H., AND R.H., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.H., APPELLANT, AND C.H., APPELLEE.

507 N.W.2d 641

Filed September 14, 1993. No. A-92-904.

1. **Juvenile Courts: Final Orders: Appeal and Error.** On appeal of any final order of a juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but, when the evidence is in conflict, the 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.
2. **Juvenile Courts: Child Custody: Words and Phrases.** Under Neb. Rev. Stat. § 43-1202(3)(b) (Reissue 1988), "custody proceeding" shall mean proceedings in a juvenile court in which a person under the age of 18 years is alleged to be a child as described in Neb. Rev. Stat. § 43-247(3) (Reissue 1988).
3. **Child Custody: Modification of Decree: Jurisdiction: States.** Under Neb. Rev. Stat. § 43-1203(1)(c) (Reissue 1988), a Nebraska court can exercise jurisdiction to modify an existing out-of-state custody decree if the child is physically present in Nebraska and it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse.
4. **Child Custody: Jurisdiction: States.** When the welfare of a child present in Nebraska is threatened by a grave emergency, a Nebraska court may enter orders for the protection of the child even if the orders contravene those of another state that still retains custodial jurisdiction of the child.
5. **Child Custody: Jurisdiction.** The child's physical presence in Nebraska is alone sufficient to confer jurisdiction on a Nebraska court to make a child custody determination under Neb. Rev. Stat. § 43-1203(1)(c) (Reissue 1988).
6. **Child Custody: Modification of Decree: Jurisdiction: States.** Under Neb. Rev. Stat. § 43-1214(1) (Reissue 1988), if a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.
7. _____: _____: _____: _____. When another state has entered a child custody decree and one of the parents remains a resident of that state, generally the courts of this state are without jurisdiction to make a permanent change of custody unless the first state affirmatively declines jurisdiction or fails to take appropriate action.
8. **Trial: Witnesses.** In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of witnesses and the weight to be given their testimony.
9. **Trial: Expert Witnesses.** The opinion of an expert witness is not binding on the trier of fact.
10. **Trial: Witnesses.** It is within the discretion of the trial court to permit subsequent

examination of a witness after direct and cross-examination.

11. **Trial: Evidence: Appeal and Error.** A prerequisite to an appeal based upon erroneous admission of evidence is a timely objection stating the specific grounds for the objection unless the grounds are apparent from the context of the record.
12. **Expert Witnesses: Juries.** It is not for an expert to suggest to a jury how a witness' testimony shall be weighed or evaluated.
13. **Trial: Expert Witnesses: Minors.** An expert witness may not give testimony which directly or indirectly expresses an opinion that a child is believable, that the child is credible, or that the witness' account has been validated.
14. **Trial: Evidence: Appeal and Error.** Impermissible evidence, that is, evidence properly objected to at trial but erroneously admitted, is not considered by an appellate court.
15. **Trial: Witnesses: Minors.** It is permissible for a trial court to allow another person to sit or stand in close proximity to a child witness testifying live in court.

Appeal from the District Court for Greeley County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Greeley County, KEITH J. KOVANDA, Judge. Judgment of District Court affirmed.

Charles R. Maser for appellant.

Wesley D. Nespor, Greeley County Attorney, for appellee State.

Brad Roth for appellee C.H.

Michael J. Shaughnessy, guardian ad litem.

CONNOLLY, HANNON, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

This appeal arises from an order of adjudication on a petition filed by the State of Nebraska in the county court for Greeley County, Nebraska, sitting as a juvenile court, asking the court to exercise emergency custodial jurisdiction over the children of the appellant, J.H., and his former wife, C.H. When the petition was filed, J.H., a resident of Missouri, had legal and physical custody of the children and the Missouri court that had dissolved the marriage of J.H. and C.H. had custodial jurisdiction of the children. The children had been transported to Nebraska by the mother in violation of an existing Missouri custody decree because, according to the mother, the children had to be rescued from the alleged physical

and sexual abuse visited upon them by the father.

The State of Nebraska petitioned the Greeley County Court to adjudicate the children pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). The juvenile court made an initial finding that there was probable cause that the children faced an emergency situation as defined in § 43-247(3)(a). The juvenile court exercised emergency custodial jurisdiction of the children and placed them in the temporary custody of the Nebraska Department of Social Services (DSS) pending further adjudication. After a subsequent hearing on the State's petition, the juvenile court found that the children were juveniles in a situation injurious to their health or morals pursuant to § 43-247(3)(a). The juvenile court continued to exercise custodial jurisdiction of the children, leaving them in the legal custody of DSS, with physical custody in the mother, pending a dispositional hearing.

The father appeals, assigning several errors in the proceedings and arguing that the juvenile court failed to comply with the Nebraska Child Custody Jurisdiction Act in its exercise of custodial jurisdiction of the children. We affirm.

I. FACTS

The marriage of C.H. and J.H. was dissolved February 15, 1989, in the circuit court of Buchanan County, Missouri. The mother was awarded primary physical custody of the parties' three children: J.L.H., a daughter born December 28, 1982; J.L.H., a son born July 11, 1984; and R.H., a son born October 7, 1987.

In August 1990, the mother moved herself and the three children into the home of her boyfriend, who lived in Osborn, Missouri. The boyfriend was married at the time. His divorce decree did not become final until August 23, 1991.

Approximately 3 months after the move to Osborn, the mother and the children moved to Maysville, Missouri, with the boyfriend joining them later on a part-time basis. On November 17, while the boyfriend's wife was in the hospital recovering from an attempted suicide, the boyfriend, the mother, and the three children moved to Nebraska. The boyfriend took with him the two children of his marriage.

In January 1991, the circuit court of Buchanan County, Missouri, issued a modification of the decree of dissolution of the marriage of C.H. and J.H. The mother was found in contempt of court for having willfully violated the court's order concerning the father's visitation rights by moving the children to Nebraska and establishing their residence some 300 miles from the father's place of residence in Missouri. Citing the mother's repeated uprooting of the children and several periods during which the children were subjected to living arrangements that included the mother's live-in male companions, the court transferred custody of the children to the father. The mother was granted visitation rights.

In March 1991, the mother contacted the Division of Family Services in Missouri to report that the father was abusing the children. A child protective services worker investigated the allegations. The investigation yielded no evidence of abuse, and the report was coded "unsubstantiated."

In June 1991, the mother traveled to Missouri to exercise her visitation rights. On Friday, June 7, she picked up the children for a weekend visit. On the evening of Sunday, June 9, instead of returning the children to the father, the mother took the children with her back to Nebraska. The mother contacted DSS on the morning of June 11 and reported that the children had been abused by the father.

The record reflects that the daughter was examined on June 17 by a Dr. Martin, who found no signs of sexual assault or abuse.

Officer John Frederick of the Nebraska State Patrol interviewed the mother, the daughter, and the older son on June 21. In his report, Frederick stated that the mother told him that back in Missouri, the children's physician, Dr. Betsy McClure, had said that she suspected that the children were being physically and sexually abused. The mother testified that Dr. McClure had told her this in the fall of 1990. The record contains a letter from Dr. McClure dated June 25, 1991, in which the doctor declared that she did not recall ever making such a statement, that she had no written record of any such statement, and that in treating the children she had never found any evidence of such abuse.

The daughter was examined on June 25 by Dr. Susan Greenwald. Dr. Greenwald found an abnormal thickness at the 9- or 10-o'clock position of the daughter's hymen and a prominence of blood vessels, which prominence Dr. Greenwald said was caused by an injury sometime in the past that had since healed. Because the hymen was not torn, Dr. Greenwald did not believe there had been vaginal penetration. In her medical report, Dr. Greenwald wrote: "Exam is consistent with patient history of molestation although vaginal penetration is doubtful." The history of molestation referred to by Dr. Greenwald had been provided by the mother.

On June 21, the State filed a petition in Greeley County Court pursuant to § 43-247(3)(a) alleging that the children were minors "in a situation that is dangerous to the life or limb of such juveniles or injurious to [their] health or morals." The State petitioned the juvenile court to adjudicate the matter pursuant to its authority under § 43-247(3)(a). In conjunction with the § 43-247 petition, the State filed a motion for emergency detention of the children. The State moved the court to place the children in the temporary custody of DSS pending a hearing to determine whether there was probable cause to continue to exercise jurisdiction over the children. Claiming to act under Neb. Rev. Stat. § 43-255 (Reissue 1988), the court detained the children and placed them in the temporary custody of DSS. A probable cause hearing was scheduled for June 26.

The probable cause hearing was held. In his opening statement, the father moved the court to dismiss the petition on grounds that the Greeley County Court lacked jurisdiction. The motion to dismiss was taken under advisement, and a hearing on the merits ensued. On July 17, the court filed an order finding that there was probable cause to retain jurisdiction over the children pending further proceedings. The court stated that it "acknowledges the existence of a Circuit Court Order of Custody in the State of Missouri but retains jurisdiction over the juveniles notwithstanding that order." The children were placed in the temporary custody of DSS pending adjudication.

On August 9, the father filed an application for review of the temporary placement of the children. DSS had placed the children in the home of the mother and her boyfriend. The

father moved the court to place the children in a foster home in Missouri at his expense. The court found that the father had "not presented evidence sufficient to warrant a change of the status quo." The children remained in the legal custody of DSS, with physical custody in the mother.

In a filing dated October 4, the court ruled on several matters. The State had filed a notice of intent to offer into evidence hearsay statements of the daughter and the older son. The statements were contained in reports prepared by DSS and the Nebraska State Patrol. The State had also filed a motion in limine seeking clarification of the extent to which the court would permit the State's expert witnesses to testify on matters such as the abilities of the children to distinguish fact from fiction and common reasons for delays in reporting abuse. Since the children would be available to testify, the court found that the State could use the hearsay statements only as corroborative evidence. If the children were not able to testify at trial, the State would be allowed to renew its motion to use the hearsay statements as direct evidence. The court found that the expert witnesses could testify to the extent outlined in the State's motion in limine, but that they would not be allowed to offer opinions as to the veracity of the children. The court's order also included the following entry:

> The Court . . . has contacted Judge Jackson of the Circuit Court in Missouri pursuant to the [Uniform Child Custody Jurisdiction Act] to discuss which Court is the appropriate forum. The Court advises the parties that Judge Jackson is not insisting that jurisdiction be transferred to Missouri. Based upon the Court's review of the applicable law andthe [sic] fact that this is a Juvenile Court proceedingand [sic] not a custody proceeding per se . . . this Court has jurisdiction to proceed.

The adjudication hearing was held October 4 and 5. The father again challenged the exercise of jurisdiction by the Greeley County Court. A hearing on the merits ensued. In addition to social worker Kaye Mindt Long's live expert testimony, the State submitted expert deposition testimony from Dr. Patricia Sullivan, a pediatric psychologist, and from Dr. Greenwald, the physician who had examined the daughter

on June 25, to corroborate the testimony by the daughter that she had been abused by the father. Dr. Sullivan testified that she believed that the older son, too, had been sexually molested by the father. The father introduced expert deposition testimony from Dr. John Reilly, a specialist in obstetrics and gynecology, who testified that the thickness in part of the daughter's hymen and the prominence of blood vessels could have resulted from several causes other than touching by an adult. Dr. Reilly's testimony was based on his analysis of the report prepared by Dr. Greenwald after she had examined the daughter on June 25. Dr. Reilly never examined the daughter.

The father moved the court to dismiss the petition after the State had rested and again moved for dismissal after putting on his own evidence. The court denied both motions. The matter was taken under advisement.

While the matter was pending, the court issued an order that included the following entry:

> The Court then addresses the issue of the telephonic request by Judge Jackson to have the juveniles available to testify in Missouri on the contempt hearing currently pending. . . . The Court . . . finds that it is not in the [children's] best interest to be sent to Missouri while the Greeley County Case is still under advisement. Therefore, this Court respectfully declines the request of the Missouri Court pending the decision on the adjudication of [the case in Greeley County Court].

In the order of adjudication, issued November 20, the court made the following findings:

> [B]oth [the daughter and the older son] were telling the truth, sans maternal influence . . . and their veracity is amply borne out by the collective corroboration of the various social, psychological and medical experts who interviewed and examined them . . . .
>
> The allegations . . . have been proved by the State with a preponderance of the evidence [;] the molestation of these two minor children by the father in Missouri constitutes a "situation that is dangerous to the life or limb of such juveniles or injurious to the health or morals of such juveniles" within the purview and meaning of

> [§ 43-247(3)(a)] and they are herewith adjudicated accordingly including [the younger son], albeit there is no evidence of his being molested; however, he otherwise would be exposed to the same dangerous situation . . . .

Temporary custody of the children in DSS was continued pending the scheduling of a dispositional hearing.

There is no mention in the order of adjudication of the issue of jurisdiction, nor is there any discussion about the availability of the children as witnesses in the contempt proceeding in the circuit court in Missouri. The record does not indicate whether the children were ever made available to testify in Missouri.

On appellate review, the Greeley County District Court affirmed the judgment of the county court.

II. ASSIGNMENTS OF ERROR

The father assigns 11 errors, which we consolidate and consider in the analysis below.

III. STANDARD OF REVIEW

[1] On appeal of any final order of a juvenile court, an appellate court tries factual questions de novo on the record and is required to reach a conclusion independent of the findings of the trial court, but, when the evidence is in conflict, the 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 L. W.*, 241 Neb. 84, 486 N.W.2d 486 (1992).

An abuse of discretion occurs when a trial court's reasonings or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993).

IV. ANALYSIS

1. JURISDICTION

Assignment of error: The district court erred in affirming the judgment of the juvenile court on the issue of jurisdiction because the juvenile court failed to comply with the Nebraska Child Custody Jurisdiction Act in exercising jurisdiction over the children.

One of the main objectives of the Uniform Child Custody

Jurisdiction Act (UCCJA), adopted by the Nebraska Legislature as the Nebraska Child Custody Jurisdiction Act (NCCJA) at Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1988), is to prevent the jurisdictional confusion that can arise when a parent unilaterally removes a child from the state of a court that has rendered a decree concerning custody of the child. See Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Fam. L.Q. 203 (1981). See, also, § 43-1201(1)(a). In such cases, "the continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the [custody] decree. They must respect and defer to the prior state's continuing jurisdiction." Bodenheimer, *supra* at 214. This principle is incorporated into the NCCJA at §§ 43-1213 and 43-1214. Thus, it is beyond dispute that the circuit court of Buchanan County, Missouri, had jurisdiction of the children, and any issues involving their custody, when the State of Nebraska filed its initial petition in these proceedings in Greeley County Court on June 21, 1991.

[2] The juvenile court apparently did not believe it was confronted with a custody proceeding. The juvenile court was mistaken. Under § 43-1202(3) of the NCCJA, "[c]ustody proceeding shall mean . . . (b) [p]roceedings in a juvenile court in which a person under the age of eighteen years is alleged to be a child as described in subdivision (3) of section 43-247." The State's initial petition moved the court to adjudicate the children under § 43-247(3)(a). Every decision rendered by the juvenile court in the course of these proceedings affected the legal and physical custody of the children. At every step of these proceedings, from the initial filing on June 21 to the order of adjudication issued on November 20, the juvenile court was involved in a custody proceeding.

[3-5] Although as a general rule the juvenile court was bound by the NCCJA to defer to the custodial jurisdiction of the Missouri court, the juvenile court's exercise of custodial jurisdiction over the children on June 21 was justified under the emergency exception in the NCCJA. Under § 43-1203(1)(c), a Nebraska court can exercise jurisdiction to modify an existing out-of-state custody decree if the child is physically present in

Nebraska and it is necessary in an emergency to protect the child because he or she has been subjected to or threatened with mistreatment or abuse. In its discussion in *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992), of emergency custodial jurisdiction under § 43-1203(1)(c), the Nebraska Supreme Court stated two propositions of law that bear directly on the case before us. The court declared that when the welfare of a child present in Nebraska is threatened by a grave emergency, a Nebraska court may enter orders for the protection of the child even if the orders contravene those of another state that still retains custodial jurisdiction of the child. The court also ruled that the child's physical presence in Nebraska is alone sufficient to confer jurisdiction on a Nebraska court to make a child custody determination under § 43-1203(1)(c). In the instant case, the juvenile court claimed to have placed the children in the temporary custody of DSS pursuant to its authority under § 43-255, but that statute refers to juveniles taken into temporary custody by a peace officer. We find that the juvenile court was authorized under § 43-1203(1)(c) to place the children in the temporary custody of DSS on June 21, pending a probable cause hearing on the State's § 43-247 petition on June 26.

The juvenile court found that there was probable cause to believe that the emergency conditions alleged in the State's petition existed. Consequently, the court directed that temporary custody of the children should remain with DSS. This the court was authorized to do. However, once the emergency proceedings were concluded with the court order of July 17, any further adjudication of the custody of the children by the juvenile court was unauthorized unless justified by some other exception.

[6] Under § 43-1214(1) of the NCCJA,

> [i]f a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction . . . or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

The Greeley County Court had properly exercised emergency

jurisdiction over the children, but emergency jurisdiction alone was not a sufficient basis for the Greeley County Court to continue to adjudicate the custody of the children. The Missouri court still had custodial jurisdiction of the children. The Greeley County Court was authorized to make further determinations regarding the custody of the children only if the Missouri court relinquished custodial jurisdiction for that purpose.

Unfortunately, the record does not contain a definitive statement one way or the other on the question of whether the Missouri court declined custodial jurisdiction of the children. Thus, we review excerpts from the record that we believe shed light on this question.

The following is an excerpt from a journal entry in the circuit court of Buchanan County, Missouri, dated July 10, 1991:

> The Court hears additional evidence and argument concerning [the mother's] motion [for continuance] and finds that the motion must be sustained in view of the unanswered jurisdictional questions [raised by the action in Greeley County] and the necessity of [the mother's] having an attorney'[s] representation in view of [the father's] requested relief of incarceration. The hearing on [the father's] motion for contempt is set for September 5, 1991, at 9:30 a.m.

The Greeley County Court filed its order finding probable cause to exercise emergency jurisdiction on July 17. The following is an excerpt from another journal entry in Buchanan County Circuit Court, this one dated September 5, 1991:

> [The mother] orally moves this Court to reconsider her motion for continuance of this contempt hearing until after the juvenile court hearing in Greeley County, Nebraska, set for October 4 and 5, 1991 . . . . This Court finds that the juvenile court of Greeley County, Nebraska, has lawfully exercised jurisdiction over the minor children which are the subject of this proceeding and that this Court should continue the contempt hearing until after the Nebraska hearings of October 4 and 5, 1991. In the meantime, this Court should communicate with the judge of the Juvenile Court of Greeley County, Nebraska, and

> exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring jurisdiction will be exercised by the more appropriate court pursuant to the [UCCJA].

Later in the same day, the Missouri circuit court made the following entry:

> This Court exchanges information in the above-captioned case with Keith J. Kovanda, Judge of the Juvenile Court of Greeley County, Nebraska, by telephone with a view to assuring that jurisdiction over the minor children will be exercised by the more appropriate and convenient court in the best interest of the minor children. Judge Kovanda advises this Court that he will again discuss the matter of jurisdiction in a subsequent call.

The following is an excerpt from a journal entry filed in Greeley County Court on October 4: "[T]he Court advises the parties it has contacted Judge Jackson of the Circuit Court in Missouri pursuant to the UCCJA to discuss which Court is the appropriate forum. The Court advises the parties that Judge Jackson *is not insisting that jurisdiction be transferred to Missouri*." (Emphasis supplied.)

Apparently, there was another conversation between Judges Jackson and Kovanda that preceded the following excerpt from Judge Kovanda's journal entry in Greeley County Court filed November 8:

> The Court then addresses the issue of the telephonic request by Judge Jackson to have the juveniles available to testify in Missouri on the contempt hearing currently pending. . . . The Court . . . finds that it is not in the [children's] best interest to be sent to Missouri while the Greeley County Case is still under advisement. Therefore, this Court respectfully declines the request of the Missouri Court pending the decision on the adjudication of [the case in Greeley County Court].

In terms of preservation of the record for appellate review, the jurisdictional negotiations between the Nebraska and Missouri courts were handled in a haphazard manner that unnecessarily complicates our review of the issue of

jurisdiction. We do not find in the record an unequivocal statement by the Missouri court in which that court declines custodial jurisdiction of the children. Under § 43-1207(9), "Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court." We recommend that a communication in which the court of another state declines jurisdiction should also be filed in the appropriate court. Furthermore, we recommend that the Nebraska court instruct the out-of-state court that in its statement declining jurisdiction, the out-of-state court should clarify the extent to which it is surrendering jurisdiction.

It appears that the main concern of the Buchanan County Circuit Court was to get the children back in Missouri after the Greeley County Court was finished with them so that the children could testify in the contempt proceeding in Missouri against the mother. There is no definitive statement from the Missouri court in which it formally declines to assume its prior custodial jurisdiction over the children, but the court did acknowledge as lawful the Nebraska court's exercise of emergency jurisdiction and did not insist that the case be transferred back to Missouri prior to the Greeley County Court's adjudication of the § 43-247 petition in October. We conclude from the record that the Buchanan County Circuit Court relinquished custodial jurisdiction of the children to the extent necessary to allow the Greeley County Court to adjudicate the § 43-247 petition and that the Missouri court reserved its right to exercise jurisdiction over the children for any proceedings subsequent to that adjudication, such as the contempt action against the mother or a dispositional hearing to modify the original custody decree. For purposes of this appeal, we find that the Greeley County Court complied in substance, if not in form, with the NCCJA in exercising jurisdiction over the children. Therefore, we affirm the judgment of the district court affirming the county court's exercise of jurisdiction to adjudicate the § 43-247 petition.

2. ADJUDICATION UNDER § 43-247

Assignment of error: The district court erred in affirming the juvenile court's order adjudicating the children under § 43-247(3)(a).

Section 43-247 states that "[t]he juvenile court shall have *exclusive original jurisdiction* as to any juvenile defined in subdivision . . . (3) of this section." (Emphasis supplied.) For reasons discussed above, the Greeley County Court could not have had exclusive original jurisdiction of the children. Thus, it would appear that the State's initial petition was flawed and that the juvenile court was mistaken in adjudicating the children pursuant to § 43-247(3)(a).

In *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992), the Supreme Court found that the Legislature had incorporated § 43-247(3) into the NCCJA by referring to that statute in the definition of "custody proceeding" set out in § 43-1202(3)(b). The court also seems to have recognized a degree of interchangeability between § 43-247(3) and § 43-1203(1)(c), the emergency custodial jurisdiction provision in NCCJA. In *In re Interest of L.W.*, the juvenile court in Nebraska, unaware of an existing divorce decree in Iowa that included a determination of the custody of L.W., had assumed original custodial jurisdiction of L.W. under § 43-247(3). Later in the proceedings, the Nebraska court was informed of the prior custody determination in Iowa. The Supreme Court stated that "[s]ince the child was assaulted in Custer County, [Nebraska,] the juvenile court had temporary emergency jurisdiction under § 43-1203(1)(c) which would include a temporary custody placement of the child." *In re Interest of L.W.*, 241 Neb. at 103, 486 N.W.2d at 499. The reference to Custer County as the situs of the action giving rise to the emergency appears to be unnecessary for purposes of emergency jurisdiction because § 43-1203(1)(c) does not specify that the threatening person or situation must be in Nebraska. Only the child must be physically present in Nebraska. Thus, *In re Interest of L.W.* seems to stand for the proposition that § 43-1203(1)(c) can automatically be substituted for § 43-247(3) as a basis for custodial jurisdiction when it becomes apparent that exclusive original jurisdiction already exists in an

out-of-state court.

[7] This approach conforms to the dictates of common sense. The Greeley County Court drew upon language from § 43-247(3)(a) to justify its exercise of jurisdiction over the children, claiming that they were in "a 'situation that is dangerous to the life or limb of such juveniles or injurious to the health or morals of such juveniles' within the purview and meaning of [§ 43-247(3)(a)]." That is another way of saying that it is necessary because of emergency circumstances to exercise jurisdiction and protect the children, which is the test for exercise of emergency custodial jurisdiction under § 43-1203(1)(c). Clearly, the statutes of Nebraska are designed to allow a court to exercise emergency custodial jurisdiction to safeguard children regardless of whether the jurisdiction arises originally in Nebraska or is usurped from another state for emergency purposes. However, the Supreme Court emphasized in *In re Interest of L.W.* the limited scope of a court's jurisdiction in cases where exercise of emergency jurisdiction by a Nebraska court encroaches on the jurisdiction of a court in another state. After finding that the juvenile court in Nebraska had temporary emergency jurisdiction over L.W., the court went on to state that

> the Iowa court retains continuing jurisdiction to render a final custody determination. We therefore order the juvenile court to refrain from modifying the Iowa divorce decree and to communicate with the Iowa court to determine the appropriate forum for this case. The Nebraska juvenile court will have permanent jurisdiction over the case if the State of Iowa declines jurisdiction or fails to take appropriate action. When another state has entered a child custody decree and one of the parents remains a resident of that state, generally the courts of this state are without jurisdiction to make a permanent change of custody unless the first state affirmatively declines jurisdiction or fails to take appropriate action.

Id. at 103, 486 N.W.2d 499. The circuit court of Buchanan County, Missouri, has entered a child custody decree, and the father presumably still lives in Missouri. Therefore, the Buchanan County Circuit Court retains continuing jurisdiction

to make any permanent changes in custody. The Greeley County Court cannot make any further determinations concerning the custody of the children without first communicating with the Missouri court. The Greeley County Court cannot order a permanent change of custody unless the Missouri court affirmatively declines jurisdiction.

3. Dr. Reilly

Assignment of error: The district court erred in affirming the juvenile court's failure to consider the testimony of Dr. Reilly.

[8,9] The record does not support the father's contention that the juvenile court refused to consider Dr. Reilly's testimony. The comment of the trial judge on Dr. Reilly, which the father quoted in his brief, was that "[t]he deposition of Dr. Reilly and his opinion [on whether the daughter had been abused are] of little probative value, absent his actually examining the child." The trial judge did consider Dr. Reilly's testimony. He found it of little probative value. In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of witnesses and the weight to be given their testimony. See *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991). The opinion of an expert witness is not binding on the trier of fact. *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990). This assignment of error is without merit.

4. Recall of the Daughter

Assignment of error: The district court erred in affirming the action of the juvenile court permitting the State to recall the daughter to the witness stand over the objection of the father.

The daughter appeared to become upset during the father's very brief recross-examination and was unable to respond to questioning. Counsel for the parties had no further questions, so the daughter was excused, and the State was granted a few minutes' recess before calling its next witness. During the recess it was discovered that the daughter had become confused during recross-examination; this had upset her so much that she could not respond to further questioning. When the hearing resumed, the court allowed the State to recall the daughter and conduct further redirect examination.

[10] "It is within the discretion of the trial court to permit subsequent examination of a witness after direct and cross-examination." *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 51, 497 N.W.2d 657, 669 (1993). Thus, we will not disturb the ruling of the juvenile court unless it was clearly untenable and unfairly deprived the father of his substantial right to a fair trial.

To support his argument that the recall of the daughter constituted prejudicial error, the father quotes in his brief the following language found in *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946):

> A party's evidence should be discredited as a matter of law and disregarded only where, without reasonable explanation, he testifies to facts materially different concerning a vital issue than had been previously testified to by him under oath in another action, and the change was clearly made to meet the exigencies of the pending action.

(Syllabus of the court.) The most obvious distinguishing feature of *Faulhaber* is that it dealt with a situation in which a witness testified in two different legal proceedings. In the case at bar, the daughter's testimony on recall was further redirect examination in the same proceeding. *Faulhaber* offers nothing of use for our analysis of this assignment of error.

No other witnesses interrupted the testimony of the daughter. The father was able to conduct further recross-examination after the State finished with the daughter on recall, which provided him the opportunity to ferret out any inconsistencies he perceived between the daughter's previous testimony and her testimony on recall. We find nothing prejudicial to the father in this sequence of events. Therefore, we find no abuse of discretion and no error in the decision to allow the recall of the daughter.

5. Admission of Dr. Sullivan's Deposition

Assignment of error: The district court erred in affirming the juvenile court's admission of the deposition testimony of Dr. Sullivan.

[11] During the taking of Dr. Sullivan's deposition, the father

raised the following objection after the State had expressed its intention to use the deposition at trial: "Excuse me, I'm going to interpose an objection here while we're on it, to we [sic] object to the use of this deposition at trial. We are not stipulating to that." While he obviously made an objection, the father did not state the grounds for the objection. A prerequisite to an appeal based upon erroneous admission of evidence is a timely objection stating the specific grounds for the objection unless the grounds are apparent from the context of the record. *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992); *Bailey v. Farmers Union Co-op Ins. Co.*, 1 Neb. App. 408, 498 N.W.2d 591 (1992).

The father argues on appeal that the deposition was inadmissible because he thought it would be used only for discovery purposes and because the State had failed to show that Dr. Sullivan was unavailable to testify at trial pursuant to Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 1989).

Even if we give the father the benefit of the doubt and read into his objection an argument based on discovery versus use for trial, he still would not prevail on this issue in light of the following comment by the Supreme Court in *Maresh v. State*, 241 Neb. 496, 508, 489 N.W.2d 298, 308 (1992): "[W]e need not address the State's other contention that the deposition was inadmissible because it was taken for discovery only, except to note that the federal courts . . . have universally rejected a 'discovery-use' dichotomy as a criterion for the admissibility of a deposition."

There is on the face of the objection no hint of the father's argument on appeal based on rule 804, nor does the context of the record suggest a rule 804 argument. Therefore, we do not consider it.

For these reasons, we find no error in the admission of Dr. Sullivan's deposition testimony.

6. Expert Testimony by Long and Dr. Sullivan

Assignment of error: The district court erred in affirming the juvenile court's reliance on the testing and evaluation procedures administered by Long and Dr. Sullivan.

[12,13] The father cites a number of instances in the record

where he objected on foundation to the test results and evaluations discussed by Long and Dr. Sullivan and to the expert opinions based on those tests and evaluations. We believe there is merit in the father's arguments, particularly regarding instances in the record where the expert witnesses arguably validated the testimony of the children. See *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988) (it is not for an expert to suggest to a jury how a witness' testimony shall be weighed or evaluated). See, also, *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993) (an expert witness may not give testimony which directly or indirectly expresses an opinion that a child is believable, that the child is credible, or that the witness' account has been validated). However, we do not engage in a detailed analysis of the merits of this assignment of error because it will not affect the disposition of the case.

[14] We note in summary fashion that much of the data and portions of the opinions offered by Long and Dr. Sullivan were erroneously admitted into evidence without proper foundation. Impermissible evidence, that is, evidence properly objected to at trial but erroneously admitted, is not considered by an appellate court. See *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992). Thus, in reaching our decision, we have not considered evidence properly objected to by the father but erroneously admitted by the juvenile court. However, significant portions of the experts' testimony were not objected to or, particularly in the case of Dr. Sullivan, were supported by sufficient foundation and were properly admitted. We do not review each of the father's contentions because even if we strip away all of the impermissible portions of the testimony of Long and Dr. Sullivan, the remnants of their testimony plus the deposition and physical examination report of Dr. Greenwald plus the testimony of the daughter and the older son all add up to a sum of evidence sufficient to satisfy the burden of proof in this case, which is proof by a preponderance of the evidence.

7. Long Seated Next to the Daughter

Assignment of error: The district court erred in affirming the juvenile court's decision to let Long sit next to the daughter while the daughter testified.

[15] In *Evers v. State*, 84 Neb. 708, 121 N.W. 1005 (1909), the Supreme Court held that because there was nothing in the record to indicate that the maneuver had prejudiced the defendant, the trial court had not erred in permitting an adult friend of the witness, an 8-year-old girl, to sit next to the girl on the witness stand while the girl testified before the jury. That holding is still good law, and many other jurisdictions also have held that it is permissible for a trial court to allow another person to sit or stand in close proximity to a child witness testifying live in court. See, 81 Am. Jur. 2d *Witnesses* § 723 (1992); Annot., 82 A.L.R.4th 1038 (1990). The record in the case at bar does not show that Long said or did anything prejudicial or disruptive during the daughter's testimony. We find no error in the juvenile court's decision to permit Long to sit next to the daughter while the daughter testified.

8. Credibility of the Mother

Assignment of error: The district court erred in affirming the juvenile court's decision to reserve judgment on the issue of the credibility of the mother until the dispositional phase of the proceedings.

We acknowledge that we are puzzled by the statement in the juvenile court's order of adjudication that the credibility of the mother was a consideration "more germane to disposition than adjudication." There is evidence in the record of previous occasions on which the mother lied in court in Missouri. The mother initiated an investigation in Nebraska of alleged abuse by the father 3 months after she had initiated a similar investigation of the father in Missouri. The children were in the mother's physical custody throughout the course of these proceedings. All of these factors related to the mother's credibility could have undermined the allegations against the father.

We find no prejudicial error here because we believe the credibility of the mother faded in importance as the proceedings progressed. On de novo review, we are concerned with whether the children were telling the truth, regardless of who or what initially prompted them to speak out. Even if we were to determine from the record that the mother was a

chronic liar, her lack of veracity did not produce the abnormal thickness and prominence of blood vessels in the daughter's hymen. The mother did not conduct the various psychological tests taken by the children and did not evaluate the results.

The juvenile court did not decide that the allegations were true because the mother said so. The court believed the allegations because the children had testified to them in court and because "their veracity [was] amply borne out by the collective corroboration of the various social, psychological and medical experts who interviewed and examined them." This court, too, finds that there was properly admitted expert testimony corroborating the testimony of the children. The issue of the mother's credibility was rendered virtually irrelevant by the testimony of the children and the experts. Therefore, the failure of the trial judge to rule on the mother's credibility did not constitute reversible error.

9. Sufficiency of the Evidence

Assignment of error: The district court erred in affirming the factual findings of the juvenile court because those findings were against the weight of the evidence.

We are disturbed by the suspicious circumstances out of which this case developed. It smacks of forum shopping. In a vexing and unintended way, the decisions of the trial and appellate courts of Nebraska in this case have rewarded the mother for snatching the children from Missouri and then initiating in Nebraska a campaign against the father that she had been unable to sustain in Missouri. For this reason, once the initial emergency adjudication was completed in July 1991, we believe the Nebraska and Missouri courts should have arranged to have any further adjudication transferred back to the court of original and continuing jurisdiction in Missouri. However, the record indicates that the Missouri court acceded to the Nebraska court's desire to further adjudicate the case, so this appeal, and the factual findings of the juvenile court, are properly before us.

When the evidence is in conflict, the 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 L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). Of crucial importance to us is the fact that the trial judge observed the witnesses in person, which, in this type of proceeding, is of immeasurable value in determining which witnesses to believe. On paper, the testimony of the children is credible. Obviously, while observing the children in his courtroom, the trial judge found their testimony not just credible, but compelling. Though certainly not overwhelming in volume or probativeness, there is unchallenged or properly admitted expert testimony in the record that corroborates the testimony of the children. Therefore, we reject the father's argument that the factual findings of the juvenile court are not supported by the greater weight of the evidence.

V. CONCLUSION

We affirm the judgment of the district court affirming the judgment of the juvenile court, but we reiterate the jurisdictional limitation on the juvenile court that we set out earlier in this opinion. The circuit court of Buchanan County, Missouri, retains continuing custodial jurisdiction of the children. The Greeley County Court must communicate with the Missouri court and reach a mutual determination on the more appropriate forum for the case before further adjudicating the custody of the children. Finally, the Greeley County Court is without jurisdiction to render a permanent custody order concerning the children unless the Missouri court affirmatively declines jurisdiction or fails to take appropriate action.

AFFIRMED.

BARBRA SHKOLNICK, APPELLANT, V. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, APPELLEE.

506 N.W.2d 356

Filed September 21, 1993. No. A-92-036.

1. **Insurance: Motor Vehicles: Liability.** Neb. Rev. Stat. § 60-578 (Reissue 1988) allowed an insured's own carrier to reduce its underinsured motorist liability to the insured by the amount of benefits paid to the insured by any person or

organization legally liable to the insured for bodily injury; for purposes of determining the amount of the reduction of the underinsured motorist liability of the insured's own carrier, a payment of underinsured motorist benefits to the insured by the insurer of the vehicle in which the insured was riding is no different from a payment of benefits to the insured by the insurer of the tort-feasor.

2. _____: _____: _____. Pursuant to Neb. Rev. Stat. § 60-578 (Cum. Supp. 1992), an insured's own carrier must compensate the insured to the limit of the carrier's underinsured motorist coverage if, after payments by any other legally liable person or organization pursuant to Neb. Rev. Stat. § 60-580 (Reissue 1988), the insured still has not been fully compensated for his or her injuries.
3. **Insurance: Contracts: Motor Vehicles: Liability: Damages.** Pursuant to Neb. Rev. Stat. § 60-578 (Cum. Supp. 1992), the amount for which an insured's own carrier can be liable for underinsured motorist coverage is the difference between the damages sustained by the insured and the amounts already paid to the insured by any legally liable person or organization, with the condition that the maximum liability of the insured's own carrier cannot exceed the liability limit for underinsured motorist coverage set out in the insured's policy.
4. **Statutes: Legislature: Intent.** A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
5. **Statutes: Time.** Statutes covering substantive matters in effect at the time of a transaction govern, not later enacted statutes.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellant.

Eugene L. Hillman, of McCormack, Cooney, Mooney, Hillman & Elder, for appellee.

CONNOLLY, HANNON, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

This appeal arises from the summary judgment of the trial court in favor of the appellee, American Family Mutual Insurance Company (American Family). The appellant, Barbra Shkolnick, was injured in an automobile accident and claimed benefits pursuant to her parents' underinsured motorist (UIM) coverage with American Family. American Family denied her claim on grounds that its UIM liability had been extinguished because Shkolnick had received benefits from other sources in an amount that exceeded the limit of American Family's UIM

coverage. The trial court found as a matter of law that Shkolnick had no claim against American Family. We affirm.

I. FACTS

1. Multiple Recoveries on Injury Claim

On December 23, 1989, Shkolnick was riding as a passenger in an automobile driven by Catherine Dunn when an automobile driven by Kelly Armstrong crossed the centerline of the road and crashed head-on into the Dunn vehicle. The parties stipulated that Armstrong was at fault. Shkolnick stated in her petition that on impact she was propelled through a backseat window of the Dunn vehicle, causing her to suffer a host of severe and permanent injuries.

The occupants of the Dunn and Armstrong vehicles made multiple claims against Armstrong's insurer, Leader National Insurance Company (Leader). Leader's liability limit was $50,000 for the entire accident, with a $25,000 limit for injury to any one person. Pursuant to an agreement by all interested parties, Shkolnick received $18,500 of the total benefits paid out by Leader.

The Dunn vehicle was insured by St. Paul Fire and Marine Insurance Company (St. Paul). The Dunns' policy with St. Paul provided single-limit UIM coverage of $300,000. Pursuant to an agreement by all interested parties, Shkolnick received $127,000 of the total benefits paid out by St. Paul.

2. Dispute with American Family on UIM Coverage

Shkolnick also was covered by her parents' automobile insurance policy with American Family. The Shkolnicks' policy with American Family provided UIM coverage of up to $300,000 per accident, with a $100,000 limit per person. Neb. Rev. Stat. § 60-580 (Reissue 1988) states:

> (1) In the event an insured is entitled to underinsured motorist coverage under more than one policy of motor vehicle liability insurance, the maximum amount an insured may recover shall not exceed the highest limit of any one such policy.
>
> (2) When multiple policies apply, payment shall be made in the following order of priority, subject to the limit

of liability for each applicable policy:

(a) A policy covering a motor vehicle occupied by the injured person at the time of the accident;

(b) A policy covering a motor vehicle which came into contact with the insured while a pedestrian; and

(c) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured.

Thus, in Shkolnick's case, payment for UIM coverage had to be sought first from St. Paul, then from American Family.

Neb. Rev. Stat. § 60-578 (Reissue 1988), which was in force at the time Shkolnick was injured, stated:

(1) The maximum liability of the insurer under the underinsured motorist coverage shall be the lesser of:

(a) The difference between the limit of underinsured motorist coverage and the amount paid to the insured by or for any person or organization which may be held legally liable for the bodily injury [of the insured]; or

(b) The amount of damages sustained but not recovered.

(2) In no event shall the liability of the insurer under such coverage be more than the limits of the underinsured motorist coverage provided.

The parties agreed that American Family's $100,000 UIM limit for Shkolnick's injuries should be reduced by $18,500, the amount Shkolnick had recovered from Leader, the insurer of the tort-feasor. A dispute arose over American Family's insistence that the $127,000 Shkolnick received from St. Paul also should be credited toward American Family's UIM liability. Obviously, such a credit would wipe out the $81,500 remainder of American Family's UIM coverage for Shkolnick and completely discharge American Family from UIM liability.

3. Action and Judgment

Shkolnick sued American Family for $81,500, the difference between the limit of the UIM coverage ($100,000) and the amount paid to Shkolnick by Leader ($18,500). Shkolnick acknowledged that the benefits paid by Leader, the insurer of the tort-feasor, could be applied to reduce American Family's

UIM coverage pursuant to § 60-578, but she argued that benefits paid by St. Paul could not be used to reduce American Family's UIM coverage because St. Paul did not insure the tort-feasor. St. Paul insured the Dunn vehicle in which Shkolnick had been riding, but the driver of the Dunn vehicle was not the tort-feasor. Shkolnick asserted that the term "legally liable" in § 60-578 refers only to a person or organization that pays on behalf of the tort-feasor. Thus, according to Shkolnick, the UIM benefits paid by St. Paul could not be used to reduce American Family's UIM coverage because the driver of the Dunn vehicle was not legally liable in tort for Shkolnick's injuries.

American Family answered that Shkolnick was not entitled to any recovery because its $100,000 UIM limit had been extinguished by payments Shkolnick had received from Leader ($18,500) and St. Paul ($127,000). American Family moved for summary judgment. Shkolnick responded with a motion for partial summary judgment in her favor. After a hearing on the motions, the trial court found that the payment Shkolnick had received from St. Paul constituted an amount paid by an organization legally liable for Shkolnick's injuries as described in § 60-578, which meant that Shkolnick had received benefits from organizations legally liable for her injuries in the amount of $145,500, an amount in excess of American Family's $100,000 liability limit for UIM coverage. Thus, the difference between American Family's limit and the amount recovered by Shkolnick from legally liable parties was not $81,500, but, instead, a negative $45,500. Therefore, the trial court reasoned, Shkolnick was entitled to nothing from American Family. The trial court sustained American Family's motion for summary judgment, overruled Shkolnick's motion for partial summary judgment, and dismissed Shkolnick's petition.

II. ASSIGNMENT OF ERROR

Shkolnick argues that the trial court erred in finding that American Family's UIM liability was reduced by the amount paid by St. Paul as well as by the amount paid by Leader.

III. STANDARD OF REVIEW

On appellate review of a summary judgment, the evidence is

viewed in a light most favorable to the party against whom the judgment was granted and such party is given the benefit of all reasonable inferences deducible from the evidence. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992).

On a matter of law, an appellate court must reach a conclusion independent from that of the trial court. *Nebraska Builders Prod. Co. v. Industrial Erectors*, 239 Neb. 744, 478 N.W.2d 257 (1992).

IV. ANALYSIS

A summary judgment is to be granted only when the record discloses that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See *Murphy v. Spelts-Schultz Lumber Co., supra*. There is in the instant case no dispute over the facts. The only dispute is over the legal question of whether the $127,000 paid to Shkolnick by St. Paul should have been applied to reduce American Family's UIM liability to Shkolnick.

1. St. Paul is Legally Liable

Shkolnick argues that the $127,000 in UIM benefits that she received from St. Paul should not be credited toward American Family's UIM coverage because St. Paul was not an organization "legally liable" to her as that term is used in § 60-578. Shkolnick contends that in § 60-578, "legally liable" means liable in tort. If that is the case, then the only legally liable organization in this case is Leader, the insurer of the tort-feasor. Consequently, Shkolnick argues that only the $18,500 recovered from Leader should be credited toward American Family's UIM coverage.

Shkolnick insists that the reference to legal liability in § 60-578 refers only to tort liability and not to contractual liability, but she offers no germane authority to support this proposition, nor do we find any. The relevant entries in Black's Law Dictionary include the following excerpts from case law in various jurisdictions:

> **Legal liability**. A liability which courts recognize and enforce as between parties litigant. . . .
>
> . . . .

> **Legally liable**. Liable under law as interpreted by courts. . . . Liability imposed by law or liability which law fixes by contract. . . .
>
> . . . .
>
> **Liability**. . . . [A]n obligation one is bound in law or justice to perform . . . ; condition of being actually or potentially subject to an obligation; condition of being responsible for a possible or actual loss . . . ; condition which creates a duty to perform an act immediately or in the future . . . ; duty to pay money or perform some other service . . . ; every kind of legal obligation, responsibility, or duty . . . ; responsibility for torts . . . ; the state of being bound or obliged in law or justice to do, pay, or make good something; the state of one who is bound in law and justice to do something which may be enforced by action . . . .
>
> . . . .
>
> **Liability insurance**. Contract by which one party promises on consideration to compensate or reimburse other if he shall suffer loss from specified cause . . . .
>
> **Liable**. Bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution. . . .
>
> Exposed or subject to a given contingency, risk, or casualty, which is more or less probable. . . . Exposed, as to damage, penalty, expense, burden, or anything unpleasant or dangerous. . . .

Black's Law Dictionary 805-06, 823-24 (5th ed. 1979). We find nothing in the case law cited by the parties, nothing in the record, and nothing in the generally accepted meaning of legally liable as reflected in the case law cited in Black's Law Dictionary to support the distinction between tort and contractual liability that Shkolnick urges us to accept.

Shkolnick argues that the enactment of § 60-580 indicates that the Nebraska Legislature intended to treat providers of UIM coverage as a class separate from insurers of tort-feasors. We reach a different conclusion, particularly when we read § 60-580 in conjunction with § 60-578. We find that the Legislature enacted § 60-580 to clarify the order in which payments will be made when more than one person or

organization is legally liable to pay UIM benefits to the injured party. Under § 60-580(2)(a), St. Paul was legally liable to appropriately compensate Shkolnick for her bodily injuries because it insured the vehicle in which Shkolnick was riding when she was injured by an underinsured motorist. We fail to see how St. Paul was any less legally liable to Shkolnick for her bodily injuries than Leader was.

[1] Section 60-578 allowed an insured's own carrier to reduce its UIM liability to the insured by the amount of benefits paid to the insured by any person or organization legally liable to the insured for bodily injury; for purposes of determining the amount of the reduction of the UIM liability of the insured's own carrier, a payment of UIM benefits to the insured by the insurer of the vehicle in which the insured was riding is no different from a payment of benefits to the insured by the insurer of the tort-feasor.

2. Unconditional Discharge of UIM Liability

Shkolnick correctly points out that under § 60-580, an insured entitled to UIM coverage under more than one policy may recover a maximum amount up to "the highest limit of any one such policy," which in this case would be the $300,000 available under the St. Paul policy. Shkolnick apparently argues that until she has received the maximum amount of benefits available under § 60-580, American Family is liable to her for its policy limit of $100,000, less any payments made to Shkolnick by the insurer of the tort-feasor. That position is rendered untenable by our ruling that St. Paul was a legally liable organization under § 60-578 whose UIM benefits were properly credited toward American Family's UIM liability. Regardless of how much of the $300,000 limit Shkolnick had recovered, American Family was discharged from UIM liability when the total amount of benefits Shkolnick had received from Leader ($18,500) and St. Paul ($127,000) exceeded $100,000.

3. Amendment of § 60-578

[2,3] Shkolnick acknowledges the need to prevent a double recovery by an insured, but she nonetheless argues that the setoff provision of § 60-578 should not be construed in such a way that it prevents an injured party from recovering full and

fair compensation. Shkolnick asserts that "if preventi[on] of a double recovery is the goal, that goal can more fairly be achieved by allowing a set-off for non-liability benefits received against the damages awarded rather than against the UIM limits of liability." Brief for appellant at 17. The Legislature amended § 60-578 in 1990 to operate in essentially the manner outlined by Shkolnick in her brief. Under the revised version of § 60-578, an insured's own carrier must compensate the insured to the limit of the carrier's UIM coverage if, after payments by any other legally liable person or organization pursuant to § 60-580, the insured still has not been fully compensated for his or her injuries. The amount for which the insured's own carrier can be liable for UIM coverage is no longer the difference between the limit of the carrier's coverage and amounts already paid to the insured by legally liable persons or organizations; instead, it is the difference between the damages sustained by the insured and the amounts already paid to the insured by any legally liable person or organization, with the condition that the maximum liability of the insured's own carrier cannot exceed the liability limit for UIM coverage set out in the insured's policy. See § 60-578 (Cum. Supp. 1992).

[4,5] If her cause of action had accrued after enactment of the revised version of § 60-578, or if the Legislature had included in the amended statute language stating that it should be applied retroactively, then Shkolnick would be entitled to recover up to $100,000 from American Family, assuming that there were still damages in that amount not yet compensated. However, the revised version of § 60-578 is not applicable to Skholnick's case. A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992). Statutes covering substantive matters in effect at the time of a transaction govern, not later enacted statutes. *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992).

4. Credit for UIM Payments from Other Sources

Finally, Shkolnick argues that American Family's own policy provision regarding reduction of its UIM liability prevents

American Family from reducing its UIM exposure by crediting toward its UIM liability any UIM benefits paid by other insurers. The provision states that American Family's UIM coverage will be reduced by "[a] payment made or amount payable by or on behalf of any person or organization which may be legally liable, or under any collectible auto liability insurance, for loss caused by an accident with an underinsured motor vehicle." (Emphasis omitted.) Shkolnick claims that the reference to "any collectible auto liability insurance" indicates that reductions to American Family's UIM coverage are permitted only for payments by or for a tort-feasor based on direct tort liability. Shkolnick maintains that American Family chose to assert less than its full rights under § 60-578 (Reissue 1988) by precluding itself from using UIM payments by other insurers to reduce its own UIM liability. We disagree. Such an interpretation of the provision on UIM reductions would require us to ignore the clause in the provision that tracks the language of § 60-578. By declaring that its UIM liability will be reduced by payments "by or on behalf of any person or organization which may be legally liable," American Family has asserted the full measure of its rights under § 60-578, including the right to reduce its UIM exposure by the amount of UIM benefits Shkolnick has recovered from other legally liable sources.

V. CONCLUSION

By virtue of its UIM coverage on the Dunn vehicle, St. Paul was an organization legally liable to Shkolnick for her injuries. The UIM payment made by St. Paul pursuant to that legal liability was properly applied by the trial court to reduce and, in this case, extinguish American Family's UIM liability. Therefore, we affirm the judgment of the trial court sustaining American Family's motion for summary judgment.

AFFIRMED.

KATHLEEN J. ZOET, APPELLEE, V. DEAN J. ZOET, APPELLANT.

507 N.W.2d 42

Filed September 28, 1993. No. A-92-221.

1. **Motions for New Trial: Time.** Neb. Rev. Stat. § 25-1143 (Reissue 1989) requires a motion for new trial to be filed within 10 days after the judgment, decree, or order complained of is entered, except where unavoidably prevented.
2. _____: _____. A motion for new trial that is not filed within the time restraints required and not unavoidably prevented is a nullity and of no force or effect.
3. **Motions for New Trial: Time: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992) requires a notice of appeal to be filed within 30 days of a ruling on a motion for new trial, or an appellate court has no jurisdiction.
4. **Motions for New Trial: Time: Appeal and Error.** When timely filed, a motion for new trial extends the time in which a notice of appeal must be filed to a period of 30 days following a ruling on that motion.
5. _____: _____: _____. A motion for new trial that is not filed within the time restraints of Neb. Rev. Stat. § 25-1143 (Reissue 1989) will not extend the time within which a notice of appeal must be filed.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Appeal dismissed.

Clarence E. Mock, of Johnson and Mock, for appellant.

William C. Stanek, of Stanek & Smith, for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

Dean J. Zoet appeals from an order of the district court for Burt County which modified the decree dissolving the marriage of appellant and appellee, Kathleen J. Zoet. For the reasons set forth below, we dismiss this appeal.

The district court for Burt County entered a divorce decree in this case on April 23, 1991. On April 24, appellant filed a motion for new trial on the issue of alimony, which the district court sustained. After the new trial on the issue of alimony, the district court entered an order on October 25, awarding appellee alimony of $400 per month for 246 months. Appellee then filed a motion for new trial on November 7, alleging that alimony should commence on the date of the final hearing on this matter, or February 5, rather than on November 1, as provided for in the October 25 order. The district court granted

the motion, and the court entered an order in the second new trial on March 11, 1992. The March 11 order provided that alimony due from appellant was to begin on February 5, 1991. Dean Zoet appealed the March 11, 1992, order by filing a notice of appeal on March 23.

ASSIGNMENT OF ERROR

Appellant alleges that the district court abused its discretion in setting the amount of alimony due from appellant to appellee at $400 per month for 246 months. Because we have determined that this court is without jurisdiction in this case, we do not address appellant's assigned error.

DISCUSSION

[1,2] Neb. Rev. Stat. § 25-1143 (Reissue 1989) requires a motion for new trial to be filed within 10 days after the judgment, decree, or order complained of is entered, except where unavoidably prevented. See, *Williams v. Gering Pub. Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990); *Smith v. Smith*, 225 Neb. 93, 402 N.W.2d 688 (1987). A motion for new trial that is not filed within the time restraints required and not unavoidably prevented is a nullity and of no force or effect. See, *Williams, supra*; *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977).

In this case, appellee's motion for new trial, dated November 7, 1991, was not filed within 10 days of the October 25 order, as required by § 25-1143. There is also nothing in the record indicating that appellee was unavoidably prevented from timely filing her motion for new trial. In fact, this issue was not addressed by the district court or by the parties to this appeal. When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992); *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). Appellee's untimely filing of the second motion for new trial is plainly evident from the record. Because appellee's motion for new trial, filed on November 7, was not within the time requirements of § 25-1143, it was a nullity and of no effect.

In reviewing the record, we are aware that a trial court has the inherent power to grant a new trial on its own motion during the same term of court, whether or not a motion for new trial is filed. See, *Quinlan v. City of Omaha*, 203 Neb. 814, 280 N.W.2d 652 (1979); *Harman v. Swanson*, 169 Neb. 452, 100 N.W.2d 33 (1959). However, in this case the trial court's order of March 11, 1992, states: "*Petitioner's* motion for new trial should be and hereby is sustained." (Emphasis supplied.) Thus, it is evident that the trial court did not order a new trial on its own motion.

[3] Because the motion for new trial filed by appellee was a nullity, it logically follows that any ruling on such motion must also be a nullity. That leaves the decree entered on October 25, 1991, as the final decree in this case. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992) requires a notice of appeal to be filed within 30 days of a ruling on a motion for new trial, or an appellate court has no jurisdiction. *Williams, supra*. See *Smith, supra*.

[4,5] When timely filed, a motion for new trial extends the time in which a notice of appeal must be filed to a period of 30 days following a ruling on that motion. *Williams, supra*; *In re Interest of C.M.H. and M.S.H.*, 227 Neb. 446, 418 N.W.2d 226 (1988). See *Smith, supra*. However, a motion for new trial that is not filed within the time restraints of § 25-1143 will not extend the time within which a notice of appeal must be filed. *Williams, supra*.

Because this appeal was filed more than 4 months after the final decree was entered, this court has no jurisdiction, and this appeal must be dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DONALD L. NOLL, APPELLANT.

507 N.W.2d 44

Filed September 28, 1993. No. A-92-1105.

1. **Criminal Law: Child Support: Intent.** Neb. Rev. Stat. § 28-706(1) (Reissue 1989) provides that any person who intentionally fails, refuses, or neglects to

provide proper support which he or she knows or reasonably should know he or she is legally obligated to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport.

2. **Criminal Law: Child Support.** Pursuant to Neb. Rev. Stat. § 28-706(7) (Reissue 1989), criminal nonsupport is a Class IV felony if it is in violation of any order of any court.
3. **Criminal Law: Due Process: Proof.** Due process in a criminal case requires that the prosecution prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged against a defendant.
4. **Criminal Law: Intent.** Intent in criminal conduct involves the existence of a mental process or other state of mind of an accused, and such elements are issues of fact.
5. **Criminal Law: Child Support: Intent.** Under Neb. Rev. Stat. § 28-706(1) (Reissue 1989), intent is one of the essential elements of the crime of criminal nonsupport.
6. **Trial: Jury Instructions.** It is the duty of the trial court to instruct the jury on the law of the case, whether requested to do so or not.
7. **Trial: Jury Instructions: Appeal and Error.** An instruction which, by the omission of certain elements, has the effect of withholding from the jury an essential issue or element in the case is prejudicially erroneous.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded for a new trial.

Louie M. Ligouri for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal arises from the appellant's conviction and sentence of 5 years' probation for criminal nonsupport under Neb. Rev. Stat. § 28-706 (Reissue 1989). The appellant, Donald L. Noll, argues, inter alia, that he was prejudiced at trial by an improper jury instruction. We agree. We reverse, and remand for a new trial.

FACTS

The appellant and his ex-wife were divorced on January 16, 1976, in Brown County, Kansas. There were three children born of the marriage. The Brown County District Court dissolved the parties' marriage and ordered the appellant to pay child support in the amount of $150 per month. In a very brief jury

trial, the ex-wife testified that from the date the decree was entered through August 1, 1991, she had received no child support payments from the appellant. The appellant did not testify. The appellant was convicted of criminal nonsupport and sentenced to 5 years' probation.

ASSIGNMENT OF ERROR

We reach only one of the appellant's assignments of error, as it is dispositive of the appeal. The appellant argues that the trial court erred in giving instruction No. 6 to the jury because the instruction failed to inform the jury of all of the essential elements of the offense of criminal nonsupport.

STANDARD OF REVIEW

Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

ANALYSIS

[1,2] Section 28-706(1) provides that any person who *intentionally fails, refuses, or neglects* to provide proper support which he or she knows or reasonably should know he or she is legally obligated to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport. Criminal nonsupport is a Class IV felony if it is in violation of any order of any court. § 28-706(7).

We now set out the pertinent part of instruction No. 6:

> Regarding criminal non-support, the elements of the State's case are:
>
> (1) The alleged crime occurred on or about August 1, 1991.
>
> (2) The alleged crime occurred in Richardson County, Nebraska.

> (3) The defendant then and there being [sic] failed to provide proper support for his minor children when he knew or reasonably should have known he was legally obligated to provide support pursuant to the Order of the District Court of Brown County, Kansas.

The words "intentionally fails, refuses, or neglects" were not included in instruction No. 6.

[3,4] The appellant asserts that because the trial court did not include in instruction No. 6 the words "intentionally fails, refuses, or neglects," the instruction failed to inform the jury of all of the essential elements of criminal nonsupport and, thus, allowed a finding of guilt without a guarantee that the State had proved beyond a reasonable doubt all of the essential elements of the crime. We agree. "Due process in a criminal case requires that the prosecution prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged against a defendant." *State v. Harney*, 237 Neb. 512, 514, 466 N.W.2d 540, 543 (1991). Intent in criminal conduct involves the existence of a mental process or other state of mind of an accused, and such elements are issues of fact. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). The Nebraska Supreme Court has defined "intentionally" to mean "willfully or purposely, and not accidentally or involuntarily." *State v. Williams*, 243 Neb. 959, 966, 503 N.W.2d 561, 566 (1993).

[5] We hold that under § 28-706(1), intent is one of the essential elements of the crime of criminal nonsupport. Consequently, we find that the element of intent was erroneously omitted from the language in instruction No. 6 setting out the elements of criminal nonsupport.

[6,7] The State argues that the appellant did not properly object to instruction No. 6. The appellant's counsel objected to instruction No. 6 in the following manner: "[T]he defendant does object concerning the elements." Although the objection could have been more specific, it was sufficient to inform the court of the claimed defect. In any event, it is the duty of the trial court to instruct the jury on the law of the case, whether requested to do so or not. *State v. Gorman*, 232 Neb. 738, 441 N.W.2d 896 (1989). An instruction which, by the omission of certain elements, has the effect of withholding from the jury an

essential issue or element in the case is prejudicially erroneous. *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

CONCLUSION

Intent is an essential element of the crime of criminal nonsupport. In the case at bar, the court did not instruct the jury on all of the essential elements of the crime charged. An instruction omitting an essential element is prejudicially erroneous. Therefore, we vacate the appellant's sentence, reverse his conviction, and remand the cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. DANIEL McGINNIS, APPELLANT.

507 N.W.2d 46

Filed September 28, 1993. No. A-93-032.

1. **Courts: Jurisdiction.** Adoption of a rule of another jurisdiction ordinarily requires that great weight be given to the construction of the rule at the time of its enactment by the courts of the jurisdiction from which it was taken unless such construction is violative of some established state policy.
2. **Sentences: Restitution.** Assertion that a district court violated the statutory requirements for imposing a restitution sentence may properly be brought in a motion to reduce sentence.
3. **Appeal and Error.** An appellate court will not consider errors that are assigned but not discussed.
4. **Restitution: Damages: Presentence Reports.** While a victim may testify as to what his damages are, a victim's unsworn, uncorroborated statements and a handwritten note in the presentence report that is neither signed nor dated provide an insufficient basis for a restitution order.
5. **Appeal and Error.** Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Sentences.** In imposing sentence, a court should state with care the precise terms of the sentence which is imposed.
7. **Criminal Law: Sentences: Restitution.** The certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1992).

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Sentence vacated, and cause remanded with directions.

Michael L. Getty for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

On March 23, 1992, appellant, Daniel McGinnis, was involved in an altercation with the victim, Jeff A. Switzer, at the Lariat Club in Fremont, Nebraska. Appellant struck Switzer twice with a pool cue, causing Switzer to sustain head injuries that required stitches. Appellant was charged with and pled guilty to second degree assault pursuant to Neb. Rev. Stat. § 28-309 (Reissue 1989) in the district court for Dodge County. On October 13, the district court sentenced appellant to a term of probation, including 4 months in the Dodge County jail as a condition of that probation, and ordered appellant to pay the victim restitution in the amount of $3,743.55 "plus any additional medical expenses."

On December 7, 1992, appellant filed a motion to reduce his sentence, claiming that the amount of restitution ordered did not reflect actual damages sustained by the victim. The district court denied appellant's motion without a hearing, and appellant has timely filed this appeal. For the reasons set forth below, we vacate the district court's sentence of restitution on appellant's motion for reduction and remand the cause with directions for a new sentencing hearing.

ASSIGNMENTS OF ERROR

Appellant alleges that the district court erred in (1) not making the presentence report part of the record and (2) not holding a hearing or requiring documentation of the victim's alleged lost wages for purposes of restitution.

STANDARD OF REVIEW

Whether a sentence is to be reduced under the provisions of Neb. Rev. Stat. § 29-2308.01 (Reissue 1989) is within the

discretion of the sentencing court, and its ruling with regard thereto will not be disturbed absent an abuse of discretion. *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989). An appellate court will not consider errors assigned but not discussed. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

DISCUSSION

Procedural Issues.

Before addressing the merits of appellant's claim, we first consider whether any procedural bar exists to preclude his appeal of the district court's denial of his motion to reduce sentence. The State alleges that appellant cannot raise the alleged violations of sentencing rules via a motion to reduce his sentence, but must raise these errors via a direct appeal. Hence, the State alleges, without citing authority, that appellant's allegations regarding restitution are not properly before this court.

[1] This court has been unable to find any authority in this jurisdiction for the State's argument. The legislative history of § 29-2308.01 reveals that this section was patterned after Fed. R. Crim. P. 35, as that rule existed in 1986. "[A]doption of a rule of another jurisdiction ordinarily requires that great weight be given to the construction of the rule at the time of its enactment by the courts of the jurisdiction from which it was taken unless such construction is violative of some established state policy." *Haarhues v. Gordon*, 180 Neb. 189, 193, 141 N.W.2d 856, 860 (1966). See *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985); *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984). We therefore look to judicial construction of rule 35 for guidance in making our decision.

[2] A review of federal decisions reveals that a defendant may raise an alleged sentencing rule violation by a motion to reduce his sentence pursuant to rule 35 as that rule existed when the Nebraska Legislature adopted § 29-2308.01. See, e.g., *U.S. v. Sarduy*, 838 F.2d 157 (6th Cir. 1988) (holding that a defendant may raise an alleged sentencing rule violation either on direct

appeal or by a motion to reduce sentence); *U.S. v. Katzin*, 824 F.2d 234 (3d Cir. 1987) (holding that a federal district court has jurisdiction under rule 35 to reduce sentence that was imposed in violation of sentencing rules); *United States v. Rosenbarger*, 536 F.2d 715 (6th Cir. 1976), *cert. denied* 431 U.S. 765, 97 S. Ct. 2920, 53 L. Ed. 2d 1060 (1977) (holding that if a defect in sentence appears from the record, an appellate court may resolve the issue on direct appeal or by a rule 35 motion); *Popeko v. United States*, 513 F.2d 771 (5th Cir. 1975), *reh'g denied* 515 F.2d 1183, *cert. denied* 423 U.S. 917, 96 S. Ct. 225, 46 L. Ed. 2d 146 (holding that a defendant may raise an alleged illegal sentence on direct appeal or via motion to reduce sentence); *United States v. Littlefield*, 543 F. Supp. 420 (N.D. Fla. 1982) (holding that a trial court's alleged reliance on incorrect information in sentencing may be a ground for sentence reduction); *United States v. DeMier*, 520 F. Supp. 1160 (W.D. Mo. 1981), *aff'd* 671 F.2d 1200 (8th Cir. 1982) (holding that a trial court's reliance on incomplete or inaccurate information at the time of sentencing may properly be considered in a motion to reduce sentence).

Appellant alleges that the district court violated Neb. Rev. Stat. §§ 29-2280 and 29-2281 (Cum. Supp. 1992) with regard to appellant's restitution sentence. Section 29-2280 requires the sentencing court to include documentation of a victim's actual damages in a presentence report in cases where the court orders a defendant to make restitution to a victim. Section 29-2281 prescribes procedural rules for a sentencing court to follow in determining the amount of restitution to be made by a defendant. As noted above, judicial interpretation of the federal counterpart to Nebraska's statute regarding motions to reduce sentence reveals that a defendant may assert alleged sentencing rule violations on a motion to reduce sentence. Likewise, we find that appellant's assertion that the district court in this case violated the statutory requirements for imposing a restitution sentence may properly be asserted on a motion to reduce sentence. We find that the district court's denial of appellant's motion to reduce sentence is appealable to this court.

[3] We now turn to the substantive elements of this appeal.

Appellant alleges in his first assigned error that the district court erred in not making the presentence report a part of the record. Appellant failed to discuss this assignment of error in his brief. An appellate court will not consider errors that are assigned but not discussed. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

Evidence Supporting Restitution Order.

Appellant also alleges that the district court erred in ordering restitution without requiring a hearing or documentation of the victim's injuries or losses. Section 29-2280 provides that a sentencing court may order a defendant to make restitution for a victim's actual injury or loss sustained as a direct result of the offense for which the defendant has been convicted. Section 29-2281 provides that "[t]he amount of restitution shall be based on actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record."

In *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990), the Nebraska Supreme Court considered the above statutes in a case where the sole basis for the trial court's damages determination was the presentence report prepared by the probation officer. The probation officer was not present at the sentencing hearing, and there was no testimony regarding the victims' damages. The court in *Yost* stated, "[W]e have serious concerns whether, without an evidentiary hearing, the bare statements contained in the PSR are sufficiently reliable to meet § 29-2281 . . . ." 235 Neb. at 329, 455 N.W.2d at 164.

[4] In *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991), the Nebraska Supreme Court again dealt with these restitution statutes. At McLain's sentencing hearing, the victim, without being sworn, told the court he had suffered losses of $9,759.20 due to medical expenses and lost wages. The victim explained that his lost earnings amounted to $2,880. He arrived at this figure by multiplying the period he missed work by his claimed hourly wage. The presentence report contained a handwritten note explaining his calculations. The victim also related in an

unsworn victim impact statement that he had no insurance to cover these losses. On appeal, McLain argued that the documentation regarding lost wages was insufficient. The Supreme Court vacated the restitution order and remanded the cause for a new hearing. The court held that while a victim may *testify* as to what his damages are, a victim's *unsworn*, uncorroborated statements and a handwritten note in the presentence report that is neither signed nor dated provide an insufficient basis for a restitution order.

In the case before us today, no evidentiary hearing was held regarding the victim's actual injury or loss. The only evidence regarding the victim's amount of loss or injury was the victim's statements in the presentence report, and the sentencing court ordered appellant to pay the exact amount claimed by the victim in that report.

In light of *Yost* and *McLain*, this court finds that the victim's unsworn and uncorroborated statements in the presentence report are insufficient documentation of the claimed losses, and such statements fall short of the requirements of § 29-2281, that a victim's actual damages be supported by evidence in the record. The district court thus abused its discretion in ordering appellant to make restitution under these circumstances.

Certainty of Sentence.

[5] Another reason, based upon plain error noted by the court, causes us to conclude that a new sentencing hearing must be held:

> "Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. . . ."

Design Data Corp. v. Maryland Cas. Co., 243 Neb. 945, 958, 503 N.W.2d 552, 561 (1993). See *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990).

We determine that the trial court committed plain error regarding the portion of the probation order that required

appellant to pay "Restitution: **$3,743.55 plus any additional medical expenses submitted by Dr. Johnson**."

[6] In Nebraska, and many other jurisdictions, the rule of law exists that in imposing a sentence, the sentencing court should state with care the precise terms of the sentence to be imposed. *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988).

Most recently, in the case of *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992), the Supreme Court commented that "in imposing sentence, the court should state with care the precise terms of the sentence which is imposed. . . . This same rule applies to the terms of probation imposed upon a defendant." *Id.* at 1005, 480 N.W.2d at 176.

[7] It is important to iterate at this juncture that restitution ordered by a court pursuant to § 29-2280 is a criminal penalty imposed as punishment for a crime and is part of the criminal sentence imposed by the sentencing court. *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987). Consequently, the certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to § 29-2280.

Nebraska case law has dealt with the issue of precision in sentencing language. *State v. Jurgens*, 187 Neb. 557, 560, 192 N.W.2d 741, 743 (1971), *questioned on other grounds, State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989), states that "[j]udges in imposing sentences should use precise language." See, *State v. Laden*, 42 N.J. Super. 540, 127 A.2d 404 (1956); *Simunov v. United States*, 162 F.2d 314 (6th Cir. 1947)).

State v. Mees, 272 N.W.2d 61, 66 (N.D. 1978), uses similar language even more on target with the facts of the case at bar: "We recognize and accept the legal concept that a sentence must be certain, definite, and not be dependent upon an uncertain contingency or condition." In *People v. Durk*, 215 Ill. App. 3d 186, 574 N.E.2d 891 (1991), the Illinois Appellate Court stated that a sentencing order should be so sufficiently precise and certain as to not require further action by the court or a ministerial officer to ascertain its meaning.

CONCLUSION

The amount of restitution ordered in this case, $3,743.55 plus any additional medical expenses, is not precise, certain, or definite in disclosing to appellant exactly what restitution is required of him. The amount of restitution hinges on the possible receipt of more medical expenses which are not known at the time of sentencing. Appellant is not informed as to what the final amount might be, whom the bills will be received from, and what procedures the bills will be for. The restitution order in this case is vacated with respect to the payment of Switzer's lost wages and medical expenses, and the cause is remanded for a new sentencing hearing on Switzer's loss of income and medical expenses.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

RHODEN AUTO CENTER, INC., AN IOWA CORPORATION, APPELLANT, V. JOHN OAKLEY AND SIXTH STREET MOTORS, ALSO KNOWN AS 6TH STREET MOTORS, APPELLEES.

507 N.W.2d 51

Filed October 5, 1993. No. A-92-239.

1. **Default Judgments: Appeal and Error.** An order vacating a default judgment is an appealable one.
2. **Appeal and Error.** An earlier decision of an appellate court controls later appeals of the same case on the actual points determined in the first appeal.
3. **Default Judgments.** Neb. Rev. Stat. § 25-2720 (Reissue 1989) must be followed to set aside a default judgment in a county court.
4. **Courts: Jurisdiction.** It is inconceivable that the district court and the county court could have jurisdiction of the same matter at the same time.
5. **Default Judgments: Notice: Time: Waiver.** When a default judgment is set aside, a plaintiff may waive both the notice of the trial and the timeliness of the trial that are otherwise required under Neb. Rev. Stat. § 25-2720 (Reissue 1989).
6. **Appeal and Error.** An appellate court reserves the right to correct plain error.

Appeal from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, on appeal thereto from the County Court for Douglas County, SAMUEL V. COOPER, Judge. Judgment of District Court affirmed as modified.

Victor J. Lich, Jr., and Jerry P. Herold, of Lich, Herold & Mackiewicz, for appellant.

Fred J. Ferraro, of Trustin, Schweer & Ferraro, for appellee Oakley.

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

HANNON, Judge.

On May 2, 1989, the plaintiff, Rhoden Auto Center, Inc., obtained a judgment by default against John Oakley and Sixth Street Motors. This case involves the effort of Oakley to set aside the judgment against himself, not the judgment against Sixth Street Motors. Sixth Street Motors is not a party to the proceeding to set aside the judgment. The facts of the case are not material, but we must set forth the procedural history to deal with the issues concerning the setting aside of default judgments which this appeal presents.

On May 19, 1989, the county court set the default judgment aside, on the defendant Oakley's ex parte application, with the following trial docket entry: "For good cause shown, default judgment set aside. Leave granted [defendant] to file answer instanter upon payment of [plaintiff's] court costs." On June 1, plaintiff appealed the set aside order to the district court, which affirmed the county court's judgment on August 31. The plaintiff did not appeal this ruling to this court. The mandate from the district court was filed with the county court on September 5.

On September 6, the county court judge made a trial docket note, "On motion of [defendant,] case set for trial on Tuesday, Sept[.] 19, 1989 [at] 2 PM." The defendant served the plaintiff appropriate notice of the trial. The plaintiff then filed a motion to reinstate the default judgment because the defendant had not complied with Neb. Rev. Stat. § 24-537 (Reissue 1985), which is now found at § 25-2720 (Reissue 1989). The motion contained a notice that it would be heard on September 19 at 2 p.m., the time the case was set for trial, and attached was a certificate that the motion was mailed to the opposing counsel on September 14. Although the actual motion was not date-stamped until

September 20, about which the defendant complains, the motion was taken up by the court and the parties on September 19. The date the motion was physically filed is not of consequence in this appeal. The county court's trial docket entry of September 19 states, "Motion of [plaintiff] to reinstate default judgment overruled. [Plaintiff] elects to stand on motion . . . . [Plaintiff's] petition is dismissed."

On October 4, 1989, the plaintiff filed a notice of appeal to the district court from the September 19 order of the county court overruling the plaintiff's motion and dismissing the case. The appeal was heard in the district court on February 27, 1992. The bill of exceptions on this appeal contains only a record of the hearing that was held by the county court on September 19, 1989. The district court journal entry showed: "The ruling by the County Court is hereby affirmed and the case is remanded to the County Court for trial." The plaintiff timely perfected an appeal to this court from this order.

The plaintiff alleges that the district court erred in affirming (1) the county court's order setting aside the plaintiff's default judgment and (2) the county court's order overruling the plaintiff's motion to reinstate its default judgments.

[1,2] We turn to the first assignment of error. An order vacating a default judgment is appealable. *Vacca v. DeJardine*, 213 Neb. 736, 331 N.W.2d 516 (1983). An earlier decision of an appellate court controls later appeals of the same case on the actual points determined in the first appeal. *Security State Bank v. Gugelman*, 230 Neb. 842, 434 N.W.2d 290 (1989). In the first appeal, the district court necessarily considered the validity of the county court's order of May 19, 1989, which set aside the plaintiff's default judgment, and the county court's order was affirmed. This order of the district court was not appealed and became final. Therefore, the validity of the county court's order of May 19 setting aside the default judgment became the law of the case. The plaintiff cannot now be heard to complain to this court that the county court committed error in setting aside the default judgment, which obviously disposes of the first assignment of error.

Turning to the second assignment of error, we find that the plaintiff relies upon § 25-2720, which provides:

> When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions: (1) That he pay the costs awarded against him; (2) that his motion be made within thirty days after such judgment was entered; (3) that he notify in writing the opposite party, or his attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time thereof, if the party reside in the county, and if neither the plaintiff nor his attorney be a resident of the county, by leaving a written notice thereof at the office of the clerk of the court ten days before the trial; *Provided,* that the time of trial shall not be more than forty days after the rendition of the judgment.

The plaintiff also relies upon the following statement in *Royal Trust Co. v. Exchange Bank*, 55 Neb. 663, 668, 76 N.W. 425, 427 (1898):

> "By an examination of this section it will be seen that the order setting aside a judgment can be made only on three conditions. These are, the making of the motion within the time prescribed, the payment of costs, or that judgment therefor be confessed, and that the party seeking to set it aside give written notice of the same, and of the time of trial. These conditions are precedent. . . . The judgment can only be set aside conditionally in the first instance. (Maxwell, Justice Practice 76.) If the judgment is thus conditionally set aside, and the notice is not given nor waived, that fact should be stated on the docket, without hearing any testimony, and the motion overruled. (Swan's Treatise [12th ed.] 104)."

[3] There are other cases which consider similar statutes and different matters under the predecessor of § 25-2720 which establish that § 25-2720 must be followed to set aside a default judgment in a county court. See, *Anderson Mktg. Associates v. Roberts*, 215 Neb. 670, 340 N.W.2d 384 (1983); *Vacca v. DeJardine*, 213 Neb. 736, 331 N.W.2d 516 (1983); *Credit Bureau v. Hastings, Inc. v. George*, 203 Neb. 338, 278 N.W.2d 608 (1979).

The plaintiff claims that the failure of the defendant to give

at least 5 days' prior notice of a trial to be held within 40 days after the judgment was set aside means that the county court should have granted the plaintiff's motion to reinstate default judgment on September 19. The plaintiff argues from *Royal Trust Co.*'s holding that what we shall call the "5-day notice/40-day trial requirement" is also a condition precedent to the setting aside of the default judgment. Consequently, the plaintiff argues that since the trial was not held within 40 days, the order setting aside the default judgment, which was conditional, became ineffective and the default judgment is necessarily reinstated.

The transcript shows that the judgment was set aside on May 19, 1989. Under the literal language of § 25-2720, the defendant had only until June 23 to send the plaintiff notice that the trial would be held no later than June 28. There was no trial set, and the defendant did not send such a notice. The plaintiff therefore maintains the judgment must be reinstated because the required condition precedents did not occur, that is, the notice and trial did not occur as required by § 25-2720(3).

[4] The plaintiff filed a notice of appeal to the district court on June 1, and the docket fee was paid by at least June 5. An order vacating a default judgment is appealable. *Vacca v. DeJardine, supra*. The filing of a notice of appeal and payment of the docket fee "give the district court jurisdiction of the matter appealed." Neb. Rev. Stat. § 25-2729(2) (Reissue 1989). The Supreme Court has said, "It is not conceivable that both the supreme court and the district court could at the same time have jurisdiction of this cause." *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 735, 226 N.W. 318 (1929). By the same logic, the district court and the county court could not have jurisdiction of this case at the same time. Since the appeal to the district court was timely perfected, it follows that the district court had jurisdiction of this case from June 5 to September 5. Thus, during this time period, the county court was clearly without jurisdiction to enter an order for trial.

[5] In *Royal Trust Co.*, the Supreme Court stated that the notice of setting aside and setting for trial may be waived. We believe that when a default judgment is set aside, a plaintiff may waive both the notice of the trial and the timeliness of the trial

that are otherwise required under § 25-2720. We find that by appealing, the plaintiff waived compliance with the 5-day notice/40-day trial provisions of § 25-2720. To hold otherwise would allow a plaintiff to prevent a defendant from successfully setting aside a default judgment by simply filing an appeal, even if that appeal had no merit. In other words, one party may not prevent the other party from complying with a statute and then complain about the failure to comply.

The plaintiff also maintains that even if the appeal affects the 5-day notice/40-day trial provisions of § 25-2720, that rule still applies, except that the period of time while the jurisdiction of the case is in the district court is not counted. To adopt this rule would create a good possibility that in many cases a defendant could not comply with the rule, because the number of days left in the 40-day period after the return of the case to the county court might be less than is necessary to give the required 5-day notice and may well be less than is necessary for the county court to put the case on its trial docket. We therefore hold that once the plaintiff has waived the 5-day notice/40-day trial provision, the provision is waived and the plaintiff must rely upon other procedures to obtain an expeditious trial if the defendant does not do so. There is, however, one final matter to clarify.

On the second appeal, the district court ordered: "The ruling by the County Court is hereby affirmed and the case is remanded to the County Court for trial." The county court's order which the plaintiff appealed from states: "Motion of [plaintiff] to reinstate default judgment overruled. [Plaintiff] elects to stand on motion . . . . [Plaintiff's] petition is dismissed." Immediately after the judge orally announced his decision overruling the motion, the plaintiff's attorney stated: "All right. May I suggest to the Court that if the Court should go on from there and provide that the plaintiff elects to stand on his — [o]n its motion[.] . . . And declines to present evidence . . . . And plaintiff's petition is dismissed."

[6] Plaintiff chose not to adduce evidence and invited the dismissal. Thus, plaintiff could only succeed in his appeal to the district court, and in turn to this court, if the motion to reinstate the default judgment was erroneously overruled. The district

court said that it was properly overruled, and we agree. Thus, the order of remand was wrong, as the matter was disposed of by the plaintiff's strategic choice of action. In other words, plaintiff bet on the motion to reinstate and the appeal from the overruling of that motion and, therefore, declined to produce evidence. The strategy was flawed, but the plaintiff was not entitled to a remand for trial when its strategy failed. The defendant does not cross-appeal, but we reserve the right to correct plain error. See *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988). The remand was plain error, and the district court's order is modified to simply affirm the order of the county court of September 19.

AFFIRMED AS MODIFIED.

COUNTY OF DOUGLAS, NEBRASKA, AND JOSEPH C. VITEK, DIRECTOR OF THE DOUGLAS COUNTY DEPARTMENT OF CORRECTIONS, APPELLEES, V. JOHNNY E. BURTS, APPELLANT.

507 N.W.2d 310

Filed October 12, 1993. No. A-92-240.

1. **Judgments: Final Orders: Appeal and Error.** A judgment in an error proceeding reversing an inferior tribunal is a final order.
2. **Courts: Jurisdiction.** When a district court remands a case and the lower tribunal acts on that order, the district court's power to modify its order ceases.
3. **Courts: Jurisdiction: Appeal and Error.** As a general proposition, an appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time.
4. **Pleadings: Jurisdiction: Appeal and Error.** A petition in error is a jurisdictional requirement for an appeal by petition in error.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded with directions to dismiss.

Thomas F. Dowd, of Dowd & Dowd, for appellant.

James S. Jansen, Douglas County Attorney, and Michael W. Amdor for appellees.

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

HANNON, Judge.

In a disciplinary proceeding, the Douglas County Department of Corrections suspended Johnny E. Burts, the defendant in error, for 10 days without pay. He appealed to the Douglas County Civil Service Commission, and the commission set aside the suspension. The county appealed to the district court by petition in error. After a hearing, the district court vacated the commission's decision and remanded the case to the commission "for the preparation and execution of factual findings." The commission then prepared a written order containing factual findings and otherwise entered the same order as before. The county then formally notified the district court of the commission's action. The district court again reversed the order of the commission and reinstated the suspension. The defendant in error now appeals to this court. We reverse the judgment and remand the cause with directions for the district court to dismiss for lack of jurisdiction.

FACTS

We are not deciding the case on the issue considered below, but a short summary of evidence adduced at the hearing before the commission will better identify the issue that controls the outcome of this appeal. Burts was a corrections officer with the Douglas County Department of Corrections. His duties included conducting pat-down searches on inmates. Corrections officers are trained to follow department policy and guidelines regarding the extent and method of carrying out these searches, including searches of the crotch and groin areas, to make sure inmates are not concealing weapons or other contraband.

On April 12, 1991, seven inmate trustees who worked in the kitchen were leaving the area and were required to be searched, and Burts searched them by a pat-down search. Witnesses at the proceedings testified that as Burts searched the groin and crotch areas of each inmate, the inmate dropped to his knees, grabbed at his crotch, and then laughed and danced. Later, the inmates alleged that during the search on April 12, Burts struck the

testicles of each inmate, which caused them to drop to their knees in pain. Burts' supervisors conducted an investigation into the matter.

Joseph C. Vitek, one of Burts' senior supervisors, suspended Burts on June 12, 1991. This action was upheld by John M. Taylor II, the personnel director for Douglas County, on June 20. On June 20, Burts appealed the suspension to the commission. At a hearing of the commission held on August 22, conflicting reports and testimony were presented. Vitek testified to the commission that the investigation revealed that Burts conducted the pat-down searches improperly, even if the searches involved merely "horseplay," and that a suspension of Burts for 10 days without pay was warranted. Burts testified and denied searching the inmates improperly. The commission set aside the suspension and ordered that wages be paid for the 10-day period.

On September 5, 1991, the county properly appealed by petition in error to the district court, pursuant to Neb. Rev. Stat. §§ 23-2501 et seq. (Reissue 1991) and 25-1903 (Reissue 1989). On February 11, 1992, the district court entered a memorandum opinion and order. In that order, the court observed that the commission did not make specific findings of fact as requested by the county and as the district judge deemed required by § 23-2511. The court's order then provided: "[T]he decision of the . . . Commission is vacated; and the matter is remanded to the Commission for the preparation and execution of factual findings which form the basis for the Commission's Order of August 22, 1991." By an order dated February 18, 1992, the commission essentially stated that it believed the testimony of Burts and another witness that Burts did not improperly perform the pat-down searches or strike the inmates' testicles, and the commission overturned the decision of the Douglas County Department of Corrections and ordered that the matter be stricken from his record and that Burts be compensated for the 10 days he was not paid.

The county then filed in the district court a document entitled "Notice of Filing Order." The document merely stated that the county had filed a duly authenticated copy of the commission's order of February 18, 1992. On February 25, the

district court held a hearing and entered a written memorandum containing special findings of fact that were contrary to the findings of the commission. The district court found that the decision of the commission was not supported by the evidence and that it was arbitrary, capricious, and unreasonable. The district court reversed the commission's order and reinstated the administrative decision to suspend Burts for 10 days.

DISCUSSION

Burts appeals to this court, alleging in five assignments of error that the district court erred in finding the decision of the commission was not supported by the evidence and in finding the decision of the commission was arbitrary, capricious, and unreasonable. Burts also alleges that the appeal to the district court is frivolous and requests that an allowance of fees for his attorney be allowed in that court. We do not reach the errors assigned by Burts because we find that this appeal must be dismissed for lack of jurisdiction.

We believe this court does not have jurisdiction because the district court did not have jurisdiction when it entered the order appealed. In summary, the commission's order of August 22, 1991, was properly appealed to the district court by petition in error under Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1989 & Cum. Supp. 1992). The district court rendered its decision on that matter on February 11, 1992, when it vacated the commission's order and remanded the matter to the commission. The district court did not purport to reserve jurisdiction in itself. It simply vacated the commission's order and remanded the matter to the commission for further action.

[1] Apparently, the county and the district courts proceeded in this case upon the assumption that the district court acquired jurisdiction at the time of the first appeal and kept jurisdiction until it rendered its order of February 25, 1992. At first blush, this assumption seems particularly tenable because the actions of the commission and the court were taken so quickly. However, this position is not tenable. In the first place, the order of February 11 stated that "the decision of the Douglas County Civil Service Commission is vacated; and the matter is

remanded to the Commission . . . ." Webster's Encyclopedic Unabridged Dictionary of the English Language 1576 (1989) defines "vacate" as "**4.** to render inoperative; deprive of validity; void; annul: *to vacate a legal judgment*." A judgment in an error proceeding reversing an inferior tribunal is a final order. *Tootle, Hosea & Co. v. Jones*, 19 Neb. 588, 27 N.W. 635 (1886). The district court's order was clearly a final order. It was not appealed to this court, and it became final.

[2] More importantly, the district court remanded the case and the commission entered an order in compliance with the order of remand. The Supreme Court determined many years ago that it can modify its decisions within term, the same as any other court, except that once the district court acts upon its mandate, the Supreme Court's power to modify a decision ceases. *Horton v. State*, 63 Neb. 34, 88 N.W. 146 (1901). Likewise, when the district court remands a case, and the lower tribunal acts on that order, the district court's power to modify its order ceases.

[3] Also, both the commission and the district court could not have jurisdiction over the same matter at the same time. The Supreme Court has stated, "It is not conceivable that both the supreme court and the district court could at the same time have jurisdiction of this cause." *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 735, 226 N.W. 318 (1929). We believe this notion is applicable between any tribunal that tries a matter and the court that hears appeals. As a general proposition, an appellate court and the tribunal appealed from do not have jurisdiction over the same case at the same time. We must therefore determine which court had jurisdiction at which time.

The transcript shows that the county filed a petition in error on September 5, 1991, as well as a praecipe for a transcript as required by § 25-1905. Generally, the transcript shows that the county perfected an appeal by petition in error from the order of the commission rendered on August 22, 1991. At that point, the district court had jurisdiction of the matter. As stated above, the district court lost jurisdiction when it vacated the commission's order and remanded the case to the commission on February 11, 1992. The notice of appeal to this court purports to appeal from the district court's decision of

February 25, and since that notice was not filed until March 23, that notice could not have given this court jurisdiction to review the order of February 11.

The commission necessarily had jurisdiction on February 18, 1992, when it entered the order of that date. The transcript shows that no petition in error or praecipe for a transcript of the proceedings was filed, both necessary steps to perfect an appeal to the district court from the commission's order of February 18.

[4] While the question arose in a different manner, the following quote from the recent case of *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 353, 466 N.W.2d 442, 459 (1991), is helpful:

> Abboud's only remedy was to file a petition in error requesting the district court to reverse or modify the decision of the Ralston City Council. This court could then review the district court's determination on appeal. He has failed to file a petition in error, and therefore the district court and this court are without jurisdiction to hear his claim.

In *Abboud*, the Supreme Court went on to list the various reasons why the amended petition was not a petition in error. Abboud at least filed a petition, albeit an inadequate one. The *Abboud* case is the most recent case holding that a petition in error is a jurisdictional requirement for an appeal by petition in error. In this case, the county did not attempt to file a petition in error, a transcript, a praecipe for a transcript, or a praecipe for summons, nor did it otherwise satisfy the requirements of §§ 25-1903 through 25-1905. See, *Brown v. Board of Education*, 231 Neb. 108, 435 N.W.2d 184 (1989); *McDonald v. Rentfrow*, 171 Neb. 479, 106 N.W.2d 682 (1960); *From v. Sutton*, 156 Neb. 411, 56 N.W.2d 441 (1953); *Barney v. Platte Valley Public Power and Irrigation District*, 144 Neb. 230, 13 N.W.2d 120 (1944); *Roberts v. City of Mitchell*, 131 Neb. 672, 269 N.W. 515 (1936). The district court did not acquire jurisdiction from the commission after the case was returned.

CONCLUSION

In making this decision, we do not wish to imply that had the county filed a second petition in error, the district court and

hence this court could review the commission's decision. It may well be that the second appeal would be limited to issues raised after the first decision of the district court. Other procedures followed in this case appear to be novel. There was no properly perfected petition in error proceeding from the commission's February 18 decision in favor of Burts which the commission rendered after the district court's order of February 11 remanding the matter to the commission. Without the perfection of a second petition in error, the district court was without jurisdiction to reverse the commission's order of February 25. Therefore, the decision of the district court of February 25 is reversed, and the cause is remanded to the district court with directions to dismiss for lack of jurisdiction. Thus, the February 18 decision of the commission is reinstated.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. LAVELL DEAN FLYE, APPELLANT.

507 N.W.2d 493

Filed October 12, 1993. No. A-92-808.

1. **Prosecuting Attorneys: Pretrial Procedure: Presumptions.** No presumption of prosecutorial vindictiveness arises where a prosecutor imposes more severe charges on a defendant in a pretrial context responding to the defendant's rejection of a prosecutor's plea offer.
2. **Immunity: Appeal and Error.** A defendant's successful appeal in one case does not render him immune from prosecution for an unrelated offense, even if prior charges for the unrelated offense had previously been dropped.
3. **Jury Instructions.** A trial court has a duty to instruct the jury on the law of the case, whether requested to do so or not.
4. _____. When read conjunctively, all jury instructions must correctly state the law, adequately state the issues, and not mislead the jury.
5. **Damages: Words and Phrases.** The term "pecuniary loss," as used in Neb. Rev. Stat. § 28-519 (Reissue 1989), means monetary loss suffered by another as the result of the defendant's conduct which constitutes criminal mischief under § 28-519.
6. **Appeal and Error.** Although an appellate court does not consider assignments of

error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellant.

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

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

Lavell Dean Flye appeals his conviction of criminal mischief involving a pecuniary loss in excess of $300 and his being sentenced as a habitual criminal. For the reasons recited below, we affirm in part, and in part reverse and remand for a new trial.

FACTUAL BACKGROUND

In February 1991, appellant was charged with first degree sexual assault and burglary in Lancaster County. On July 15, while in detention awaiting trial on these charges, appellant was charged with criminal mischief causing a pecuniary loss in excess of $300, a Class IV felony, after appellant vandalized his jail cell. On August 8, while still incarcerated, appellant was charged with second degree assault, also a Class IV felony.

On October 4, 1991, the State offered to allow appellant to plead guilty to the burglary charge and one misdemeanor charge, in exchange for which all other charges pending against appellant would be dismissed. The State informed appellant that if he did not accept the plea offer, he would be charged as a habitual criminal regarding all of his pending felony charges. Appellant rejected the plea offer.

On October 29, 1991, the trial court granted the State leave to amend the information in the proceedings regarding the sexual assault and burglary charges to allege that appellant was a

habitual criminal. On November 5, a jury acquitted appellant of the sexual assault and burglary charges.

Subsequent to the above trial, but prior to appellant's separate trials on the criminal mischief and second degree assault charges, appellant was advised that he would be charged as a habitual criminal regarding both of those charges. The State rejected appellant's offer to plead guilty to one Class IV felony and one Class I misdemeanor and filed informations that included the habitual criminal allegations on November 22, 1991.

Appellant thereafter filed a plea in abatement in the proceedings regarding the criminal mischief charge, alleging that the habitual criminal charge filed against him in the pending case was an act of "prosecutorial vindictiveness intended to punish the defendant for successfully exercising his right to a jury trial" in the prior sexual assault and burglary proceedings. The district court denied appellant's plea in abatement. A jury subsequently found appellant guilty of criminal mischief, with the property damaged having a pecuniary loss value of $1,147. Appellant thereafter filed a motion for new trial, which the district court denied. At the enhancement hearing in August 1992, the district court found appellant to be a habitual criminal and sentenced him to "10 years." Appellant filed a timely notice of appeal to this court.

ASSIGNMENTS OF ERROR

Appellant alleges that the district court erred in (1) failing to find that the State's addition of the habitual criminal charges constituted prosecutorial vindictiveness, (2) instructing the jury on pecuniary loss regarding appellant's criminal mischief charge, (3) failing to find the verdict unsupported by evidence beyond a reasonable doubt, and (4) abusing its discretionary authority to place appellant on probation in lieu of sentencing appellant to confinement.

DISCUSSION

Prosecutorial Vindictiveness.

In his first assignment of error, appellant claims that the district court erred in failing to find that the State's addition of habitual criminal charges in the assault and criminal mischief

cases was the result of prosecutorial vindictiveness and, therefore, violated appellant's due process rights. See, U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3. Specifically, appellant asserts that the decision to charge him as a habitual criminal in the assault and criminal mischief cases was vindictive because it was made in response to appellant's "successful exercise of his right to trial in the rape and burglary case." Brief for appellant at 21. We note that this appeal addresses only the criminal mischief case against appellant and that the assault case is not before this court.

The U.S. Supreme Court has addressed the issue of vindictiveness against a defendant on several occasions. In *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the Court discussed whether the 14th Amendment Due Process Clause was violated when a defendant was given a harsher sentence on reconviction after successfully asserting his right to an appeal. The Court held that while there was no absolute bar to a harsher sentence on reconviction, due process required that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U.S. at 725.

In *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), the Court applied the principles of *Pearce* to hold that a prosecutor cannot reindict a convicted defendant on greater charges after the defendant has invoked his right to appeal his conviction for the same charges. The Court in *Blackledge* stated that the Due Process Clause is violated in situations that pose a "realistic likelihood of 'vindictiveness.' " 417 U.S. at 27.

The U.S. Supreme Court has addressed alleged prosecutorial vindictiveness in the pretrial setting in *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), and *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).

In *Bordenkircher*, the Court held that the Due Process Clause of the 14th Amendment did not prohibit a prosecutor from carrying out a threat made during plea negotiations. The prosecutor in *Bordenkircher* had threatened during plea

negotiations to reindict the defendant on a habitual criminal charge if the defendant did not plead guilty to a felony charge of uttering a forged instrument. The defendant refused to plead guilty, and the prosecutor reindicted the defendant on the habitual criminal charge. The defendant was then convicted, and he was sentenced to life imprisonment, as required by the habitual criminal statute. Acknowledging the importance of plea bargaining to this country's criminal justice system, the Court held that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." 434 U.S. at 363.

In *Goodwin*, the Court addressed whether a presumption of vindictiveness was warranted in evaluating the prosecutor's *pretrial* response to the defendant's demand for a jury trial. In that case, the defendant was charged with several misdemeanor charges. After initially expressing an interest in plea bargaining on the misdemeanor charges, the defendant decided not to plead guilty and requested a jury trial. Thereafter, the prosecutor indicted the defendant on a felony charge for the same conduct. The defendant was convicted of the felony charge, and he appealed on the basis of prosecutorial vindictiveness. The U.S. Court of Appeals for the Fourth Circuit reversed the conviction, holding that a legal presumption of prosecutorial vindictiveness applies where a defendant is reindicted on more serious charges after invoking his right to a jury trial. The U.S. Supreme Court reversed, stating that a presumption of prosecutorial vindictiveness was not warranted in the *pretrial* setting. The Court reasoned that "a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." 457 U.S. at 380. The Court also stated that "[a] prosecutor should remain free *before trial* to exercise . . . broad discretion [and his] initial decision should not freeze future conduct." (Emphasis supplied.) 457 U.S. at 382. However, the Court concluded that a defendant "in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." 457

U.S. at 384. No such showing was made according to the record.

[1] The above discussion reveals that a presumption of prosecutorial vindictiveness applies where the State seeks a more severe punishment for a defendant *after* the defendant has exercised his legal right to attack his original conviction. However, no presumption of prosecutorial vindictiveness arises where a prosecutor imposes more severe charges on a defendant in a *pretrial* context responding to the defendant's rejection of a prosecutor's plea offer.

Unlike the situation in *Blackledge*, appellant does not allege that prosecutorial vindictiveness resulted from appellant's exercise of his right to appeal his conviction on any of the charges brought against him. Neither does appellant allege that prosecutorial vindictiveness resulted from his rejection of the State's plea offer, as in *Goodwin* and *Bordenkircher*. Rather, appellant alleges that the State filed additional charges against him in the criminal mischief case as a result of appellant's exercise of his right to trial in the *separate and unrelated* sexual assault and burglary proceedings.

Not only does appellant's allegation of prosecutorial vindictiveness lack authority, but principles announced in the above-cited cases indicate that no prosecutorial vindictiveness existed in this case. Appellant has failed to show that a realistic likelihood of vindictiveness existed in this case. See *Blackledge, supra*.

[2] The Nebraska Supreme Court has rejected allegations of prosecutorial vindictiveness in a case similar to the one before this court. In *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992), the State prosecuted the defendant on two unrelated charges, sexual assault and aiding the consummation of a felony, in separate proceedings. After the defendant was convicted of sexual assault, the prosecutor dismissed the separate charge for aiding the consummation of a felony. However, the prosecutor reinstated the aiding charge after the defendant successfully appealed his conviction for sexual assault. The court in *Trammell* found no prosecutorial vindictiveness, stating: "We are aware of no authority which supports the proposition that a defendant's successful appeal in

one case renders him immune from prosecution for an unrelated offense, even if prior charges for the unrelated offense had previously been dropped." *Id.* at 734, 484 N.W.2d at 270. Likewise, we find that the State's filing of a habitual criminal charge in appellant's criminal mischief proceeding after appellant's successful assertion of his right to trial on the sexual assault and burglary charges does not constitute prosecutorial vindictiveness.

Pecuniary Loss Instruction.

Appellant alleges in his second assignment of error that the trial judge failed to properly instruct the jury on pecuniary loss with regard to his conviction for criminal mischief.

[3,4] A trial court has a duty to instruct the jury on the law of the case, whether requested to do so or not. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). When read conjunctively, all jury instructions must correctly state the law, adequately state the issues, and not mislead the jury. *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991).

The statute defining the crime of criminal mischief states in relevant part as follows:

> (1) A person commits criminal mischief if he or she:
>
> (a) Damages property of another intentionally or recklessly . . . .
>
> (2) Criminal mischief is a Class IV felony if the actor intentionally causes pecuniary loss in excess of three hundred dollars . . . .
>
> (3) Criminal mischief is a Class II misdemeanor if the actor intentionally causes pecuniary loss in excess of one hundred dollars.
>
> (4) Criminal mischief is a Class III misdemeanor if the actor intentionally or recklessly causes pecuniary loss in an amount of one hundred dollars or less, or if his or her action results in no pecuniary loss.

Neb. Rev. Stat. § 28-519 (Reissue 1989). Pecuniary loss is not an element of the crime of criminal mischief. Rather, "[t]he function of 'pecuniary loss' in relation to the crime of criminal mischief is establishment of the grade of the offense to determine which punishment or penalty may be imposed on

conviction for criminal mischief." *Pierce*, 231 Neb. at 971-72, 439 N.W.2d at 440.

The trial court in the present case instructed the jury on pecuniary loss as follows: " 'Pecuniary loss' means loss in the form of money, property, commercial interest or anything else, the primary significance of which is economic loss."

Appellant alleges that this instruction is erroneous under *Pierce*. In *Pierce*, the defendant was charged with criminal mischief following an incident in which he drove his car into a store employee's vehicle after the employee had refused to accept forged checks from the defendant. The only evidence regarding pecuniary loss at the trial was testimony that the cost to repair the employee's vehicle exceeded $500. There was no evidence of the market value of the employee's vehicle. In a jury instruction, the trial court defined pecuniary loss as " 'loss in the form of money, property, commercial interest, or anything else, the primary significance of which is economic loss.' " *Id.* at 970, 439 N.W.2d at 439. The jury convicted the defendant of criminal mischief.

[5] The Nebraska Supreme Court in *Pierce* held that the pecuniary loss instruction was "incomplete and misleading, constituting prejudicial error." *Id.* at 976, 439 N.W.2d at 443. The court reasoned that the instruction "permitted the jury to speculate about various losses, including a loss of a commercial interest 'or anything else' which involved 'economic loss.' " *Id.* The court stated that the term "pecuniary loss," as used in § 28-519, means "monetary loss suffered by another as the result of the defendant's conduct which constitutes criminal mischief under § 28-519." *Pierce*, 231 Neb. at 975, 439 N.W.2d at 442.

[6] The Supreme Court in *Pierce* concluded that although sufficient evidence existed to "sustain the finding of fact necessary for imposition of the felony punishment . . . the erroneous instruction on pecuniary loss necessitates . . . setting aside the jury's finding concerning the extent of pecuniary loss." *Id.* at 981, 439 N.W.2d at 446. We are therefore compelled to reach that same conclusion and direct that a new trial be held to determine the extent of pecuniary loss resulting from appellant's criminal mischief. This in no way affects appellant's

conviction for criminal mischief, and the conviction is affirmed. We note that appellant's counsel did not object to this instruction. However, this erroneous jury instruction constitutes plain error.

> Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Design Data Corp. v. Maryland Cas. Co., 243 Neb. 945, 958, 503 N.W.2d 552, 561 (1993).

Value of the Pecuniary Loss.

Due to the disposition of the previous assigned error, we need not address appellant's assigned errors concerning the value of the pecuniary loss or the lawfulness of the sentence.

CONCLUSION

We find that the addition of a habitual criminal charge in this case was not the result of prosecutorial vindictiveness, and we affirm appellant's conviction for criminal mischief. However, because the pecuniary loss instruction given in this case constituted plain error, we reverse the jury's finding regarding the extent of pecuniary loss resulting from this crime, vacate the sentence imposed and the imposition of an enhanced penalty, and remand the cause for a new trial regarding the extent of pecuniary loss resulting from appellant's criminal mischief.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, Judge, dissenting.

I respectfully dissent from the decision of the majority, which concludes that the pecuniary loss instruction constituted plain error requiring the court to reverse the jury's finding regarding the extent of pecuniary loss resulting from this crime.

The jury found the defendant guilty of criminal mischief, with the property damage having a pecuniary loss value of $1,147. In the present case, the trial court gave the following instruction as to pecuniary loss: " 'Pecuniary loss' means loss

in the form of money, property, commercial interest or anything else, the primary significance of which is economic loss." This same instruction was given in *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

In *Pierce*, the Supreme Court held that such an instruction was incomplete and misleading, constituting prejudicial error which permitted the jury to speculate about various losses, including the loss of a commercial interest or anything else which involved economic loss. The court stated that the term "pecuniary loss" means "monetary loss suffered by another as the result of the defendant's conduct which constitutes criminal mischief under § 28-519." *Pierce*, 231 Neb. at 975, 439 N.W.2d at 442. The court in *Pierce* concluded that although there was significant evidence to sustain a finding of fact necessary for the imposition of the felony punishment, the instruction for pecuniary loss required setting aside the jury's findings concerning the extent of pecuniary loss.

As I review the record, the jury could not have been misled by the instruction given in the present case. The jury may have been able to speculate in *Pierce* concerning various losses, including a commercial interest or anything else which involved an economic loss and therefore may have been misled.

Here, there is no doubt as to what the pecuniary loss was in connection with the crime charged. The evidence of the damage caused by the defendant in the Lancaster County jail included the following costs for replacement and repair: $138 for a security shelf, $36 for labor to replace the shelf, $45 for a stainless steel mirror, $144 for labor to replace the mirror, $50 for caulking the mirror, $150 for replacing concrete blocks, $100 for painting, $318 for a light fixture, $50 for caulking the light fixture, and $116 for labor to install the light fixture. These costs total $1,147. The jury assessed the value of the pecuniary loss at $1,147.

The defendant did not consider the instruction prejudicial, and I have no doubt that the defendant was not prejudiced by this instruction. I would affirm the judgment and the sentence of the district court.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. WHITE, APPELLANT.

507 N.W.2d 654

Filed October 12, 1993. No. A-92-826.

1. **Rules of Evidence: Hearsay: Witnesses.** Under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 1989), statements made by a declarant for purposes of medical diagnosis or treatment and describing medical history, or the inception or general character of the cause or external source of the declarant's medical problem insofar as reasonably pertinent to diagnosis or treatment, are not excluded by the hearsay rule, even though the declarant is available as a witness.
2. **Judgments: Evidence: Appeal and Error.** An appellate court may affirm the trial court's judgment if an error in the admission of evidence was harmless beyond a reasonable doubt.
3. **Criminal Law: Trial: Juries: Appeal and Error.** Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence a jury in a verdict adverse to a substantial right of the defendant.
4. **Criminal Law: Evidence: Convictions: Verdicts: Appeal and Error.** On appeal of a criminal conviction, error in the admission of evidence will not be found harmless if, absent the forbidden evidence, honest, fair-minded jurors might very well have brought in a not-guilty verdict.
5. **Rules of Evidence.** In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
6. _____. Evidence which is not relevant is not admissible.
7. **Rules of Evidence: Words and Phrases.** Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence more or less probable than it would be without the evidence.
8. **Evidence.** To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.

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

Robert J. Sivick for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

CONNOLLY, MILLER-LERMAN, and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal arises from the appellant's conviction and prison sentence of 2 to 5 years for first degree sexual assault under

Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1989). The appellant, Robert L. White, challenges the sufficiency of the evidence, the admissibility of the testimony of Dr. Carlos Dardon, the admissibility of the testimony of the victim pertaining to her father's disability and her financial support of the family, and the alleged excessiveness of the sentence imposed by the trial court. We affirm.

I. FACTS

The 17-year-old female victim testified at trial that she was working at Amigo's Restaurant at 90th and Fort Streets in Omaha when she was sexually assaulted by White, the shift supervisor, near or just after the close of the shift at 2 a.m. on July 6, 1991. The victim testified that White approached her from behind and pulled down her pants. The victim pulled her pants back up. White spun her around and began rubbing his body against her body. He then forced the victim to the floor, restrained her wrists in a very tight grip, and proceeded to kiss her and fondle her breasts. According to the victim, White next removed her pants, pushed her underwear aside, and placed his finger into her vagina. After White released her, the victim finished her work duties and went home.

Later the same morning, the victim reported the assault to her mother, and then to police officers. She quit working at Amigo's that day.

1. Expert Testimony

The victim saw Dr. Gerald Matzke, a family physician, on July 9. Dr. Matzke testified that the victim told him that she had been attacked at work and that her attacker had removed her pants, held her down by her wrists, and ejaculated on her leg. Dr. Matzke testified that in his physical examination of the victim, he discovered tenderness and soreness in her wrists, scratches on her upper back that were less than a week old, tenderness over her spine on the front part of the pelvic bone and through the hipbones, and discomfort in her "mid lower back." Dr. Matzke did not ask about digital penetration, and the victim did not volunteer any information about digital penetration. While he found no evidence of trauma in the victim's vaginal area, Dr. Matzke pointed out that digital

penetration probably would not cause trauma perceptible to the eye. Regarding the soreness of the victim's hipbones, Dr. Matzke said, "From what I understood from her telling me, it possibly could have happened from the alleged assailant being on her, on top of her or against her forcefully." Dr. Matzke testified that he was experienced in examining sexual assault victims and that the victim's physical injuries and anxious manner were not inconsistent with her claim of having been sexually assaulted.

Dr. Matzke also testified that the victim told him that there had been another incident with White approximately 1 week prior to the incident for which she was being examined.

On July 8, the victim was treated by Dr. Dardon, a psychiatrist. The victim had seen Dr. Dardon on previous occasions, as evidenced by the following excerpt from Dr. Dardon's trial testimony:

> [State:] And how is it that you're familiar with [the victim]?
>
> [Dardon:] [The victim] came in to see me the first time in August of 1991.
>
> [State:] Okay. Doctor, was it 1991 that she first saw you?
>
> [Dardon:] Or 1990, I'm sorry. It's almost three years now.
>
> [State:] Had she been seeing a previous psychiatrist, too?
>
> [Dardon:] She had seen another psychiatrist, Dr. Egan, for about a year prior to the time when she came in to see me.
>
> [State:] All right. And, Doctor, without going into the details of it, can you tell us the general reason as to why she came to your office for treatment?
>
> [Defense:] Your Honor, I object on relevance grounds.
>
> [Court:] Overruled.
>
> [Dardon:] I believe I started seeing her father first. He had been involved in a car accident and had severe brain damage. At some point they felt that perhaps I could help her better, so they brought her in.
>
> [State:] And for what purpose did they bring her in?

> [Dardon:] She was having different psychiatric problems stemming from the car accident, from the trauma.

The direct examination of Dr. Dardon then moved to the victim's July 8, 1991, appointment for treatment of the victim's trauma in the wake of the assault on July 6. Over objection by way of a motion in limine filed by White, Dr. Dardon related the victim's medical history as told to him by the victim, including the details of the sexual assault by White.

2. Family Financial Support by Victim

On direct examination, the victim testified that White had sexually assaulted her on two occasions prior to July 6. Before asking the victim to relate the details of the prior alleged assaults, the prosecutor asked the victim why she gave her Amigo's paychecks to her parents. The court sustained an objection by defense counsel on relevance grounds. In a bench conference, the prosecutor argued that his question about the paychecks was intended to show that the victim was under pressure to maintain her job at Amigo's. According to the prosecutor, the pressure to provide financial support for her family accounted for the victim's decision to remain at Amigo's and not report to the police the two prior incidents of alleged sexual assault by White. Defense counsel responded that unless the victim's continued employment at Amigo's and failure to report the two prior alleged assaults were raised on cross-examination, the victim's role as a contributor to the family's finances was not relevant. The court made the following ruling: "The offer is overruled. You may pose other questions that relate to that." Soon thereafter, the prosecutor asked the victim if she helped support the family with her Amigo's paychecks. Again, defense counsel objected on relevance grounds. The objection was overruled, and the victim responded, "I gave my checks to my parents to help them."

3. Defendant's Testimony

White denied having had any physical contact with the victim. He acknowledged having given her a clean shirt to put on at the close of the work shift in the early morning hours of July 6, but claimed he did so because of a dirt mark on the front

of the shirt the victim had been wearing, not because of the obvious dirt marks on the back of the shirt. The victim testified that White gave her the clean shirt and said, " '[H]ere is a clean shirt so your mom won't think anything.' " White also acknowledged that the victim's mother had arranged a meeting in late May 1991 which included the victim, White, and supervisory personnel from Amigo's to ensure that the victim would no longer be scheduled to work the closing shift with White. The victim's mother had arranged the meeting after the victim had told her mother that White had forced himself on her with incessant kissing during a closing shift in late May.

4. JUDGMENT

White was found guilty as charged and was sentenced to a prison term of 2 to 5 years.

II. ASSIGNMENTS OF ERROR

White argues that the trial court erred in (1) determining that there was sufficient evidence to allow the case to go to the jury, (2) allowing the unfairly prejudicial testimony of Dr. Dardon, (3) allowing the victim to testify as to her father's disability and her financial support of the family, and (4) imposing an excessive sentence on White.

III. STANDARD OF REVIEW

1. EXPERT WITNESS TESTIMONY

The determination of whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact in accordance with Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989), involves the discretion of a trial court, whose ruling on the admissibility of an expert's testimony or opinion will be upheld on appeal unless the trial court abused its discretion. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

2. SUFFICIENCY OF THE EVIDENCE

In determining whether evidence is sufficient to sustain a conviction in a jury trial, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are

within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992).

On a claim of insufficiency of evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.*

3. Excessive Sentence

When a sentence imposed by a court is within the statutorily prescribed limits, an appellate court will not disturb the sentence unless there has been an abuse of discretion. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993).

An abuse of discretion occurs when a sentencing court's reasonings or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

IV. ANALYSIS

1. Dr. Dardon's Testimony

[1] Under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 1989), statements made by a declarant for purposes of medical diagnosis or treatment and describing medical history, or the inception or general character of the cause or external source of the declarant's medical problem insofar as reasonably pertinent to diagnosis or treatment, are not excluded by the hearsay rule, even though the declarant is available as a witness. The question of whether statements made to a psychiatrist qualify as a hearsay exception under Neb. Evid. R. 803(3) has not been addressed in Nebraska. However, in interpreting Fed. R. Evid. 803(4), which is virtually identical to Neb. Evid. R. 803(3), the U.S. Court of Appeals for the Eighth Circuit has determined that statements made to a trained social worker or psychologist qualify as hearsay exceptions under Fed. R. Evid. 803(4). See *U.S. v. Balfany*, 965 F.2d 575 (8th Cir. 1992). In *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988), the defendant argued that the victim's statements to a psychologist who

testified as an expert witness were inadmissible because the psychologist was consulted in order to testify as a witness rather than for treatment of the victim. The U.S. Court of Appeals for the Fourth Circuit nonetheless stated that the hearsay exception for statements to physicians applies equally to psychiatrists and psychologists and went so far as to hold that the statements of a victim made to a psychologist are admissible even if the examination during which the statements were made was conducted for the purpose of diagnosis to prepare the psychologist for court testimony rather than for the purpose of treating the victim.

Despite the federal authority recognizing a hearsay exception for statements made to a psychiatrist, in the context of the instant case we are unwilling to fashion a rule that could lead to a standard operating procedure in which any sexual assault victim is sent to a psychiatrist to tell his or her story so that the psychiatrist can then retell the victim's story to the jury and thereby bolster the credibility of the victim's story by virtue of the psychiatrist's expert, professional status. Therefore, we decline to apply the rationales of *Balfany* and *Morgan* to the case before us.

We do not suggest that the victim in the case at bar was sent to Dr. Dardon merely to prepare Dr. Dardon for trial testimony. The record indicates that the victim went to Dr. Dardon for treatment of the trauma resulting from the alleged assault. We also note that a doctor-patient relationship already existed between the victim and Dr. Dardon before the appointment relating to the alleged assault. However, we still decline to recognize a hearsay exception under Neb. Evid. R. 803(3) that would permit Dr. Dardon to relate to the jury the victim's statements to him during treatment.

While there may be a place for the psychiatrist exception in Nebraska law, this is not the case that establishes that place. In this case, there was a competent 17-year-old witness who was quite capable of telling the jury her version of the alleged assault. Before Dr. Dardon testified, the jury heard from Dr. Matzke, who related to the jury the victim's version of the alleged assault. We agree with the argument proffered during trial by defense counsel in his oral motion in limine attempting

to block the testimony of Dr. Dardon. Defense counsel pointed out that one expert witness, Dr. Matzke, had already told the victim's story to the jury. Another expert witness, Dr. Dardon, once again telling the victim's story of the assault would constitute cumulative evidence. Furthermore, the probative value of that evidence would be outweighed by its potential for unfair prejudice. See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989). For these reasons, we find that the trial court erred in allowing Dr. Dardon to restate to the jury the statements made to him by the victim while she was being treated by Dr. Dardon.

We reject White's claim that the revelation during Dr. Dardon's testimony that the victim's father had suffered brain damage so distorted the jury's perception of the victim in her favor that White's right to a fair trial was compromised. The passing mention of the condition of the victim's father was a small part of the background information on the doctor-patient relationship between Dr. Dardon and the victim, and the prosecutor did not dwell on it. Therefore, we find that the reference to the father's condition was not prejudicial.

2. Harmless Error

[2,3] An appellate court may affirm the trial court's judgment if an error in the admission of evidence was harmless beyond a reasonable doubt. See *State v. Christian*, 237 Neb. 294, 465 N.W.2d 756 (1991). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence a jury in a verdict adverse to a substantial right of the defendant. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

[4] Having reviewed the entire record, we do not believe White was prejudiced by the admission of Dr. Dardon's testimony. Dr. Dardon's testimony was cumulative. If Dr. Dardon's testimony was the only evidence in the record corroborating the alleged assault, there would be a greater chance of prejudice resulting from his testimony. However, even if we erase Dr. Dardon's testimony from the record, we still have the properly admitted testimony of Dr. Matzke to corroborate the victim's description of the alleged assault. This

case is not analogous to *Chapman v. California*, 386 U.S. 18, 25-26, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), described by the Court as a case "in which, absent the . . . forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." Given the testimony of the victim about the alleged assault, the testimony of Dr. Matzke, and the physical evidence, we do not believe the verdict of the jury would have been different had the testimony by Dr. Dardon not been allowed. Therefore, we find harmless the admission error concerning Dr. Dardon's testimony.

3. FINANCIAL SUPPORT OF THE FAMILY

[5-8] In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992). Evidence which is not relevant is not admissible. Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989). Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence more or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989). To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided. *State v. Coleman, supra.*

Before the victim testified, there had been references by other witnesses to one or possibly two prior, unreported sexual assaults of the victim by White. Immediately after answering the question about what she did with her paychecks, the victim described in detail, without objection by defense counsel, the first of the alleged sexual assaults by White in late May 1991. The victim went on to say that after telling her mother about the May incident, the mother called a meeting involving the victim, White, and supervisory personnel from Amigo's, to ensure that the victim would not work any more closing shifts with White.

Had the prosecutor asked the victim what she did with her paychecks without there having been any testimony concerning the previous incidents either before or after the question was posed, defense counsel's objection on relevance grounds might

have been sustainable on appeal. Perhaps any question about the relevance of the victim's helping with family expenses might have been cleared up by one or two preliminary questions focusing on the alleged prior incidents of sexual assault and on the reason for the victim's decision to continue working at Amigo's and not notify the police about the alleged sexual assaults. Nevertheless, we find that sufficient evidence of at least one prior on-the-job sexual assault was adduced on direct examination to make relevant the prosecutor's question about the victim's contribution to the family budget. Therefore, we find no error in the trial court's admission of the testimony about the victim delivering her Amigo's paychecks to her parents to help support the family.

4. Sufficiency of the Evidence

When viewed in a light most favorable to the State, the admissible testimony of the State's witnesses and the physical evidence, particularly the shirt with the dirt marks on the back side, constitute evidence sufficient to support the conviction of White. Regardless of whatever evidence White may have offered at trial to characterize himself as innocent, there was sufficient incriminating evidence in the record to allow the jury to find beyond a reasonable doubt that White had sexually assaulted the victim. See *State v. Schumacher*, 240 Neb. 184, 480 N.W.2d 716 (1992).

White places great emphasis on the victim's failure to report the digital penetration of her vagina until July 16, 10 days after the alleged assault, at which time a followup investigator specifically asked the victim whether such a violation had occurred. White suggests that the victim made up the claim of digital penetration to enhance the case against him. The victim claimed that initially she was reluctant to reveal the full extent of the assault because she found it embarrassing. Both explanations are plausible. The jurors observed the witnesses and considered both explanations for the delay in reporting the digital penetration. The verdict indicates that the jury accepted the victim's explanation. This court will not reevaluate the jury's determination of that factual issue.

5. EXCESSIVE SENTENCE

First degree sexual assault is a Class II felony punishable by a prison term of 1 to 50 years. See, § 28-319(2); Neb. Rev. Stat. § 28-105(1) (Reissue 1989). We find nothing in the record to indicate that the trial court abused its discretion by sentencing White to a prison term of 2 to 5 years.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN SOBIESZCZYK, APPELLANT.

507 N.W.2d 660

Filed October 12, 1993. No. A-92-1091.

1. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992), the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.
2. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the trial court will not be disturbed unless clearly erroneous.
3. **Constitutional Law: Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** Multiple representation by the same attorney does not give rise to a denial of a defendant's Sixth Amendment right to effective assistance of counsel unless an actual conflict exists and that conflict affects the performance of counsel.
4. _____: _____: _____: _____. A sole attorney's multiple representation of codefendants is not a per se violation of the constitutional guarantee of effective assistance of counsel.
5. **Attorney and Client: Conflict of Interest: Effectiveness of Counsel: Presumptions.** In a case involving multiple representation by the same attorney, prejudice is presumed only if a defendant demonstrates that counsel actually represented conflicting interests and that an actual conflict of interest adversely affected his attorney's performance.
6. **Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** Conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
7. **Attorney and Client: Conflict of Interest.** In determining whether there was an actual conflict of interest, a court may consider whether the appellant objected to his counsel's representation of the codefendant and whether the appellant acknowledged or corroborated the factual basis for the crime.

8. **Sentences: Appeal and Error.** The mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.
9. **Attorney and Client: Conflict of Interest: Courts.** In a case involving multiple representation by the same attorney, if the trial court is not aware of a potential conflict of interest because the parties do not make simultaneous court appearances, it then becomes the duty of trial counsel to bring the issue to the attention of the court so that the court can address the matter in the manner prescribed in *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

Appeal from the District Court for Buffalo County: STEPHEN ILLINGWORTH, Judge. Affirmed.

John Sobieszczyk, pro se.

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

CONNOLLY, HANNON, and MILLER-LERMAN, Judges.

CONNOLLY, Judge.

This appeal arises from the trial court's denial of a motion for postconviction relief filed by the appellant, John Sobieszczyk. Sobieszczyk's defense counsel represented Sobieszczyk and another defendant, Steve Moran, in pretrial proceedings. Two of the multiple counts against each of the defendants were identical charges arising out of the same incident. Pursuant to a plea bargain, Sobieszczyk was convicted of two counts of distribution of a controlled substance under Neb. Rev. Stat. § 28-416 (Reissue 1989) and one count of attempted distribution of a controlled substance under § 28-416 and Neb. Rev. Stat. § 28-201 (Reissue 1989). In his petition for postconviction relief, Sobieszczyk alleged that the joint representation by defense counsel resulted in a conflict of interest prejudicial to his right to effective assistance of counsel. Sobieszczyk asked the trial court to vacate and set aside his convictions. After an evidentiary hearing, the trial court denied Sobieszczyk's petition. We affirm.

I. FACTS

As a result of an undercover operation, Sobieszczyk and Moran were charged, inter alia, with unlawful distribution of

marijuana and lysergic acid diethylamide (LSD) arising from the same incident occurring on September 28, 1990. Sobieszczyk and Moran were represented by the deputy public defender. The parties did not make a joint court appearance at any time in their pretrial proceedings.

On the advice of defense counsel, Sobieszczyk entered guilty pleas in accordance with the terms of a plea bargain. Moran also participated in the plea bargain. Sobieszczyk pled guilty to the same two counts with which Moran was initially charged in relation to the incident of September 28, 1990. Sobieszczyk also pled guilty to attempted distribution of methamphetamine. Moran pled guilty to two counts of unlawful distribution of a controlled substance arising from an incident occurring on March 15, 1990. Apparently, the charges arising from the September 28 incident were dismissed as to Moran.

Sobieszczyk was convicted of two counts of unlawful distribution of a controlled substance (one count for marijuana and the other for LSD) pursuant to § 28-416(1)(a). On each count, Sobieszczyk was sentenced to a prison term of 6 to 10 years. In addition, Sobieszczyk was convicted of attempted unlawful distribution of a controlled substance (methamphetamine) under §§ 28-416(1)(a) and 28-201, for which he received a prison sentence of 1 to 3 years. All sentences were ordered to be served concurrently. At the time Sobieszczyk entered his pleas, he acknowledged the factual basis for the crimes charged. Sobieszczyk appealed his convictions, and the Nebraska Supreme Court affirmed.

In his motion for postconviction relief and at his postconviction hearing, Sobieszczyk claimed that defense counsel had never disclosed that he was also representing Moran on the charges stemming from the September 28, 1990, incident. Defense counsel testified at the postconviction hearing that some time after Sobieszczyk's preliminary hearing on November 16, but before his arraignment on December 14, he discussed with Sobieszczyk the fact that he had also been appointed to represent Moran. Defense counsel testified that his usual practice would have been to discuss the joint representation to determine whether either of the parties had a problem with his representation. According to defense counsel,

at no time prior to the motion for postconviction relief did Sobieszczyk indicate that there was a problem with the joint representation. Defense counsel further testified that since Sobieszczyk and Moran appeared in court at different times, the problem was not discussed with the trial court.

The trial court expressed its criticism of the practice of joint representation in the context of this case, but found that Sobieszczyk had failed to show an actual conflict of interest on the part of his trial counsel such that Sobieszczyk's right to effective assistance of counsel was prejudiced. The request for postconviction relief was denied.

II. ASSIGNMENTS OF ERROR

Sobieszczyk argues that the trial court erred (1) in failing to find an actual conflict of interest on the part of defense counsel, (2) in failing to rule that defense counsel breached his ethical duty by representing Sobieszczyk and Moran, (3) in failing to find that defense counsel failed to obtain Sobieszczyk's consent to joint representation in the record, and (4) in ignoring the greater weight of the evidence that defense counsel had not zealously represented both Sobieszczyk and Moran.

III. STANDARD OF REVIEW

[1] In an evidentiary hearing for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992), the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *State v. White*, 238 Neb. 840, 472 N.W.2d 720 (1991).

[2] A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the trial court will not be disturbed unless clearly erroneous. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993); *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992).

IV. ANALYSIS

1. Actual Conflict of Interest

Sobieszczyk argues that defense counsel had an actual conflict of interest that affected his ability to represent

Sobieszczyk because defense counsel was prevented from utilizing every possible defense, from calling and cross-examining witnesses, and from being able to put Sobieszczyk in the best light.

[3-6] Multiple representation by the same attorney does not give rise to a denial of a defendant's Sixth Amendment right to effective assistance of counsel unless an actual conflict exists and that conflict affects the performance of counsel. *State v. Wilson*, 224 Neb. 721, 400 N.W.2d 869 (1987). A sole attorney's multiple representation of codefendants is not a per se violation of the constitutional guarantee of effective assistance of counsel. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). Prejudice is presumed only if a defendant demonstrates that counsel actually represented conflicting interests and that an *actual conflict of interest* adversely affected his attorney's performance. *Id.* Conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. *Id.*

[7] In determining whether there was an actual conflict of interest, the court may consider whether Sobieszczyk objected to his counsel's representation of Moran and whether Sobieszczyk acknowledged or corroborated the factual basis for the crime. See *id.* In the instant case, Sobieszczyk acknowledged the factual basis for his guilty pleas. In the postconviction proceeding, the court concluded that defense counsel had raised the subject of joint representation to Sobieszczyk and that Sobieszczyk had not objected. The record reflects that Sobieszczyk's focus was not on establishing a defense at trial, but on obtaining the best plea bargain. Defense counsel obtained a dismissal of two felony charges for unlawful distribution of a controlled substance. In reviewing the record, we cannot say that the trial court was clearly erroneous in finding that there was no actual conflict of interest.

2. Breach of Ethical Duty

Sobieszczyk alleges that defense counsel breached an ethical duty by jointly representing Sobieszczyk and Moran. Resolution of the issue would not affect the outcome of this

appeal. Regardless of whether defense counsel breached an ethical duty by engaging in joint representation in this case, we agree with the trial court that no actual conflict of interest was proven and that, consequently, Sobieszczyk's right to effective assistance of counsel was not prejudiced. Therefore, we do not reach the question of whether defense counsel breached an ethical duty by jointly representing Sobieszczyk and Moran.

3. SOBIESZCZYK'S CONSENT TO JOINT REPRESENTATION

The actual wording of this assignment of error is that the trial court "committed error by failing to find that defense counsel failed to obtain Defendant's informed consent of the actual conflict on the record or in writing that Defendant understood the conflict." On its face, the assignment of error implies that the trial court ruled that defense counsel had made a record of Sobieszczyk's consent to the joint representation. The trial court made no such finding, and defense counsel never suggested that Sobieszczyk's consent to joint representation had been preserved in the record. We can make sense of this assignment of error only by construing it to mean that Sobieszczyk believes that the trial court erred in concluding that defense counsel had informed Sobieszczyk of the joint representation. The trial court weighed the credibility of the witnesses and determined that defense counsel was telling the truth when he testified that he had informed Sobieszczyk of the joint representation. While the better practice by defense counsel would have been to address the matter of joint representation on the record, the trial court's finding that Sobieszczyk was advised of the joint representation was not clearly erroneous.

4. GREATER WEIGHT OF THE EVIDENCE

The only substantive argument provided by Sobieszczyk to support this assignment of error is found in his reply brief and reads as follows:

> It can clearly and easily be argued that the Appellant was clearly put at a disadvantage by his attorney's representation of co-defendants charged with two identical charges stemming from the same transaction. The actual conflict of interest is shown clearly by the fact

> Mr. Sobieszczyk pled to the two mutual charges with [sic] his co-defendant pled to two separate charges.

Reply brief for appellant at 5. We are unable to discern from the two sentences proffered by Sobieszczyk on this issue an intelligible argument concerning the greater weight of the evidence.

[8] The trial court indicated that at the postconviction hearing, Sobieszczyk argued that defense counsel's failure to zealously represent him was evidenced by the fact that he received a harsher sentence than Moran received for similar convictions. The trial court correctly pointed out that many factors could account for the fact that Sobieszczyk and Moran received different sentences for the same or similar crimes. The Nebraska Supreme Court has stated:

> "[T]he mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence."

State v. Vance, 240 Neb. 794, 800-01, 484 N.W.2d 453, 458 (1992). The fact that Sobieszczyk received a harsher sentence than Moran does not establish by the greater weight of the evidence that defense counsel failed to zealously represent Sobieszczyk. This assignment of error is without merit.

V. CONCLUSION

We find no prejudice to Sobieszczyk's right to effective assistance of counsel. Therefore, we affirm the judgment of the trial court denying the motion for postconviction relief. However, we join the trial court in discouraging joint representation in cases like the one now before us. The Nebraska Supreme Court has stated that

> unless it appears that there is good cause to believe no conflict is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel in cases involving joint and multiple representation of criminal defendants.
>
> In carrying out such responsibility the court should

> elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and potential perils of such conflict, that he has discussed the matter with his attorney or, if he wishes, with outside counsel, and that he voluntarily waives his right to a conflict-free attorney required under the Constitutions, state and federal. [Citations omitted.] Judges should inquire with as much detail as the court's experience and knowledge of the case will permit, and should bear in mind that most defendants are rarely sophisticated enough to evaluate potential conflicts which may arise from joint and multiple representation.

State v. Turner, 218 Neb. 125, 137-38, 354 N.W.2d 617, 625 (1984).

[9] If, as in this case, the trial court is not aware of a potential conflict of interest because the parties do not make simultaneous court appearances, it then becomes the duty of trial counsel to bring the issue to the attention of the court so that the court can address the matter in the manner prescribed in *State v. Turner, supra*.

AFFIRMED.

ASSOCIATION OF COMMONWEALTH CLAIMANTS, AN UNINCORPORATED ASSOCIATION, APPELLANT, V. KENLON HAKE ET AL., APPELLEES.

507 N.W.2d 665

Filed October 19, 1993. No. A-92-039.

1. **Demurrer: Pleadings.** In ruling on a demurrer, the court is to liberally construe the petition. If as so construed the petition states a cause of action, the demurrer is to be overruled.
2. **Demurrer: Pleadings: Appeal and Error.** In reviewing a ruling sustaining a demurrer, an appellate court must accept the truth of the facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but the court will not accept conclusions of the pleader.
3. **Derivative Actions: Pleadings: Corporations: Receivers.** In order to maintain a derivative action, a stockholder must allege in unmistakable terms that he made

a demand upon the corporation or its receiver, unless circumstances excuse the stockholder from making such demand.

4. **Derivative Actions: Corporations.** A demand notice and request should set forth the persons to be sued, describe all the causes of action which it is intended to assert, clearly state the corporate wrongs complained of, and state any facts upon which its charges were based.
5. **Actions: Corporations.** According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.
6. **Derivative Actions: Corporations: Receivers.** The business judgment rule applies equally to a derivative action where the corporation is in the hands of a receiver.
7. **Demurrer: Pleadings.** Neb. Rev. Stat. § 25-854 (Reissue 1989) provides that if a demurrer is sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct.
8. **Judgments: Pleadings: Interventions.** Intervention after judgment cannot be obtained as a matter of right under Neb. Rev. Stat. § 25-328 (Reissue 1989).
9. **Equity: Judgments: Pleadings: Interventions.** Although a party may not intervene after judgment as a matter of right, a court of equity may allow intervention after judgment.
10. **Pleadings: Interventions: Time.** Intervention should not be allowed where the party seeking to intervene had an opportunity to intervene at an earlier time, yet delayed in doing so.

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

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellant.

James B. Cavanagh, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for appellees First National Bank of Omaha and Dennis O'Neal.

Rodney M. Confer and Trev E. Peterson, of Knudsen, Berkheimer, Richardson & Endacott; William D. Kuester, of Crosby, Guenzel, Davis, Kessner & Kuester; Thomas L. Kimer, of Faegre & Benson; Paul M. Schudel, of Woods & Aitken; Gerald Laughlin and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; Gregory Perry, of Perry, Guthery, Haase & Gessford, P.C.; and David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellees Hake et al.

CONNOLLY, HANNON, and IRWIN, Judges.

IRWIN, Judge.

Appellant, Association of Commonwealth Claimants (ACC), as assignee of various depositors and creditors of the insolvent Commonwealth Savings Company, brought this action for damages against appellees, alleging mismanagement and other improprieties which resulted in the insolvency, collapse, and liquidation of Commonwealth. Appellees are former directors of the Nebraska Depository Institution Guaranty Corporation (NDIGC), financial institutions that employed the former directors, and alleged coconspirators.

Appellees demurred to ACC's third amended petition, claiming that ACC failed to state facts sufficient to constitute a cause of action, that ACC failed to allege that it made a proper demand on the receiver to bring this action, and that ACC was not the real party in interest. The district court for Lancaster County sustained the demurrers and dismissed this action. For the reasons set forth below, we affirm the order of the district court.

FACTUAL BACKGROUND

Commonwealth Savings Company was an industrial loan and investment company located in Lincoln, Nebraska. On November 1, 1983, the Nebraska Department of Banking and Finance took possession of Commonwealth pursuant to state law regarding the insolvency of industrial loan and investment companies. See Neb. Rev. Stat. §§ 8-416 (Reissue 1991) and 8-187 (Reissue 1983). On November 8, the district court for Lancaster County issued an order declaring Commonwealth insolvent and appointed the Department of Banking and Finance as the receiver of Commonwealth pursuant to § 8-416 and Neb. Rev. Stat. § 8-198 (Reissue 1983).

Commonwealth deposits were guaranteed at up to $30,000 per account by the NDIGC. However, the NDIGC defaulted on its guarantees. In January 1985, the receiver and the NDIGC entered into an agreement providing that the NDIGC would transfer all of its remaining assets, worth $3 million, to the receiver. The agreement also provided that the receiver would indemnify the NDIGC, its officers, and its directors against any

claims arising out of the transfer of the NDIGC's assets.

The receiver also filed two tort claims against the State of Nebraska. These claims were filed with the State Claims Board pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissues 1981 & 1987 & Supp. 1983). The first claim was filed on behalf of the creditors of Commonwealth against the State, its officers, and its employees. The second claim was brought under the Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat. § 21-17,127 et seq. (Reissue 1991). Both claims essentially alleged that state officers and employees committed negligent, willful, and wanton acts that resulted in the creditors' losses.

After two settlements proposed by the State Claims Board were rejected by the district court for Lancaster County, the receiver filed suit against the State of Nebraska on March 20, 1985, in the district court for Lancaster County. On April 26, the district court approved a settlement entered into by the receiver and the State. The terms of the settlement included a payment to the receiver of $8.5 million as a full and complete satisfaction of all claims held by the receiver against the State and its employees.

ACC and Claude T. Weimer filed the present action on October 28, 1987, seeking $58 million in damages from appellees. Weimer died in 1990 and is no longer a named party in this action. See, Neb. Rev. Stat. § 25-1405 (Reissue 1989); *Vogt v. Daily*, 70 Neb. 812, 98 N.W. 31 (1904). Appellees filed demurrers to ACC's amended petition, and the district court for Lancaster County sustained appellees' demurrers and dismissed ACC's petition on the grounds that the causes of action belonged to the receiver and that ACC had no standing to bring this action. ACC appealed this ruling to the Nebraska Supreme Court. On May 11, 1990, the Supreme Court ruled on ACC's claims as follows:

> We have determined that appellants' [Weimer's and ACC's] actions are derivative and that they have not suffered individual harm upon which they can sue directly. Their actions are properly brought by the receiver. However, the record shows that the receiver sued only the State of Nebraska . . . . If [Weimer and ACC] in fact state a

> cause of action against the NDIGC or other defendants, this leaves Commonwealth, its creditors, and its depositors with a claim which the receiver failed or neglected to pursue.
>
> . . . .
>
> . . . [A]ppellants have stated a cause of action at least against the NDIGC based on statutory and common-law contractual liability toward Commonwealth and its depositors.
>
> Although the receiver was the proper party to enforce that liability, the appellants are not left without a remedy in this situation. While § 8-199 gives the receiver broad authority to enforce claims on behalf of the bank, its shareholders, and creditors, we find that the shareholders and creditors must be afforded relief when the receiver fails or neglects to enforce a claim. Therefore, in remaining consistent with general corporate law and the federal common law, we hold that a depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit. [Citations omitted.]
>
> In order for appellants to state a derivative action, their petition must allege the fact that a demand has been made on the receiver or that such a demand would be futile. The petition makes no such allegation, thereby failing to allege facts sufficient to constitute a cause of action.

Weimer v. Amen, 235 Neb. 287, 302-04, 455 N.W.2d 145, 155-57 (1990). The Supreme Court reversed the district court's dismissal of this action and remanded the cause with directions to permit Weimer and ACC to amend their petition.

On remand, ACC filed its third amended petition, in which ACC alleged that Weimer had requested the receiver and the court supervising the receiver to prosecute causes of action against the NDIGC, the officers and directors of the NDIGC, and "all others including officials of Nebraska and co-conspirators." ACC also alleged that requests to the receiver to pursue the above causes of action "were and continue to be

futile" because (1) the receiver had failed to file actions against any of the defendants named in the petition; (2) the counsel for the receiver had orally informed ACC that he was of the opinion that it was inappropriate for the receiver to bring the causes of action set forth in the third amended petition, and the receiver had continuously agreed with that opinion; (3) the receiver had entered into agreements with the NDIGC and the State; and (4) the court supervising the receivership was also the court that had approved the settlement between the Commonwealth receiver and the State.

Appellees demurred to ACC's third amended petition on the grounds that it failed to allege that a proper demand was made on the receiver, that it failed to state facts sufficient to constitute a cause of action, and that ACC was not the real party in interest. On December 13, 1991, the district court issued an order dismissing the case after sustaining the demurrers on the basis that ACC failed to make demand on the receiver prior to the commencement of the action and failed to allege circumstances that would excuse ACC from making such demand. ACC has timely appealed the order to this court.

We note at this point that while this case was before the Supreme Court in *Weimer*, the successor receiver assigned his causes of action against appellees to ACC. In addition, while this case was pending appeal in this court, ACC filed a petition to intervene in its capacity as assignee of the receiver. We will address the intervention issue after addressing the issues pending from the order of the district court.

ASSIGNMENTS OF ERROR

ACC has assigned four errors on this appeal, which we have condensed into three assigned errors for purposes of this discussion. ACC alleges that the district court erred in (1) finding that ACC failed to make demand on the receiver, (2) finding that ACC failed to allege circumstances that would excuse demand, and (3) finding that ACC failed to state a cause of action against appellees.

STANDARD OF REVIEW

[1-3] In ruling on a demurrer, the court is to liberally construe the petition. If as so construed the petition states a cause of

action, the demurrer is to be overruled. *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991). In reviewing a ruling sustaining a demurrer, an appellate court must accept the truth of the facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but the court will not accept conclusions of the pleader. *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989); *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989). In order to maintain a derivative action, a stockholder must allege in unmistakable terms that he made a demand upon the corporation or its receiver, unless circumstances excuse the stockholder from making such demand. See, *Weimer, supra*; *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955).

DISCUSSION

Derivative Action Requirements.

In *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990), the Supreme Court held that ACC's claims in this case are derivative in nature. A derivative action is a suit by a shareholder to enforce a cause of action belonging to the corporation. Black's Law Dictionary 443 (6th ed. 1990). The court in *Weimer* also held that in order to state a cause of action, ACC must allege that a demand has been made on the receiver, or that such demand would have been futile. On appeal to this court, ACC argues both that it has satisfied the demand requirement and that it is excused from making a demand due to futility. We will address these arguments in turn.

ACC's Claim that Demand Was Made.

ACC did not allege in its petition that it personally made a demand on the receiver prior to bringing this action. In fact, ACC acknowledges in its brief that it made no such demand. Rather, ACC claims that its former coplaintiff, Weimer, made a demand on the receivership court and that Weimer's demand satisfies ACC's obligation to make a demand on the receiver.

ACC's claim that it made a demand on the receiver fails for several reasons. First, ACC itself did nothing with regard to making a demand on the receiver before bringing this action. Second, we are unaware of any authority stating that the

demand requirement is satisfied where the alleged demand is made by a person who is no longer a party to the action.

[4] Third, even if we held that ACC's demand requirement could be satisfied by Weimer's alleged demand, ACC would not be able to establish that a demand was made because Weimer's application did not constitute a valid demand. "The demand notice and request should set forth the persons to be sued, and should describe all the causes of action which it is intended to assert. The demand must clearly state the corporate wrongs complained of and should state any facts upon which its charges were based." 13 William M. Fletcher et al., Cyclopedia of the Law of Private Corporations § 5968 at 178 (rev. perm. ed. 1991). See, *Starrels v. First Nat. Bank of Chicago*, 870 F.2d 1168 (7th Cir. 1989); *Renfro v. Federal Deposit Ins. Corp.*, 773 F.2d 657 (5th Cir. 1985); *Halprin v. Babbitt*, 303 F.2d 138 (1st Cir. 1962); *Stoner v. Walsh*, 772 F. Supp. 790 (S.D.N.Y. 1991).

In his application to the receivership court, Weimer stated that he had "reasonable grounds to believe" that he had "meritorious causes of action" against "members and directors of NDIGC," among others, and that the receiver "failed, refused, and neglected" to pursue these causes of action. However, Weimer's application failed to name specific persons or facts giving rise to such causes of action and also failed to specify the causes of action he allegedly held. In fact, the receivership court cited these defects as part of its basis for denying Weimer's application, stating: "The applicant has not furnished the court with any new or unique facts nor has he furnished the court with any new or different legal authorities to support his conclusions; he merely argues that he believes these proposed suits are valid."

The allegations in Weimer's application are mere conclusions and do not satisfy the requirement that the demand set forth the persons to be sued, the causes of action intended to be asserted, and the wrongs complained of. ACC's contention that Weimer's application to the receivership court satisfies the demand requirement is therefore without merit.

ACC's Claim that Demand Is Excused.

As noted above, the Supreme Court in *Weimer* held that

ACC may bring a derivative action against appellees if ACC can show that it would have been futile to demand that the receiver sue the appellees. ACC alleges that the district court erred in failing to find that ACC is excused from making a demand on the receiver under this futility exception. Where no demand was made because it was deemed futile, the petition must state with particularity the facts which excuse such demand. See, *Kowalski, supra*; 13 Fletcher et al., *supra*, 6008.

The district court found that ACC "failed to allege that the Receiver had an interest in not pursuing this litigation or that the Receiver acted in bad faith thus excusing [ACC's] failure to make demand." ACC claims that there are circumstances other than bad faith or self-interest which would render demand upon a receiver futile. ACC alleges that such circumstances existed in this case and that the district court thus erred in sustaining appellee's demurrers.

First, ACC alleges that demand is excused in this case because the receiver and the receiver's counsel informed ACC that they were of the opinion that pursuing claims against appellees would be inappropriate. In support of its contention that such circumstances excuse demand, ACC cites *Nussbacher v. Continental Ill. Nat. B. & T. Co., Chicago*, 518 F.2d 873 (7th Cir. 1975), *overruled by Kamen v. Kemper Financial Services, Inc.*, 908 F.2d 1338 (7th Cir. 1990), *rev'd* 500 U.S. 90, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991), and *In re Pittsburgh & Lake Erie R. Co. Sec. & Antitr. Lit.*, 392 F. Supp. 492 (E.D. Pa. 1975). ACC contends that the courts in these cases held that a shareholder who seeks to bring a derivative action is excused from making a demand where evidence reveals that the board of directors, the board's legal counsel, or both have been opposed to bringing the action. ACC contends that these cases support a finding that demand was excused in this case because the receiver and the receiver's legal counsel informed ACC (after this litigation had been initiated) that they had been opposed to bringing any action against appellees ever since the cause of action arose.

ACC's argument fails, however, because ACC mischaracterizes the holdings in these cases. Both *Nussbacher* and *In re Pittsburgh & Lake Erie R. Co. Sec. & Antitr. Lit.* involved

situations where shareholders alleged wrongdoing by the board of directors. In finding that demand was excused, the courts in those cases applied the generally accepted rule of corporate law which states that it is futile to request directors who are accused of wrongdoing to sue themselves. In the present action, however, ACC has not named Commonwealth directors or the receiver as defendants, but has named outside parties as defendants. With regard to this contention, ACC is not asking a wrongdoer to sue himself, as was the situation in *Nussbacher* and *In re Pittsburgh & Lake Erie R. Co. Sec. & Antitr. Lit.* ACC's contention that it is excused from making a demand on the receiver solely because the receiver and the receiver's counsel were opposed to bringing such action is thus without merit.

ACC also relies on *Zilker v. Klein*, 510 F. Supp. 1070 (N.D. Ill. 1981), for the proposition that demand is excused in a derivative action against a corporation's board of directors where the directors "failed to deal with" the subject matter of the action independently for 4 years after the derivative suit was filed. Brief for appellant at 14. ACC thus contends that because the receiver in this case failed to bring an action against appellees for nearly 4 years prior to the filing of this action, ACC is excused from making a demand on the receiver. Once again, ACC mischaracterizes the case it cites for support. In *Zilker*, the court held that demand was excused because the action was brought against the board of directors of the corporation, and as such, a demand that the directors sue themselves would be futile.

[5] ACC's above arguments regarding futility of demand are also contrary to a basic tenet of corporate law known as the business judgment rule. According to the business judgment rule, "courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." 3A Fletcher et al., *supra*, § 1039 at 8 (Cum. Supp. 1993). The Nebraska Supreme Court has acknowledged the validity of the business judgment rule, stating:

> Within the limits of their authority directors possess full discretionary powers, and in the honest and reasonable

> exercise of such powers are not subject to control by stockholders or by courts at the instance of stockholders. The accepted principle is that the wisdom and expediency of business policies and the methods of executing them are left to the discretion and decision of the board of directors. The established rule is that, in the absence of usurpation, or fraud, or of gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule and control the discretion of directors on questions of corporate management, policy or business.

Royal Highlanders v. Wiseman, 140 Neb. 28, 38, 299 N.W. 459, 464-65 (1941).

[6] The business judgment rule applies equally to a derivative action where the corporation is in the hands of a receiver. See, *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973) (stating that the principles expressed by the business judgment rule applied with equal force to derivative actions by depositors of a bank under the control of a receiver); *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). Neb. Rev. Stat. § 8-199 (Reissue 1983) provided that the receiver has the power to bring actions on behalf of the corporation. See *Weimer, supra*. In effect, the receiver steps into the shoes of the corporation's board of directors in this regard. See *id.*

ACC's arguments that demand would be futile in this case because the receiver was opposed to bringing an action against appellees or that the receiver refused to deal with the subject matter of this action run contrary to the business judgment rule. In effect, ACC is requesting this court to substitute its judgment for that of the receiver and the receivership court. We refuse to do so absent a showing of bad faith, fraud, or gross negligence. See *Royal Highlanders, supra*.

ACC has made several allegations of bad faith in its petition and in its arguments before this court. ACC first alleges that demand was futile because the receiver had a potential conflict of interest arising out of the indemnification agreement between the receiver and the NDIGC. As noted in the "Factual Background" portion of this opinion, this agreement provided that the NDIGC would transfer its remaining assets ($3 million)

to the receiver and that the receiver would indemnify the NDIGC and its officers and directors (some of whom are appellees in this action) against any claims *arising out of that transfer*. This court fails to see how this agreement results in a conflict of interest for the receiver. Clearly, the agreement does not anticipate nor require that the receiver indemnify appellees regarding this action prosecuted by ACC. ACC thus has not shown a conflict of interest or other circumstances that would excuse demand with regard to this agreement.

ACC also alleges that the settlement agreement between the receiver and the State pursuant to the action brought under the State Tort Claims Act created a conflict of interest for the receiver. This agreement released all state officers and employees from liability in exchange for $8.5 million to be paid to the receiver. ACC alleges that because the present action originally included state officers as defendants, the receiver had conflicting interests between "pursuing this suit as it was originally filed, and honoring its own settlement." Brief for appellant at 17. This argument is also without merit. Appellees in the present action are not state officers or employees. See, *Landy, supra*; *Weimer, supra*. The receiver's settlement of claims against nonparties to this action does not result in a conflict of interest.

Demand Made in a Related Case as a Basis for Futility.

ACC also claims that it is excused from making a demand on the receiver because Weimer made a demand on the receivership court. In support of this proposition, ACC cites *Nussbacher, supra*, and *Zimmerman v. Bell*, 585 F. Supp. 512 (D. Md. 1984); ACC's reliance on these cases is also misplaced. In both *Nussbacher* and *Zimmerman*, the court based its finding of futility primarily on the fact that the board had participated in the wrongdoing that gave rise to the derivative action.

Even if we were to accept ACC's contention that a demand made in a related action excuses the demand requirement in a subsequent derivative action, we would conclude that ACC was not excused from making demand in this case. As discussed above, Weimer's application in the receivership proceedings did not constitute a valid demand, and therefore, in this case there

was no demand made in a related action.

CONCLUSION

The court in *Weimer* held that a derivative action may only be maintained by ACC if ACC alleged in its petition the fact that it had made a demand on the receiver or facts revealing that such demand would have been futile. ACC has failed to do either in its third amended petition. Therefore, we affirm the order of the district court dismissing ACC's third amended petition for failure to state a cause of action.

[7] Neb. Rev. Stat. § 25-854 (Reissue 1989) provides that if a demurrer is sustained, "the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct." ACC has acknowledged that it made no demand on the receiver prior to initiation of this action. We have also found that ACC's allegations of fraud or self-interest with regard to its futility argument are unfounded. Therefore, we cannot imagine any circumstances under which ACC could sufficiently allege a derivative cause of action against appellees in an amended petition. Because the defect in ACC's petition cannot be remedied by amendment, we affirm the trial court's ruling dismissing this action.

INTERVENTION

In December 1988, while this action was pending appeal in *Weimer*, the successor receiver assigned his causes of action against appellees to ACC. However, ACC did not petition to intervene while this case was in the district court on subsequent remand. Rather, ACC, in its capacity as assignee of the receiver, has filed a petition in intervention while this action has been on appeal to this court. We thus address the issue of whether ACC is permitted to intervene in this action on appeal in its capacity as assignee of the receiver.

In *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990), the court held that the Commonwealth receiver was the real party in interest in this action. Due to the assignment, ACC, as assignee of the receiver, is now the real party in interest in this action. If ACC is allowed to intervene, the action will no longer be derivative, and the issues regarding derivative actions and

demand addressed in the Supreme Court, the district court, and this court will be rendered moot.

Neb. Rev. Stat. § 25-328 (Reissue 1989) addresses intervention as a matter of right. Section 25-328 states:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action . . . *before the trial commences.*

(Emphasis supplied.) ACC claims that it has a right to intervene under this statute as assignee of the receiver because the action was dismissed on a demurrer, and thus trial has not yet commenced in this action.

[8] We find that ACC's argument requires a strained reading of § 25-328 and is contrary to well-established law in this state. Although trial has not taken place in this action, a final judgment has been rendered by the district court. Numerous decisions of the Supreme Court make it clear that intervention after judgment cannot be obtained as a matter of right under § 25-328. See, *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 138 N.W.2d 462 (1965); *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962); *Department of Banking v. Stenger*, 132 Neb. 576, 272 N.W. 403 (1937); *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.*, 126 Neb. 744, 254 N.W. 507 (1934). Therefore, we find that ACC, as assignee of the receiver, has no right to intervene in this action while it is on appeal to this court.

[9,10] Although a party may not intervene after judgment as a matter of right, a court of equity may allow intervention after judgment. *Barrett, supra*; *Tillman, supra*. However, intervention after a final judgment should seldom be granted. *Barrett, supra*; *Tillman, supra*. The Nebraska Supreme Court has indicated that intervention should not be allowed where the party seeking to intervene had an opportunity to intervene at an earlier time, yet delayed in doing so:

> A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit.

> An intervener may not unreasonably delay the original parties, unduly retard the trial of the case, or render nugatory a judgment without a compelling cause, particularly when it has been partially performed. Consequently, persons who would otherwise be granted leave to intervene are denied consideration where they sit by and allow litigation to proceed without seasonably requesting leave to enter the case.

Barrett, 179 Neb. at 371, 138 N.W.2d at 465.

In this case, the receiver assigned his causes of action against appellees to ACC in December 1988. ACC had ample opportunity to file its petition for intervention in the district court after the Supreme Court remanded the cause in *Weimer*. However, ACC waited until June 1992, after the action was on appeal to this court, to file a petition for intervention. ACC thus sat by and allowed the litigation to proceed without seasonably requesting leave to enter the case in its capacity as assignee of the receiver. Had ACC petitioned to intervene in the district court, it could have avoided the issues regarding derivative actions and demand, thus saving the parties, the district court, and this court a substantial amount of time and expense. Consistent with *Barrett*, this court denies ACC's request to intervene in this action as assignee of the Commonwealth receiver.

For the above reasons, the district court's order dismissing this action is affirmed.

AFFIRMED.

NUCOR STEEL, A DIVISION OF NUCOR CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. M. BERRI BALKA, TAX COMMISSIONER OF THE NEBRASKA DEPARTMENT OF REVENUE, AND STATE OF NEBRASKA, APPELLEES.

507 N.W.2d 499

Filed October 26, 1993. No. A-92-257.

1. **Administrative Law: Judgments: Final Orders: Time: Appeal and Error.** When a petition seeking review of an agency decision is filed in the district court on or after July 1, 1989, the appeal shall be taken in the manner provided by law for appeals in civil cases. The judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Administrative Law: Taxation: Appeal and Error.** An appeal from a decision by the Tax Commissioner of the State of Nebraska is governed by the Administrative Procedure Act.
3. **Appeal and Error.** In reviewing a law action, the appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
4. **Taxation.** Tangible personal property which is purchased and used as an essential ingredient or component part in the condition in which it was originally purchased should be exempt from taxation. Tangible personal property which is purchased and originally used for a different purpose than as an essential ingredient or component part, but which is later used as an ingredient or component part only after its use for its original purpose has been exhausted should be subject to sales and use tax.

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

Tim O'Neill and V. Gene Summerlin, of Harding & Ogborn, for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Nucor Steel appeals the judgment of the district court which affirmed the order of the Tax Commissioner of the State of Nebraska dated May 17, 1991. The order denied Nucor's petition to abate two deficiency assessments and to grant a refund claim of Nebraska sales and use tax on Nucor's purchase and use of mill rolls and billet guides. Nucor claims such

tangible property is exempt from sales and use tax pursuant to Neb. Rev. Stat. § 77-2702(10)(a), (11)(a), and (20) (Reissue 1990).

SCOPE OF REVIEW

[1] When a petition seeking review of an agency decision is filed in the district court on or after July 1, 1989, the appeal shall be taken in the manner provided by law for appeals in civil cases. The judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 84-918 (Cum. Supp. 1992).

[2] An appeal from a decision by the Tax Commissioner of the State of Nebraska is governed by the Administrative Procedure Act. *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989).

[3] In reviewing a law action, the appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. See *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992).

FACTS

Nucor filed its petition in the Lancaster County District Court requesting the court to vacate the order of the Nebraska Department of Revenue (Department) and to order a refund of sales and use taxes of $28,720.74 plus interest. Tax Commissioner M. Berri Balka and the State of Nebraska were named as the respondents. Nucor alleged that between May 1, 1985, and May 31, 1990, it purchased and used in its manufacturing process several types of mill rolls and billet guides which it claimed were exempt from state sales and use tax because the mill rolls and billet guides enter into or become an ingredient or component part of tangible personal property manufactured for ultimate sale at retail or are purchased for resale in the regular course of Nucor's business.

In 1988, the Department issued Nucor two notices of deficiency determination. Nucor protested the assessments and filed a claim for overpayment of sales and use tax related to the

purchase and use of the mill rolls and billet guides. The Department's order denied Nucor's protest and its refund claim. The hearing officer found that the mill rolls and billet guides purchased and used by Nucor did not qualify as ingredient or component parts of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail, making them subject to the state sales and use tax. The hearing officer also found that the mill rolls and billet guides purchased and used by Nucor were not exempt from sales and use tax as being a "sale for resale."

The district court affirmed the hearing officer's findings and adopted the findings as its own. The Tax Commissioner's order, which dismissed the protest and denied the refund claim, was affirmed by the district court. Nucor assigns as error the district court's affirmance of the Department's determination that the mill rolls and billet guides used by Nucor are not exempt from sales and use tax.

Nucor manufactures steel products in its plant, which is referred to as a "minimill" because it purchases and remelts scrap metal in an electric arc furnace. Nucor purchases its scrap metal through a dealer and also uses "obsolete home scrap," which is generated internally during the process of making steel.

The process begins when scrap is placed into an electric arc furnace until the furnace's capacity is reached. Carbon electrodes are lowered into the furnace and electricity passes through the electrodes forming an arc. The heat generated by the arc melts the scrap metal. During the second phase, lime is added to remove undesirable elements. The lime and these elements form slag that rises to the top of the molten bath. Other elements may then be added to complete the process.

The molten steel is poured from the furnaces into billets, which are long pieces of steel with a square cross section measuring 5 1/4 inches on each side. During the process, the billet is reduced and shaped into the finished product in the rolling mill, which consists of a series of machines called mill stands. Each mill stand holds a pair of mill rolls, which are cylindrical pieces of iron. Shapes or grooves, which are called passes, are cut on the surface of the iron by a turning lathe. Two

mill rolls are mounted on each mill stand, and the steel billet passes between the two mill rolls. The shapes which are cut into the mill rolls correspond so that the steel billet takes on the shape of the passes as it goes through the mill rolls. To reduce the steel billet to the shape and size of the desired product, the billet is run through a series of mill stands. The mill rolls have passes which progressively reduce the billet to the desired shape and size. Billet guides are used on either side of the mill rolls to guide the steel so that it passes between the mill rolls in the proper place.

During this process, the mill rolls and billet guides are worn away by the rolling of the steel, which involves pressure, friction, and heat. Mill rolls and billet guides are made of iron, and they oxidize as they are exposed to air, a process which occurs quickly under extreme heat. During the oxidation, pieces break off and the mill roll passes and billet guides become worn. The high temperature of the mill roll also causes "firecracking," or the creation of small cracks on the surface, and small pieces of the mill roll break away.

As the mill rolls wear away, the passes become worn and lose their shape. This requires that the mill roll be removed and the passes be machined back to their original shape on a turning lathe. Material is removed from the mill roll until the passes again have the proper shape. The process is repeated until the diameter of the mill roll reaches the size where it can no longer be properly adjusted and the diameter no longer exceeds the necks on the mill rolls. When this point is reached, the wornout mill rolls and billet guides are placed in a scrap pile which Nucor eventually uses as part of its source of iron for making steel. The turnings from the lathe are also placed in the scrap pile for future use in the furnace.

The hearing officer found that the value of the mill rolls was in their use to roll steel, not as scrap. The value of the mill rolls as scrap represented 2 to 3 percent of the initial purchase price of the mill rolls. The billet guides were even more expensive than the mill rolls, and their value as scrap was an even smaller percentage of their value as billet guides. If the mill rolls or billet guides were defective, they were used as scrap and the supplier was paid only for their scrap value.

Customers purchasing the steel are provided with a chemical analysis of the steel as it exists in the ladle before it is rolled. The hearing officer concluded that any material which was added to the product after that point would not be considered an essential ingredient or component part of the steel. The hearing officer determined that the mill rolls were purchased almost exclusively for their ability to roll steel and that the billet guides were purchased almost exclusively based on their ability to guide the steel through the mill rolls.

ANALYSIS

Neb. Rev. Stat. § 77-2703(1) (Cum. Supp. 1992) imposes a sales tax upon a taxpayer's gross receipts that stem from all retail sales of tangible personal property sold in Nebraska. A use tax is imposed by § 77-2703(2) upon the storage, use, or other consumption in Nebraska of tangible personal property purchased, leased, or rented from any retailer.

Nucor contends its purchase of mill rolls and billet guides is exempt from sales and use tax because the mill rolls and billet guides are resold in the regular course of Nucor's business. Sales for resale are specifically exempt from sales and use tax. "Retail sale or sale at retail shall mean: (a) A sale for any purpose other than for resale in the regular course of business of tangible personal property." § 77-2702(10)(a). Section 77-2702(20) excludes from the definition of use "the sale of that tangible personal property in the regular course of business or the exercise of any right or power over tangible personal property which will enter into or become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail."

Section 77-2702(14) defines sale for resale as

> a sale of tangible personal property to any purchaser who is purchasing such tangible personal property for the purpose of reselling it in the normal course of his or her business, either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property.

The Nebraska "Sales and Use Tax Regulations" provide:

> The test of a sale at retail is whether . . . the sale is to a

> purchaser for use or consumption and not for resale, either in the form or condition in which it was purchased or made over, or changed into, or included in some form of tangible personal property for resale. Sales of property to manufacturers . . . are not considered to be sales at retail, but are considered to be sales for resale to the extent that such property or its reduced component substances are resold or incorporated into tangible personal property which is sold.

316 Neb. Admin. Code, ch. 1, § 006.03 (1986).

At the beginning of our analysis, we note that the mill rolls and billet guides are used as part of the rolling mill operation and that when they can no longer function in this capacity, because they consist of iron, they become part of the scrap metal, are ultimately melted down, and become part of the billets in Nucor's manufacturing of steel. It is not disputed by the parties that the mill rolls and billet guides ultimately become an ingredient in Nucor's products. Part of the mill rolls and billet guides are incorporated as an ingredient in the steel or incorporated as scale, which Nucor collects and sells to a cement company. It is because of this use and incorporation into products which are ultimately sold to third parties that Nucor contends that the mill rolls and billet guides are exempt from the Nebraska sales and use tax.

We first address Nucor's contention that the mill rolls and billet guides are exempt because they are purchased for resale. Section 77-2702(14) requires that the property be purchased "for the *purpose* of reselling it." (Emphasis supplied.) The burden is on Nucor to establish that it is entitled to an exemption from taxation. Statutes concerning an exemption from taxation are to be strictly construed, and therefore, the claimant who seeks an exemption must establish the entitlement. *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989).

Nucor maintains that one of its purposes in buying the mill rolls and billet guides is for their use as scrap. The hearing officer found that Nucor's choice as to the type of mill rolls to purchase was based on the durability of the mill rolls relative to the cost, measured in terms of the amount of steel which could

be rolled at a given cost. The differences in iron content in the types of available mill rolls was found to be so minimal that such a consideration did not appear to be a real factor in the choice of the mill rolls purchased by Nucor.

The hearing officer found that a portion of the mill rolls and billet guides form scale, which is produced during the steelmaking process. Scale, composed primarily of iron oxide, is an unavoidable result of the process in which iron exposed to air and water at high temperatures oxidizes and forms scale. The oxide is not strongly bonded to the iron surface on which it forms, and the high temperature and friction in the rolling process cause scale to flake off the surface of the billets, mill rolls, and billet guides. Scale rolled into the surface of the steel product is considered undesirable, and Nucor eliminates scale on the products by high-pressure spraying of the scale into a trough. The scale is collected and sold to a third party for use as an ingredient in cement products, which are then sold at retail. Scale must be collected and removed as it accumulates around the machinery and conveyor system. This collection and removal is necessary, even if the scale is not sold. During the years of the assessments and the refund claim, the scale was sold at prices between $14 and $23 per ton. In order to sell the scale, it must be dried and screened to eliminate large pieces. The entire process consists of washing the scale into a sluice system, collecting it in a sump, removing it, drying it, and screening it.

A chemical analysis of the steel is made when the steel is still in the ladle before it is rolled. The hearing officer stated that material added to the steel after this point is, therefore, not considered an essential ingredient or component part. The hearing officer found that Nucor did not purposely change mill rolls and billet guides into scale, as the company wanted to use the mill rolls for as long as possible. Durability is a major factor in selecting the mill rolls, and the scale which originates with the mill rolls is a major factor in the wearing away of the mill rolls and billet guides.

The hearing officer determined that Nucor's reasons for purchasing the mill rolls and billet guides are almost exclusively for their ability to roll steel and guide the steel during the steelmaking process. Their value is in rolling steel, not as scrap.

Wornout mill rolls and billet guides are used as scrap and become an ingredient or component part of the finished steel product only after they are no longer usable as mill rolls and billet guides. The transformation of mill rolls and billet guides into scale is an undesirable but unavoidable process over which Nucor has little control. The scale is collected out of necessity, but then is resold at a price which represents only a small fraction of the cost of the major component. No materials from the mill rolls or billet guides are incorporated as essential ingredients of the steel product during the rolling process.

An appeal from a decision by the Tax Commissioner of the State of Nebraska is governed by the Administrative Procedure Act. *Nucor Steel v. Leuenberger, supra.* A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. § 84-918.

In reviewing this action, we consider the evidence most favorably to the successful party and resolve evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. See *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992). We hold that the district court did not err in affirming that Nucor did not purchase mill rolls or billet guides for the purpose of resale, which would exempt the property from sales and use tax. Nucor did not satisfy the requirement of § 77-2702(14) that the mill rolls and billet guides be purchased for the purpose of resale.

We next address Nucor's argument that the purchase and use of mill rolls and billet guides are exempt from sales and use tax because they will enter into and become an ingredient or component part of the tangible personal property manufactured, processed, or fabricated for ultimate sale at retail. The ingredient or component part exemption has been the subject of several Nebraska cases. In *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979), the court held that cellulose casings used in the manufacture of skinless meat products, e.g., frankfurters, did not become an ingredient or component part of the finished product and therefore were subject to a use tax. The casings contained glycerin, part of

which migrated into the meat as the casings were used to shape the meat product. The casings were removed and discarded after being used to shape the product. The court held that the presence of the glycerin was incidental and that the glycerin was not an essential ingredient of the final product.

In *Nucor Steel v. Herrington*, 212 Neb. 310, 322 N.W.2d 647 (1982), a portion of the electrodes used in the casting of steel became a component of the finished steel product. The court found that the carbon from the graphite electrodes entered into and became an essential ingredient and component part of the finished steel. The electrodes served two functions: They formed an arc which was used to melt and refine scrap into steel products, and they added essential carbon to the steel as they broke off or were intentionally lowered into the melt. The court found that it was not necessary that the sole purpose of the electrodes was their incorporation into the end product. The court stated that where a substantial part of the graphite electrodes entered into and became an essential ingredient of the finished steel and the remainder was consumed in the manufacturing and refining process, the use of the graphite electrodes in the manufacturing and processing of steel was not subject to taxation.

In *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989), refractories, which served as an insulating and protecting barrier for equipment that was exposed to the high temperature of molten steel, were sought to be exempted from taxation. The refractories did not melt from the heat used to make molten steel, but they wore away, deteriorated, and had to be replaced when they no longer served as effective insulators. As the refractories wore away from the walls of the manufacturing equipment, they fell into the slag, which is a substance made up of impurities extracted during refining. The remaining refractories which were no longer adequate as insulators were also removed and placed in the slag pile. The slag consisted of lime, impurities from scrap metal, and the refractory material. After iron was removed from the slag pile, some of the slag was sold as a substitute for gravel.

Some of the refractory material ended up in scale and "bag dust." Scale was sold to a manufacturer. Its value came from the

iron oxide of the scale, not from the refractory material. Bag dust, which contained minute pieces of refractory material, was sold or given away for use in fertilizer. The value of bag dust was attributed to zinc and iron, not the refractory material.

Nucor argued that because almost all of the refractories were eventually present in slag, scale, or bag dust, the refractories were exempt from tax because they became an ingredient or component part of tangible personal property manufactured for ultimate sale at retail and that the refractories were purchased for use in resale.

The court held:

> [M]aterial which only accidentally or incidentally becomes incorporated into a finished product and which is not an essential ingredient of the finished product is subject to sales and use tax because such material is not an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.

Id. at 872, 448 N.W.2d at 914.

Here, the mill rolls and billet guides are used as scrap only after they no longer have value in the steel rolling process. Nucor obtains scrap from a number of other sources, so the availability of mill rolls and billet guides is not crucial to the steelmaking process. Nucor seeks to exempt the purchase price of the mill rolls and billet guides while they are used as such and does not seek to exempt the value of the mill rolls and billet guides as scrap metal when they are used as a component of the steel. The distinction is material to our decision in this case. As a source of raw material for the steel, the mill rolls' value as an ingredient or component part of steelmaking represents only 2 to 3 percent of the purchase price for the mill rolls.

We believe that in our review of the sales and use tax, the claim of an exemption must be considered in a reasonable and practical manner. If we accept Nucor's argument that the mill rolls are made of metal, which is a component of steel, and therefore the use of wornout mill rolls and billet guides as scrap metal makes their purchase price exempt from taxation, all metal products purchased in connection with the manufacture of steel would be exempt from taxation, provided the

manufacturer ultimately melted the product and resold it as steel. Trucks and other steel equipment used for transportation of the raw materials to the furnace, upon being exhausted for this purpose, could be thrown into the melting pot as a component of the steel and therefore could be claimed to be exempt from taxation.

The problem of applying broad general rules to the taxation process is readily apparent. The purchase price of any material thrown into the melting pot which becomes an ingredient of the finished product would be exempt from taxation as a component part. Thus, the use of a limousine as an ingredient of the molten steel would exempt the purchase price of the automobile from taxation. This would be true if the limousine transported the president of the company to work and later became a component of the steel when the car's bumpers, fenders, and engine were melted into a new steel creation. With such an outcome, the company could exempt the purchase price of any item which became a component part of the newly manufactured steel.

[4] The determination of an exemption must be made on the facts of each case. We hold in this case that tangible personal property which is purchased and used as an essential ingredient or component part in the condition in which it was originally purchased should be exempt from taxation. Tangible personal property which is purchased and originally used for a different purpose than as an essential ingredient or component part of steel manufacturing, but which is later used as an ingredient or component part of the steel only after its use for its original purpose has been exhausted should be subject to sales and use tax.

Nucor's mill rolls and billet guides are used as scrap and become an ingredient or component part of Nucor steel only when their usefulness as mill rolls and billet guides has been exhausted. Such use is no different than the truck which hauled the scrap to the plant and was later used as scrap metal after its primary purpose had been exhausted. The mill rolls and billet guides are not purchased for their value as scrap, but are purchased for their use in the steelmaking process. The value of the finished product, steel, is not obtained because the

substances in the mill rolls and billet guides are melted to become a component part of the steel. The presence of the mill rolls and billet guides is incidental to the final product, and the purchase price of the mill rolls and billet guides is not exempt from taxation.

The burden is on Nucor to establish that it is entitled to the exemption from taxation. See *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989). Nucor has failed to meet that burden. The district court did not err in affirming the Department's order dismissing Nucor's protest and denying its claim for refund. We find that the district court correctly affirmed the finding of the hearing officer that the mill rolls and billet guides are not exempt from Nebraska sales and use tax. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVIN D. EDWARDS, APPELLANT.

507 N.W.2d 506

Filed October 26, 1993. No. A-92-954.

1. **Juries: Discrimination: Prosecuting Attorneys: Proof.** 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 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 neutral explanation for challenging the jurors on the basis of their race.
2. **Juries: Discrimination: Appeal and Error.** The trial court's determination as to whether a defendant has established purposeful discrimination in jury selection is a finding of fact entitled to appropriate deference from an appellate court.
3. _____: _____: _____. The trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed upon appeal unless clearly erroneous.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of

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.

5. **Motions for New Trial: Evidence.** The newly discovered evidence offered in support of a motion for new trial must be such that, by strengthening the evidence already offered, a new trial would probably result in a different verdict.
6. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, a defendant must show, first, that counsel's performance was deficient and, second, that such deficient performance prejudiced the defense such that there is a reasonable probability that but for counsel's deficient performance the result would have been different.
7. **Rules of Evidence: Other Acts: Proof.** 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.
8. **Rules of Evidence: Other Acts.** Under Neb. Rev. Stat. § 27-609 (Reissue 1989), once a prior conviction has been established, the inquiry must end, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
9. **Constitutional Law: Effectiveness of Counsel: Proof.** Generally, there is no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.
10. **Effectiveness of Counsel: Proof: Words and Phrases.** A defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
11. **Verdicts: Appeal and Error.** An appellate court will not interfere with a guilty verdict based upon the evidence unless the evidence is so lacking in probative force that it can be said that as a matter of law the evidence is insufficient to support the verdict beyond a reasonable doubt.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Richard J. Epstein for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Marvin D. Edwards appeals his convictions for unlawful possession with intent to deliver a controlled substance and possession of a firearm by a felon. He assigns as error the district court's overruling his objection to the State's use of two

peremptory challenges in excluding two black potential jurors, and the court's overruling his motion for a new trial based upon ineffective assistance of counsel. He also contends that the evidence is insufficient as a matter of law to support his convictions.

SCOPE OF REVIEW

A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed upon appeal unless clearly erroneous. *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991).

A motion for new trial on the basis of 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. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992).

FACTS

The Omaha Police Division obtained a search warrant for a residence located at 4712 North 40th Street in Omaha, Nebraska. The warrant was served by Omaha police in the evening hours of November 20, 1991. Edwards was one of the parties arrested inside the residence during the search, after police officers observed Edwards in the northeast bedroom and ordered him to the ground. As the police rolled him over, they found a loaded semiautomatic pistol described as a Taurus 9 mm. In the right front pocket of Edwards' jacket, police found $805. Items of venue were found indicating that the home was occupied by Damon Ellington and Eugenia Luker. An AT&T bill in Ellington's name included a number of long-distance calls to Edwards in Bakersfield, California.

Outside the house, Officer Mark Lang saw that the basement door was slightly ajar, and he noticed a footprint in an area of fresh dirt. In the backyard, Lang dug about 5 inches into the dirt and found a white plastic bag and an athletic supporter. Inside the athletic supporter were seven plastic baggies of crack cocaine which weighed a total of 11 ounces. A shovel with a small amount of dirt on it was found on the basement stairway.

On the State's motion, Edwards' case was consolidated with those of Ellington, Luker, and Calvin Wright. Ellington and

Luker entered guilty pleas, and Edwards and Wright were subsequently tried together. During voir dire, the State used peremptory challenges to excuse two potential jurors. One potential juror (venireperson No. 1), who lived near 42d and Cuming Streets, stated during voir dire that she worked as an encoder at First Data Resources and that her husband was retired. When asked where her husband had worked before retirement, she replied: "I have no idea. I can't remember offhand. I recently — I was recently married." When questioned about any experiences she had had as a victim of crime, she said: "It has something to do with molestation of a minor." She said that the case had been completed. She did not recall the name of the prosecutor, but said she was not satisfied with the fact that the case took place, but that the outcome had justified the means.

The other potential juror (venireperson No. 2), who lived near 43d and Lake Streets, stated during voir dire that she was unemployed and single and that she had served on a jury about 3 years earlier in a case involving a stolen car. The homes of her brother and mother had been burglarized on two separate occasions, and no one had been arrested. She said that the police had responded and conducted "[s]omewhat" of an investigation, but she did not think the police had done all they could under the circumstances.

After the State exercised its peremptory challenges, the defense requested that the State articulate its reasons for striking the two black potential jurors. Of the three black potential jurors in the pool, the State struck two and the defense struck one. The State said it struck venireperson No. 1 because it was concerned that she did not know the identity of her husband's employer and because she had had contact with the county attorney's office in a sexual assault case and seemed reluctant to discuss the facts of the case. The court suggested that additional inquiries could be made concerning her husband's employment to find out if there was a justification for her being stricken.

The State said it struck venireperson No. 2 because she lived near 43d and Lake Streets, was unemployed and single, had no ties to the community, and was not satisfied with the police

response to her family's burglaries. The court stated that the potential juror's address or her ties to the community were not sufficient reasons to strike her from the panel, but added that her opinion that the police failed to do all they could in regard to the burglaries showed some potential negative feelings about the police and their ability to follow up on crimes and was a substantive position that would justify striking venireperson No. 2. Venireperson No. 1's inability to state her husband's occupation might reflect that she was not alert, adept, and able to assimilate the evidence, and the court found that this was a neutral basis for striking venireperson No. 1 and allowed the potential jurors to be stricken.

At trial, Larissa Minnex testified that the night of the search she saw Edwards go into the backyard of the home for 5 to 10 minutes with his codefendant and that when they returned, Edwards was carrying a shovel. When Minnex, Edwards, and two others went to a liquor store, Edwards said he was worried and wanted to return to the house to check on something in the backyard. Upon their return from the liquor store, Edwards and his codefendant went to the backyard. About 2 minutes later, the police entered the house pursuant to the search warrant.

Luker, who lived in the house with Ellington, pleaded guilty to possession of crack cocaine and testified for the State. She said that Edwards first came to Omaha from Bakersfield, California, in September 1991 and that he stayed in the northeast bedroom of the house. She said that Edwards brought some crack cocaine with him and that at the time he arrived, he had a gun.

Ellington pleaded guilty to a drug-related Class III felony. He testified that he had been involved in selling crack for about 1 1/2 years and that he usually bought about an ounce of crack and then sold it piece by piece for $20 to $100. He said that Edwards was his supplier and that Edwards had brought the handgun in October and left it at Ellington's house.

A chemist testified for the State that the baggies found in the backyard contained crack cocaine which weighed approximately 10 ounces. Swabs of Edwards' hands tested positive for cocaine and marijuana.

Evidence that Edwards had a prior felony conviction was admitted via a copy of the district court judge's journal entry. The prosecutor, without objection from the defense, stated that Edwards had been convicted of possession of a controlled substance and was sentenced to 1 year in prison. During the course of the trial, the codefendant's counsel questioned Edwards about his prior drug conviction.

ANALYSIS

Edwards argues that in two instances the State discriminatorily excluded blacks from the jury. In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the U.S. Supreme Court held that the Equal Protection Clause of the U.S. Constitution forbids a prosecutor from using peremptory challenges to strike individuals from a jury based solely on their race. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

[1] 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 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 neutral explanation for challenging the jurors on the basis of their race. *Id.*

[2,3] In *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988), the Nebraska Supreme Court applied the *Batson* test and stated that the prosecutor's explanations do not need to rise to the level of a challenge for cause. If the trial court does not state on the record that the defendant has met the burden of proving a prima facie case, "it does so implicitly by asking the State to articulate its reason for the questioned strikes." *Rowe*, 228 Neb. at 669, 423 N.W.2d at 787. The trial court's determination as to whether a defendant has established purposeful discrimination is a finding of fact "entitled to appropriate deference" from an

appellate court. *Id.* at 670, 423 N.W.2d at 787. The trial court's "determination of the adequacy of the State's 'neutral explanation' of its challenges will not be reversed upon appeal unless clearly erroneous." *State v. Morrow*, 237 Neb. 653, 662, 467 N.W.2d 63, 70 (1991).

We find that the trial court was not clearly wrong in holding that the State's peremptory challenges were used in a nondiscriminatory manner in this case. The fact that venireperson No. 1 was unable to explain where her husband had worked could lead the State to believe, as the court noted, that she was not alert, adept, and able to assimilate the evidence. Venireperson No. 2 expressed her dissatisfaction with the police following burglaries of her relatives' homes, which is a sufficiently neutral reason to challenge her placement on the jury. We find that Edwards' first assignment of error has no merit.

Edwards next argues that the trial court erred in overruling his motion for new trial on the basis of ineffective assistance of counsel. The jury's verdicts were returned on June 9, 1992, and Edwards' motion for new trial was not filed until September 21. The motion for new trial was overruled, and Edwards was sentenced on September 23. A motion for new trial must be filed within 10 days after the verdict unless the motion is based on newly discovered evidence. Neb. Rev. Stat. § 29-2103 (Reissue 1989). Although Edwards contends that a new trial should be granted because of newly discovered evidence, he does not state the substance of any newly discovered evidence. Instead, Edwards provides a number of other reasons as to why he believes a new trial should be allowed, including that the witnesses were allowed to testify to hearsay and to other matters without proper foundation and that exhibits were introduced which were without foundation and were hearsay.

[4] A motion for new trial on the basis of 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. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992).

Section 29-2103 provides:

> In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by

> affidavits, depositions, or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial . . . .

Edwards' affidavit states that he had only two conferences with trial counsel prior to the hearing on the motion to suppress and that Edwards' trial counsel never discussed with him the preparation of the case or the issues prior to trial. The first time counsel told Edwards that he would have to testify was either the day before or the day of his testimony. During the trial, counsel did not object when the codefendant's counsel questioned Edwards about a prior drug conviction. Edwards states that his trial counsel refused to draft a motion requesting another attorney and that he could not raise these issues until a new attorney had been appointed after trial.

[5] The newly discovered evidence offered in support of a motion for new trial must be such that, by strengthening the evidence already offered, a new trial would probably result in a different verdict. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). Here, Edwards offers no newly discovered evidence, but, instead, offers his contention that his trial counsel did not adequately represent him, failed to prepare his testimony, and failed to offer appropriate objections during trial. We agree with Edwards' contention that he was not able to raise these issues until a new attorney had been appointed after trial and that since his new counsel was appointed on July 6, his motion for new trial could not have been filed within 10 days of the verdicts. However, we find that the court did not abuse its discretion in refusing to grant Edwards a new trial based on the affidavits and evidence submitted on Edwards' motion.

[6] Although it is not precisely stated in the assignments of error, we consider Edwards' contention that he was denied effective assistance of counsel at trial. To sustain a claim of ineffective assistance of counsel, a defendant must show, first, that counsel's performance was deficient and, second, that such deficient performance prejudiced the defense such that there is

a reasonable probability that but for counsel's deficient performance the result would have been different. See *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992).

[7] Edwards argues that his counsel should have objected when the codefendant's counsel asked Edwards about a previous drug conviction. 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. *State v. Farrell*, 242 Neb. 877, 497 N.W.2d 17 (1993). In response to a question asked by his codefendant's counsel, Edwards admitted that he had been convicted of possession of a controlled substance, crack cocaine, and that he had pleaded guilty because he was offered a deal. Without objection from Edwards' counsel, Edwards testified that he had a failure to appear charge pending against him and that drugs had been planted on him by police when he went to the police station for an identification check. Our consideration in this case is not whether the court should have excluded the testimony, since Edwards' attorney did not object, but whether Edwards has demonstrated with a reasonable probability that if the jury had not been informed that Edwards had previously been convicted of possession of a controlled substance, Edwards would not have been convicted of possession of crack cocaine with intent to deliver.

Objections to testimony about a prior conviction for a similar offense are usually raised in the context of the failure of the trial court to sustain an objection to questions by the prosecutor concerning previous criminal activity of the defendant. In *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987), the defendant was convicted of the felony of issuing an insufficient-fund check. The defendant claimed the court erred in not declaring a mistrial based on misconduct by the prosecuting attorney. During the trial, the prosecutor asked the defendant whether he had ever sold unregistered securities and whether he was in prison in the months of January to June 1985. A motion for mistrial on the grounds that the prosecutor had deliberately sought to inflame the jury with this line of questioning was denied, but the court instructed the jury that the question was improper and should be disregarded. The

Supreme Court found that it was apparent that the prosecutor was trying to communicate to the jury that the defendant had been in prison for selling unregistered securities, a similar offense to writing an insufficient-fund check. The court found that the prosecutor's method was wholly improper and reversed the conviction. The court noted that since the credibility of the witness was the critical issue, the determination of whether the defendant could have received a fair trial was questionable.

[8] Under Neb. Rev. Stat. § 27-609 (Reissue 1989), once a prior conviction has been established, the inquiry must end, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof. See *State v. Daugherty*, 215 Neb. 45, 337 N.W.2d 128 (1983). In *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989), the court found that the prosecutor's impeachment of the defendant by questions concerning the number of times he had been convicted of felonious escape was improper and that such error was not harmless.

Although not assigned as error, we point out that the prosecutor in this case offered the transcript of Edwards' prior conviction, including the type of crime and the sentence, without objection by Edwards' counsel. In addition, the prosecutor told the jury via a statement to the court that the exhibit was a certified copy regarding a previous felony conviction where Edwards was "convicted of possession of a controlled substance and sentenced to one year at hard labor at the Nebraska penal complex" in 1991. The exhibit should not have contained a description of the crime or the sentence, and the prosecutor's comment about the contents of the exhibit was improper. See § 27-609.

[9,10] The issue in this case is whether counsel's failure to object when codefendant's counsel asked Edwards about his previous felony conviction and counsel's failure to object to the improper offering of the certified copy regarding Edwards' prior conviction sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution. In *State v. Hawthorne*, 230 Neb. 343, 431 N.W.2d 630 (1988), the defendant based his ineffective assistance of counsel claim on the fact that his retained lawyer

elicited testimony from the defendant during direct examination that the defendant had been convicted of a felony more than 10 years before the trial for first degree sexual assault. The court stated, " '[T]here is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.' " *Id.* at 344, 431 N.W.2d at 631. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The *Hawthorne* court, applying the *Strickland* test, found that the conduct of Hawthorne's counsel "in eliciting from Hawthorne testimony concerning the prior felony (burglary) conviction, which was otherwise inadmissible as evidence, was performance which fell below a standard of reasonableness required in the defense of a criminal charge, namely, conversance with the rules of evidence." *Hawthorne*, 230 Neb. at 353, 431 N.W.2d at 636. Applying the same reasoning used in *Hawthorne*, we find that under the circumstances of this case, the conduct of Edwards' counsel in failing to object to codefendant's counsel's inquiry regarding Edwards' prior drug conviction and in failing to object to the State's introduction of evidence concerning the details of the prior conviction fell below the standard of reasonableness required of Edwards' counsel.

We next determine whether Edwards has demonstrated with reasonable probability that but for the information about his prior drug conviction, the jury would have acquitted Edwards on the charge of possession of cocaine with intent to deliver. Edwards denied possession of the cocaine. The evidence showed that Edwards was seen going to the backyard that night, was seen returning with a shovel, had expressed concern about the backyard, and had gone to check the backyard. During the search, crack cocaine was found buried in the backyard. Two witnesses for the State testified that Edwards brought crack cocaine with him from California and sold it in

Omaha.

Under the *Strickland* test, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. We find that the failure of Edwards' counsel to object to this evidence undermines our confidence in the outcome as to Edwards' conviction for possession of cocaine with intent to deliver. The jury, in attempting to determine which of the defendants were in possession of the crack cocaine, could in our opinion rely heavily upon the fact that Edwards had previously been convicted of possession of a controlled substance. We therefore reverse Edwards' conviction for possession of crack cocaine with intent to deliver and remand the matter for a new trial on that issue.

Our inquiry does not end here because Edwards was also convicted of being a felon in possession of a firearm. We review the evidence to determine whether counsel's performance also prejudiced Edwards' conviction involving the firearm. The evidence established that at the time the search warrant was executed, Edwards was residing in the northeast bedroom of the residence. During the search, Edwards was lying on top of a gym bag in the northeast bedroom, and as the police rolled him over, they found a loaded, semiautomatic Taurus 9-mm pistol. The gun was in proper working order and ready to fire. Ellington and Luker testified that Edwards had brought a pistol from California and that he kept it at the residence. As we review the evidence, we cannot say that but for the admission of the prior drug-related conviction Edwards would not have been convicted for possession of the firearm. Even if Edwards' credibility were at issue, the fact that Edwards was lying on top of the pistol is uncontroverted. We cannot say that counsel's performance prejudiced Edwards' defense on this charge such that there is a reasonable probability the result would have been different. The prosecutor could have properly introduced evidence that Edwards had a prior felony conviction in 1991. We therefore affirm Edwards' conviction for possession of a firearm by a felon.

[11] Direct evidence was presented to show that Edwards was a felon in possession of a firearm. We will not interfere with a guilty verdict based upon the evidence unless the evidence is so

lacking in probative force that it can be said that as a matter of law the evidence is insufficient to support the verdict beyond a reasonable doubt. *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993). The conviction for possession of a firearm by a felon is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

BRIAN T. BENNETT AND MARY JO BENNETT, HUSBAND AND WIFE, ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF CITY OF LINCOLN, NEBRASKA, AND CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEES.

507 N.W.2d 514

Filed October 26, 1993. No. A-93-606.

1. **Special Assessments: Proof: Appeal and Error.** In an appeal from a levy of a special assessment, the party contesting the assessment has the burden of showing invalidity.
2. **Special Assessments: Appeal and Error.** In all appeals from special assessments, an appellate court must, upon review de novo on the record, retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to the conclusion reached by the district court or the fact that there may be some evidence in support thereof.
3. **Special Assessments: Improvements: Words and Phrases.** Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvement in excess of the benefits accruing to property or people in general.
4. **Special Assessments: Improvements.** It is a question of fact whether a property which has been specially assessed has benefited or will benefit from an improvement project.
5. **Special Assessments: Presumptions.** The amount of a special assessment cannot exceed the amount of benefits conferred, but a presumption exists that the amount of a special assessment was arrived at with reference only to the benefits which accrued to the property affected.

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

J. Michael Rierden for appellants.

William F. Austin, Lincoln City Attorney, and Don W. Taute for appellees.

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

SIEVERS, Chief Judge.

This is an appeal from an order of the district court for Lancaster County, Nebraska, affirming special assessments levied against the appellants' properties by the Lincoln City Council, sitting as the Board of Equalization of City of Lincoln. The board of equalization levied assessments on the appellants' properties for benefits conferred on those properties as a result of a paving improvement along a portion of South 27th Street.

On December 16, 1987, the City of Lincoln created paving district No. 2542 by ordinance No. 14807. The ordinance designated properties to be benefited as a result of the paving of South 27th Street between Old Cheney Road and the southern boundary of Southern Hills 1st Addition. The benefited properties generally are within an area approximately 200 feet on either side of the centerline of South 27th Street, as well as six properties off the west side of South 27th Street on Norman Circle. The ordinance further provided that the cost of paving South 27th Street should be assessed against the properties benefited within paving district No. 2542 in proportion to the benefits, not exceeding the cost of the improvement.

The paving improvement was completed by November 1988. The city council passed an assessment resolution on December 4, 1989, assessing a portion of the paving cost against properties within paving district No. 2542. The assessment resolution proposed a total assessment of $80,726.12 at the rate of $.09 per square foot to all the properties within paving district No. 2542, including the appellants' properties. The total cost for constructing the paved road was $438,134.62. The City of Lincoln subsidized $357,408.50 of that amount. Therefore, the amount assessed to properties in the paving district represented

18.4 percent of the total cost of the paving improvement.

On December 11 and 18, 1989, the city council, sitting as the board of equalization, held a hearing to consider the proposed special assessments. Numerous property owners within paving district No. 2542 voiced objections to the proposed assessments. The board of equalization subsequently overruled the objections, and the assessments were levied in the amounts set forth in the assessment resolution.

The property owners appealed the decision of the board of equalization to the district court for Lancaster County, pursuant to Neb. Rev. Stat. § 15-1201 et seq. (Reissue 1991). After a hearing, the district court ruled in favor of the appellants. However, the district court sustained the appellees' motion for new trial. After a new trial, the district court affirmed the decision of the board of equalization. After the property owners' motion for new trial was denied, this appeal followed.

On appeal to this court, the appellants' assignments of error can be summarized into the following: (1) that the district court erred in not finding that a Lincoln municipal ordinance precluded the assessments against their properties; (2) that the district court should not have relied on the district court for Lancaster County's decision in Pester v. Board of Equal. of City of Lincoln, Lancaster County District Court, docket 355, page 52; and (3) that the district court erred in finding that the appellants received benefits beyond those enjoyed by the general public.

[1,2] In an appeal from a levy of a special assessment, the party contesting the assessment has the burden of showing invalidity. *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993). In all appeals of such actions, an appellate court must, upon review de novo on the record, retry the issues of fact involved and reach an independent conclusion as to the findings required under the pleadings and all the evidence, without reference to the conclusion reached by the district court or the fact that there may be some evidence in support thereof. *Id.*

The appellants in this case are various property owners in Chez Ami Knolls 3d & 5th Additions, Sevenoaks 1st Addition, and Southern Hills 1st Addition, all subdivisions that abut

South 27th Street. The platting ordinances of these subdivisions required that the owners of lots that directly abut South 27th Street relinquish the right of direct vehicular access to South 27th Street. The appellants argue that since they were required to relinquish direct access to South 27th Street, they should not be required to pay any of the cost associated with the paving of the street, pursuant to the Nebraska Supreme Court's decision in *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980), and pursuant to Lincoln Mun. Code. § 26.11.110 (1989).

In *Briar West, Inc.*, pursuant to a platting ordinance, a subdivider was required to relinquish the right of direct vehicular access from all lots abutting South 27th Street and Old Cheney Road. The subdivider was also required to pay " 'the equivalent cost of local street paving installation' for the future installation of widened paving on both of the streets [South 27th Street and Old Cheney Road]" by immediate early payment or by furnishing a bond. 206 Neb. at 174, 291 N.W.2d at 731. The developer of the land filed a declaratory judgment action seeking a declaration that it was not required to pay the local street paving cost. The Nebraska Supreme Court determined that the city had no power to assess the cost of local street installation to be used to pay for future street widening:

> The city has not attempted in any way to link the required payment to special benefits conferred upon the subdivision by the future improvement of Old Cheney Road and South 27th Street. Nor is there any indication that any special benefits would, in fact, arise from such future improvement.
>
> . . . .
>
> . . . No case has been cited under either rule in which a court has held it to be reasonable for a city to require a developer to relinquish all right of direct access to an arterial street from all abutting lots in the subdivision and, at the same time, pay the costs of future widening and paving of the street to which access has been restricted. The unreasonableness of such a requirement is accentuated in the present case by the fact that no time limit is specified for the widening and paving of the streets

> nor, indeed, is there any absolute requirement that it be done at all.

Id. at 179-80, 291 N.W.2d at 733-34.

Section 26.11.110 sets forth a subdivider's responsibilities for improvements in collector and major streets. After the *Briar West, Inc.* decision, this ordinance was amended to provide in relevant part:

> The subdivider shall be responsible for:
>
> (a) The equivalent cost of local street paving in a major street when:
>
> (1) The subdivision abuts such major street;
>
> (2) The major street is within the city limits or will be annexed with final plat approval; and
>
> (3) Improvement of the major street is planned in the six-year capital improvements program; provided, however, no payment shall be required when individual lot access to such major street has been relinquished.

The appellants argue that since the original developers of their subdivisions were required to relinquish direct access to South 27th Street and consequently were not required to pay the equivalent cost of local street paving pursuant to § 26.11.110, they also should not be required to pay the cost associated with the paving. The appellants acknowledge that § 26.11.110 and the *Briar West, Inc.* decision deal only with conditions for *subdividers* seeking approval for subdivisions. The appellants argue, however, that it was the intent of the Nebraska Supreme Court in *Briar West, Inc.* to extend the proposition not only to subdividers, but to their successors in interest. However, the appellants fail to support this argument in their brief, nor do we find that notion in *Briar West, Inc.* ourselves. While *Briar West, Inc.* and § 26.11.110 deal with conditions on subdividers seeking approval for subdivisions, neither addresses the different issue of assessment for special benefits conferred on property owners by a public improvement after the creation of the subdivision. *Briar West, Inc.* involved a present assessment for future paving which may or may not have conferred special benefits. Thus, *Briar West, Inc.* is clearly distinguishable from this case.

[3] Special assessments are charges imposed by law on land to

defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvement in excess of the benefits accruing to property or people in general. *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 440 N.W.2d 485 (1989); *Nebco, Inc. v. Speedlin*, 198 Neb. 34, 251 N.W.2d 710 (1977). The foundation of the power to levy a special assessment for a local improvement is that the benefits conferred on the owners of property in the assessment district are different from the general benefits which the owners enjoy in common with other citizens of the community. 14 Eugene McQuillin & J. Jeffrey Reinholtz, The Law of Municipal Corporations § 38.02 (rev. 3d ed. 1987). "Accordingly, it is now well settled in most jurisdictions that adjacent property may be specially assessed to defray, in whole or in part, the cost of local improvements by which such property is especially benefited." *Id.* at 22.

Neb. Rev. Stat. §§ 15-701 through 15-759 (Reissue 1991) authorize cities of the primary class, such as Lincoln, to wholly or partially assess, proportionate to benefits, property specially benefited by public improvements. It is therefore clear that the City of Lincoln had the power to specially assess the properties in this case if the property owners received benefits above those received by the general public.

In the present case, the property owners argue that the special assessments should not have been levied against them because they did not receive any benefits from the paving improvement above those enjoyed by the general public. However, the property owners do not argue, nor did they present any evidence, that if they did receive benefits, the amount of the assessments levied against them was excessive.

There is a presumption of validity of local improvement assessments. 14 McQuillin & Reinholtz, *supra*, § 38.36; *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987); *Bitter v. City of Lincoln*, 165 Neb. 201, 85 N.W.2d 302 (1957). In the present case, the City of Lincoln does not have the burden of proving that the special assessments were valid. Rather, the property owners have the burden of establishing their invalidity. See, *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993); *Brown v. City of York, supra*; *Bitter v. City*

of Lincoln, supra.

The six property owners testifying at the district court level generally disputed that they received any benefits from the paving of South 27th Street. In summary, the property owners testified that dust was not a problem prior to the paving of the street because any dust was generally caused by the large amount of construction occurring in the area. The property owners testifying also complained that traffic increased dramatically on the street after paving was completed. Several property owners also testified that rather than improving drainage flow, the paving of the street created more severe drainage problems. One property owner testified that his home decreased in value after South 27th Street was paved, due to increased traffic.

On behalf of the appellees, Bruce Michaelson, deputy city engineer in charge of design for the City of Lincoln, testified that in his opinion, the paving conferred benefits on the property owners in the form of dust reduction, a more aesthetically pleasing appearance, drainage improvements, and easier access for emergency vehicles. Michaelson also testified with regard to the improved drainage system that accompanied the paving improvement. Michaelson testified that when the gravel street was paved, the ditches alongside the street were filled in, and additional storm sewer pipe and inlets were installed.

Richard Haden, city traffic engineer for the City of Lincoln, testified that the traffic volume on South 27th Street increased from 485 vehicles per day when the road was unpaved to 3,600 vehicles per day by March 1991. H. Lee Becker, an engineer with E. A. Engineering Science and Technology, testified concerning the reduction of dust in the area after the road was paved. Becker testified that given the quantifiable data of speed limit, traffic volume, truck traffic, and average silt content in a gravel road as compared to a paved road, the dust along the relevant portion of South 27th Street was reduced to one-seventh of what it had been prior to the paving, despite a dramatic increase in traffic volume.

In *Reiser v. Hartzler*, 213 Neb. 802, 331 N.W.2d 523 (1983), several property owners sought to have declared null and void

special assessments levied against their properties as the result of the paving of a street. The district court found that the special assessments were illegally assessed and levied, since the " '[b]enefits to plaintiffs appear to the Court to be little, if any, greater than to the public at large.' " *Id.* at 803, 331 N.W.2d at 524. The road paved by the city in *Reiser* bordered the rear side of the plaintiffs' properties. All of the properties faced north, away from the paved street, and all of the property owners had constructed a fence along the south end of their lots. The project engineer for the paving job in *Reiser* testified that the properties in that case were only assessed one-quarter of the total cost of the paving project as a matter of fairness. The engineer stated that it was not an unusual procedure for the city to make assessments in this amount when double-fronted lots (paved street at both the front and rear) were assessed. The engineer further testified that in his opinion, the assessments levied against the properties were in proportion to the special benefits to the lots. He further testified that in his opinion, the special benefits exceeded the amount of the assessments. The engineer described the benefits received by the lots as the following:

> all-weather road to travel in and out of the area; the elimination of dust caused by traffic; the establishment of drainage within the area; the establishment of a uniform grade in the adjacent area, allowing proper landscaping; the elimination of borrow pits, which are a trap for casual water; reduced noise; and modernization.

Id. at 806, 331 N.W.2d at 526. On appeal, the Nebraska Supreme Court reversed the finding of the district court, holding that the record supported a conclusion that the property owners received substantial benefits as a result of the paving improvement. The Nebraska Supreme Court did not reach the question of whether the amount of the assessments was correct, as that question was not properly before the court, since the proceeding was a collateral attack, which cannot contest excessiveness. Since this is a direct appeal from the board of equalization, the amount of the assessments, as well as their validity, is before us.

[4] It is a question of fact whether a property which has been

specially assessed has benefited or will benefit from an improvement project. *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993). "[V]alidity of the assessments is aided by the presumption of law that all real estate is benefited to some degree from the improvement of a street or alley on which it abuts or from a like improvement made in a district of which the property assessed is a part." *Bitter v. City of Lincoln*, 165 Neb. 201, 209, 85 N.W.2d 302, 308 (1957). "There is a presumption of benefit to all property abutting on a street to be improved." 14 McQuillin & Reinholtz, *supra* at § 38.36 at 159.

Given the presumption of validity, our de novo review of the record in this case indicates that the appellants have not met their burden of showing the invalidity of the special assessments. The facts indicate that the property owners were benefited by the paving improvement. The City of Lincoln has designated 27th Street as a major arterial street. Therefore, all citizens of the City of Lincoln benefit from the paving of this street. However, it is also true that the property abutting the paved improvement received special benefits beyond those received by the general public. While the appellants did not have the benefit of direct access from their individual lots to South 27th Street, the appellants did receive clear benefits from the paving improvement in the form of dust reduction, improved drainage, and appearance.

[5] With regard to the calculation of the amount of the special assessments levied against the properties in this case, we note that there is no method for ascertaining benefits to property resulting from a public improvement provided in any legislation applicable to cities of the primary class, such as Lincoln. However, with regard to calculating special assessments, the Nebraska Supreme Court has previously stated:

> The basis and justification for a special assessment are benefits to the property affected. An assessment may not be arbitrary, capricious, or unreasonable but the law does not require that a special assessment correspond exactly to the benefits received. Precise accuracy is not required and the determination of the extent of benefits must be committed to some tribunal. Legislation has delegated it to the city council in its capacity as a board of equalization

> after notice to the property owner. Benefits capable of easy demonstration and mathematical exactness are not necessary to support an assessment. The most any officer or any tribunal can do in this regard is to estimate the benefits to each tract of real estate upon as uniform a plan as may be in the light afforded by available information.

Bitter v. City of Lincoln, 165 Neb. at 208-09, 85 N.W.2d at 307-08. The amount of a special assessment cannot exceed the amount of benefits conferred on the property assessed. *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987). See § 15-701.02. Absent evidence to the contrary, however, it will be presumed that the amount of a special assessment was arrived at with reference only to the benefits which accrued to the property affected. *Brown v. City of York, supra*; *Bitter v. City of Lincoln, supra*.

Bruce Michaelson, deputy city engineer in charge of design for the City of Lincoln, testified that the special assessments levied against the properties in paving district No. 2542 were calculated using the square-foot method of assessment. Michaelson testified that this method was used because he felt it was the fairest method of assessing the property. Michaelson further testified that in the past, the City of Lincoln had used the square-foot method of assessment when assessing property benefited by the paving of arterial streets. The formula used is that the estimated cost of construction is reduced by one-half as credit for existing adjacent paving; one-third of the remainder is then deducted for the lack of direct vehicular access from the assessed property to the paved road. The remaining portion of the estimated cost is divided by the total square footage within the assessment area to arrive at a square-foot assessment rate. In this case, the formula yielded an assessment to property within the paving district at $.09 per square foot.

The property owners in this case failed to present any evidence that the amount of the special assessments levied against their properties exceeded the amount of benefits conferred on their properties as a result of the paved improvement. Therefore, using *Brown*, we presume that the amount of the special assessments was arrived at with reference only to the benefits which accrued to the properties within the

paving district and was not excessive.

Our de novo review of the record in this case, without reference to Pester v. Board of Equal. of City of Lincoln, Lancaster County District Court, docket 355, page 52, supports the district court's decision in this case. Therefore, we need not discuss the property owners' assignment of error with regard to the district court's allegedly erroneous reliance on that case.

In conclusion, we find that the property owners have received special benefits beyond those accorded the general public, primarily by dust reduction and improved drainage. The property owners failed to show that the special assessments levied against their properties were invalid or that they were in excess of benefits conferred on them. Therefore, the judgment of the district court which upheld the decision of the board of equalization is affirmed.

AFFIRMED.

WRIGHT, Judge, dissenting.

I respectfully dissent from the finding of the majority that the property owners have received special benefits, by dust reduction and improved drainage, beyond those accorded the general public and that the property owners failed to show the special assessments levied against their properties were in excess of the benefits conferred on them.

The properties in question are within 200 feet of the centerline of South 27th Street from Old Cheney Road to the southern boundary of Southern Hills 1st Addition. The deputy city engineer testified that the formula to determine the special assessments was to reduce the estimated construction cost by one-half as a credit for existing adjacent paving and to deduct one-third of the remainder of that amount for lack of direct vehicular access to the paved road. The remaining portion of the estimated cost was divided by the total square footage within the assessment area to arrive at an assessment per square foot. This amount was considered the amount of special benefits the owners received beyond those accorded the general public.

Our review is de novo on the record, and we retry the issues of fact and reach an independent conclusion as to the findings

of fact without reference to the conclusion reached by the district court. *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993). The theory of a special assessment is to defray the expense of a municipal improvement to property which has received benefits greater than the benefits to the public in general. *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 440 N.W.2d 485 (1989).

The majority correctly states that the parties whose properties were assessed have the burden to establish that the assessments were invalid. Here, six property owners disputed the benefits and testified that dust was not a problem and that traffic increased dramatically after the paving was completed. One owner testified that the value of his home decreased by $3,000 because of the increased traffic. Several owners testified that the paving created more severe drainage problems. A witness for the appellees testified that paving reduced the dust to one-seventh of the amount it had been prior to paving and that the traffic volume on South 27th Street had increased significantly.

What I find of great significance is the testimony of the city traffic engineer. He stated that prior to the paving, 485 vehicles per day traveled on the street. After the road was paved, traffic increased to 3,600 vehicles per day. This is an increase in the amount of traffic of 742 percent. It represents one car every 24 seconds every hour of the day. Obviously, there are more cars at certain times of the day and fewer cars at other times. The majority failed to consider the burden to the property owners of this sevenfold increase in traffic volume.

Thus, I believe that when all facts are considered, the only issue is whether the benefits received by settling the dust exceed the obvious burden of the increase of over seven times the amount of traffic to owners of properties that are located 200 feet from the center of the street. The amount of a special assessment cannot exceed the amount of benefits conferred on the property assessed. *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987). Keeping in mind that 27th Street is acknowledged to be a major arterial that now links with Interstate 80 to the north, my independent factual conclusion based upon the evidence not in conflict is that the burden of the

increased traffic greatly exceeds any benefits to the property owners in the form of dust reduction and drainage and that the overall benefit was only to the general public of the City of Lincoln. A board of equalization's valuation of benefits conferred is not limited to the present use made of improvements, but extends to the use which might reasonably be made of the improvements in the future. *Id.* The value of these properties will, in my opinion, decrease as the amount of traffic increases with the future use of South 27th Street.

I would reverse, and remand with directions to vacate the special assessments.

ELSIE STUTHMAN, APPELLEE, V. PAUL STUTHMAN, APPELLANT.

507 N.W.2d 674

Filed November 2, 1993. No. A-92-043.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
2. **Landlord and Tenant: Forcible Entry and Detainer: Agriculture.** Neb. Rev. Stat. § 76-1408 (Reissue 1990) provides that unless they are created to avoid the application of Neb. Rev. Stat. §§ 25-21,219 (Reissue 1989) and 76-1401 to 76-1449 (Reissue 1990) (Uniform Residential Landlord and Tenant Act), farm lease arrangements are not governed by §§ 25-21,219 and 76-1401 to 76-1449.
3. **Statutes: Legislature: Intent.** When asked to interpret 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. It is the court's duty to discover, if possible, legislative intent from the statute itself.
4. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
5. **Landlord and Tenant: Agriculture: Time.** A farm lease which provides a termination date does not automatically expire on that date under all circumstances.
6. **Landlord and Tenant: Agriculture: Time: Intent.** If a farm lease is created and if after expiration of the term of the lease the tenant remains on the land and is recognized as a tenant by the landlord's receiving rent or in any other way showing that both parties regard the relation of landlord and tenant as continuing, then a year-to-year tenancy is created upon the same conditions as specified in the original lease.

7. **Landlord and Tenant: Agriculture: Time: Notice: Intent.** A year-to-year farm lease tenancy may only be terminated by agreement of the parties or, if the lease does not provide otherwise, by the landlord's giving notice of his or her intent to evict the tenant 6 calendar months before the end of the period that the tenancy commenced.

Appeal from the District Court for Colfax County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court for Colfax County, GERALD E. ROUSE, Judge. Judgment of District Court reversed, and cause remanded with directions.

Paul Stuthman, pro se.

Frank J. Skorupa for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

On July 2, 1991, appellee lessor, Elsie Stuthman, filed a petition in the Colfax County Court seeking the return of certain real property in the possession of appellant lessee, Paul Stuthman. On July 23, 1991, the county court found that (1) the parties had originally entered into a farm lease; (2) the lease "terminated by its own terms" on February 28, 1991; (3) the lease had not been extended by the parties; and (4) Elsie had given Paul 3 days' notice to vacate, which had lapsed, and therefore, Elsie was entitled to possession of the property. Paul properly appealed the order of the county court to the Colfax County District Court. On December 23, 1991, the district court found that the lease had expired and that neither party had taken action to extend the lease. Therefore, the district court affirmed the county court's order. Paul subsequently perfected this appeal.

On appeal, Paul essentially asserts that the county court lacked jurisdiction over the proceedings. For reasons other than those put forth by appellant, we reverse the order of the district court affirming the judgment of the county court and direct the district court to remand the cause to the county court for a hearing consistent with this opinion.

SCOPE OF REVIEW

[1] The issue on appeal is a question of law concerning the rights of a landlord and a tenant under a farm lease. Regarding

questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992); *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989).

STATUTORY INTERPRETATION

The farm lease is present in the record. The parties entered into the lease on March 25, 1990, and by its own terms, the lease was to expire without notice on February 28, 1991, since the parties had specifically waived notice. Paul asserts on appeal, somewhat inelegantly, that the Uniform Residential Landlord and Tenant Act, as it existed on March 25, 1990, Neb. Rev. Stat. §§ 25-21,219 (Reissue 1989) and 76-1401 to 76-1449 (Reissue 1990), is inapplicable to his case because the lease is a farm lease and that therefore the county court did not acquire appropriate jurisdiction over the case. Elsie agrees that the act does not apply to this case, but claims that the "Forcible Entry and Detainer" statutes, § 25-21,219 and Neb. Rev. Stat. §§ 25-21,220 to 25-21,235 (Reissue 1989), provide the county court with jurisdiction and govern the notice requirements to evict a tenant. Elsie further asserts that the prescribed 3 days' notice was given to Paul.

[2] However, § 76-1408 of the act provides: "Unless created to avoid the application of sections 25-21,219 and 76-1401 to 76-1449 [Uniform Residential Landlord and Tenant Act], the following arrangements are *not* governed by sections 25-21,219 and 76-1401 to 76-1449 . . . . (7) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes." (Emphasis supplied.)

[3] When asked to interpret 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. It is the court's duty to discover, if possible, legislative intent from the statute itself. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). Statutes which effectuate a change in the common law should be strictly construed. *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989).

It is clear that if the statutory language in the act is considered in its plain, ordinary, and popular sense, the farm lease at issue in this case is not governed by the rules delineated in the act or in the Forcible Entry and Detainer statutes. Therefore, the outcome of this case depends upon common law, not the act or the Forcible Entry and Detainer statutes.

EVICTION OF A FARM LEASE TENANT UNDER COMMON LAW

As noted above, the lease expired by its own terms on February 28, 1991. The record contains a "Summons for Restitution of Premises Under Residential Landlord and Tenant Act or Forcible Entry and Detainer" dated July 2, 1991, which gave Paul 3 days' notice to vacate. The county court found that the lease had expired by its own terms, that notice had been given, and that Paul had refused to leave. For these reasons, the county court held that Elsie was entitled to possession of the property. Paul asserts that the county court erred and that the district court erred in affirming the judgment of the county court.

[4] Although Paul, acting pro se, has failed to set out with particularity each error he believes was committed by the county court, it is well recognized that an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992); *In re Interest of G.G. et al.*, 237 Neb. 306, 465 N.W.2d 752 (1991). Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991).

[5-7] Nebraska case law has long held that a farm lease which provides a termination date does not automatically expire on that date under all circumstances. *Moudry v. Parkos*, 217 Neb. 521, 349 N.W.2d 387 (1984). See, also, *Fisher v. Stuckey*, 201 Neb. 439, 267 N.W.2d 768 (1978) (stating that the tenant's continuation on the property, as consented to by the landlord,

was sufficient to create a year-to-year tenancy); *Barnes v. Davitt*, 160 Neb. 595, 71 N.W.2d 107 (1955) (stating that the presumption of a year-to-year tenancy arises when the tenant of a farm lease holds over). If a farm lease is created and if after expiration of the term of the lease the tenant remains on the land and is recognized as a tenant by the landlord's receiving rent or in any other way showing that both parties regard the relation of landlord and tenant as continuing, then a year-to-year tenancy is created upon the same conditions as specified in the original lease. See, *Moudry v. Parkos, supra*; *Otto v. Hongsermeier Farms*, 217 Neb. 45, 348 N.W.2d 422 (1984). Concerning a farm lease, a year-to-year tenancy may only be terminated by agreement of the parties or, if the lease does not provide otherwise, by the landlord's giving notice of his or her intent to evict the tenant 6 calendar months before the end of the period that the tenancy commenced. *Sempek v. Minarik*, 200 Neb. 532, 264 N.W.2d 426 (1978).

In the case at bar, the evidence reveals that Elsie and Paul were negotiating a new lease in February 1991. Elsie knew that Paul remained on the property after February 28, during these negotiations. Apparently, the negotiations broke down in May 1991, when Paul refused to sign a new lease which did not include farming the corn cropland. There is authority for the proposition of law that negotiations for a new lease may give rise to a finding that the continuation by the tenant of his occupation of the leased property is with the landlord's consent. See Restatement (Second) of Property § 12.3, comment *k*. (1977).

The county court found that the lease automatically terminated on the expiration date stated in the lease. However, because Elsie and Paul entered into negotiations for a new lease before the termination of the old lease and Paul remained on the land after February 28, 1991, a factual question is raised as to whether or not Paul continued to be recognized as a tenant after the lease terminated. See, *Moudry v. Parkos, supra*; *Otto v. Hongsermeier Farms, supra*. If Paul was recognized as a tenant, then the presumption of a year-to-year tenancy was created and appropriate notice is required to terminate the tenancy.

For these reasons, the district court's order affirming the county court's judgment must be reversed and the cause must be remanded to the district court with directions that the district court remand the cause to the county court to determine if Paul was a holdover tenant.

REVERSED AND REMANDED WITH DIRECTIONS.

LEONARD JAMES OLMER, APPELLEE AND CROSS-APPELLANT, V. JANE CHRISTINE OLMER, NOW KNOWN AS JANE CHRISTINE BAKER, APPELLANT AND CROSS-APPELLEE.

507 N.W.2d 677

Filed November 2, 1993. No. A-92-047.

1. **Modification of Decree: Child Support: Proof.** Modification of a child support award is not justified unless the applicant proves a material change of circumstances has occurred since the dissolution.
2. **Modification of Decree: Child Support: Appeal and Error.** In determining if a material change of circumstances has occurred, an appellate court considers factors such as a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent.
3. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions: Time.** Pursuant to paragraph P of the Nebraska Child Support Guidelines, a rebuttable presumption of a material change of circumstances is established if application of the child support guidelines results in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 6 months and can reasonably be expected to last for an additional 6 months.
4. **Modification of Decree: Child Support: Appeal and Error.** An appellate court does not treat an action to modify support as a retrial of the original case or a review of the equities of the decree.
5. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines must be applied to child support orders entered before the adoption of the guidelines.
6. **Child Support: Courts: Insurance.** Where matters of child support are concerned, a trial court may make appropriate orders as to the manner in which future medical expenses not covered by insurance are to be shared by the child's parents.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed in part as modified, and in part vacated and remanded for further proceedings.

Richard E. Mueting and Joel E. Carlson, of Mueting and Stoffer, for appellant.

Jeffrey L. Hrouda for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

CONNOLLY, Judge.

Jane Christine Baker appeals the trial court's decision denying her request for an increase in child support payments by the appellee, Leonard James Olmer, her ex-husband. The trial court found no material change of circumstances to justify modification of child support or visitation rights. The court did find that the parties' only child, Jared, had suffered a hearing loss that constituted a material change of circumstances not contemplated at the time of the decree. Consequently, the court ordered each party to pay one-half of any necessary medical expenses for Jared which are not covered by Leonard's insurance or other available sources. Leonard cross-appeals, asserting that the trial court erred in not awarding him attorney fees for defending the modification action. We affirm in part as modified, and in part vacate and remand for further proceedings.

I. FACTS

According to the petition for dissolution, Jane and Leonard were married on November 29, 1986, and had one child, Jared. Jared was almost 2 years old when the parties were divorced on June 13, 1989. Pursuant to a decree of dissolution, Jane was awarded custody of Jared and Leonard was ordered to pay $230 per month in child support. On April 4, 1991, Jane filed an application for an increase in child support and a change in visitation rights based on changes in the conditions of the parties and the discovery that Jared had developed a hearing impairment that would result in medical bills.

The trial court found that no material change of circumstances had occurred to justify an increase in child

support or a change in visitation rights. The court did find a material change as to Jared's health because of the hearing impairment and ordered each party to pay one-half of the necessary medical expenses not covered by Leonard's insurance or other available sources.

II. ASSIGNMENTS OF ERROR

Jane assigns various errors dealing with the admission of evidence, but does not discuss them in her brief. We refuse to consider errors assigned but not discussed. See, *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991). Jane's remaining assignments of error concern her request for modification of child support and visitation rights, and they can be summarized as follows: The trial court erred in failing to find a material change of circumstances based on (1) Leonard's increased earning capacity, (2) a decrease in Jane's earning capacity, and (3) increased medical costs incurred by Jane because of Jared's hearing impairment.

III. STANDARD OF REVIEW

An appeal involving the modification of a child support award is reviewed de novo on the record, and the trial court's decision will be affirmed absent an abuse of discretion. *Lodden v. Lodden*, 243 Neb. 14, 497 N.W.2d 59 (1993). The de novo review is also qualified by the fact that where there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other. *Kroenke v. Kroenke*, 239 Neb. 699, 477 N.W.2d 583 (1991); *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991).

IV. ANALYSIS

1. MATERIAL CHANGE OF CIRCUMSTANCES

[1-3] Modification of a child support award is not justified unless the applicant proves a material change of circumstances has occurred since the dissolution. *Lodden, supra.* In determining if a material change of circumstances has occurred, an appellate court considers factors such as a change in the financial resources or ability to pay on the part of the

parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. *Schmitt, supra.* A material change of circumstances may also be found pursuant to paragraph P of the Nebraska Child Support Guidelines, which states:

> Application of the child support guidelines which would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 6 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

Paragraph P was adopted November 14, 1991, 12 days before the modification hearing at issue in this case. It appears from the record that the trial court did not make a finding as to whether paragraph P of the child support guidelines was applicable.

The record reflects that at the time of the dissolution, Jane was a self-employed operator of a day-care center and that Leonard farmed and also worked full time at Vulcraft, a division of Nucor Corporation. A child support calculation worksheet prepared at the time of the dissolution hearing indicated that Jane was earning $433 gross per month and $370 net, while Leonard earned $1,665 gross per month and $1,185 net. Jane and Leonard's 1988 income tax return, the last tax return completed before the dissolution, reflected that Leonard earned $39,626 at Vulcraft, but had a farming loss of $22,620 with $11,523 in depreciation. The worksheet does not indicate whether Leonard's farming loss was taken into account or whether the depreciation was added back. The worksheet reflects only that his gross income was $1,665 per month, with a net of $1,185. Based on the figures on the worksheet, Leonard would have been obligated to pay $229.04 per month in child support. Apparently relying on the incomes reflected on the worksheet, the trial court ordered Leonard to pay $230 per month in child support. This award was not appealed.

At the modification hearing on November 26, 1991,

Leonard's 1990 income tax return showed wages from Vulcraft in the amount of $33,070, a decrease of approximately $6,500 from 1988; a farming loss of $31,161; and a capital loss of $1,516, for a total taxable income of $1,089. Leonard's child support calculation worksheet admitted into evidence at the modification hearing showed a monthly gross income of $1,512.92 and a monthly net income of $1,151.18. Those figures were based on the following projections for 1991: Vulcraft wages of $33,510.49, a farming loss of $31,161, and added-back depreciation of $15,806.

At the time of the modification hearing, Jane was attending school full time at a local community college and was working part time at a restaurant. Her child support calculation worksheet showed $60.95 as her monthly net income and $2,792.54 as Leonard's monthly gross income. After allowing for tax deductions, Jane calculated Leonard's monthly net income to be $1,951. Based on those figures, Jane concluded that Leonard should be paying $371.54 per month in child support.

[4] Jane mistakenly relies on *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991), and *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991), to support her assertion that in determining Leonard's income for purposes of calculating child support payments, the farming loss should not be used to offset Leonard's wages from Vulcraft. Neither *Stuczynski* nor *Phelps* is helpful to our analysis on this issue because they do not address the scenario presented in the case before us, where the parent paying child support derives income from two full-time occupations in which he has been engaged since before the marriage of the parties. Leonard points out that both incomes were used in arriving at the child support figure to which Jane agreed at the time of the dissolution. We find nothing in Nebraska law to suggest that it was improper for the court, at the dissolution hearing and at the modification hearing, to consider Leonard's farming losses in determining his income for purposes of calculating child support payments. Perhaps in retrospect Jane is not satisfied with the way the numbers came out in the original calculation of the child support payments, but an appellate court does not treat an

action to modify support as a retrial of the original case or a review of the equities of the decree. See *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984).

At the time of the dissolution, Leonard was earning wages from Vulcraft and was engaged in a farming operation incurring substantial losses. At the time of the modification hearing, Leonard was earning lower wages at Vulcraft and his farming operation was still incurring substantial losses. His monthly net income was less at the time of the modification than it was at the time of the original hearing. With regard to Leonard's earning capacity, there has been no material change of circumstances that was not contemplated by the parties at the time the decree was entered.

[5] Although we find no material change of circumstances concerning Leonard's earning capacity, that does not conclude our inquiry into whether there has been a material change of circumstances warranting modification of child support. As we noted above, paragraph P of the child support guidelines was adopted only 12 days before the modification hearing at issue. It is quite possible that at the time of the hearing the trial court was not yet apprised of the necessity of conducting a paragraph P analysis. Nonetheless, the Nebraska Supreme Court has stated that the child support guidelines must be applied to child support orders entered before the adoption of the guidelines:

> We noted in *Schmitt* [*v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991),] that the implementation of certain federal and state statutes "may well render the concept of 'material change of circumstances' of much less concern," and held that the adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

Phelps, 239 Neb. at 621, 477 N.W.2d at 555. Applying this rationale to the guideline at issue, we find that paragraph P must be considered in this action for modification. Although Leonard's financial circumstances do not appear to have changed, at least not for the better, since the entry of the child support order in 1989, Jane's financial circumstances have

changed dramatically for the worse. Thus, it is necessary for the trial court to apply paragraph P and calculate Leonard's child support obligation after factoring in Jane's decrease in earning capacity.

In order for there to be a rebuttable presumption of a material change of circumstances such that Leonard should pay increased child support, application of the child support guidelines would have to result in an increase in Leonard's child support obligation of at least 10 percent ($23 per month). If the numbers indicate an increase in Leonard's obligation of 10 percent or more and if the trial court determines that the increase is due to financial circumstances which have lasted 6 months and can reasonably be expected to last for an additional 6 months, then a rebuttable presumption of a material change of circumstances will have been established. In that event, Leonard should have the opportunity to challenge the presumption.

For the reasons discussed above, we vacate the judgment of the trial court finding no material change of circumstances sufficient to justify modification of child support and remand this cause to the trial court for further proceedings consistent with this opinion.

2. Jared's Hearing Impairment

[6] The trial court did not order an increase in child support payments in response to the discovery of Jared's hearing impairment. However, the court properly exercised its authority to make arrangements for future medical expenses when it ordered each party to pay one-half of any necessary medical expenses not covered by insurance. See *Druba v. Druba*, 238 Neb. 279, 470 N.W.2d 176 (1991) (a trial court may make appropriate orders as to the manner in which future medical expenses not covered by insurance are to be shared).

The provision calling for equal sharing of Jared's future medical expenses is not specifically mentioned in Jane's assignment of error on this issue. However, we interpret Jane's argument to be that given her current financial position as a full-time student with a monthly net income of $61, she should not have been ordered to pay any portion of Jared's future

medical expenses related to his hearing impairment. Leonard argues that Jane's income is actually greater than $61 per month because she received a $1,200 Pell Grant for her education and because she receives Supplemental Security Income (SSI) payments for Jared. We determine from the record that the Pell Grant funds were used for Jane's school expenses and should not be considered income. We also note that SSI is a means-tested public assistance benefit that would not be included in calculating monthly income under the child support guidelines. See Nebraska Child Support Guidelines, paragraph D. Therefore, we accept Jane's characterization of her financial position and find that the district court abused its discretion in ordering Jane to pay one-half of Jared's future medical expenses. We modify the order filed January 9, 1992, by directing that Leonard pay all reasonable and necessary medical expenses related to Jared's hearing impairment that are not covered by Leonard's medical insurance or other available sources.

3. Leonard's Cross-Appeal

Citing Neb. Rev. Stat. § 25-824 (Reissue 1989), Leonard assigns as error the trial court's failure to award him attorney fees for defending the modification action. Leonard claims that Jane's petition for modification was a vexatious and unfounded action prompted by an earlier contempt proceeding filed by Leonard. In view of our decision to remand on the issue of material change of circumstances and our modification ordering Leonard to pay all of Jared's reasonable and necessary medical expenses, this assignment of error is without merit.

Appellant is awarded $1,000 for attorney fees in this court.

Affirmed in part as modified, and in part vacated and remanded for further proceedings.

STATE OF NEBRASKA, APPELLEE, V. STANLEY DEUTSCH, APPELLANT.
507 N.W.2d 681

Filed November 2, 1993. No. A-93-137.

1. **Motions for New Trial: Courts: Time: Appeal and Error.** The filing of a motion for new trial in a court which functions as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court.
2. _____: _____: _____: _____. A motion for a new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true whether that court is hearing appeals from the county court or from some other lower tribunal.
3. **Motions for New Trial: Courts: Appeal and Error.** It is improper to move for a new trial in a court which reviews the decision of a lower court and therefore functions as an intermediate court of appeals and not as a trial court.

Appeal from the District Court for Saline County, ORVILLE L. COADY, Judge, on appeal thereto from the County Court for Saline County, J. PATRICK MCARDLE, Judge. Appeal dismissed.

Bernard J. Ach for appellant.

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

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Stanley Deutsch appeals his sentence for attempted sexual assault of a child.

STANDARD OF REVIEW

[1] The filing of a motion for new trial in a court which functions as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court. *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993).

FACTS

Stanley Deutsch was charged in county court with attempted sexual assault of a child, a Class I misdemeanor, in violation of Neb. Rev. Stat. §§ 28-201(1)(b) and 28-320.01 (Reissue 1989). At arraignment, Deutsch pleaded no contest in return for

dismissal of an attempted first degree sexual assault charge which was pending in Saline County District Court. The county court found a factual basis for the charge and found that the plea was knowingly, intelligently, and voluntarily made. The court ordered a presentence investigation.

A sentencing hearing was held April 14, 1992, and Deutsch filed a motion to recuse, which was overruled. He was sentenced to serve 1 year in an institution under the jurisdiction of the Department of Correctional Services. On April 14, Deutsch filed a notice of appeal in the county court, but he did not file assignments of error with the district court until June 30. He asserted that the county court erred in considering evidence not included in the presentence report. The court was alleged to have reviewed letters from the victim's parents which were sent directly to the court and not included in the presentence report. Deutsch also assigned as error the refusal of the county court judge to recuse himself from sentencing and the excessiveness of the sentence.

On December 15, the district court affirmed the county court's sentence. On December 24, Deutsch filed in the district court a motion for new trial, which was denied on January 29, 1993. Deutsch then appealed to this court on February 18.

ANALYSIS

[2] We do not reach the merits of Deutsch's appeal because we do not have jurisdiction. Deutsch's sentence was affirmed by the district court on December 15, 1992. Pursuant to Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992), his appeal to this court must have been filed within 30 days unless tolled by a timely filed motion for new trial. The time for filing an appeal was not tolled by Deutsch's filing of a motion for new trial in the district court.

> A motion for a new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true whether that court is hearing appeals from the county court or from some other lower tribunal.

Interstate Printing Co. v. Department of Revenue, 236 Neb.

110, 112-13, 459 N.W.2d 519, 522 (1990).

[3] In *Hueftle v. Northeast Tech. Community College, supra*, the Supreme Court noted that it is improper to move for a new trial in a court which reviews the decision of a lower court and therefore functions as an intermediate court of appeals and not as a trial court. The filing of a motion for new trial in a court which functions as an intermediate court of appeals does not stop the running of the time for filing the appeal.

Since Deutsch failed to file an appeal within 30 days of the district court's order affirming the sentence imposed by the county court, we are without jurisdiction to consider his appeal. We dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. BENNETT, APPELLANT.

508 N.W.2d 294

Filed November 9, 1993. No. A-92-476.

1. **Trial: Rules of Evidence: Testimony: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context in which the questions were asked.
2. **Sentences: Appeal and Error.** A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion.
3. **Statutes: Legislature: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed as modified.

Deborah D. Cunningham for appellant.

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

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Terry L. Bennett appeals his convictions for robbery and assault in the first degree. He was sentenced to concurrent terms of 16⅔ to 20 years for the robbery and 6⅔ to 20 years for the assault. The sentences required that each year Bennett be placed in solitary confinement from July 28 to August 8.

Bennett contends that the district court erred in granting the State's motion in limine excluding certain testimony and that the sentences are excessive and unconstitutionally cruel and unusual.

SCOPE OF REVIEW

[1] Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context in which the questions were asked. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991).

[2] A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion. *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242 Neb. 874, 496 N.W.2d 872 (1993).

FACTS

On Sunday, July 28, 1991, the victim, Janis Erichsen, drove to her neighborhood supermarket, where she locked her car before buying groceries. When she came out with her cart of groceries, she placed them in her car, locked it, and returned the cart to the store. As she returned to her car, she noticed a man walking directly toward her. Because he was the only person nearby in the parking lot, she became uncomfortable and tried to quickly unlock her car. The man approached her, sprayed her face with Mace, grabbed her purse, and walked toward a Ford Escort, which was parked at the edge of the parking lot with a young woman standing behind it.

Erichsen went to the Escort and reached into the car in an attempt to recover her purse, which was between the front seats of the car. She was again sprayed with Mace and became

entangled in the seatbelt strap. At trial, she said she remembered hearing the car start, but nothing afterward, and then she awoke in an intensive care unit of a hospital.

Chris Humphrey testified that his attention was attracted to the car when he saw a body dangling from the driver's side of the car as it sped through a residential area. He chased the Escort in his car. Humphrey called out his window for someone to call the police. He said the car he was chasing reached speeds of up to 50 m.p.h. and ran through stop signs. At one point, the Escort turned a wide corner, and Humphrey was able to get ahead of it to block the street. The Escort stopped long enough to turn around, but no one tried to exit the vehicle or to release Erichsen from the car.

Tim Tompkins testified that he was working in his driveway when he noticed two vehicles race past him. He saw what he perceived to be a dummy hanging from the side of the first car, a Ford Escort. The driver of the second car was honking the horn and yelling for someone to call the police. Tompkins got in his mother's car and followed a trail of blood marks in the street, but he lost sight of the Escort. He continued following the trail of blood for about a mile and found Erichsen lying in the middle of the street. The trail of blood was at least 1.6 miles long. The shortest distance from the supermarket where the initial purse-snatching incident occurred to the spot where Erichsen was dropped was half a mile.

Erichsen was taken to the hospital, where a breathing tube was inserted because she was suffering from respiratory arrest caused by her body being suspended with no support from her feet. She underwent 12 to 13 surgeries, including surgery "just about" each of the first 9 days. She remained in the hospital for approximately 2 months. She sustained an abrasion on her abdomen and bruises in the center of her chest and on her left arm. The four fingers on her left hand were black and blue. She had a contusion on her right arm and an abrasion on her right forearm. Both legs from the thighs down to below her knees had been severely abraded, and both kneecaps were exposed. On the left leg, there was a severe, deep black burn that extended from the left hip to the exposed kneecap, and a severe burn ran from the front of the left knee to her toes. Another

burn extended from the right hip to halfway down the shin. The friction burns, caused by sliding along asphalt, blackened the skin.

Erichsen testified that she "lost both of [her] kneecaps" and a large amount of skin from her legs. She incurred numerous infections and required numerous surgeries. By the time of the trial, she could walk unassisted with a cane, but continued to have problems going up and down stairs. Her left knee did not bend. She had trouble lifting her left leg to get into a bathtub. She was unable to drive and could no longer work as a medical secretary for a psychiatrist, a position she held for 28 years. She identified Bennett as her assailant.

Bennett was found guilty and sentenced to concurrent terms of $16^{2}/_{3}$ to 20 years for the robbery and $6^{2}/_{3}$ to 20 years for the assault. The court ordered that Bennett be placed in solitary confinement beginning at 6:51 p.m. on the anniversary date of the crime, July 28, through 3:45 p.m. on August 8 of each year. The court stated that the solitary confinement was intended to remind Bennett of the terrible ordeal that his crime victim is enduring.

ANALYSIS

Bennett assigns as error the granting of the State's motion in limine to exclude certain statements made by Natalie Church to Det. James Reuting. During the investigation, Reuting interviewed Church on several occasions after the Ford Escort, which was owned by Church's mother, had been located. Church was not called as a witness. Defense counsel cross-examined Reuting about his questioning of Church. The State contended that defense counsel was attempting to elicit hearsay statements made to Reuting by Church in an attempt to admit the statements without calling Church as a witness. When the court sustained the State's motion to restrict the defense's questions, defense counsel made no offer of proof.

Bennett now argues that he sought to solicit testimony which would show that Reuting did not believe statements made by Church. Bennett suggests that the testimony would rebut the detective's motives and therefore is not hearsay.

"Hearsay is a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Rev. Stat. § 27-801(3) (Reissue 1989). Since we can only speculate as to the evidence Bennett sought to elicit from Reuting, we cannot determine whether the statement would have been admissible.

> Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.

State v. Cortis, 237 Neb. 97, 109, 465 N.W.2d 132, 141 (1991). See, also, Neb. Rev. Stat. § 27-103 (Reissue 1989).

The offer of proof brings the substance of the evidence before the trial court and the appellate court so that both may determine whether the refusal to accept the evidence was error. An offer of proof is not necessary if the record and the form of the question show that the offered evidence is relevant and competent. *State v. Kramer*, 238 Neb. 252, 469 N.W.2d 785 (1991). Since the record here does not provide us with information as to the testimony which defense counsel planned to introduce, we have no record to consider in determining whether the court erred in sustaining the objection to the testimony. This assignment of error fails because defense counsel failed to preserve the evidence for our consideration on appeal.

Bennett contends that the sentence is excessive and that the condition which requires his placement in solitary confinement for 12 days each year is unconstitutionally cruel and unusual. Robbery is a felony which carries a minimum sentence of 1 year in prison and a maximum sentence of 50 years' imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 1989). First degree assault is a Class III felony which has a minimum sentence of 1 year in prison and a maximum sentence of 20 years' imprisonment. § 28-105(1). A sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion. *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242 Neb. 874,

496 N.W.2d 872 (1993).

The seriousness of the offense and the amount of violence used in the commission of the crime are important factors in determining the appropriateness of a sentence. *State v. Wounded Arrow*, 240 Neb. 44, 480 N.W.2d 205 (1992). There is no question that these are serious crimes and that the violence involved caused the victim untold pain and suffering. The senseless nature of these crimes leads us to find it nearly inconceivable that Bennett would claim that the sentences are excessive. Similar to the cowboy who was dragged behind the horse over rocks and cactus, the helpless victim was dragged by an automobile over concrete and asphalt. We find no abuse of discretion in the sentences imposed by the district court.

We address Bennett's argument that the court abused its discretion by sentencing him to serve the period from July 28 to August 8 of each year in solitary confinement. We find that at the time of sentencing, the trial court did not abuse its discretion in entering such an order.

Bennett does not argue that the statute which provided for solitary confinement is unconstitutional. We therefore consider whether the punishment was cruel and unusual, in violation of the Constitution of the State of Nebraska and the Eighth Amendment to the U.S. Constitution. In *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985), a defendant convicted of murder was required to spend 2 days per year in solitary confinement, the defendant's birthday and the anniversary of the victim's death. In the present case, the 12 days of solitary confinement begin each year at 6:51 p.m. on July 28, which is the date the robbery occurred, and end on August 8 of each year at 3:45 p.m., which confinement the court stated was intended to remind Bennett of the terrible ordeal his crimes had caused the victim to endure. Regardless of the severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not cruel and unusual punishment in a constitutional sense. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974).

One of the factors to be used in determining whether solitary confinement should be ordered under both state and federal Constitutions is the gravity of the offense in comparison with

the harshness of the penalty. *State v. Stratton, supra.* In imposing Bennett's sentences, the trial court found that the crime victim would live each day of her life with not only the memory, but the physical and emotional hurt that the crimes created for her. The court could not recall a case where any more violent acts were perpetrated on a human being than those inflicted on this victim.

Judicial abuse of discretion means that the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993). We find these sentences do not reflect an abuse of the trial court's discretion.

Neb. Rev. Stat. § 29-2204(1) (Reissue 1989) was amended by the Legislature effective September 1993. Approved by the Governor on May 4, 1993 Neb. Laws, L.B. 529, deleted the portion of § 29-2204 that provided: "[T]he court . . . shall determine and declare in its sentence whether any such convict shall be kept in solitary confinement . . . and . . . for what period of time."

[3] Bennett argues that due to this amendment of the statute, the portion of the sentences mandating the annual 12 days in solitary confinement should be vacated. Bennett relies upon *State v. Randolph*, 186 Neb. 297, 301-02, 183 N.W.2d 225, 228 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686, in which the court held that "where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise." We note that Bennett's sentences are not final, due to the pending appeal.

Therefore, we must consider whether the amendment to § 29-2204 mitigated the punishment such that we are required to modify the sentences by eliminating the provision for solitary confinement. If solitary confinement is a part of the punishment, then we are required to modify the sentences. If such confinement is merely the manner in which the incarceration is to be served, then we are not required to modify the sentences, unless we find an abuse of discretion. In

considering the trial court's explanation for the solitary confinement, we find that in this case, such confinement was intended as a form of punishment. The statute as amended contains no provision for the imposition of solitary confinement as a part of a sentence. We therefore modify the judgment of the district court to eliminate the provision for solitary confinement. We affirm the judgment in all other respects.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ALISHA J. OWEN, APPELLANT.

508 N.W.2d 299

Filed November 9, 1993. No. A-92-866.

1. **Motions for New Trial: Evidence: Time.** If there are valid grounds for reexamination on the basis of newly discovered evidence to ascertain whether or not a person has been wrongfully convicted, the steps provided for such reexamination should be taken timely and without undue delay.
2. **New Trial: Juror Misconduct: Proof.** In order for a new trial to be granted because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
3. **Juror Misconduct: Presumptions.** Where juror misconduct is alleged, the opportunity for prejudice does not raise a presumption that prejudice exists.
4. **Juror Misconduct: Proof.** Where juror misconduct based on exposure to media coverage is alleged, the defendant must offer the content of allegedly prejudicial media coverage and also show prejudicial effect.
5. **Motions for New Trial: Evidence.** A motion for new trial based on newly discovered evidence may be granted if the new evidence (1) probably would have produced a different result had it been offered and admitted at trial and (2) is relevant and credible, and not merely cumulative.

Appeal from the District Court for Douglas County: RAYMOND J. CASE, Judge, Retired. Affirmed.

John W. DeCamp and Stanford L. Sipple, of DeCamp Legal Services, P.C., for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

SIEVERS, Chief Judge, and CONNOLLY and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal arises from the conviction of the appellant, Alisha J. Owen, on eight counts of perjury under Neb. Rev. Stat. § 28-915 (Reissue 1989). This court has decided a previous appeal in this case. See *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993) (*Owen I*). Among the matters addressed in *Owen I* was the trial court's denial of Owen's first motion for new trial. The subject matter of this appeal is a second motion for new trial that was filed while *Owen I* was pending before this court. The second motion for new trial was overruled. We affirm.

I. FACTS

For the factual background of the entire case, we refer the reader to *Owen I*. In this opinion, we review only the facts pertinent to the filing of the second motion for new trial.

Neb. Rev. Stat. § 27-606(2) (Reissue 1989) states that

> a juror may not testify as 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.

Section 27-606(2) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstandings, thought processes, or discussions during deliberations, which enter into the verdict. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). Thus, as we review the facts in the record provided by juror affidavits and testimony, we consider only that evidence which complies with the requirements of § 27-606(2).

Eleven months after her first motion for new trial was overruled in the trial court, Owen filed a second motion for new trial pursuant to Neb. Rev. Stat. § 29-2101 (Reissue 1989) on grounds of newly discovered evidence. The second motion for new trial was based on the following allegations: (1) During

deliberations, jurors read a letter written by Michael Casey and addressed to Owen which suggested that Owen was involved in a plan to capitalize on the Franklin scandal, but the letter had never been received into evidence; (2) on the evening of the first day of deliberations, several jurors defied the explicit instruction of the court and watched the television program "48 Hours," which featured the Franklin scandal as one of several case studies in a program about the controversial nature of child sexual abuse allegations; and (3) after the trial, Troy Boner, a witness for the State who had testified that the sexual abuse allegations made by himself and Owen were false, spoke with Owen's mother on the telephone and told her that he had perjured himself because of fear and pressure.

In support of the second motion for new trial, Owen filed affidavits by two jurors, an alternate juror, Owen's mother, and an employer of relatives of Boner. Owen also filed a transcript and an audiotape of the phone conversation between Boner and Owen's mother and a transcript and videotape of the "48 Hours" program.

1. Casey Letter

The Douglas County grand jury that indicted Owen for perjury included in its report a finding that Casey, with whom Owen had become acquainted in the fall of 1988, was "a 'con man' passing himself off as an investigative reporter who 'endeavored to uncover the "real" Franklin story,' " *Owen I* at 1065, 510 N.W.2d at 509.

In a letter dated March 15, 1990, and found among Owen's personal papers, Casey wrote to Owen that he was working with producers in Los Angeles and Omaha to develop his "Franklin project" and that he would send Owen a copy of the first draft of a script for a play so that Owen could review it and offer her ideas. The letter also contains the following paragraph:

> "I also know and feel that promises were made — before I ever gave Gary you[r] name and location — he'd assured me that if your info checked out you would receive favorable consideration and protection outside of a prison environment. I feel most responsible if promises were made to you and not kept!"

Id. at 1066, 510 N.W.2d at 509-10. In March 1990, Owen was serving a prison term for having passed bad checks. The "Gary" mentioned in the letter apparently was Gary Caradori, a private investigator hired by the Nebraska Legislature to investigate Franklin-related allegations of child sexual abuse.

In a greeting card to Owen dated March 23, 1990, and found among Owen's personal papers, Casey wrote that three national publications and a movie producer were interested in his Franklin project and that Owen was " 'assured of a job when [you] get out of their [sic] as a consultant and researcher.' " *Id.* at 1065, 510 N.W.2d at 509.

Juror John Hurley testified via affidavit and at the hearing on the second motion for new trial that a letter from Casey to Owen had been passed among jurors and read during deliberations. It appears from the record that Hurley was referring to the March 15 letter. Hurley testified that shortly after the trial, Frances Mendenhall, editor of a newspaper called the Nebraska Observer, asked him to pull the Casey letter from the evidence and show it to her. He could recall being in the courthouse but could not recall in which room the encounter with Mendenhall had occurred. Hurley said that he had followed Mendenhall down a hallway and into a room. In the room was a box allegedly containing the evidence from *Owen I.* Hurley could not recall any dealings with court reporters or clerks in obtaining the evidence, nor were any such personnel present in the room where he and Mendenhall "started digging through" the evidence. Hurley had assumed that Mendenhall had obtained permission to examine the evidence. Hurley testified that he was unable to find the Casey letter during this posttrial examination of the evidence.

Owen argues that the Casey letter was "planted" in the jury room during deliberations so that it would come to the attention of the jurors and was then removed from the body of evidence.

2. "48 Hours"

Hurley also testified that he and other jurors had violated the court's prohibition and had watched the "48 Hours" program dealing with the Franklin scandal. Jury deliberations began the

morning of June 19, 1991, and continued throughout the day. The program aired that evening. The jury continued deliberations on June 20 and reached a verdict on June 21.

The brief segment of the program devoted to the Franklin scandal (less than three pages of written copy) consisted mainly of Boner explaining that he had falsely accused prominent Omahans of having sexually abused children. The segment was also interspersed with comments by the person who had borne the brunt of the false accusations.

3. Boner's Alleged Perjury

(a) Janecek Affidavit

Robert Janecek, Jr., formerly a law enforcement officer and more recently a private investigator, testified via affidavit that he has known the Boner family for approximately 30 years and that during that time he has employed various members of the Boner family on a part-time basis. Janecek claimed that three relatives of Boner's had told Janecek that Boner had informed the Boner family that he had accepted a $12,000 bribe for lying at Owen's perjury trial. Janecek stated that according to Boner's relatives, he was induced to perjure himself by two means: the threat that he "would never make it to trial" and the promise of a financial reward. Janecek's affidavit does not name the party or parties who allegedly threatened Boner and bought his perjured testimony.

(b) Donna Owen Affidavit

Donna Owen, the mother of Alisha Owen, testified via affidavit that Boner phoned the Owen residence after the trial and claimed that he had lied at trial to protect himself. She stated that Boner asserted that "it was impossible for me, Donna Owen, to understand the fear and pressure that he, Troy, was under from the time he had gone to Senator Schmit's office and tried to recant and tell the truth up to and during the trial."

The reference to former State Senator Loran Schmit was an allusion to an incident examined during Owen's perjury trial. Schmit had served as the chairman of the "Franklin Committee," a special ad hoc committee established by the Nebraska Legislature to investigate the Franklin scandal. He

testified at Owen's perjury trial that Boner had come to his State Capitol office shortly after the death of the Franklin Committee's investigator in a plane crash in July 1990. Schmit said that Boner informed him that Boner had told the investigator the truth—that prominent Omahans were running a child sexual abuse ring. While testifying before a Douglas County grand jury impaneled in March 1990 to review allegations related to the Franklin scandal, Boner had recanted the original story of sexual abuse he had told to the Franklin Committee's investigator. Boner told the grand jury that the allegations about a child sexual abuse ring were false. According to Schmit, though, in July 1990 Boner said he had recanted the original story he told to the Franklin Committee's investigator because he had been pressured to do so by members of the FBI.

As was the case with the Janecek affidavit, the affidavit of Donna Owen did not name the party or parties allegedly applying the pressure on Boner. Donna Owen had activated a recording device during the phone conversation with Boner. A transcript and an audiotape of the conversation were admitted into evidence along with Donna Owen's affidavit, but significant portions of the audiotape are unintelligible.

4. Judgment on the Motion

Relying on § 27-606(2), Owen argued that the Casey letter and the TV show constituted extraneous prejudicial information improperly brought to the jury's attention. Owen also characterized the reading of the Casey letter in the jury room as improper communication between a nonjuror and the jury. Regarding the alleged perjury committed by Boner, Owen contended that there "would have been no charges [and] no trial" but for Boner's testimony and that the evidence provided by Janecek and Donna Owen indicated that Boner had lied as a witness for the State.

The trial court found that the allegations of prejudicial misconduct concerning the Casey letter and the TV show were "not substantiated by any of the records brought to the attention of the Court." On the Boner issue, the court found that evidence adduced at Owen's perjury trial

> indicated that Troy Boner had recanted his story as given to the grand jury, and his instability was clearly brought out to the trial jury. . . .
>
> The purported new evidence as reflected by [the transcript and audiotape of the phone conversation with Donna Owen] does not in the opinion of the Court constitute new evidence but would show a continuing instability on the part of the trial witness Boner . . . .

The motion for new trial was overruled.

II. ASSIGNMENTS OF ERROR

Owen argues that the trial court erred in refusing to grant a new trial based on (1) the misconduct of the jurors who watched the "48 Hours" segment on the Franklin scandal, (2) the reading of the Casey letter in the jury room, and (3) the posttrial evidence that Boner had perjured himself.

III. STANDARD OF REVIEW

A motion for new trial made under § 29-2101 on grounds of newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed on appeal. *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

Judicial abuse of discretion means that the reasonings or rulings of the trial judge are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

IV. ANALYSIS

1. JURISDICTION

[1] We first point out that the trial court properly asserted jurisdiction of the second motion for new trial even though a prior motion for new trial was pending before this court when the second motion was filed. In *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958), the defendant filed a motion for new trial based on newly discovered evidence while the appeal of his conviction was pending before the Nebraska Supreme Court. The Supreme Court set forth the following proposition of law:

"If there are valid grounds for re-examination on the basis of newly discovered evidence to ascertain whether or not a person has been wrongfully convicted[,] the steps provided for such re-examination should be taken timely and without undue delay." *Id.* at 495, 93 N.W.2d at 501. We rely on that same rationale in proceeding with a decision in this appeal even though our decision on the prior motion for new trial is pending before the Nebraska Supreme Court.

2. Casey Letter

We take judicial notice of the record in *Owen I* pursuant to Neb. Rev. Stat. § 27-201 (Reissue 1989) and note that during Owen's perjury trial exhibits 54 and 55 were offered into evidence *by Owen's attorney* and were received. Exhibit 54 was a bundle of correspondence that had been found in Owen's personal files. Included in the bundle was the March 23 greeting card from Casey. Exhibit 55 also was a bundle of correspondence that had been found in Owen's personal files. The March 15 letter from Casey was included in the exhibit 55 bundle. Therefore, both the letter and the greeting card from Casey were properly before the jurors in the jury room, and this assignment of error is without merit.

3. "48 Hours"

[2,3] In order for a new trial to be granted because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992). We also are guided by the following excerpt from *State v. Rife*, 215 Neb. 132, 141, 337 N.W.2d 724, 730 (1983):

> During the trial one of the jurors indicated that she had watched a television report [concerning the trial]. The appellant complains that the trial court erred in failing to grant his motion for mistrial based upon this alleged juror misconduct. There is no showing in the record of the content of the television report. . . . In the absence of a showing of prejudice, the trial court was correct in denying the motion for mistrial. Opportunity for prejudice . . . does not raise a presumption that prejudice . . . exists.

Although the passage immediately above dealt with a motion for mistrial rather than a motion for new trial, we believe the rationale applies in the case before us. Thus, Owen bears the burden of proving by clear and convincing evidence that the program prejudicially affected the jurors in reaching their verdict.

[4] The court indicated in *Rife* that the defendant must offer the content of allegedly prejudicial media coverage and also show prejudicial effect. In *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975), the court stated that a mistrial should not be granted on grounds that jurors had read newspaper reports of the progress of the trial unless the reports were prejudicial to the defendant. Although in this case we are dealing with a report presented by the electronic media rather than the print media, we apply the rationale of *Bautista* and consider whether the "48 Hours" coverage of the Franklin matter was prejudicial to Owen.

We reject Owen's assertion that because the program was hosted by a nationally known and respected news reporter, the jurors disregarded 5 weeks' worth of evidence and instead convicted Owen in response to the supposed imprimatur bestowed on Boner by the nationally known reporter's indirect influence. (A correspondent other than the nationally known reporter actually prepared and presented the Franklin segment.) Instead, we look to the substance of the report to determine whether there was prejudice to Owen.

The segment on the Franklin scandal essentially consisted of the following: (1) Boner said that he had falsely claimed that prominent men in Omaha had sexually abused children, including himself; (2) a former Omaha chief of police who had been a main focus of Owen's allegations talked about the professional and personal devastation he had experienced because of the allegations; and (3) an Omaha criminal defense attorney not connected with the case described the volatility and destructive potential of allegations of child sexual abuse.

We find that the record does not present clear and convincing evidence of prejudice to Owen resulting from the fact that some of the jurors watched "48 Hours." The following excerpts from the testimony of Hurley are instructive on this point:

> [State's attorney:] . . . Mr. Hurley . . . I want you to peruse [the written transcript of the program] and tell me if you see any information disclosed in that 48 Hours program that was not gone over in detail [during the trial].
>
> [Hurley:] I'm sure it was all gone over in the trial.
>
> . . . .
>
> [State's attorney:] . . . You sat for five weeks —
>
> [Hurley:] Yeah.
>
> [State's attorney:] — and listened to over 50 witnesses discuss this case. And you had 400 or more exhibits in the case. So obviously you as a juror saw and heard and observed far more than any five- to ten-minute segment on a television program could ever, ever hope to present; isn't that true?
>
> [Hurley:] Yes, sir.

In substance, Boner's comments on the television program were identical to the statements he had made as a witness at trial. The former chief of police interviewed on "48 Hours" had already testified extensively at trial to the falsity of the allegations against him and their traumatic impact on his life. The comments by the defense attorney about the explosive nature of child sexual abuse allegations certainly were no revelation to jurors who had spent 5 weeks hearing evidence in a highly controversial case implicating prominent citizens and city officials. Although we certainly do not condone the conduct of the jurors who disregarded the court's admonition against watching "48 Hours," we find that the cursory treatment of the subject matter in the television program offered nothing that the jurors had not already heard and considered in much greater detail during the trial. Therefore, we agree with the ruling of the trial court that Owen failed to show that the verdict against her was tainted by prejudice because some of the jurors had watched the Franklin segment on "48 Hours."

4. Boner's Alleged Perjury

Owen argues that a new trial is warranted because the affidavits of Janecek and Donna Owen, and the transcribed and tape-recorded versions of Donna Owen's phone conversation with Boner, constitute newly discovered evidence that

Boner was coerced into committing perjury.

[5] A motion for new trial based on newly discovered evidence may be granted if the new evidence (1) probably would have produced a different result had it been offered and admitted at trial and (2) is relevant and credible, *and not merely cumulative. State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). See, also, *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

In this instance, the newly discovered evidence is cumulative. Boner testified at Owen's perjury trial that the allegations of sexual abuse made by himself and Owen were false. Owen presented evidence to the jury that Boner had initially confirmed Owen's allegations of sexual abuse, then recanted before the Douglas County grand jury, and then later told former State Senator Schmit that he had recanted only because of pressure from the FBI. In its ruling on the second motion for new trial, the trial court correctly noted that the issue of Boner's credibility had been thoroughly explored at trial. The jury heard evidence that over the course of the Franklin investigation, Boner seemed to vacillate between two completely different stories of the alleged child sexual abuse ring and his involvement in it. We agree with the trial court that the newly discovered evidence presented by Owen on the matter of Boner's alleged perjury proves nothing new, but, instead, merely reiterates the fact that Boner is unstable. The fact that Boner once again may have changed his story on the Franklin scandal is not surprising. Six months from now Boner may well change his story again. At this point in the proceedings, evidence of further vacillation by Boner concerning the Franklin allegations is cumulative and is of no probative value.

V. CONCLUSION

We find no grounds to support Owen's second motion for new trial. The Casey letter was part of the record properly before the jury. The "48 Hours" segment on the Franklin scandal barely skimmed the surface of the case and presented information that had received exhaustive attention during the trial. The question of whether Boner was coerced into betraying Owen and lying as a witness at her perjury trial was raised at

trial. There is no justification in the record for revisiting that question. For these reasons, we affirm the judgment of the trial court overruling Owen's second motion for new trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RHONDA L. MOORE, APPELLANT.

508 N.W.2d 305

Filed November 9, 1993. No. A-92-1136.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
2. **Search Warrants: Affidavits: Evidence: Appeal and Error.** Appellate review of a search warrant is restricted to consideration of the information contained within the four corners of the affidavit for the search warrant. Evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
3. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** The burden is upon a defendant who seeks to suppress evidence obtained pursuant to a search warrant to establish that the search warrant is invalid so that the evidence secured thereby may be suppressed.
4. **Search Warrants: Affidavits: Judges.** In order to authorize the issuance of a search warrant for service during the nighttime under Neb. Rev. Stat. § 29-814.04 (Reissue 1989), the magistrate or judge must only be satisfied from a commonsense reading of the affidavit in support of such issuance that it reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

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

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Rhonda L. Moore was charged by information with unlawful possession of a controlled substance with intent to deliver. She filed a motion to suppress physical evidence seized by the police during a nighttime search of her residence. The trial court overruled her motion to suppress. In a bench trial, she was found guilty of unlawful possession of a controlled substance with intent to deliver and was sentenced to a term of 4 to 6 years in prison with credit for 7 days served. In this appeal, she assigns as error the overruling of her motion to suppress the physical evidence.

STANDARD OF REVIEW

[1] In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993).

FACTS

On March 18, 1992, Douglas County Deputy Sheriff E.J. Van Buren prepared an affidavit and application for issuance of a search warrant for a residence located at 2704 South 13th Street in Omaha, Nebraska. Van Buren's affidavit stated that he had just and reasonable grounds to believe and did believe that there was concealed or kept on the premises cocaine and its derivatives, administering instruments, moneys, and records pertaining to possession and distribution of the controlled substance. Van Buren stated that the property was under the control of Moore.

The affidavit stated that on January 25, 1992, at 5:02 p.m., Van Buren, in an undercover capacity, met a known but unnamed individual who obtained one-eighth of an ounce of cocaine for Van Buren from the residence at 2704 South 13th Street. Another deputy conducting surveillance observed the individual walk to the residence, enter the front door at approximately 5:26 p.m., and then exit at approximately 5:30 p.m. The one-eighth ounce of the substance delivered to Van Buren was tested by chemical analysis and found to be cocaine. On March 16, the same unnamed individual obtained another

one-eighth ounce of cocaine for Van Buren from the same residence. The individual was observed entering the residence at about 7:55 p.m., and then delivered another one-eighth ounce to Van Buren, which substance field-tested positive for cocaine.

The application for the warrant requested a nighttime search because the investigation "may terminate during the night-time hours, due to the hour that this warrant application is being prepared, and the nature of this investigation." The application requested a no-knock search warrant because the officers "may be at great risk to life and limb, and evidence may be easily destroyed." Van Buren stated that he was told by a reliable confidential informant that the occupants of the residence had a shotgun and a handgun in their possession and that the residence was known to be a modern residence equipped with modern plumbing, including running water. Van Buren stated that based on his past experience, "these facilities" could easily be used to destroy evidence of the type that was being sought under the warrant.

The search warrant was issued by a county judge, who found probable cause to believe that sufficient grounds existed for the issuance of the warrant based on Van Buren's written affidavit. The warrant authorized entry of the premises "at any time" without knocking or announcing police authority. The court found that "if officers anounced [sic] their presence and intention[,] officers will be at great risk to life and limb, and evidence may be destroyed." The warrant was executed on March 24, 1992, at approximately 9 p.m.

Moore filed a motion to suppress all evidence obtained pursuant to the warrant, arguing that the affidavit did not contain sufficient information to establish probable cause to believe evidence of a crime would be found in her home on March 24, 1992. She claimed the warrant was in violation of her Fourth Amendment rights because it was executed untimely, 6 days after the application, and at night, in violation of Neb. Rev. Stat. § 29-814.04 (Reissue 1989).

At the suppression hearing, the court found there was sufficient probable cause shown in the affidavit for the issuance of the warrant. In considering whether the warrant had become stale by the date of its execution on March 24, 1992, the court

held that an inference could be drawn from two prior drug buys on January 25 and March 16 that a quantity of cocaine was kept on hand by Moore. The court found that probable cause had not become so stale that it dissipated into extinction. In holding that the warrant could be executed at any time, the court determined that an inference could be drawn that the officer anticipated as he prepared the affidavit that it would not be finished or the warrant signed until after 8 p.m. and that although prior buys had occurred during the daytime, the last buy concluded at 7:58 p.m., just 2 minutes before 8 p.m., statutory nighttime. The court noted that in March it is dark at 7:58 p.m. and that although not statutorily nighttime, 1 or 2 minutes before 8 p.m. was not a sufficient reason to find that the purchase of narcotics was not at night. Because the prior buy was at around 8 p.m. and the sale of cocaine is a detriment to the best interests of the public, the district court found that the county court was correct in issuing a search warrant to be served at any time.

ANALYSIS

[2] Appellate review of a search warrant is restricted to consideration of the information contained within the four corners of the affidavit for the search warrant. Evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). In an appellate court's determination of the correctness of a trial court's ruling on a motion to suppress, the appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993). Therefore, in determining whether the trial court erred, we consider only the facts set forth in the affidavit.

[3] The burden is upon a defendant who seeks to suppress evidence obtained pursuant to a search warrant to establish that the search warrant is invalid so that the evidence secured thereby may be suppressed. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). In reviewing the sufficiency of the affidavit, an appellate court considers the "totality of the circumstances" test which is set forth in *Illinois v. Gates*, 462

U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Given the totality of the circumstances set forth in the affidavit, the issuing magistrate must make a practical commonsense decision that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Utterback, supra.*

Moore argues that the affidavit failed to support the court's finding that the public interest required a nighttime search of the premises. Section 29-814.04 provides that a warrant shall "be served in the daytime unless the magistrate or judge is satisfied that the public interest requires that it should not be so restricted, in which case the warrant may direct that it may be served at any time." Daytime is defined as "the hours from 7:00 a.m. to 8:00 p.m." *Id.*

Issuance of the warrant was based on two controlled buys of cocaine, one made 2 days prior to the application for the search warrant. The reliability of the information obtained is not at issue because the affiant was the deputy who made the purchase. The seller of the cocaine was observed by another deputy as the seller left the subject residence. Based on the totality of the circumstances contained in the affidavit, we find that there were sufficient facts to justify a finding of probable cause for the issuance of the warrant. Moore does not argue otherwise.

We first consider whether the execution of the warrant was improper because it occurred on March 24, 1992, 6 days after the warrant was issued. In *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991), an application for a warrant was based on information from an informant who had been inside the house within the previous 72 hours, but the sheriff's office waited 9 days after receiving the warrant before executing it. The court rejected the defendant's argument that the warrant was executed too late by stating that Neb. Rev. Stat. § 29-815 (Reissue 1989) requires that a warrant be executed and returned within 10 days after the date of its issuance. Since the warrant was executed and returned within the statutory time period, the court determined that the defendant's argument was without merit. We make a similar finding in this case. The execution of the warrant 6 days after its issuance does not require

suppression of evidence obtained based on the warrant.

We next address whether the issuance of the warrant for an "anytime" search and the execution of the warrant at approximately 9 p.m. were clearly in violation of § 29-814.04. Our review, therefore, is to determine whether the court could reasonably determine that the public interest required nighttime service of the warrant. The district court drew the inference that the officer anticipated he would not complete the preparation of the affidavit and application for the warrant before 8 p.m. The court noted that the last purchase of cocaine at the house concluded at 7:58 p.m., just 2 minutes before statutory nighttime, and that reason and logic dictated that the purchase concluding 2 minutes before statutory nighttime was not a sufficient reason to find that the purchase of the narcotics did not occur at night. Thus, the court reasoned that the previous buy had occurred at night and that the sale of cocaine was a detriment to the best interests of the public, which supported the issuance of a search warrant to be served at any time in the interests of the public and the interests of justice.

[4] In order to authorize the issuance of a search warrant for service during the nighttime under § 29-814.04, the magistrate or judge must only be satisfied from a commonsense reading of the affidavit in support of such issuance that it reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service. *State v. Paul*, 225 Neb. 432, 405 N.W.2d 608 (1987). In our review of the court's ruling on the motion to suppress, we cannot say that the court's findings were clearly erroneous.

We note that the U.S. Courts of Appeals for the Eighth and Sixth Circuits have held that a violation of a procedural rule regarding nighttime searches does not per se invalidate the search. In *United States v. Searp*, 586 F.2d 1117 (6th Cir. 1978), *cert. denied* 440 U.S. 921, 99 S. Ct. 1247, 59 L. Ed. 2d 474 (1979), the U.S. Court of Appeals for the Sixth Circuit acknowledged that there was probably no more offensively invasive procedure than a nighttime entry into a private home, but the procedures by which nighttime search warrants are governed are not included in the Fourth Amendment. Therefore, suppression of evidence does not automatically

result from violation of the procedural rules. To require suppression as a result of the violation of procedural rules, there must be a showing that there was prejudice in the sense that the search might not have occurred, that the search would not have been so abusive if the rule had been followed, or that there was evidence that the rule was deliberately and intentionally disregarded. *Searp, supra.*

In *U.S. v. Schoenheit*, 856 F.2d 74 (8th Cir. 1988), the court held that noncompliance with Fed. R. Crim. P. 41 does not automatically mandate suppression of the evidence. Rule 41(c)(1) provides in part: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." The court pointed out that the time of the search is relevant to determine whether a search is reasonable under the federal Constitution, but there is no authority for concluding that a search is per se unconstitutional because it was conducted at night. The Eighth Circuit adopted the same test as set forth by the Sixth Circuit in *Searp, supra.*

As we review the facts, we do not find that the search would not have occurred or would not have been so abusive if the search had been during the daytime. There was probable cause for the issuance of a warrant. The warrant was executed at about 9 p.m., not in the middle of the night, but at a time of the year when it is dark before 8 p.m. Moore has not shown that she was prejudiced by the execution of the warrant at approximately 9 p.m. or that the search was in violation of her Fourth Amendment rights.

For the reasons set forth herein, we affirm the judgment and sentence of the district court.

AFFIRMED.

NICKI L. WHITE, APPELLEE, V. CHRISTIAN HOMES, INC., AND CONTINENTAL INSURANCE COMPANY, APPELLANTS.

508 N.W.2d 309

Filed November 9, 1993. No. A-92-1177.

1. **Workers' Compensation: Appeal and Error.** A decision by the Nebraska Workers' Compensation Court after rehearing has the same force and effect as a jury verdict, and the findings of fact will not be set aside unless an appellate court determines that those findings are clearly erroneous.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in a light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
3. **Workers' Compensation: Expert Witnesses.** When medical and other expert testimony is in conflict, the resolution thereof is for the compensation court, and that court is not bound by the testimony of an expert.
4. **Workers' Compensation.** Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact.
5. **Workers' Compensation: Words and Phrases.** Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Stephen W. Kay, of Kay & Kay, for appellants.

Craig L. Kelley, of Inserra Law Offices, for appellee.

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

SIEVERS, Chief Judge.

Christian Homes, Inc., and Continental Insurance Company (collectively referred to as Christian) appeal the November 23, 1992, award on rehearing of the Workers' Compensation Court finding that Nicki L. White is permanently and totally disabled.

ASSIGNMENTS OF ERROR

Christian assigns the following three errors: The Workers'

Compensation Court erred (1) in finding that White is permanently and totally disabled, (2) in finding that White is physically unable to participate in an active program of vocational rehabilitation, and (3) in finding that Christian should continue to provide future medical and hospital services and treatment to White.

STANDARD OF REVIEW

[1] As this appeal is determined by factual issues, our standard of review is limited. A decision by the Nebraska Workers' Compensation Court after rehearing has the same force and effect as a jury verdict, and the findings of fact will not be set aside unless an appellate court determines that those findings are clearly erroneous. *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992).

Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 1992), an appellate court will not set aside, modify, or reverse a Workers' Compensation Court decision if there is sufficient competent evidence in the record to warrant the compensation court's order, judgment, or award. See *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991).

[2] In testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in a light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

[3] When medical and other expert testimony is in conflict, the resolution thereof is for the compensation court, and that court is not bound by the testimony of an expert. See *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

FACTS

We do not sit to resolve disputed factual matters in workers' compensation cases. Under the standard of review, we look to the record for sufficient competent evidence to warrant the compensation court's award, and if such evidence is there, the decision will be affirmed, irrespective of how we would have decided the factual disputes. Thus, viewing the evidence in the

light most favorable to White, we find that the following facts are supported by sufficient competent evidence:

White, a petite woman standing 5 feet tall and weighing approximately 107 pounds, was employed as a certified nursing assistant, earning $4.01 per hour for a 40-hour workweek. Her work for Christian, a nursing home, involved bathing, feeding, and dressing the residents and lifting them in and out of wheelchairs and beds. On the date of her work accident, July 16, 1989, White was lifting a patient from a wheelchair when the patient's legs slipped between White's, causing White to bend over bearing the full weight of the patient. She immediately felt pain in her lower back, and the pain radiated into her legs. That the work accident occurred and that it caused the back injury are not disputed. Although White had difficulty with anemia, apparently beginning in 1979, she had nonetheless worked as a nursing assistant at several other nursing homes and had worked as a cook, a motel maid, a dishwasher, and a cashier and clerk. She had never had back difficulties prior to the date of her work accident, July 16, 1989.

While White was under the care of Dr. Steven Brestin, an orthopedic surgeon in Kearney, Nebraska, a herniated fifth lumbar disk was diagnosed. Although we do not detail them, conservative treatment measures did not resolve White's back and leg pain. Accordingly, on January 2, 1990, Dr. Brestin performed a fifth lumbar diskectomy, along with an L5-S1 spinal fusion with a bone graft taken from the left ilium. X rays taken July 16 revealed incomplete healing of the fusion on the right side. On August 27, a magnetic resonance imaging scan revealed decreased disk height at the L5-S1 level, as well as disk desiccation, indicating degenerative disk disease. As a result, a diagnosis of postoperative fibrosis around the thecal sac and the right S1 nerve root was made. White stopped seeing Dr. Brestin in November 1990 but continued to see her primary care physician, Dr. Charlotte Wirges. Additionally, White saw Dr. Samuel Smith, a Lincoln orthopedist, in December 1990. Dr. Smith authored a letter stating that White's diagnosis "is basically that of a failed lumbar laminectomy syndrome from what I believe is epidural and epineural scar formation around the L5-S1 nerve roots."

In April 1991, White began seeing Dr. Richard Slovek, a North Platte orthopedist. On June 13, Dr. Slovek wrote the following in a hospital record of White's:

> 26[-year-old] female who has a failed low back surgery syndrome. She has had a laminectomy and arthrodesis. She has had treatment for pseudoarthrosis. She has chronic perineural fibrosis which has caused her chronic back and radicular pain that has not responded to conservative treatment. . . . She continues to be limited with sitting to less than 30 minutes. She has a poor quality of life. She has not been able to be rehabilitated for any work activity because of the chronic back and radicular pain. The patient is not a good candidate for further surgery on her back . . . .

According to Dr. Slovek, White has a 36-percent physical impairment as a result of her condition, but in his opinion, she is incapable of any gainful employment and therefore has a 100-percent disability. Dr. Slovek testified that the basis of his 100-percent disability rating for White is that she lacks the ability to "sit long enough, stand long enough or walk enough to carry out any kind of occupation, even a sedentary job."

White testified that she now uses a cane and that on a scale of 1 to 10, her pain level is at 4 when she is at rest and at 10 when she is exerting herself. She can lift no more than 5 pounds without increasing her pain. White testified that she can sit for about 15 minutes before she experiences tingling and numbness, that she can stand for 15 minutes, and that when her symptoms flare up, she lies down. White does not believe there is any job she can do. She testified that she hardly does anything at home and that she spends half of an 8-hour day in bed because of the pain. Under Dr. Slovek's care, she had a dorsal cord stimulator inserted in her back, which she could not tolerate, and was treated with a pump that put morphine directly into her spine, which she also could not tolerate. At the suggestion of one of her physicians, she has weaned herself from narcotic pain medication and now regularly uses Extra-Strength Tylenol.

White's testimony was that she has had Graves' disease (hyperthyroidism), which was apparently discovered at the time

of her back surgery, and anemia. The Graves' disease has been treated with radioactive iodine. White takes iron supplements for the anemia, which she had well before this injury and which did not interfere with her work. At the time of the rehearing, White related that she was not troubled by symptoms from either of those conditions.

Christian argues that the award on rehearing should be reversed on the basis of its evidence that White's disability is less than 100 percent according to the testimony of Christian's examining physician, AnnaMaria Guidos, a physiatrist employed by Madonna Rehabilitation Hospital in Lincoln who saw White on one occasion, and the testimony of Elizabeth Fassig, a vocational rehabilitation consultant who had one meeting with White.

Dr. Guidos' diagnosis was chronic pain syndrome, possible fibrosis, and possible delayed union of the spinal fusion. She admitted that all the components of her diagnosis were causally related to the accident of July 16, 1989. Citing a lack of motivation to return to work because of secondary gain and inconsistencies found during her physical examination of White, Dr. Guidos rendered an opinion that White could work an 8-hour day but would be restricted to not lifting greater than 25 pounds and not bending frequently. Dr. Guidos also opined that White could sit and work for 1 hour with the option of standing or moving about as tolerated. Dr. Guidos assessed White's physical impairment at 10 percent.

Fassig testified that she was aware of the restrictions placed on White by numerous physicians, but that she was able to find positions for White as a telemetry technician, a ward clerk, and a pharmacy technician at the Tri-County Hospital in Lexington and the Good Samaritan Hospital in Kearney, all of which had paid on-the-job training. It was Fassig's opinion that these potential jobs, which would pay more than White was earning when injured, were within the guidelines outlined by Drs. Smith and Guidos and that White was capable of performing these jobs and earning a wage. Fassig disagreed with Dr. Slovek's conclusion of permanent total disability and stated that, in her opinion, White had a loss of earning capacity of 15 to 20 percent.

DISCUSSION

[4] "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, 912, 464 N.W.2d 343, 351 (1991).

In *Thom v. Lutheran Medical Center*, 226 Neb. 737, 740, 414 N.W.2d 810, 813 (1987), the Supreme Court stated:

> Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted.

In *Sherard v. Bethphage Mission, Inc., supra*, the court quoted with approval from Arthur Larson's treatise The Law of Workmen's Compensation that the term "compensable disability" is generally defined as inability, as a result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training.

[5] In *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 890, 457 N.W.2d 815, 820 (1990), the court held:

> Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.

Accord *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991).

With these governing legal principles and the standard of review in workers' compensation cases in mind, we address Christian's first assignment of error: The compensation court erred in awarding permanent total disability. The evidence is in conflict. Dr. Slovek, who now treats White, testified that she is incapable of returning to any type of work, even sedentary work. On the other hand, Dr. Guidos, the examining physician for Christian, and Dr. Smith, a Lincoln orthopedist, each of whom saw White once, opined that she could return to work for

an 8-hour day, with the restrictions which we have detailed above. Additionally, Christian's vocational rehabilitation consultant testified that she had found three jobs in each of two hospitals for White. This evidentiary conflict was for the compensation court to resolve. Dr. Slovek's testimony, coupled with White's self-described limitations, provides sufficient competent evidence to support a finding of permanent and total disability. At least three of the physicians who saw her agree that White suffers from "failed back surgery syndrome." This surgery, instead of resolving her back injury, has made it worse by the formation of scarring around the thecal sac and the fifth lumbar nerve root. Based on the seriousness of White's initial injury, together with the painful and limiting sequelae of her surgery, we cannot say that the compensation court was clearly wrong in holding that she was permanently and totally disabled.

Christian's next assignment of error attacks the compensation court's holding that White is physically unable to participate in a program of vocational rehabilitation at this time. Christian's brief relies upon the testimony of its vocational consultant, who testified that White could perform the jobs which the consultant had found for her. However, it is apparent by virtue of the compensation court's finding of permanent and total disability that this testimony by Fassig was rejected. Thus, we cannot say that the conclusion that White is physically unable to participate in a program of vocational rehabilitation was clearly erroneous.

The final assignment of error assails the compensation court's finding that White is entitled to such future medical and hospital services and treatment as may be reasonably necessary. Christian argues that since physicians agree that White has reached maximum medical improvement, this means that no future medical benefits should have been awarded. Given the seriousness of White's condition, this argument is obviously without merit. To suggest that a 27-year-old person who has experienced a failed back operation and has scarring around a lumbar nerve root will never need additional medical treatment is to ignore the obvious. No physician testified that White would not ever need further treatment. If Christian disputes

a medical expense which is later incurred, the Workers' Compensation Act allows Christian to litigate the dispute at that time. This assignment of error lacks merit.

CONCLUSION

Having reviewed the record in light of the assignments of error, we conclude that all of the assignments are without merit. Christian, having appealed to this court and having failed to obtain a reduction in the amount of White's award, is liable for attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 1992), which fees we assess in the amount of $2,000.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST HARPER, APPELLANT.

508 N.W.2d 584

Filed November 16, 1993. No. A-91-1239.

1. **Appeal and Error.** The only issues to be considered on appeal are those issues which are both assigned and discussed in the brief of the appellant.
2. **Criminal Law: Appeal and Error.** When an assignment of error is generalized and vague, an appellate court will review the appeal if the specific contention made by the criminal defendant is set forth in his or her brief and the State, through its brief, has argued in response to that contention.
3. **Postconviction: Appeal and Error.** In an appeal involving a proceeding for postconviction relief, the trial court's finding will be upheld unless such finding is clearly erroneous.
4. **Postconviction.** An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is entitled to no relief.
5. _____. A court is not required to grant an evidentiary hearing under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of the constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in the motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
6. _____. Postconviction relief is limited to alleged infringement of constitutional rights.
7. **Extradition and Detainer.** The right of a prisoner to be tried within 120 days of

being brought into this state under the Interstate Agreement on Detainers is a statutory right and not a constitutional right.

8. **Extradition and Detainer: Waiver.** A prisoner may waive his or her right to be tried within 120 days after being brought into this state for trial under the Interstate Agreement on Detainers by not raising the issue prior to or during trial.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

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

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

HANNON, Judge.

The district court found that the files and records of this case showed the defendant, Ernest Harper, was not entitled to postconviction relief under Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 & Cum. Supp. 1992) and dismissed the defendant's application without an evidentiary hearing. The defendant appeals. We affirm.

We start by recognizing that the defendant has had one direct appeal and three appeal proceedings which were denominated as postconviction actions. See, *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983); *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984); *State v. Harper*, 225 Neb. 300, 404 N.W.2d 436 (1987); *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989). In the last postconviction proceeding, the Supreme Court observed that the defendant was incarcerated in the State of Iowa when that proceeding was commenced. The Supreme Court held that "[t]he district court did not have jurisdiction to entertain defendant's motions for postconviction relief, and his motions should have been dismissed on that ground." *Id.* at 843, 448 N.W.2d at 408-09. An examination of the record shows that Harper was incarcerated in the State of Iowa at the time he brought each of the other two postconviction proceedings. By the same logic as the Supreme Court applied in the last

postconviction proceeding, the district court would not have had jurisdiction for the first two postconviction proceedings. For this reason, we shall treat this appeal as being from a first postconviction proceeding. See *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

In the defendant's application for postconviction relief, he alleged that he is now confined to the Nebraska Penal and Correctional Complex in Lincoln and that this confinement results from the denial of or an infringement of his rights under the Nebraska Constitution and the Constitution of the United States. The defendant alleged that he arrived in Nebraska under the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. app. §§ 1 and 2 (1988), on or about April 3, 1982, and that he was not tried until some time after August 25, 1982, which is longer than the 120 days allowed for trial in any proceeding made possible by article IV of the IAD. See, article IV(c) of the IAD; Neb. Rev.Stat. § 29-759 (Reissue 1989).

ASSIGNMENTS OF ERROR

The defendant also alleged, or attempted to allege, several other grounds for postconviction relief. He alleged that he was denied counsel in the detainer and extradition proceeding in which he was brought from Iowa to Nebraska to be tried in this case, that he was not given the opportunity to challenge the detainer and extradition proceeding, that he was denied counsel in his first postconviction relief proceeding, that there is no evidence to prove that he sexually assaulted one of the victims, and that the detainer filed against him was made under false pretenses in that it was not filed at the time alleged by the State. The district court wrote a formal opinion wherein it considered each of the issues presented, found that the files and records of the case showed the defendant was not entitled to any relief, and denied the application for postconviction relief.

[1,2] The only assignment of error that the defendant makes in his appeal to this court is that the district court erred in denying him an evidentiary hearing. In the defendant's brief, the only issue argued or discussed is that the judgment of conviction is void because the State failed to comply with the provisions of article IV of the IAD in that the State failed to try

the defendant within 120 days of his arrival in Nebraska. The only issues to be considered on appeal are those issues which are both assigned and discussed in the brief of the appellant. See, *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). However, when an assignment of error is generalized and vague, an appellate court will review the appeal if the specific contention made by the criminal defendant is set forth in his or her brief and the State, through its brief, has argued in response to that contention. See *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986). This case fits the latter rule, and we therefore will consider only the issue concerning the State's alleged failure to try the defendant within 120 days.

STANDARD OF REVIEW

[3-5] In an appeal involving a proceeding for postconviction relief, the trial court's finding will be upheld unless such finding is clearly erroneous. *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992); *State v. Gildea*, 240 Neb. 780, 484 N.W.2d 467 (1992). In considering this appeal, we must bear in mind that an evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is entitled to no relief. See *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991). A court is not required to grant an evidentiary hearing under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of the constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in the motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable. *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992); *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990).

DISCUSSION

In this appeal, we are considering whether the district court erred in not granting an evidentiary hearing in view of the fact that the defendant was brought into the state under the IAD

and was not tried within 120 days of the date he arrived in Nebraska.

The IAD provides the procedure between the states and the United States whereby persons who are imprisoned in one state or by the United States and who are also charged with crimes in other states or by the United States can be tried expeditiously for the pending charges while they are serving their current sentence. Article III of the IAD provides that a prisoner may request final disposition of the charge referred to in a detainer filed against the prisoner. Basically, the prisoner is entitled to be brought to trial on the charge within 180 days from the day the prisoner makes a proper request. The compact provides detailed provisions for the filing of the request and for the giving of notice required to commence the 180-day period.

Article IV of the IAD provides for the handling of the trial on the untried charges in the receiving state when the prisoner is delivered to the state where the charges are pending. Article IV(c) of the IAD provides as follows:

> "In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

The defendant alleges that he came into the State of Nebraska pursuant to the IAD on April 3, 1982, and that he was not tried until August 25, that is, 144 days later. Article V(c) of the IAD provides:

> "If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

[6] The trial court held that if the IAD required that the defendant be tried within 120 days and he was not tried within 120 days, then this would be a violation of law but not a violation of the defendant's constitutional rights under either the state or federal Constitution. The trial court reasoned that since postconviction relief is limited to alleged infringement of constitutional rights, *State v. Cole*, 207 Neb. 318, 298 N.W.2d 776 (1980), and the error, if it was made, was not a violation of a constitutional right, then such an error would have had to have been raised in a direct appeal rather than by a request for postconviction relief.

The trial court made its decision without an evidentiary hearing. Neither the transcript, the bill of exceptions, nor any other record which was supplied to this court establishes how the defendant was brought from Iowa to Nebraska to be tried. For this reason, we must assume that the allegations contained in the defendant's petition which are not controverted by the available record are true. We will therefore assume for purposes of this decision that the defendant was brought into the state under the IAD on or about April 3, 1982. The record shows the trial actually commenced on August 30, 1982. The defendant did not bring this issue before the court prior to trial, during trial, or on his direct appeal to the Supreme Court.

The defendant maintains that a prisoner's right to be tried within 120 days of arriving in the receiving state is a constitutional right under the Privileges and Immunities Clause of the U.S. Constitution and that if a receiving state fails to comply with the provisions of article IV(c), the IAD deprives the courts of the receiving state of jurisdiction to try the prisoner and any such conviction is void. The authority cited by the defendant does not support his position.

The defendant relies primarily on the case of *Moore v. Whyte*, 164 W. Va. 718, 266 S.E.2d 137 (1980). In *Moore*, the infringement of the defendant's right to prompt disposition of the case was relatively flagrant. The defendant was imprisoned in Atlanta, Georgia, and a detainer was sent by West Virginia to Georgia in August 1972. Moore was brought to West Virginia and appeared in court on three separate occasions in September 1972 without being tried, and he was returned to Georgia on

October 7. On December 1, the prosecutor's office again requested that Moore be brought to West Virginia, the request being satisfied on January 31, 1973, for trial on February 20. The prosecution then moved for a continuance, and that continuance was granted. Moore was finally tried on March 27, 1973. In a habeas corpus proceeding, the West Virginia Supreme Court of Appeals held that by violating the 120-day trial provision in article IV of the IAD, the trial court lost jurisdiction. Hence, the defendant was entitled to seek immediate release via a collateral proceeding. In making this decision, the West Virginia court relied in part upon its interpretation of a statutory provision requiring dismissal of a criminal prosecution for failure to try a case within the specified period. The court stated that West Virginia law provides that its courts are without jurisdiction after the specified time allowed for trial has passed. It applied the same principle to IAD proceedings and concluded that Moore was entitled to immediate release. This is the only case that really supports the defendant's position.

The defendant also relies upon *Gibson v. Klevenhagen*, 777 F.2d 1056 (5th Cir. 1985); *Johnson v. Stagner*, 781 F.2d 758 (9th Cir. 1986); and *Brown v. Wolff*, 706 F.2d 902 (9th Cir. 1983). In *Gibson*, a prisoner in the Florida state prison brought a habeas corpus proceeding in federal court to question the validity of his conviction in the State of Texas. This conviction resulted from a proceeding to which the IAD was applicable. In that case, the court held that Gibson had properly requested a final disposition of criminal charges pending against him on November 2, 1981. The State of Texas failed to accept custody of Gibson within the required time, and after he made a timely assertion of his rights under the IAD, these objections were denied and he pled guilty on August 15, 1983. The court of appeals noted that Gibson had raised the speedy trial claim by written motion prior to trial. In *Gibson*, the district court's denial of a writ of habeas corpus was reversed, and the court of appeals remanded the cause with instructions that the conviction entered on August 15, 1983, be vacated and the detainer placed upon Gibson be removed. *Gibson* is distinguishable from the case at hand by the fact that in *Gibson*

the defendant raised the question before trial.

In *Johnson*, the U.S. Court of Appeals for the Ninth Circuit considered a situation where the defendant had been in prison in the State of California and, after an unsuccessful attempt, succeeded in filing an appropriate request under article III of the IAD for disposition of charges pending in Oregon. On September 21, 1982, the trial court granted a continuance. A few days after the 180-day time limit expired on November 4, 1982, the defendant moved to dismiss based on the prosecution's failure to try the case within 180 days. This motion was denied, and the defendant was convicted. In *Johnson*, the district court had denied the writ of habeas corpus, and the court of appeals reversed the judgment and remanded the cause with directions for the district court to determine whether the continuance was granted for good cause or whether the defendant stipulated to the continuance or explicitly waived his right to be tried within 180 days. This decision implies, of course, that if the defendant was not tried as required by the IAD, the writ of habeas corpus would have been granted and he would have been released. In *Johnson*, the defendant also raised the timeliness issue before trial.

In *Brown*, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court order denying the defendant's petition for a writ of habeas corpus. The basis of the petition was that the State of Nevada did not try the defendant, who was being held in Maryland, within 180 days of the time the defendant filed a request for trial. Neither the defendant nor his attorney objected when the trial court set the trial to commence on July 24, 1978. The defendant had filed a petition for a pretrial writ of habeas corpus and had stipulated that if the petition was not decided by July 10, the trial court could continue the trial. This petition alleged that the state had violated both Brown's right to a speedy trial under the IAD and his constitutional right to a speedy trial. The trial court denied relief in state court proceedings, and the Nevada Supreme Court later affirmed. While the court of appeals found that the defendant had specifically agreed to a continuance of the case if it became necessary, the court nonetheless addressed some of the issues we are considering. In making its decision, the court held that

failure to try a defendant within the time limits imposed by the IAD was an " 'exceptional circumstance.' " *Brown*, 706 F.2d at 905. The court distinguished this decision from its earlier holding in *Hitchcock v. United States*, 580 F.2d 964 (9th Cir. 1978), that a violation of the antishuttling rule in the IAD was not a "fundamental defect" and that, therefore, a habeas corpus proceeding could not be used to attack a conviction in a proceeding where a prisoner had been returned to the original jurisdiction before trial in the receiving state. Article V(c) provides the same sanction as that of the antishuttling rule for violating the timeliness provision of the IAD. In part, the *Brown* court relied upon the holding in *United States v. Mauro*, 436 U.S. 340, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978). However, in *Mauro*, the defendants moved to dismiss the proceedings before trial, and the U.S. Supreme Court was considering the timeliness issue on direct appeal.

The *Brown* court recognized the decision of the U.S. Supreme Court in *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981), in which the Court held that the IAD is an interstate compact approved by Congress, and thus a federal law within the meaning of 28 U.S.C. § 2254 (1988), but it did not consider whether rights under the IAD were or were not constitutional rights. The court in *Brown* then concluded that violation of the IAD was a violation of federal law and that the district court had jurisdiction to decide the case.

It should be noted that the Ninth Circuit cases recognized that the habeas corpus proceedings under § 2254(a) could be brought by a defendant "only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States," and as explained above, the court of appeals has held that a violation of the IAD is a violation of federal law. That court did not hold that a violation of the IAD was a violation of constitutional rights. Under § 29-3001, postconviction proceedings can only be brought in Nebraska if the defendant has been deprived of constitutional rights. The Fifth and Ninth Circuit cases are therefore inapplicable to these proceedings. Even the cases cited by the defendant do not hold that a state's failure to try a defendant within the time prescribed by the IAD violates a constitutional right.

The Eighth Circuit has taken a different approach from that taken by the Fifth and Ninth Circuits. In *Camp v. United States*, 587 F.2d 397 (8th Cir. 1978), the petitioner had been convicted in federal court under an IAD proceeding, and more than 3 years later, he filed a motion to vacate the sentence and judgment because he had been taken into federal custody and returned to state custody without a trial. His rights under the IAD were undoubtedly violated before he pled guilty to the charge. The district court had granted the petitioner relief, and the court of appeals reversed. The court of appeals stated that a valid guilty plea operates as a waiver of all nonjurisdictional defects and errors, that violations of article IV of the IAD are not jurisdictional, and that these rights are not deemed of such fundamental importance that a violation of them deprives a court of jurisdiction. The court of appeals recognized the U.S. Supreme Court has indicated that even constitutionally derived rights, such as the right to suppress inadmissible evidence, may be waived. In announcing its decision, the court of appeals stated:

> In light of these decisions, it cannot be said that the statutory rights defined in the IAD—which clearly are not derived from the Constitution—are so fundamental as to preclude acceptance by a court of a voluntary plea of guilty. Accordingly, we hold that a violation of Article IV(e) of the IAD is a non-jurisdictional error and, as such, is waivable by a criminal defendant.
>
> . . . "[T]he violation of a statutory provision such as Article IV(e) is not sufficiently important to deny a court jurisdiction to entertain a guilty plea where the defendant fails to raise the issue in a timely manner."

(Citation omitted.) *Camp*, 587 F.2d at 400.

In *Camp*, the petitioner argued that he could not have waived the right without being aware of it. The court of appeals held that, almost without exception, the requirement that a waiver be knowingly and intelligently done is limited to constitutional guarantees. The court then went on to say:

> [T]he IAD amounts to nothing more than a statutory set of procedural rules which clearly do not rise to the level of constitutionally guaranteed rights. . . . Moreover, the

> sanctions contained in Article IV(e) of the IAD have nothing to do with preserving a fair trial but are instead intended only to prevent excessive interference with a prisoner's rehabilitation in the state prison system.

(Citation omitted.) *Camp*, 587 F.2d at 400.

The U.S. Court of Appeals for the Eighth Circuit made essentially the same decision in *Huff v. United States*, 599 F.2d 860 (8th Cir. 1979). In that case, the court noted that proceedings under 28 U.S.C. § 2255 (1988) could be brought by a prisoner on four grounds: "(1) [T]he sentence imposed violates the Constitution or laws of the United States; (2) the court that imposed the sentence lacked jurisdiction to do so; (3) the sentence exceeds the maximum authorized by law; and (4) the sentence 'is otherwise subject to collateral attack.' " *Huff*, 599 F.2d at 863. In holding that the petitioner could not collaterally attack a conviction where rights under article IV(e) of the IAD were violated, the court explained that when a prisoner bases his claim upon an allegation that the laws of the United States were violated, "the alleged error must be 'a fundamental defect which inherently results in a complete miscarriage of justice' and must present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' " (Emphasis omitted.) *Huff*, 599 F.2d at 863. The court held that mere failure to comply with the IAD, without more, does not justify relief under § 2255.

The U.S. Court of Appeals for the Sixth Circuit has arrived at essentially the same decision. See, *Mars v. United States*, 615 F.2d 704 (6th Cir. 1980); *United States v. Eaddy*, 595 F.2d 341 (6th Cir. 1979). In *Eaddy*, the court held that, while the defendant in that case gave sufficient notice to the government of his desire for a speedy trial, if a defendant does not raise the speedy trial question in the district court, he cannot raise the article IV(c) claim for the first time on appeal. The court further stated that the defendant forfeited his right to assert a violation of article IV(e) of the IAD by failing to assert it prior to or during the trial in the district court. "Neither does a violation of Article IV automatically strip the trial court of subject matter jurisdiction over the underlying criminal charges

upon which the detainer is lodged." *Eaddy*, 595 F.2d at 346. "The rights created by Article IV(c) and (e) are purely statutory." *Eaddy*, 595 F.2d at 346.

CONCLUSION

[7,8] On the basis of the above authority, we conclude that the right of a prisoner to be tried within 120 days of being brought into this state under the IAD is a statutory right and not a constitutional right. Since postconviction relief is limited to cases where the defendant claims a violation of a constitutional right, the defendant cannot maintain a postconviction proceeding based upon the violation of an IAD right. We also conclude that a prisoner may waive his or her right to be tried within 120 days after being brought into this state for trial under the IAD by not raising the issue prior to or during trial. Therefore, the defendant waived any such right by not raising the issue in time. For these reasons, the judgment and order of the district court are affirmed.

AFFIRMED.

ANGELO MASTROCESARE, APPELLANT, V. BETTY J. MASTROCESARE, APPELLEE.

507 N.W.2d 683

Filed November 16, 1993. No. A-92-087.

1. **Divorce: Words and Phrases.** Labels placed upon payments made under the terms of divorce judgments are not determinative of their nature.
2. **Courts: Judgments: Time.** A trial court has inherent authority to vacate its former judgment during the same term of court.
3. **Courts: Time.** A term of district court begins on January 1 of a given year and ends on December 31 of that same year, unless otherwise provided by order of the district court.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

John R. Brogan for appellant.

David L. Kimble, of Souchek & Kimble, for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

Angelo Mastrocesare appeals from a denial of his motion to vacate a judgment for spousal support contained within the decree of dissolution of the parties' marriage. The district court for York County held that it was without jurisdiction to entertain appellant's motion to vacate. For the reasons set forth below, we affirm.

FACTS

Appellant, Angelo Mastrocesare, filed a petition for dissolution of marriage on April 30, 1990. Appellee, Betty J. Mastrocesare, filed a responsive pleading requesting an award of spousal support and other equitable relief. On February 20, 1991, the district court for York County entered a decree dissolving the parties' marriage and ordering appellant to pay spousal support to appellee in the amount of $300 per month for 72 months. Neither party appealed from the decree. On December 16, 1991, appellant filed a motion to vacate the judgment for spousal support, requesting the district court to vacate the portion of the decree that ordered appellant to pay spousal support. On January 7, 1992, the district court overruled appellant's motion to vacate. The district court stated that it was without jurisdiction to entertain a motion to vacate because neither party had filed a timely appeal from the decree entered on February 20, 1991, and that the decree had thus become final. Appellant filed this appeal on February 4, 1992.

ASSIGNMENTS OF ERROR

Appellant assigns three errors, which we have consolidated into two assigned errors for purposes of this discussion. Appellant claims that the district court erred in (1) ordering appellant to pay spousal support and (2) determining that it had no jurisdiction to hear appellant's motion to vacate.

STANDARD OF REVIEW

In an appeal involving an action for dissolution of marriage, an appellate court's review is de novo on the record to

determine whether the trial court has abused its discretion. In the absence of an abuse of discretion, an appellate court will uphold the trial court's judgment. See, *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Larimore v. Larimore*, 240 Neb. 13, 480 N.W.2d 192 (1992).

DISCUSSION

Spousal Support Order.

Appellant has not challenged the amount of support that he was ordered to pay appellee, either in his motion to vacate or in this appeal. Rather, appellant claims that the district court abused its discretion by ordering him to pay spousal support instead of alimony. Appellant contends that a court cannot enter an order for spousal support outside of a decree or judgment which also provides for child support. Appellant bases his argument on the statutory definition of spousal support found in Neb. Rev. Stat. §§ 42-347(4) (Cum. Supp. 1992) and 43-1715 (Reissue 1988). Section 42-347(4) states:

> Spousal support, when used in the context of income withholding or any provisions of law which might lead to income withholding, shall mean alimony or maintenance support for a spouse or former spouse when ordered as a part of an order, decree, or judgment which provides for child support and the child and spouse or former spouse are living in the same household.

Section 43-1715 defines spousal support almost identically.

Appellant contends that because he and appellee had no children, the district court could not have ordered appellant to pay support to appellee "as part of an order . . . which provides for child support" as stated in the statutory definition of spousal support. Appellant is correct in his assertion that the term "spousal support," as defined by the Legislature, means support paid to a spouse within the confines of an order that also provides for child support. However, appellant is incorrect in his assertion that the district court's mislabeling of appellant's support obligation to appellee justifies vacating the judgment containing such order.

In *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986), a husband had been ordered by the district court to pay alimony

pursuant to Neb. Rev. Stat. § 42-362 (Reissue 1988). Section 42-362 provided that a court may order "support and maintenance" for a mentally ill spouse upon dissolution of the marriage and thereafter. The husband appealed to the Nebraska Supreme Court, contending that the district court had erred in awarding alimony to his spouse under § 42-362 because the statute did not provide for such an award. The Nebraska Supreme Court rejected the husband's argument, noting that it was "clear from the trial court's language . . . that notwithstanding its use of the word 'alimony,' it in fact awarded the wife 'support and maintenance' under the terms of § 42-362." 223 Neb. at 207, 388 N.W.2d at 819.

[1] We believe that the present case presents a situation analogous to the situation addressed by the Nebraska Supreme Court in *Black*. In this case, it is clear that the district court, notwithstanding its employment of the term "spousal support," in fact awarded the appellee alimony. This result is also consistent with authority from other jurisdictions holding that labels placed upon payments made under the terms of divorce judgments are not determinative of their nature. *In re Marriage of Kessler*, 110 Ill. App. 3d 61, 441 N.E.2d 1221 (1982); *Knipfer v. Knipfer*, 259 Iowa 347, 144 N.W.2d 140 (1966) (holding that a trial court's use of the term "alimony" was not conclusive against a claim that the award was actually a property settlement); 27B C.J.S. *Divorce* § 309 (1986); 24 Am. Jur. 2d *Divorce and Separation* § 520 (1983). In addition, despite the statutory definition of spousal support, it is evident that the term "spousal support" and the term "alimony" are commonly used interchangeably. See, *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985); 24 Am. Jur. 2d, *supra*. In light of the above, we find that the district court in fact awarded appellee alimony despite the fact that it used the term "spousal support." Appellant's first assigned error is thus without merit.

District Court's Jurisdiction.

[2,3] Appellant contends in his second assignment of error that the district court erred in determining that it did not have jurisdiction to entertain his motion to vacate the decree. A trial court has inherent authority to vacate its former judgment

during the same term of court. *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981). In *In re Estate of Weinberger*, the Nebraska Supreme Court found that there is a presumption that a term of district court begins on January 1 of a given year and ends on December 31 of that same year, unless otherwise provided by order of the district court.

The district court entered the decree in this case on February 20, 1991. Appellant filed his motion to vacate on December 16. There is no evidence in the record that the district court provided that its term for this period was other than from January 1 through December 31. Consistent with *In re Estate of Weinberger*, we must find that both the decree and appellant's motion to vacate in this case were filed during the same term of court. Therefore, appellant correctly asserts that the district court had jurisdiction to entertain appellant's motion to vacate.

Appellant based his motion to vacate on the same grounds as his first assigned error in this case, i.e., that the district court's order to pay spousal support was not statutorily authorized. As noted above, this claim is without merit. A court must disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and no judgment will be reversed or affected due to such error or defect. Neb. Rev. Stat. § 25-853 (Reissue 1989).

CONCLUSION

Because appellant's motion would not have been properly granted if entertained by the district court, we conclude that the district court's determination that it had no jurisdiction to entertain appellant's motion to vacate was harmless error. We therefore affirm the district court's decision.

AFFIRMED.

PHELPS COUNTY, NEBRASKA, APPELLEE, V. DR. PAUL E. ANDERSON ET AL., APPELLEES, AND ROBERT E. WINKLER ET AL., APPELLANTS.

508 N.W.2d 314

Filed November 16, 1993. No. A-92-265.

1. **Real Estate: Improvements: Assessments: Taxes.** A tax on land and a building or other improvement is a single and indivisible tax, even if the building or improvement is assessed separately from the land.
2. **Real Estate: Improvements: Assessments: Taxes: Liens.** A county assessor's assessment of improvements on a different ledger page from the underlying property is at most a mere irregularity and does not affect the validity of the tax or subsequent lien on the underlying property.

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

Robert A. Ide, of Aten, Noble & Ide, for appellants.

Rebecca E. Miller, Phelps County Attorney, for appellee Phelps County.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

Appellee Phelps County, Nebraska, brought this action in the district court for Phelps County to foreclose real estate tax liens upon real estate alleged to belong to the appellants, Robert E. Winkler, Suzanne Winkler, and First National Bank of Holdrege. Trial to the court was held on October 11, 1991. The court found in favor of the county and entered a decree of foreclosure on February 6, 1992. For the reasons set forth below, we affirm.

FACTUAL BACKGROUND

In 1970, Robert E. Winkler and James R. Collison purchased land in Holdrege, Nebraska, referred to as parcels Nos. 2764.02, 2764.03, 2764.05, and 2764.06. Between 1970 and 1980, mobile homes located on these parcels were taxed as personal property. In June 1980, Collison requested the Phelps County assessor to list the mobile homes located on these parcels as improvements to the real estate. The assessor complied with Collison's request and sent a "Notice of

Valuation Change" to the coowner, Winkler, reflecting an increase in the valuation of the property "due to mobile homes being added to real estate." This notice also stated that any protest against the change in valuation was to be filed within 10 days of the date of the notice. See Neb. Rev. Stat. §§ 77-518 and 77-1315 et seq. (Reissue 1981). Neither owner filed a protest regarding the increase in valuation.

A year or more later, Winkler informed the assessor that he was concerned because Collison was removing mobile homes from the property. Evidently to assist Collison and Winkler, the assessor thereafter recorded the land valuations separately from the mobile home valuations, "so they [Collison and Winkler] could clearly see where their value laid [sic]." The record does not reveal how Collison and Winkler would have benefited from having the land and mobile home valuations recorded separately. Such separate valuations could indicate that Collison and Winkler had different ownership interests in the mobile homes than in the underlying property, although the record does not confirm this. In any event, the record does reveal that Collison and Winkler failed to pay the portion of the property taxes allocated to the mobile homes from 1981 through 1988.

In 1988, Collison assigned his interest in the property to First National Bank of Holdrege. In February 1991, the county brought an action to foreclose on the property due to delinquent taxes. At the trial, the parties stipulated that the liens that were being foreclosed related to real estate taxes on the mobile homes, assessed as real estate and not as unattached personal property. In February 1992, the district court for Phelps County entered a decree of foreclosure, and appellants have timely appealed from that decree.

ASSIGNMENTS OF ERROR

Appellants maintain that the tax liens enforced by the foreclosure proceedings were "solely those against certain mobile homes which were separately assessed and valued" and that the trial court erred by "allowing a foreclosure upon the underlying premises for taxes assessed and levied against other real estate, in this case mobile homes."

DISCUSSION

Neb. Rev. Stat. § 77-103 (Reissue 1981) defined "real estate" as "city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or *mobile homes* which shall have been permanently attached to the real estate upon which they are situated." (Emphasis supplied.) Because the parties to this case have stipulated that the mobile homes were taxed as real estate, we need not address the issue of whether the mobile homes were permanently attached to the real estate. Neb. Rev. Stat. § 77-203 (Reissue 1990) provides that unpaid real estate taxes are a first lien "on the real estate taxed." Appellants contend that the county could not establish liens on the underlying land under § 77-203 because the mobile homes were taxed separately from the underlying land. Appellants claim that because the unpaid taxes related only to the mobile homes, the liens arising from the unpaid taxes could attach to the mobile homes only and not to the underlying property.

Appellants' claim that the mobile homes were taxed separately from the underlying property is contradicted by the record. The only means of identifying the mobile homes in the assessor's records was according to the lots to which they were attached. Further, the assessor's records reveal that the mobile homes were assessed as "Buildings and Improvements" to the lots on which the mobile homes were situated. As noted above, § 77-103 also includes buildings and improvements within the definition of real estate. Appellants' argument that the mobile homes were taxed separately is thus without merit.

[1] Even if the mobile homes were assessed separately from the underlying property, authority from other jurisdictions indicates that a tax on land and a building or other improvement is a single and indivisible tax, even if the building or improvement is assessed separately from the land. See, *Matter of Spangles, Inc.*, 17 Kan. App. 2d 335, 835 P.2d 699 (1992); *In re Tax Objections of Hutchens*, 34 Ill. App. 3d 1039, 341 N.E.2d 169 (1976); 84 C.J.S. *Taxation* § 72 (1954). We agree with these authorities and find that the tax on the mobile homes and the underlying lots in this case was a single and indivisible tax, and as such, any portion of the tax which remained delinquent became a lien on the entire property taxed,

including the lots to which the mobile homes were attached.

[2] Appellants also contend that the mobile homes were taxed separately because the assessor listed the mobile homes on separate ledger pages from the lots. However, as noted above, the mobile homes were identified in the assessor's books according to the lots to which they were attached. In addition, Neb. Rev. Stat. § 77-1853 (Reissue 1990) provides that "[i]rregularities in making or equalizing assessments . . . shall not invalidate . . . the tax levied on any property or charged against any person." Neb. Rev. Stat. § 77-1854 (Reissue 1990) defines "irregularities" for purposes of § 77-1853 as "any irregularity, informality or omission in any assessment book, tax collector's book, or other record of any real or personal property assessed for taxation." In this case, the assessor's assessment of the mobile homes on different ledger pages from the underlying property is at most a mere irregularity and does not affect the validity of the taxes or subsequent liens on the underlying property. Appellants received due notice of the assessments on the mobile homes, yet failed to pay the taxes or timely challenge the assessments. For these reasons, we affirm the order of the district court.

AFFIRMED.

KOLLEEN ANN HOOVER, APPELLEE, V. LYNN EDMUND HOOVER, APPELLANT.
508 N.W.2d 316

Filed November 16, 1993. No. A-92-300.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal.
2. **Modification of Decree: Child Support: Proof.** The party seeking a modification of a child support order has the burden to show that there has been a material change of circumstances affecting the best interests of the child.
3. **Modification of Decree.** A material change of circumstances must have occurred subsequent to the entry of the original decree and must not have been

contemplated by the parties when the decree was first entered.

4. **Actions: Stipulations.** Parties to litigation are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances.
5. **Modification of Decree: Child Support: Appeal and Error.** A decree for child support in a divorce case is always subject to review and modification regardless of the particular language of the award.
6. **Child Support: Rules of the Supreme Court.** Child support payments should be set according to the guidelines established by the Nebraska Supreme Court. The trial court may deviate from those guidelines whenever application of the guidelines in an individual case would be unjust or inappropriate.
7. _____: _____. Deviation from the Nebraska Child Support Guidelines to provide for a percentage of future expenses incurred is permissible in individual cases when strict adherence to the guidelines would be unjust or inappropriate.

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

Richard D. Stafford, of Brogan & Stafford, P.C., for appellant.

Jan L. Einspahr, of Hutton, Freese & Einspahr, P.C., for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Lynn Edmund Hoover appeals the order of the district court which modified an existing stipulation for child support and required him to pay $214 per month in child support and $4,561 in payment for unreimbursed expenses incurred by his ex-wife, Kolleen Ann Hoover, for medical treatment of their minor child.

SCOPE OF REVIEW

[1] Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

FACTS

Kolleen and Lynn were divorced on July 31, 1980. A joint application to modify the decree was filed on November 19, 1982, in which the parties agreed that Lynn's child support

obligation would be terminated and that Lynn would transfer his interest in the family residence to Kolleen in lieu of all back and future child support. The court entered an order modifying the decree to conform with the parties' stipulation.

On May 22, 1991, Kolleen filed an application to modify the decree. She alleged that there had been a material change of circumstances in that the minor child had incurred extraordinary and exceptional medical expenses for treatment of an attention deficit disorder which required medication, tutoring, and extensive counseling. She alleged that she provided health insurance for the minor, but she had incurred medical expenses which were not covered by her insurance. Her amended request asked the court for an order requiring Lynn to pay one-half of the unreimbursed expenses and to pay child support according to the Nebraska Child Support Guidelines. The district court entered an order of modification, finding that there had been a material change of circumstances based on the diagnosis that the minor child has attention deficit disorder and finding that there had been attendant medical, psychiatric, psychological, and educational expenses incurred since the 1982 modification.

The court also found a material change of circumstances resulting from Lynn's employment and from the adoption of the Nebraska Child Support Guidelines subsequent to the order of support. The court ordered Lynn to pay child support of $214 per month commencing February 1, 1992, until the minor child reaches the age of majority, and to pay $4,561 to Kolleen, which represented 35 percent of the total of the unreimbursed expenses. Lynn was given 36 months to pay the amount, after which interest would begin to accrue on the unpaid balance.

Lynn appeals, assigning as error the order requiring him to pay unreimbursed expenses incurred by Kolleen between the entry of the order terminating his child support obligation and the filing of the application for modification, and requiring him to pay child support after an earlier stipulation which provided that Lynn would give up his interest in the family residence in exchange for a termination of his future child support obligation.

Our review of this case is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be

affirmed on appeal. See *Wulff v. Wulff, supra.*

Kolleen testified that she began noticing changes in the minor child toward the end of 1989, when he was having trouble getting along with friends and continually being expelled from school. The child was diagnosed as having attention deficit disorder and was placed on medication. Counseling was also recommended. After being treated by a psychologist for a year with little success, the minor child began seeing a psychiatrist in Omaha who recommended immediate hospitalization. The child was treated at Richard Young Hospital in Omaha for 30 days. The aftercare treatment program included four types of medication, the continuation of counseling, and periodic blood monitoring. The child required tutoring because he frequently missed school. He continues in counseling two or three times per month. He also attends a specialized learning center because he cannot function in the normal junior high environment.

Reports and letters received from various treating physicians, a school psychologist, and the student services director of the local public school system indicate that the minor child needs continued treatment, medication, and counseling. Although Lynn receives medical insurance through his employment, the minor child cannot be covered because his condition is considered preexisting. Lynn testified that Kolleen initiated the 1982 agreement and that he accepted it because at the time he was unemployed and had no money. The total equity in the house at the time of the dissolution was $11,700.

The child support calculation worksheet offered into evidence at the hearing showed a total monthly income of $3,333 for Kolleen and $1,667 for Lynn. The division of contributions was 65 percent for Kolleen and 35 percent for Lynn. Based on a total of $611 in monthly child support, Kolleen's share of the support according to the guidelines was $397 and Lynn's share was $214.

ANALYSIS

[2,3] We must first determine whether the trial court erred in ordering Lynn to pay support after the earlier modification which was based on a nonconditional stipulation that provided

he would not be required to pay any further support. In order to obtain a modification of the earlier decree, Kolleen has the burden to show that there was a material change of circumstances affecting the best interests of the child. See *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993). The material change of circumstances must have occurred subsequent to the entry of the original decree and must not have been contemplated by the parties when the decree was first entered. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991).

In determining if a material change of circumstances has occurred, an appellate court considers such factors as a change in the financial resources or ability to pay on the part of the parent obligated to pay support, the needs of the child or children for whom support is paid, a good faith or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991).

Here, two factors can be considered as material changes. First, the child support guidelines were adopted with an effective date of October 1, 1987, and second, and more importantly, the needs of the minor child have changed. The record supports a finding that the minor child's disability requires the outlay of additional expenses not contemplated by the parties at the time of the original decree or the first modification. The additional expenses were first incurred in 1989, when Kolleen began seeking treatment for the minor child.

[4] Lynn argues that he should not be required to pay child support now because he signed a stipulation releasing him from the obligation. We consider the effect of the stipulation on the current modification request. The Supreme Court has held that "parties to litigation are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances." *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 582, 477 N.W.2d 8, 11 (1991). In *Hickenbottom*, the court found that the mother had merely changed her mind about the visitation issue and that a mere change of mind is not an exceptional circumstance. In *Martin v. Martin*, 188 Neb. 393,

197 N.W.2d 388 (1972), the Supreme Court ruled that courts will enforce valid stipulations unless some good cause is shown for declining to do so.

[5] We point out that a decree for child support in a divorce case is always subject to review and modification regardless of the particular language of the award. *Shomaker v. Shomaker*, 183 Neb. 609, 163 N.W.2d 102 (1968). Regarding minor children, a decree in a dissolution is never final in the sense that it cannot be changed. *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975). Here, we find that there are exceptional circumstances which provide good cause for modifying the decree in regard to child support. The minor child's disability was not foreseen at the time of the decree or at the time of the first modification. The expenses incurred in his care and treatment are extensive. By requiring Lynn to contribute to those expenses in the future, the trial court responded to the minor child's needs and his best interests. We find that the court did not err in ordering Lynn to provide future child support.

We then turn to consideration of the amount of child support. Offered into evidence was an income form, identified as a child support calculation worksheet, and the parties' testimony. The form shows total monthly income of $3,333 for Kolleen and $1,667 for Lynn. Lynn testified that he earned $307.25 in net pay per week, which would result in a monthly net income of $1,331. He offered an exhibit which shows an average monthly net pay of $1,229 and monthly expenses of $1,258. He contends that he owes $12,600 on a car loan and $2,000 on a personal note. Kolleen testified that she receives $1,680 every 2 weeks in gross salary, which translates into $3,640 as her monthly gross income. There are no income tax returns in the record.

[6] Our de novo review of the record is qualified by the fact that where there is a conflict in the evidence, weight may be given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other. *Lauenstein v. Lauenstein*, 241 Neb. 521, 489 N.W.2d 828 (1992). We are unable to determine who completed the income form, but it was received into evidence, and it is clear that the court relied upon that form in determining the amount of child

support payable by each of the parties. Child support payments should be set according to the guidelines established by the Nebraska Supreme Court. The trial court may deviate from those guidelines whenever application of the guidelines in an individual case would be unjust or inappropriate. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). We find that the trial court did not abuse its discretion, and we affirm the order requiring Lynn to pay $214 in monthly child support for the minor child.

The next question is whether the trial court erred in ordering Lynn to pay 35 percent of the unreimbursed expenses incurred by Kolleen for the care of the minor child. The court found that Lynn's share was $4,561. Lynn argues that the trial court did not have authority to enter a retroactive judgment which requires him to pay expenses incurred prior to the date the application for modification was filed, May 22, 1991. Many of the expenses for which Kolleen seeks reimbursement were incurred prior to that date. A review of the unreimbursed expenses indicates that the total incurred after May 22, 1991, is $1,701.45.

The general rule in Nebraska is to allow a modification of child support prospectively from the time of the modification order itself. "[W]hen a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue." *Maddux v. Maddux*, 239 Neb. 239, 244, 475 N.W.2d 524, 529 (1991). Since 1939, the Supreme Court has held there is no authority to reduce amounts of child support retroactively. " '[T]he modifying decree relates to the future only and from the time of its entry.' " *Wassung v. Wassung*, 136 Neb. 440, 443, 286 N.W. 340, 342 (1939). Accord *Maddux v. Maddux, supra.*

In *Maddux*, the court noted that it has on occasion, depending upon the equities, approved modification of a child support order retroactive to the filing date of the application for modification. We find that the same rules should apply to an order to pay expenses incurred for the care of the child which have accrued prior to the filing of the application for modification.

The expenses for which Kolleen seeks reimbursement include not only medical bills, but also mileage and meal allowances for trips to Omaha and Council Bluffs, Iowa, for treatment for the minor child. Neb. Rev. Stat. § 42-369(3) (Reissue 1988) provides: "Such an order or decree for support may include the providing of necessary shelter, food, clothing, care, medical attention, expenses of confinement, education expenses, funeral expenses, and any other expense the court may deem reasonable and necessary." Thus, mileage and meals could be included in a support order if the court found such expenses were reasonable and necessary. However, such expenses, whether medical or mileage and meals, cannot be applied retroactively prior to the application for modification of the order for support.

The Nebraska Child Support Guidelines were promulgated by Supreme Court order pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1988). Paragraph C of the guidelines, amended December 23, 1992, provides:

> The child support guidelines shall be applied as a rebuttable presumption. All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order; or worksheet 5 should be completed by the court and filed in the court file. Deviations from the guidelines are permissible under the following circumstances:
>
> 1. when there are extraordinary medical costs of either parent or child;
>
> 2. when special needs of a disabled child exist . . . .

[7] As we review the guidelines in conjunction with the applicable sections of the child support statutes, we believe a reasonable interpretation requires us to find that past expenses, such as for medical care and other reasonable and necessary expenses, are to be considered in the modification of the amount of child support payable in the future. Deviations from the guidelines are also permitted "whenever the application of

the guidelines in an individual case would be unjust or inappropriate." Nebraska Child Support Guidelines, paragraph C. Thus, deviation from the guidelines to provide for a percentage of future expenses incurred is permissible in individual cases when strict adherence to the guidelines would be unjust or inappropriate.

Therefore, we find that the trial court's order requiring Lynn to pay a portion of the expenses which were incurred prior to the application for modification was an abuse of discretion by the trial court, and we modify that portion of the award. Our review of the record shows that the unreimbursed medical expenses which were incurred after the application was filed on May 22, 1991, totaled $434.45. Under the circumstances, we think it appropriate that Lynn pay 35 percent of these expenses.

The court found that Kolleen had incurred mileage and other expenses for her trips to Omaha and Council Bluffs for counseling sessions for the minor child. Our review of the record indicates that the total expenses incurred for the trips made after the filing of the application for modification are $1,267. We find under the facts and circumstances of this case that Lynn should pay 35 percent of these expenses for the trips that occurred after the filing of the application for modification.

Lynn urges this court to give him credit for past child support against the equity in the house which he gave up as a condition of the earlier modification. Kolleen testified that the total equity in the house at the time of the dissolution was $11,700, of which Lynn was to receive one-third, or $3,900. We decline to offset this amount against the unreimbursed expenses. Lynn did not pay child support for 9 years under the earlier modification, and he has benefited by not having to pay child support during that time.

The issue of future medical expenses was not addressed by the court. However, at oral argument, the parties agreed that the award of child support was to be in lieu of future medical expenses. We therefore make no finding as to the obligations of the parties regarding future medical expenses for the minor child.

The appellee is granted $500 for the services of her attorney in this court.

The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

ROBERT TODD ROSEBERRY, D.V.M., APPELLANT, V. GREGG F. WRIGHT, M.D., M.ED., DIRECTOR OF THE DEPARTMENT OF HEALTH, STATE OF NEBRASKA, APPELLEE.

508 N.W.2d 867

Filed November 23, 1993. No. A-92-089.

1. **Administrative Law: Appeal and Error.** Agency regulations properly adopted and filed with the Nebraska Secretary of State have the effect of statutory law and, therefore, are construed by an appellate court the same as statutes.
2. **Administrative Law: Licenses and Permits.** Under 184 Neb. Admin. Code, ch. 1, § 004.01 (1983), of the Rules of Practice and Procedure of the Department of Health, an application for a license to practice veterinary medicine is not formally complete until all supporting data have been included in the application file.
3. **Administrative Law: Licenses and Permits: Time.** Under 184 Neb. Admin. Code, ch. 1, § 004.01 (1983), of the Rules of Practice and Procedure of the Department of Health, the 150-day discretionary period for departmental review of an application for a license to practice veterinary medicine does not begin to run until all supporting data have been included in the application file, at which point the application is "formally complete" as that term is used in § 004.01.
4. **Injunction.** An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate.
5. **Administrative Law: Courts: Jurisdiction: Appeal and Error.** The judiciary will not interfere with executive officers in the performance of duties which are discretionary in their nature or involve the exercise of judgment. There exists no power in the courts to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before the officer for action.

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

James R. Mowbray, of Mowbray & Walker, P.C., for appellant.

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellee.

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

CONNOLLY, Judge.

This appeal arises from the failure of the appellant, Robert Todd Roseberry, to secure a permanent injunction enjoining the Nebraska Department of Health (Department) from refusing to issue to Roseberry a license to practice veterinary medicine. Roseberry's application for a permanent license was complete, and he had passed the veterinary examination, but the Department decided to delay issuance of a license to Roseberry pending an investigation of an allegation that he had practiced veterinary medicine in Nebraska without a license. The district court ruled that it did not have the power to order the injunction sought by Roseberry while the matter was pending before the Department pursuant to the Department's proper exercise of statutory and regulatory authority. We affirm.

I. FACTS

Roseberry was a licensed veterinarian in Iowa and Illinois when he moved to Omaha in May 1990 to practice veterinary medicine in Nebraska. He was informed by the Department that until he was able to take the Nebraska veterinary examination, he could practice veterinary medicine only under the supervision of a veterinarian with a Nebraska license. Initially, Roseberry complied with this condition, as he worked at an Omaha horseracing track under the supervision of another licensed veterinarian. In July, Roseberry left the Omaha racetrack and began working at a racetrack in Columbus, Nebraska, no longer under the supervision of a licensed veterinarian.

In response to concerns of other veterinarians about his practicing in Nebraska without a Nebraska license, Roseberry requested a temporary license from the Department on or about July 31, 1990. The temporary license was issued July 31. Subject to certain conditions, the temporary license was valid through January 31, 1991. Roseberry filed an application with the Department for a permanent license on or about July 30, 1990. The record does not indicate what documentation was required or whether all such documentation was filed with the initial application.

In a letter dated January 8, 1991, the Department informed Roseberry: "Your application for a license to practice Veterinary Medicine and Surgery in the State of Nebraska has been reviewed and accepted. The examination will be given on Tuesday, January 29, 1991. Your application is complete."

Roseberry took the January 29 examination. On January 31, Roseberry telephoned the Bureau of Examining Boards, the agency that administers examinations for the Department. He was informed that he had passed the examination. He also was given his veterinary license number over the phone. Later the same day, the coordinator for the Board of Examiners in Veterinary Medicine and Surgery telephoned Roseberry to inform him that a license would not be issued to him until the Department had investigated a complaint that Roseberry had practiced veterinary medicine in Nebraska without a Nebraska license. Roseberry was told over the phone that pursuant to 184 Neb. Admin. Code, ch. 1, § 004.01 (1983), of the Department's rules of practice and procedure, the Department had 150 days to decide whether to issue a license to him.

On February 7, 1991, Roseberry filed a petition for injunction in district court seeking "a temporary restraining order, temporary injunction, and permanent injunction upon proper hearing, restraining and enjoining the [Department] from . . . continuing to refuse to issue" to Roseberry a license to practice veterinary medicine. In addition to the petition for injunction, Roseberry filed a motion seeking a temporary restraining order without notice pursuant to Neb. Rev. Stat. § 25-1064 (Reissue 1989) on grounds that "immediate and irreparable injury . . . will result to [Roseberry] before this matter can be heard." In the motion, Roseberry claimed that the horseracing season would begin in less than a week and that the Department's delay in issuing a license to Roseberry would cost him an average of $1,478 a day in income.

The motion for a temporary restraining order was overruled on February 7. A hearing on what the district court referred to as the motion for temporary injunction was set for February 12. On February 12, the court found that Roseberry faced immediate and irreparable injury if the Department continued to refuse to issue a veterinary license to him and that Roseberry

had no adequate remedy at law. Therefore, the court granted the temporary injunction and ordered the Department to issue a license to Roseberry "forthwith, until further order of the Court."

On March 7, 1991, in response to the portion of Roseberry's petition seeking a permanent injunction, the Department answered that although Roseberry had satisfied the minimum statutory requirements for admission to the practice of veterinary medicine in Nebraska, the Department had reason to believe that Roseberry might have committed violations of the type set out in Neb. Rev. Stat. § 71-147 (Reissue 1990). Therefore, the Department asked the court to deny Roseberry's request for a permanent injunction and to dissolve the temporary injunction, thereby allowing the Department to exercise its discretionary authority pursuant to title 184 of the Department's rules of practice and procedure and reach a decision within 150 days on whether to issue a license to Roseberry.

On October 10, 1991, the State moved for summary judgment for the following reasons:

> 1. The Department of Health is authorized by law to exercise its discretion in determining when a license to practice veterinary medicine and surgery should be issued pursuant to Neb.Rev.Stat. §§71-104 and 71-147 (Reissue 1990).
>
> 2. The Director of the Department of Health has jurisdiction of proceedings to deny the issuance of a license to practice veterinary medicine and surgery pursuant to Neb.Rev.Stat. §71-150 (Reissue 1990).
>
> 3. The Department of Health has not exercised its discretion in regards to [Roseberry's] application for licensure to practice veterinary medicine and surgery.
>
> 4. The Court may not interfere or control the exercise of the [Department's] discretionary powers collaterally by ordering an injunction.
>
> 5. [Roseberry] has an adequate remedy at law if his application for license in veterinary medicine and surgery is denied in that [he] may appeal at the Department of

> Health level and also appeal from there to the District Court pursuant to Neb.Rev.Stat. §84-917 (1990 Cum. Supp.).
>
> 6. The Department of Health has 150 days from the date an application is complete to act on said application pursuant to Title 184, Chapter 1, Section 004.01 of the Nebraska Administrative Code. Said regulation was duly promulgated by the Department of Health and statutorily authorized by Neb.Rev.Stat. §71-169 (Reissue 1990).

The Department asked the court to dissolve the temporary injunction and to cancel the license issued pursuant to the court order of February 12.

On November 15, the parties filed a joint stipulation stating that there were no genuine issues of material fact and that the matter would be submitted on the pleadings and attached materials previously filed in the case as well as on the trial briefs not yet filed at that time. On November 22, Roseberry filed a motion for summary judgment asking the court to continue the order of February 12 and grant a permanent injunction against the Department. On January 28, 1992, the court sustained the Department's motion for summary judgment and overruled Roseberry's. The court adopted almost verbatim the legal propositions proffered in the Department's motion for summary judgment, as set out above. The court found that Roseberry's application had not become complete until January 31, 1991, the date on which the results of the January 29 examination were included in his application file. Thus, the court found that Roseberry had sought an injunction during the 150-day period in which the Department was authorized to exercise its discretion with regard to the review and issuance of licenses. Citing *Leeman v. Vocelka*, 149 Neb. 702, 32 N.W.2d 274 (1948), the court ruled that the properly exercised discretionary authority of a state agency could not be attacked collaterally by a judicial order. The court dissolved the temporary injunction of February 12 and canceled the license issued pursuant to the order of February 12. The order of January 28, 1992, was stayed pending the outcome of this appeal.

II. ASSIGNMENTS OF ERROR

We reach only two of Roseberry's four assignments of error, as they are dispositive of this appeal. Roseberry argues that the district court erred (1) in finding that the Department had 150 days from January 31, 1991, to determine whether to issue a license to Roseberry and (2) in finding that the Department may not be enjoined from exercising its discretion in determining whether to issue the license.

III. STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in the light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. See *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 495 N.W.2d 624 (1993).

Summary judgment is to be granted 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. See *id.*

An action for injunction sounds in equity. *City of Newman Grove v. Primrose*, 240 Neb. 70, 480 N.W.2d 408 (1992). Appellate review of an equity action is de novo on the record, and the appellate court makes findings of fact and law independent of those of the trial court. See *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992).

IV. ANALYSIS

1. Beginning of the 150 Days

[1] Section 004.01 of the Department's rules of practice and procedure states:

> An application for issuance or renewal of any license, permit, or certificate which the Department is empowered to grant or deny shall be made on forms provided by the Department. No application shall be considered to be formally complete for purposes of Departmental review unless and until it is accompanied by all supporting data,

> including a set of plans and specifications, as is necessary for proper review. Such application shall be acted upon within one hundred and fifty (150) days after its filing with the Department, and may be granted without the necessity of holding a public hearing thereon.

Agency regulations properly adopted and filed with the Nebraska Secretary of State have the effect of statutory law. See *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989). Section 004.01 has been properly filed and adopted with the Secretary of State. Thus, we construe § 004.01 as we would a statute, not reading into the regulation a meaning unwarranted by its plain language, but also not reading out of it anything plain, direct, and unambiguous. See *Matrisciano v. Board of Ed. of Sch. Dist. No. 6*, 236 Neb. 133, 459 N.W.2d 230 (1990). In addition, we are guided by the presumption that the Department intended a sensible rather than an absurd result.

[2,3] Roseberry focuses on the last sentence of § 004.01 and argues that the 150-day period for discretionary review began to run on July 30, 1990, the day he filed his application materials for a permanent license. Taken by itself, the requirement that an application be acted on within 150 days after its filing does seem to support Roseberry's position. However, § 004.01 also indicates that an application is not ripe for departmental review until it is formally complete and that an application is not formally complete until all supporting data are included in the application file. Reading § 004.01 as a whole, we find that the 150-day discretionary period for departmental review of an application does not begin to run until all supporting data have been included in the application file, at which point the application is "formally complete" as that term is used in § 004.01.

There is no evidence in the record to support the contention that Roseberry's application was formally complete for purposes of departmental review on July 30, 1990. The first reference in the record to Roseberry's application being complete occurs in the January 8, 1991, letter from the Department. In that letter, the Department effectively said to Roseberry, "Although you have not yet taken the examination, your application is complete." Despite the plain language of the

letter, the Department argues that Roseberry's application could not possibly be complete without examination results. That is not true. An application could be complete *and a license could be issued* without examination results ever having been included in an applicant's file. See Neb. Rev. Stat. §§ 71-1,158 and 71-1,160 (Reissue 1990) (permitting the board of examiners in veterinary medicine to issue a veterinary license to an applicant without requiring the applicant to take the examination). However, the record as a whole indicates that Roseberry's admission to the practice of veterinary medicine was contingent on his passing the January 29, 1991, veterinary examination.

It is clear that under § 004.01, an application is not formally complete until all supporting data have been included in the application file. Obviously, Roseberry's examination results would have been crucial supporting data in his application file. Therefore, despite the misleading language in the Department's letter of January 8, we find that Roseberry's application was not formally complete for purposes of departmental review until the January 29 examination results were added to his application file. Therefore, the 150-day discretionary period began to run on January 31, 1991.

2. No Clear Right to Injunction

[4] An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate. *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991).

[5] The controlling case on this issue is *Leeman v. Vocelka*, 149 Neb. 702, 711, 32 N.W.2d 274, 279-80 (1948), from which we take the following excerpt:

> "Where a statute gives a discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is the sole and exclusive judge of the existence of those facts; the courts will not attempt to interfere with or control the exercise of his discretionary powers, in the absence of any controlling provisions in the law conferring the power. . . . [T]he judiciary will not interfere with executive officers in the performance of duties which are

> discretionary in their nature or involve the exercise of judgment. . . . [T]here exists no power in the courts . . . to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts."

V. CONCLUSION

As of January 31, 1991, Roseberry's application was properly before the Department for administrative review. The Department had until June 29, 1991, to exercise its judgment on Roseberry's application, during which time the district court had no power to interfere with the Department's discretionary authority over Roseberry's application. Therefore, we affirm the January 28, 1992, order of the district court sustaining the Department's motion for summary judgment, dissolving the temporary injunction of February 12, 1991, and canceling the license issued to Roseberry pursuant to the order of February 12.

AFFIRMED.

TAMMIE A. VORDERSTRASSE, APPELLANT, V. JARROD E. VORDERSTRASSE, APPELLEE.

508 N.W.2d 872

Filed November 23, 1993. No. A-92-902.

1. **Appeal and Error.** Only errors assigned and discussed in the appellant's brief will be considered by an appellate court on appeal.
2. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and on appeal, although the appellate court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion, keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.
3. **Child Custody: Courts.** Pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1992), a district court may obtain and retain legal custody of a minor child and grant a parent physical custody of the child.
4. _____: _____. When a court has retained legal custody of a child pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1992), the best interests of the child determine whether a change of physical custody is necessary. It is not necessary to show any change of circumstances otherwise required for a change in legal custody of the child.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Gary G. Thompson for appellant.

Lyle Joseph Koenig for appellee.

SIEVERS, Chief Judge, MILLER-LERMAN, Judge, and NORTON, District Judge, Retired.

SIEVERS, Chief Judge.

On September 16, 1992, the district court for Gage County, Nebraska, entered a dissolution decree dissolving the marriage of Tammie A. Vorderstrasse and Jarrod E. Vorderstrasse. The court retained legal custody of the parties' daughter, Paige Marie, and awarded physical custody of Paige to Jarrod. Tammie appeals, asserting that the district court erred by retaining legal custody of Paige and by placing physical custody of the child with Jarrod.

At the outset, we note that the determination of child custody is a matter which is dependent upon the particular facts of each case. By necessity, the decision of a district court judge in awarding custody is somewhat subjective. Although the statutes and case law provide guidance, there is no magic formula which allows a court to plug in data and facts and receive back the perfect solution. We also believe that little good can come from memorializing the shortcomings of the parties in extensive and graphic detail. Accordingly, although we have comprehensively reviewed the evidence, we keep our factual summary purposefully brief.

Tammie and Jarrod were married on July 30, 1988. Their daughter, Paige, was born on October 20, 1990. Tammie also has a daughter, Ashley, from a prior relationship. The parties separated in December 1991. At that time, Tammie moved into an apartment with both Ashley and Paige. Jarrod was later granted temporary custody of Paige pending trial on the dissolution action. The parties saw a marriage counselor and attempted a reconciliation in April 1992 that lasted approximately 3 weeks.

Tammie and Ashley currently rent a one-bedroom house in Plymouth, Nebraska. Tammie is employed at Prosnip

Corporation and earns approximately $7.70 per hour. However, she receives no medical benefits through her employment. Much of the evidence with regard to Tammie centered on her relationship with another man, whom she described as her best friend. This relationship was a source of tension in the marriage and more so after the separation. There is no direct evidence that Tammie's relationship with this man was harmful to Paige.

Jarrod and Paige currently live in a rented three-bedroom house in Fairbury, Nebraska. Jarrod is employed by Demster Industries in Beatrice, Nebraska. He is a high school graduate and has also earned a degree from Southeast Community College. He testified that he has a good relationship with his parents and grandparents, who live within 20 miles of him. Jarrod testified that he and Paige attend church on the weekends she is with him. Jarrod further testified that he believes in providing a stable home environment for his daughter.

There is evidence in the record that indicates Jarrod has had a problem with alcohol in the past. He has had at least two convictions of driving while intoxicated, the last occurring in 1989. Jarrod testified, however, that he does not believe he has an alcohol problem. He further testified that he currently drinks very little and that he never drinks and drives.

There is also evidence in the record that Tammie has been vindictive toward Jarrod since their separation. Tammie admitted that she told the guardian ad litem appointed to represent Paige that Jarrod was a drug user. However, the results of a drug test taken by Jarrod were negative. Tammie also sent a note to Jarrod that indicated with regard to the custody dispute that she was "going to start playing dirty to [sic] so be prepared." Tammie also indicated in the note that if she did not get custody of Paige, Jarrod and his family would "never ever see Ashley again NEVER."

There is also evidence in the record of an incident that occurred during Tammie and Jarrod's attempted reconciliation. Tammie and Jarrod, along with Paige and Ashley, were traveling to Fairbury from Beatrice. Apparently, Jarrod was drinking a wine cooler in the car. When the parties stopped at a

gas station, Tammie went into the station and told the attendant that Jarrod was driving and was "drunk and obnoxious." Tammie asked the attendant to notify the police. Tammie also gave the attendant her male friend's phone number and asked that he also be called. The vehicle Jarrod was driving was subsequently stopped by police. The officer informed Jarrod that he had been reported for drinking and driving. However, Jarrod passed field sobriety tests and was allowed to drive home.

The record also indicates that Jarrod has a problem with his temper. Tammie testified that Jarrod's temper was especially bad after he had been drinking. The record reflects that on two occasions after the parties were separated, Jarrod came to Tammie's home to try to talk to her. On both occasions, Jarrod broke the lock on the door and entered Tammie's home without her permission. However, Jarrod left on both occasions without further incident.

[1] On appeal to this court, Tammie has assigned four errors. However, only two errors are discussed in Tammie's brief. Only errors assigned and discussed in the appellant's brief will be considered by an appellate court on appeal. *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). Tammie's assignments of error properly before this court are that the district court erred (1) in retaining legal custody of the parties' minor child and (2) in placing physical custody of the parties' minor child with Jarrod.

[2] Child custody determinations are matters initially entrusted to the discretion of the trial court, and on appeal, although the appellate court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion, keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992).

Tammie's first assignment of error is that the district court erred by retaining legal custody of Paige. The district court stated in its decree of dissolution:

> [W]ith respect to the custody of the minor child of the

> parties, Paige Marie Vorderstrasse, born October 20, 1990, the Court finds sufficient concern with respect to both parties that legal custody of said child should remain with the Court; with respect to physical custody, the Court finds that such custody should be awarded to the respondent subject to rights of visitation by the petitioner
> . . . .
> . . . .
> . . . That in awarding physical custody of the minor child, Paige, to the respondent, the Court has taken into account the actions of the parties one toward the other, the degree of vindictiveness shown by petitioner, the inclination of petitioner to use the child as a bargaining tool with respect to the parties['] own personal difficulties, the degree and nature of care shown the child by each of the parties to the date of this decree and the association by the petitioner with another man both before and during the pendency of this proceeding.

[3] Pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1992), a district court may obtain and retain legal custody of a minor child and grant a parent physical custody of the child. *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

With regard to this issue, the Nebraska Supreme Court has previously stated:

> "Section 42-364, R.R.S. 1943, authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the children, and to make subsequent changes when required. When the best interests of the children, in regard to custody, is [sic] not clear, the court may, and should, place custody in the court. In regard to such disposition we have stated that: 'Its purpose is to "facilitate judicial supervision and summary power to act swiftly in their (the childrens' [sic]) best interests." . . . The parent having possession where the court has retained custody is in effect an agent of the court.' Benson v. Benson, 190 Neb. 87, 206 N.W.2d 51 [1973].

> "It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties. Such an order is ordinarily temporary and probationary in nature and reserves in the court the power to make further summary disposition of minor children when it becomes apparent that their best interests require it. There has not been a final determination of fitness in regard to either party. That question remains open and subject to determination after further notice and hearing."

Ensrud v. Ensrud, 230 Neb. at 725, 433 N.W.2d at 196, quoting *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975).

After our de novo review of the record in this case, we cannot say that the district court abused its discretion by retaining legal custody of Paige. The court obviously carefully considered the important issues. We agree with the district court's finding of "sufficient concern with respect to both parties" and hold that the district court properly retained legal custody of Paige. The evidence in this case is clear that both parties have exhibited questionable behavior in the past. Although Jarrod appears to have decreased his use of alcohol, it is clear that he has had a problem with alcohol in the past. His temper is a matter of concern, as is Tammie's vindictive behavior toward Jarrod after their separation. Accordingly, at this time, the best interests of Paige require that the district court temporarily retain legal custody of Paige in order to most effectively ascertain the child's best interests as concerns custody.

[4] As noted previously, an order placing legal custody with the court is ordinarily temporary and probationary in nature, and the district court has the power to make further summary disposition of the minor children when necessary. See *Ensrud, supra*. When a court has retained legal custody of a child pursuant to § 42-364, the best interests of the child determine whether a change of physical custody is necessary. In this situation, it is not necessary to show any change of circumstances otherwise required for a change in legal custody

of the child. *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

It is also clear that the district court did not abuse its discretion by placing Paige's physical custody with Jarrod.

> [I]n determining a child's best interests under § 42-364(1) the court may consider "factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child."

Miles v. Miles, 231 Neb. 782, 784, 438 N.W.2d 139, 141 (1989). See, also, *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991); *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990).

There was no showing in this case that either Jarrod or Tammie was unfit to be the custodial parent. However, we acknowledge that the trial judge observed and heard the witnesses in this case and accepted one version of the facts over another. There was evidence that Jarrod provided Paige with a stable home environment. There was also evidence that Jarrod has access to and has utilized support from his parents, grandparents, and minister. Given the standard of review and the nature of the case, we cannot say that the trial court abused its discretion by awarding physical custody to Jarrod. Accordingly, Tammie's second assignment of error is without merit.

The decision of the district court is affirmed.

AFFIRMED.

KENNETH JOHNSON, APPELLANT, V. NEBRASKA ENVIRONMENTAL CONTROL COUNCIL AND NEBRASKA DEPARTMENT OF ENVIRONMENTAL CONTROL, APPELLEES, AND WASTE-TECH SERVICES, INC., INTERVENOR-APPELLEE.

509 N.W.2d 21

Filed November 30, 1993. No. A-91-1174.

1. **Demurrer: Waiver.** When a demurrer is sustained, and the pleader desires to amend, it has been held that he thereby waives his exception to the ruling of the court.
2. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Administrative Law: Statutes.** In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.
5. **Administrative Law: Waiver.** Procedural rules are binding upon the agency which enacts them, and the agency does not have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule.
6. **Public Meetings: Words and Phrases.** A statutorily required public hearing is the transaction of business, for which a quorum is necessary.
7. **Administrative Law: Public Meetings: Notice: Waiver.** The provision of title 115, chapter 25, of the Nebraska Administrative Code which states that a party waives any notice requirement by participating in a hearing applies only to contested proceedings.
8. **Administrative Law: Legislature.** Rulemaking is a legislative process as contrasted with an administrative, judicial, or quasi-judicial process.
9. _____: _____. The Legislature may provide the conditions and limitations with which an agency must comply before the authority or power delegated to the agency may be exercised.
10. _____: _____. It is the province of the Legislature to determine the manner in which delegated powers shall be exercised, and a failure to comply with the conditions and limitations imposed is an unlawful exercise of the powers purportedly granted.
11. **Administrative Law: Public Meetings: Notice.** If notice and hearing are afforded as required by law or constitutional right, the power to act exists; if notice and hearing in such a case are not afforded, the power to act does not exist and the courts are available to redress against the unlawful exercise of power.
12. **Administrative Law: Legislature.** Compliance with the mandate of the Legislature in the delegation of power and authority to an agency of government

is in effect a condition precedent to the exercise of such power and authority.

13. **Public Meetings: Statutes.** Nebraska public meeting law is to be broadly interpreted and liberally construed to obtain the goal of openness in favor of the public.
14. **Administrative Law: Public Meetings.** Listening and exposing itself to facts, arguments, and statements constitutes a crucial part of a governmental body's decisionmaking.
15. _____: _____. Nebraska public meeting law applies to meetings at which briefings or formation of tentative policy takes place.

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

Patricia A. Knapp, of Bailey, Polsky, Cope, Wood & Knapp, for appellant.

Don Stenberg, Attorney General, and Linda L. Willard for appellees.

Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather; Marcus L. Squarrell and Robert F. Copple, of Parcel, Mauro, Hultin & Spaanstra, P.C.; and Ruth Brammer Johnson for intervenor-appellee.

CONNOLLY, HANNON, and MILLER-LERMAN, Judges.

HANNON, Judge.

The plaintiff, Kenneth Johnson, brought this declaratory judgment action against the Nebraska Environmental Control Council (Council) under Neb. Rev. Stat. § 84-911 (Reissue 1987) to challenge the validity of an amendment to the Council's rules and regulations, which amendment was promulgated by the Council. The challenged amendment was adopted after the intervenor, Waste-Tech Services, Inc. (Waste-Tech), petitioned the Council for a rule change which would exclude waste produced by Waste-Tech's incinerator in Kimball, Nebraska, from the Council's list of hazardous wastes, which are set forth under title 128 of the Nebraska Administrative Code. The Nebraska Department of Environmental Control (Department) was made a party defendant after the court sustained a demurrer. The district court granted the separate motions for summary judgment filed by the defendants and the intervenor

and dismissed the plaintiff's action. The plaintiff appeals to this court and assigns both procedural and substantive errors. We reverse the judgment and remand the cause for further proceedings because the Council did not follow the required procedures, and therefore, we do not reach the substantive issues.

BACKGROUND INFORMATION

A summary of the statutory basis for the Department's and the Council's authority, as well as a summary of the pertinent rules and regulations, will help clarify the issues of this case. The Nebraska Environmental Protection Act (NEPA), Neb. Rev. Stat. §§ 81-1501 to 81-1533 (Reissue 1987 & Cum. Supp. 1992), was adopted in 1971. This act was adopted at the behest of the U.S. government, and it provides that regulations adopted by the Council "shall in all respects comply with the Environmental Protection Act and the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 et seq." See § 81-1505(13)(a).

Section 81-1505 (Reissue 1987), which is applicable to the case at hand, provides in significant part: "(1) In order to carry out the purposes of the Environmental Protection Act, the council shall adopt rules and regulations which shall set standards of air, water, and land quality . . . ." This lengthy statute then sets forth the matters the Council shall consider in adopting rules and regulations regarding water quality standards, various pollutants, mineral explorations, livestock waste, hazardous waste, and several other common sources of pollution. Pursuant to this statutory authority, the Council adopted title 128 of the Nebraska Administrative Code, which contains substantive rules governing pollution, including a listing of what shall be considered hazardous waste, and title 115 of the Nebraska Administrative Code, which provides the procedural rules under which the Council and the Department operate. Title 115 was amended by the Department in August 1993; however, the version of the rules applicable to the case at hand is the title 115 rules which went into effect in December 1985 and July 1987.

The controlling issue in this appeal is whether the Council

followed the applicable statutes and regulations when it adopted an amendment to 128 Neb. Admin. Code, ch. 15 (1989), which authorized Waste-Tech to build the incinerator.

PLAINTIFF'S SECOND AMENDED PETITION

The trial court sustained a demurrer to the plaintiff's amended petition on the ground that the Department was a necessary party. The plaintiff filed a second amended petition and made the Department a party.

In his second amended petition, Johnson, who lives near Kimball, specifically alleged the date and place of each of the Council's meetings at which the amendment to title 128, chapter 15, which authorized Waste-Tech to build the incinerator was considered, as well as the date and place of each of the several hearings at which anything relating to the amendment was considered. Johnson also set forth the date and type of notice given for the meetings and hearings and the action taken. This information will be set forth below when the evidence on the proceeding is summarized and discussed.

In his first cause of action, Johnson alleged in his second amended petition that the adopted amendment, which excluded Waste-Tech's waste from the list of hazardous waste, violates the U.S. Constitution and the Constitution of Nebraska in the following respects: (1) The Council's exclusion of waste generated by Waste-Tech is arbitrary and capricious; (2) the amendment grants Waste-Tech exclusive privileges or immunities, in violation of article III, § 18, of the Constitution of Nebraska; (3) the amendment violates the Due Process Clause; and (4) the Council has no adequate mechanism for separating the legislative, executive, and judicial powers delegated to it by the Legislature.

Johnson also alleged that the Council had exceeded its statutory authority under NEPA and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (1988). He further alleged that the Council does not have the authority to define hazardous waste as nonhazardous and does not have the authority to exclude from regulation waste emitted from a particular facility. Johnson also alleged that the Council did not comply with the statutory requirements or the

Council's own rules, as the Council did not conduct its hearings in the area to be affected by the proposed change in the standards and did not give proper notice to the area to be affected.

In his second cause of action, Johnson alleged that on February 16 and May 17, 1989, the Council met with Waste-Tech in nonadvertised meetings. He asserted that the public was not allowed to attend these meetings and that no minutes were kept of these meetings. The plaintiff contended that these actions violated Nebraska public meeting law, Neb. Rev. Stat. § 84-1401 et seq. (Reissue 1987), which is applicable to the case at hand, particularly § 84-1413.

The transcript does not show whether the defendants filed an answer to the plaintiff's second amended petition. The court granted the defendants' and intervenor's separate motions for summary judgment and dismissed the plaintiff's second amended petition.

ASSIGNMENTS OF ERROR

Johnson alleges that the court erred (1) in sustaining the Council's demurrer to his amended petition on the basis that the Department had not been joined in the action as a necessary party and (2) in granting the motions for summary judgment, because the record discloses that there are genuine issues of material fact. In connection with the second assignment of error, Johnson argues that he is entitled to a declaratory judgment and that, therefore, the trial court erred in granting the motions for summary judgment and dismissing his second amended petition. Johnson asserts that (1) the amendment was arbitrary because the Council acted on insufficient information when it adopted the amendment; (2) the amendment exceeds the Council's statutory authority because the amendment does not comply with the federal RCRA; (3) "delisting" the Waste-Tech facility is a grant of a special privilege to Waste-Tech in violation of article III, § 18, of the Constitution of Nebraska; (4) the amendment exceeds the Council's statutory authority because the power to delist waste is distinct from the power to list waste; (5) the Council did not conduct a hearing in the area affected, as required by statute, and did not give notice,

as required by statute and the Council's own regulations; and (6) the Council's February 16, 1989, meeting violated Nebraska public meeting law. Our decision is based upon the fifth and sixth assertions, which raise procedural questions, and we find that discussion of the other issues would not be helpful.

DEMURRER

[1] We shall begin by considering the first error assigned by the plaintiff, that of the court's granting a demurrer on the ground that the Department was a necessary party. Upon granting the demurrer, the court allowed Johnson to modify his amended petition to make the Department a party defendant. " 'When a demurrer is sustained, and the pleader desires to amend, it has been held that he thereby waives his exception to the ruling of the court.' " *Papillion Times Printing Co. v. Sarpy County*, 85 Neb. 397, 400, 123 N.W. 452, 453 (1909). As the plaintiff has modified his amended petition upon demurrer, as opposed to standing on his amended petition and appealing the demurrer, he has waived his objection to the court's grant of a demurrer regarding the joinder of parties. See *id.* Therefore, we cannot review this issue.

STANDARD OF REVIEW

[2,3] All of the other issues in this appeal arise under the question of whether the court should have granted the defendants' and intervenor's separate motions for summary judgment. In appellate review of a summary judgment, the 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. *Turek v. St. Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992); *Purbaugh v. Jurgensmeier*, 240 Neb. 679, 483 N.W.2d 757 (1992); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). Moreover, summary judgment is to be granted 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. *Abboud v. Michals*, 241 Neb. 747, 491 N.W.2d

34 (1992); *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992); *Bowley v. Village of Bennington*, 241 Neb. 329, 488 N.W.2d 354 (1992). In the context of this case, the above-stated rule has the effect of requiring this court to reverse the judgment of the district court and remand the cause unless the record shows as a matter of law that the plaintiff is entitled to no relief.

THE EVIDENCE

At the hearing on the motions for summary judgment, the parties stipulated that Johnson had attended a January 12, 1989, hearing held in Kimball. The affidavit of Eliot Cooper, a vice president for Waste-Tech, was received in evidence. In this affidavit, Cooper stated that no representative of Waste-Tech had attended the Council's February 16 informational meeting. Cooper also stated that Waste-Tech had supplied the Council and the Department with all of the information required by the applicable rules and regulations as well as all additional information requested by the Council and the Department.

The affidavit of Dennis Grams, the director of the Department, was received. Grams' affidavit established the foundation for the introduction into evidence of the minutes from the various Council meetings at which the amendment was considered and the notice given for each of these meetings. This information will be summarized later in this opinion when it is relevant to the issue under consideration.

ANALYSIS

GENERAL DISCUSSION

This case is an appeal from a declaratory judgment action under § 84-911. In summary, that statute allows the district court to declare a rule or regulation invalid if the court finds that the rule or regulation (1) violates constitutional provisions, (2) exceeds the statutory authority of the agency, or (3) was adopted without compliance with the statutory rulemaking or regulation-making procedures. This procedure should be distinguished from the procedure outlined in Neb. Rev. Stat. §§ 84-917 and 84-918 (Cum. Supp. 1992), which provides for judicial review of contested cases by appeal.

The plaintiff raises the issues of whether the amendment, once adopted by the Council, was the result of arbitrary and capricious action on the part of the Council, was based on insufficient information, was special legislation, and did not comply with the federal RCRA. As we decide below that the amendment adopted appears void, on the record, because it was adopted without compliance with the statutory rulemaking procedures in that sufficient notice was not given and proper hearings were not held, there is no need to address the substantive arguments against the Council's decision.

NONCOMPLIANCE WITH STATUTORY RULEMAKING AND REGULATION-MAKING PROCEDURES

Title 128 of the Nebraska Administrative Code contains the rules and regulations governing hazardous waste management. Under chapter 15 of title 128, there is a list of identified hazardous wastes. This chapter is some 16 pages long, and the list, much of which is in fine print with 2 columns on each page, constitutes most of the chapter. The list is technical and is obviously not intended to be understood by the general public. Hazardous waste can be excluded from the list upon the petition of a generator of such waste. 128 Neb. Admin. Code, ch. 8, § 002.01 (1989). Title 128, chapter 8, § 002.05, states that the proceedings are to be conducted as rulemaking under title 115, chapters 80, 81, and 82.

The plaintiff argues that the method used by the Council to promulgate the amendment excluding waste to be produced by the Waste-Tech incinerator from the list of hazardous wastes found in title 128 did not comply with the statutory rulemaking and regulation-making procedures and that, therefore, the amendment is invalid under § 84-911. To decide whether there is no genuine issue of material fact regarding the promulgation of the amendment in question, we must examine the applicable statutory rulemaking procedures.

Under § 81-1505(1), the Council is authorized to adopt rules and regulations which set the standards of air, water, and land quality. Under § 81-1505(17), prior to adopting, amending, or repealing standards and classifications of air, water, and land quality, the Council is required to conduct public hearings in the

general area to be affected by the standard. Notice of the public hearing must be published twice, and the first publication must occur not more than 30 days nor less than 20 days before the public hearing. § 81-1505 (17)(a).

All state boards, commissions, departments, and administrative offices authorized to make rules and regulations are subject to the Administrative Procedure Act (APA), Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987 & Cum. Supp. 1992). The provisions of APA in effect at the time the amendment was adopted were "intended to constitute an independent act establishing minimum administrative procedure for all agencies," § 84-916, and were to "be considered as cumulative to existing laws," § 84-919. Under APA, no rule or regulation shall be adopted except after public hearing on the question of adoption, and notice of the public hearing must be given at least 30 days prior by publication in a newspaper having general circulation in the state. § 84-907. Read together, NEPA and APA require that notice of a public hearing must first be published in a newspaper of general circulation, which also has regular circulation in the area to be affected, on the 30th day prior to the public hearing by the Council on a rule regarding air, water, or land quality standards and must then be published again in a newspaper which has regular circulation in the area to be affected.

According to the Council's own rules and regulations, any interested person may petition the Council to promulgate a standard, rule, or regulation. 115 Neb. Admin. Code, ch. 80, § 001. The Council then has the option of denying the petition or instituting rulemaking proceedings. *Id.* at § 004. The rules governing the Council require that a public hearing be held before the adoption of standards for air, water, or land quality and that the hearing be held in the area to be affected by the standards. 115 Neb. Admin. Code, ch. 83, § 003. Notice of the hearing is to be published at least twice in a newspaper regularly circulated in the area to which the proposed standards apply. *Id.* at § 003.02. The first date of publication must be not more than 30 days nor less than 20 days before the hearing. *Id.* at 003.03.

Under title 128, chapter 8, § 002.01, any person may petition for a regulatory amendment excluding waste at a particular

generating facility from the hazardous waste list. Title 128, chapter 8, § 002.05, states that the petitioning process is to operate in accordance with title 115, chapters 80, 81, and 82. As title 115, chapter 80, requires the Council to use the general rulemaking procedures if it does not deny the petition, the rest of the rulemaking procedures found in title 115 apply to the promulgation of a rule excluding waste under title 128.

The plaintiff alleges that the Council did not hold a public hearing in the area affected by the amendment and did not give adequate notice of its public hearings and that, therefore, the amendment was not promulgated according to the statutory rulemaking procedures. The evidence in the record reveals the following: In his affidavit, Grams, director of the Department, attested that the Council had held an informal public hearing on Waste-Tech's petition for a rule change in Lincoln, Nebraska, on September 23, 1988. Public notice of the hearing was published on August 24 and September 2 in the Lincoln Journal-Star, Grand Island Daily Independent, Scottsbluff Star-Herald, Norfolk Daily News, and North Platte Telegraph.

Grams attested that on January 12, 1989, the Department held a public hearing in Kimball on the Waste-Tech petition. Public notice of the hearing was published once in the Scottsbluff Star-Herald, Sidney Telegraph, and Western Nebraska Observer on December 13, 14, and 15, 1988, respectively. The plaintiff attended the January 12 public hearing. Grams attested that a transcript of this hearing was prepared and provided to the Council at a later date. The minutes of a public hearing by the Council on February 17, 1989, reflect that "[a] public hearing was held in Kimball, Nebraska on January 12, 1989 to obtain public comment on the proposed rule change. A copy of the transcript from this meeting was offered as exhibit 3." No copy of the transcript was attached to the minutes of the meeting submitted into evidence, nor is there evidence of any minutes from the January 12 hearing.

Grams' affidavit contains conflicting evidence regarding a meeting held by the Council on February 16, 1989. On the one hand, Grams attests in one paragraph that "[o]n February 16, 1989, the Department held a public informational meeting in

Lincoln, Nebraska." Grams attests that a press release was sent on February 10 to more than 200 interested persons on the Department's mailing list and that a copy of such press release is attached to the affidavit. There is no copy of such press release in the evidence. On the other hand, Grams states in another paragraph that the February 16 meeting "was an informational session where the Council heard reports from the staff of the Department. No minutes were recorded from this meeting because no action was contemplated or taken."

Grams attests that on February 17 the Council held a formal hearing on the Waste-Tech petition in Lincoln. Notice of the hearing was published on January 18 and 28 in the Lincoln Journal-Star, Scottsbluff Star-Herald, Grand Island Daily Independent, Norfolk Daily News, and North Platte Telegraph. In addition, a two-way audio hookup was provided between the hearing in Lincoln and a hall in Kimball.

Finally, Grams attests that on May 18, 1989, the Council held a public hearing on the Waste-Tech petition in Omaha, Nebraska. Notice of the public hearing was published on April 18 and 28 in the Lincoln Journal-Star, Grand Island Daily Independent, Scottsbluff Star-Herald, Norfolk Daily News, and North Platte Telegraph. Notice of the hearing was also published on April 20 and 27 in the Western Nebraska Observer. Again, a two-way audio hookup was provided between the hearing in Omaha and a hall in Kimball.

The Council argues in its brief that the January 12, 1989, hearing held in Kimball sufficed as a public hearing held in the area to be affected by the proposed amendment, because the hearing was called by the Council and was presided at by a Department employee acting as a hearing officer. There is no evidence in the record, however, of who presided at or attended the hearing on January 12 beyond Grams' attestation that the Department held the hearing.

[4,5] In contrast, Waste-Tech does not make the same argument as the Council. Waste-Tech's argument is an attempt to have its cake and eat it too. On the one hand, Waste-Tech argues that the Council is empowered under the general statutory provisions of § 81-1505 to delist waste because the rules and regulations set the standards for waste by defining

what amount is permissible in air, water, and land (using the criteria listed in § 81-1505 (13)). On the other hand, Waste-Tech argues that the provisions of § 81-1505, which require that a hearing be held in the area to be affected, do not apply to a delisting, as delisting a waste is not setting a standard. In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984). Procedural rules are binding upon the agency which enacts them, and the agency does not have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule. *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 284 N.W.2d 10 (1979). We find that in establishing a standard, the Council must abide by the applicable statutory provisions as well as the Council's own procedural requirements for promulgating a standard under § 81-1505.

[6] There is no evidence in the record regarding who conducted the January 12, 1989, meeting for the Council. If, as the Council alleges in its brief, the January 12 hearing was conducted only by a Department employee, then the delisting may be subject to invalidation. Section 81-1503(7) states that the Council shall adopt standards, rules, and regulations and that "[a] majority of the members of the council shall constitute a quorum for the transaction of business." There is no Nebraska law regarding what the term "transaction of business" means. However, other states' courts have found that a statutorily required public hearing is the transaction of business, for which a quorum is necessary. See, *Croaff v. Evans*, 130 Ariz. 353, 636 P.2d 131 (Ariz. App. 1981); *Vaughan v. Duke*, 232 Ga. 545, 207 S.E.2d 509 (1974); *City of Passaic v. Passaic County Bd. of Taxation*, 18 N.J. 371, 113 A.2d 753 (1955); *Clark v. Montgomery County*, 235 Md. 320, 201 A.2d 499 (1964). The newly created title 115 rules, promulgated in August 1993, make it even more clear that a hearing officer's role is simply to preside at the hearing but that the Council is expected to attend the hearing, as the rules provide that "[b]efore each hearing is closed, the hearing officer may allow

the Council to ask questions of any witness." 115 Neb. Admin. Code, ch. 10, § 010. We find that there is a genuine issue of material fact regarding whether the January 12 hearing satisfied the statutory requirement that the Council hold a hearing in the area which would be affected by the amendment.

In addition, there appears to be a genuine issue of material fact regarding the adequacy of the published notice. Under § 81-1505(17), the Council is required to publish notice of a public hearing twice in a newspaper regularly published or circulated in the county or counties affected by the proposed standards. The first date of publication shall not be more than 30 days before the hearing. Under APA, notice is to be published at least 30 days prior to the hearing. Publication was had once in the Scottsbluff Star-Herald, 30 days before the hearing; once in the Sidney Telegraph, 29 days before the hearing; and once in the Western Nebraska Observer, 28 days before the hearing. These publications do not fulfill the statutory requirements and the Council's rules regarding publication, which require that publication be had twice.

[7] Waste-Tech argues that as Johnson stipulated before the district court that he had attended the January 12, 1989, hearing, he has waived any objection to the form of notice. Waste-Tech cites *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979); *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976); and *County of Blaine v. State Board of Equalization & Assessment*, 180 Neb. 471, 143 N.W.2d 880 (1966), in support of this argument. However, an examination of these cases shows that they were contested cases and that they, therefore, involved adjudicative hearings in which the person who waived notice was the interested party. As stated above, the rules that apply to adjudicative hearings are different from those that apply to quasi-legislative hearings. The provision of title 115, chapter 25, which states that a party waives any notice requirement by participating in a hearing applies only to contested proceedings. As presented to this court, the proceeding before the Council was not a contested proceeding. Therefore, there are genuine issues of material fact regarding the adequacy of notice of the January 12, 1989, hearing.

The next issue we must address is whether, in light of the apparent inadequacy of the hearing held in Kimball, the hearings in Lincoln and Omaha satisfied the statutory and rulemaking requirements. The record does not show that Lincoln and Omaha are in the area to be affected by the incinerator. However, we are not sufficiently certain that judicial notice can be taken of this fact, and there is no proof in the record which would establish exactly what "the area to be affected" is, particularly to the degree of certainty necessary for a summary judgment.

Therefore, there appears to be a genuine issue of material fact regarding the adequacy of the Lincoln and Omaha hearings to fulfill the requirement that a hearing be held in the area to be affected by the standard. The issue thus becomes whether a rule is invalid on the basis that the hearings held by the agency did not comply with the statutory requirements or the agency's own rules.

[8] "Rule making is a legislative process as contrasted with an administrative, judicial, or quasi-judicial process . . . ." 73 C.J.S. *Public Administrative Law and Procedure* § 87 at 576 (1983). We believe that the propriety of the procedure must be judged by the rules and cases dealing with rulemaking, rather than contested cases or adjudicatory matters. "[I]n the absence of a statutory requirement a hearing before the administrative body is not necessarily a sine qua non to the validity of rules and regulations . . . ." 73 C.J.S., *supra*, § 106 at 646.

In *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953), the Nebraska Supreme Court considered a school redistricting statute which allowed school reorganization committees to change school district boundaries. The court held that the delegation of power to change school district boundaries was a delegation of a legislative power and stated that "[u]nder the situation here the duties of the county committee do not fall within the category to which the due process clause of either the state Constitution or the federal Constitution has application." *Id.* at 826, 61 N.W.2d at 574. In the case at hand, the challenged action is the Council's amendment of regulations. As such, notice is not required under the Constitution, but nonetheless, the Legislature has

seen fit to require notice under the statutes governing the Council.

We are then interested only in the effect of the Council's failure to hold a hearing in accordance with the state statutes and the Council's own rules. We have been unable to find any case where the Nebraska Supreme Court directly ruled upon the effect of an agency's failure to follow statutory directions concerning notice of a hearing when the administrative body acted quasi-legislatively. In *Syfie v. Tri-County Hospital Dist.*, 186 Neb. 478, 184 N.W.2d 398 (1971), the Nebraska Supreme Court concluded that the notice given was in compliance with the pertinent statute in a case held to involve a purely legislative function. Presumably, the court must have thought that a failure to give notice would have affected the validity of the proceedings, even though the court concluded that the required notice was given.

Failure to follow statutes which prescribe notice for a hearing before an agency that is exercising quasi-legislative powers, that is, conducting proceedings to find some fact in the course of exercising legislative powers, has resulted in that action being held ineffective. See *School Dist. No. 8 v. State Board of Education*, 176 Neb. 722, 127 N.W.2d 458 (1964). That case is not strictly applicable to the present case because it involved a situation where notice was constitutionally and statutorily required. However, the reasons given in that case apply equally to all cases where the required notice was not given before the exercise of legislative powers, such as those where quasi-legislative powers are to be exercised.

> [9-12] The delegation of authority and power does not ordinarily imply a parting with the powers of the Legislature, but points rather to the conferring of authority or power to do the things which otherwise the Legislature would have to do itself. The Legislature may therefore provide the conditions and limitations with which the agency must comply before the authority or power may be exercised.

Id. at 733, 127 N.W.2d at 464. "It is the province of the Legislature to determine the manner in which delegated powers shall be exercised and a failure to comply with the conditions

and limitations imposed is an unlawful exercise of the powers purportedly granted." *Id.* at 732, 127 N.W.2d at 464.

> If notice and hearing are afforded as required by law or constitutional right, the power to act exists; if notice and hearing in such a case are not afforded, the power to act does not exist and the courts are available to redress against the unlawful exercise of power . . . .
>
> . . . .
>
> . . . Compliance with the mandate of the Legislature in the delegation of power and authority to an agency of government is in effect a condition precedent to the exercise of such power and authority.
>
> . . . .
>
> . . . "If a statute lays down general standards, the administrative agency may implement the statute by filling in the necessary details. But where, as in the case here, the statute in itself prescribes the exact procedure the administrative agency may not add to or subtract from such a provision." . . .
>
> . . . The authority of the state board and the commissioner to afford notice and hearing is not valid when it fails to comply with the conditions and limitations of the statute.

Id. at 731-34, 127 N.W.2d at 464-65.

In the case at hand, § 81-1505(17) prescribed the place of the hearing and the notice requirements. Title 115, chapter 83, contains the same directions. The Nebraska Supreme Court has stated that "[g]enerally, rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of the agency, are as binding as if they were statutes enacted by the Legislature. Likewise, procedural rules are binding upon the agency which enacts them." *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 572, 284 N.W.2d 10, 11 (1979). We conclude that there was a genuine issue of material fact as to whether the Council followed the applicable rulemaking procedures and that, therefore, there was a genuine issue of material fact as to whether the promulgated amendment is valid.

VIOLATION OF NEBRASKA PUBLIC MEETING LAW

The plaintiff alleges that on February 16, 1989, the Council met for a briefing and that no public notice of the meeting was given and no minutes were kept. The evidence available on this issue is the affidavit of Grams, in which he makes conflicting statements regarding the events of February 16. He attests first that

> [o]n February 16, 1989, the Department held a public informational meeting in Lincoln, Nebraska, referenced in the Second Amended Petition, ¶ 12. Prior to that meeting, a press release providing public notice of the meeting was issued on February 10, 1989 and mailed to more than 200 interested persons on the Department's mailing list. A true and correct copy of the press release is attached to this Affidavit as Exhibit D.

In the record, exhibit D announces a quarterly meeting to be held by the Council on *February 17, 1989*. There is no evidence in the record to reflect that the public was notified of the February 16 meeting. However, Grams goes on to attest that

> [m]inutes were recorded for each of the hearings and meetings by the Council or the Department referenced above, with the exception of the January 12, 1989 public hearing which was transcribed and the February 16, 1989 meeting. The February 16 meeting, referenced in the Second Amended Petition, ¶ 12, was an informational session where the Council heard reports from the staff of the Department. No minutes were recorded from this meeting because no action was contemplated or taken.

Nebraska public meeting law requires that "[e]very meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies." § 84-1408. The purpose behind the open meeting law is that it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret." *Id.* The public meeting law applies to governing bodies of all agencies of the executive branch and, therefore, applies to the Council. § 84-1409. A meeting, under § 84-1409, is defined as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of

briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." The public body is required to "give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes." § 84-1411. Finally, the public body is required to "keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed." § 84-1413. The Nebraska Supreme Court has held that

> [t]he Nebraska Public Meetings Laws are a statutory commitment to openness in government. As a result of open meetings, there will be development and maintenance of confidence, as well as participation, in our form of government as a democracy. The public can observe and within proper limits participate in discussions and deliberations of a public body. "Deliberation" means the act of weighing or examining reasons for and against a choice or measure, and connotes not only collective discussion but collective acquisition and exchange of facts preliminary to the ultimate decision. . . .
>
> ". . . The people must be able to 'go beyond and behind' the decisions reached and be apprised of the 'pros and cons' involved if they are to make sound judgments on questions of policy and to select their representatives intelligently. The presence of outside observers is an invaluable aid in making such information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action. . . ."

Grein v. Board of Education, 216 Neb. 158, 163-64, 343 N.W.2d 718, 722 (1984) (quoting Note, *Open Meeting Statutes: The Press Fights for the "Right to Know"*, 75 Harv. L. Rev. 1199 (1962)).

[13-15] The public meeting law is to be broadly interpreted and liberally construed to obtain the goal of openness in favor of the public. *Grein v. Board of Education, supra.* "Listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking." *St. ex rel. Badke v. Greendale Village Bd.*,

173 Wis. 2d 553, 572, 494 N.W.2d 408, 415 (1993). Whether the Department held "a public informational meeting," as Grams states in one breath, or whether it held "an informational session where the Council heard reports from the staff of the Department," as Grams states in another breath, the fact that the Council may have received information triggers coverage under the public meeting law. The public meeting law applies to meetings at which briefings or formation of tentative policy takes place. The law's application is not limited to meetings at which action is contemplated or taken. " 'The likelihood that the public . . . may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be *influenced* dictates that compliance with the law be met.' " *Id.* at 573, 494 N.W.2d at 415. In addition, the law requires that minutes be taken of all meetings, not just those at which action is contemplated. § 84-1413. We find that informational sessions in which the Council hears reports are briefings and, therefore, are meetings covered under the statute. Grams attests that no minutes were taken at the February 16, 1989, meeting. Further, we find no evidence that the public received reasonable advance notice of the meeting on February 16. Action taken in violation of Nebraska public meeting law is subject to nullification by a district court under § 84-1414. *Leibbrandt v. Lomax*, 228 Neb. 552, 423 N.W.2d 453 (1988). "The prohibition against decisions or formal action in a closed session also proscribes 'crystallization of secret decisions to a point just short of ceremonial acceptance,' and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session." *Grein v. Board of Education*, 216 Neb. at 168, 343 N.W.2d at 724 (quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968)). We find that there is a genuine issue of material fact as to whether the meeting of the Council on February 16 violated the public meeting law.

CONCLUSION

We therefore conclude that the record shows there are

genuine issues of material fact as to whether the amendment was adopted in compliance with the statutory rulemaking and regulation-making procedures as well as Nebraska public meeting law. The record specifically fails to show that the applicable notice and hearing provisions were followed. The trial court erred in granting the motions for summary judgment.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CENTRAL ICE MACHINE COMPANY, APPELLANT, V. RONALD A. COLE, APPELLEE.

509 N.W.2d 229

Filed December 7, 1993. No. A-92-097.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the 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. Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Pleadings.** Summary judgment is improper when the challenge involves the sufficiency of a petition to state a cause of action.
3. **Demurrer: Pleadings.** If a demurrer alleges that the petition fails to state a cause of action, the parties should be permitted to amend if an amendment would cure the defect.
4. **Witnesses: Immunity.** In the absence of a statute imposing civil liability, witnesses should be granted immunity from civil liability for damages resulting from statements made by them as witnesses.

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

Thomas H. Dahlk and Sandra L. Dougherty, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for appellant.

Jeff A. Anderson and Margaret A. Falck, of Kutak Rock, for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Central Ice Machine Company (Central) brought an action against Ronald A. Cole for malicious prosecution, alleging that Cole caused previous litigation to be brought against Central. The district court granted summary judgment for Cole on the ground that Cole's status as an expert witness in the prior legal proceeding afforded him immunity from liability as a matter of law. Central appeals.

SCOPE OF REVIEW

[1] In appellate review of a summary judgment, the 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. Summary judgment is to be granted 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. *Gables CVF v. Bahr, Vermeer & Haecker Architect*, 244 Neb. 346, 506 N.W.2d 706 (1993).

FACTS

Prior to any legal proceedings involving Central, Cole had been retained by Millard Warehouse as a consultant. Central alleged that Cole advised Millard Warehouse that cover plates on the headers of Recold evaporators purchased from Central were defective and inadequate. Central alleged that Cole had been retained by Central in 1983 as a consultant and knew that the Recold evaporators were patterned after the design of Imeco evaporators, but that he failed to tell Central that he thought the thickness of the cover plates on the Imeco headers was inadequate. Central contended that a dispute occurred concerning the value of Cole's services as a consultant to Central and that Cole accepted a lesser amount than the bill submitted for his consulting services.

In February 1987, Millard Warehouse filed a counterclaim against Central. (The record does not disclose the subject of the action filed by Central.) On June 29, 1987, Millard Warehouse filed a separate lawsuit against Central. Central's petition in this case refers to the above cases collectively as the "Legal Proceedings."

Central alleges that at all times relevant Cole was the moving cause of the initiation and continuation of the legal proceedings brought by Millard Warehouse against Central and, as the moving force, advised Millard Warehouse that the evaporators were defective and inadequate. Central contends that Cole, with the intent of injuring Central and without probable cause, caused the legal proceedings to continue and to be amended by telling Millard Warehouse that the evaporators sold to Millard Warehouse lacked sufficient cooling capacity. Central contends that Cole harbored feelings of hatred, animosity, and ill will toward an officer, director, and principal shareholder of Central and, for reasons other than the legitimate participation in a civil proceeding, took an active role in the initiation and continuation of the legal proceedings brought by Millard Warehouse. Central further contends that judgment was rendered in favor of Central against Millard Warehouse and that by reason of Cole's wrongful conduct, Central suffered injury to its business and incurred legal expenses and other damages.

Cole's demurrer to the original petition was sustained, and the court concluded that the pleadings brought Cole within the purview and protection of absolute immunity afforded to witnesses. Central then amended its petition by deleting the allegation that Cole "provided Millard Warehouse with purported theories and alleged expert opinions which caused the Legal Proceedings to be brought and tried before a jury" and by substituting the following: "[Cole] caused Millard Warehouse to initiate the Legal Proceedings." Cole's demurrer to the amended petition was overruled, and he filed an answer.

Cole's motion for summary judgment with a supporting affidavit claimed he was absolutely immune from civil liability because he had served as an expert witness in the prior legal proceedings. The district court granted summary judgment on

the basis that Cole's status as an expert witness in the prior legal proceedings afforded him immunity from liability as a matter of law.

ASSIGNMENTS OF ERROR

Central claims that the court erred in granting summary judgment on the basis that a consultant who later becomes an expert witness is immune from any liability for malicious prosecution as a matter of law, that there was no evidence supporting the district court's finding that Cole's actions as a consultant were inextricably tied to his actions as an expert witness, and that the district court erred in allowing Cole to insulate himself from liability by testifying in the previous litigation.

ANALYSIS

It is undisputed that Cole provided expert testimony in the legal proceedings between Millard Warehouse and Central. The expert opinions rendered by Cole in his deposition and trial testimony were based upon the investigation and analysis of the coolers that he performed in 1986 and 1987.

Cole's affidavit was the only evidence presented at the summary judgment hearing. The affidavit set forth Cole's professional background and qualifications, stating that he was a self-employed engineer who was the president of R.A. Cole and Associates, Inc., and a registered professional engineer in Illinois, Wisconsin, Georgia, Colorado, and Maryland. He was a member of the industry staff for the Industrial Refrigeration Workshop sponsored semiannually by the International Institute of Ammonia & Refrigeration (IIAR), the director of the semiannual Industrial Refrigeration School for Operators, and a past president of the IIAR. He was a member of the IIAR board of directors; the American Society of Heating, Refrigerating and Air Conditioning Engineers; the American Society of Mechanical Engineers; the National Society of Professional Engineers; and the British Institute of Refrigeration, and he was an associate member of the International Institute of Refrigeration.

The affidavit stated that Cole and Roger Kirschenman of Millard Warehouse visited a Millard Warehouse facility in

Grand Island in July 1986. During that visit, Cole noticed that one or more of the coolers exhibited a "spotty" frost pattern, which often indicated that the unit was not operating at full performance. He noted that the circuiting of the coolers was similar to that of other coolers he had seen in an earlier consultation and that those other coolers were performing at 30 to 50 percent of their rated capacity. Cole informed Kirschenman of this possibility during the visit.

One of the headers from the Millard Warehouse coolers was sent to a metallurgist to examine the type of material from which it was fabricated and to determine the cause of the failure of the header. When the metallurgist's report was received, Cole recommended to Millard Warehouse that the coolers be taken out of service. He made recommendations concerning design and replacement of the headers. Cole was then hired to complete a theoretical evaluation to test the actual capacity of the coolers, which evaluation showed that the coolers might not operate at full capacity. During the legal proceedings involving Central and Millard Warehouse, Cole testified as an expert witness, basing his testimony on his investigation and analysis of the coolers in 1986 and 1987.

The first problem in this case is that the petition fails to state a cause of action. Cole's first demurrer was sustained, and Central amended its petition to allege that "[Cole] caused Millard Warehouse to initiate the Legal Proceedings." A subsequent demurrer was overruled, and Cole filed a motion for summary judgment. The basis for the motion was that Cole had absolute immunity as a witness. Based upon the amended petition and answer, we treat the motion for summary judgment as a motion for judgment on the pleadings. See *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993).

[2,3] In *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993), the Supreme Court stated that summary judgment is improper when the challenge involves the sufficiency of a petition to state a cause of action. Accord *Gould v. Orr*, 244 Neb. 163, 506 N.W.2d 349 (1993). Summary judgment is not allowed in such a case because it circumvents the parties' right to amend the pleadings. This rule is somewhat analogous to the

rule involving a demurrer. If a demurrer alleges that the petition fails to state a cause of action, the parties should be permitted to amend if an amendment would cure the defect. See *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992). Therefore, in accordance with *Hoch*, we consider the motion as one for a judgment on the pleadings, which motion should be sustained only if it is not possible to amend the petition to state a cause of action.

Central alleged in its petition that Cole maliciously and without probable cause caused Millard Warehouse to initiate and to continue the legal proceedings. The district court granted summary judgment on the basis of witness immunity. In *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983), the Court held that there is absolute immunity from civil liability which arises from a witness' testimony in a prior trial. In *Briscoe*, several defendants brought civil rights actions against police officers who had given allegedly perjured testimony at the criminal trials of the defendants. The Court, holding that the Civil Rights Act does not provide for a damages claim against a police officer for giving perjured testimony at a criminal trial, declined to create an exception to the general immunity rule for alleged perjury by police officer witnesses. Thus, federal law has not recognized any exception to witness immunity.

[4] Central argues that *Stolte v. Blackstone*, 213 Neb. 113, 328 N.W.2d 462 (1982), created an exception to immunity for witnesses when the false testimony of a witness is a step or part of a total conspiracy or fraudulent scheme. However, Central made no allegations of a conspiracy or false testimony. In Nebraska, the Supreme Court has recognized that absent a statute imposing civil liability, witnesses are immune from liability for statements made during testimony. In *Stolte*, the court discussed the concept of a witness' immunity regarding allegedly perjured deposition testimony and stated that perjury must be

> but a step or part of a larger total conspiracy or fraudulent scheme in order to create an exception to the rule that there is no civil liability for giving or conspiring to give false testimony. . . .

> In the absence of a statute imposing civil liability, we believe the better policy to be to grant witnesses immunity from civil liability for damages resulting from statements made by them as such, and to leave the matter of liability for perjury to the criminal law.

Stolte, 213 Neb. at 122, 328 N.W.2d at 466.

In *Stolte*, the issue was whether a witness whose testimony was indeed false would still be immune from civil liability. The court, recognizing that it had not previously addressed whether immunity should extend to giving or conspiring to give false testimony, stated: "[W]e are of the opinion the better reasoning requires that the perjury be but a step or part of a larger total conspiracy or fraudulent scheme in order to create an exception to the rule that there is no civil liability for giving or conspiring to give false testimony." *Stolte*, 213 Neb. at 122, 328 N.W.2d at 466. We do not find that *Stolte* applies to the present case.

Central urges us to make a distinction between Cole's activities as a consultant and his activities as an expert witness. We decline to make that distinction. Central asks us to recognize a malicious prosecution exception to the witness immunity rule. We find no law in Nebraska that would support such an exception, and we decline to expound on such an exception.

We therefore find that Central could not have amended its petition to state a cause of action against Cole. The judgment of the district court is modified to the extent that we treat the cause as requiring a judgment on the pleadings, and for the reasons stated herein, the judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD M. NELSON, APPELLANT.

509 N.W.2d 232

Filed December 7, 1993. No. A-92-448.

1. **Courts: Appeal and Error.** When an appellate court reviews a decision of a district court which affirmed, reversed, or modified a decision of a county court, it will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the appellate court.
2. **Courts: Rules of the Supreme Court: Time: Appeal and Error.** On the matter of perfecting an appeal to the district court from a judgment rendered in the county court, Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) stated that within 10 days of filing a notice of appeal, the appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed.
3. **Courts: Rules of the Supreme Court: Records: Appeal and Error.** Under Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992), the district court's appellate jurisdiction is limited to review of errors assigned and discussed in the statement of errors. The district court also has jurisdiction to review the record for plain error not assigned.
4. **Courts: Rules of the Supreme Court: Notice: Appeal and Error.** An appellant who has incorporated a properly drafted statement of errors directly into a notice of appeal from a judgment of the county court has satisfied the requirement in Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) concerning the timely filing of a statement of errors with the district court.
5. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.

Appeal from the District Court for Dodge County, MARK J. FUHRMAN, Judge, on appeal thereto from the County Court for Dodge County, DANIEL J. BECKWITH, Judge. Judgment of District Court affirmed.

Clarence E. Mock, of Johnson and Mock, for appellant.

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

CONNOLLY, IRWIN, and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal arises from the convictions of the appellant, Richard M. Nelson, of driving while under the influence of

alcohol, third offense, and refusing to submit to a chemical blood, breath, or urine test. Nelson appealed his county court convictions to the district court on grounds that the trial court had committed prejudicial error by giving an improper jury instruction on the meaning of "under the influence of alcoholic liquor." The district court affirmed the judgment of the county court. The State contends that Nelson's assignment of error concerning the jury instruction is not properly before this court due to an alleged failure by Nelson to comply with the rules of appellate procedure in perfecting his appeal to the district court. We find that Nelson's assignment of error is properly before us. We affirm.

I. FACTS

As a result of an incident on August 12, 1991, Nelson was charged in county court with count I, driving while under the influence of alcoholic liquor, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990); count II, refusing to submit to a chemical blood, breath, or urine test in violation of § 39-669.08(4) (Cum. Supp. 1990); and count III, driving in excess of the posted speed limit in violation of Neb. Rev. Stat. § 39-662 (Reissue 1988).

At trial, Nelson tendered a jury instruction in which a person "under the influence of alcoholic liquor" was defined as one who has consumed a quantity of alcohol sufficient to affect

> the nerves, brain, and muscles of the operator or person in actual physical control of a motor vehicle so as to impair to an appreciable degree his ability to operate his motor vehicle in the manner that an ordinary, prudent, and cautious man, in the full possession of his faculties, would operate the same . . . .

The operative language of Nelson's proposed instruction tracked the language used by the Nebraska Supreme Court in a long line of cases, most recently *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991), to define "under the influence of alcoholic liquor" for purposes of § 39-669.07. The trial court rejected Nelson's instruction, and instead gave the following instruction:

INSTRUCTION #4

1. "Operate" shall mean the actual physical handing [sic] of the controls of a motor vehicle.

2. "Alcoholic liquor" shall mean and include alcohol, spirits, wine and beer capable of being consumed as a beverage by a human being.

3. "Actual physical control of a motor vehicle" means one present in a motor vehicle directing influence, dominion or regulation thereof.

4. "A person is under the influence of alcoholic liquor" within the meaning of the law making it unlawful to operate a motor vehicle or be in the actual physical control of a motor vehicle while under the influence of alcoholic liquor, if he has consumed intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties and to the extent there is an impairment of the capacity to think and act correctly and efficiently.

The jury found Nelson guilty as charged on counts I and II. Nelson was sentenced to concurrent jail terms of 6 months on count I and 30 days on count II. He was fined $500 on each count, and his license was revoked and suspended for concurrent terms of 15 years on count I and 6 months on count II.

Nelson filed a timely notice of appeal in the county court. We now set out the substance of Nelson's notice of appeal in the form in which it appears in the record:

> YOU ARE HEREBY NOTIFIED of Richard M. Nelson's appeal from the jury verdict rendered on February 27, 1992 and the sentence of the Dodge County Court entered on March 31, 1992 to the District Court of Dodge County for the following reason:
>
> 1. The Dodge County Court erred in giving Instruction No. 4 that incorrectly defined the term "Under the Influence" within the meaning of *Neb. Rev. Stat.* §39-669.07 (Cum. Supp. 1990).

The notice of appeal was filed in the county court on March 31, 1992. Nelson did not file a separate statement of error in conjunction with his appeal to the district court, but his notice

of appeal was included in the county court transcript that was before the district court on appeal. The county court transcript was filed with the district court on April 1.

The judgment of the county court was affirmed by the district court, and Nelson subsequently appealed to this court.

II. ASSIGNMENT OF ERROR

Nelson argues that the district court erred in affirming the judgment of the county court because instruction No. 4 was "incomplete, misleading[,] and thereby adversely affected Nelson's substantial and material right to have the jury properly instructed as to the applicable law."

III. STANDARD OF REVIEW

Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

IV. ANALYSIS

1. Preservation of Assignment of Error

[1-3] When an appellate court reviews a decision of a district court which affirmed, reversed, or modified a decision of a county court, it will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the appellate court. *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992); *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). On the matter of perfecting an appeal to the district court from a judgment rendered in the county court, Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992), which was in effect during the relevant time, stated in part:

> Within 10 days of filing a notice of appeal, the appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each

> error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed.

Pursuant to rule 52(I)(G), the district court's appellate jurisdiction is limited to review of errors assigned and discussed in the statement of errors. The district court also has jurisdiction to review the record for plain error not assigned.

The State argues that Nelson's assignment of error is not properly before this court because Nelson did not file with the district court a separate statement of error in addition to the notice of appeal filed in the county court. The State urges this court to ignore Nelson's assignment of error and instead limit our review of the record to a search for plain error.

Rule 52(I)(G) did not require an appellant to file two separate pieces of paper, a notice of appeal and a separate statement of errors. While the more common practice might have been to file a statement of errors separately from the notice of appeal, nothing in rule 52(I)(G) prevented an appellant from incorporating a statement of errors directly into a notice of appeal. Rule 52(I)(G) merely requires that each statement of error be separately numbered and paragraphed. The purpose of the rule is to direct the attention of the reviewing court to precisely what error was allegedly committed by the lower court and to advise the nonappealing party of what is specifically at issue in the appeal. See *State v. Boye*, 1 Neb. App. 548, 499 N.W.2d 860 (1993).

[4] In an appeal to the district court from a judgment of the county court, Neb. Rev. Stat. § 25-2731 (Reissue 1989) requires the clerk of the county court to transmit a certified copy of the transcript to the district court within 10 days of the perfection of the appeal. Pursuant to rule 52(I)(B)(1)(c), the notice of appeal is one of the documents that the clerk must include in the transcript. Therefore, we hold that an appellant who has incorporated a properly drafted statement of errors directly into a notice of appeal from a judgment of the county court has satisfied the requirement in rule 52(I)(G) concerning the timely filing of a statement of errors with the district court.

In Nelson's notice of appeal, his assignment of error was concisely stated in a separately numbered paragraph in

accordance with the requirements of rule 52(I)(G). Nelson's notice of appeal containing the statement of error was filed in the county court on March 31. The county court transcript containing the notice of appeal was filed in the district court on April 1. Thus, Nelson's statement of error was filed with the district court 1 day after the filing of his notice of appeal in the county court, which means that Nelson complied with the requirement in rule 52(I)(G) that a statement of errors be filed with the district court within 10 days of the filing of a notice of appeal in the county court. Consequently, his assignment of error concerning instruction No. 4 was properly before the district court and is now properly before this court.

2. Instruction No. 4

The State argues that Nelson forfeited his right to challenge instruction No. 4 before this court because he did not have the entire set of jury instructions preserved in the record. We do not decide whether Nelson was remiss in neglecting to include other instructions in the record because we find that instruction No. 4, standing alone, was a correct statement of the law.

[5] It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). We find no substantive difference between the instruction given by the trial court and the one proposed by Nelson. A person who has lost to an appreciable degree the normal control of his mind and body to the extent that he is impaired in his capacity to think and act correctly and efficiently is indistinguishable from a person who is impaired to an appreciable degree in his ability to operate a motor vehicle in the manner of an ordinary, prudent, and cautious person in full possession of his faculties. Logic dictates that one cannot act in the prudent and cautious manner of a person in full possession of his faculties if one has lost control of his ability to think and act normally, correctly, and efficiently.

Nelson argues that the connection between impairment and the ability to operate a motor vehicle was not made for the jury. We disagree. The clear message of the trial court's instruction

was that a person is impaired for purposes of operating a motor vehicle if he has consumed so much alcohol that he is no longer in full possession of his faculties and has lost control of his ability to think and act correctly. That is a correct statement of the law.

In *Shanahan v. State*, 162 Neb. 676, 77 N.W.2d 234 (1956), the Nebraska Supreme Court upheld an instruction similar to the one challenged in the case at bar. The instruction challenged in *Shanahan* read as follows: " 'A person is intoxicated or is under the influence of alcoholic liquor if such person is under the influence of alcoholic liquor to such an extent as to have lost to an appreciable degree the normal control of his body and mental faculties.' " *Id.* at 677, 77 N.W.2d at 236. That instruction was considered with an instruction which informed the jury that the case was a prosecution for unlawfully operating a motor vehicle while under the influence of alcoholic liquor, and with another instruction which tracked the statutory language defining the offense, stating that " '[i]t shall be unlawful for any person to operate . . . any motor vehicle while under the influence of alcoholic liquor . . . .' § 39-727, R. S. Supp., 1955." 162 Neb. at 679, 77 N.W.2d at 237.

(The record now before us indicates that an instruction defining the offense similar to that in *Shanahan* quoted immediately above was given as instruction No. 3. However, instruction No. 3 is not preserved in the record.)

In *Shanahan*, the court held that when considered with the other instructions, the challenged instruction did not misstate the law. The court reasoned that the challenged instruction was

> to the effect that if the defendant was found to have been under the influence of alcoholic liquor to such an extent that he appreciably had lost normal control of his body and mental faculties, naturally it shows that his ability to operate a motor vehicle under such circumstances would not be such as that of a man of ordinary prudence and caution in full possession of his faculties.

162 Neb. at 679-80, 77 N.W.2d at 237.

We find no substantive difference between the combined instructions in *Shanahan* and the following excerpt from instruction No. 4 in the case at bar:

> "A person is under the influence of alcoholic liquor" within the meaning of the law making it unlawful to operate a motor vehicle or be in the actual physical control of a motor vehicle while under the influence of alcoholic liquor, if he has consumed intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties and to the extent there is an impairment of the capacity to think and act correctly and efficiently.

The statutory definition of the offense of driving while under the influence that was in effect at the time of the offense was the same as that quoted above in *Shanahan*: "It shall be unlawful for any person to operate . . . any motor vehicle . . . [w]hile under the influence of alcoholic liquor . . . ." § 39-669.07(1)(a). In *Shanahan* and in the case at bar, the jury was informed that an operator of a motor vehicle who has less than full possession of his or her faculties due to consumption of alcohol is a person who is impaired in his or her ability to operate a motor vehicle and, consequently, is a person who has violated the law prohibiting operation of a motor vehicle while under the influence of alcoholic liquor.

V. CONCLUSION

While confusion might have been avoided had the trial court adopted Nelson's proposed instruction and used the definition of "under the influence of alcoholic liquor" that has been approved in the line of Nebraska Supreme Court cases cited by Nelson, we find no error in the instruction given by the trial court.

AFFIRMED.

IN RE INTEREST OF R.W., M.W., AND D.W., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. G.W. AND J.A., APPELLEES, AND D.B., APPELLANT.

509 N.W.2d 237

Filed December 7, 1993. No. A-92-1004.

1. **Parental Rights: Appeal and Error.** An order terminating parental rights is reviewed by an appellate court de novo on the record.
2. **Parental Rights: Evidence: Proof.** The unequivocal language of Neb. Rev. Stat. § 43-292 (Reissue 1988) imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that the termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is clear and convincing.
3. **Evidence: Words and Phrases.** Clear and convincing evidence means and is 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.
4. **Parental Rights: Proof.** Regarding parental noncompliance with a court-ordered rehabilitative plan as a basis on which to terminate parental rights under Neb. Rev. Stat. § 43-292(6) (Reissue 1988), the State must prove by clear and convincing evidence that (1) the parent has willfully 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.
5. _____: _____. To justify termination of parental rights under the provisions of Neb. Rev. Stat. § 43-292(2) (Reissue 1988), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child.
6. **Parental Rights.** Although parental rights may not be terminated solely because of a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated.
7. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Gene T. Oglesby, of Oglesby Law Office, for appellant.

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

Deborah K. Long, guardian ad litem.

SIEVERS, Chief Judge, MILLER-LERMAN, Judge, and NORTON, District Judge, Retired.

MILLER-LERMAN, Judge.

D.B., natural father of M.W. and D.W., minor children, appeals the order of the separate juvenile court of Lancaster County, which ordered his parental rights to his children terminated. For the reasons recited below, we affirm the court's order.

FACTS

Background.

G.W. is the natural mother of the three children involved in this action. D.B. and G.W. are the natural parents of M.W., a female child born April 6, 1984, and D.W., a male child born April 20, 1987. G.W. and J.A. are the natural parents of R.W., a female child born January 24, 1982. G.W.'s parental rights to R.W., M.W., and D.W. were terminated. J.A.'s parental rights to R.W. were terminated. G.W. and J.A. have not appealed from the order terminating their parental rights. For purposes of this appeal, we concern ourselves only with those issues relevant to the termination of D.B.'s parental rights to M.W. and D.W.

The October 8, 1992, journal entry which terminates all parental rights to the three children states that "[t]he original petition in this case was filed by the Lancaster County Attorney's Office on November 30, 1988" and that "[t]he children are Indian children as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. [§] 1901 et seq. [(1988).]" The court stated that G.W. and her children are eligible for membership in the Rosebud Sioux tribe and the Oglala Sioux tribe and that notice was given to the tribes as shown by affidavits filed December 5, 1988. The record shows that although no declination was received from the Oglala Sioux Tribal Court, on January 19, 1989, a judge of the Rosebud Sioux Tribal Court filed a declination to a transfer and a

declination to intervene because G.W. and her children had not established enrollment with either tribe.

The juvenile court order stated that on February 22, 1989, all the children were adjudicated to be juveniles as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988), lacking proper parental care through the fault and habits of G.W. and D.B. At the adjudication hearing, the court found that the children were in the custody of both G.W. and D.B. at all times mentioned in the State's petition and that in 1987, D.B. had subjected R.W. to inappropriate sexual contact on approximately 10 occasions and had subjected M.W. to inappropriate sexual contact on approximately 1 occasion. R.W. and M.W. informed G.W. of the inappropriate sexual contact, but G.W. did not take appropriate action to protect R.W. and M.W. The court noted that D.B. and G.W. were using illegal drugs in 1987 and found that due to D.B.'s actions and G.W.'s failure to protect R.W. and M.W., D.W. was also at risk.

Following a March 27, 1989, dispositional hearing, the children were committed to the temporary legal custody of the Nebraska Department of Social Services (DSS), and a plan was approved and ordered for the parents. The terms of the plan are not reflected in the record. The children were placed in the custody of G.W.'s sister N.W., in compliance with the Indian Child Welfare Act.

In February 1990, D.B. began serving a 3- to 6-year sentence for delivery of a controlled substance. Through April 1992, the court held the required 6-month reviews of the case. On November 29, 1990, the court approved and ordered a change in placement for R.W. and M.W. from the home of N.W., who had undergone major surgery, to a foster home. On May 3, 1991, the court approved and ordered that D.W. be placed in the same foster home so that he could be with his sisters.

On June 23, 1992, the children's guardian ad litem filed a motion for termination of parental rights. The motion stated, in part, that as a result of the children's adjudications, a rehabilitation plan had been implemented and administered under the direction of the court, but that reasonable efforts had failed to correct conditions leading to the determination. The motion stated that D.B. had failed to participate in therapy

addressing sexual abuse issues, failed to participate in domestic violence programs, and failed to put himself in a position to parent and financially support the children. The guardian ad litem also filed on June 23, 1992, a supplemental petition and praecipe, which alleged, in part, that D.B. had "substantially and continuously or repeatedly neglected [M.W.] and [D.W.] and refused to give the minor children necessary parental care and protection" and that termination of D.B.'s parental rights was in the best interests of the children.

In its October 8, 1992, journal entry, the court indicated that the guardian ad litem had given notice to the Rosebud Sioux tribe, which had previously appeared and made representations regarding both the Rosebud Sioux and Oglala Sioux tribes, by sending it a copy of the pleadings. At the termination hearing, D.B. testified that he objected to the transfer of this case to the "Indian Tribal Court."

Termination Hearing.

At the hearing on the motion to terminate parental rights, Melinda Wilson, a counselor specializing in treating victims of sexual abuse, testified that she first began treating R.W. and M.W. in 1988, at which time both children reported being physically and sexually abused by D.B. Wilson stated that both children exhibited behaviors consistent with sexual abuse. It was Wilson's opinion that in the absence of D.B.'s successful completion of treatment for sexual abuse issues, R.W. and M.W. would face a risk of continued molestation by D.B. should they be returned to his custody. Wilson stated that in her opinion, children who are returned to an untreated perpetrator of sexual abuse get the message that they are not important. She said that such an event would be confusing and very upsetting to the emotional development of the children.

Henrietta Vargas, director of the counseling center and of human services at the Lincoln Indian Center, testified that she had been working with G.W.'s family since 1987. In 1989, therapeutic services were initiated for R.W. and M.W. because Vargas had concluded that incest had occurred. Vargas based this conclusion on symptoms she observed in R.W. and M.W., including

> [t]he nightmares, the sleeplessness, not eating, being scared, not wanting windows to be open at night, didn't want to play in the streets for fear that the perpetrator would come and get them, being afraid to really talk because they didn't want the perpetrator to know those things because of the threats the perpetrator had made to them . . . . Also the descriptions that both children gave were very vivid.

Vargas stated that in 1990, D.W. cried often and was destructive and very defiant. All three children exhibited sexual acting out.

Vargas said that the children

> recall seeing their father injecting [their] mother, the children talk about father putting something in mother's veins so that she was blanked out so that he could take them in the room and do whatever he had to do with them. The children talk about . . . trying to get outside so that they can call the police when something was happening in the home.

Vargas testified that in her opinion, returning the children to D.B. would result in continued sexual molestation and that it was in the best interests of the children that parental rights be terminated. She said that to disrupt the children's current placement would be "the greatest disservice they had ever known" and that to return them to either G.W. or D.B. would be "total devastation" to the children.

Vargas testified that the children's behaviors had greatly improved since their placement with a foster family. The foster family worked with Vargas on implementing strategies to deal with the children's sexual acting out. Vargas stated that the foster family always followed through on therapeutic directives and that the sexual acting out of R.W. and M.W. had ceased. Vargas recommended that the foster family be allowed to adopt the children, based on the emotional, social, mental, and developmental progress made by the children. She stated that the children hoped to be adopted by their foster family because

> they have a family now, they have stability, they do not have to be afraid that the perpetrator is going to come back and take them away. They do a lot of things with this family. They feel loved, they have a future, they talk about

> their plans to attend college, that they have a grandmother, they have a family who does things with them, they feel as though they belong somewhere . . . .

It was Vargas' opinion that therapy for the children was no longer necessary.

D.B. testified that he has participated in programs for substance abuse and anger control while at the penitentiary, but that although there is a program at the penitentiary which addresses issues of sexual abuse, he declined to participate because he was not in need of that program. D.B. testified that he understood that the court had ordered therapy or counseling for sexual abuse issues, but he stated that the sexual abuse

> never happened, and I'm not about to acknowledge that it did or give the Court or anybody else the satisfaction that they made the right adjudication and give themselves a pat on the back. It never happened, and I refuse to participate in anything that has anything to do with it other than an evaluation to show I pose no threat . . . .

Although the court granted D.B.'s request for a psychiatric evaluation to establish that he did not pose a threat to the children, D.B. ultimately chose not to present evidence regarding the results of the evaluation on the ground that it was not conclusive as to the issues that D.B. was attempting to prove.

D.B. stated that he had sent cards to M.W. and D.W. the previous week. He also testified that while on parole in 1989 when the children were staying with N.W., he had had a girl friend deliver a birthday present to M.W. while he waited down the street. He stated that N.W. "chased me off, she wrote down the license and chased me down the street." He acknowledged that he was under a no-contact order by the court, but stated that he had made contact because he loves his children. D.B. also sent Christmas presents to the children through DSS, which delivered the gifts without informing the children that the gifts came from D.B. In April 1989, while on parole relating to a previous conviction, D.B. made a $70 payment for child support. This is the only support paid by D.B. on behalf of his children. He was arrested in October 1989, apparently on the charges for which he was incarcerated at the time of the

termination hearing.

Miriam Hayworth, the supervisor of mental health services at the Nebraska State Penitentiary, testified that counseling services are available for inmates who wish to address sexual abuse issues, but that D.B. had never taken part in such counseling. She stated that D.B. participated in group therapy, unrelated to the sexual abuse issue, from September 1991 to January 1992, during which time his participation was described as "minimal." D.B. withdrew from the therapy program to begin work at a prison industry and was then placed on a waiting list for an evening therapy group. At the time of the termination hearing, D.B. had not participated in any other therapy or treatment programs.

The court found that the allegations of the motion to terminate parental rights and of the supplemental petition were true by clear and convincing evidence. The court stated that the evidence was clear and convincing that grounds exist to terminate D.B.'s parental rights to M.W. and D.W. under Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 1988) and that such termination is in the children's best interests. The court noted that D.B. has failed and refused to follow the rehabilitative plan by not involving himself in therapy to address the issue of sexual abuse, despite having had more than adequate time and opportunity to do so.

The court stated that the Indian tribes in which the children are eligible for membership had not intervened in the action. The court terminated D.B.'s parental rights under § 43-292, the Indian Child Welfare Act, and the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. § 43-1501 et seq. (Reissue 1988). The court committed the children to the legal custody of DSS, with the authority for DSS to place the children in an approved foster home and to consent to the adoption of the children.

ASSIGNMENTS OF ERROR

D.B. has appealed to this court, assigning as error the juvenile court's holding that there was sufficient evidence to prove the allegations for termination filed by the guardian ad litem and that grounds exist for termination of D.B.'s parental rights under § 43-292(2) and (6).

STANDARD OF REVIEW

[1-3] An order terminating parental rights is reviewed by an appellate court de novo on the record. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

> "The unequivocal language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if a circumstance designated in subsections (1) to (6) is evidentially established, there must be the additional showing that the termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. The standard of proof for each of the two preceding requirements prescribed by § 43-292 is evidence which is 'clear and convincing.' "...
>
> . . . " '[C]lear and convincing evidence means and is 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.' "

(Citations omitted.) *In re Interest of L.V.*, 240 Neb. 404, 406-07, 482 N.W.2d 250, 253 (1992).

ANALYSIS

In terminating D.B.'s parental rights, the court referred to D.B.'s failure and refusal to participate in therapy to address the sexual abuse issues. The court stated that "[h]e has had more than adequate time and opportunity to comply. Such a provision is appropriate." The court's order, along with the remainder of the record, is replete with references to a rehabilitative plan, although the plan itself was not included in the record. Nonetheless, it is clear that the plan included a requirement that D.B. participate in therapy to address sexual abuse. In fact, D.B. testified that he was aware that he had been ordered by the court to undergo such therapy, but that he had refused to do so.

> When a parent is unwilling or unable to rehabilitate herself or himself within a reasonable period of time after the adjudication hearing, the best interests of the child usually

> require that a final disposition be made without delay. *In re [Interest of] L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991). Furthermore, when a parent fails to make reasonable efforts to comply with a court-ordered rehabilitative plan, the parent's failure presents an independent reason justifying termination of parental rights. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

In re Interest of J.H., 242 Neb. at 911, 497 N.W.2d at 351.

[4] Regarding parental noncompliance with a court-ordered rehabilitative plan as a basis on which to terminate parental rights under § 43-292(6), the State must prove by clear and convincing evidence that (1) the parent has willfully 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 J.H., supra.*

The facts presented at the adjudication hearing, relating numerous incidents of sexual abuse by D.B., support a finding that a plan requiring D.B. to participate in therapy for sexual abuse issues is both reasonable and material. A provision in a rehabilitative plan is material to rehabilitation of a parent if such provision tends to correct, eliminate, or ameliorate the situation or condition on which an adjudication is obtained under the Nebraska Juvenile Code. *In re Interest of J.H., supra.* We hold that the State has proved by clear and convincing evidence that the rehabilitative plan, which required D.B. to participate in therapy to address the issue of his sexual abuse of R.W. and M.W., was both reasonable and material.

On appeal, D.B. has challenged neither the reasonableness nor the materiality of the plan. D.B. instead argues that his failure to comply with the terms of the plan cannot be termed "willful" because of his incarceration. This argument is not borne out by the record. The evidence reflects that therapy which would have addressed the concerns of the juvenile court was available to D.B. in the penitentiary. D.B. has consistently refused to avail himself of such therapy because of his adamant denial of culpability relating to sexual abuse of R.W. and M.W.

[5] The juvenile court also stated that D.B.'s parental rights should be terminated under § 43-292(2). To justify termination of parental rights under the provisions of § 43-292(2), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

[6] At the time of the termination hearing, D.B. was serving a 3- to 6-year sentence for delivery of a controlled substance. Although parental rights may not be terminated solely because of a parent's incarceration, parental incarceration is a factor which may be considered in determining whether parental rights should be terminated. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). D.B. testified that prior to his current incarceration, he was confined at the Omaha Correctional Center for violating his parole. The record does not reflect the nature of the offense for which D.B. was initially confined. However, the fact remains that D.B. has been incarcerated and hence unemployed and unavailable at least twice since 1989. While on parole from the correctional center, D.B. paid a total sum of $70 for support of his children. In view of these circumstances, we find that the evidence clearly and convincingly establishes that D.B. has substantially and continuously or repeatedly neglected M.W. and D.W. and has refused to provide parental care and protection for them, all without any justifiable reason or excuse for such parental failure. See § 43-292(2).

CONCLUSION

[7] A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of J.H., supra*. From our de novo review, we find that the best interests of M.W. and D.W. mandate that the parental rights of D.B. be terminated as authorized by § 43-292(2) and (6) of the Nebraska Juvenile Code. The order of the juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEONARD STUBBLEFIELD, APPELLANT.

509 N.W.2d 243

Filed December 7, 1993. No. A-93-012.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence.
2. _____: _____. A conviction in a bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the light most favorable to the State, is legally sufficient to support that conviction.
3. **Search and Seizure: Police Officers and Sheriffs: Weapons.** In order to conduct a frisk for weapons, an officer need not be certain that a suspect is armed; the issue is whether a reasonably prudent person in the same circumstances would have believed that his or her safety or the safety of others was threatened. In justifying the intrusion, the officer must be able to point out specific and articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion.

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

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and David Arterburn for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal arises from the conviction of the appellant, Leonard Stubblefield, for possession of a controlled substance. Stubblefield argues that evidence on which he was convicted should have been suppressed because it was obtained in a search of his vehicle that was tainted by a prior illegal search of his person. Stubblefield also argues that the trial court erred in rejecting his explanation that, unknown to him, someone else must have left the contraband in his vehicle. We affirm.

I. FACTS

Uniformed Omaha police officer Donald Ficenec and his partner were patrolling the Pleasantview West housing project

in Omaha in their police cruiser at approximately 6:50 one evening when they encountered a vehicle parked illegally. The vehicle was facing south in the northbound traffic lane and was obstructing northbound traffic, forcing it into the southbound lane. After being forced into the southbound lane themselves and passing by the illegally parked vehicle, the officers turned their cruiser around, pulled up behind the vehicle, activated their emergency lights, and conducted a traffic stop for obstruction of traffic and driving on the wrong side of the street.

Officer Ficenec testified that "extremely darkly tinted" windows prevented him from seeing inside the vehicle as he approached it. The driver, Stubblefield, was the sole occupant of the vehicle. Officer Ficenec described Stubblefield as "very upset" and "very belligerent" at having been stopped by police. Officer Ficenec asked Stubblefield for identification and returned to the cruiser to run a data check on Stubblefield. Stubblefield's computerized criminal record was reviewed by a police operator, who radioed back that Stubblefield was a convicted felon on either parole or probation and was considered dangerous.

Officer Ficenec returned to Stubblefield's vehicle and asked Stubblefield if he would step out of the vehicle so that the officers could search him for weapons. Stubblefield complied, and the officers patted him down for weapons. None were found. The officers then asked Stubblefield for permission to search his vehicle for weapons.

In a pretrial hearing on a motion to suppress evidence seized from Stubblefield's vehicle, Officer Ficenec testified that Stubblefield consented to the search of the vehicle. At trial, Stubblefield testified that he did not recall the officer's asking for permission to search the vehicle and that Officer Ficenec said that he did not need Stubblefield's permission to search the vehicle. Upon looking inside the vehicle, Officer Ficenec found what appeared to be a piece of crack cocaine approximately the size of a grain of rice on the front passenger seat. A field test confirmed Officer Ficenec's belief that the substance was crack cocaine. Stubblefield was arrested and charged with possession of a controlled substance in violation of Neb. Rev. Stat.

§ 28-416(3) (Cum. Supp. 1992).

Stubblefield filed a motion to suppress the evidence seized during the search of the vehicle on grounds that the searches of Stubblefield's person and vehicle were unconstitutional. The trial court found that the initial detention of Stubblefield was justified because he was breaking the law, that the search of Stubblefield's person was justified because of Stubblefield's belligerent attitude and because police records indicated that he was dangerous, and that the search of the vehicle was justified by Stubblefield's consent. The court concluded that "there was probable cause here to stop the automobile, to detain the defendant, to search the defendant, and to search the car." The motion to suppress was overruled.

In a trial to the court, Stubblefield testified that he had not been aware that there was crack cocaine in the vehicle. Although he owned the vehicle, he testified that he often gave rides to other people and that he allowed other people to use the vehicle. Swabs of Stubblefield's hands for crack cocaine residue were negative.

The court found that Stubblefield had consented to the search of the vehicle and stated that "[t]he crack cocaine was found in the defendant's car and was undoubtedly in plain view, so it would undoubtedly be considered as in the defendant's possession." The court then found that Stubblefield was guilty of unlawful, knowing, and intentional possession of crack cocaine. According to the journal of the court, Stubblefield was sentenced to a prison term of 18 months to 5 years.

II. ASSIGNMENTS OF ERROR

Stubblefield argues that the trial court erred in overruling the motion to suppress evidence found during an illegal search of his vehicle and in finding Stubblefield guilty when there was a reasonable explanation for the presence of the crack cocaine that supported Stubblefield's claim of innocence.

III. STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992).

In deciding whether the trial court's findings on a motion to

suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992).

Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Wilson*, 238 Neb. 217, 469 N.W.2d 749 (1991).

[1] In determining the sufficiency of the evidence to sustain a conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Peterson*, 242 Neb. 286, 494 N.W.2d 551 (1993).

[2] A conviction in a bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the light most favorable to the State, is legally sufficient to support that conviction. *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992).

IV. ANALYSIS

1. Motion to Suppress

There was nothing wrong with the stop and initial detention of Stubblefield. He was committing a traffic violation. At the hearing on the motion to suppress, Stubblefield did not contest Officer Ficenec's testimony that Stubblefield had consented to the search of the vehicle. Stubblefield argues that the motion should have been granted because the search of his person constituted an illegal detention that invalidated the consent given for the subsequent search of the vehicle.

[3] In order to conduct a frisk for weapons, an officer need not be certain that a suspect is armed; the issue is whether a reasonably prudent person in the same circumstances would have believed that his or her safety or the safety of others was threatened. *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990). In justifying the intrusion, the officer must be able to point out specific and articulable facts which, together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* Officer Ficenec stopped a traffic violator in an

area described by the court as "a high drug area." The windows of the vehicle were so darkly tinted that the officer could not see persons or activities inside the vehicle as he approached it. The driver of the vehicle was upset and belligerent at having been stopped by police. Then the officer discovered that Stubblefield was a convicted felon coded as "dangerous" in police records. While Officer Ficenec acknowledged that police do not automatically frisk a person for weapons in the course of a traffic stop, he testified that it is standard practice for an officer to conduct a weapons frisk when the word is received that a suspect is coded as "dangerous" in police records. Given the facts of this case, we find that the record provides articulable facts and reasonable inferences sufficient to justify Officer Ficenec's decision to frisk Stubblefield's person for weapons. There was nothing illegal about the search of Stubblefield's person. Consequently, the search of Stubblefield's person did not taint the subsequent consensual search of Stubblefield's vehicle. Therefore, we affirm the trial court's order overruling the motion to suppress.

2. Sufficiency of the Evidence

The decisive issue at trial was whether the trial court believed that Stubblefield was telling the truth when he said that he knew nothing about the crack cocaine and implied that a recent passenger or borrower of his vehicle must have left the contraband in the vehicle.

Stubblefield relies heavily on *State v. Friend*, 230 Neb. 765, 433 N.W.2d 512 (1988), to support his argument that the trial court erred in not accepting his explanation exonerating himself of any knowledge of the contraband in his vehicle. Stubblefield seems to believe that, by default, he must be acquitted because he produced an explanation that supported his claim of innocence. In *Friend*, the court stated that "when illegal materials are found in an automobile possessed and operated by the defendant, the evidence of unlawful possession is deemed sufficient to sustain a conviction, '*in the absence of any other reasonable explanation for its presence.*' " *Id.* at 769, 433 N.W.2d at 515. That proposition of law was disapproved of in *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991), on

grounds that it unfairly shifted to the defendant the burden of disproving possession. Thus, Stubblefield could have been acquitted even if he had not proffered an explanation for the presence of the contraband in his vehicle. Regardless of whether Stubblefield proffered an explanation for the presence of the contraband, he should have been acquitted if the trier of fact harbored a reasonable doubt as to whether Stubblefield knew that the crack cocaine was in his vehicle.

In convicting Stubblefield, the court obviously determined beyond a reasonable doubt that Stubblefield was aware of the presence of the crack cocaine in plain view next to him on the front passenger seat. Stubblefield urges us to find that the trial court erred in rejecting his claim that he was not aware of the presence of the crack cocaine in his vehicle. This we cannot do. The parties introduced conflicting evidence on whether Stubblefield was in possession of the contraband, leaving to the trial court the task of weighing the testimony and credibility of the witnesses and resolving the conflicts in the evidence. An appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury. *State v. Peterson*, 242 Neb. 286, 494 N.W.2d 551 (1993). On appellate review of a conviction in a bench trial, we ask whether the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992). Having reviewed the evidence in the light most favorable to the State, we find no error in the trial court's judgment that Stubblefield was in possession of the crack cocaine found in his vehicle.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LOWEN D. LEMBURG, APPELLANT.

509 N.W.2d 247

Filed December 7, 1993. No. A-93-175.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed upon appeal absent an abuse of discretion.
3. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
4. **Convicted Sex Offender: Mentally Disordered Sex Offender.** The Convicted Sex Offender Act, Neb. Rev. Stat. §§ 29-2922 to 29-2936 (Cum. Supp. 1992), repealed the mentally disordered sex offender statutes, Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1989), and became effective on July 15, 1992.
5. **Convicted Sex Offender: Mentally Disordered Sex Offender: Sentences.** The Convicted Sex Offender Act, Neb. Rev. Stat. §§ 29-2922 to 29-2936 (Cum. Supp. 1992), authorizes certain persons committed as mentally disordered sex offenders to elect to be resentenced.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Harry A. Moore, Madison County Public Defender, for appellant.

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

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

SIEVERS, Chief Judge.

After pleading no contest, Lowen D. Lemburg was found guilty of one count of sexual assault of a child, pursuant to Neb. Rev. Stat. § 28-320.01 (Reissue 1989), and two counts of contributing to the delinquency of a child, pursuant to Neb. Rev. Stat. § 28-709 (Reissue 1989). On April 30, 1992, Lemburg was sentenced to 5 years' imprisonment with the Department of Correctional Services for the sexual assault conviction and to 1

year's imprisonment for each of the contributing to the delinquency of a child convictions. The sentences are to be served consecutively. Lemburg was given credit for 323 days already served.

Lemburg was adjudged to be a mentally disordered sex offender, see Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1989), and was ordered to receive treatment at the Lincoln Regional Center as such treatment was available. In January 1993, Lemburg elected to be resentenced under the Convicted Sex Offender Act, Neb. Rev. Stat. §§ 29-2922 to 29-2936 (Cum. Supp. 1992). After a disposition hearing on January 28, 1993, the district court ordered Lemburg to serve the remainder of his original sentences in a facility operated by the Department of Correctional Services. Lemburg now appeals to this court, arguing that the district court erred by refusing to resentence him pursuant to the Convicted Sex Offender Act.

[1] Statutory interpretation of the Convicted Sex Offender Act is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. See *Douglas Cty. Bank & Trust v. Stamper*, 244 Neb. 226, 505 N.W.2d 693 (1993).

[2,3] Although this appeal involves resentencing pursuant to the Convicted Sex Offender Act, we do not believe this changes our standard of review with regard to the appeal of a criminal sentence. A sentence imposed within the statutory limits will not be disturbed upon appeal absent an abuse of discretion. *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993). In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.*

[4,5] In 1992, the Nebraska Legislature passed the Convicted Sex Offender Act and repealed the mentally disordered sex offender statutes. Effective July 15, 1992, the Convicted Sex Offender Act provides that persons convicted of certain types of sexual assault crimes shall be evaluated by the Department of

Public Institutions within 60 days of their commitment to the Department of Correctional Services to determine whether treatment for the offender is appropriate. § 29-2925. The act also provides that an aftercare treatment program may be an alternative to incarceration for qualified offenders upon the successful completion of an inpatient treatment program. § 29-2931. As a result, some qualified offenders can obtain an early release from confinement. Since the Convicted Sex Offender Act provides sentencing alternatives to persons previously convicted under the mentally disordered sex offender statutes, the act specifically authorizes certain persons to elect to be resentenced. The act provides that each person committed as a mentally disordered sex offender pursuant to §§ 29-2911 to 29-2921 as such sections existed prior to July 15, 1992, who is still receiving inpatient treatment or is awaiting inpatient treatment and who, as of July 15, 1992, has at least 1 year of his or her sentence left to serve is entitled to elect whether to be resentenced under the act. § 29-2934(1), (2), and (4). The act also provides:

> (5) For each person identified in subsections (1) and (2) of this section who was committed as a mentally disordered sex offender by a court after having entered a plea of not guilty and for each person identified in subsection (4) of this section who elected to be resentenced under the act, subsections (6), (7), and (8) of this section shall apply.
>
> (6) If the court finds that the offender is treatable in an inpatient treatment program operated by the Department of Public Institutions, the offender shall be returned to or placed in such a treatment program and sections 29-2929 to 29-2933 shall apply.
>
> (7) If the court finds that the offender is not amenable to treatment, is uncooperative in treatment, or has reached the maximum benefit of treatment in an inpatient treatment program operated by the Department of Public Institutions but cannot be placed in an aftercare treatment program under conditions set by the court consistent with public safety, the offender shall be placed in a facility operated by the Department of Correctional Services to

serve the remainder of his or her original sentence.

(8) If the court finds that the offender has successfully completed an inpatient treatment program operated by the Department of Public Institutions and can be treated in an aftercare treatment program under conditions set by the court consistent with public safety, the court shall proceed in accordance with section 29-2931 and sections 29-2932 and 29-2933 shall apply.

§ 29-2934.

In the case at bar, Lemburg argues that since he elected to be resentenced pursuant to the provisions of the Convicted Sex Offender Act, the district court was required to resentence him. Lemburg asserts that since the district court ordered him to serve the remainder of his original sentences, the district court in effect refused to resentence him under the purview of the act. We infer that Lemburg objects to being sentenced to serve the remainder of his original sentences rather than being sentenced to a shorter term of incarceration.

At the disposition hearing, Lemburg testified that he wanted to serve his time at the Nebraska State Penitentiary rather than at the Lincoln Regional Center. Evidence adduced at the hearing included a report from the staff at the regional center which indicated that Lemburg was not a suitable candidate for the treatment program based on his history of acting out, poor motivation, defiant attitude, and antisocial tendencies. The district court, after reviewing the evidence, determined that pursuant to § 29-2934(7) of the act, Lemburg was not amenable to treatment, was uncooperative during treatment, and could not be placed in an aftercare treatment program under conditions set by the court consistent with public safety. The district court therefore ordered Lemburg to serve the remainder of his original sentences with the Department of Correctional Services.

Pursuant to § 29-2934, the trial court considered Lemburg's individual facts and circumstances and determined that Lemburg was not qualified for inpatient treatment and could not be placed in an aftercare treatment program. Accordingly, since the trial court considered Lemburg's particular circumstances and ultimately determined that he should serve

the remainder of his original sentences, we believe that the trial court resentenced Lemburg as envisioned by the act.

The fact that proceedings under the Convicted Sex Offender Act result in the same sentence as originally imposed does not mean that resentencing has not occurred. The act establishes a procedure, which was followed in this case; it does not guarantee a particular result. When the result on resentencing is not an abuse of discretion, this court will affirm. See *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993). In the case at bar, there is abundant evidence to support the district court's result on resentencing.

Lemburg argues that the procedure employed by the district court will deprive him of the benefit of the new and more expansive "good time" statute, Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 1992). His argument is that prison officials will apply the old good time statute to his sentences, which could affect his date of release. Obviously, Lemburg speculates on what prison officials may or may not do, but no issue concerning good time is presented by the record in this case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL H. STUTHMAN, APPELLANT.

509 N.W.2d 410

Filed December 7, 1993. No. A-93-222.

1. **Rules of the Supreme Court: Records: Notice: Time: Appeal and Error.** A statement of errors filed pursuant to Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1993) must be filed with the district court within 10 days of the filing of the *bill of exceptions*, rather than within 10 days of the filing of the notice of appeal.
2. **Criminal Law: Restitution: Evidence.** Neb. Rev. Stat. § 29-2281 (Cum. Supp. 1992) states that in criminal cases where restitution is ordered, at the time of sentencing the court may hold an evidentiary hearing to determine the amount of restitution. An order of restitution unsupported by an evidentiary hearing is suspect.

Appeal from the District Court for Sherman County, RONALD D. OLBERDING, Judge, on appeal thereto from the County Court for Sherman County, GERALD R. JORGENSEN, Judge. Judgment of District Court affirmed.

Charles D. Brewster, of Butler, Voigt & Brewster, P.C., for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal arises from the county court's sentencing of the appellant, Paul H. Stuthman, following his conviction for transporting livestock without a valid health certificate. Stuthman was fined $500 and sentenced to a 90-day jail term. He also was ordered to pay restitution in the amount of $2,056.32. The jail term was to be suspended if Stuthman paid the fines, costs, and restitution before the date the jail term was to commence. Stuthman challenges the jail sentence on grounds of excessiveness and the restitution order on grounds of insufficient evidence. We affirm.

I. FACTS

In August 1988, Stuthman purchased 20 calves in Wisconsin, transported them to Nebraska, and then sold them. Eight of the calves died within days of their sale, and three more died within approximately 1 month. Veterinary examinations of the dead calves revealed that the animals had died because of a failure of the digestive system. There was speculation in the record that the calves may have had Salmonella poisoning, though that possibility was not confirmed.

Stuthman was charged in county court with count I, transporting livestock without a valid health certificate in violation of Neb. Rev. Stat. § 54-788 (Reissue 1988); count II, transporting calves without a valid permit in violation of § 54-792 (Reissue 1988); and count III, selling livestock without a livestock dealer license in violation of § 54-1704 (Reissue 1988). Pursuant to a plea bargain, Stuthman pled nolo

contendere to count I, and the other counts were dismissed.

Stuthman was sentenced by the county court three times. On appeal to the district court, the first two sentences were reversed and remanded. The third sentence—90 days in jail, a $500 fine, and restitution in the amount of $2,056.32—was affirmed. Stuthman appeals the district court's judgment affirming the third sentence imposed by the county court.

Stuthman's notice of appeal challenging his third sentence was filed in the county court August 7, 1992. That same day, Stuthman filed assignments of error in the county court. Also on August 7, Stuthman filed in the county court a praecipe for transcript for use in his appeal to the district court. In the praecipe, Stuthman specified 13 items to be included in the transcript, but he did not specify that the assignments of error be included in the county court transcript to be filed with the district court on appeal.

II. ASSIGNMENTS OF ERROR

Stuthman argues that the district court erred in affirming the trial court's imposition of a 90-day jail sentence, and in affirming the trial court's order for restitution which, according to Stuthman, was not supported by sufficient evidence in the record.

III. STANDARD OF REVIEW

When a sentence imposed by a court is within the statutorily prescribed limits, an appellate court will not disturb the sentence unless there has been an abuse of discretion. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993).

An abuse of discretion occurs when a sentencing court's reasonings or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

IV. ANALYSIS

1. Preservation of Error

The State argues that Stuthman's assignments of error are not properly before us because the record does not indicate that the assignments of error were filed with the district court, a procedural prerequisite necessary to preserve error for review by this court.

When an appellate court reviews a decision of a district court which affirmed, reversed, or modified a decision of a county court, it will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court. *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). On the matter of perfecting an appeal to the district court from a judgment rendered in the county court, Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) stated that "[w]ithin 10 days of filing a notice of appeal, the appellant shall file *with the district court* a statement of errors . . . ." (Emphasis supplied.) In *State v. Nelson, ante* p. 289, 509 N.W.2d 232 (1993), this court held that an appellant who incorporated his statement of error directly into his notice of appeal filed in the county court satisfied the requirement that the statement of error be filed with the district court because the notice of appeal containing the statement of error was included in the county court transcript filed with the district court on appeal. In *Nelson*, the appellant's statement of error was automatically filed with the district court because a notice of appeal filed in the county court is among the documents that must be included in the transcript on appeal to the district court. See rule 52(I)(B)(1)(c). In the case now before us, the document entitled "Assignments of Error" that Stuthman filed in the county court is not one of those documents automatically included in the transcript on appeal to the district court. See rule 52(I)(B)(1). Indeed, the rules do not require or address the filing of such a document in the county court. Stuthman did not file with the district court his assignments of error, and he did not request that the assignments of error filed in the county court be included in the transcript that went to the district court for appellate review.

The State makes a plausible argument on this issue. However, the transcript certified by the clerk of the district court as the one reviewed by the district court on appeal does contain Stuthman's assignments of error. We confess that we cannot tell from the record how the assignments of error were incorporated into the transcript prepared for appellate review by the district court. Nonetheless, the record indicates that Stuthman's assignments of error were contained in the

transcript reviewed by the district court, and so we rule that they are now properly before this court.

[1] As a procedural note, we direct the attention of the practitioner to the amended version of rule 52(I)(G), effective October 27, 1993. From that date on, the statement of errors must be filed with the district court within 10 days of the filing of the *bill of exceptions*, rather than within 10 days of the filing of the notice of appeal.

2. Jail Term

Stuthman complains about being sentenced to the maximum jail term permissible for transporting livestock without a valid health certificate. We agree with the State that in Nebraska there are strong public policy reasons for penalizing to the utmost violators of laws designed to preserve the health of livestock and to prevent the spread of animal-borne diseases. When we consider that two additional Class III misdemeanors were dismissed and that Stuthman could avoid jail time entirely by paying restitution, we find nothing excessive in the imposition of a conditional 90-day jail sentence.

3. Restitution

[2] Neb. Rev. Stat. § 29-2281 (Cum. Supp. 1992) states that in criminal cases where restitution is ordered, at the time of sentencing the court may hold an evidentiary hearing to determine the amount of restitution. The Nebraska Supreme Court has stated that an order of restitution unsupported by an evidentiary hearing is suspect:

> [W]e have serious concerns whether, without an evidentiary hearing, the bare statements contained in the [presentence investigation report] are sufficiently reliable to meet § 29-2281, which requires that "[t]he amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record."

State v. Yost, 235 Neb. 325, 329, 455 N.W.2d 162, 164 (1990). In the case before us, the sentencing court conducted an extensive evidentiary hearing on the damages suffered by the victims as a result of purchasing the diseased calves from Stuthman. Contrary to the claims of Stuthman in his brief, the record

supports the sentencing court's conclusion that the damages suffered by the victims resulted directly from the criminal conduct of Stuthman in transporting and selling diseased calves. Calves began dying within 24 hours after the victims had purchased them from Stuthman. The record is replete with copies of invoices and checks that document the victims' transactions with Stuthman and with veterinarians and animal clinics in the effort to save the dying calves. We note that the court did not order restitution in connection with the three calves that survived until sometime in September. The court ordered restitution only in connection with the eight calves that died within days of their purchase in August. We find that the court was very circumspect in calculating the amount of restitution and that there is ample evidence in the record supporting the order of restitution.

Stuthman argues that the court did not give sufficient consideration to the question of whether his earning ability, employment status, financial resources, and other obligations would preclude an order of restitution. See *State v. Yost, supra* (such factors must be considered if restitution is contemplated). This argument is without merit. The record contains a presentence investigation report in which Stuthman stated that he makes $25,000 a year at his job, rents a home from his mother for $300 a year, has no outstanding obligations, and also receives additional income from farming. Stuthman had the opportunity during the evidentiary hearing in March 1991 to draw attention to any factors weighing against a restitution order. At a subsequent sentencing hearing in July 1992, Stuthman could have challenged his financial profile as reflected in the presentence investigation report or raised other factors not mentioned in the report. The record of the July 1992 hearing contains the following colloquy:

> THE COURT: . . . [T]he Court is in possession of the pre-sentence investigative report prepared by the State Probation Office. [Defense counsel], have you had an opportunity to review that?
>
> [Defense counsel]: Yes, your Honor.
>
> . . . .
>
> THE COURT: [Prosecutor], any changes or

corrections?

[Prosecutor]: No, your Honor.

THE COURT: [Defense counsel], do you have any further evidence or any statements you would like to make?

[Defense counsel]: I don't believe so, your [H]onor.

The court considered Stuthman's financial profile as reflected in the presentence investigation report and determined that Stuthman was capable of paying the restitution ordered. The record clearly supports that determination.

AFFIRMED.

LOLA LEU, APPELLANT AND CROSS-APPELLEE, V. DALE LITTELL AND MARY LITTELL, HUSBAND AND WIFE, AND GRAYCE CLARK, APPELLEES AND CROSS-APPELLANTS.

513 N.W.2d 24

Filed December 14, 1993. No. A-92-055.

1. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Easements: Proof: Time.** In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period.
4. **Easements: Proof.** To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence.
5. _____: _____. Continuous and uninterrupted use may be established by use of the easement whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed.

6. _____: _____. In order to establish a public prescriptive easement, the use must be open and notorious so that the owner will learn of the use, assuming that he keeps himself informed about the condition of his property; the use must be exclusive, meaning that the claimant's right to use the property does not depend upon a similar right in others; the claimant must use the prescriptive easement under claim of right; and the claimant's right must be adverse to the property owner.
7. **Easements: Proof: Presumptions.** If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence.
8. _____: _____: _____. The assertion of a prescriptive easement may be defended against on the basis that the use was made by permission. Once the presumption of a prescriptive easement has been established, this presumption may be rebutted by the owner of the servient estate only by proving by a preponderance of the evidence that the use was by license, agreement, or permission.
9. **Real Estate: Presumptions: Title.** As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land.
10. **Easements.** The extent and nature of an easement are determined from the use made of the property during the prescriptive period.
11. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Hayes County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded with directions.

Charles W. Baskins and Robert E. Roeder, of Baskins & Roeder, for appellant.

John A. Gale, of McCarthy, Gale & Moore, for appellees.

SIEVERS, Chief Judge, MILLER-LERMAN, Judge, and NORTON, District Judge, Retired.

PER CURIAM.

This lawsuit involves a "trail road" similar to the countless other unimproved and unmaintained roads which crisscross the Sandhills ranch country of Nebraska and allow travel from

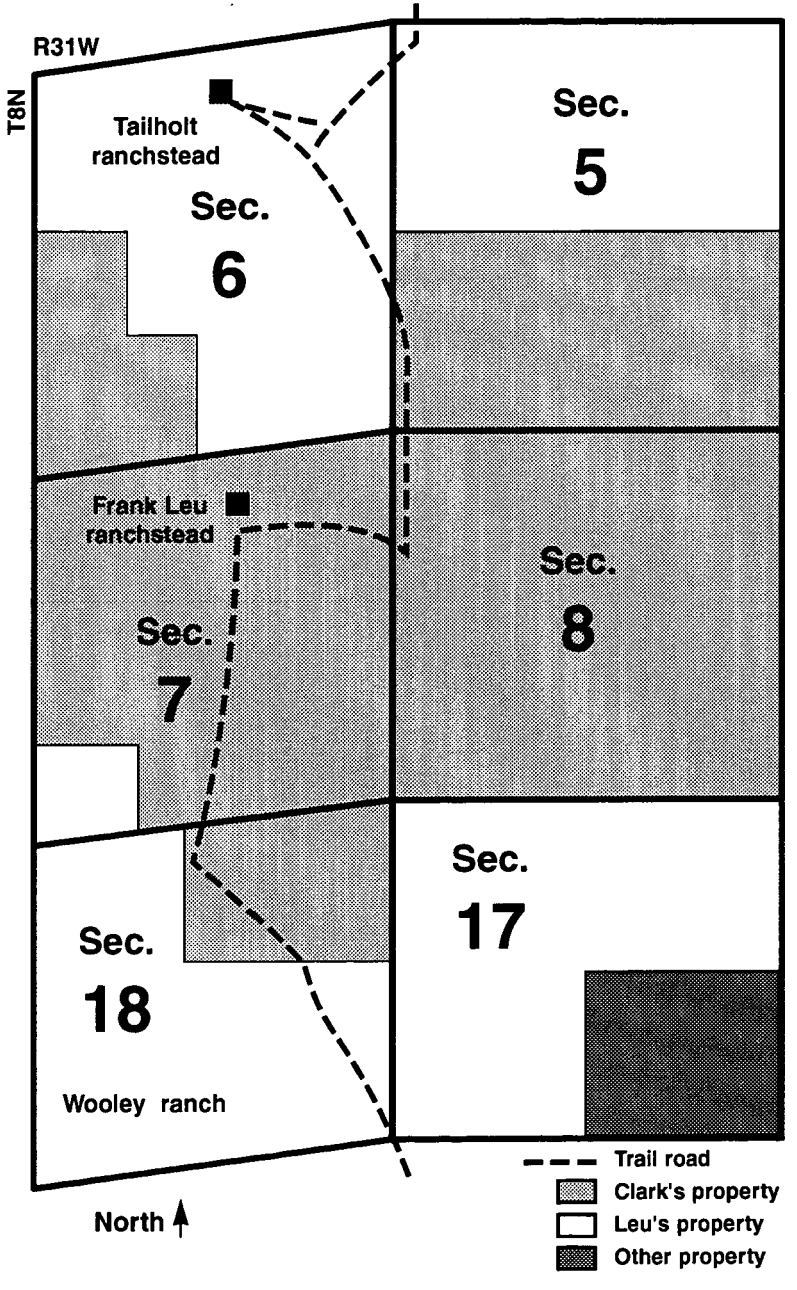
ranch to ranch and to town for the people of this sparsely populated region of our state.

The plaintiff, Lola Leu, brought this action against the defendants, Grayce Clark and Clark's tenants, Dale and Mary Littell, to establish a public prescriptive easement across Clark's land. Leu also sought to permanently enjoin the defendants from placing obstructions on the public easement, to require the defendants to open certain gates across the trail road, and to further enjoin the defendants from interfering with the public's rights to use the trail road. Clark cross-petitioned, praying that Leu and all other persons be permanently enjoined from using the trail road in question for ingress, egress, or any other purpose, and to quiet title in Clark to 120 acres of land that is not directly connected to the trail road. The trial court found that Leu had established a private prescriptive easement across land belonging to Clark, but that a public prescriptive easement did not cross this land. The court also quieted title to the 120 acres of land in Clark. Leu appeals to this court, and the defendants cross-appeal.

Clark died while the case was pending in this court. The case was revived by Leu against Clark's estate and Clark's sole heir, Sandra L. Scholz.

FACTS

Leu is a cattle rancher who maintains three separate ranches, which we will refer to as her "home ranch," the "Wooley ranch," and the "Tailholt ranch." Leu's home ranch and the Wooley ranch are separated from the Tailholt ranch by ranchland that was owned by Clark and known as the Frank Leu ranch. Leu and Clark were first cousins whose fathers previously ranched much of the land crossed by the trail road involved in this case. This trail road begins south of Leu's land where it meets a graded road. It meanders north across Leu's land, then across Clark's land, and then across Leu's land again for a few miles before it meets a maintained road. From the exhibits, we have constructed the diagram which appears herein and which should facilitate understanding of this case. Lola Leu's property extends north and south of that depicted in our diagram.


R31W
T8N
Tailholt ranchstead
Sec. 6
Sec. 5
Frank Leu ranchstead
Sec. 7
Sec. 8
Sec. 18
Wooley ranch
Sec. 17
North
Trail road
Clark's property
Leu's property
Other property

Clark, who was about 81 years old at the time of the trial, was raised at the Frank Leu "ranchstead," and she acquired her land from her parents and her siblings after her parents' death. She rented her land to the Littells, who kept cattle on it.

A trail road (not shown on our diagram) proceeds northwest from the Tailholt ranchstead across Leu's land for a distance that is not disclosed by the evidence. However, the aerial photograph of the area, in evidence as exhibit 4, shows that this northwest trail road and the two segments leading east and southeast from the ranchstead (shown on our diagram) are the only means of access to the Tailholt ranchstead.

When Leu was a child, Leu's parents lived south of section 18, and Leu was raised there on her home ranch. The Wooley ranch, which is located in part in sections 17 and 18, is now owned by Leu. Until about 1940, it was owned by an aunt of Leu and Clark. The Tailholt ranch was not owned by a Leu family member until it was purchased by Leu's father in the late 1920's.

Leu testified that she has been personally familiar with the trail road for 70 years. She claimed that the trail road existed before her and Clark's time, that is, before 1911. Leu has been maintaining a livestock operation since 1935, and she stated that she has personally used the trail road when traveling to North Platte and Wellfleet and to check her water, livestock, and fences. Leu further testified that she uses the trail road in her livestock operation to move cattle to and from her separate ranches. Leu stated that she has used the trail road approximately two to three times per week for the last 35 years. Leu estimated that the width of the trail road is approximately 40 feet at its widest point.

Leu stated that over the last 50 or 60 years, she has also observed other persons using the trail road. Leu testified that people had been using the trail road to cross her land and Clark's land for more than 10 years. Leu also stated that several suppliers haul supplies over the trail road. She testified that she and Clark never discussed Leu's use of the trail road, nor did Leu discuss her use of the trail road with Clark's father. Leu stated that Clark never objected when Leu moved her cattle on the trail road across Clark's land.

Leu was married to Waldo Goedeker from 1959 until 1980. Goedeker leased the Frank Leu ranch from Clark's father and then from Clark. Leu denied operating any livestock business with Goedeker, although she did admit that she watered her cattle on Goedeker's land and installed a gate which allowed her to move cattle across sections of the Frank Leu ranch. When Leu and Goedeker were divorced in 1980, Goedeker continued to lease the Frank Leu ranch from Clark and subleased part of it to Leu until 1986. In 1987, Dale and Mary Littell leased the ranch from Clark and subleased it to Leu until 1989. Clark was not aware of either of these subleasing arrangements.

Clark testified that she used the trail road regularly when she was growing up. She used the trail road south of the Frank Leu ranchstead to travel to visit her aunt Marietta Wooley until at least 1932. She admitted the trail road was used by her immediate family to travel south to Hoyt City and Marengo, but said the route was later changed. The trail road was a means of getting south to the county road to go to Dickens and Hayes Center. Clark's family did not have relatives other than the Roy Leu family to the north, but Clark's family did use the trail road north when they went to North Platte. Clark stated that from 1921 until 1932, she was not aware of anyone other than family, including the Roy Leu family, using the trail road. She stated that when she was growing up, it was rare to see a car on the trail road.

Clark did not live on the ranchstead for any length of time after she left to attend college in 1932. She did remember auto gates being installed. On the portion of the trail road in question, there are four gates, which generally are located at the section lines and where the trail road crosses the Leu-Clark boundaries. Clark's parents moved off the ranch to North Platte in 1944.

Clark testified that she was not aware that Leu was subleasing the land from either Goedeker or the Littells. Clark testified that she was not aware of anyone using the trail road, but admitted that she did not know who had used the trail road since 1941 because she did not live on the ranch.

Leu called several witnesses to testify to their use and familiarity with the trail road. Melvin Shipman, a livestock

feedstore department manager, testified that he has been familiar with the trail road since 1979 and that he used the trail road to deliver feed to Leu and to Clark's tenants. Bill Rodgers is in the business of drilling and servicing water wells. He stated he has used the trail road on and off for approximately 25 years, both to get to Leu's ranches and to travel to other ranches in the area. James Griffiths testified that he has been familiar with the trail road since about 1941. He stated that he used the trail road to move cattle and to visit friends. He further testified that he had not traveled the trail road north of the Frank Leu ranch since 1966, and to the south since 1980.

Keith Lapp, a rancher, testified that he has moved cattle on the trail road since 1979 and that he also uses the trail road to haul "mineral" and to check his cattle's water. He testified that he has seen other ranchers moving cattle on this trail road.

Jerry Schultz works occasionally for Leu, but he has his own cattle. He testified that he has been familiar with the trail road since 1947 and that he moved cattle for Leu approximately 1 month prior to the trial. Schultz stated that he has used the trail road for personal reasons such as checking his cattle's water. Schultz testified that he has seen others using the trail road, including that portion on Clark's land.

All of the witnesses called by Leu testified that they have never asked anyone's permission to use the trail road, except that Lapp testified he asked for Dale Littell's permission in 1990 after Littell wired several gates closed on the trail road.

Clark called several witnesses to testify to the use of the trail road. Martin Viersen stated that he was familiar with the trail road, but testified that he had never actually used it, except that he had crossed the trail road with cattle two or three times. Leu had named several families who had allegedly used the trail road in the 1930's. Viersen testified that he did not believe that the families named by Leu had regularly used the trail road because it was located in a very isolated area. Viersen stated that he was not aware of any families in that area who had regularly used the trail road to move either cattle or vehicles during the period from the early 1900's to the 1940's. Lola Weesner testified that she grew up in Hayes County and that she and her immediate family used "a trail road" to get to Frank Leu's

property, but that she was not aware of any other relatives that frequently used the trail road.

Stanley Sellers, a rancher who worked for Leu in 1982 and 1983, testified that Leu kept cattle on Goedeker's leased land. Sellers used the trail road to travel from one part of Leu's land to another. Sellers stated that he had Leu's permission to use the trail road and also stated that he never saw anyone else using the trail road during the time that he worked for Leu. He further testified that Leu had told him that the trail road was private property and that she did not want others to use it.

Glen Stoetzel worked for Roy Leu on the Tailholt ranch every summer from 1951 through 1959. Stoetzel testified that he did not see very much traffic on the trail road and stated that the trail road was used mainly by neighbors. Stoetzel testified that he did not recall seeing Leu move cattle on the trail road, or that anyone other than those people who were pasturing on the Tailholt ranch moved cattle on the trail road.

Dale Littell, Clark's tenant at the time of this lawsuit, testified that in 1987 he leased land from Clark and then subleased the land to Leu. Littell stated that he continued to sublease to Leu for about 2 years, but that Clark was not aware of the arrangement between Leu and Littell. In 1990, Littell leased the land from Clark for his own cattle operation, and he continued to lease the land at the time of the trial. Littell stated that he goes on the land that he leases approximately two to three times per week during pasture season.

TRIAL COURT'S DECISION

In June 1990, Littell, with permission from Clark, wired several gates on the trail road closed. In response, Leu initiated this lawsuit, praying that the court grant her, and the public generally, a prescriptive easement for the trail road and enjoin the defendants from interfering with the easement.

After a full trial, the court found on November 13, 1991, that "[t]he trail road involved herein has not been generally used by the public to the extent required to make the trail a public road." However, the court found that "[t]he trail road involved herein has been sufficiently used by the Plaintiff and her predecessors in title for more than seventy years which establishes an

easement by prescription." In its decree, as amended on December 27, the court ordered that Leu's easement consist of the right to occasional use by vehicles and farm machinery without prior notice by Leu to Clark and the Littells and that such use be granted to Leu and her agents, delivery people, and guests. The court also provided that Leu and her employees can occasionally drive cattle over the easement, subject to 36 hours' prior notice to Clark, her lessees, or her agents. The court ordered that the easement be 10 feet wide on either side of the centerline of the trail road. The court also held that where erosion has occurred, the users of the easement can bypass the eroded areas within a reasonable distance to protect the land and permit passage. The court enjoined Clark and the Littells from interfering with Leu's use of the easement. The court found that Leu had not established any other prescriptive easement rights across the land belonging to Clark. The court noted that Leu had admitted in open court that she was not claiming any land in excess of that shown to be hers in a government survey. The court then quieted title to the disputed 120 acres of land in Clark. The court noted that the course of the trail road across Clark's land was specifically described in Leu's second amended petition and that the 120 acres was specifically described in Clark's cross-petition.

ASSIGNMENTS OF ERROR BY LEU

In her appeal to this court, Leu raises three assignments of error: (1) The court erred in finding that the trail road did not constitute a public road by prescription, (2) the court abused its discretion in denying the admission of exhibits 35 and 35-A, and (3) the court erred in quieting title in Clark to the disputed 120 acres.

[1] Leu alleges that the court erred in denying the admission of exhibits 35 and 35-A. However, she does not discuss this error in her brief. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992); *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991); *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991). Therefore, we

will not consider the court's denial of the admission of exhibits 35 and 35-A.

ASSIGNMENTS OF ERROR ON CROSS-APPEAL BY THE DEFENDANTS

In their cross-appeal to this court, the defendants allege two errors: (1) The court's finding that Leu had established a private prescriptive easement across Clark's lands was not sustained by the evidence, and (2) the court erred as a matter of law in finding a private prescriptive easement because Leu's pleadings prayed only for a public prescriptive easement.

STANDARD OF REVIEW

[2] In an appeal of an equity action, this court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992); *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991).

GENERAL FINDINGS OF FACT

On a de novo trial of the matter, we first observe that there is no dispute that a trail road has existed since at least before 1911 in approximately the same place as that trail road which Leu contends is a public road by prescription. Understandably, there is no direct evidence of anyone who remembered having traveled the road longer than Clark and Leu, and they both were about 81 years old at the time of the trial in 1991. The areas shown on various plat maps the parties introduced in evidence are displayed on maps prepared by the U.S. government. These basic plats contain usual symbols for an unimproved road, i.e., two dotted lines, at essentially the position that Leu contends is a public road. Such evidence does not show a public road, but the existence of such notations on publicly circulated material is relevant and tends to show that the public at least has notice the

trail road exists. The aerial photograph taken in 1985 clearly shows this same trail road twisting through an area that, from the top to the bottom of the photo, is roughly 5 miles long.

The aerial photo also shows that without the trail road, there is an area of at least 5 by 3 miles, and perhaps larger, that has virtually no access. Leu's and Clark's property is pasture and hayland, but approximately 1 mile to the east of the trail road, farming operations can be seen on the aerial map. The Tailholt, Frank Leu, and Wooley ranchsteads were on that trail road, presumably by at least 1911, and in order to get to or from the ranchsteads it was necessary to travel on at least part of the trail road. It is true that those living at the Tailholt ranchstead could have had access to their land to the northwest or the northeast, that the Frank Leu family could have gotten to town by going east, and that the Wooley family could have gotten to town by going south. But Clark admitted she traveled south on the trail road to visit the Wooley ranchstead and to go to Hayes Center and Marengo. She also testified that she traveled north on the trail road to go to North Platte. Roy Leu eventually acquired the Tailholt ranch, and his son occupied the Wooley ranch. The record is not completely clear as to how Leu acquired all the land she now owns, but members of the extended Leu family have not always owned all of this land.

The auto gates are of some significance. Clark did not recall specifically when they were installed, but stated that they were a great improvement in her view. However, there is testimony that some of the auto gates were in place for at least as long as 36 years. Ranchers do not build auto gates where they rarely travel. The evidence does not show who built the auto gates. A trail road that passes over an auto gate goes in two directions, which implies frequent use on both sides of the auto gate. It seems unlikely that anyone would build an auto gate merely to get into his or her neighbor's pasture. It is much more likely the auto gates were installed to permit ease of travel in crossing over to another place or places. For instance, if the auto gates between Clark's land and Leu's land were built by Frank Leu, it is a reasonable inference that his travel was frequent enough that he would want to avoid opening fence gates to cross over his brother's land. If Roy Leu built the auto gates, he

undoubtedly did so for the same reason, or perhaps it was a joint project. In any event, the auto gates allow the inference of frequent travel across the trail road by motor vehicles.

It is also significant that all of the witnesses were familiar with the trail road. Even those who never saw traffic upon it seemed to be familiar with where it was located. Clark and her witnesses tended to testify that there was very little traffic on the trail road. However, "very little traffic" and similar expressions are necessarily relative terms. Anyone familiar with travel in the Sandhills ranch country would expect travel on such a trail road to be very slight as compared to travel in more populated areas of the state.

PUBLIC EASEMENT BY PRESCRIPTION

[3] It has long been recognized in this jurisdiction that a highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. See, *Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984); *Lancaster County, ex rel. Rosewell, v. Graham*, 120 Neb. 785, 235 N.W. 338 (1931). "In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period." *Sellentin*, 216 Neb. at 286, 343 N.W.2d at 897. Furthermore, "there must be a use by the general public under a claim of right adverse to the owner of the land of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more." *Id.* at 287, 343 N.W.2d at 897.

[4] " 'To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. . . .' " *Svoboda v. Johnson*, 204 Neb. 57, 62, 281 N.W.2d 892, 897 (1979). The six elements which must be established are delineated in the following discussion:

[5] First, continuous and uninterrupted use may be established by use of the easement "whenever there was any necessity to do so and with such frequency that the owner of the

servient estate would have been apprised of the right being claimed." *Id.* at 63, 281 N.W.2d at 897. In this case, Leu's evidence establishes that she used the trail road when it was necessary to go from south of Clark's property to Leu's land north of Clark's property. Leu and other witnesses established that the public traversed the trail road when there was reason to use it. Above all, there is no dispute that a clear trail road exists. The evidence established this element.

[6] Second, the use must be "open and notorious so that the owner will learn of the use, assuming that he keeps himself informed about the condition of his property." (Emphasis omitted.) *Svoboda*, 204 Neb. at 63, 281 N.W.2d at 898. The well-established trail road would notify the owner that somebody was traveling not only across her land, but from her land in both directions. Significant parts of the trail road on Clark's land could have no purpose other than to get across her land to Leu's land. Apparently, Clark did not keep herself informed of the current use, but she did admit she knew and approved of the auto gates. The evidence established this element. Third, the use must be exclusive. As used in this connection, the word "exclusive" could be misunderstood. It does not mean that no one but the claimant uses the road. It simply means the claimant's right to use the property does not depend upon a similar right in others. *Svoboda, supra.* The fourth element is that the claimant's use of the prescriptive easement is under claim of right, and the fifth element is that the claimant's right must be adverse.

[7] The following holding from *Svoboda*, however, is quite applicable to the situation here, where the use of the trail road predated the memories of the litigants who were in their eighties:

> [I]f a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence.

(Emphasis omitted.) *Svoboda*, 204 Neb. at 66, 281 N.W.2d at 899.

[8] Sixth, the assertion of a prescriptive easement may be defended against on the basis that the use was made by permission. To get to this sixth element, it is required that a claimant show open, visible, continuous, and unmolested use of the land for the necessary period, and the use will be presumed to be under a claim of right. Once so established, this presumption may be rebutted by the owner of the servient estate only by proving by a preponderance of the evidence that the use was by license, agreement, or permission. *Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981).

Clark attempted to dispute Leu's evidence that use of the trail road was made by the public. However, the existence of so visible a trail road for so long a period makes Clark's challenge difficult to accept. The reality of the matter is that the trail road exists because it is used. In other words, the vehicle tracks in the sand which form the trail road are there because it is used. Use is the trail road's only maintenance.

The evidence in this case clearly shows there was open, visible, continuous, and unmolested use of the trail road for a period far exceeding 10 years. The burden to prove that the trail road's use was by permission clearly shifted to Clark. This is the element that encompasses the principal issue in this case. We must consider whether Clark introduced sufficient evidence to prove by a preponderance of the evidence that the use by the public was permissive.

Clark claimed to have not known about the use of the trail road. Obviously, this position made it difficult for the defendants to introduce direct evidence that the use was permissive. The defendants attempt to justify their position indirectly by two means: (1) by the fact that Clark and Leu, and their fathers before them, were blood relatives, and therefore the use was permissive, and (2) by the fact that Leu was a sublessee of Clark's land for a number of years, although this was unknown to Clark, and therefore Leu's use was as a tenant and not as an adverse claimant.

> [9] "As between parties sustaining parental and filial relations, the possession of the land of the one by the other

> is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land."

Chase v. Lavelle, 105 Neb. 796, 807, 181 N.W. 936, 940 (1921). This principle has been applied to relationships as distant as grandson and stepgrandmother, or between cousins. See *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983). This principle can be more correctly applied to an easement or adverse claim by one relative over land of another relative. If Leu claimed that only she had a private right to cross Clark's land on the trail road, the fact that Leu and Clark were relatives would perhaps point toward permissive use. However, the claim here is for public use.

The evidence shows that the trail road continues for several miles and connects on the north and south with maintained roads. The trail road was physically established by use when some of the land was owned by relatives and some was owned by others. We find there is no basis to hold the use was permissive on the theory that most of the land was owned by related people. Furthermore, to the extent that the evidence on adversity was conflicting, the trial court saw the witnesses testify. The trial court found the trail road was used by the plaintiff and her predecessors in interest for more than 70 years.

The fact that Leu was a sublessee of Clark's land for a number of years without Clark's knowledge has no bearing on the issue of whether Leu and others used the trail road with Clark's permission. Clark either knew or should have known that someone was making substantial use of the trail road, as it continues to exist and is plainly visible for all to see. Since Clark did not know that Leu was subleasing the real estate, Clark could hardly have maintained she was giving permission to Leu to use the trail road based upon a legal relationship of which she was not aware. Leu's sublease of Clark's land really has a bearing on the exclusiveness issue. However, in view of the evidence establishing substantial use before the existence of the sublease arrangement, it does not appear that Leu thought she was traveling on the trail road under her rights as a sublessee,

but traced her right of travel back long before she was a sublessee.

We therefore conclude that the defendants did not establish that the use by Leu and the public was permissive, and that Leu did establish a public prescriptive easement across Clark's land on the course described in the decree. The nature and extent of that easement will be discussed below. As the defendants correctly argue, Leu did not claim a private prescriptive easement in her second amended petition, and in the cross-appeal the defendants deny there is such an easement. We need not discuss the private prescriptive easement further, except to note that that part of the court's decree should be reversed, as we conclude that the easement is public.

EXTENT OF THE EASEMENT

[10] The nature and extent or scope of an easement must be clearly established. *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986).

> "The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. * * * If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel."

Smith v. Bixby, 196 Neb. 235, 239-40, 242 N.W.2d 115, 118-19 (1976).

The court granted Leu a private prescriptive easement over the established trail road and held that the right of way over the easement shall be 10 feet wide on either side of the centerline of the trail road. As to where erosion has occurred, the court granted Leu the prescriptive right to bypass the eroded areas within a reasonable distance to protect the land and to permit passage in accordance with the easement that it had granted.

We direct the court to modify the easement to allow for public use of the trail road. Accordingly, the public's right to use

the trail road is not limited to the actual beaten path, but extends to such width as is reasonably necessary for public travel, including a reasonable width to drive livestock. We likewise grant the public the prescriptive right to bypass the eroded areas within a reasonable distance. Generally, the cases involving prescriptive easements in the public do not prescribe specific rules for easement use. After all, by this action Leu has necessarily admitted that the trail road, which we find to be a prescriptive easement, continues in both directions across her own land and that it is public.

QUIET TITLE

The court quieted title in Clark to 120 acres of land in dispute, more specifically described in the cross-petition of Clark and the Littells. The 120 acres in question lies between a parcel of land owned by Leu and a parcel of land that was owned by Clark. Clark contended that she had owned the described property from the time of her deed and that she continued to own it at the time of trial.

In her answer to Clark's counterclaim, Leu admitted that Clark owned the south half and northwest quarter of the southwest quarter of Section 6, Township 8 North, Range 31 West of the 6th P.M., in Hayes County, Nebraska, having acquired title to such property by deed. Leu further admitted that from 1954 until 1986, Clark and her predecessor in title leased the above-described 120 acres to Goedeker. Leu subleased this land from Goedeker and, later, from the Littells.

[11] On appeal, Leu contends that Leu acquired title to the 120 acres by adverse possession. Leu maintains that Leu could only be divested of title by Leu's conveyance of the land in writing or by subsequent disseisin for the statutory period and that Leu could not lose title by Leu's acknowledgment of a recognition of title in Clark. The Nebraska Supreme Court has frequently stated that an issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991); *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990); *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 434 N.W.2d 703 (1989). Thus, we refuse to consider Leu's claim that

she acquired title to the 120 acres in question by adverse possession, except to observe that with the existence of the lease and sublease, we have difficulty in understanding the basis for the claim. The trial court's judgment quieting title to the 120 acres in question is affirmed.

CONCLUSION

We affirm that part of the trial court's judgment quieting title in Clark to the 120 acres in dispute. We reverse only that part of the trial court's judgment granting Leu a private prescriptive easement in the trail road across Clark's land, and we remand the cause with directions for the trial court to award a public prescriptive easement along the trail road in accordance with this opinion.

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

NORTHERN STATES BEEF, APPELLANT, V. ARTHUR L. STENNIS, APPELLEE.

509 N.W.2d 656

Filed December 14, 1993. No. A-92-290.

1. **Administrative Law: Appeal and Error.** An aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals. In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992).
2. **Statutes: Legislature: Intent: Appeal and Error.** When an appellate court is asked to interpret a statute, it must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **Administrative Law: Pleadings: Time: Appeal and Error.** In order to perfect an appeal under the Administrative Procedure Act, the party instituting the proceedings for review must file a petition in the district court for the county where the action is taken within 30 days after the service of the final decision by the agency, and cause summons to be served within 30 days of the filing of the petition.

4. **Courts: Jurisdiction: Appeal and Error.** To acquire jurisdiction over the subject matter of an action, the requirements of the statute granting the right of appeal are mandatory and must be fully complied with in order for the district court to have jurisdiction, and the district court may not enter any order other than an order of dismissal.
5. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, an appellate court acquires no jurisdiction.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Patrick J. Barrett, of McGrath, North, Mullin & Kratz, P.C., for appellant.

Roger K. Johnson, of Casey, Elworth & Johnson, for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

WRIGHT, Judge.

Northern States Beef appeals the order of the district court dismissing its petition for review of an order of the Nebraska Equal Opportunity Commission and awarding attorney fees to Arthur L. Stennis.

SCOPE OF REVIEW

[1] An aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals. In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993).

FACTS

Arthur L. Stennis filed a complaint with the Nebraska Equal Opportunity Commission (NEOC) against Northern States Beef, asserting that the termination of his employment was discriminatory and was based on his disability. The hearing officer found that Stennis' employment discrimination claim

filed pursuant to Neb. Rev. Stat. § 48-1104 (Reissue 1988) alleged that Stennis received disparate treatment because of his seizure disorder, or epilepsy. The hearing officer found that Stennis had made a prima facie showing of discrimination, but that Northern States had articulated a good faith, nondiscriminatory reason for terminating Stennis, and that Stennis did not satisfy his burden of showing that Northern States' reason for termination was a mere pretext for discrimination. The hearing officer recommended the dismissal of Stennis' complaint.

The NEOC amended the recommended order in part and issued a final order on October 18, 1991. The NEOC found that Stennis had satisfied his burden of showing that the reason articulated by Northern States was a mere pretext for discrimination. It ordered Stennis' immediate reinstatement with an award of backpay for the period of September 13, 1989, to October 21, 1991; coverage for medical costs; and an attorney fee of $8,310 and expenses of $238.

On November 15, 1991, Northern States filed a petition for review of the NEOC's order. On December 17, it filed a praecipe requesting that a summons and a copy of the petition for review be served upon Stennis. That same date, Stennis filed a motion to dismiss, contending that the court did not have jurisdiction because the appeal was not properly perfected, since no summons was served within 30 days of filing the petition. The district court sustained Stennis' motion to dismiss, concluding that service of summons was a jurisdictional requirement. The court awarded an attorney fee of $500 to Stennis.

ASSIGNMENTS OF ERROR

Northern States contends that the district court erred in holding that the issuance of summons within 30 days of the filing of a petition for review under the Nebraska Fair Employment Practices Act and the Administrative Procedure Act is jurisdictional. Northern States asserts that the district court erred in dismissing the petition because Northern States had substantially complied with Neb. Rev. Stat. § 48-1120 (Reissue 1988), and Northern States contends that Stennis waived any jurisdictional objections by failing to make a special

appearance to object to jurisdiction and by filing a motion to dismiss.

ANALYSIS

The issue on appeal is whether serving a summons within 30 days of the filing of the appeal is required in order for the district court to acquire subject matter jurisdiction for review under the Nebraska Fair Employment Practices Act and the Administrative Procedure Act. Section 48-1120(1) provides that an appeal from a decision by the NEOC must be in accordance with the Administrative Procedure Act. The applicable section of the Administrative Procedure Act provides:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

Neb. Rev. Stat. § 84-917(2)(a) (Cum. Supp. 1992).

Northern States' petition for further review was filed November 15, 1991, but its praecipe for summons was not filed until December 17, which time period was more than 30 days. We do not decide whether the filing of a praecipe is the equivalent of service of summons, since neither event occurred within 30 days.

The district court, in dismissing the appeal, relied upon *Norris P.P. Dist. v. State ex rel. Jones*, 183 Neb. 489, 161 N.W.2d 869 (1968). In *Norris P.P. Dist.*, the primary question was whether or not the district court obtained jurisdiction of the appeal under § 84-917(2) (Reissue 1966), which required, inter alia, that "[s]ummons shall be served as in other actions." The court held that the requirements for invoking the jurisdiction of the district court were "the filing of a petition, with all parties of record made parties, and the service of summons on such parties, all within 30 days from the service of

the final decision of the agency . . . ." 183 Neb. at 492, 161 N.W.2d at 871.

The plaintiffs contended that jurisdiction was complete with the filing of the petition only. The court concluded that it was the intention of the legislative act to require within 30 days the filing of a petition, and the issuance of summons subsequently served to confer jurisdiction on the district court. At the time *Norris P.P. Dist.* was decided, Neb. Rev. Stat. § 25-217 (Reissue 1964) provided that an action was deemed commenced as to the defendant on the date on which summons was served on the defendant. Northern States argues that *Norris P.P. Dist.* does not control because § 25-217 (Reissue 1964) differed from § 25-217 (Reissue 1989), which now provides that an action is commenced on the date the petition is filed with the court, and an action shall stand dismissed without prejudice as to any defendant not served within 6 months from the date the petition was filed.

Leach v. Dept. of Motor Vehicles, 213 Neb. 103, 106, 327 N.W.2d 615, 617 (1982), quotes § 25-217 (Reissue 1979), which, before *Leach* was decided, had been amended to provide that " '[a]n action shall be deemed commenced, within the meaning of this chapter, as to the defendant, on the date the petition is filed with the court if proper service is obtained within six months of such filing.' " (Emphasis omitted.) Section 84-917(2) (Reissue 1981) provided that summons shall be served as in other actions. The court held that the appeal under § 84-917(2) was perfected by filing a petition within 30 days of service of the final decision of the director and by causing summons to issue and be served within 6 months of such filing.

After *Leach*, § 84-917 was again modified to now provide that the summons shall be served within 30 days of filing of the petition. Northern States argues that this language requiring the service of a summons within 30 days is not mandatory to confer jurisdiction upon the district court. See § 84-917(2)(a) (Cum. Supp. 1992). Northern States urges us to adopt the holding of *Cox v. Board of Fire & Police Commissioners*, 96 Ill. 2d 399, 451 N.E.2d 842 (1983), that the issuance of a summons within 35 days under the Administrative Review Act was mandatory but not jurisdictional.

We decline to adopt the rationale of *Cox* in determining whether service of summons is a jurisdictional requirement under the Administrative Procedure Act in Nebraska. We note that serving summons within 30 days has been inserted as a new requirement for instituting proceedings for review under the Administrative Procedure Act. See § 84-917(2)(a) (Cum. Supp. 1992).

In *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), the court determined that the failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings before it within 15 days after service of the petition, pursuant to § 84-917(4) (Reissue 1981), did not, in and of itself, require the setting aside of the agency's order. The court stated that in order to perfect an appeal to the district court from an order entered by an agency, the petition must be filed within 30 days and a summons must be issued and served within 6 months. Although the preparation and filing of the transcript under the Administrative Procedure Act were critical to the decision, the court held that those steps were not jurisdictional.

[2] We must therefore determine the intent and purpose of the Legislature in adding the requirement of service of a summons within 30 days under § 84-917(2)(a) (Cum. Supp. 1992) in light of the amendment to § 25-217 (Reissue 1989), which provides that an action shall stand dismissed as to any defendant not served with summons within 6 months from the date the petition is filed. When an appellate court is asked to interpret a statute, it 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. *Conkel v. Higgins*, 1 Neb. App. 676, 511 N.W.2d 147 (1993). We find that the plain meaning of the statute requires that summons be served within 30 days of the filing of the petition in order to perfect an appeal under the Administrative Procedure Act. We conclude that the Legislature intended that service be effected in 30 days and not 6 months as provided in § 25-217.

[3] If the service of a summons within 30 days is not jurisdictional, then 30-day service of summons has no reason

for being included in § 84-917(2)(a). We therefore hold that in order to perfect an appeal under the Administrative Procedure Act, the party instituting the proceedings for review must file a petition in the district court for the county where the action is taken within 30 days after the service of the final decision by the agency, and cause summons to be served within 30 days of the filing of the petition. In this case, we do not decide whether the filing of a praecipe for summons within the above 30 days would comply with the statute, since Northern States did not file a praecipe or have summons served within the 30-day period.

Northern States argues that summons was timely issued because the petition was filed by mail and a file-stamped copy was returned to Stennis' counsel on or about November 18, 1991, which was within 30 days of the filing of the praecipe on December 17. Northern States relies upon Neb. Rev. Stat. § 25-534 (Reissue 1989). Our review of this statute shows that it does not apply to a summons. Section 25-534 specifically exempts a summons from the 3-day extension period.

[4] Finally, Northern States claims that the motion to dismiss filed by Stennis constituted a general appearance which conferred jurisdiction upon Stennis. The problem with this argument is that the issue before us is subject matter jurisdiction and not personal jurisdiction. In *Nebraska Dept. of Correctional Servs. v. Carroll*, 222 Neb. 307, 309, 383 N.W.2d 740, 741 (1986), the court held:

> To acquire jurisdiction over the subject matter of the action, the requirements of the statute granting right of appeal are mandatory and must be fully complied with in order for the district court to have jurisdiction, and the district court may not enter any order other than an order of dismissal.

[5] When the summons was not served, Stennis took the appropriate action in seeking a dismissal for lack of subject matter jurisdiction. The district court did not have jurisdiction over the action and properly granted the motion to dismiss. Because the district court did not have jurisdiction, this court does not have jurisdiction over the appeal. Where the court from which an appeal was taken lacked jurisdiction, an

appellate court acquires no jurisdiction. *Garber v. State*, 241 Neb. 523, 489 N.W.2d 550 (1992).

In *Nebraska Dept. of Correctional Servs. v. Carroll, supra*, the court held that under the previous statute, § 48-1120(6) (Reissue 1984), an award of attorney fees was proper for securing dismissal of the appeal. Section 48-1120(2) (Reissue 1988), which is similar to § 48-1120(6), provides: "In any action or proceeding under the Nebraska Fair Employment Practice Act wherein an appeal is lodged in the district court, the court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of the costs." We find that in accordance with *Carroll*, the district court's award of $500 for attorney fees was reasonable and proper.

We decline to award attorney fees because § 48-1120(2) does not provide for attorney fees in this court.

The decision of the district court is affirmed.

AFFIRMED.

KEITH BARTHEL AND DOROTHY BARTHEL, HUSBAND AND WIFE, APPELLANTS, V. GENE LIERMANN AND ERNA LIERMANN, HUSBAND AND WIFE, APPELLEES.

509 N.W.2d 660

Filed December 14, 1993. No. A-92-293.

1. **Actions: Injunction: Equity.** An action for an injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, the appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Injunction: Proof.** A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief.
4. **Statutes: Legislature: Intent.** When asked to interpret 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. It is the court's duty to discover, if possible, legislative intent from the statute itself.

5. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
6. **Waters: Words and Phrases.** A watercourse is defined as any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water or a river or brook.
7. **Injunction: Equity.** Mandatory injunctions are equitable remedies which require the defendant to perform some affirmative act to maintain, or return the parties to, the status quo.
8. **Courts: Equity: Pleadings.** It is appropriate for a trial court in an equity action to consider all factual issues at one time, bearing in mind that it speaks as a court of law regarding issues of fact arising from the pleadings in law, and as a court of equity regarding issues of fact arising from pleadings in equity.
9. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.

Appeal from the District Court for Holt County: RONALD D. OLBERDING, Judge. Reversed and remanded.

Richard E. Gee for appellants.

David A. Domina and Cletus W. Blakeman, of Domina & Copple, P.C., for appellees.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

I. INTRODUCTION

Keith and Dorothy Barthel are appealing the order of the Holt County District Court which denied their request for a mandatory injunction. The Barthels sought a court order requiring Gene and Erna Liermann to annually clean out a ditch that extends from the Barthels' land onto the Liermanns' land. The Barthels claim that Neb. Rev. Stat. § 31-224 (Reissue 1988) requires the Liermanns to clean out the ditch. The Barthels also sought recovery of damages for the loss of crops caused by flooding which occurred when the Liermanns negligently failed to maintain the ditch. The Liermanns counterclaimed, asserting that the Barthels had damaged the Liermanns' land by dredging the ditch too deep in 1983. The Liermanns also requested from the court a mandatory injunction ordering the Barthels to refill the ditch. The requests

for mandatory injunction were denied, and the trial court failed to award damages to either party. The Barthels subsequently perfected this appeal, asserting that the trial court erred in failing to find that the Liermanns had obstructed the ditch, in failing to issue an injunction, in failing to award the Barthels damages, and in misstating the proper measure of damages. For the reasons recited below, we reverse the judgment and remand the cause for a mandatory injunction to issue and for the trial court to determine if the Barthels are entitled to damages for crop loss.

II. SCOPE OF REVIEW

[1,2] An action for an injunction sounds in equity. *City of Newman Grove v. Primrose*, 240 Neb. 70, 480 N.W.2d 408 (1992); *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991); *Stuthman v. Adelaide D. Hull Trust*, 233 Neb. 586, 447 N.W.2d 23 (1989). In an appeal of an equity action, the appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the 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. *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992); *Dowd v. Board of Equal.*, 240 Neb. 437, 482 N.W.2d 583 (1992); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *Hartford v. Womens Services, P.C.*, 239 Neb. 540, 477 N.W.2d 161 (1991); *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991).

III. FACTS

Keith and Dorothy Barthel, plaintiffs-appellants, own a 400-acre hay meadow in Holt County, Nebraska. The hay meadow, referred to by the parties as the "Grass Lake" or the "Grass Lakebed," lies within Sections 29, 32, and 33, Township 26 North, Range 15 West of the 6th P.M. The southeast section of the hay meadow is adjacent to property owned by Gene and Erna Liermann, defendants-appellees. The hay meadow, resting in the Sandhills of Nebraska, may be described as a

fairly flat basin where surface water drains from the surrounding hillsides. The south fork of the Elkhorn River runs across the hay meadow and exits at the southeast edge of the Barthels' property, where it enters the Liermanns' property. The parties testified that years ago a portion of the south fork, which crosses the boundary between the two properties, was straightened. This straightened portion is referred to as a "ditch," "drainageway," "streamway," or "natural drainageway," and it extends approximately 6,100 feet onto the Liermanns' property. The parties and the Liermanns' expert witness, Dr. Sanford Kaplan, assert that the ditch is indistinguishable from the south fork of the Elkhorn River. This testimony is supported by a 1932 Holt County soil survey map. A 1981 geological survey map by the U.S. Department of the Interior shows the course of the south fork of the Elkhorn River traversing the hay meadow and exiting what would now be considered the southeast corner of the Barthels' property. The river continues to meander in an easterly direction and eventually joins the Elkhorn River just southeast of Ewing, Nebraska.

The dispute between the parties surrounds that portion of the south fork of the Elkhorn River which the parties call, inter alia, the ditch. The Barthels assert that the ditch is obstructed and that this has caused the water which used to drain out of the hay meadow to back up and create a lake. Testimony by the parties and witnesses, which is supported by a review of the contour lines on both the soil survey and geological survey maps, reveals that the hay meadow has a very gradual slope toward the southeast corner of the Barthels' property. A survey was performed by Al Dearmont. He testified that the fall of the land entering the ditch area was .0328 feet per 100 feet. The survey of the ditch shows that the distance between the bottom of the ditch and the surrounding land varies between 3 and 7 feet.

Keith Barthel testified that in the late 1960's the hay meadow was graded to connect all the low spots so the surface water would drain into the ditch more efficiently. Since that time until 1987, the hay meadow has produced reed canary grass for the Barthels' stock and dairy cattle. This testimony was supported

by Bob Lowe, a ranch consultant, who viewed the hay meadow in 1974 and testified that it was "one of the best stands [of reed canary grass] that I had ever seen . . . ." Keith Barthel testified that traditionally in the spring the ditch would be frozen for a time and that 100 to 150 acres would flood until the ditch thawed. He also testified that the reed canary grass could survive this 3- to 4-week flood condition and, by June, could provide sufficient palatable food to feed all his cattle.

In the 1950's, even before the grading of the hay meadow, the ditch was dredged with a dragline because the flow of the water had slowed to a point where the water upstream on the Barthels' land was covering the grass too long for it to survive. In 1977, the ditch had to be cleared again. The cost of dredging the ditch was paid by the Barthels and an adjacent landowner, Blaine Garwood.

In the spring of 1983, the ditch was again partially obstructed, and Keith Barthel asked Garwood to contact Gene Liermann and seek permission to dredge the ditch. The Liermanns agreed to allow the dragline on their property, and the cost was again split between Garwood and the Barthels. The dragline operator testified that he believed he had dredged the ditch only as deep as it had been before the flow stopped and that when he was finished, the ditch flowed the full length. During the summer of 1983, the Barthels were able to harvest over 150 stacks of hay from the meadow. The Barthels continued to feed their cattle without having to pasture them on rental pasture or buy hay until 1987, when the ditch became obstructed and water covered nearly the whole meadow for the entire year. Keith Barthel testified that in 1988 Gene Liermann refused to dredge the ditch again. In 1988, the Barthels harvested 23 stacks of hay from the meadow. In 1989, 81 stacks were harvested; in 1990, 68 stacks were harvested; and in 1991, 30 stacks were harvested. To compensate for the loss of hay during these years, the Barthels had to purchase hay and pasture their cattle on rental pasture.

Gene Liermann testified at trial that he had acquired his property in the early 1970's. He claimed to maintain the ditch, monitoring where his cattle crossed and monitoring the weeds in the ditch so that nothing would block the waterflow. He

further testified that when he needed to have a roadway cross the ditch, he installed a culvert on his property to maintain the ditch's passage. Gene Liermann claimed that during each spring for the last several years, he or his son removed 3 to 6 inches of dirt from the ditch near the cattle crossings because the ditch needed to be cleared. It was his belief that the dredging of the ditch in 1983 made the ditch deeper than it originally had been and caused his crops adjacent to the ditch to suffer. Gene Liermann presented no facts to support these claims.

Charles Liermann, Gene's son, testified that the vegetation which had been removed from the ditch in the 1983 dredging returned by the next spring. Gene Liermann felt that the ditch had filled in since 1983, but "[n]ot any more than normal." He also asserted that he would not clean out the ditch because it was "a lot of expense and I don't think that it is the logical thing to do."

Following the trial, the court found that (1) the ditch was part of the south fork of the Elkhorn River system; (2) the ditch had been dredged in 1950, 1976 or 1977, and 1983 by the Barthels and third parties; (3) the drainage out of Grass Lake was good for several years, but that it would get progressively slower; and (4) the evidence showed that the drainage from Grass Lake was poor because of the following:

> A. The flat topography of the draingage [sic] area.
>
> B. The sandy soil type tends to cave in and refill the dredged ditch. . . .
>
> C. Animal traffic across the drainage way. While some sand is dragged into the drainage way by cattle, the evidence does not show it is the primary cause of the poor drainage. . . .

The court then concluded that since the Barthels did not prove by a preponderance of the evidence that the Liermanns *caused the obstruction of the ditch*, the Barthels were not entitled to an injunction and could not recover damages. The court also found that the Liermanns failed to show that the Barthels had lowered the water table on the Liermanns' land or caused any damage by dredging the ditch in 1983. The Barthels subsequently perfected this appeal.

IV. ANALYSIS

We will discuss the assigned errors in the sequence stated in part I. First, we will discuss the trial court's determination that the Barthels did not prove the Liermanns had obstructed the ditch and that, therefore, the Barthels were not entitled to injunctive relief. Second, we will discuss the trial court's determination that the Barthels were not entitled to damages.

1. INJUNCTION

[3] A party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle the claimant to relief. *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991); *Uhing v. City of Oakland*, 236 Neb. 58, 459 N.W.2d 187 (1990); *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989). Injunction would be the appropriate remedy, since injunctive relief includes a court order "commanding someone to undo some wrong or injury." See Black's Law Dictionary 784 (6th ed. 1990).

The Barthels claim that the ditch is a watercourse and that pursuant to § 31-224, the Liermanns have a duty to clean the ditch once a year. The ultimate determination of this case depends upon a correct interpretation of § 31-224.

[4,5] When asked to interpret 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. It is the court's duty to discover, if possible, legislative intent from the statute itself. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992). Section 31-224, which is essentially unchanged since its introduction by Senator J.H. Buhrman in 1911, provides:

> It shall be the duty of landowners in this state . . . owning or occupying lands through which a watercourse, slough, drainage ditch or drainage course lies, runs or has its course to clean such watercourse, slough, drainage ditch or drainage course at least once a year, between March 1 and April 15, of *all* rubbish, weeds or other substance blocking or otherwise obstructing the flow of the water in such watercourse, slough, drainage ditch or drainage course, whenever such obstruction is caused by any of the acts of said owner . . . *or with his [or her] knowledge or consent* . . . .

(Emphasis supplied.)

[6] A watercourse is defined as "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook . . . ." Neb. Rev. Stat. § 31-202 (Reissue 1988).

In order for the Barthels to succeed, they must first show that the ditch is a watercourse, slough, drainage ditch, or drainage course. The evidence presented in the record, specifically the geological survey map, describes the current depth of the ditch as varying between 3 and 7 feet below the surrounding land. Furthermore, it is undisputed by the parties that the ditch is essentially a straightened portion of the south fork of the Elkhorn River and that the water from the ditch continues into the south fork of the Elkhorn River, which meanders across the state until it joins the Elkhorn River southeast of Ewing. Pursuant to the § 31-202, the ditch satisfies the requirements to be considered a watercourse, and we need not consider whether it is also a slough, drainage ditch, or drainage course. See, also, *Gruber v. County of Dawson*, 232 Neb. 1, 439 N.W.2d 446 (1989).

Second, to obtain injunctive relief, the Barthels must show that this watercourse "lies, runs or has its course" through the Liermanns' property. See § 31-224. This fact is undisputed by the parties.

Third, the Barthels must show that "rubbish, weeds or other substance[s]" are "blocking or otherwise obstructing the flow of the water" in the ditch. See *id.*

The trial court found that the flat topography of the hay

meadow and the sandy soil on the edge of the ditch were as responsible for the poor drainage of water from the meadow as the cattle that tramp the soil into the ditch. Although we can take into account that the trial court observed the witnesses, we must still review the matter "de novo without reference to findings of fact made by the trial court." *Belsky v. County of Dodge*, 220 Neb. 76, 80, 369 N.W.2d 46, 51 (1985).

The record shows that the ditch has been dredged by a dragline three times: first in the 1950's, next in the 1970's, and last in 1983. After each dredging, the water in the Barthels' hay meadow has drained. The parties agree that since the last dredging, the Liermanns' cattle have walked across the ditch at several points. These cattle crossings correspond to the most shallow points on the survey of the ditch. Photographs of these crossings in the record reflect how sand and other substances have been pulled into the ditch. Additional photographs show portions of the ditch which are completely filled with weeds or show algae growing on the surface of the water. The dragline operator testified that weeds like those in the photographs and dirt were removed during the 1983 dredging. After this dredging, the Barthels had gradually increasing problems with water backing up on their land for several years. Keith Barthel testified that in 1987 the water in the ditch was partially, if not totally, obstructed, as reflected by a photograph showing a small lake of water covering the hay meadow and engulfing a fence line. This lake remained on the hay meadow for the entire year. During subsequent years, the water in the hay meadow continued to fail to drain through the ditch, and the number of hay stacks recovered from the meadow continued to decline. During the summer after the last dredging, which was in 1983, the Barthels recovered over 150 stacks of hay from the meadow. In 1991, the Barthels recovered only 30 stacks. It is apparent that when the ditch is dredged, the Barthels do not have a lake on their hay meadow. We find this evidence sufficient to support a finding that the flow of water in the ditch is obstructed; the hay meadow does not merely drain slowly.

Since the evidence supports a finding that the ditch is obstructed, the Barthels must now show that it was the acts of the Liermanns which caused the obstruction of the ditch *or that*

the obstruction occurred with their knowledge or consent. See § 31-224.

As noted in part III above, the record indicates that the Liermanns admit that they maintained the ditch, monitored where their cattle crossed the ditch, and monitored the weeds in the ditch. Gene Liermann also claimed that in the last couple of years before trial he or his son removed 3 to 6 inches of dirt from the ditch near the cattle crossings. Gene Liermann also admitted that the ditch had filled in since the dredging in 1983, although "[n]ot any more than normal." Although the record does not support a finding that the Liermanns affirmatively caused an obstruction of the ditch, see *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991) (holding that the defendants' leveling of their field caused an obstruction of a natural drainageway), the record does support a finding that the Liermanns were aware of the cattle walking in the ditch and of the weeds growing in the ditch and admitted that the ditch was filling in with various substances. Section 31-224 provides that it is the duty of a landowner to clean from this type of ditch once a year *all* weeds or other substances obstructing the flow of the water, provided the landowner knows of the obstruction. The Liermanns know about the cattle and the weeds and know that the ditch is filling in; therefore, they have a duty to clean the ditch of all substances causing the obstruction. The trial court was correct in finding that the Liermanns did not *cause* the obstruction, but the trial court apparently failed to consider whether the obstruction occurred "with [the Liermanns'] knowledge or consent." See § 31-224. It is clear from the record that the Liermanns knew of the obstruction; yet, they failed to remove the obstruction as contemplated by § 31-224. The trial court's refusal to grant the injunction was error.

[7] Mandatory injunctions are equitable remedies which require the defendant to perform some affirmative act to maintain, or return the parties to, the status quo. See *City of Beatrice v. Williams*, 172 Neb. 889, 112 N.W.2d 16 (1961) (holding that a mandatory injunction should issue requiring the defendants to remove the part of the building which extended beyond the 20-foot setback provided for by city ordinance). Mandatory injunction is an extreme or harsh remedy and must

be exercised sparingly and cautiously. See 42 Am. Jur. 2d *Injunctions* § 26 (1969).

In the case at bar, the cause must be remanded to the district court for a mandatory injunction to issue requiring the Liermanns to clean out the ditch. The mandatory injunction need not be perpetual because the interpretation of § 31-224 by this court notifies the Liermanns that they are required, by law, to clean the ditch of *all* weeds or other substances obstructing the flow of the water, provided they *know* about the substances.

2. Liability and Damages

The Barthels assert on appeal that the trial court "did not state the proper measure of damages." Brief for appellants at 5. The Barthels urge this court on appeal to "aid the parties by discussing the measure of damages." *Id.* at 31.

[8] This court recognizes that it is appropriate for a trial court in an equity action to consider all factual issues at one time, "bearing in mind that it speaks as a court of law regarding issues of fact arising from the pleadings in law, and as a court of equity regarding issues of fact arising from" pleadings in equity. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 466, 428 N.W.2d 141, 149 (1988).

From a review of the record, we are uncertain that the trial court ruled on the issue of liability or on the measure of damages. Unlike the injunctive relief discussed in part IV, subsection 1, the issues of liability and damages discussed in the instant subsection are issues of law, not equity. We can find no authority which would allow this court to determine a question of law that has not first been determined or ruled upon by a trial court.

[9] The Nebraska Supreme Court has long held that in appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court. *Lickert v. City of Omaha*, 144 Neb. 75, 12 N.W.2d 644 (1944). See, also, *Gas 'N Shop v. State*, 234 Neb. 309, 451 N.W.2d 81 (1990) (holding that the Supreme Court does not render advisory opinions, but simply decides cases and controversies). An issue not presented to *or passed on* by the

trial court is not appropriate for consideration on appeal. *Underwriters Acceptance Corporation v. Dunkin*, 152 Neb. 550, 41 N.W.2d 855 (1950). In *Underwriters Acceptance Corporation*, the defendant claimed on appeal that the trial court had erred in failing to enjoin the plaintiff from instituting a replevin action while an equity action, instituted by the defendant, was pending in the district court. The defendant included the transcript of each action in the record when he appealed the judgment in the replevin case. The cases were not consolidated. The Nebraska Supreme Court held that the replevin action did not contain a ruling from the trial court regarding the above-mentioned issue, and therefore, the court would not consider the issue on appeal. The court further stated that although the record contained orders from the equity action, the mere inclusion of the orders in the record for the replevin action was insufficient to make them orders in the replevin action. The court then reiterated the rule that "[e]rror cannot be predicated upon rulings which have never actually been made in the case appealed." *Id.* at 552, 41 N.W.2d at 857.

The factual scenarios in most of the remaining cases which hold that an issue will not be reviewed unless it was presented to or passed on by the trial court, involve an issue which was not presented to the trial court for decision. See, *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991); *Hensman v. Parsons*, 235 Neb. 872, 458 N.W.2d 199 (1990); *Beaver Lake Assn. v. Sorensen*, 231 Neb. 75, 434 N.W.2d 703 (1989); *Guynan v. Guynan*, 208 Neb. 775, 305 N.W.2d 882 (1981). This does not defeat the fact that an appellate court reviews only the determination or ruling of a trial court, not the reasoning behind the ruling. See *Wymore v. Wymore*, 239 Neb. 940, 479 N.W.2d 778 (1992) (holding that where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, an appellate court will affirm the ruling). See, also, *State v. $15,518*, 239 Neb. 100, 474 N.W.2d 659 (1991); *Staman v. Yeager & Yeager*, 238 Neb. 133, 469 N.W.2d 532 (1991); *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

Another case somewhat analogous to the present case is *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256

(1987). In that litigation, there was a stipulation at the trial level that no evidence concerning damages would be presented until after the issue of liability had been resolved. Nevertheless, the trial court determined that Johnson was not entitled to damages. On appeal, the Nebraska Supreme Court held that the trial court had resolved an issue not yet before it. The Supreme Court went on to state:

> If the district court meant by its decision to rule that it did not award damages because it found NM Farms had no liability to Johnson, we cannot discern that intention from the mere fact that the court denied Johnson's prayer for a permanent injunction. Since the purpose of an injunction is preventive, protective, and prohibitory, and it will not issue against discontinued acts unless there are probable grounds to believe there will be a resumption of the violations or activities, *Stuthman v. Lippert*, 205 Neb. 302, 287 N.W.2d 80 (1980), such a ruling could just as well flow from a conclusion that it was unlikely NM Farms would in the future discharge its diffused surface waters onto Wheeler III's land.

Johnson, 226 Neb. at 687-88, 414 N.W.2d at 263.

In the case at bar, the order of the trial court provides: "7. Because the Plaintiffs have not shown that the Defendants have obstructed the drainageway, they are not entitled to a mandatory injunction and cannot recover damages from Defendants."

It is not apparent from this language that the trial court denied the injunction and damages because it found that the Liermanns were not liable in the negligence action or, alternatively, that the Liermanns were liable but insufficient proof of damages was presented. The statement could just as well flow from a mistaken conclusion that only a violation of § 31-224 results in liability, thus providing a basis for damages. During the trial, the court expressed a view from the bench as to the measure of damages it thought would be appropriate. The trial court did not issue a ruling on the measure of damages. At most, the trial court expressed what might have been the reasoning behind a ruling if the Barthels would have succeeded

in the action. Since there is no ruling for this court to review, the assigned error will not be addressed.

V. CONCLUSION

In light of the fact that we reverse the trial court's denial of the injunction, the cause must be remanded for a mandatory injunction to issue commanding the Liermanns to comply with § 31-224. Also, the trial court is to hold a hearing to determine if the Liermanns are liable to the Barthels for damages sustained to the hay crops and, if so, the appropriate measure of damages.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN RODGERS, APPELLANT.

509 N.W.2d 668

Filed December 14, 1993. No. A-93-057.

1. **Police Officers and Sheriffs: Arrests: Jurisdiction: Statutes.** Absent statutory or common-law authority, city police officers may not make warrantless misdemeanor arrests outside their jurisdiction.
2. **Police Officers and Sheriffs: Statutes.** A sheriff may orally summon to his assistance any person when he deems it necessary to effect an arrest. The person thus summoned has all the authority of a formally deputized officer in such matter, and is in fact a de jure deputy sheriff.
3. _____: _____. One who is actually acting as a deputy sheriff under color of an appointment is such officer de facto, although his appointment was not made with the formalities required by statute.
4. **Drunk Driving: Blood, Breath, and Urine Tests: Time.** Evidence of delay between the time a defendant is stopped and the time he is given a breath test goes to the weight of the test results, rather than to the admissibility of such results.

Appeal from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge, on appeal thereto from the County Court for Scotts Bluff County, G. GLENN CAMERER, Judge. Judgment of District Court affirmed.

Byron M. Johnson, Scotts Bluff County Public Defender, and Jeffery A. Pickens for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

Appellant, Steven Rodgers, was convicted of driving while under the influence of alcohol in the county court for Scotts Bluff County. The district court for Scotts Bluff County affirmed Rodgers' conviction, and Rodgers has timely filed an appeal in this court. For the reasons set forth below, we affirm the conviction.

A conviction in a bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in a light most favorable to the State, is sufficient to support that conviction. *State v. Crowdell*, 241 Neb. 216, 487 N.W.2d 273 (1992). With this standard of review in mind, we turn to the record.

FACTS

The record discloses that on April 12, 1992, police chief Larry Morris of the Minatare Police Department was returning to Minatare on U.S. Highway 26 from the Gering communications center. When Chief Morris was 3 to 4 miles outside of the Minatare city limits, he observed a vehicle driven by Rodgers cross the centerline twice and then cross "over into the far right side [of the highway] past the fog line twice." Chief Morris then radioed the communications center and requested that a deputy sheriff or a State Patrol trooper follow the vehicle and stop it "for a possible intoxicated driver."

Deputy Perry Britsch of the Scotts Bluff County sheriff's office responded via radio and stated that he was on the west side of Scottsbluff, apparently a substantial distance from Chief Morris' location. Nebraska State Patrol Trooper Brian Hegarty then responded via radio, stated that he was closer to Chief Morris' location than Deputy Britsch was, and asked the deputy if he, Trooper Hegarty, should respond to Chief Morris' request. Upon Deputy Britsch's affirmative response, Trooper Hegarty began driving his cruiser toward Chief Morris' location. As Trooper Hegarty was en route, Chief Morris radioed that Rodgers' vehicle had traveled completely left of the centerline and that Chief Morris feared an accident was imminent because there was traffic approaching from the opposite direction. Trooper Hegarty then advised Chief Morris

to stop Rodgers' vehicle.

Following this instruction, Chief Morris stopped the vehicle and approached Rodgers to ask for his driver's license, registration, and proof of insurance. Chief Morris testified that he smelled a strong odor of alcohol emanating from the interior of the vehicle when Rodgers lowered the driver's-side window. Chief Morris explained why he had stopped Rodgers and requested that Rodgers accompany him to his cruiser. Chief Morris then told Rodgers that a State Patrol trooper would arrive shortly to "take care of the rest of the stop." Trooper Hegarty arrived approximately 3 minutes later, and Deputy Britsch arrived shortly thereafter.

When Trooper Hegarty arrived, he took Rodgers' driver's license, registration, and proof of insurance and began an investigation. Trooper Hegarty testified that Rodgers' "eyes were red and watery, his speech was slow and slurred, he . . . somewhat staggered when he walked, and he also had a strong odor of an alcoholic beverage emanating from his person." Trooper Hegarty then administered field sobriety tests on Rodgers. Rodgers failed the field sobriety tests, and Trooper Hegarty placed him under arrest. Trooper Hegarty then transported Rodgers to the sheriff's office in Gering, where he was given an Intoxilyzer test. The test results showed that Rodgers had .115 of a gram of alcohol per 210 liters of breath. Rodgers was then charged with operating a motor vehicle while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990).

Rodgers pled not guilty to the charge and filed a motion to suppress all evidence obtained after his arrest, on the basis that his "arrest was made by Officer Morris of the Minatare Police Department outside of the officer's jurisdiction to arrest." A hearing was held on the motion, and after taking the matter under advisement, the county court denied Rodgers' motion to suppress. Thereafter, a bench trial was held, and the county court found Rodgers guilty of operating a motor vehicle while under the influence of alcohol. The court sentenced Rodgers to 7 days in jail, suspended his driver's license for 6 months, and fined him $200.

Rodgers appealed to the district court for Scotts Bluff

County, alleging that the county court erred in failing to suppress the evidence obtained after he was arrested and that there was insufficient evidence to sustain his conviction. The district court affirmed Rodgers' conviction, and Rodgers has timely appealed to this court.

ASSIGNMENTS OF ERROR

Rodgers assigns two errors on appeal. He claims that the evidence obtained after his arrest should have been suppressed and that evidence of his breath alcohol content should not have been admitted at trial.

STANDARD OF REVIEW

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. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Thompson, supra*; *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992).

In reviewing a criminal conviction, an appellate court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jansen*, 241 Neb. 196, 486 N.W.2d 913 (1992); *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992).

DISCUSSION

Authority to Arrest.

[1] In his first assignment of error, Rodgers claims that all evidence obtained after Chief Morris stopped Rodgers outside of the Minatare city limits should have been suppressed. In support of his claim, Rodgers cites *State v. Tingle*, 239 Neb.

558, 477 N.W.2d 544 (1991). In *Tingle*, a city of Neligh police officer arrested the defendant outside of the Neligh city limits for driving while under the influence of alcohol. The Nebraska Supreme Court held that "[a]bsent statutory or common-law authority, city police officers may not make warrantless misdemeanor arrests outside their jurisdiction." *Id.* at 564, 477 N.W.2d at 549. The court found that there was no common-law or statutory authority in Nebraska that permitted such arrests. The court thereupon found that the arrest in *Tingle* was illegal and that all evidence obtained subsequent to the arrest was to be suppressed.

In the present case, Rodgers claims that Chief Morris arrested him for driving while under the influence, a misdemeanor, outside of Chief Morris' geographical jurisdiction and that such arrest was illegal under *Tingle*. Rodgers concludes that all evidence obtained after Chief Morris allegedly arrested him should therefore have been suppressed.

Rodgers correctly asserts that Chief Morris had no authority to make a misdemeanor arrest outside of the city limits of Minatare *in his capacity as a city police officer*. See *Tingle, supra*. However, under Neb. Rev. Stat. § 23-1704 (Reissue 1991), Chief Morris would have the authority to make such an arrest if he did so in response to a deputy sheriff's request for assistance. Section 23-1704 provides: "The sheriff and his deputies are conservators of the peace, and to keep the same, to prevent crime, to arrest any person liable thereto, or to execute process of law, *they may call any person to their aid*." (Emphasis supplied.)

[2,3] In *Anderson v. Bituminous Casualty Co.*, 155 Neb. 590, 52 N.W.2d 814 (1952), the Nebraska Supreme Court applied § 23-1704 to facts similar to the facts of the present case. In *Anderson*, the Nemaha County sheriff called on a Nebraska Safety Patrol trooper to assist him in capturing an escaped prisoner. The trooper thereafter called upon Anderson, a citizen, to assist in searching for the escapee. While Anderson was assisting in the search, a motor vehicle struck and killed him. Anderson's widow brought a claim against the county and the state in the Workmen's Compensation Court, claiming that Anderson was acting as an employee of the county and the state

when he was killed. Citing § 23-1704, the court found that Anderson was a de facto deputy sheriff at the time of his death and, thus, was entitled to compensation from the county's insurance carrier. In so holding, the court stated:

> "The sheriff may, without organizing a formal posse comitatus, orally summon to his assistance any person when he deems it necessary to effect an arrest. . . . The person thus summoned has all the authority of a formally deputized officer in such matter, and is in fact a de jure deputy sheriff. . . ." [Citations omitted.]
>
> Decedent was not formally deputized; that is, he was not appointed and confirmed nor did he take an oath or give bond. . . . Under situations, such as here, it is seldom practical to go through these formalities.
>
> . . . "[I]t is generally held that one who is actually acting as a deputy sheriff under color of an appointment is such officer de facto, although his appointment was not made with the formalities required by statute. . . ."

(Citations omitted.) *Anderson*, 155 Neb. at 597-98, 52 N.W.2d at 819. The court also held that in requesting Anderson's assistance, the trooper was acting at the request of the sheriff and was not acting as a patrolman of the Nebraska Safety Patrol.

We believe that the facts of the instant case present an even stronger basis for the use of § 23-1704 than was presented in *Anderson*. Deputy Britsch had jurisdiction to stop and arrest Rodgers; yet, due to the distance between Deputy Britsch and Rodgers and the need to act quickly to avert a potential tragedy, the deputy called Trooper Hegarty to his aid within the meaning of § 23-1704. Consistent with the Supreme Court's decision in *Anderson*, Trooper Hegarty at that point was a de jure deputy sheriff, with all of the authority of a formally deputized officer, including the power to call any person to his aid under § 23-1704. While Trooper Hegarty was en route, the situation became critical, as Rodgers was placing the lives of other motorists in imminent danger. At that point, Trooper Hegarty requested that Chief Morris stop Rodgers' vehicle. Trooper Hegarty's request was also a call to aid within the meaning of § 23-1704, and the request made Chief Morris a de facto deputy

sheriff with all of the authority of a formally deputized officer under § 23-1704. As such, Chief Morris, *in his capacity as a deputized officer*, had the authority to stop and arrest Rodgers.

Clearly the Legislature intended the term "keep the [peace]" within § 23-1704 to include stopping criminal activity that risks imminent loss of human life and limb. Deputy Britsch and the de facto deputies thus utilized their statutory power to summon assistance in an effort to keep the peace and to arrest criminals within the meaning of § 23-1704. The deputies did so by preventing a suspected intoxicated driver from endangering his own life as well as the lives of others traveling on the highway. Thus, we conclude that Rodgers' first assignment of error is without merit.

Admission of Rodgers' Breath Alcohol Content.

In his second assignment of error, Rodgers claims that evidence of his breath alcohol content should not have been admitted at trial. The record reveals that Rodgers was stopped at approximately 1 a.m. and that a sample of his breath was taken at 2:42 a.m., a difference of 1 hour 42 minutes. The sample contained .115 of a gram of alcohol per 210 liters of breath. Section 39-669.07(1)(c) provides that it is unlawful for a person to operate a motor vehicle when such person has a concentration of .100 of a gram of alcohol per 210 liters of his or her breath. Citing *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990), Rodgers claims that his breath sample was not taken within a reasonable time after he was stopped and that the test results were not probative of his impairment or breath alcohol level while driving.

[4] In *Kubik*, the defendant was administered an Intoxilyzer test 43 minutes after he was stopped. The test revealed that the defendant had .139 of a gram of alcohol per 210 liters of breath. The defendant claimed that the state failed to show a proper nexus between his breath alcohol level at the time it was measured and at the time of his arrest. The court in *Kubik* reviewed authority from various jurisdictions regarding the relationship between the admissibility of breath alcohol test results and delays between driving and testing. The court cited with approval cases in which breath alcohol tests were admitted

into evidence although administered up to 2 hours 45 minutes after the defendant had been stopped. See, e.g., *State v. Taylor*, 132 N.H. 314, 566 A.2d 172 (1989) (holding that a test was admissible despite a 1-hour-15-minute delay between driving and testing); *Com. v. Speights*, 353 Pa. Super. 258, 509 A.2d 1263 (1986), *appeal denied* 517 Pa. 594, 535 A.2d 83 (1987) (holding that a test was admissible despite a 2-hour-45-minute delay between driving and testing); *Com. v. Slingerland*, 358 Pa. Super. 531, 518 A.2d 266 (1986) (holding that a test was admissible despite being taken 1 hour 23 minutes after the defendant was involved in an automobile accident). The court in *Kubik* concluded that evidence of delay between the time a defendant is stopped and the time he is given a breath test is properly viewed as going to the weight of the test results, rather than to the admissibility of such results. See, *State v. Tejral*, 240 Neb. 329, 482 N.W.2d 6 (1992); *State v. Towler*, 240 Neb. 103, 481 N.W.2d 151 (1992).

Likewise, in the present case we find that the delay between driving and testing must go to the weight, rather than to the admissibility, of the test results. Although the breath test was administered 1 hour 42 minutes after Rodgers was stopped, we find that the test results are probative on the issue of whether Rodgers was driving while under the influence of alcohol. Further, even if the test results were not admitted into evidence, we find that there was sufficient additional evidence to sustain Rodgers' conviction of driving while under the influence of alcohol. See § 39-669.07(1)(a). That evidence includes Rodgers' erratic driving, red and watery eyes, slurred speech, and staggered walk, as well as the odor of alcohol emanating from his person and his failure of field sobriety tests administered by Trooper Hegarty. Accordingly, we reject Rodgers' second assignment of error.

CONCLUSION

Having found both of Rodgers' assignments of error to be without merit, we affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN E. CRONIN, APPELLANT.
509 N.W.2d 673

Filed December 14, 1993. No. A-93-155.

1. **Constitutional Law: States.** A state may interpret its own constitution to offer greater protection of individual rights than does the federal Constitution.
2. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A seizure for purposes of article I, § 7, of the Nebraska Constitution requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority.

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

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

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

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

INTRODUCTION

Appellant, John E. Cronin, was convicted of possession of a controlled substance in the district court for Douglas County. Cronin has appealed to this court, claiming the district court erred in overruling his motion to suppress physical evidence.

FACTUAL BACKGROUND

The record discloses that on June 19, 1992, Officers Randy Anderson and Joseph Baudler of the Omaha Police Division were working a foot patrol, in uniform, at the south side housing projects near 30th and T Streets in Omaha, Nebraska. At approximately 1 a.m., the officers observed appellant inside a parked, olive green Datsun station wagon. As the officers approached the vehicle, appellant drove away in the opposite direction. The officers ordered appellant to stop, and when he did not comply, the officers returned to their cruiser and broadcast a description of appellant's car over the police radio "with the intent for possibly another cruiser to stop the vehicle." The officers then drove around the area searching for appellant and, less than 5 minutes later, discovered appellant's

vehicle in a parking lot at Stratford Square Apartments near 27th and Harrison Streets. As the officers approached appellant's vehicle, appellant stood up between two other parked vehicles and began walking away from the officers. Officer Anderson then leaped from the cruiser. When appellant continued to walk in the opposite direction, Officer Anderson ran after appellant. As Officer Anderson was fast approaching appellant, the officer observed appellant drop a small plastic bag containing a white substance. Officer Anderson then forced appellant to the ground and placed him under arrest. The substance in the plastic bag later tested positive for cocaine. Swabs of appellant's hands also tested positive for the presence of cocaine. Appellant was then charged with possession of a controlled substance, a Class IV felony.

Appellant filed a motion to suppress physical evidence, alleging that the evidence, i.e., the cocaine, "was obtained in violation of the rights of the Defendant as guaranteed by the Constitutions of the United States and the State of Nebraska." The district court overruled appellant's motion to suppress and convicted appellant after a bench trial.

ASSIGNMENT OF ERROR

Appellant alleges that the district court erred in overruling his motion to suppress physical evidence, because the evidence was "the fruit of an illegal detention." Brief for appellant at 4.

STANDARD OF REVIEW

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. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993); *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993); *State v. Thomas*, 240 Neb. 545, 483 N.W.2d 527 (1992). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Thompson, supra*; *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992).

ANALYSIS

To support his claim that the physical evidence in this case was obtained during an illegal detention, appellant cites *State v. Hicks, supra*, and *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993). In *Hicks*, police officers stopped and questioned the defendant after he had run upon being warned of the officers' presence. The officers asked the defendant why he had run, to which he responded that he had an outstanding warrant. The officers then placed the defendant under arrest. Upon searching the defendant and looking in the passenger-side window of his car, the officers found a gun. The defendant was charged with being a felon in possession of a firearm. The defendant filed a motion to suppress the statements he had made to the officers, alleging the statements were the fruit of an illegal seizure. The trial court denied the motion, but the Nebraska Supreme Court reversed. The Supreme Court held that a suspect's flight from a police officer, without more, does not give the officer a reasonable suspicion of criminal activity that would justify an investigative stop. The court stated that flight from a police officer can justify an investigatory stop only when the officer has specific knowledge connecting the person to criminal activity.

In *Ellington*, police officers observed the defendant leaning into a stopped vehicle. As the officers approached the defendant, the defendant walked away. The officers thereafter stopped, questioned, and searched the defendant. The search produced drugs and drug paraphernalia. Ellington filed a motion to suppress physical evidence, which was denied by the trial court. The Nebraska Supreme Court reversed, holding that the police did not have reasonable suspicion to seize the defendant. Once again, the court held that police must have knowledge of specific facts connecting a suspect to criminal conduct before the suspect may lawfully be detained.

In both *Hicks* and *Ellington*, the State conceded that the defendant had been seized for Fourth Amendment purposes when the physical evidence at issue was recovered. The central issue in each of those cases was whether the police had reasonable suspicion to seize the defendant. However, in this case, the principal issue is whether appellant had been seized at

all when he discarded the bag containing cocaine. Appellant thus cannot rely on *Hicks* or *Ellington* to support his claim that he was detained (seized) unlawfully when he dropped the bag containing cocaine.

A finding that appellant was not seized when he dropped the cocaine would then render the cocaine abandoned property that was lawfully recovered by the police. See, *State v. Shahid*, 813 S.W.2d 38 (Mo. App. 1991); *Fernandez v. State*, 306 S.C. 264, 411 S.E.2d 426 (1991); *State v. Perez*, 592 So. 2d 1099 (Fla. App. 1990); *People v Mamon*, 435 Mich. 1, 457 N.W.2d 623 (1990); Annot., 40 A.L.R.4th 381 (1985).

The U.S. Supreme Court has addressed the issue of whether a Fourth Amendment seizure had occurred on facts exceptionally similar to those in the case before us. In *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), two Oakland, California, police officers were patrolling a high crime area when they saw several youths huddled around a parked car. When the youths saw the officers' car, they panicked and took flight. The officers then chased one of the suspects. As the officers neared the suspect, he tossed away what appeared to be a small rock. A moment later, one of the officers tackled the suspect and handcuffed him. The rock that the suspect discarded was found to be crack cocaine.

The suspect filed a motion to suppress the cocaine, contending that it was the fruit of an illegal seizure. The only issue presented to the U.S. Supreme Court in *Hodari D.* was whether the suspect had been seized within the meaning of the Fourth Amendment at the time he tossed away the cocaine.

The Court in *Hodari D.* held that a seizure for Fourth Amendment purposes requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's assertion of authority. The Court went on to hold that the police in *Hodari D.* asserted authority by chasing the suspect. However, the Court found that the suspect did not submit to the officer's show of authority, and thus, the suspect was not seized for Fourth Amendment purposes until the officer tackled him. The Court reasoned that because the suspect in *Hodari D.* was not seized at the time he dropped the cocaine, the cocaine was abandoned property that

was lawfully recovered by the police and admissible as evidence against the suspect. See, Annot., 40 A.L.R.4th 381 (1985).

The Nebraska Supreme Court has cited *Hodari D.* with approval in two cases involving search and seizure issues. See, *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* ____ U.S.____, 114 S. Ct. 113, 126 L. Ed. 2d 78; *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). However, in both *Van Ackeren* and *Twohig* the court addressed the seizure issue in the context of appeals based on the Fourth Amendment to the U.S. Constitution, and the court did not apply the *Hodari D.* decision to article I, § 7, of the Nebraska Constitution. As discussed above, appellant challenges the police conduct on both federal and state constitutional grounds.

[1] We note that the prohibition against unreasonable searches and seizures in the federal Constitution is textually identical to that found in article I, § 7, of the Nebraska Constitution. However, it is well established that a state may interpret its own constitution to offer greater protection of individual rights than does the federal Constitution. See, *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). Thus, we address the question of whether the interpretation of the term "seizure" in *Hodari D.* is applicable to the Nebraska Constitution.

Several other states that have addressed this question have declined to follow the *Hodari D.* approach. See, *Matter of Welfare of E.D.J.*, 502 N.W.2d 779 (Minn. 1993); *State v. Quino*, 74 Haw. 161, 840 P.2d 358 (1992), *reconsideration denied* 74 Haw. 650, 843 P.2d 144, *cert. denied* ____ U.S. ____, 113 S. Ct. 1849, 123 L. Ed. 2d 472 (1993); *State v. Oquendo*, 223 Conn. 635, 613 A.2d 1300 (1992); *People v. Madera*, 153 Misc. 2d 366, 580 N.Y.S.2d 984 (1992), *aff'd* No. 283 SSM 38, 1993 WL 403902 (N.Y. Oct. 12, 1993). See, also, *State v. Tucker*, 619 So. 2d 38 (La. 1993), *reinstated and reaffirmed* Nos. 92-KO-2093, 92-K-2130, 1993 WL 427306 (La. Oct. 18, 1993) (adopting *Hodari D.*'s definition of an actual stop, but holding that under the Louisiana Constitution a seizure also occurs when there is an "imminent actual stop").

These states have cited various reasons for declining to follow the *Hodari D.* approach, including the existence of an explicit state constitutional right of privacy that afforded greater constitutional protection from unreasonable seizures, see *Quino, supra*, the fact that the state courts had considerable experience in applying the pre-*Hodari D.* standard, see *Matter of Welfare of E.D.J., supra*, and *Madera, supra*, and the existence of authoritative state precedent that did not parallel the restricted definition of a seizure employed in *Hodari D.*, see *Oquendo, supra*. In addition, several of the states that declined to follow *Hodari D.* had historically afforded their citizens greater rights under their respective state constitutions than is afforded by the federal Constitution. See, *Quino, supra*; *Madera, supra*.

[2] Unlike most states that have declined to follow the *Hodari D.* approach, Nebraska has neither an explicit constitutional right of privacy nor a history of affording individuals greater rights than are afforded by the federal Constitution. See, *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991) (White, J., dissenting); *Havlat, supra*; *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983) (White, J., concurring). When these distinctions are added to the Nebraska Supreme Court's apparent approval of *Hodari D.* in *Van Ackeren* and *Twohig*, where the appeals were based on the federal Constitution, we are compelled to hold that the standard announced in *Hodari D.* applies to the present case, where the appeal is based on the state Constitution as well as the federal Constitution. A seizure for purposes of article I, § 7, of the Nebraska Constitution thus requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority.

Applying the *Hodari D.* standard to the present case, we find that although Officers Anderson and Baudler made a show of authority by ordering appellant to stop and subsequently pursuing him, appellant did not submit to that show of authority and, hence, was not seized until Officer Anderson applied physical force to appellant. Thus, appellant was not seized or detained by the officers when he dropped the drugs. Because appellant was not seized when the drugs were

recovered, *Hicks* and *Ellington* are inapplicable to this case.

We find that the drugs were abandoned by appellant, were lawfully recovered by the police, and were not the fruit of an unlawful seizure.

CONCLUSION

Having found that the evidence in this case was not obtained as the result of an unlawful seizure of appellant, we affirm the district court's overruling of appellant's motion to suppress physical evidence.

AFFIRMED.

YORK EQUIPMENT, INC., APPELLANT, V. DENNIS ASHWILL, APPELLEE.

510 N.W.2d 79

Filed December 21, 1993. No. A-92-154.

1. **Contracts: Reformation: Equity: Appeal and Error.** An action to reform a contract is an equity action, and appellate review of an equity action is by trial de novo on the record.
2. **Appeal and Error.** Where the credible evidence is in conflict on a material issue of fact, an appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over the other.
3. _____. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Contracts: Reformation: Proof.** An appellate court, in its de novo trial, must bear in mind that reformation of a contract may not be granted unless a mistake sufficient to justify reformation is established by clear and convincing evidence.
5. **Contracts: Presumptions: Intent.** A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. However, deviations or changes in a contract do not necessarily abrogate it or imply its abandonment, and where it is claimed that by reason of inconsistency between the terms of the new agreement and those of the old, the old one is discharged, the fact that such was the intention of the parties must clearly appear.
6. **Contracts.** The construction of a written contract is a question of law for the court.

7. **Contracts: Presumptions: Intent.** There is a strong presumption that a written instrument correctly expresses the intention of the parties.
8. **Contracts: Intent.** Parties are bound by the terms of the contract, even though their intent may be different from that expressed in the agreement.
9. _____: _____. In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole, and, if possible, effect must be given to every part thereof.
10. **Contracts: Reformation: Fraud.** Reformation may be decreed where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.
11. **Contracts: Reformation: Words and Phrases.** A mutual mistake is a belief shared by the parties which is not in accord with the facts.
12. **Contracts: Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
13. **Contracts: Reformation: Intent: Words and Phrases.** If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded with directions.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellee.

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

HANNON, Judge.

York Equipment, Inc., the plaintiff, commenced this action seeking to reform a retail installment sale contract that it had made with Dennis Ashwill, the defendant. Under this contract, York sold a large amount of farm machinery to Ashwill in consideration for a cash downpayment, machinery, and a cash balance payable by Ashwill in eight semiannual installments. York maintains that the balance due on the contract was incorrectly computed and that this error was a mutual mistake which should be corrected. In the alternative, York argues it should receive a judgment against Ashwill in the amount of the error on a theory of subrogation or a theory of unjust

enrichment. The case was tried to the court as an equity case, and the trial court found for Ashwill, dismissing York's petition. York appeals this decision, and we reverse the judgment and remand the cause with directions.

APRIL 21, 1990, CONTRACT

The written contract was prepared on a printed form entitled "**J I Case Credit Corporation Retail Installment Sale Contract and Security Agreement.**" In addition to the necessary information such as the name and address of the parties, warranty information, and the necessary verbiage of an installment sale contract and a security agreement, the form contains a ruled section for the listing of the several pieces of equipment being sold and the sale price of each piece. It also contains a similar but smaller area to list the description of property being traded in, the trade-in allowance, and the amount of any encumbrances on this property. In this area, the form states the "Purchaser hereby conveys to Seller the Trade-In Equipment free and clear of all encumbrances except as noted above." The form also contains the necessary lines, organized so the value of the encumbrances can be subtracted from the trade-in allowance and the net trade-in allowance shown. The form has a "**Statement of Transaction**" section where the cash sale price may be recorded in an organized fashion, the downpayment and net trade-in allowance subtracted from the cash sale price, and the difference shown as the "Unpaid Balance of Cash Sale Price." The form then has the usual spaces to compute the finance charges and to display the semiannual payments and other information required by state and federal laws for credit sales with interest.

When the contract was completed and signed on April 21, 1990, the machinery being sold and traded in was partially listed on the contract form in the spaces provided, but in the area of the form listing the machinery sold, the words "Reference to Addendums [sic] #1,2,3,4,5" appear. These addenda were also signed by the parties on the same date as the contract was signed. Addenda Nos. 1, 2, 3, and 4 list all the pieces of equipment Ashwill purchased, the serial number, and the sale price of each piece. Each addendum is then totaled, and

the totals appear in the cash-sale-price column of the installment sale contract. The total sale price, including sales tax, was $1,138,377.

Addendum No. 5 listed 21 pieces of machinery Ashwill traded in, with the serial number and the trade-in value listed for each piece. The trade-in values are totaled to $1,000,341.08, and this figure appears on the installment sale contract as the "Seller's valuation of Trade-In Equipment." Page 2 of addendum No. 5 reads in part as follows:

PAYOFF JOHN DEERE CREDIT CORP.	
NOTE #08474460472RB	-$106,394.36
NOTE #08474460472RC	- 152,450.05
NOTE #08474460472RJ	- 143,779.15
NOTE #08476366676RF	- 27,576.52
NET PAYOFF AMOUNT	-$430,200.08
NET TRADE ALLOWANCE	$570,141.00

The $430,200.08 figure was listed on the contract form underneath the space for the seller's valuation of the trade-in equipment in a space labeled "less amount owing to (encumbrances)," and the net trade-in allowance shown on the contract was $570,141.

Two of the tractors Ashwill was trading in had been subject to liens held by the John Deere Company totaling $109,379.67. Because York had paid John Deere for these liens in January 1990, these liens were not included in the total payoff figure obtained from John Deere when the contract was prepared in April. York claims that not including the amount of these liens in the amount of encumbrances listed as outstanding on the contract was a mutual mistake which justifies reformation of the contract. In the alternative, York argues the court should have granted York a judgment against Ashwill on the basis that York would be subrogated to John Deere's rights or on the basis that Ashwill was unjustly enriched by the mistake. The background necessary to judge the nature of the mistake is complex.

DECEMBER 15, 1989, CONTRACT

In June 1989, York was a well-established truck and agricultural equipment dealership in York, Nebraska. Ashwill

was a well-established farmer and custom harvester who lived in Dassel, Minnesota. Dan Reiter was the sales supervisor for York in 1989 and 1990. In June 1989, Darwin Shriver, a salesman for York, received a telephone call from Ashwill inquiring about a trade-in for several new combines. Shriver handled the preliminary negotiations. The negotiations remained general until Reiter and Shriver went to South Dakota and Minnesota in mid-November to inspect the machinery Ashwill wanted to trade in to York for the combines. On November 30, Shriver called Ashwill and told him they needed to make the agreement firm that day in order for Ashwill to avoid an impending price increase on the new combines. The parties made an oral agreement over the telephone by which Ashwill agreed to purchase eight combines and other equipment. However, later that day, Ashwill called Reiter and ordered two more combines. No written agreement was signed until December 15.

If the sale was going to be made, York needed to order at least some of the combines for the purpose of filling Ashwill's order. York officials were anxious to get a firm, signed contract with Ashwill. Ashwill came to York, Nebraska, on December 15, and the parties negotiated and signed a contract on a form regularly used by York that was entitled "**Retail Order**." This document did not have the usual provisions of an installment sale contract and security instrument, but it contained spaces for listing the machinery sold, the machinery traded in, and the amounts owing on the traded-in machinery, as well as blank spaces organized for computing the unpaid cash balance. Insofar as information about the machinery being sold and traded in, and for what price, this form was essentially equivalent to the form used for the April 21, 1990, contract.

The December 15 contract provided for Ashwill to buy 10 new combines and associated machinery for a cash price of $1,420,590, to be paid for by a cash downpayment of $9,100 with the order, and the trading-in of several pieces of machinery valued at $1,119,115 which were subject to liens totaling $491,709. The net value of the property, $697,406, was added to the cash downpayment of $9,100, and the resulting figure of $636,506 was entered in a box entitled "Total Down Payment."

The downpayment was subtracted from the cash sale price, plus tax, to obtain the unpaid cash balance that was listed as $790,113.50. The contract did not provide the method of payment of the balance, although it did provide an annual interest rate of 14.5 percent and that the finance charges were to begin accruing September 1, 1990. The form provided for financing for a qualified buyer, and agreement by the buyer to give a security interest, in the event the balance was financed.

No addenda were attached to this contract, but the machinery sold and traded in was described on the form in an abbreviated fashion. It provided that Ashwill traded in "2-4850 MFWD" and then listed numbers corresponding to the serial numbers later listed for the tractors on addendum No. 5 of the April 21 contract. The evidence does not disclose which liens made up the total of $491,709.

When this contract was signed, York had not received delivery of the combines, and the form states: "I hereby order . . . ." The form contains space for a delivery date of the equipment being purchased, but the date was not filled in.

ACTION UNDER THE DECEMBER 15 CONTRACT

Reiter testified that on December 15, 1989, Ashwill told York it could pick up the equipment he was trading in. The two 4850 tractors were picked up at Montevideo, Minnesota, on December 18. On January 22, 1990, York wrote John Deere a check for $109,379.67 to pay the liens on the two tractors. York claims this was done because the dealer in Minnesota upon whose property the tractors were located would not let York remove the tractors until the liens were paid. This excuse does not make sense because the tractors were removed in December, and the liens were not paid until January 22. We do not know why the liens were paid when they were, but there is no dispute that they were paid. As concluded below, why they were paid is immaterial.

Other pieces of the property Ashwill traded in were picked up by York between January 17 and March 22 from wherever they were located. Before April 21, all of the tractors and combines were picked up by York or by someone purchasing the machinery from York. Much of this equipment was resold by

York before April 21. Ashwill testified that he agreed York could pick up the machinery, but that he did not agree York could sell it.

APRIL 21 CONTRACT IS SIGNED

Following the execution of the December 15, 1989, contract, the parties discussed possible changes in that contract and apparently negotiated over the telephone about changes in the contract. The evidence does not establish any clear modifications of the December 15 contract until April 21, 1990. On that date, Ashwill again came to York, Nebraska, and the parties negotiated and signed a second contract. Any previous modifications of the December 15 contract are immaterial because if they existed, they were likewise modified by the April 21 contract. There is no doubt that the April 21 contract superseded the December 15 contract and any possible verbal modifications the parties might have made to that contract.

Merle Lessig, York's accountant, discovered the error in June 1990 when he analyzed the transaction at the request of York's owner. When the error was discovered, York requested that Ashwill execute a new contract showing the correct value of the liens, thus increasing the amount that was unpaid on the contract by approximately $109,000. Ashwill refused, and this action followed.

TRIAL COURT'S FINDINGS

The district court found in favor of Ashwill and dismissed this action. In its written opinion, the trial court found the contract of December 15, 1989, was prepared by York and was not based on any representations of Ashwill. It also found that Ashwill authorized York to pick up and display the machinery, but not to sell it. The court determined that York picked up the tractors on December 18 and paid the $109,379.67 on January 22, 1990, and that York sold all of the machinery except one tractor and one combine before April 21.

The court found that "Ashwill was concerned about the manipulation of the trade-in figure on the [April 21] contract by York and the numerous addenda but he was satisfied with the 'bottom line' of the contract as this was his main objective." The court further found that every entry on the April 21

contract was "verified, ascertained and entered by York's representatives." The court also found that Reiter assured Ashwill that "the figures on the final Contract were correct and he relied on the figures as presented." The court determined that it was upon this representation that Ashwill entered into the April 21 contract.

The court found that it was clear that the "time balance Ashwill expected to pay and York expected to receive on the entire transaction was $699,556.78" and that there was no evidence of a mutual mistake or of a unilateral mistake caused by the fraud or inequitable conduct of Ashwill. The court further found that York paid the liens on the tractors so that it could resell them and was a volunteer with a profit motive and that on January 22, York had no legal interest in the tractors because Ashwill still had the option of canceling the purchase order.

ASSIGNMENTS OF ERROR

York alleges the trial court erred (1) in not finding a mutual mistake or a unilateral mistake existed with respect to the April 21 contract sufficient to require reformation of the contract; (2) in applying a clear and convincing evidentiary standard as York's burden of proof; (3) in not finding York was entitled to restitution of the $109,379 on the theories of unjust enrichment, implied contract, restitution, or subrogation; and (4) in not admitting exhibit 27 and other evidence of the loss York sustained on the sale. Since we find the parties' mistake justifies reformation of the April 21 contract, we will consider only the first and third assignments of error.

STANDARD OF REVIEW

[1-4] An action to reform a contract is an equity action, and appellate review of an equity action is by trial de novo on the record. *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988). However, where the credible evidence is in conflict on a material issue of fact, an appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over the other. *Id.* Regarding a question of law, an appellate court has an obligation to reach a conclusion

independent of that of the trial court in a judgment under review. *City of Newman Grove v. Primrose*, 240 Neb. 70, 480 N.W.2d 408 (1992). In our de novo trial, we must bear in mind that reformation of a contract may not be granted unless a mistake sufficient to justify reformation is established by clear and convincing evidence. *Darr v. D.R.S. Investments*, 232 Neb. 507, 441 N.W.2d 197 (1989).

GENERAL DISCUSSION

The record contains a great deal of evidence that we regard as immaterial. Therefore, we have not summarized that evidence in this opinion, nor have we stated the parties' arguments which tend to use this immaterial evidence to support a general claim that the other party was somehow inequitable in negotiating the April 21 contract.

YORK WAS NOT A VOLUNTEER

The trial court found that York was a volunteer when it paid off the liens on January 22, 1990. This finding ignores the contract the parties entered into on December 15, 1989, which was still the controlling contract until April 21, 1990. The December 15 contract includes a provision that it contains the parties' entire agreement. Its terms could not be contradicted by prior agreement or contemporaneous oral agreement. See Neb. U.C.C. § 2-202 (Reissue 1992).

In this analysis, we are interested in machinery (goods) that Ashwill traded in to York. Under the Uniform Commercial Code, Ashwill is a seller of that machinery. See Neb. U.C.C. § 2-304 (Reissue 1992). That machinery, unlike the machinery Ashwill was buying, was identified. The April 21 agreement did not provide a delivery date of that machinery, but it did provide that the machinery traded in was part of the downpayment. Since the agreement did not otherwise provide, title to that property passed at delivery. See Neb. U.C.C. § 2-401 (Reissue 1992).

Since title on the trade-in machinery passed to York before it paid the liens, and because York purchased the property subject to the liens, York was entitled to, and even obligated to, pay off the liens. Therefore, York was not a volunteer when it paid off the liens on its own property. The trial court erred as a matter of

law when it found that York paid the liens to John Deere as a volunteer.

Examining the provisions of the December 15 contract reinforces these findings. The reverse side of the contract provides, "The trade-in allowance set forth herein is based upon an appraisal by the seller . . . free of all liens except as stated herein." Also contained on the reverse side of the form is the following:

> In case the purchaser refuses to . . . settle . . . the seller may retain as liquidated damages all moneys or equipment paid on account of said equipment, not exceeding, however, twenty-five percent of the purchase price . . . trade-in equipment taken by the seller in part payment shall be accounted for at the price at which resold, less expense of reconditioning, handling and selling.

After providing that property traded in is valued at its present value, free of liens, the December 15 contract states:

> Such trade-in shall be subject to reappraisal by seller at the time it is delivered to seller and if it is reappraised at a different value than the trade-in allowance . . . because [it is in different condition], or because it is subject to a lien not set forth herein, [the trade-in allowance shall be changed].

These provisions of the December 15 contract merely reinforce the conclusion that York had the right to sell the tractors when York obtained possession of them and was not acting as a volunteer when it paid the liens.

The trial court found that Ashwill was entitled to cancel the December 15 contract. We cannot find any reason why either party could unilaterally cancel that contract, but of course the parties could modify, replace, or cancel it by mutual agreement.

[5] Before the April 21 contract was entered into, Ashwill was contractually bound to buy and take delivery of the machinery he contracted to buy.

> "A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot

> subsist together. However, deviations or changes in a contract do not necessarily abrogate it or imply its abandonment, and where it is claimed that by reason of inconsistency between the terms of the new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear."

Caro, Inc. v. Roby, 215 Neb. 897, 904-05, 342 N.W.2d 182, 186 (1983) (quoting 17A C.J.S. *Contracts* § 395 (1963)). Accord *In re Estate of Wise*, 144 Neb. 273, 13 N.W.2d 146 (1944).

The April 21 contract clearly superseded the December 15 contract, insofar as the two were inconsistent. The major changes concerned the property being purchased and traded in, as well as the long-term financing. The other provisions covering traded-in machinery are essentially the same. York's valuation of the property traded in was placed on both contracts, and the amount of the liens against the property was subtracted to get the net value of the machinery traded in. The December 15 contract provides on the back page that the trade in is valued at its present value, free of liens, and the April 21 contract provides on the front page, "Purchaser hereby conveys to Seller the Trade-In Equipment free and clear of all encumbrances except as noted above." Furthermore, Neb. U.C.C. § 2-312(1) (Reissue 1992) provides in significant part: "[T]here is in a contract for sale a warranty by the seller that . . . (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge." This warranty is excluded only by specific language or circumstances showing the buyer that the seller is purporting to sell only such right as the seller may have. § 2-312(2). The April 21 contract therefore gives both an express and an implied warranty against liens not listed on the contract.

Ashwill testified that he told Darwin Shriver and Dan Reiter that York was responsible for learning the amount of the liens against his property. Ashwill indicated this was his standard business practice. Time and time again he reiterated in his testimony that a dealer that accepts a trade-in is responsible for determining the amount of any lien on the machinery being traded in. Ashwill also testified that he was only interested in

the bottom line of the April 21 contract, and the trial court found that to be true. Ashwill's intent, not expressed in the written contract of April 21, obviously does not determine the outcome of this contract action.

[6-9] A listing of some of the basic rules of contract construction would be helpful at this point. The construction of a written contract is a question of law for the court. *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 438 N.W.2d 474 (1989). There is a strong presumption that a written instrument correctly expresses the intention of the parties. *Id.* Parties are bound by the terms of the contract, even though their intent may be different from that expressed in the agreement. *Id.* " 'In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof. . . .' " *Mills v. Aetna Ins. Co.*, 168 Neb. 612, 619, 96 N.W.2d 721, 725 (1959). Ashwill cannot expunge the remainder of the April 21 contract merely by testifying that he was only interested in the bottom line.

Ashwill implied in his testimony that York changed the trade-in value of the equipment to come to a bottom-line figure he would have to pay. The April 21 contract provides that the trade-in value is the value placed on the equipment by York, and, therefore, changing this amount indicates nothing except York's willingness to negotiate this amount. As long as the April 21 contract contains the other provisions, this process does not tend to prove the bottom line was more controlling than any other provision of the contract.

The April 21 contract must necessarily be construed to mean that York sold certain specific equipment to Ashwill for $1,138,377. This sum was payable by a cash downpayment; a $1,000,341.08 allowance for machinery traded in, less the value of the liens upon that property; and a balance of cash payable in installments at 12 percent interest commencing September 1, 1990. To be sure, the amount of the liens listed on the April 21 contract was in error. Interestingly, Ashwill does not argue that the value of the liens was correct, but merely that the error was not mutual.

[10] "In this jurisdiction, reformation may be decreed where

there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party." *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 589, 428 N.W.2d 185, 191 (1988).

> [11-13] A mutual mistake is a belief shared by the parties which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986). As stated by this court in *Newton*, " 'A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.' [Citation omitted.]
>
> "If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties."

Omaha Door Co. v. Mexican Food Manuf. of Omaha, 232 Neb. 153, 157, 439 N.W.2d 776, 780 (1989). See, also, Restatement (Second) of Contracts § 151 (1981).

The trial court found that every entry on the April 21 contract was verified by the York representatives and that this mistake was York's, not Ashwill's, and therefore concluded that the mistake was not mutual. This conclusion focuses on the wrong mistake and is therefore error.

In the introductory note to the Restatement, *supra*, ch. 6 at 379, that authority states:

> The type of mistake dealt with in this Chapter [on mistake] is one that relates to existing facts that the parties regard as a basis for making an agreement. An important sub-category of such mistake is mistake as to expression, in which the mistake relates to the contents or effect of a writing that expresses an agreement.

"A mistake is a belief that is not in accord with the facts." *Id.*, § 151 at 383. "In this Restatement the word 'mistake' is used to refer to an erroneous belief. A party's erroneous belief is

therefore said to be a 'mistake' of that party." *Id.*, comment *a.* at 383.

Verification of the wrong amount is the cause of the mistake, not the mistake. The significant mistake, as shown by the above-quoted authority, is that the prepared document failed to correctly reflect the total amount of the liens which Ashwill had on the equipment that he traded in. There is no doubt that the parties agreed Ashwill would trade in to York equipment that was either subject to disclosed liens or free of liens. The terms of the written agreement of April 21 disclose that the parties did not intend York to take title subject to any liens except those listed on the contract.

In view of the terms of the April 21 contract which provided that Ashwill was warranting the property to be free of liens except for those disclosed, Ashwill must necessarily have believed the lien figure was correct, or he knew the figure in the contract was wrong, and he remained silent, thus engaging in inequitable conduct. There is no credible evidence that the York representatives did not believe they were using the correct figure, and there is no credible evidence that Ashwill did not believe the April 21 contract contained the correct figure. The parties held a belief that was not in accord with the facts, which belief was that the April 21 contract reflected the correct total of the liens against the equipment which was traded in, and that is a mistake. Expressed in another manner, the evidence establishes clearly and convincingly that the scrivener did not prepare the contract of April 21 to reflect the parties' agreement. This is a mutual mistake, and York is entitled to have the contract of April 21 reformed.

CONCLUSION

York also argues that it is entitled to relief on the ground that Ashwill was unjustly enriched or that it is subrogated to John Deere's rights against Ashwill. Since we have determined York is entitled to a reformation of the April 21 contract, it is unnecessary to consider these other theories of recovery.

The record establishes that the April 21 contract has been paid in full and that Ashwill no longer owns the machinery that would be security for the unpaid balance. Therefore, the most

efficient and equitable relief would be a judgment computed under the April 21 contract, that is, York should be awarded judgment for $109,397.67, plus interest at 12 percent per annum, the interest rate provided in the contract, from September 1, 1990, and the costs of this action.

REVERSED AND REMANDED WITH DIRECTIONS.

LARRY R. BOYLES AND OLGA J. BOYLES, APPELLANTS, V. GARY J. HAUSMANN AND RENEE S. HAUSMANN, HUSBAND AND WIFE, ET AL., APPELLEES.

509 N.W.2d 676

Filed December 21, 1993. No. A-92-204.

1. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989, Cum Supp. 1992 & Supp. 1993) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment raising issues of law, the appellate court has an obligation to reach a conclusion independent of the conclusion reached by the trial court.
3. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process.
4. **Contracts.** The language in a contract is to be accorded its plain and ordinary meaning as understood by an average or reasonable person.
5. **Contracts: Restrictive Covenants: Time.** A mere majority of landowners may not attempt to change a covenant prior to expiration of the principal period in contravention of the terms of the agreement.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded with directions.

Nile K. Johnson, of Johnson & Mock, for appellants.

Gregory P. Drew for appellees.

CONNOLLY, IRWIN, and WRIGHT, Judges.

IRWIN, Judge.

Larry R. and Olga J. Boyles, landowners in Pioneer Hills Subdivision, brought suit seeking a declaratory judgment regarding whether the defendants, also landowners in the subdivision, could amend an agreement containing restrictive covenants pertaining to the subdivision so as to include a setback provision for each lot. The district court found generally for the defendants and dismissed the Boyleses' petition. The Boyleses subsequently perfected this appeal. For the reasons recited below, we reverse the judgment and remand the cause with directions.

SCOPE OF REVIEW

[1,2] An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989, Cum. Supp. 1992 & Supp. 1993) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992). In the case at bar, the Boyleses seek only a declaratory judgment of their rights under the covenant agreement. In an appeal from a declaratory judgment raising issues of law, the appellate court has an obligation to reach a conclusion independent of the conclusion reached by the trial court. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989).

FACTS

In 1973, the Pioneer Hills Subdivision was platted. The subdivision was subject to a pipeline easement. Additionally, the original landowners of the subdivision entered into an agreement adopting specific restrictive covenants which, according to covenant L, were to

> run with the land and continue until January 1, 1983, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall

> have been recorded in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

This agreement was recorded in the Washington County clerk's office.

In 1976, the then current landowners entered into a separate agreement to share the costs for the maintenance and repair of a water use system for the subdivision. The agreement provides that it "shall be binding upon the parties hereto, their heirs, and assigns and successors in title of interest." This agreement was signed by a majority of the then current landowners and was recorded in the Washington County clerk's office. In 1977, the Boyleses purchased their lot and were aware of both of these recorded agreements.

In April 1983, after the principal 10-year time period from the restrictive covenant agreement had expired, the then current landowners amended the agreement to reflect changes in covenants E, H, I, J, K, and L. The changes to covenants E and H through K all concerned topics which were discussed in the original 1973 agreement. The changes could be characterized as clarifications of the existing covenants, resulting in less restrictive covenants. The change to covenant L provided: "Change 1983 to 1988." This particular amendment changed the language in covenant L to read:

> These covenants . . . shall run with the land and continue until January 1, 1988, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recorded in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

This agreement was signed by the Boyleses.

In January 1990, 2 years after the principal 5-year period from the 1983 agreement had expired, the agreement was rewritten. The new agreement was essentially identical to the 1983 covenant agreement, except for the addition of an entire section regarding water use regulations. This new section relates to the water system agreement which the landowners signed in 1976. The 1990 agreement also provided that

> [t]hese covenants, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk . . . agreeing to change same in whole or in part.

This 1990 agreement was signed by owners of 12 of the 18 lots, including Larry Boyles. The agreement was recorded in February 1990.

In August 1990, a majority of the landowners attempted to amend the January 1990 agreement to include the following under covenant C: "1. NO RESIDENTIAL STRUCTURE OR OUTBUILDING SHALL BE PLACED WITHIN 120' OF PIONEER HILLS ROAD." The existing covenant C provided: "No residential structure shall be erected on any building lot which is smaller in area than the original plotted [sic] number lot on which it is erected."

The Boyleses assert on appeal that the August 1990 alleged covenant amendment, establishing a setback of 120 feet from the road, creates a new covenant, not an amendment to an existing covenant, and is therefore invalid.

ANALYSIS

The determination of this appeal rests upon the construction of the agreements between the parties, which is a matter of law. See *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). The Boyleses urge this court to adopt case law from surrounding jurisdictions which have refused to allow a majority of landowners in a subdivision subject to restrictive covenants to create a new covenant or impose harsher covenants upon the subdivision. See, *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984) (holding that where a grantee takes title without clear notice in the current restrictive covenants that a majority of the lot owners may impose an assessment upon his property, the majority may not attempt to amend the covenants to impose such a burden); *Van Deusen v. Bussmann*, 343 Mo. 1096, 125

S.W.2d 1 (1938) (holding that the language in a restrictive covenant authorizing modification of the covenant did not authorize the imposition of a harsher restriction). Cf. *Zito v. Gerken*, 225 Ill. App. 3d 79, 587 N.E.2d 1048 (1992).

[3] Despite the fact that the Boyleses do not assign as error a misinterpretation of the agreement relating to *when* the current landowners may effectuate a change in the agreement, we cannot review the documents in this case without recognizing this plain error. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993); *Wichman v. Naylor*, 241 Neb. 249, 487 N.W.2d 291 (1992); *In re Estate of Fischer*, 227 Neb. 722, 419 N.W.2d 860 (1988). Since we are determining the rights of these parties on the basis of a contractual interpretation, the issue of whether the August 1990 amendment was a harsher restriction or a new restriction is no longer a justiciable issue between the parties and need not be addressed. This is true even in the context of an action for declaratory judgment. See, *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956).

[4] The Nebraska Supreme Court has held that the language in a contract is to be accorded its plain and ordinary meaning as understood by an average or reasonable person. *Baker's Supermarkets v. Feldman, supra.* A close review of the language of the original 1973 covenant agreement reveals that the covenants were to run with the land "until January 1, 1983, after which time they shall be automatically extended . . . unless an instrument signed by a majority of the then owners of said land shall have been recorded . . . agreeing to change same in whole or in part." This language was incorporated into the 1983 agreement except that the January 1, 1983, date was changed to January 1, 1988. The parties did not try to change any part of the 1973 agreement during the 10-year principal period despite the fact that a water use system had been installed on the

property in 1976. A separate agreement was created for this purpose. From 1983 through 1988, arguably the second principal period, the parties did not attempt to change the agreement. In January 1990, after the 1983 agreement's 5-year principal period had expired, the parties changed the covenant agreement to include a section dealing with the water system. They also changed the language so that the 1990 agreement provided:

> These covenants, water use regulations, restrictions and conditions shall run with the land *and continue until January 1, 1995, after* which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk . . . agreeing to change same in whole or in part.

(Emphasis supplied.)

We interpret this language to mean that the 1990 covenants are binding for 5 years, *after* which time they may be changed by a majority of the property owners. This is supported by cases from other jurisdictions.

In *Kauffman v. Roling*, 851 S.W.2d 789, 793 (Mo. App. 1993), the agreement provided that the restrictive covenants would be binding for 25 years "except as otherwise provided herein, after which time said covenants shall be automatically extended for successive periods of twenty-five (25) years unless an instrument signed by two-thirds of the then owners of the lots has been recorded . . . ." (Emphasis omitted.) After reviewing the entire agreement, the Missouri appellate court held that there was no provision for amendment by less than a unanimous vote of the parties to the agreement prior to the expiration of the 25-year period. In *Hill v. Rice*, 505 So. 2d 382, 383 (Ala. 1987), the original covenant agreement provided that the restrictions

> " 'shall be binding upon all parties and persons claiming under them until Jan. 1, 1980, at which time said covenants and restrictions shall automatically be extended for successive periods of ten (10) years, unless by vote of majority of the then owners of the lots it is agreed to

discontinue or to change said covenants . . . .' "

The plaintiff attempted to assert that an agreement to eliminate the restrictive covenants made by a majority of the landowners in 1985 was invalid because the original covenant agreement required that the 10-year period must automatically be extended. The Alabama Supreme Court stated that "[w]hile it is clear that the restrictions were binding upon all parties and persons claiming under them until January 1, 1980, it is not clear that the intent of the covenants was that a majority of the owners could not agree to remove the restrictions after that date." (Emphasis omitted.) *Id.* at 384. Consequently, the court found that a majority of the then owners could eliminate the covenants in 1985. In *Johnson v. Howells*, 682 P.2d 504, 505 (Colo. App. 1984), the agreement provided:

> "These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty (20) years from the date hereof after which time said covenants shall be automatically extended for a successive period of 20 years unless an instrument signed by sixty percent of the then owners of the property has been recorded, agreeing to change said covenants in whole or in part."

The appellate court held that the plain meaning of the agreement was that "the covenants will be binding for twenty years, after which time they are automatically extended unless sixty percent of the property owners agree to change them and record an instrument to that effect." (Emphasis omitted.) *Id.* The court further stated that if the owners had intended to allow amendments at any time, then they would have had no need to include reference to a 20-year period in the first place.

See, also, *Dauphin Island, etc. v. Kuppersmith*, 371 So. 2d 31 (Ala. 1979) (holding that amendments to covenants could not be effectuated by a majority of the lot owners until the end of the 25-year period following the adoption of the covenants); *White v. Lewis*, 253 Ark. 476, 487 S.W.2d 615 (1972) (holding that the restrictive covenants could not be amended prior to the expiration of the initial 25-year period); *Perkins v. B & W Contractors, Inc.*, 439 So. 2d 652 (La. App. 1983) (holding that amendments to restrictive covenants were valid even though

they were filed before expiration of original period, because the amendments were not effective until the original period had expired).

[5] Although case law from other jurisdictions holds that a unanimous vote of the landowners can effectuate amendment of the covenants during the original period, such is not the situation before us. See, *Kauffman v. Roling, supra*; *Johnson v. Howells, supra*. Here, a mere majority of the current landowners attempted to change the January 1990 agreement during the principal period, in contravention of the terms of the agreement. They did not have the authority to change the January 1990 agreement in August 1990, and it was plain error for the trial court to find in favor of the defendants. The judgment of the district court is reversed, and the cause is remanded for an order to issue finding that the attempted amendment is invalid.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, Judge, concurring.

I concur in the majority's conclusion that the attempted amendment to the covenant in August 1990 was invalid. As the majority points out, in January 1990, 2 years after the principal 5-year period for the 1983 agreement had expired, the agreement was rewritten to provide that the covenants would run with the land and continue until January 1, 1995. The August 1990 attempt to amend the covenant during the principal term was invalid.

I also believe the attempt to amend the covenant was invalid for another reason. When the Boyleses purchased the property, there was no existing setback of 120 feet from Pioneer Hills Road. Landowners in a subdivision may not, by a majority vote, create new covenants which restrict the use of the land held by a minority of the landowners. In my opinion, any attempt to place greater restrictions on the use of the land by amendment of existing covenants would require the vote of all landowners in the subdivision. It is for this additional reason that I believe the attempt by the majority of the landowners to amend the covenant was void.

STATE OF NEBRASKA, APPELLEE, V. KEVIN G. DEAN, APPELLANT.

510 N.W.2d 87

Filed December 21, 1993. No. A-93-064.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from a county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. Both the district court and the higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Criminal Law: Constitutional Law: Right to Counsel.** The 6th and 14th Amendments to the U.S. Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.
4. **Penalties and Forfeitures: Right to Counsel.** Where a defendant is penalized only by fine, he or she is neither constitutionally nor statutorily entitled to have counsel present.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Gerald F. Fisher, Lincoln City Prosecutor, for appellee.

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

As the result of a fight with his girl friend's former boyfriend, Kevin G. Dean, appellant, was charged with one count of assault in violation of Lincoln Mun. Code § 9.12.010 (1990). The penalty for assault for a violation of this section of the Lincoln Municipal Code is a fine of up to $500, imprisonment in the county jail for up to 6 months, or both. Dean pled not guilty. The case was tried to the county court for Lancaster County, during which Dean appeared pro se. Dean was convicted and received a fine of $350. At the sentencing, Dean

gave notice of his intention to appeal and requested appointment of counsel. Counsel was appointed on the appeal, and the case was affirmed by the district court for Lancaster County. This appeal followed. For the reasons recited below, we affirm.

SCOPE OF REVIEW

> [1] Under Neb. Rev. Stat. § 25-2733 (Reissue 1989), in an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. . . . Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.

State v. Styskal, 242 Neb. 26, 29, 493 N.W.2d 313, 316 (1992).

[2] " 'Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.' " *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 283, 505 N.W.2d 719, 722 (1993).

ANALYSIS

For his assignment of error, Dean claims that he was entitled to be represented by counsel at the county court trial and that the trial court's failure to obtain a knowing and intelligent waiver of his right to counsel was a violation of his rights guaranteed by the 6th and 14th Amendments to the U.S. Constitution and by article I, § 11, of the Nebraska Constitution. We do not agree.

[3] The U.S. Supreme Court discussed in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), the circumstances under which counsel was constitutionally required to represent criminal defendants. After a conflict developed among state and lower federal courts regarding application of *Argersinger* to misdemeanor cases, the Court granted certiorari to an Illinois case. See *People v. Scott*, 68 Ill. 2d 269, 369 N.E.2d 881 (1977), *cert. granted* 436 U.S. 925, 98 S. Ct. 2817, 56 L. Ed. 2d 767 (1978). In *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), the Court affirmed the Illinois Supreme Court's judgment and held that "the Sixth

and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. at 373-74. This holding has been specifically applied in Nebraska. *State v. Austin*, 219 Neb. 420, 363 N.W.2d 397 (1985). See, also, *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990) (holding that a defendant's unrepresented prior conviction for giving false information resulting in a fine of $25 was valid and could therefore be used to impeach the defendant's credibility in a subsequent proceeding). Elsewhere, it has been succinctly observed that "Argersinger forbids imprisonment without representation. It does not forbid trial without representation." *Sweeten v. Sneddon*, 463 F.2d 713, 716 (10th Cir. 1972).

Dean concedes on appeal that because his county court trial resulted in a fine and not imprisonment, he was not entitled to court-appointed counsel. He claims that he was nevertheless denied assistance of counsel because the trial court failed to advise him of his right to retain private counsel and did not receive a knowing waiver of that right. We disagree.

In *People v. Scott, supra*, the defendant was charged with a theft for which the penalty under the criminal code was a fine, imprisonment of up to 1 year, or both. The defendant appeared pro se at trial and was at no time advised of a right to assistance of counsel or, if indigent, the right to have counsel appointed.

As in this case, the record in *People v. Scott* indicated that the defendant was indigent on appeal, but it was silent about his status at trial. The Illinois Supreme Court stated, "We are unpersuaded by defendant's argument that the mere possibility of incarceration upon conviction should trigger a defendant's constitutional right to counsel, for there exists no possibility of incarceration if counsel was not properly waived." *People v. Scott*, 68 Ill. 2d at 272, 369 N.E.2d at 882.

[4] The Illinois Supreme Court held that

> [s]ince the defendant was penalized only by fine, he was neither constitutionally nor statutorily entitled to have counsel present. The court was, therefore, under no obligation to obtain a waiver before proceeding to trial

without counsel and, hence, was under no obligation to advise the defendant of his right to counsel.

People v. Scott, 68 Ill. 2d at 274, 369 N.E.2d at 883.

Dean cites several Nebraska cases, not repeated here, for the proposition that a waiver of the right to counsel must affirmatively appear from the record. These cases are distinguishable from the case at bar because in each of the cases relied on by Dean, the criminal defendant was entitled to court-appointed counsel by virtue of being charged with a felony or because imprisonment was imposed; whereas because Dean was penalized only by fine, he was not entitled to court-appointed counsel. Cf. Neb. Rev. Stat. § 29-3901 et seq. (Cum. Supp. 1992).

CONCLUSION

We conclude that Dean was a nonfelony criminal defendant who was penalized only by fine even though the penalty could have included imprisonment and that the trial court did not err in failing to advise him of his right to retain private counsel and obtain a waiver of counsel before trial.

AFFIRMED.

PHILIP M. KELLY, APPELLEE AND CROSS-APPELLANT, V. LINDA F. KELLY, APPELLANT AND CROSS-APPELLEE.

510 N.W.2d 90

Filed December 21, 1993. No. A-93-114.

1. **Motions for New Trial: Appeal and Error.** On appellate review of a motion for new trial pursuant to Neb. Rev. Stat. § 25-1142(7) (Reissue 1989), the judgment of the trial court overruling the motion will not be disturbed absent an abuse of discretion.
2. **Trial: Evidence: Appeal and Error.** On de novo review in an appellate court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded.
3. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the

litigant nor his or her counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.

4. **Criminal Law: Effectiveness of Counsel.** The claim of ineffective assistance of counsel is one reserved for a defendant in a criminal action.
5. **Rules of the Supreme Court: Child Support: Alimony.** Pursuant to paragraph M of the Nebraska Child Support Guidelines, alimony is to be calculated subsequently to the calculation of child support obligations.
6. **Child Support: Child Custody: Alimony.** Alimony paid to the noncustodial parent by the custodial parent is not income for purposes of calculating the child support obligation of the noncustodial parent.
7. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Neb. Rev. Stat. § 42-365 (Reissue 1988).
8. **Alimony: Child Custody.** Among the factors to be considered in an award of alimony is the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Neb. Rev. Stat. § 42-365 (Reissue 1988).
9. **Alimony.** Alimony is not to be used simply to equalize the income of the parties, but to assist the economically disadvantaged party during a period of unavailability for employment or training for employment.

Appeal from the District Court for Scotts Bluff County: RONALD D. OLBERDING, Judge. Affirmed as modified.

Samuel W. Segrist, of Meister & Segrist, for appellant.

Richard A. Douglas, of Nichols, Douglas, Kelly, and Meade, P.C., for appellee.

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

CONNOLLY, Judge.

This appeal and cross-appeal arise from the decree dissolving the marriage of the appellant and cross-appellee, Linda F. Kelly, and the appellee and cross-appellant, Philip M. Kelly. Linda appeals the trial court's decision to award to Philip custody of the parties' three minor children, and specifically the decision of the trial court to allow expert testimony by a professional counselor who had seen the parties individually and as a couple. Philip cross-appeals the trial court's decisions concerning property division, the calculation of the parties' child support obligations, and the award of alimony to Linda. We affirm as modified.

I. FACTS

Linda and Philip were married June 23, 1973. At the time of the marriage, Linda was in the middle of her 1-year training program to become a cytotechnologist, an assistant who aids a pathologist in the examination of body fluids for medical diagnosis. After the marriage, Linda worked full time as a cytotechnologist while Philip went to law school. When the parties moved to Scottsbluff, Nebraska, in 1977, Linda switched from full-time to part-time work as a cytotechnologist.

A petition for dissolution of the marriage was filed June 1, 1992, and trial was held September 30. At the time of the trial, the parties had three children: Brian, born April 13, 1977; Kevin, born February 25, 1979; and Adam, born December 4, 1981. Both Linda and Philip testified to their desire and fitness for custody of the children. The evidence shows that both parties are loving, caring parents who are actively involved in the raising of the children.

During in camera proceedings, Brian expressed a preference for living with his father, while Kevin and Adam said they would prefer to live with their mother. However, the boys' in camera testimony clearly reflected mixed emotions about their parents and the impending breakup of the family. The boys were unanimous in their belief that their mother would be leaving Scottsbluff. Brian expressed a strong desire to remain in Scottsbluff. Adam expressed regret at the prospect of having to leave Scottsbluff. Kevin did not express an inclination on that subject.

Philip called two witnesses besides himself to testify on his behalf. One was Jan Poole, a longtime acquaintance of the Kelly family. The other was Anne Talbot, a licensed registered nurse who described herself as a practicing psychotherapist nurse with a master's degree in mental health nursing. Talbot testified that she was certified as a guidance counselor in Nebraska and as an advanced practitioner of nursing by the American Nurses Association. Linda and Philip had participated in individual and joint counseling sessions with Talbot in an effort to deal with problems in their marriage.

Before Talbot testified, Linda's attorney objected on

grounds of physician-patient privilege to the disclosure by Talbot of any information regarding Linda. Although Talbot would not have qualified as a physician under Neb. Rev. Stat. 27-504 (Cum. Supp. 1992), the statute in force at the time of the trial, we note that Talbot would have been bound by Neb. Rev. Stat. § 71-1,274 (Reissue 1990), which prohibits a professional counselor from disclosing confidential information about a client that is derived from professional consultation.

The court ruled that Philip's attorney would be allowed to lay foundation for Talbot before the court would rule on whether Talbot would be permitted to give substantive testimony. After eliciting testimony from Talbot about her professional credentials and experience in counseling, Philip's attorney asked the court whether the questioning could move into substantive matters. Citing *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985), for support, the court ruled that Talbot could testify only to matters relating to the joint sessions in which Linda and Philip met with Talbot as a couple. Shortly after Talbot began her substantive testimony, Linda's attorney raised a continuing objection on grounds of foundation, which was granted.

Despite the condition set down by the court, the record clearly shows that Talbot relied on both individual and joint sessions as she related background information on Linda and proffered expert opinions on Linda's fitness as a parent. Near the end of her direct examination; Talbot was asked for her opinion "to a reasonable medical certainty" as to which party would be a better single parent for the children. Talbot responded that Philip would be the better single parent.

The dissolution decree was entered October 14, 1992. The court found both parties fit for custody, but awarded custody to Philip because the court believed that Philip would be better able to maximize the potential of the children. Linda was not ordered to pay child support, but was instructed to notify the court when she obtained employment so that the matter of child support could be reevaluated. The court ordered Philip to pay alimony in the amount of $1,500 per month for 120 months.

Both parties filed motions for new trial on various grounds. The trial court denied both parties' motions for new trial. The

parties' assignments of error to this court are essentially restatements of their arguments for a new trial in the lower court, so we will address the pertinent allegations in the motions for new trial in the analysis section below.

II. ASSIGNMENTS OF ERROR

1. LINDA'S APPEAL

Linda's assignments of error concern generally the matter of custody. Regarding the testimony of Talbot, Linda argues that the trial court erred in allowing Talbot to testify over Linda's objection based on her privilege to prevent the dissemination of confidential information by a professional counselor pursuant to § 71-1,274, in allowing Talbot to give improper opinion testimony, and in allowing Talbot to give opinions and recommendations based on information derived from individual and joint counseling sessions with Linda and Philip. Linda also assigns as error the trial court's refusal to order a new trial based on either of two grounds: newly discovered evidence or ineffective assistance of counsel.

2. PHILIP'S CROSS-APPEAL

Philip's assignments of error deal with property division and alimony. Philip argues that the trial court erred in calculating his net assets because the court refused to consider as a liability a promissory note payable to Philip's father and signed by Philip. Philip also argues that the court erred in refusing to set aside to him 75 percent of his corporate stock in his law firm, which stock Philip claims he purchased with the inheritance he received from his mother. Regarding alimony, Philip argues that the trial court erred in refusing to include the alimony awarded to Linda as income to Linda in the calculation of her child support obligation. Philip also argues that the court erred in awarding Linda alimony of $1,500 per month for 120 months.

III. STANDARD OF REVIEW

In appeals involving actions for dissolution of marriage, the appellate court's review is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of

discretion. When the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992).

Child custody determinations are matters initially entrusted to the discretion of the trial court and, on appeal, although the appellate court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion, keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992).

The ultimate test in determining the appropriateness of an award involving custody of minor children is reasonableness, as determined by the facts of each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Kroenke v. Kroenke*, 239 Neb. 699, 477 N.W.2d 583 (1991).

[1] On appellate review of a motion for new trial pursuant to Neb. Rev. Stat. § 25-1142(7) (Reissue 1989), the judgment of the trial court overruling the motion will not be disturbed absent an abuse of discretion. See *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991).

IV. ANALYSIS

1. Linda's Appeal

(a) Talbot's Testimony

In her assignments of error regarding Talbot's testimony, Linda raises several issues concerning the admissibility of the testimony of Talbot. We do not address them because resolution of those issues would not affect the result in this appeal.

[2] On de novo review in this court, incompetent, irrelevant, and immaterial evidence offered in the original trial, which was admitted over proper objections by the adverse party, will be disregarded. *Stecker v. Stecker*, 197 Neb. 164, 247 N.W.2d 622 (1976). We decline to address the arguments pertaining to Talbot's testimony because even if we find that some or all of

Talbot's testimony was inadmissible and excise it from the record on de novo review, the record still contains evidence sufficient to support the decision to grant custody to Philip. The trial court found both parties fit to have custody, but decided that Philip could better maximize the potential of the children. Considering on de novo review all of the evidence except Talbot's testimony, and considering that the trial judge observed and heard the witnesses, we cannot say that the decision to grant custody to Philip was clearly untenable. Therefore, we find no abuse of discretion in the decision to grant custody to Philip.

(b) Newly Discovered Evidence

[3] In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his or her counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. See *Kocarnik v. Kocarnik*, 209 Neb. 454, 308 N.W.2d 352 (1981).

Soon after entry of the dissolution decree on October 14, 1992, the parties figuratively commenced lobbing grenades at each other in the form of affidavits.

In support of her motion for new trial based on newly discovered evidence pursuant to § 25-1142(7), Linda filed a series of affidavits executed by persons acquainted with the Kelly family. Linda's posttrial attorney (not her trial counsel) also executed an affidavit. The gist of the affidavits executed by the acquaintances of the Kelly family was that Philip had physically abused the boys on past occasions and had carried on an extramarital affair with a former female client. A collection of so-called love letters between Philip and his alleged paramour were delivered into Linda's possession. The record is unclear as to how these letters were discovered. Linda argued that the information in the affidavits constituted newly discovered evidence because she had been unaware of the

incidents of abuse and of the affair until the affiants who had knowledge of the alleged events contacted her after entry of the decree.

Philip countered with affidavits executed by himself, other family members, and the woman with whom he allegedly had the affair. The affidavits filed by Philip refuted the allegations of abuse and infidelity contained in the affidavits filed by Linda.

In considering the motion for new trial, the trial court was presented with a conflict in the evidence, the resolution of which depended entirely on the trial court's evaluation of the credibility of the affiants and their allegations. The court had observed several of the affiants as trial witnesses. Therefore, the court was in a much better position than we are on appellate review to evaluate the credibility of the affiants and their allegations.

We cannot disturb the trial court's judgment overruling the motion for new trial unless we find that judgment clearly untenable. See *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991). The trial court had to sort through a flurry of emotionally charged accusations and denials that were supported by nothing other than the statements of the affiants. On the record before us, it is impossible for us to find clearly untenable the trial court's determination that the allegations in the posttrial affidavits did not constitute newly discovered evidence sufficient to justify a new trial. Therefore, we affirm the order overruling the motion for new trial.

(c) Ineffective Assistance of Counsel

[4] The claim of ineffective assistance of counsel is not included among the causes set out in § 25-1142 as grounds for granting a new trial in a civil action. Our research yields no Nebraska cases in which ineffective assistance of counsel was considered proper grounds for granting a new trial in a civil action. We conclude that in Nebraska, the claim of ineffective assistance of counsel is one reserved for a defendant in a criminal action. We do not ignore Linda's argument in her brief that in a case of this nature, a lawsuit for malpractice—the usual remedy for one dissatisfied with counsel's performance in

a civil action—will not accomplish her goal of recovering custody of the children. However, without Nebraska statutory or case law authority to do so, we decline to recognize the claim of ineffective assistance of counsel as proper grounds for granting a new trial in a civil action.

Although we do not address this assignment of error on the merits, we note that the trial court made a specific finding that there was no lack of skill on the part of Linda's counsel which would require a new trial.

2. Philip's Cross-Appeal

(a) Promissory Note Payable to Philip's Father

The record includes a promissory note for $5,000 signed by Philip and payable to Philip's father. Philip claims that the note covers a $5,000 loan from his father that was used to reduce the first mortgage on the parties' house. Philip insisted at trial that the note was an obligation similar to any other type of debt. However, Philip acknowledged at trial that in the nearly 6 years since the execution of the note in November 1986, he had not made any interest or principal payments on the note. According to the terms of the note, any outstanding balance and accumulated interest on the note at the time of the father's death would be subtracted from Philip's share of his father's estate. Having reviewed the note and the evidence pertaining to it, we find no error by the trial court in deciding not to consider the note as one of Philip's debts for purposes of dividing the marital estate.

(b) Stock Allegedly Purchased With Inheritance

Philip argues that 75 percent of his corporate stock in the law firm should have been set aside to him as an inheritance because he used his inheritance from his mother to purchase the stock. Philip's testimony is the only evidence in the record to support this assignment of error. There is no documentation of the alleged use of the inheritance to purchase the stock. Absent any proof in addition to Philip's testimony, we find no error in the trial court's determination that the funds from the inheritance were commingled in the marital estate. Therefore, we find no error in the court's refusal to set aside to Philip 75 percent of the stock.

(c) Relation of Alimony to Child Support

Philip asserts that alimony must be included in the income of the receiving party for purposes of calculating both parties' child support obligations, but paragraph M of the Nebraska Child Support Guidelines states: "**Alimony.** These guidelines intend that spousal support be determined from income available to the parties after child support has been established." Philip argues that paragraph M applies only to cases in which a noncustodial parent pays child support and alimony to a custodial parent. We reject this interpretation.

We find nothing in paragraph M or in the child support guidelines as a whole to support Philip's assertion that the relationship between child support and alimony changes depending upon which party, if either, is ordered to pay alimony. The clear language of paragraph M states that child support obligations are to be calculated prior to the calculation of alimony. Obviously, in filling out the child support worksheet, a party cannot factor alimony into income if alimony has not yet been determined. There is no deduction allowed in the child support worksheet for the party paying alimony, which one would expect if the other party is required to acknowledge alimony as income.

[5,6] We conclude that pursuant to paragraph M of the child support guidelines, alimony is to be calculated subsequently to the calculation of child support obligations. Therefore, we hold that alimony paid to the noncustodial parent by the custodial parent is not income for purposes of calculating the child support obligation of the noncustodial parent. Consequently, we find no error in the trial court's decision to exclude alimony from Linda's income in the calculation of her child support obligation.

(d) Alimony Award

Philip argues that the alimony awarded to Linda was excessive and too long in duration. We agree.

[7-9] "The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances . . . make it appropriate." Neb. Rev. Stat. § 42-365 (Reissue 1988). Among the factors to be considered in an award of alimony is "the ability of the

supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." *Id.* Alimony is not to be used simply to equalize the income of the parties, but to assist the economically disadvantaged party during a period of unavailability for employment or training for employment. See *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992). Nebraska statutes and case law clearly indicate that alimony is a means of helping the economically disadvantaged party get through the period of transition after the divorce, until that party becomes self-sufficient, remarries, or dies.

The record indicates that at the time of trial, the parties and the trial court were aware that Linda was a trained cytotechnologist considering a job offer in Denver at an annual salary in the $38,000- to $40,000-range. Linda testified that she was "very, very skilled" in her field. There seemed to be little doubt that Linda would be able to secure employment as a cytotechnologist relatively soon after the divorce. There would be no training interval for her. Linda was ready to go to work immediately, and her commencement of work would not interfere with the interests of the children, since they would be in Philip's custody. When we consider that the purpose of alimony is to provide financial support until a party is able to develop his or her earning capacity, we can find no justification in the record for awarding Linda alimony of $180,000, payable at $1,500 per month for 10 years. An award ordering alimony payments for a reasonable period of time, long enough to allow Linda to rejoin the work force and reorganize her life, would have been justifiable, but not the unconditional 10-year award ordered by the trial court.

V. CONCLUSION

We conclude from the record that Linda will have reached the point of self-sufficiency contemplated by the statutes and case law on alimony long before the termination of Philip's alimony payments in October 2002. On the facts of this case, we believe a reasonable period of alimony to be 60 months. Therefore, we modify the award of alimony to Linda by ordering Philip to pay alimony of $1,500 per month for 24

months, then $1,000 per month for 36 months.

Linda's motion asking that Philip be ordered to pay attorney fees is denied. Both parties are to pay their own costs.

AFFIRMED AS MODIFIED.

BEVERLY ENTERPRISES - NEBRASKA, INC., DOING BUSINESS AS COLUMBUS MANOR, APPELLEE, V. COLUMBUS HEALTH CARE, INC., DOING BUSINESS AS CAMBRIDGE COURT CARE CENTER, A NEBRASKA CORPORATION, APPELLANT, AND CITY OF GENOA, DOING BUSINESS AS COUNTRY VIEW CARE VILLAGE, ET AL., APPELLEES.
COLUMBUS HEALTH CARE, INC., DOING BUSINESS AS CAMBRIDGE COURT CARE CENTER, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH ET AL., APPELLEES.

510 N.W.2d 569

Filed December 28, 1993. No. A-92-359.

1. **Administrative Law: Appeal and Error.** When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, that court's review is to be conducted without a jury de novo on the record of the agency.
2. _____: _____. An aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals.
3. _____: _____. When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the appeal shall be taken in the manner provided by law for appeals in civil cases. The judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
4. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. **Administrative Law: Public Health and Welfare.** The consideration of an application for a certificate of need is governed by three authorities: (1) the Nebraska Health Care Certificate of Need Act, encompassed in Neb. Rev. Stat. §§ 71-5801 through 71-5872 (Reissue 1990 & Cum. Supp. 1992); (2) Department of Health regulations promulgated under the act, 182 Neb. Admin. Code, ch. 2, §§ 005 through 006 (1983); and (3) the Nebraska State Health Plan 1986-1991 (Neb. Dept. of Health 1986).

6. **Administrative Law: Public Health and Welfare: Proof.** An applicant for a certificate of need bears the burden of demonstrating in its application that the proposal satisfies all of the review criteria in the Department of Health regulations which are appropriate and significant to the proposal.
7. **Administrative Law: Public Health and Welfare: Proof: Appeal and Error.** In an appeal of a decision to deny a certificate of need, the person requesting the appeal shall bear the burden of proving that the project meets the applicable criteria. In an appeal of a decision to grant a certificate of need, the person appealing that decision shall bear the burden of proof that the application does not meet the applicable criteria.

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

Robert L. Lepp, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellant.

Joseph E. Casson and David C. Beck, of Proskauer, Rose, Goetz & Mendelsohn, and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellee Beverly Enterprises - Nebraska.

Don Stenberg, Attorney General, and Linda L. Willard for appellee Nebraska Department of Health.

Dwayne Smith for amicus curiae Columbus Economic Council.

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

This case arises from an appeal of the orders of the district court for Lancaster County in two consolidated cases involving the issuance of a certificate of need (CON) to nursing homes in the Columbus area. Columbus Health Care, Inc., doing business as Cambridge Court Care Center (Cambridge), appeals the court's orders which (1) affirmed the decision of the Certificate of Need Review Committee (Review Committee) to grant a CON to Beverly Enterprises - Nebraska, Inc., doing business as Columbus Manor (Beverly), and (2) reversed the decision of the Review Committee to grant a CON to Cambridge. For the reasons recited below, we affirm the orders of the district court.

ASSIGNMENTS OF ERROR

Cambridge alleges that the trial court erred in reversing the Review Committee's decision in favor of Cambridge by its finding that Cambridge's proposed project did not comply with the Nebraska State Health Plan 1986-1991 (Neb. Dept. of Health 1986), was not the least costly or most effective alternative, and did not meet the needs of the medically underserved. Cambridge also alleges that the court erred in finding that Cambridge was not entitled to judicial review of the Beverly decision because Cambridge is not a "person aggrieved" as defined under the Administrative Procedure Act.

STANDARD OF REVIEW

[1-3] When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, that court's review is to be conducted without a jury de novo on the record of the agency. Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992).

> (1) An aggrieved party may secure a review of any judgment rendered or final order made by the district court under the Administrative Procedure Act by appeal to the Court of Appeals.
>
> . . . .
>
> (3) When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the appeal shall be taken in the manner provided by law for appeals in civil cases. The judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.

Neb. Rev. Stat. § 84-918 (Cum. Supp. 1992).

[4] An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993).

BACKGROUND

Beverly and Cambridge both filed applications for CON's with the Nebraska Department of Health (Department) in December 1990. The City of Genoa, doing business as Country

View Care Village (Genoa), also filed an application for a CON at this same time. All projects are located within the state's "Region 10" health planning area.

Cambridge proposed to construct a new 60-bed long-term-care facility in Columbus. Cambridge's facility would consist of 32 private and 14 semiprivate rooms and a child day-care center. The facility would cost an estimated $2.2 million and would provide skilled nursing care for the elderly in Columbus.

In its application, Beverly sought to remodel its existing Columbus facility, which was licensed for 142 beds. Beverly's facility, approximately 25 years old, was operating only 136 beds, due in part to outdated 6-bed and 4-bed wards. Beverly proposed to renovate and expand the facility to provide an additional 20 beds at a cost of approximately $1.2 million or greater.

After review of the applications, the Department made extensive findings and rendered three separate opinions, approving Beverly's application and denying the applications of Cambridge and Genoa. Cambridge and Genoa appealed to the Review Committee regarding the denial of their applications and the grant of Beverly's application.

At a public hearing on May 7 and 8, 1991, each of the three applicants submitted evidence in support of its project. Beverly also submitted evidence in opposition to the Cambridge project. Witnesses testifying at the hearing included Jack Vetter, corporate owner, with his wife, of Cambridge; Bernard Dana, executive vice president of Vetter's corporation; Garold Ulmer, an expert in nursing home construction; Jack Lavelle, administrator of Beverly; Tom Boerboom, vice president of operations for Beverly Enterprises at the national level; and Stephen Frederick, a state health planner.

A copy of the Department's "Findings, Conclusions, and Decision" regarding each application was also received in evidence by the Review Committee. After a comparative review, the Review Committee granted CON's to Beverly and Cambridge. Beverly filed an appeal in the district court, requesting that the court reverse the Review Committee's decision which granted a CON to Cambridge. In response,

Cambridge also filed an appeal in the district court, requesting that the court reverse the Review Committee's decision granting a CON to Beverly.

The district court reversed the decision of the Review Committee granting a CON to Cambridge. The court found that the evidence before the Review Committee indicated that Cambridge's project did not meet all the criteria of the Department's regulations because it did not meet the needs of the medically underserved, did not comply with the state health plan, and was not the least costly nor most effective alternative for delivery of health care services to Region 10.

The court affirmed the decision of the Review Committee granting a CON to Beverly. The court stated that Cambridge was not entitled to judicial review of the Beverly decision because Cambridge was not a "person aggrieved" as contemplated by § 84-917(1). Notwithstanding its conclusion that Cambridge was not a person aggrieved, the court proceeded to the merits and found that Cambridge failed to sustain its burden to show that the Review Committee's grant of a CON to Beverly should be overturned.

ANALYSIS

Neb. Rev. Stat. § 71-5830(7) (Cum. Supp. 1992) required that a CON be obtained prior to "[a]ny capital expenditure or obligation incurred by or on behalf of a health care facility in excess of the capital expenditure minimum made . . . [i]n preparation for the offering or developing of a new institutional health service, [or] in preparation for initiating a substantial change in an existing health service . . . ." Minimum capital expenditure is defined in Neb. Rev. Stat. § 71-5805.01 (Reissue 1990) as a "base amount of one million two hundred thousand dollars . . . ." Because the cost of each of the proposed projects of Beverly and Cambridge was anticipated to exceed $1.2 million, a CON was required for both projects.

The Nebraska Legislature has declared that the purpose of the Nebraska Health Care Certificate of Need Act is

> to conserve the limited health care resources of personnel and health care facilities in order to provide quality health care to all citizens of the state, to minimize unnecessary

> duplication of facilities and services, to encourage development of appropriate alternative methods of delivering health care, to promote wherever appropriate a more competitive health care delivery system, to encourage the provision of high-quality health care which is available and accessible to all citizens of the state, and to maximize the effectiveness of expenditures made for health care.

Neb. Rev. Stat. § 71-5802 (Reissue 1990).

[5] The consideration of an application for a CON is governed by three authorities: (1) the Nebraska Health Care Certificate of Need Act, encompassed in Neb. Rev. Stat. §§ 71-5801 through 71-5872 (Reissue 1990 & Cum. Supp. 1992); (2) Department regulations promulgated under the act, 182 Neb. Admin. Code, ch. 2, §§ 005 through 006 (1983); and (3) the state health plan. *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986).

[6,7] "[T]he applicant bears the burden of demonstrating in its application that the proposal satisfies all of the review criteria in [the Department] regulations which are appropriate and significant to the proposal." 182 Neb. Admin. Code, *supra* at § 003.02C. However,

> [i]n an appeal of a decision to deny a [CON], the person requesting the appeal shall bear the burden of proving that the project meets the applicable criteria . . . . In an appeal of a decision to grant a [CON], the person appealing that decision shall bear the burden of proof that the application does not meet the applicable criteria.

§ 71-5865.

The decision of an appeal board of the Nebraska Certificate of Need Appeal Panel is the final determination of the Department. *Department of Health v. Lutheran Hosp. & Homes Soc.*, 227 Neb. 116, 416 N.W.2d 222 (1987). The decision of the Review Committee is subject to judicial review as provided in §§ 84-917 and 84-918 and in Neb. Rev. Stat. § 84-919 (Cum. Supp. 1992). § 71-5866. Specifically, § 84-917(5)(a) provides that "[w]hen the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the review shall be conducted by the court without

a jury de novo on the record of the agency."

On appeal, the parties devote considerable attention to the issue of the proper standard of review to be applied by the district court. The petitions were filed in district court on July 18, 1991, and are controlled by the statutory standard applicable to petitions filed after July 1, 1989; i.e., the district court's review shall be de novo on the record. § 84-917(5)(a). In its orders of March 27, 1992, the district court relied on several Nebraska Supreme Court cases decided between 1976 and 1979 and concluded that "the appropriate standard of review for this court under its de novo review of an order granting or denying a Certificate of Need is a determination of whether the order was supported by substantial evidence . . . ." We do not agree with the district court's articulation of the applicable standard of review.

In a series of cases prior to 1989, the Supreme Court held that its de novo review of agency decisions under then-applicable legislation was de novo for substantial evidence. E.g., *Herink v. State ex rel. State Real Estate Commission*, 198 Neb. 241, 252 N.W.2d 172 (1977); *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973). Upon "reexamining the statutory scheme for judicial review of an administrative agency's decision" in 1985, the Supreme Court concluded that its review should be "de novo on the record" and that pronouncements inconsistent therewith such "as exemplified by *The 20's, Inc. v. Nebraska Liquor Control Commission* . . . are overruled." *Haeffner v. State*, 220 Neb. 560, 566, 371 N.W.2d 658, 662 (1985). See, also, *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 420 N.W.2d 314 (1988). The first concurrence in *Haeffner* makes clear that "[a] de novo review by [the Supreme Court] necessarily includes finding and weighing facts anew." 220 Neb. at 568, 371 N.W.2d at 663.

In 1989, the Nebraska Legislature passed 1989 Neb. Laws, L.B. 213, which, in part, created § 84-917(5)(a) and which directs the district court to review the appeal de novo on the record. As noted in Beverly's brief and confirmed by review of the legislative history, the introducer of L.B. 213 observed:

Under current law [pre-1989 amendment], the district

> court which first reviews an agency decision on appeal applies the narrow criteria found in section 84-917. On appeal to the Supreme Court under current section 84-918, the Supreme Court reviews the district court's judgement de novo on the record, *which is a much broader standard of review.* LB 213 would place the broader standard of review (de novo on the record) in the district court, and then a narrower standard of review in the Supreme Court will be applied (errors appearing on the record). This change would take place with appeals filed in the district court on or after July 1, 1989.

(Emphasis supplied.) Statement of Intent, L.B. 213, Committee on Government, Military, and Veterans' Affairs, 91st Leg., 1st Sess. (Feb. 23, 1989).

Based on the foregoing, we conclude that the district court's standard of review in the instant case, in which the petitions were filed July 18, 1991, was de novo on the record and that its articulation of its standard as de novo for substantial evidence was incorrect. However, it is apparent from its 13-page orders of March 27, 1992, and its subsequent orders of April 21, that the district court weighed evidence and made findings as it was required to do under the proper standard of review. Accordingly, we find no error with respect to the standard of review which the district court actually undertook in its examination of the appeals from the Review Committee.

CON for Cambridge's Project.

In its orders, the district court adopted the findings of the Department, which, as the initial body evaluating the applications, had found that Cambridge had failed to meet eight of the criteria required by the regulations to be met before a project is approved. The court specifically noted that the Cambridge project did not meet the needs of the medically underserved, that it did not comply with the state health plan, and that it was neither the least costly nor the most effective alternative for delivery of health care services to Region 10.

The regulations state that "[t]he proposed project must provide access for and contribute to meeting the health-related needs of medically underserved groups in its service area,

particularly low-income persons . . . and the elderly." 182 Neb. Admin. Code, *supra* at § 005.02E3. This regulation was promulgated in response to § 71-5853(1), which mandates that the Department, inter alia,

> by rules and regulations, provide criteria for:
>
> (1) The need that the population served or to be served by the services has for the services, and the extent to which all residents of the area, and in particular low-income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups, and the elderly, are likely to have access to those services . . . .

At the hearing before the Review Committee, Jack Vetter, co-owner of the for-profit corporation proposing to build the Cambridge project, testified that Cambridge would not be medicaid certified. He stated that despite the fact that 50 to 60 percent of the nursing home population in Nebraska is covered by the medicaid program, Cambridge intended to target only the "private-pay" portion of the population and would screen the financial condition of prospective residents to ensure their ability to pay. He acknowledged that in doing so, the proposed facility could dilute the private-pay census at surrounding facilities, resulting in their increased reliance on the lower medicaid rates of payment for their remaining residents.

Subdivision (3) of § 71-5853 mandates that the department provide criteria for the following:

> The contribution of the proposed service in meeting the health-related needs of medically underserved groups, including consideration of the following with respect to the facility as a whole:
>
> (a) The extent to which medically underserved populations currently use the applicant's services in comparison to the percentage of the population in the applicant's service area which is medically underserved, and the extent to which medically underserved populations are expected to use the proposed services if approved;
>
> . . . .
>
> (c) The extent to which medicare, medicaid, and medically indigent patients are served by the applicant.

> Failure to meet the criteria promulgated pursuant to *this subdivision* shall not require the disapproval of any application.

(Emphasis supplied.)

On appeal to this court, Cambridge correctly points out that failure to meet the criterion relating to "[t]he extent to which medicare, medicaid, and medically indigent patients are served by the applicant" does not require disapproval of an application. Nonetheless, such a factor is relevant to the decision to approve a CON. Furthermore, the qualifying sentence relating to "this subdivision" pertains only to subdivision (3) of § 71-5853. It does not pertain to subdivision (1), which directs that departmental regulations include criteria relating to the need that the relevant population has for the services and the extent to which all residents of the area, *particularly underserved groups, including low-income persons*, and the elderly, are likely to have access to those services.

Because there is competent evidence to support the factual findings of the district court, we will not substitute our judgment for those findings.

The regulations provide:

> The applicant must demonstrate that the proposed project is the least costly of the alternatives for meeting the need established under part 005.01A above, or if it is not the least costly, that it is the most effective alternative for meeting such need. In determining which alternative is the least costly, consideration shall include (but without limitation to) the following: the total cost of the project; charges to all consumers and payers, including government reimbursement programs; the effect of the proposed means of financing on consumers and payers considered as a whole; and, in the case of construction projects (including remodeling), the design, methods, and materials of construction and the long-term energy costs for the project. The most effective alternative is the alternative which makes high-quality health care available and accessible to the greatest number of people in need of the services established as needed under part 005.01A

> above, maximizes the effectiveness of expenditures made for health care, minimizes unnecessary duplication of facilities and services, encourages development of appropriate alternative methods of delivering health care, and promotes wherever appropriate a more competitive health care delivery system.

182 Neb. Admin. Code, *supra* at § 005.02A2.

Evidence was presented that the Cambridge project was the most expensive project, both in terms of total outlay and in terms of per-bed costs. There was evidence that the proposed facility would not be available or accessible to the greatest number of people in need of services. This evidence was competent to support the district court's findings that the Cambridge project failed to meet the criteria as set out in § 005.02A2.

CON for Beverly's Project.

The district court found that Cambridge was not a person aggrieved under § 84-917(1) because Cambridge's Jack Vetter had conceded at the hearing before the Review Committee that he was not opposed to Beverly's project. Cambridge argues that it is entitled to judicial review as an "affected person" as set forth in the Nebraska Health Care Certificate of Need Act in § 71-5823, which reads in relevant part as follows: "Affected persons shall include . . . health care facilities . . . which prior to the submission of the application for a certificate of need have formally indicated an intention to provide such similar services in the future, either through adopting a plan or filing a letter of intent . . . ."

In addition, "[t]he findings, conclusions, and decisions resulting from the hearing shall constitute the determinations of the department, except that the department, the applicant, or any affected person who has intervened in the matter before the review committee may seek judicial review as provided in sections 84-917 to 84-919." § 71-5866. Section 84-919, in turn, provides that the Administrative Procedure Act is the exclusive means of judicial review of an agency decision, *except as otherwise provided by law*. Therefore, even if Cambridge was not a person aggrieved as defined in § 84-917(1), an issue we

need not decide, it is entitled to judicial review of the actions of the Review Committee as provided by the Nebraska Health Care Certificate of Need Act because it is an affected person that had intervened in the matter before the Review Committee.

The district court also found that Cambridge failed to sustain its burden of showing that the Review Committee's decision to grant a CON to Beverly should be overturned. The court stated that there was substantial evidence that Beverly met all the criteria under the regulations. In addition, essentially no evidence opposing Beverly's CON application was presented at the Review Committee's hearing. Cambridge, even on appeal to this court, objects to Beverly's project only if Cambridge's project is not approved. The district court correctly affirmed the grant of a CON to Beverly.

We affirm the judgments of the district court which reversed the granting of a CON to Cambridge and affirmed the granting of a CON to Beverly.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PHILIP FAHLK, APPELLANT.

510 N.W.2d 97

Filed December 28, 1993. No. A-92-1180.

1. **Theft: Intent.** A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.
2. **Trial: Witnesses: Appeal and Error.** Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness.
3. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
4. _____: _____. There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is in issue, that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading

and controlled by the substantive law. The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. A fact that is of consequence is material, and evidence that affects the probability that a fact is as a party claims it to be has probative force. Such evidence often is said to have logical relevance, while evidence lacking in probative value may be condemned as remote or speculative.

5. **Trial: Evidence.** Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.
6. **Trial: Rules of Evidence.** The claim of a privilege is not a proper subject of comment by judge or counsel.
7. **Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, he or she must timely assert the right to a mistrial.
8. **Trial: Motions for Mistrial: Waiver.** When there occurs in the course of trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should have known of the prejudicial occurrence constitutes a waiver of the objection.
9. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** The general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
10. **Trial: Prosecuting Attorneys: Motions for Mistrial: Proof: Appeal and Error.** 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. Similar standards are applicable where one seeks a new trial by raising on appeal the issue of prosecutorial misconduct. If there is some incorrect conduct in a jury trial which, on review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the defendant, the error is harmless.
11. **Trial: Rules of Evidence: Witnesses.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his or her credibility, other than conviction of crime as provided in Neb. Rev. Stat. § 27-609 (Reissue 1989), may not be proved by extrinsic evidence.
12. **Trial: Rules of Evidence.** The trial judge is granted discretion in connection with the conduct of the trial.
13. **Criminal Law: Circumstantial Evidence: Evidence: Appeal and Error.** In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor.
14. **Criminal Law: Intent.** A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this

section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

15. **Criminal Law: Evidence: Intent.** A person commits the offense of tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he knowingly makes, presents, or offers any false physical evidence with intent that it be introduced in the pending or prospective official proceeding.

Appeal from the District Court for Otoe County: GEORGE A. THOMPSON, Judge. Affirmed.

David A. Domina and Denise E. Frost, of Domina & Copple, P.C., for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Philip Fahlk appeals his jury convictions of theft by unlawful taking and of obstructing government operations. For the reasons recited below, we affirm the judgment of the district court for Otoe County.

FACTS

The record reflects that Fahlk was employed as the superintendent of the Nebraska City public schools beginning July 1, 1991. Fahlk found that his immediate duties included the negotiation of teacher contracts for the 1991-92 school year and the preparation of the yearly budget for the Nebraska City public schools. Fahlk testified that when he began his work, there was no computer equipment available to him. Fahlk brought his own ImageWriter printer to work with him and borrowed an Apple IIc computer from an elementary school. The school district later borrowed computer equipment from an office equipment store for Fahlk's use, including an ImageWriter II printer.

On August 22, 1991, the school district received a shipment of three new ImageWriter II printers intended for use at the

senior high school. The printers, valued at $398.90 each, were delivered to the building in which Fahlk's office was located. Jodi Rathe, an administrative assistant and bookkeeper for the school district, testified that she signed an invoice to acknowledge delivery of the printers. She stated that three large boxes containing the printers were placed in the kitchen area of the superintendent's building. When she arrived at work the next morning, only two boxes remained.

William Lambrecht, curriculum coordinator for the Nebraska City school system, testified that he arrived for work at the superintendent's building at 7 a.m. on August 23, 1991, at which time he noticed three computer boxes in the kitchen. He stated that when he returned to the kitchen at 7:20 a.m., he saw only two computer boxes. Lambrecht testified that Fahlk was in the kitchen at that time.

Lambrecht and Rathe conducted a search for the missing printer in the kitchen area. Rathe then inquired among other employees of the building to determine whether anyone had borrowed the printer. Because Fahlk was attending a breakfast meeting at another building, Rathe left a note on Fahlk's desk explaining the situation with the printer and asking if Fahlk had any knowledge of the printer's whereabouts. Fahlk returned from the meeting before noon, but he did not respond to the note. Rathe testified that she obtained the serial numbers of the three printers, determined which one was missing, and asked Fahlk if he knew of anyone who might have the printer. Rathe said that Fahlk indicated that he remembered seeing three printers in the kitchen area when he came to work that morning but that he had no knowledge of who might have taken the missing printer.

Rathe stated that when she spoke to Fahlk, she had a piece of paper with the three serial numbers written on it. Rathe explained to Fahlk that she had placed a checkmark next to two of the numbers, while the third number, corresponding to the missing printer, had no checkmark next to it. Fahlk agreed with Rathe's suggestion to call the police, apparently doing so when Rathe briefly left his office. Rathe testified that after Fahlk left the building to travel to Lincoln, she again reported the theft to the police "[j]ust to check." According to Rathe, she then

discovered that in reporting the theft, Fahlk had given the police a serial number which corresponded to one of the remaining printers. Vickie Rhoades, dispatcher for the Nebraska City Police Department, testified that Fahlk reported a missing printer with the serial number "TF1280337%" but that Rathe later called and reported the correct serial number, "TF1280FN%." At trial, Fahlk acknowledged that he had reported an incorrect serial number to the police, but stated that Rathe had advised him of the error and that he told her to call the police to give them the correct number.

In any event, shortly after Fahlk's call to the police, he traveled to Lincoln to deliver the school district's budget, as required, to the State Department of Education. Also on this date, Fahlk's daughter, Nicole, a freshman at the University of Nebraska at Lincoln, was moving into her dormitory. Fahlk testified that he brought with him to Lincoln his own ImageWriter printer, which he had been using at work, and set it up in his daughter's room. Fahlk's daughter testified that Fahlk did not bring a printer to her room on August 23, 1991, and that the only times Fahlk brought a printer to her room were in September 1991 and on April 5, 1992.

According to Fahlk, his own ImageWriter printer proved to be better suited to the programs he used in his work than was the school district's ImageWriter II printer. Fahlk testified that on September 18, 1991, he again traveled to Lincoln, installed the school district's ImageWriter II printer in his daughter's room, and brought back to his workplace his own ImageWriter printer.

On April 1, 1992, a UN-L police officer searched the dorm room of Fahlk's daughter and questioned her regarding her computer equipment. The following day, Terry Becker, an investigator for the Nebraska State Patrol, met with Fahlk in Fahlk's office. Becker stated that he asked Fahlk if Fahlk was aware of three computer printers which had been delivered on August 22, 1991, and that Fahlk had replied that there were multiple equipment deliveries made and that he did not take care of that sort of thing. Fahlk denied to Becker that he had reported a missing printer to the police. Becker testified Fahlk said that his daughter had possession of a printer belonging to

the school district and that Fahlk had not gotten permission to take the printer to his daughter because, as superintendent, he did not need permission to do so. Becker stated that Fahlk said that he had exchanged printers with his daughter because the school district's ImageWriter II printer was not compatible with the software program relating to teacher contract negotiations and that the exchange was not intended to be permanent.

Fahlk notified the board of education of Becker's visit and informed the members that he would exchange the printers. Fahlk exchanged the printers on April 5, 1992. At trial, Fahlk was unable to explain why the serial number was missing from the ImageWriter II printer after it was returned to the school district.

Becker again visited Fahlk on April 10, 1992. Becker testified that Fahlk then acknowledged that he had taken one of the printers delivered on August 22 and produced a signed checkout sheet for the printer. Becker testified that Fahlk said that he had unpacked the printer at his desk and then kept the printer under his desk in his office from August 23 until the switch with his daughter was made on September 18. Becker stated that Fahlk said that he was unaware that a search had been conducted for the missing printer. Becker testified that Fahlk said that when he was questioned by Rathe on August 23 regarding a missing printer, Fahlk had assumed that Rathe was referring to part of a group of equipment that had been stolen from the school district over the course of the summer.

Fahlk testified that he did not produce the signed checkout sheet during his first interview with Becker because Becker did not ask for it. Fahlk stated that the checkout sheet was in his office, where he was being interviewed by Becker regarding the printer, but that he never thought about showing it to Becker.

Lambrecht testified that in the fall of 1991 he was instructed by Fahlk to devise a computer checkout sheet. Lambrecht stated that the checkout sheet was approved by Fahlk and used by the school district until a new form was designed by Fahlk in May 1992. The checkout sheet which Fahlk gave to Becker on April 10, 1992, was different in form from either version used by the school district during the 1991-92 school year. Fahlk explained that the form he used to check out the ImageWriter II

printer was one that was in use only in his office. Connie Sackles, Fahlk's secretary, testified that she had never seen the file containing Fahlk's checkout sheet until May 1992.

At trial, Fahlk presented expert testimony that the ImageWriter printer was worth more than the ImageWriter II printer. However, the expert also stated that this was true, in part, because the ImageWriter printer cost more when it was new than the ImageWriter II printer does today. The owner's guide for the ImageWriter II printer indicates that it has an expanded memory capacity.

Fahlk was charged with theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1989), and with obstructing government operations, in violation of Neb. Rev. Stat. § 28-901 (Reissue 1989). In response to the State's pretrial motion in limine, the trial court prohibited Fahlk from eliciting testimony or presenting evidence to show that the board of education had either condoned or ratified any alleged criminal behavior on the part of Fahlk.

Fahlk was found guilty on both counts and was sentenced to 1 year of probation followed by 30 days in the Otoe County jail.

ANALYSIS

Testimony Regarding Intent.

[1] "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." § 28-511(1). The dispute in this case centers around Fahlk's intent with regard to the ImageWriter II printer.

On appeal, Fahlk argues that the trial court erred in refusing to give Fahlk the opportunity to present his own testimony regarding his lack of intent to permanently deprive the school district of the use or benefit of its ImageWriter II printer. Fahlk objects to the trial court's rulings with regard to the following examination at trial:

> [Fahlk's counsel:] Mr. Fahlk, when you took the school district's ImageWriter II printer to Lincoln and brought your own ImageWriter back here, was it your intention to keep the school district's property?
>
> [Fahlk:] No.

[Prosecutor]: Objected to as invading the province of the Jury, and move to strike.

THE COURT: Sustained.

Later, a similar exchange took place:

[Fahlk's counsel:] Did you steal anything from the Nebraska City School District?

[Fahlk:] No.

[Prosecutor]: Objected to as invading the province of the Jury, and move to strike.

THE COURT: Sustained.

In evaluating the trial court's rulings on the proffered testimony, we note that even if the trial court's rulings were erroneous, the substance of Fahlk's disputed testimony was subsequently placed before the jury. Asked if he had had a plan for exchanging the printers back again, Fahlk replied that "it was my intention that after negotiations for the 91-92 contract were completed, to take them back, to reexchange them." In addition, exhibit 28, Fahlk's letter to the board of education informing them of the exchange, was admitted into evidence. The letter explains that the exchange was not intended to be permanent, states that the exchange had never been a secret, and asks that the board of education authorize the continuation of the exchange.

[2] Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected. Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 1989). " ' "Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness." ' " *Rose v. City of Lincoln*, 234 Neb. 67, 77, 449 N.W.2d 522, 529 (1989). Because testimony to the same effect was allowed to be given by Fahlk, no substantial right of Fahlk's was affected. This assignment of error is without merit.

Exclusion of Nienkamp's Testimony.

Fahlk argues that the trial court erred in excluding, on relevancy grounds, the testimony of Ann Nienkamp, president of the Nebraska City Board of Education, regarding board authorization of Fahlk's use of the school district's property.

Fahlk made an offer of proof that if Nienkamp were allowed to testify, she would state that

> she and the board of education did in fact charge the defendant with the responsibility for completing budget work, teacher negotiations work, bond issue work, computer acquisition work, and school asbestos removal work in whatever means that he could accomplish those tasks with all due dispatch and that he was authorized and permitted to use his own equipment to accomplish those tasks and that the board of education neither voiced nor indicated an objection and indeed shared and communicated to the defendant a willingness to permit him to do so on terms that would allow the use of his equipment by the school district and equipment owned by the school district of lesser value and lesser utility by him or members of his family at that same time that the school district was using his equipment.

Following the offer of proof, Nienkamp stated, in an examination by the court outside of the jury's presence, that Fahlk had not informed her that he planned to take the ImageWriter II printer to his daughter in Lincoln, and that she had no knowledge of a checkout sheet signed by Fahlk on September 18, 1991. Also outside of the jury's presence, Nienkamp told the prosecutor that all of the board members present at a meeting with the Otoe County Attorney and a Nebraska State Patrol investigator stated that Fahlk had not been given permission to take the printer to Lincoln.

[3] "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. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).

[4,5] The Nebraska Supreme Court has noted:

> " 'There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is "in issue," that is,

> within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> " 'The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . . A fact that is "of consequence" is material, and evidence that affects the probability that a fact is as a party claims it to be has probative force. . . . Such evidence often is said to have "logical relevance," while evidence lacking in probative value may be condemned as "remote" or "speculative." ' " Quoting 1 McCormick on Evidence § 185 (John W. Strong 4th ed. 1992).
>
> Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. *State v. Dixon, supra*; *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

State v. Lowe, 244 Neb. 173, 177-78, 505 N.W.2d 662, 667 (1993).

Fahlk argues that he "could not have obstructed justice, or stolen the ImageWriter II printer if he believed at the time he checked it out that he had the permission of the Board of Education to take the printer!" Brief for appellant at 21. We believe that the existence of the board's permission, or the lack thereof, is not a fact of consequence in this case and is therefore not material evidence. The issue in this case was not whether Fahlk took the printer, but, rather, whether he took the printer with the intent to deprive the school district of its use. Furthermore, given the equivocal, and perhaps damaging, content of Nienkamp's proffered testimony, as explored by the court during the offer of proof, such evidence would not be probative of Fahlk's innocence. This assignment of error is without merit.

Prosecutorial Misconduct.

Fahlk argues that the trial court erred in allowing the State to

comment and speculate on the failure of Fahlk's wife to testify at the trial. Fahlk objects to the following comment made by the prosecutor in his rebuttal closing argument to the jury:

> Poor Nicole got to go home tonight, but she said [sic] up here and testified that her dad only came down there two times with printers; once after Labor Day — we all know when Labor Day is — and once on April 5. He didn't come down there on [August] 23rd. If he did, there was a third person who's there. You didn't hear from the third person, did you? It's Mrs. Fahlk.

The court overruled Fahlk's objection that the foregoing was an improper argument and denied his request that the court admonish the jury.

[6] Fahlk correctly observes that, except for certain circumstances not existing in this case, Nebraska law prohibits one spouse from testifying against the other in a criminal case unless both spouses consent to waive the privilege. See Neb. Evid. R. 505, Neb. Rev. Stat. § 27-505 (Reissue 1989). Furthermore, "[t]he claim of a privilege . . . is not a proper subject of comment by judge or counsel." Neb. Evid. R. 513, Neb. Rev. Stat. § 27-513 (Reissue 1989). Fahlk claims that a "negative, even fatal inference from the State's impermissible reference to Mrs. Fahlk's silence was simply unavoidable." Brief for appellant at 28.

[7,8] " 'When a party has knowledge during trial of irregularity or misconduct, he must timely assert his right to a mistrial.' " *State v. Morrow*, 237 Neb. 653, 661, 467 N.W.2d 63, 69 (1991).

> "[W]hen there occurs in the course of trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should have known of the prejudicial occurrence constitutes a waiver of the objection."

State v. Archbold, 217 Neb. 345, 353, 350 N.W.2d 500, 505 (1984). Although Fahlk objected to the statements of the prosecutor, he did not move for a mistrial. While we do not condone the remarks of the prosecutor, Fahlk's failure to move for a mistrial waives any error there may have been.

[9,10] Although Fahlk did not properly preserve the error regarding the prosecutor's remarks during closing arguments, we have examined the record for plain error to ensure that no miscarriage of justice was done. See *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). The Nebraska Court of Appeals has stated:

> "The general rule is that remarks made by the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial." *State v. Fraser*, 230 Neb. 157, 162-63, 430 N.W.2d 512, 515 (1988). Quoting from *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980), in *State v. Bradley*, 236 Neb. 371, 400, 461 N.W.2d 524, 544 (1990), the court said, " '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." ' . . . Similar standards are applicable where one seeks a new trial by raising on appeal the issue of prosecutorial misconduct. . . . [I]f there is some incorrect conduct in a jury trial which, on review of the entire record, did not materially influence the jury in its verdict adverse to a substantial right of the defendant, the error is harmless."

State v. Harker, 1 Neb. App. 438, 442-43, 498 N.W.2d 345, 348 (1993).

The jury in the case at bar was instructed that statements, arguments, and questions by the lawyers were not evidence to be considered by the jury. On review of the entire record, we cannot say that the prosecutor's remark misled or materially influenced the jury adverse to a substantial right of Fahlk's. See *id.*

Rebuttal Testimony.

Fahlk next asserts that the trial court erred in allowing improper rebuttal testimony from Rathe. On cross-examination, Fahlk denied making telephone calls to Rathe on October 6, 1992, a week before trial. Fahlk stated that he could not recall making calls to Rathe on that date at 3:28 p.m., 4:26 p.m., or 4:34 p.m.

Rathe was called by the State as a rebuttal witness at the end of the trial and was questioned about the telephone calls. She testified that she has a caller identification device attached to the telephone in her home, and she produced three photographs of the device which portrayed Fahlk's telephone number; the date, October 6, 1992; and the time of the calls, 3:28 p.m., 4:26 p.m., and 4:34 p.m. Fahlk's objections, on grounds of relevancy and improper rebuttal, were overruled. Fahlk refused the court's offer for surrebuttal made at this time. Both parties rested. Shortly thereafter, a conference was held outside the jury's presence. The trial court refused Fahlk's subsequent request to present testimony to rebut Rathe's rebuttal testimony. Fahlk's offer of proof stated that if Gene Mercer, a Nebraska City businessman, were permitted to testify, he would say that between 3 and 4:30 p.m. on October 6, 1992, Fahlk was not at his residence, but was with Mercer at Mercer's shop. Another gentleman, Dean Handy, would have testified similarly. Fahlk moved for a mistrial "based on the Court's rulings on admitting the rebuttal evidence, refusing to strike that evidence on the motion, and/or refusing to allow surrebuttal." The motion was denied.

[11] In the context of this trial, it is clear that Rathe's testimony was offered solely to attack Fahlk's credibility by showing that Fahlk's earlier denial of making calls to Rathe's phone number on the afternoon of October 6, 1992, was untrue. Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1989), states in relevant part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his [or her] credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence." Under this rule, Rathe's rebuttal testimony was improper. Rather than specifying a particular basis for exclusion of Rathe's testimony, Fahlk made a continuing objection thereto as irrelevant and improper rebuttal.

The Nebraska Supreme Court has recently stated:

> Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989), provides that an appellant claiming reversible error as the result of admission of evidence must have made "a timely objection . . . stating the specific

> ground of objection, if a specific ground was not apparent from the context. . . ." See, also, *Havlicek v. State*, 101 Neb. 782, 784, 165 N.W. 251 (1917) ("[i]t is the duty of counsel to make his [or her] objections so specific that the court may understand the point intended to be raised"); *State v. Todd*, 226 Neb. 906, 416 N.W.2d 13 (1987); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).
>
> One function of a proper objection is to direct the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence. See, *State v. Bissonette*, 145 Vt. 381, 488 A.2d 1231 (1985); *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978); *Fowler v. Bachus*, 179 Neb. 558, 139 N.W.2d 213 (1966); M. Graham, Handbook of Federal Evidence § 103.1 (3d ed. 1991); 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5032 (1977).

State v. Coleman, 239 Neb. 800, 811-12, 478 N.W.2d 349, 357 (1992). Although Fahlk expressed a general opposition to Rathe's testimony, he did not state a specific objection by reference to a particular rule or by language contained in an evidential rule, as required by the rules of evidence and case law. See *id.* By failing to make the proper objection, Fahlk has waived the error regarding admission of Rathe's testimony.

[12] As noted above, after both parties had rested, Fahlk argued that although Rathe's testimony was objectionable, he nevertheless wished to counter its effect by an offer of surrebuttal testimony. The court denied this request. Under Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 1989), the trial judge is granted discretion in connection with the conduct of the trial. Neb. Evid. R. 611(1) states: "The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment." In the context of this trial conducted over 3 days, the trial court did not abuse its discretion by bringing

closure to the incidental debate regarding whether Fahlk called Rathe on the afternoon of October 6, 1992.

Sufficiency of the Evidence.

[13] In his final assignment of error, Fahlk argues that the evidence was insufficient to sustain his convictions of theft by unlawful taking and of obstructing government operations. Citing *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992), the Nebraska Supreme Court recently stated that "in criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor." *State v. Covarrubias*, 244 Neb. 366, 374, 507 N.W.2d 248, 253 (1993).

The evidence, which we view favorably to the State, reflects that an all-out search for the missing printer was launched within 20 minutes of its disappearance. Rathe left a note for Fahlk inquiring about the printer. After receiving no response from Fahlk, Rathe directly questioned Fahlk about the printer, showed him a list of the three printers, and told him one was missing. Fahlk told Rathe he had no knowledge of the missing printer. Months later, Fahlk admitted that on the same date that Rathe had questioned him about the missing printer, he had taken it from the kitchen area of the building, unpacked it, and placed it under his desk, where it remained until he exchanged it with the printer in his daughter's dorm room. When Fahlk reported the theft to the police, he gave them an incorrect serial number.

Upon questioning by a State Patrol investigator months later, Fahlk admitted that the printer was under his desk at all times during the search, but stated that he had assumed the missing printer was part of a list of equipment stolen earlier in the summer. Fahlk could not explain why a serial number was not present on the printer when it was returned to the school district. A jury could properly conclude that Fahlk's conduct evidenced an intent to take the printer and to deprive the school district of its property. The evidence was adequate to support Fahlk's conviction of theft by unlawful taking.

[14] Fahlk was charged with obstructing government operations because of his action in furnishing to State Patrol Investigator Becker a purported checkout sheet for the ImageWriter II printer.

> A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

§ 28-901.

[15] Under the facts of this case, the State must prove that Fahlk's action in producing for Becker the checkout sheet on April 10, 1992, was an act which obstructed, impaired, or perverted the administration of law or other governmental function.

> A person commits the offense of tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he . . . [k]nowingly makes, presents, or offers any false physical evidence with intent that it be introduced in the pending or prospective official proceeding.

Neb. Rev. Stat. § 28-922 (Reissue 1989).

A jury could find that Fahlk presented false physical evidence to Becker when Fahlk realized that an official proceeding was about to be instituted. When Becker interviewed Fahlk about the printer on April 2, 1992, no mention was made of the checkout sheet. When Becker again interviewed Fahlk a few days later, Fahlk produced a checkout sheet which he claimed had been filled out when he took the printer to his daughter in September 1991. This purported checkout sheet was a different version than that which was used by the school district in September 1991. The form in effect at

that time required the signatures of an administrator and the media specialist. The new form devised by Fahlk in May 1992 required only his own signature. Fahlk's secretary had not seen the equipment loan file containing the checkout sheet for the printer until May 1992. From this evidence, a jury could conclude that the checkout sheet produced by Fahlk after being interviewed by Becker was created by Fahlk as an afterthought once Fahlk realized he was under suspicion. The evidence is sufficient beyond a reasonable doubt to sustain Fahlk's conviction of obstructing government operations.

The judgment of the district court is therefore affirmed.

AFFIRMED.

RONALD THORNE, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

510 N.W.2d 575

Filed January 4, 1994. No. A-92-281.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment: Proof.** A 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 if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
3. **Summary Judgment.** A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.
4. **Trial: Evidence: Appeal and Error.** In a civil case, to constitute reversible error, admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.
5. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which the reviewing court has an obligation to reach an

independent conclusion irrespective of the determination made by the court below.

6. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
7. **Affidavits.** Under common law there was no particular format for an affidavit.
8. **Affidavits: Words and Phrases.** An affidavit is a written declaration under oath, made without notice to the adverse party.
9. **Affidavits.** An affidavit must be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.
10. _____. The law does not require the doing of a useless act.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Jon H. Johnson, of Johnson & Graeser, P.C., and John J. Bedel, of Daub & Haggart, for appellant.

Joseph E. Jones and John M. Ryan, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Richard A. Drews, of Brashear & Ginn, for appellee Fuel Economy Contracting Company.

SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges.

IRWIN, Judge.

Ronald Thorne appeals the order of the district court granting summary judgment for defendants-appellees, Omaha Public Power District (OPPD), Fuel Economy Contracting Company (Fuel Economy), and Technical Asbestos Control. Thorne claims on appeal that the district court erred in refusing to allow sworn statements, which were made before a court reporter in a question-and-answer format, to be admitted as affidavits. Thorne asserts that had these sworn statements been admitted, they would have raised a genuine issue of material fact precluding the granting of summary judgment. For the reasons recited below, we reverse the judgment and remand the cause for further proceedings consistent with this opinion.

SCOPE OF REVIEW

[1] In appellate review of a summary judgment, the 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. *Dowis v. Continental Elev. Co.*, 241 Neb. 207, 486 N.W.2d 916 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

[2,3] A 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 if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Id.*; *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991). A summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

[4] In a civil case, to constitute reversible error, admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

AFFIDAVITS

Sworn statements were created by Thorne's attorneys during question-and-answer exchanges with four witnesses, which exchanges were recorded by a court reporter. Opposing counsel were not present, no cross-examination was made, and no notice was given to the adverse parties. These sworn statements were offered into evidence by Thorne's attorneys at a summary judgment hearing. The trial court refused to admit these sworn statements as affidavits because they were not "written

declarations." Determining whether the trial court erroneously excluded admissible evidence at the summary judgment hearing necessarily requires us to interpret the statutes regarding affidavits.

[5,6] Statutory interpretation is a matter of law in connection with which the reviewing court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992); *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992).

[7] Under common law there was no particular format for an affidavit. 3 Am. Jur. 2d *Affidavits* § 12 (1986). State legislatures have prescribed, via statutes, the various formal requisites for an affidavit. *Id.* See, also, 2A C.J.S. *Affidavits* § 24 (1972).

[8,9] In Nebraska, an affidavit is defined by the Legislature as a "written declaration under oath, made without notice to the adverse party." Neb. Rev. Stat. § 25-1241 (Reissue 1989). The affidavit must be made "on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Neb. Rev. Stat. § 25-1334 (Reissue 1989). There is nothing in this statutory language that bars the submission of a sworn statement in a question-and-answer format, which meets the criteria of § 25-1334, as an affidavit. Furthermore, this format, which was created by the attorneys' questioning a witness under oath in a nonadversarial context and having a court reporter record the exchange, does not violate the spirit of the statute.

OPPD and Fuel Economy cite *First Nat. Bank v. Greene Bldg. & Supply*, 220 Neb. 205, 369 N.W.2d 59 (1985), as support for the proposition that an affidavit may not be in a question-and-answer format. We do not find this to be the holding. In that case, the bank brought an action against the

defendants, Greene Building and Supply and two married couples. The bank asserted that the company had defaulted on two secured promissory notes and that the two couples were liable under an unlimited guaranty agreement. The defendants filed a general denial, and the bank filed a motion for summary judgment. The summary judgment hearing was held, at which time defense counsel called the bank's vice president to testify. The bank objected on the grounds that the vice president's affidavit had been timely filed and that no opposing affidavits had been filed. This objection was overruled, and the vice president testified that the collateral for the promissory notes had been sold without notice of the sale having been provided to the defendants. The bank's motion for summary judgment was denied.

The defendants later filed a motion for summary judgment on the basis that the bank had failed to give them notice of the collateral sale. At the subsequent hearing, the defendants offered the transcribed testimony of the vice president from the prior summary judgment proceeding. The defendants had not given notice that this document would be offered into evidence. The trial court received the transcript, over the bank's objection, and then granted the defendants' motion for summary judgment. The bank appealed.

On appeal, the bank asserted two errors, the first being that the trial court had erred in receiving the transcribed testimony " 'where the Defendants had given no notice of affidavits in opposition to the motion prior to hearing.' " *Id.* at 208, 369 N.W.2d at 61. The Nebraska Supreme Court stated that the "bank's assignment of error as to the summary judgment procedures is correct and requires reversal without consideration of the bank's second assigned error." *Id.* The court held that the procedures in a summary judgment proceeding are established by statute and that Neb. Rev. Stat. § 25-1332 (Reissue 1989) requires that the adverse party serve opposing affidavits prior to the day of the hearing. Furthermore, the court stated that pursuant to § 25-1332, a summary judgment is to be granted based on the pleadings, admissions, depositions, and affidavits. The statute does not authorize live testimony. When the trial court allowed the transcribed cross-examination

testimony of the bank's vice president to be accepted in a subsequent proceeding, the court essentially condoned a modification of statutorily prescribed conduct for a summary judgment proceeding. The Nebraska Supreme Court expressed its disapproval of such a procedure.

We have carefully reviewed *First Nat. Bank v. Greene Bldg. & Supply, supra*, which was decided on the basis that the defendants failed to give the bank notice of their intent to offer the transcribed testimony prior to the summary judgment hearing. We find that the holding does not address whether a sworn statement in a question-and-answer format, which statement was created by questioning a witness under oath in a nonadversarial context and transcribing the exchange, could be considered an affidavit.

OPPD and Fuel Economy also cite *Spell v. Bible Baptist Church, Inc.*, 166 Ga. App. 22, 303 S.E.2d 156 (1983), as support for their assertion that the sworn statements should not be allowed as evidence. *Spell* is a case in which a student was expelled from school for inappropriate behavior. The student and his parents filed suit against the school, alleging that the student had been expelled unfairly and that such expulsion was a breach of contract. The school filed a motion for summary judgment with supporting affidavits, sworn and unsworn statements, and depositions. The trial court granted the motion, and the plaintiffs appealed. The Georgia Court of Appeals affirmed the summary judgment on the grounds that sufficient appropriate evidence was presented to the trial court to support its granting of the motion. The court also stated that those sworn statements in the form of questions and answers were essentially depositions in which no notice or opportunity to cross-examine the witness was given and that, therefore, the statements should not have been admitted.

In contrast, the California Court of Appeal reviewed the issue of whether a document created in question-and-answer format and labeled as a deposition could be admitted as an affidavit in an arbitration hearing. See *Frantz v. Inter-Insurance Exchange*, 229 Cal. App. 2d 269, 40 Cal. Rptr. 218 (1964). The court held that pursuant to the California Code of Civil Procedure, the distinction between an affidavit and a

deposition is that an affidavit is a written declaration under oath given without notice, and "the mere fact that it was taken in question and answer form and labeled a 'deposition' is of little or no moment." *Id.* at 276-77, 40 Cal. Rptr. at 223. We note further that case law exists indicating that some states are willing to allow prior deposition testimony and prior trial testimony to be admitted as affidavit evidence. The reasoning behind these allowances is compelling in its common sense. See, *Farmers Union Oil Co. v. Harp*, 462 N.W.2d 152 (N.D. 1990) (holding that prior trial testimony of a witness was admissible for consideration at a subsequent summary judgment hearing, even though the defendant did not have the opportunity to cross-examine the witness, because affidavits are never subject to cross-examination and because the degree of reliability was not compromised); *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 967 (9th Cir. 1981) (holding that deposition testimony taken prior to the joinder of a third party in a products liability action was admissible as an affidavit, since it was made on personal knowledge, set forth facts that were admissible in evidence, and essentially "met all the requirements for affidavits"); *Rohlin Const. Co., Inc. v. Lakes, Inc.*, 252 N.W.2d 403, 405 (Iowa 1977) (holding that transcribed testimony from a prior trial could be admitted in a subsequent summary judgment proceeding as an affidavit pursuant to a statute authorizing the admission of evidence by affidavit or " 'any other form,' " even though the defendants were not parties to the prior action); *Hanna v. Barrett*, 39 Kan. 446, 447, 18 P. 497 (1888) (holding that deposition testimony taken with inadequate notice was appropriately treated as an affidavit in a summary judgment proceeding because it "answer[ed] fully the statutory definition of an affidavit"). See, also, *Camp v. Jiminez*, 107 Idaho 878, 693 P.2d 1080 (Idaho App. 1984) (holding that a verified complaint which sets forth facts as would be admissible in evidence and shows that the affiant is competent to testify may be used as an affidavit in a summary judgment hearing).

[10] However, this court does not determine whether prior deposition or trial testimony can be admitted as an affidavit, because in the case before us the facts are dispositive. The four

transcribed statements consist of questions by Thorne's attorneys to each witness and each witness' responses. The statements were given under oath and were signed by a notary public as statements given under oath by a witness. The responses establish that each witness had personal knowledge of the facts disclosed and that these facts would be admissible in evidence, and the statements indicate that each witness was competent to testify to the matters. See § 25-1334. Common sense dictates that the attorneys and witnesses would have engaged in similar colloquy prior to the attorneys' drafting more traditional affidavits. To require that an attorney then take the additional steps of synthesizing these questions and answers into "traditional" affidavit form and having the witness return and sign the document violates the rule of law stating that "[t]he law does not require the doing of a useless act." See *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 557, 508 N.W.2d 255, 259 (1993).

Furthermore, these statements are not testimony adduced on cross-examination, nor were they taken in contravention of any statutorily prescribed conduct for a special proceeding. Finally, OPPD and Fuel Economy were timely served with these affidavits prior to the hearing. Under the facts of this case, we do not find that this form of an affidavit violates any of the concerns expressed by the Nebraska Supreme Court in *First Nat. Bank v. Greene Bldg. & Supply*, 220 Neb. 205, 369 N.W.2d 59 (1985).

CONCLUSION

As noted above, an affidavit is defined as a "written declaration under oath, made without notice to the adverse party." § 25-1241. We are persuaded that these sworn statements in a question-and-answer format, which were created by questioning a witness under oath in a nonadversarial context and having a court reporter record the exchange, are written declarations within the purview of § 25-1241. Furthermore, the procedure of using a certified court reporter to give the witness an oath and to record both the questions and answers verbatim is no less trustworthy than a traditional affidavit, where a written statement is customarily composed

by an attorney prior to being subscribed and attested by a notary public.

Therefore, we hold that the trial court erred in refusing to receive the question-and-answer affidavits, exhibits 7 through 10. The judgment of the trial court is reversed, and the cause must now be remanded for the trial court to determine if the evidence presented, including exhibits 7 through 10, raises genuine issues of material fact which would preclude summary judgment.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROCHE, INC., DOING BUSINESS AS THE COPY CENTER, A NEBRASKA CORPORATION, APPELLANT.

511 N.W.2d 195

Filed January 4, 1994. No. A-92-1039.

1. **Appeal and Error.** An appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed in the light most favorable to the State, is sufficient to support that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Theft: Intent: Words and Phrases.** A person commits theft if he obtains property of another by deception. A person deceives if he intentionally creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise. The word "deceive" does not include falsity as to matters having no pecuniary significance, or statements unlikely to deceive ordinary persons in the group addressed.
4. **Criminal Law: Words and Phrases.** The word "person" is defined in the Criminal Code as any natural person and where relevant a corporation or an unincorporated association.

5. **Theft.** The grading of theft offenses is controlled by Neb. Rev. Stat. § 28-518 (Cum. Supp. 1992).
6. **Convictions: Sentences: Restitution: Damages: Presentence Reports.** A sentencing court may order a defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Whenever the court believes that restitution may be a proper sentence or the victim of any offense or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the *actual damages sustained* by the victim.
7. **Convictions: Corporations: Liability: Agents.** While a corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority.
8. **Criminal Law: Corporations: Liability: Agents: Intent.** A corporation may be liable criminally for offenses where its agent acts within his or her authority and in which intent is an element.
9. **Corporations: Agents: Public Policy.** The act of an agent, while exercising the authority delegated to him, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting.
10. **Corporations: Liability.** Impersonal entities such as corporations and other associations can be guilty of knowing or willful violations of regulatory statutes through the doctrine of respondeat superior.
11. **Criminal Law: Corporations: Liability: Intent.** A corporation may be held criminally liable for acts of misfeasance, malfeasance, or nonfeasance, even though the act constituting the offense may be ultra vires, or one as to which a specific intent is essential.
12. **Criminal Law: Statutes: Corporations: Words and Phrases.** In statutes defining crimes, the word "person" is usually construed to include a corporation.
13. _____: _____: _____: _____. Nebraska's statutory definition of "person," which includes corporations, applies throughout the Nebraska Criminal Code unless the context otherwise requires.
14. **Theft: Statutes: Corporations: Words and Phrases.** The context in which "person" is used in the statute defining theft by deception does not require the exclusion of corporations.
15. **Criminal Law: Intent.** The intent of a defendant may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
16. **Criminal Law: Intent: Words and Phrases.** In the context of a criminal statute, intentionally means willfully or purposely, and not accidentally or involuntarily.
17. **Corporations: Theft: Intent.** A corporation may be guilty of the intentional crime of theft by deception.
18. **Theft.** The theft by deception statute applies to a wide variety of acts of deception except those amounting to mere puffing.

19. **Theft: Value of Goods.** The value of property stolen is not an element of the crime and is important only in determining the penalty.
20. _____: _____. Unless specified by the statute defining a criminal offense of theft, the value of property is not an element of the crime of theft, but is relevant to the grade of the offense and determines the penalty that may be imposed on conviction.
21. **Theft: Value of Goods: Proof.** Although value is not an element of theft, the State must prove, by evidence beyond a reasonable doubt, the value of the property that is the subject of the theft charge.
22. **Theft: Value of Goods.** The issue of value relates to the punishment to be imposed in a conviction of theft.
23. _____: _____. The value of goods stolen is relevant to the determination of the grade of theft prosecuted.
24. **Theft: Value of Goods: Proof.** Value to be proved concerning a theft charge is market value at the time and place where the property was criminally appropriated.
25. **Theft: Value of Goods: Words and Phrases.** Value, in relation to a theft charge, is the price obtainable for property offered for sale in a market.
26. **Damages: Restitution: Evidence.** The amount of restitution ordered shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part vacated and remanded with directions.

Patrick T. O'Brien, of Bauer, Galter, O'Brien, Allan & Butler, for appellant.

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

SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

Appellant, Roche, Inc., doing business as The Copy Center, a Nebraska corporation, was convicted in a bench trial before the district court for Lancaster County of two counts of theft by deception. The case generally involved allegations that Roche had sold two copy machines on which the meters had been rolled back, thereby deceiving the purchasers with respect to the actual number of copies which had been run on the machines. The trial court found beyond a reasonable doubt that Roche was guilty of theft by deception with regard to property valued at $300 or more but less than $1,000, placing a value of $405 on

count I, in connection with the sale of a used Mita 4055 copy machine to Naber's Consulting & Tax Services, Inc. (Naber's). The court also found Roche guilty of theft by deception on count II with regard to property valued at more than $100 but less than $300, placing a value of $180, in connection with the sale of an allegedly new Mita 2555 copy machine to the Nebraska Pharmacists Association, Inc. (NPA). Both convictions are based on violations of Neb. Rev. Stat. § 28-512(1) (Reissue 1989) and graded as theft offenses pursuant to Neb. Rev. Stat. § 28-518 (Reissue 1989). Count I was a Class IV felony, and count II was a Class I misdemeanor pursuant to § 28-518. After a presentence report was prepared, the court ordered Roche to pay restitution of $405 to Naber's and $180 to the NPA. For the reasons recited below, we affirm the judgment in part, vacate the sentences, and remand the cause with directions.

ASSIGNMENTS OF ERROR

Roche claims on appeal that the trial court erred because (1) a corporation cannot be liable for theft by deception because a corporation cannot possess the requisite intent and (2) there is insufficient evidence to support the convictions of theft by deception because the testimony is not persuasive and there is no evidence that the victims suffered pecuniary loss.

SCOPE OF REVIEW AND RELEVANT STATUTES

[1] With respect to a question of law, "an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court." *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 499, 500 N.W.2d 566, 569-70 (1993).

[2] The Nebraska Supreme Court has held:

> In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed in the light most favorable to the State, is sufficient to support

that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.

State v. Reichert, 242 Neb. 33, 35, 492 N.W.2d 874, 876 (1992).

[3] Under Nebraska statutes, theft by deception is defined as follows:

> A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:
>
> (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise . . . [.]
>
> . . . .
>
> The word deceive does not include falsity as to matters having no pecuniary significance, or statements unlikely to deceive ordinary persons in the group addressed.

§ 28-512.

[4] The word "person" is defined in the Criminal Code as "any natural person and where relevant a corporation or an unincorporated association." Neb. Rev. Stat. § 28-109(16) (Reissue 1989).

[5] The grading of theft offenses is controlled by § 28-518, which provides in relevant part:

> (1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars.
>
> (2) Theft constitutes a Class IV felony when the value of the thing involved is three hundred dollars or more, but not over one thousand dollars.
>
> (3) Theft constitutes a Class I misdemeanor when the value of the thing involved is more than one hundred dollars, but less than three hundred dollars.
>
> (4) Theft constitutes a Class II misdemeanor when the value of the thing involved is one hundred dollars or less.

[6] Restitution is controlled by Neb. Rev. Stat. § 29-2280 et seq. (Reissue 1989). The pertinent portion of those statutes regarding this case states:

> A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Whenever the court believes that restitution may be a proper sentence or the victim of any offense or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the *actual damages sustained* by the victim.

(Emphasis supplied.) § 29-2280.

FACTS

Gerald (Jerry) Rock and Sandra Rock are co-owners of Roche, Inc., doing business as The Copy Center. The evidence regarding both counts of theft by deception involved the acts of employees of The Copy Center's Lincoln, Nebraska, branch office.

According to the evidence, on April 4, 1989, a Mita 4055 copier, serial No. 36002506, had a beginning meter reading of 847,752 when it was delivered to Cooper Nuclear Station. On June 21, 1989, that same copier left Cooper Nuclear Station with a meter reading of 870,308. On January 30, 1990, this copier was sold to Naber's. The meter read 375,254. The meter reading appeared on a Copy Center invoice and was prepared and initialed by a Copy Center salesperson, Matt Mueller.

Calvin Krohn, a former service manager at The Copy Center in Lincoln, testified that he rolled back the meter on the machine sold to Naber's. Krohn rolled the meter back from approximately 890,000 to under 400,000, pursuant to directions from T.J. Goltl. Goltl was the location manager at the Lincoln store.

Naber's paid $1,595 for the used Mita 4055 copier. Keith Naber testified that he knew he was purchasing a used machine and that he had been told to expect the machine to have a useful life of 1,000,000 copies. He testified that he was not told that the meter had been rolled back. Naber testified that had he been told the meter had been rolled back, he would have paid less for the machine.

Carol Langdon, office manager of the NPA, testified that in November 1989, Mueller offered to bring a demonstrator copier to the NPA. The NPA was looking for a new copier. A few days after the machine had been delivered by Mueller and one other person, the copier malfunctioned. Langdon called Mueller to report the broken copier, and Mueller and a technician went to the NPA to inspect it. The condition of the machine was such that it had to be taken back to the shop at The Copy Center to be repaired.

On December 15, 1989, the NPA purchased from The Copy Center a new Mita 2555, for which the NPA paid $4,220. During the installation by Mueller and a technician of the "new" Mita 2555, serial No. 36002766, Langdon recognized scratches on the copier identical to scratches on the demo that had been taken away for repairs. When asked if the "new" machine was the demo, Mueller replied, "Definitely not. We wouldn't do that. This is a new machine." Langdon pursued by asking, "Are you sure now?" to which Mueller replied, "Definitely."

The copier received by the NPA had two noticeable scratches about 1 foot apart, one above the other. Langdon was suspicious, so she looked at the meter, which read 16. The demo had had approximately 300 on its meter when it was taken away for repairs.

Timothy Arroyo, a former employee of The Copy Center in Lincoln, testified that he was the individual who had rolled the meter back on the machine sold to the NPA. According to Arroyo, Mueller directed him to roll back the meter so that it could be sent back to the NPA as a new one. Arroyo testified that this copier had had a reading of about 2,000 on its meter, and he rolled it back to zero.

Investigator Curtis Hibdon of the Lincoln Police Department, who investigated the case against Roche, testified that pry marks on the meter housings on the copiers sold to Naber's, the NPA, and another customer not at issue here were consistent with marks left on a sample meter which had been altered.

Brian Thomas, a former copier service technician at The Copy Center, testified that he saw another service technician

there, Brian Shea, roll back a copier meter in 1988. He also testified that he heard Jerry Rock tell Kevin Braden, the service manager in charge of all the service technicians, to have a meter rolled back.

Michael Cooper, a former salesperson with Roche, testified that he heard Jerry Rock tell Kenneth Hoefler, a former Copy Center employee, to roll back the meter on a machine.

Hoefler testified that in March or April 1987, in Norfolk, Nebraska, he was asked by Jerry Rock if he had yet learned how to turn meters back. Hoefler stated that in February 1988, Jerry Rock asked him to turn the meters back to zero on two 2055 copiers that had previously been demos. Hoefler testified that he refused and that Jerry Rock became upset. According to Hoefler, Braden telephoned Hoefler later that afternoon and insisted that Hoefler turn back the meters. Hoefler testified that he again refused, acknowledging that doing so put his employment at risk.

Hoefler also testified that most new copiers had a negative setting at the time they were set up, so that when the meter reached zero, it had already produced approximately 50 copies.

On cross-examination, Hoefler testified that he knew that a coworker, whose first name was Calvin, had turned back a meter; Hoefler stated that he did not look at the meter readings on this machine, nor did he know where this copier went after the meter had been altered.

Calvin Krohn, a former service manager at The Copy Center in Lincoln, testified that he was under the direction of Goltl and Braden. Krohn stated that Braden was the Roche service manager in Omaha. Krohn testified that he had rolled back copier meters 8 to 10 times. One of the machines altered was the meter on the copier sold to Naber's. According to Krohn's testimony, Goltl directed him to alter the meter on this particular machine in addition to the meters on four other copiers. Krohn testified that it was common practice to roll back the meters on demos so that they would read zero. Krohn testified that he was told by Braden to roll back the meters and not to worry about getting into trouble because only Jerry Rock would be held accountable. Krohn stated that Mueller also asked him to roll back copier meters.

John Kuchta, president of Lincoln Office Equipment, was called by the State to testify regarding value. Kuchta has been selling copiers since 1970. He testified that it is not uncommon for copier dealers to use a formula in determining the reduction in price of a new machine that has been used as a demo. The formula used by Lincoln Office Equipment is to discount 1 cent per copy if the copier has over 100,000 copies on it. If the copier has fewer than 100,000 copies, a flat dollar figure is used to determine the discount.

In connection with the sale to Naber's, in Kuchta's opinion a Mita 4055 copier with approximately 800,000 copies on it would have had a value of approximately $2,000 in January 1990. The same copier with approximately 375,000 copies on it would have been worth approximately $2,500 in January 1990.

In connection with the sale to the NPA, Kuchta testified that a new Mita 2555 with a sorter and feeder was worth approximately $4,500 in December 1989. With 2,000 copies on it, however, the value would fall to $4,000. The prices given by Kuchta were derived from a publication entitled "Data Quest," published by a company of the same name which is a division of Dun & Bradstreet.

Defense witnesses generally denied the allegations made by the State's witnesses. Jerry Rock testified that he did not roll back or order the rollback of any machines. Sandra Rock testified that rollbacks were not an approved or accepted part of business policy. Other employees of Roche testified that they had not rolled back meters or seen meters rolled back.

Regarding the value of the Mita copiers, the defense called as a witness Joe Wilson, the president of Data Business Systems in Cape Girardeau, Missouri, who had been in the copier business for 17 years. Wilson offered testimony generally that the value of a reconditioned copier was not affected by the number of copies on it or by the competitive market. He testified that the value of a copier is influenced by changes in technology. He gave the opinion that the "new" copier sold to the NPA was valued at $5,036.40 and that if he were to sell a used copier such as that sold to Naber's, it would not make any difference in pricing whether it had made 300,000, 800,000, or 1,500,000 copies, because after being refurbished, it was essentially a new machine.

ANALYSIS

Corporate Liability for Theft by Deception.

Relying primarily on *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985), Roche argues on appeal that a corporation cannot be guilty of theft by deception because it cannot form the requisite intent. We do not agree.

[7] *Mueller* was a wrongful termination case in which some former employees alleged, inter alia, that a manager of railroad security and special services had caused contributions of railroad funds to be made to certain candidates for public office in a manner which circumvented the disclosure requirements of Nebraska's Political Accountability and Disclosure Act, a violation of which is a Class III misdemeanor. The Nebraska Supreme Court found that the allegations in the complaint were lacking specificity and that without further description, the manager's acts did not imply in him an authority to make political decisions for the railroad. Although potential liability was not properly pleaded in *Mueller*, the Nebraska Supreme Court observed that

> [w]hile a corporation may be convicted of certain types of criminal acts committed by its agents, even if the acts have been forbidden by the corporation, in order to impose such criminal liability against the corporation, the agent must have been acting within the scope of his or her authority.

220 Neb. at 751, 371 N.W.2d at 738.

[8-11] At least since 1909, the U.S. Supreme Court has concluded that a corporation may be liable criminally for offenses where its agent acts within his or her authority and in which intent is an element. *New York Central R. R. v. United States*, 212 U.S. 481, 29 S. Ct. 304, 53 L. Ed. 613 (1909). With respect to intent, the U.S. Supreme Court stated: "If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously." 212 U.S. at 493. With respect to imputing to the corporation the acts of agents, the court further stated: "[T]he act of the agent, while exercising the authority delegated to him . . . may be controlled,

in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises." 212 U.S. at 494. Similarly, in a case involving an alleged partnership violation of criminally knowingly violating interstate commerce regulations for the safe transportation of explosives, the U.S. Supreme Court stated: "[I]t is elementary that such impersonal entities [as corporations and other associations] can be guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of *respondeat superior*." *United States v. A & P Trucking Co.*, 358 U.S. 121, 125, 79 S. Ct. 203, 3 L. Ed. 2d 165 (1958). Elsewhere, it has been observed: "It is the rule that . . . a corporation may be held criminally liable for acts of misfeasance, malfeasance or nonfeasance, even though the act constituting the offense may be ultra vires, or one as to which a specific intent is essential." *State v. Willard*, 54 So. 2d 183, 185 (Fla. 1951).

[12-14] The statutory elements of theft by deception under § 28-512(1) are recited above, and "person," as defined in Nebraska's criminal statutes, includes corporations, § 28-109(16). In statutes defining crimes, the word "person" is usually construed to include a corporation. 19 C.J.S. *Corporations* § 737 (1990). Nebraska's statutory definition of "person," which includes corporations, applies throughout the Nebraska Criminal Code "unless the context otherwise requires." § 28-109. The context in which "person" is used in the statute defining theft by deception does not require the exclusion of corporations.

Two Nebraska cases involving buying and selling grain discuss the concept of intent as used in the theft by deception statute. In *State v. Sailors*, 217 Neb. 693, 699-700, 352 N.W.2d 860, 864 (1984), the court observed: "It is the required element of guilty knowledge, criminal intent, which distinguishes a civil breach of contract from theft by deception—a person's knowingly creating a false impression in order to obtain another's property." The expression "property of another," as applied to this case, refers to the money received by Roche.

[15,16] In *State v. Ladehoff*, 228 Neb. 812, 816, 424 N.W.2d 361, 363 (1988), the Nebraska Supreme Court stated that in the

context of theft by deception, "The intent of the defendant may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct." This explanation of intent is consistent with the general rule that "[i]n the context of a criminal statute, 'intentionally' means willfully or purposely, and not accidentally or involuntarily." *State v. Williams*, 243 Neb. 959, 966, 503 N.W.2d 561, 566 (1993).

[17] Based on the foregoing analysis, we conclude that a corporation may be guilty of the intentional crime of theft by deception.

Theft by Deception.

Roche argues that even if a corporation can be guilty of theft by deception, the evidence is legally insufficient because the evidence is not persuasive. We do not agree.

In arguing that the evidence was insufficient, Roche relies on the denials of the Rocks and inconsistencies in the testimony of the prosecution's witnesses, and Roche notes that the most damaging testimony was elicited from disgruntled former employees. Reviewing the facts and circumstances in the evidence favorably to the State, and noting that the trial court had the opportunity to observe the witnesses, we find the evidence recited above is sufficient to sustain the conclusion that Roche obtained the money of Naber's and the NPA by deceiving them regarding the condition of the copiers they purchased. The evidence also shows that Roche willfully did so through its authorized agents who, acting within the scope of their duties, rolled back the copier meters and thereby created a false impression as to the condition and pecuniary value of the machines sold. The evidence shows that it was an accepted practice for Roche's salespeople to misrepresent the age and condition of copiers sold by Roche. These misrepresentations necessarily involved consideration of such factors as the useful life of the machines, expected frequency of repair, projected downtime, and premature replacement. Thus, the elements of theft by deception have been sufficiently proven.

Evidence of Value.

Roche argues that value is an element of the crime charged

and that the evidence fails to establish the value of the copiers sold to Naber's and the NPA. We do not agree that value is an element of the crime of theft by deception. We do conclude, however, as detailed more fully below, that for grading and sentencing purposes, the evidence regarding value as to the count involving Naber's is insufficient, that for sentencing purposes, the evidence regarding value is insufficient as to the count involving the NPA, and that Roche should be resentenced.

[18] The Nebraska theft by deception statute contains the following concluding language: "The word deceive does not include falsity as to matters having no pecuniary significance, or statements unlikely to deceive ordinary persons in the group addressed." § 28-512. This language is patterned on the Model Penal Code § 223.3 (1980), which makes clear that the statute applies to a wide variety of acts of deception except those amounting to mere puffing. See *State v. Sailors*, 217 Neb. 693, 352 N.W.2d 860 (1984). See, also, *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989) ("pecuniary loss" in the criminal mischief statute means monetary loss suffered by another as the result of the defendant's conduct); *State v. Kelly*, 125 N.H. 484, 484 A.2d 1066 (1984) (in a theft by deception case, the state must show pecuniary loss to the victim).

[19-21] The Nebraska Supreme Court specifically held in a 1989 theft case, *State v. Culver*, 233 Neb. 228, 231, 444 N.W.2d 662, 665 (1989), that "[t]he value of the property stolen is no longer an element of the crime and is important only in determining the penalty." Recently, the Nebraska Supreme Court stated that "[u]nless specified by the statute defining a criminal offense of theft, the value of property is not an element of the crime of theft, but is relevant to the grade of the offense and determines the penalty that may be imposed on conviction." *State v. Garza*, 241 Neb. 256, 263, 487 N.W.2d 551, 556 (1992) (where evidence consisted of price tags, value not adequately proved in shoplifting case). The value of property is a question for the fact finder, whose finding will not be set aside unless clearly erroneous. *Id.* "Although value is not an element of theft, the State must prove, by evidence beyond a reasonable doubt, the value of the property that is the subject of

the theft charge." *Id.* at 263, 487 N.W.2d at 556.

[22,23] The issue of value relates to the punishment to be imposed on Roche; value is relevant to the determination of the grade of theft prosecuted. See *Garza, supra.* Our inquiry regarding value, therefore, is made in connection with the trial court's conclusions that the value of the crime as to Naber's was $405 and punishable as a Class IV felony, and the value of the crime as to the NPA was $180 and punishable as a Class I misdemeanor.

[24,25] In *Garza*, the Nebraska Supreme Court stated that "[v]alue to be proved concerning a theft charge is market value at the time and place where the property was criminally appropriated," 241 Neb. at 263, 487 N.W.2d at 556, and "value, in relation to a theft charge, is the price obtainable for property offered for sale in a market," 241 Neb. at 264, 487 N.W.2d at 557. We logically apply the holdings regarding value in connection with the grading of offenses in *Garza*, which was a shoplifting case, to the instant case involving theft by deception.

Viewing the evidence most favorably to the State, we determine that the used Mita 4055 copier which Naber's bought, with a meter reading of 375,254, actually had 870,308 copies on it. The State's value witness, Kuchta, testified on direct examination that in January 1990, in Lincoln, a used Mita 4055 copier would have been valued at $2,000 if it had 800,000 copies on it and $2,500 if it had 375,000 copies on it. On cross-examination, Kuchta varied these values upward. Naber's paid $1,595 for a copier which had over 800,000 copies on it. Keith Naber testified that price was an important part of the transaction and that he would have paid less than $1,595 if he had known the copier had an additional 500,000 copies on it.

The court found that the value of the crime as to Naber's was $405, thereby grading the offense as one between $300 and $1,000 and punishable as a Class IV felony. See § 28-518(2). At the sentencing hearing, the court ordered Roche to pay restitution to Naber's in the amount of $405. The evidence of value as to the Naber's sale is uneven. Reference to the State's expert's testimony alone suggests that Naber's got a good deal. Keith Naber's testimony, however, speaks directly to value as

defined in *Garza*. Naber's was a willing buyer in the relevant marketplace, and it would have paid an unspecified amount less than $1,595 for the used copier actually received.

We are aware of *State v. Forshee*, 588 P.2d 181 (Utah 1978), which held in a theft by deception case that where the odometer was turned back on a used car and where the victim testified that he would not have purchased the car had he known the true mileage, the value of the property was found to be the amount received by the defendant. We note, however, that the amount received by the defendant was necessarily the value and amount paid by the victim. Elsewhere, it was held in a theft by deception case that the victim's testimony as to value, although inconsistent, supported the conviction. *State v. Heintze*, 482 N.W.2d 590 (N.D. 1992). We agree with the reasoning in *Heintze*.

Based on the foregoing, we conclude that the trial court's finding that the value of the deception was $405, which is an amount between $300 and $1,000 and punishable as a Class IV felony, is unsupported by relevant evidence and, therefore, is an erroneous finding that was the basis for the felony sentence imposed on Roche. However, the evidence shows, beyond a reasonable doubt, that the deception had some intrinsic value that translates into nominal market value, notwithstanding the absence of evidence establishing a specific value. In reaching this conclusion, we rely on *Garza, supra*, in which the Nebraska Supreme Court found that the price tags of the shoplifted goods, without more, failed to establish value punishable as a felony, but that the evidence showed the property stolen had intrinsic value. See, also, *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983) (in an attempted theft by deception action, if all that is proven beyond a reasonable doubt is that goods of value were stolen, it is a Class II misdemeanor).

CONCLUSION

Based on the foregoing, we affirm the convictions and vacate the felony sentence imposed on Roche in connection with the sale to Naber's, and remand this matter to the district court with direction to impose an appropriate sentence on Roche for misdemeanor theft by deception with a value of less than $100,

a Class II misdemeanor. See § 28-518(4).

With respect to the "new" Mita 2555 copier which the NPA bought from Roche, Kuchta testified that in December 1989, in Lincoln, a new Mita 2555 copier was worth approximately $4,500. Kuchta stated that with 2,000 copies on it, the value of the Mita 2555 would fall to $4,000. The NPA paid $4,220 for a "new" Mita 2555 copier which, viewing the evidence most favorably to the State, we find had been used as a demo and had 2,000 copies on it.

The evidence shows that the NPA had a demo copier removed and sought to purchase a new machine. Roche reinstalled the demo as if it were new, thereby deceiving the NPA as to the item purchased. The deception clearly had pecuniary significance. By finding that the value of the crime as to the NPA was $180, the trial court categorized the theft for grading purposes as one having a value of between $100 and $300, thereby resulting in its being treated as a Class I misdemeanor. See § 28-518(3). Since the evidence consisted of opinion testimony that the NPA in effect paid $220 too much and that NPA sought to buy a new, rather than a slightly used, copier, the determination of value by the fact finder which established the grade, and therefore the punishment, was not clearly erroneous. See *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989) (even if jury finding of value was erroneous, the error was not prejudicial because the value found was supported by evidence and the verdicts were in the category punished).

[26] We note, however, that the sentence imposed on Roche was restitution to be paid to the NPA in the amount of $180. Under § 29-2280, the sentencing court may order the defendants to make restitution for "the actual damages sustained by the victim." Although we find that a sentence of restitution was not an abuse of discretion, the amount ordered to be paid by Roche was not supported by the record. See *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990). Under the restitution statute, "[t]he amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record." § 29-2281. See, also, *Yost, supra*. In the instant

case, representatives of the NPA testified at trial that they wanted a new copier, as opposed to a demo, but they did not claim to have been damaged in a specific dollar amount. The victim statement in the presentence report is incomplete and does not claim an amount of actual damages. Therefore, based on the record, we conclude that the trial judge abused his discretion in concluding that the actual damages as to NPA were $180 and in ordering restitution in that amount. Accordingly, this order of restitution is also vacated, and the cause is remanded for a new sentencing hearing.

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

HANNON, Judge, dissenting.

I must respectfully dissent from significant portions of the majority's opinion. To the extent that a crime was committed, I readily agree with the majority's opinion that the corporate defendant can be guilty of the crimes charged and that the evidence convincingly establishes that the defendant corporation practiced deception as that term is used and defined in Neb. Rev. Stat. § 28-512 (Reissue 1989). However, I cannot agree with the majority's application of the facts to § 28-512 and to the grading of the offenses under Neb. Rev. Stat. § 28-518 (Reissue 1989).

"A person commits theft if he obtains property of another by deception." § 28-512. Theft by deception is graded under § 28-518 based upon "the value of the thing involved." The victims transferred only cash to the defendant. In theft by deception cases, the property obtained and the thing involved are necessarily the same. In both the crimes charged, this is cash, not the copiers. The question is, How much, if any, cash did the defendant obtain from each victim by its deceptions?

Evidence of the value of the copiers as they were presented by the defendant or as they really existed is relevant only to establish the pecuniary significance of the deceptions. If the defendant is convicted, such evidence is relevant to establish the loss sustained by the victims for restitution purposes under Neb. Rev. Stat. § 29-2280 (Reissue 1989). When cash is the property obtained by any sort of theft, evidence of its value is obviously unnecessary to establish the grade of the crime. The

fact that the victim received something of value in exchange for the cash is immaterial in grading the offense.

Other jurisdictions have considered the question of the value of property obtained by deception for purposes of grading the offense when the victim received property of value in exchange for that obtained by deception. In *State v. Forshee*, 588 P.2d 181 (Utah 1978), the defendant set back the odometer on the motor vehicle he sold the victims. One of the victims testified he would not have purchased the vehicle if he had known its true mileage. The defendant argued that the fair market value of the vehicle should have been subtracted from the price paid by the victims for purposes of grading the crime and that, therefore, he was guilty of only a misdemeanor. The statute made it a crime to obtain or exercise control over the property of another by deception. The court held that the degree of the crime must be measured by the value of the property obtained by the defendant as a result of the deception and that the value of any property received by the victim is immaterial. Similar holdings can be found in the following cases: *People v. Ross*, 25 Cal. App. 3d 190, 100 Cal. Rptr. 703 (1972); *People v. Hess*, 10 Cal. App. 3d 1071; 90 Cal. Rptr. 268 (1970); *State v. Aurgemma*, 116 R.I. 425, 358 A.2d 46 (1976); and *LaMoyne v. The State*, 53 Tex. Crim. 221, 111 S.W. 950 (1908). The only cases I have located holding the other view are *Gaskins v. State*, 38 S.W. 470 (Tex Crim. App. 1895); *Perry v. The State*, 39 Tex. Crim. 495, 46 S.W. 816 (1898); and *Lively v. State*, 74 S.W. 321 (Tex. Crim. App. 1903), and these cases were overruled by *LaMoyne*.

Naber's paid $1,595 for the copier charged in count I, and the NPA paid $4,200 for the copier charged in count II. If that amount of money was obtained by deception, the crimes are felonies. However, while there is not much doubt that Naber's was defrauded by the defendant's deception, there is no evidence that Naber's parted with its money because of the deception. However, Keith Naber did not testify that he would not have bought the copier but for the deception, but, rather, that he would not have paid as much for the copier. He did not testify how must less. For this reason, I do not think the State proved that the defendant obtained Naber's money by deception, and therefore I would dismiss count I.

Count II is different because the evidence would support a finding that the NPA would not have bought the copier it did buy if the deception had not been practiced. The defendant was guilty of a felony, but it was charged with only a Class I misdemeanor, and therefore that conviction should be affirmed. I would also affirm the restitution ordered, because the evidence shows that had the deception not been practiced, the copier the victim received would have been worth at least $180 more, and this is adequate proof of "the actual damages sustained by the victim."

STATE OF NEBRASKA, APPELLEE, V. KEVIN J. SIEVERS, APPELLANT.
511 N.W.2d 205

Filed January 11, 1994. Nos. A-92-1184, A-92-1185.

1. **Probation and Parole: Search and Seizure.** Where a probation order includes a condition in which a probationer consents to warrantless searches of his or her person or property at any time, one of the criteria that must be satisfied in order for the condition to be valid is that the condition must be applied in a reasonable manner and must contribute to the rehabilitation of the offender.
2. **Probation and Parole: Convictions: Proof.** A conviction not yet final may be used by the State to prove by clear and convincing evidence that a probationer has violated the terms of his or her probation order.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

CONNOLLY, HANNON, and WRIGHT, Judges.

CONNOLLY, Judge.

This appeal arises from the convictions of the appellant, Kevin J. Sievers, for burglary and for violation of probation. The appeal of the burglary conviction, case No. A-92-1185, and

the appeal of the violation of probation conviction, case No. A-92-1184, were consolidated for review by this court, and both appeals are addressed in this opinion. Sievers argues that the trial court erred in refusing to suppress the evidence that led to his conviction for burglary and in allowing the State to use the burglary conviction, which was not yet final, as evidence in a subsequent proceeding to prove that Sievers violated probation. We affirm.

I. FACTS

Pursuant to a plea bargain, Sievers pleaded guilty on January 3, 1991, to charges of burglary and possession of a controlled substance. On March 14, Sievers was sentenced to a prison term of 13 months on the conviction for possession of a controlled substance. He was given 184 days' credit for time served. On the conviction for burglary, he was sentenced to 2 years' probation. As a condition of receiving probation instead of additional prison time, Sievers agreed in writing to "submit my person, place of residence, business and vehicle to search and seizure at any time of the day or night by any law enforcement officer or my probation officer with or without a search warrant. A refusal will constitute a material violation of this order."

On March 19, 1992, pursuant to the condition in Sievers' probation order, police searched Sievers' residence, without a warrant, in connection with the investigation of a series of burglaries in which Sievers was a suspect. In the course of the search, police found a Russian coin stolen in one of the burglaries under investigation. On March 23, Sievers again was charged with burglary. In a bench trial in September on five counts of burglary, Sievers was convicted of one count and was acquitted of the others. He was sentenced to a prison term of $6^2/_3$ to 10 years.

On March 23, 1992, the State also charged Sievers with violation of the probation order from his previous burglary conviction of January 1991. At trial on October 9, 1992, the State's case consisted of the offer of two exhibits. Exhibit 1 contained certified copies of the judgment and sentence and the order of probation from the proceedings of March 14, 1991.

Exhibit 2 contained a certified copy of the information dated March 23, 1992, charging Sievers with five counts of burglary, and a certified copy of the trial court's docket entry of September 30, 1992, showing that Sievers had been found guilty of one count of burglary. The State rested after introducing exhibit 2. Sievers moved for dismissal because the September 30 burglary conviction used as evidence to prove the alleged probation violation had not yet become final. The September 30 burglary conviction was not final at the time of the October 9 trial because Sievers was not sentenced for the burglary conviction until November 19. He appealed the conviction and sentence on December 18.

The motion to dismiss was overruled. Sievers adduced no evidence and renewed his motion to dismiss. Sievers was found guilty of violating probation. He was sentenced to a prison term of $6^2/_3$ to 10 years, to be served consecutively to the sentence for the September 30 burglary conviction.

II. ASSIGNMENTS OF ERROR

Sievers argues that the trial court erred (1) in refusing to suppress evidence seized during the warrantless search of Sievers' residence, (2) in allowing the State to use, as a means of proving violation of probation, a conviction that was not yet final, and (3) in sentencing Sievers to an indeterminate sentence with a minimum term greater than one-third of the maximum term.

III. STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992).

In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992).

On a criminal defendant's motion to dismiss for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably

drawn from the evidence, and every controverted fact resolved in its favor. *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992).

IV. ANALYSIS

1. Motion to Suppress

Sievers consented to a provision in his probation order that allowed the State to search his residence without a warrant at any time unless Sievers refused to permit such a search. Sievers argues that the search at issue was invalid because the provision authorizing the search was invalid. He claims that the provision had no reasonable relationship to his rehabilitation and was, instead, a subterfuge that allowed the State to figuratively conduct a fishing expedition for criminal evidence whenever it desired.

[1] This issue is controlled by *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980). In *Morgan*, the court found valid a condition of a probation order in which a probationer convicted of a drug offense consented to warrantless searches of his person or property for controlled substances at any time. The court stated that one of the criteria that must be satisfied in order for such a condition to be valid is that the condition must be applied in a reasonable manner and must contribute to the rehabilitation of the offender. The condition was held valid in *Morgan* because illegal drug activity frequently is uncovered only through searches of a suspect's person or property, and because the prospect of having his person or property searched at any time could deter the offender from repeating the criminal conduct for which he was convicted.

The same rationale applies in the case now before us. Sievers was convicted of burglary. Criminal activities in the field of burglary could be uncovered or deterred because of a consensual condition in a probation order permitting a warrantless search of the probationer's person or residence. Furthermore, utilization of the search provision was reasonable in Sievers' case because the record clearly indicates that the police had gathered evidence which led them to conclude that Sievers was a suspect. Therefore, the condition in Sievers' probation order and the search at issue were valid, and we

affirm the judgment of the trial court overruling the motion to suppress.

2. Motion to Dismiss

Sievers argues that his subsequent burglary conviction cannot be used as proof by clear and convincing evidence that he violated probation because the subsequent burglary conviction had not yet become final at the time it was offered to prove the alleged violation of probation. For support of this proposition, Sievers cites *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214 (1991). However, in *Estes*, the court held that a prior conviction relied upon for *enhancement purposes* must be final. *Estes* is not analogous to the case at bar and is not helpful to our analysis.

Our research indicates that the Nebraska Supreme Court has not addressed the question of whether a conviction not yet final can be used as proof of a probation violation.

We find it significant that in *State v. Kartman*, 192 Neb. 803, 807, 224 N.W.2d 753, 755 (1975), the court held that "[w]here a criminal prosecution has been started based upon the probationer's conduct, the probation court need not wait conclusion of those proceedings in order to revoke probation. If the court is satisfied that the law has been violated a conviction is not a prerequisite." In *Kartman*, the district court revoked the defendant's probation because of conduct that resulted in the defendant's being charged with driving while intoxicated in Oklahoma. The State of Oklahoma had not yet prosecuted the defendant for driving while intoxicated, but the Nebraska Supreme Court held that evidence of the defendant's conduct pertaining to the charge in Oklahoma was sufficient to support a finding that the defendant had violated probation. Thus, evidence of alleged criminal conduct can be sufficient to support a finding of violation of probation even if there has not been a criminal conviction based on that conduct.

Even though a conviction is not necessary for a finding that probation has been violated, the State chose to join argument with Sievers on the issue of whether a conviction must be final in order to serve as clear and convincing proof of a probation violation. We assume that the State addressed the conviction

issue on the merits because, absent the conviction, the factual basis for finding a probation violation by Sievers is rather thin. In *Kartman*, the defendant was apprehended in the course of his alleged criminal conduct. Witnesses at the probation revocation hearing in Nebraska testified that the defendant was obviously intoxicated when he was found alone in the driver's seat of a vehicle that had left the road and struck a gas meter and a fire hydrant. In Sievers' case, clues led investigators to Sievers' home, but no one had witnessed Sievers' alleged unlawful conduct. A stolen coin was found in Sievers' home, but the coin could have arrived in Sievers' home in any number of ways not involving criminal conduct by Sievers. We address the issue of whether a conviction must be final because this appears to be a case in which, without the conviction, there is not clear and convincing proof of unlawful conduct.

[2] There are numerous cases from other jurisdictions supporting the use of a conviction as proof of a probation violation even if the conviction is awaiting appellate review. See, *United States v. Gentile*, 610 F.2d 541 (8th Cir. 1979); *United States v. Lustig*, 555 F.2d 751 (9th Cir. 1977); *Roberson v. State of Connecticut*, 501 F.2d 305 (2d Cir. 1974); *State v. Oppelt*, 184 Mont. 48, 601 P.2d 394 (1979); *State v. Barnett*, 112 Ariz. 212, 540 P.2d 684 (1975); *Gentry v. Warden*, 167 Conn. 639, 356 A.2d 902 (1975); *State v. Chavez*, 102 N.M. 279, 694 P.2d 927 (N.M. App. 1985). We are persuaded by this authority. Therefore, we hold that a conviction not yet final may be used by the State to prove by clear and convincing evidence that a probationer has violated the terms of his or her probation order. Consequently, we find no error in the trial court's decision to overrule Sievers' motion to dismiss.

3. SENTENCE

The record clearly indicates that Sievers' complaint regarding his sentencing was resolved in the trial court. This assignment of error is without merit.

AFFIRMED.

IN RE INTEREST OF A.D.S. AND A.D.S., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. B.S., APPELLANT.

511 N.W.2d 208

Filed January 11, 1994. No. A-93-327.

1. **Parental Rights: Due Process.** The parent-child relationship is afforded due process protection; consequently, procedural due process is applicable to a proceeding for termination of parental rights.
2. **Juvenile Courts: Parental Rights: Due Process.** When a petition alleges a juvenile to be within the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) or when termination of parental rights is sought pursuant to § 43-247(6) or (7) and the parent or custodian appears with or without counsel, the court shall inform the parties of the nature of the proceedings and the possible consequences or dispositions and of their right to engage counsel or to have counsel appointed, right to remain silent, right to confront and cross-examine witnesses, right to testify and to compel other witnesses to attend and testify, right to have a speedy adjudication hearing, and right to appeal and have a transcript or record of the proceedings.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded for further proceedings.

Mary Ellis-Harden, of Legal Aid Society, Inc., for appellant.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich for appellee.

SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges.

MILLER-LERMAN, Judge.

B.S. appeals the order of the Douglas County Separate Juvenile Court terminating her parental rights to her sons, A.D.S., born February 9, 1986, and A.D.S., born November 24, 1987. B.S.' sole assignment of error is that the proceedings lacked fundamental fairness because the juvenile court failed to inform her of her statutory rights under Neb. Rev. Stat. § 43-279.01(1) (Cum Supp. 1992). We agree that the juvenile court failed to provide B.S. with explanations and warnings as mandated by § 43-279.01(1), and we therefore reverse the order of the juvenile court and remand the cause for further proceedings.

PROCEDURAL BACKGROUND

The record reflects that B.S. and D.M.S. are the parents of A.D.S. and A.D.S. B.S. and D.M.S. were apparently divorced at the time proceedings were initiated in this action. On September 17, 1991, the State filed a petition in the separate juvenile court of Douglas County alleging that the children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) through a lack of proper parental care by reason of the faults and habits of B.S. and D.M.S. The petition alleged that almost since infancy, the children have resided in the home of parental friends; that B.S. and D.M.S. did not visit the children with any regularity and failed to provide for their support; and that B.S. and D.M.S. were aware that the children lived in a filthy, overcrowded, cockroach-infested environment.

Although the petition lists an address for B.S., an affidavit dated September 6, 1991, states that B.S.' current whereabouts are unknown. The record is not clear as to whether or not B.S. was served with the petition. B.S. was not present in person, nor represented by counsel, at a hearing held on October 1, 1991, at which time the children were placed in the temporary custody of the Nebraska Department of Social Services (DSS). At the adjudication hearing held on March 18, 1992, the guardian ad litem stated that B.S.' whereabouts were unknown. D.M.S. was present and represented by counsel. The court accepted D.M.S.' admission of the allegations in the petition and adjudicated the children, with regard to D.M.S., as being within the meaning of § 43-247(3)(a).

The State filed a supplemental petition on May 5, 1992, alleging that the children were within the meaning of § 43-247(3)(a), having been abandoned by B.S. The supplemental petition also alleged that the children came within the meaning of Neb. Rev. Stat. § 43-292(1) (Reissue 1988) because B.S. had had no contact with the children, nor provided any financial or emotional support for the children, for a period in excess of 6 months immediately prior to the filing of the petition. The supplemental petition stated that the current whereabouts of B.S. was unknown.

B.S. appeared in person but without counsel at the

adjudication hearing on September 4, 1992. The case was continued pending appointment of counsel for B.S. The court stated that "we are going to decide whether or not your rights as mother should be terminated." Counsel was appointed for B.S. following the hearing.

A hearing was held on October 13, 1992, which was intended to be an adjudication hearing with regard to B.S. B.S. did not attend the hearing, although she was represented by counsel. The record shows that the court's findings following this hearing were subsequently vacated following a determination that B.S. had been incorrectly informed that the hearing had been continued.

At a hearing held on March 15, 1993, counsel for B.S. moved to withdraw from the case, stating that counsel felt unprepared to go forward with B.S.' defense because B.S. had kept only one of six appointments made with counsel. The motion was denied. The court stated that "I'm going to advise the mother now, we're going to proceed to trial this afternoon. And if you make some statements in the record that may be used against you, I'd advise you to consult with your lawyer before you make any statements whatsoever." A DSS caseworker was the sole witness in the case. B.S.' attorney cross-examined this witness. Following the hearing, the court terminated B.S.' parental rights. B.S. timely appealed to this court.

ANALYSIS

[1] The parent-child relationship is afforded due process protection. *In re Interest of L. V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). Consequently, procedural due process is applicable to a proceeding for termination of parental rights. *Id.*

[2] Section 43-279.01 provides in part:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) or (7) of section 43-247 and the parent or custodian appears with or without counsel, the court shall inform the parties of the:
>
> (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284,

43-285, and 43-288 to 43-295;

(b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;

(c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;

(d) Right to confront and cross-examine witnesses;

(e) Right to testify and to compel other witnesses to attend and testify;

(f) Right to a speedy adjudication hearing; and

(g) Right to appeal and have a transcript or record of the proceedings for such purpose.

(2) After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission, an answer of no contest, or a denial from any parent or custodian as to all or any part of the allegations in the petition. The court shall ascertain a factual basis for an admission or an answer of no contest.

The record reveals that B.S. was informed of the possibility that her parental rights may be terminated. Counsel was appointed for her, and she was, in effect, advised of her right to remain silent as to matters of inquiry which might tend to prove her guilty of any crime. B.S.' attorney cross-examined the witness. Thus, § 43-279.01(1)(a), (b), (c), and (d) were satisfied.

There is, however, nothing in the record to show that B.S. was informed of her right to testify and to compel other witnesses to attend and testify, her right to a speedy adjudication hearing, or her right to appeal and have a transcript or record of the proceedings for such purpose as required by § 43-279.01(1)(e), (f), and (g). The statute clearly mandates that B.S. be informed of each of these rights without regard to whether she is represented by counsel. The failure of the court to advise B.S. as required by § 43-279.01 necessitates that the order in this case be reversed and the cause remanded for a new adjudication hearing.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.