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# REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 10, 1996 and SEPTEMBER 1, 1997

IN THE

# Nebraska Court of Appeals

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VOLUME V

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PEGGY POLACEK

OFFICIAL REPORTER

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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

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

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

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No. A-91-931: **Ashland State Bank v. Dowd**. Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-94-617: **Craft v. State**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-95-079: **Dana Larson Roubal & Assocs., Inc. v. The Architectural Partnership**. Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-95-081: **Juhl v. Tumblin**. Affirmed in part, and in part reversed and remanded with directions to dismiss. Hannon, Sievers, and Mues, Judges.

No. A-95-097: **Farm Credit Bank of Omaha v. Juranek**. Affirmed. Per Curiam.

No. A-95-102: **Ridnour v. Ridnour**. Affirmed as modified. Inbody, Irwin, and Sievers, Judges.

No. A-95-200: **Hroch v. Borton, Inc.** Reversed and remanded with directions. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-212: **In re Estate of Benson**. Remanded with directions. Irwin, Sievers, and Inbody, Judges.

No. A-95-322: **Ted Grace Homes, Inc. v. Dinklage**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-405: **Young & LaPuzza v. Mensen**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-418: **Blose v. Mactier**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-438: **Pritchett v. Pohlmeier**. Reversed and remanded with directions. Inbody, Irwin, and Sievers, Judges.

No. A-95-452: **Smith, Kaplan, Allen & Reynolds Advertising Agency v. Myers**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-516: **Barthel v. Liermann**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-517: **Fisher v. Robinson**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-95-528: **Thomsen v. First Baptist Church**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-95-562: **Eaton v. Eaton**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-95-570: **Edlund v. Bamford**. Affirmed as modified. Per Curiam.

No. A-95-576: **First Nat. Bank in Morrill v. Fix**. Affirmed as modified. Hannon, Sievers, and Mues, Judges.

No. A-95-582: **Ripp v. Department of Motor Vehicles**. Reversed and remanded with directions. Per Curiam.

No. A-95-595: **In re Estate of Oppliger**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-95-596: **Austin v. Severa**. Reversed. Irwin, Sievers, and Inbody, Judges.

No. A-95-675: **Rasmussen v. Rasmussen**. Affirmed as modified. Mues, Sievers, and Inbody, Judges.

No. A-95-676: **State v. Miller**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-692: **McCaslin v. Ashby**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-698: **Lake Ventura Assn. v. Thomsen**. Affirmed as modified. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-95-701: **Murante v. State**. Affirmed in part, and in part reversed and remanded with direction. Inbody, Irwin, and Sievers, Judges.

No. A-95-716: **MS Company v. Wright**. Reversed and remanded. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-95-722: **Sobieszczyk v. Department of Corr. Servs.** Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-727: **Farmers Mut. Hail Ins. Co. of Iowa v. Werner Stock & Grain**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-95-731: **State v. Delancy**. Affirmed as modified. Hannon, Mues, and Inbody, Judges.

No. A-95-754: **Thompson v. Abramson**. Reversed and remanded with directions. Per Curiam.

No. A-95-772: **State v. Shepard**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-797: **Blue v. Nebraska Dept. of Corr. Servs.** Reversed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-819: **State v. Sanders**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-822: **State v. Riley**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-95-839: **Plambeck v. Abramson**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-95-852: **Rees v. Department of Roads**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-95-859: **Payne v. Physicians Clinic, P.C.** Affirmed. Howard, District Judge, Retired, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-870: **Poehling v. Poehling**. Affirmed as modified, and cause remanded with directions. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

Nos. A-95-874, A-95-1166: **Chicago Title Ins. Co. v. Nelson**. Affirmed. Mues, Hannon, and Inbody, Judges.

No. A-95-876: **Cahill v. Westside Community Sch. Found.** Reversed and remanded with directions. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-95-877: **State v. Reid**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-881: **In re Interest of Danielle M.** Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-95-888: **City of Lincoln v. Stephens**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-95-891: **Hill & Liegl, C.P.A.'s v. National Bank of Commerce Trust & Sav.** Affirmed as modified. Inbody, Irwin, and Sievers, Judges.

No. A-95-909: **State v. Daugherty**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-95-920: **Patch v. Harlan County**. Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-95-930: **Loeffelholz v. Tierney**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-95-941: **Duncan v. Nebraska Dept. of Corr. Servs.** Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-95-945: **State v. Mack**. Affirmed. Sievers, Irwin, and Inbody, Judges.

No. A-95-949: **Gordon v. Gordon**. Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-95-954: **Smith v. City of Omaha**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-95-961: **McGuire v. Nichols**. Affirmed. Hannon, Mues, and Inbody, Judges.

No. A-95-969: **Lewis v. State**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-979: **Bates v. Schrein**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-982: **Watts v. Underriner**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1005: **Olson v. Dakota County**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1009: **Dunn v. Sheriff of Adams Cty**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-95-1012: **Coschka v. Gillogly**. Affirmed in part, and in part reversed and remanded for further proceedings. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-95-1015: **State v. Nazeck**. Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-95-1024: **In re Estate of Wagner**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge. Hannon, Judge, concurring.

No. A-95-1037: **State v. Billups**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-95-1050: **State v. Jones**. Affirmed. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-95-1053: **Khachab v. Khachab**. Appeal dismissed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-95-1060: **State v. Murphy**. Reversed and remanded with directions. Inbody, Irwin, and Sievers, Judges.

No. A-95-1066: **C.P. v. Real Estate Counselors, Inc.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1067: **Howard v. Howard**. Affirmed as modified. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1068: **City of LaVista v. Long**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1075: **Poitra v. Nebraska Dept. of Corr. Servs.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-95-1094: **Thompson v. Thompson**. Reversed and remanded with directions. Howard, District Judge, Retired, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1096: **Tyler v. Tyler**. Affirmed as modified. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1097: **Countryside Mobile Home Park v. City of Lincoln**. Reversed. Inbody, Hannon, and Mues, Judges.

No. A-95-1105: **State on behalf of Mills v. Anderson**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-95-1110: **1733 Estates Assn. v. Randolph**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-95-1125: **Helms v. Helms**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1131: **Miller v. Vandeveer**. Reversed and remanded. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1145: **Remer v. School Dist. 2 of Madison Cty.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge. Miller-Lerman, Chief Judge, dissenting.

No. A-95-1150: **Fielder v. Department of Motor Vehicles**. Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-95-1153: **Noonan v. Noonan**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1161: **In re Adoption of Hawkins**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-95-1169: **State v. Collins**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1178: **Getzschman v. Light**. Reversed and remanded for further proceedings. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1180: **Martin v. Roth**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1184: **Inzauro v. Nebraska Furniture Mart**. Affirmed. Hannon, Mues, and Inbody, Judges.

No. A-95-1196: **Lovelady v. Lovelady**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1203: **State v. Iverson**. Affirmed. Sievers, Irwin, and Inbody, Judges.

No. A-95-1207: **Enterprise Rent-A-Car Co. Midwest v. Prokop**. Affirmed in part, and in part remanded for further proceedings. Inbody, Hannon, and Mues, Judges.

No. A-95-1208: **Dann v. Anderson**. Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-95-1209: **Love v. Folk**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1210: **State v. Nichols**. Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-95-1213: **Simon v. Simon**. Affirmed as modified. Inbody, Hannon, and Mues, Judges.

No. A-95-1233: **Brosnan v. Rahn**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1277: **P & H Electric v. Roche, Inc**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-95-1283: **Diers, Inc. v. Cohrs**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1287: **State v. Ryks**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-95-1288: **Martinson v. Martinson**. Affirmed in part, and in part vacated. Mues, Irwin, and Sievers, Judges.

No. A-95-1289: **Shadel v. Landess**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-95-1290: **Overgaard v. Overgaard**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1301: **Smith v. Smith**. Affirmed as modified. Hannon, Mues, and Inbody, Judges.

No. A-95-1304: **Tucker v. Tucker**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-95-1308: **Winter v. Wilson Concrete Co**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1309: **State v. Schmailzl**. Affirmed. Sievers, Irwin, and Mues, Judges. Mues, Judge, dissenting.

No. A-95-1314: **State v. Lynch**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-95-1324: **State v. McCray**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-95-1330: **Mulligan's Inc. v. Nebraska Liquor Control Comm**. Appeal dismissed. Hannon, Sievers, and Mues, Judges.

No. A-95-1334: **O'Neal v. O'Neal**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-95-1338: **Bartling v. Bartling**. Affirmed in part as modified, and in part remanded for further proceedings. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-95-1343: **State v. Hirsch**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

Nos. A-95-1364, A-95-1365: **In re Interest of Ashley B. & Melissa B**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

Nos. A-95-1374 through A-95-1377: **State v. Clinebell**. Judgments in Nos. A-95-1374 and A-95-1375 affirmed. Sentences in Nos. A-95-1376 and A-95-1377 vacated, and causes remanded for resentencing. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-95-1390: **Randa v. Randa**. Affirmed as modified. Sievers, Irwin, and Inbody, Judges.

No. A-95-1392: **Lange v. Crouse Cartage Co**. Reversed and remanded for a new trial. Sievers, Irwin, and Mues, Judges. Irwin, Judge, concurring in part, and in part dissenting.

No. A-95-1393: **Quinn v. Lincoln Public Schools**. Affirmed. Sievers, Irwin, and Mues, Judges.

No. A-95-1397: **Gramps v. Gramps**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-95-1403: **State v. Burries**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-011: **State v. Jones**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-96-019: **State v. Quincy**. Reversed, sentence vacated, and cause remanded with directions. Inbody, Hannon, and Mues, Judges.

No. A-96-021: **Houser v. Houser**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-023: **Smith v. Smith**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-039: **Rezac v. Rezac**. Affirmed as modified. Inbody, Hannon, and Mues, Judges.

No. A-96-043: **Spanyers v. Fuehrer**. Affirmed. Mues, Irwin, and Sievers, Judges.

No. A-96-061: **State v. Oliver**. Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-96-065: **Puckett v. Puckett**. Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-066: **Jones Air Conditioning v. Coupe**. Affirmed. Mues, Irwin, and Sievers, Judges.

No. A-96-067: **Epp v. Chlman**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-069: **Bell v. Sand Livestock Sys**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-070: **Johnson v. Johnson**. Reversed and remanded with directions. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-077: **State v. Caddy**. Sentence vacated, and cause remanded for resentencing. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-078: **State v. Riley**. Affirmed. Norton, District Judge, Retired, and Hannon and Mues, Judges.

No. A-96-082: **Kovalskas v. Kovalskas**. Affirmed. Sievers, Irwin, and Mues, Judges.

Nos. A-96-091, A-96-092: **In re Estate of Baumert.** Affirmed as modified. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-094: **Margolis v. Selig.** Affirmed as modified. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-095: **In re Interest of Kayla H.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-96-096: **Grebe v. Grebe.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-103: **In re Interest of Chester C.** Reversed. Inbody, Irwin, and Sievers, Judges.

No. A-96-109: **Reichert v. Reichert.** Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-114: **State v. Rodriguez.** Affirmed. Sievers, Irwin, and Inbody, Judges.

No. A-96-116: **State v. Cavalieri.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-122: **Boston v. Boston.** Affirmed. Per Curiam.

No. A-96-124: **Hilliard v. Robertson.** Affirmed in part, and in part remanded with directions. Sievers, Hannon, and Mues, Judges.

No. A-96-129: **Nunez v. Express Personnel Servs.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-139: **In re Interest of Jayeden B.** Affirmed. Sievers, Irwin, and Inbody, Judges.

Nos. A-96-141, A-96-492: **Wood v. Wood.** Affirmed as modified. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-158: **Bishop v. Bishop.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

Nos. A-96-159, A-96-160: **Tracy Corp. IV v. Western Nebraska Community College.** Judgment in No. A-96-159 affirmed. Judgment in No. A-96-160 reversed. Mues, Sievers, and Inbody, Judges.

No. A-96-168: **HEP, Inc. v. Gibraltar Constr. Co.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-96-169: **Kucera v. Kucera**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-170: **Blackwell v. Grisanti, Inc.** Affirmed. Norton, District Judge, Retired, and Hannon and Mues, Judges.

No. A-96-172: **Roberts v. Petereit**. Affirmed as modified. Howard, District Judge, Retired, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-173: **Rodarmel v. Rodarmel**. Affirmed. Per Curiam.

No. A-96-177: **State v. Adams**. Reversed and remanded for resentencing. Miller Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-96-182: **Kumm v. Lowin**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Hannon, and Mues, Judges.

No. A-96-190: **Ernst v. Ernst**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-96-191: **Fitzke v. Community Redevelopment Auth.** Appeal dismissed, and cause remanded with directions to vacate. Irwin, Sievers, and Mues, Judges.

No. A-96-192: **Real v. Real**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-96-193: **Shaffer v. Langemeier**. Reversed and remanded with directions. Per Curiam.

No. A-96-195: **State v. Buggi**. Affirmed as modified. Norton, District Judge, Retired, and Hannon and Mues, Judges.

No. A-96-196: **State v. Harvey**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-96-197: **In re Estate of Andersen**. Remanded with directions. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-199: **Betterman & Katelman v. Pipe & Piling Supplies**. Affirmed in part, and in part reversed and remanded with directions. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-204: **In re Interest of Heather T. & Jason T.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-205: **Rehor v. Rehor**. Affirmed as modified. Irwin, Sievers, and Mues, Judges.

No. A-96-206: **Woods v. Woods**. Affirmed as modified. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

Nos. A-96-211 through A-96-214: **In re Guardianship of George W. et al**. Appeals dismissed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-96-217: **Lewis v. Biggs**. Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-96-223: **Robert v. L.J. Webb Contractor**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-225: **In re Interest of Matthew M. & Donna M.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-96-231: **State v. Frazier**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-96-240: **State v. Newsom**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-248: **Kepler v. Rudd**. Affirmed in part, and in part reversed and remanded with directions. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-96-255: **State v. Yeutter**. Affirmed in part, and in part reversed and vacated. Inbody, Sievers, and Mues, Judges.

No. A-96-274: **Chelberg v. Guitars & Cadillacs of Nebraska Inc**. Affirmed. Mues, Irwin, and Sievers, Judges.

No. A-96-277: **State v. Ayres**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

Nos. A-96-278, A-96-279: **State v. Tyler**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-280: **State v. Hoffman**. Affirmed. Mues, Irwin, and Sievers, Judges.

No. A-96-314: **Ward v. Ward**. Reversed and remanded. Inbody, Sievers, and Mues, Judges.

No. A-96-316: **United Neb. Bank v. Schutt**. Affirmed. Mues, Irwin, and Sievers, Judges.

No. A-96-317: **Gano v. Gano**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

Nos. A-96-325, A-96-326: **In re Interest of Tana B.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-96-335: **State v. White.** Affirmed as modified. Hannon, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-336: **Schmucker v. Larson.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge. Hannon, Judge, dissents.

No. A-96-347: **Hoffmeyer v. Spectrum Emergency Care.** Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-348: **In re Interest of Selma B.** Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-351: **Rieker v. Rieker.** Reversed and remanded for further proceedings. Hannon, Mues, and Inbody, Judges.

No. A-96-353: **Davis v. Independent Order of Foresters.** Affirmed in part, and in part reversed and remanded. Sievers, Mues, and Inbody, Judges.

Nos. A-96-364, A-96-365: **In re Interest of Jean Marie M. & Scott M.** Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-374: **Jourdan v. Hahn Forest Prods.** Affirmed in part, and in part reversed and remanded. Mues, Sievers, and Inbody, Judges.

No. A-96-378: **Brown v. Butler Holdings, Inc.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-381: **State v. Gilcrist.** Affirmed. Howard, District Judge, Retired, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-384: **State v. Thomas.** Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-96-387: **Clark v. Clark.** Affirmed as modified. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-388: **Herbst v. Med-America Health Care Assocs.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-96-391: **In re Interest of Trevor W. et al.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-395: **State v. Dueling.** Affirmed. Howard, District Judge, Retired, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-400: **Universal Revenue Serv. v. Waugh-Aronson.** Affirmed. Sievers, Irwin, and Mues, Judges.

No. A-96-405: **State v. McNeil.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-407: **State v. Lute.** Affirmed. Miller-Lerman, Chief Judge, and Irwin, Judge, and Howard, District Judge, Retired.

No. A-96-408: **Libengood v. Libengood.** Affirmed. Howard, District Judge, Retired, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-430: **State v. Pitre.** Affirmed. Hannon, Mues, and Inbody, Judges.

No. A-96-437: **In re Application of Borders.** Affirmed. Sievers, Irwin, and Mues, Judges.

No. A-96-445: **Simpson v. Yellow Freight Sys., Inc.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-96-460: **In re Interest of Blane H.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-461: **In re Interest of Pamela B.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-463: **State v. Carney.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-467: **State v. Goodwin.** Affirmed. Per Curiam.

No. A-96-473: **In re Estate of Smith.** Affirmed in part, and in part reversed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

Nos. A-96-476, A-96-477, A-96-499: **In re Interest of Adria C.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-484: **State v. Riley.** Reversed and remanded with directions. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-517: **State v. Reutzel**. Reversed and remanded. Mues, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-518: **State v. Gibbs**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-96-531: **Prod. Credit Assn. of the Midlands v. Hay Springs Land & Cattle**. Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-532: **State v. Utter**. Reversed and remanded. Inbody, Sievers, and Mues, Judges.

No. A-96-533: **Teten v. Teten**. Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-96-538: **In re Interest of Dennis D.** Affirmed. Mues, Hannon, and Inbody, Judges.

No. A-96-543: **Midwest First Fin. v. Smith**. Affirmed. Mues, Sievers, and Inbody, Judges.

No. A-96-548: **State v. Malik**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-96-558: **In re Interest of Jacob B.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-569: **State v. Meysenburg**. Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-96-583: **In re Interest of Nathaniel J.** Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-590: **State v. Neiman**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-96-603: **State v. Walling**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-604: **State v. Hamaker**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-96-611: **Affiliated Foods Co-op v. Meyer**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-617: **In re Interest of LaDonna K. et al.** Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-96-620: **Karstens v. Karstens**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-625: **State v. Jensen**. Reversed and remanded with directions. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-643: **State v. Burt**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Mues, Judges.

No. A-96-645: **Buol v. Tunink**. Affirmed. Mues, Hannon, and Inbody, Judges.

No. A-96-647: **Richards v. State**. Appeal dismissed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-648: **State ex rel. Pacatte v. Pacatte**. Reversed and remanded for further proceedings. Inbody, Sievers, and Mues, Judges.

No. A-96-653: **Keithley v. Department of Corr. Servs.** Affirmed as modified. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-664: **State v. Gallardo**. Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-665: **State v. McClain**. Affirmed. Hannon, Mues, and Inbody, Judges.

No. A-96-670: **In re Interest of Quinn D.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-671: **State v. Canas**. Affirmed. Mues, Hannon, and Inbody, Judges.

No. A-96-682: **Allen v. AT & T**. Reversed and remanded for further proceedings. Inbody, Hannon, and Mues, Judges.

No. A-96-684: **State v. Koster**. Reversed and remanded for further proceedings. Irwin, Sievers, and Mues, Judges.

No. A-96-693: **State v. Clubbs**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-700: **State v. Allee**. Affirmed in part, sentence of restitution vacated, and case remanded with directions. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-701: **State v. Love**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-702: **Unger v. Unger**. Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-703: **Longoria v. State**. Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-708: **State v. Price**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-714: **State v. Requejo**. Affirmed. Inbody, Irwin, and Sievers, Judges.

No. A-96-723: **State v. Koelzer**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-735: **Toby v. Toby**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-96-744: **Dedmon v. Square D Company**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-748: **Boamah-Wiafe v. Rashleigh**. Affirmed in part, and in part reversed and remanded with directions. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-751: **State v. Smith**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-766: **State v. Elliott**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-786: **State v. Russell**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-796: **Anderson v. Anderson**. Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-96-803: **Morris v. Casey's Gen. Store**. Affirmed in part, and in part reversed and remanded. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-96-813: **State v. Halouska**. Affirmed. Per Curiam.

No. A-96-817: **State v. Tuttle**. Affirmed. Sievers, Irwin, and Mues, Judges.

No. A-96-818: **In re Interest of Tiffany M.** Appeal dismissed. Irwin, Sievers, and Mues, Judges.

No. A-96-819: **In re Interest of Kasha B.** Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-826: **State v. Stauffer**. Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-830: **In re Interest of Charles C. & Alfredo G.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

Nos. A-96-833, A-96-834: **In re Conservatorship of Snyder**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-845: **State v. Ivaskevicius**. Reversed and remanded with directions. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-861: **State v. George**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-870: **State v. Hays**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-875: **State v. Campbell**. Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-882: **Reddick v. Best of Everything, Ltd.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-96-884: **Hagood v. Hagood**. Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-96-892: **Childs v. Curley's Machine Works**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-896: **In re Interest of Michael B. et al.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-897: **Gordon v. Gordon**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-96-900: **State v. Schmidt**. Affirmed. Hannon, Mues, and Inbody, Judges.

No. A-96-909: **State v. Sepulveda**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-96-913: **State v. Salmons**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-918: **State v. Morrissey**. Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-96-926: **State v. Moore**. Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-96-928: **Shikles v. Yellow Freight Sys.** Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-96-932: **State v. Sneed**. Affirmed as modified. Sievers, Hannon, and Mues, Judges.

No. A-96-934: **In re Interest of Vanessa W. & Elizabeth W.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-938: **State v. Gute**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-956: **Huston Law Office v. Hartley**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-962: **In re Interest of Juan H.** Affirmed. Mues, Irwin, and Sievers, Judges.

No. A-96-974: **State v. Snider**. Remanded with directions. Irwin, Sievers, and Mues, Judges.

No. A-96-975: **Moore v. Darling International**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-985: **Kepler v. County of Morrill**. Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-992: **Demedici v. Alberti**. Reversed and remanded with directions. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-1023: **State v. Harmelink**. Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-1024: **State v. Flynn**. Reversed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge. Miller-Lerman, Chief Judge, dissenting.

No. A-96-1026: **State v. Allen**. Affirmed. Mues, Irwin, and Sievers, Judges.

No. A-96-1030: **State v. Kawakami**. Affirmed as modified. Mues, Hannon, and Inbody, Judges.

No. A-96-1032: **State v. Graham**. Affirmed in part, and in part reversed and remanded. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-1055: **State v. Fulkerson**. Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-96-1066: **McGinty v. McGinty**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-1071: **State v. Ott**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-96-1094: **O'Neel v. O'Neel**. Affirmed as modified. Mues, Sievers, and Inbody, Judges.

No. A-96-1102: **In re Interest of Buddy C.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-1111: **Randoja v. United Parcel Serv.** Affirmed in part, and in part reversed and remanded. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-1144: **Batenhorst v. Batenhorst.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-1153: **Koch v. Hardee's.** Reversed and remanded with directions. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-1180: **State v. Dickson.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

Nos. A-96-1192, A-96-1193: **State v. Jones.** Affirmed. Irwin, Sievers, and Mues, Judges.

No. A-96-1219: **In re Interest of Maricela M.** Affirmed. Mues, Sievers, and Inbody, Judges.

No. A-96-1223: **State v. Arizola.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-96-1228: **In re Interest of Justin T.** Reversed and vacated. Inbody, Sievers, and Mues, Judges.

No. A-96-1230: **State v. Whitaker.** Reversed and remanded. Mues, Sievers, and Inbody, Judges.

No. A-96-1234: **State v. Damone.** Affirmed as modified. Per Curiam.

No. A-96-1276: **In re Interest of Nicholas F.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-1283: **State v. Nguyen.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-1305: **Edmundson-Addison v. Addison.** Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-1307: **Sea v. Union Pacific RR. Co.** Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-96-1327: **In re Interest of Catherine B. et al.** Affirmed. Mues, Sievers, and Inbody, Judges.

No. A-97-034: **Fullerton v. Douglas Cty. Hosp.** Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-97-041: **Lewis v. Getzschman.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-97-065: **State v. Fair**. Affirmed in part, and in part reversed and remanded for resentencing. Mues, Sievers, and Inbody, Judges.

No. A-97-067: **State v. Sailors**. Affirmed. Sievers, Irwin, and Mues, Judges.

No. A-97-305: **State v. Brown**. Affirmed. Hannon, Judge.

No. A-97-507: **State v. Greco**. Reversed and remanded for further proceedings. Inbody, Judge.

No. A-97-535: **State v. Lawrence**. Affirmed. Irwin, Judge.

## LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-92-496: **Polyurethane Mktg. Sys. v. UNI Enters.** Affirmed. See rule 7A(1).

No. A-93-757: **Shuck v. Jacob.** Appeal dismissed as moot.

No. A-95-357: **Jeys v. Jeys.** Affirmed. See rule 7A(1); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); and *Cavanaugh v. deBaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992).

No. A-95-426: **State v. Hallowell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-95-508: **Petry v. Petry.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-95-532: **Jones v. Jones.** Stipulation allowed; appeal dismissed.

No. A-95-541: **Abraham v. Abramson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-95-637: **Smith v. Webster Cty. Bd. of Equal.** Appeal dismissed. See rule 7A(2).

No. A-95-683: **Good v. Good.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-95-742: **Claussen v. Claussen.** Affirmed. See rule 7A(1).

No. A-95-796: **Jurgensen v. Department of Motor Vehicles.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. A-95-887: **State ex rel. Cisneros v. Birch.** Stipulation allowed; appeal dismissed.

No. A-95-908: **King v. King.** Affirmed. See rule 7A(1).

No. A-95-953: **Bjerrum v. Bjerrum.** Stipulation allowed; appeal dismissed.

No. A-95-977: **State v. McGee.** Affirmed. See rule 7A(1).

No. A-95-1048: **Frederick v. Frederick.** Stipulation allowed; appeal dismissed.

No. A-95-1071: **State ex rel. Biegert v. Nebraska Pub. Power Dist.** Motion of appellee for summary dismissal sustained; appeal dismissed as moot. See rule 7B(1).

No. A-95-1192: **State v. Arruza.** Affirmed. See rule 7A(1).

No. A-95-1225: **Reutzel v. Reutzel.** Appeal dismissed. See rule 7A(2).

No. A-95-1332: **State v. Sims.** Cause having not been shown, appeal dismissed as moot.

No. A-95-1359: **Hatt v. Hatt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-068: **State v. Person.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-083: **Aikins v. Aikins.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-084: **Sheldon v. McDermott and Miller, P.C.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-110: **Auto Owners Ins. Co. v. Janke.** Stipulation allowed; appeal dismissed.

No. A-96-111: **State v. Hanus.** Motion of appellee to dismiss as moot sustained. See rule 7B(1).

No. A-96-121: **Farmers Coop. Exch. of Elgin v. Demerath Land Co.** Appeal dismissed. See rule 7A(2).

No. A-96-127: **Gaudreau v. Gaudreau.** Affirmed. See rule 7A(1).

No. A-96-148: **Shirk v. Shirk.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-149: **Howard Cty. Community Hosp. v. Davis.** Motion sustained; appeal dismissed.

No. A-96-153: **In re Guardianship and Conservatorship of Piller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-194: **State v. Freeze.** Affirmed. See rule 7A(1).

No. A-96-203: **State v. Walton.** Affirmed. See rule 7A(1).

No. A-96-245: **County of Lancaster v. Department of Banking and Finance.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-96-273: **Rose v. H & H Enter. of Norman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-285: **State v. McCarthy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-303: **State v. Wright**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-307: **State v. Stueve**. Stipulation allowed; appeal dismissed.

No. A-96-315: **Stark v. Stark**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-320: **Benes v. Benes**. Appellant's motion to dismiss appeal and cross-appeal sustained. See *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993).

No. A-96-323: **State v. Sheriff**. Appeal dismissed as moot. See rule 7A(2).

No. A-96-327: **State v. Baker**. Affirmed. See rule 7A(1).

No. A-96-328: **State v. Bohlke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-333: **Labenz v. Labenz**. Cause not having been shown, case dismissed. See rule 7A(2).

No. A-96-338: **State v. Tran**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-339: **State v. Ngo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-340: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-342: **Burton v. Ebenezer Baptist Church**. Stipulation allowed; appeal dismissed.

No. A-96-343: **State v. Coulson**. Affirmed. See rule 7A(1).

No. A-96-346: **State v. Kaczmarek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-349: **In re Interest of Ralston**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-355: **State v. Fairchild**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-356: **State v. Fairchild**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-369: **In re Estate of Johnson**. Motion sustained; appeal dismissed at cost of appellant.

No. A-96-380: **Mixan v. Anesthesia Servs. Medical Group, P.C.** Stipulation allowed; appeal dismissed.

No. A-96-392: **Carstensen v. Bergan Mercy Hosp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-414: **Iwanski v. Leisinger**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-416: **Koch v. Coble**. Affirmed. See rule 7A(1).

No. A-96-419: **State v. Armagost**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-420: **State v. Smith**. Affirmed. See rule 7A(1).

No. A-96-425: **Howard v. Heithoff**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-431: **State v. Nunn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-439: **State v. Ott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-440: **Austin v. Keys**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-441: **Austin v. Keys**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-442: **Austin v. Wineberg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-443: **Austin v. Walker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-447: **Schlenker v. Schlenker**. Stipulation allowed; appeal dismissed.

No. A-96-450: **Fetherkile v. AT & T Network Sys.** Affirmed. See rule 7A(1).

No. A-96-451: **State v. Coyle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-455: **In re Interest of Wescoat**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-456: **In re Interest of Wescoat**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-457: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-468: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-469: **State v. Kizzire**. Appeal dismissed as moot. See rule 7C.

No. A-96-470: **State v. Kizzire**. Appeal dismissed as moot. See rule 7C.

No. A-96-475: **Global Credit Servs., Inc. v. AMISUB**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-478: **State v. Requejo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-481: **Root v. Root**. Stipulation allowed; appeal dismissed.

No. A-96-482: **Stephens v. Bower**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-96-483: **In re Interest of Christensen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-485: **State v. Johnson**. Affirmed. See rule 7A(1).

No. A-96-486: **State v. McCall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-487: **State v. Ebert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-488: **State v. Wilson**. Appeal dismissed. See rule 7A(2).

No. A-96-494: **Grap v. Schultz**. Affirmed. See rule 7A(1).

No. A-96-495: **State ex rel. Tucker v. Kaelin**. Cause not having been shown, appeal dismissed as moot.

No. A-96-496: **Clark v. Clark**. Stipulation allowed; appeal dismissed.

No. A-96-502: **State v. Dornan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-503: **State v. Dornan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-504: **State v. Dornan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-509: **Wright v. Dept. of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-512: **State v. Loper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-513: **State v. Rasmussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-514: **State v. Rasmussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-515: **State v. Rasmussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-526: **State v. Beckman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-527: **State v. Podoll**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-530: **Hunt v. Hunt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-540: **Concord Enter., Inc. v. Vil Inn York, Ltd.** Motion of appellee for summary dismissal sustained upon basis that controversy is moot.

No. A-96-547: **State v. Splain**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-96-549: **In re Estate of Denton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-551: **Buche v. Buche**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993). See, also, rule 7B(2).

No. A-96-560: **State v. Morales-Chitik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-561: **State v. Arandus**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-565: **Pratt v. Nebraska Parole Bd.** Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-96-567: **Smith v. Kellerman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-570: **Kerns v. Dahm.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-572: **State v. Hogue.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-581: **State v. Alderman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-584: **State v. Brooks.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-585: **Herren v. Board of Parole.** Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-96-586: **State v. Boonie.** Affirmed. See rule 7A(1).

No. A-96-592: **Schluntz v. Hess.** Affirmed. See rule 7A(1).

No. A-96-593: **Schluntz v. Hess.** Affirmed. See rule 7A(1).

No. A-96-595: **State v. Lawson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-596: **State v. Tolston.** Motion of appellee for summary affirmance sustained. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

No. A-96-597: **State v. Tolston.** Motion of appellee for summary affirmance sustained. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

No. A-96-599: **State v. Wurgler.** Affirmed. See rule 7A(1).

No. A-96-606: **State v. Burnett.** Affirmed. See rule 7A(1).

No. A-96-607: **State v. Arias.** Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-96-608: **State v. King.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-609: **State v. Holmgren.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-610: **State v. Holmgren**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-616: **State v. Dennis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-619: **State v. Wolgamott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-621: **Minor v. Union Pacific RR. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-622: **State v. Carter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-624: **State v. Dwyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-630: **Mohl v. State**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-96-631: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2) and *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

No. A-96-633: **Church v. Church**. Affirmed. See rule 7A(1).

No. A-96-634: **State v. Burnett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-635: **State v. Spurlock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-636: **State v. Covos**. Affirmed. See rule 7A(1).

No. A-96-637: **State v. McGuire**. Affirmed. See rule 7A(1).

No. A-96-638: **State v. McGuire**. Affirmed. See rule 7A(1).

No. A-96-639: **State v. Giacomo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-640: **State v. Cemper**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-96-642: **State v. Welk**. Affirmed. See rule 7A(1).

No. A-96-644: **State v. Tremain**. Affirmed. See rule 7A(1).

No. A-96-649: **Neujahr v. McGregor**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-651: **Malin v. Malin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-657: **State v. Hubka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-658: **State v. Vanmeter**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-659: **State v. Vanmeter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-660: **Southview Dev. Co. v. City of Lincoln**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-663: **State v. Wertz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-666: **Alejo v. Beef America, Inc**. Affirmed. See rule 7A(1).

No. A-96-668: **Lynch v. Tasty Toppings, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-669: **Kugler v. Kugler**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-96-672: **Burrage v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-674: **In re Estate of Gahl**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-675: **State v. Harrington**. Affirmed. See rule 7A(1).

No. A-96-676: **State v. Redler**. Affirmed. See rule 7A(1).

No. A-96-677: **State v. Ruiz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-679: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-680: **State v. Webster**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-683: **State v. Starks**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-685: **State v. Mosley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-688: **Hoven v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-689: **Fasse v. Physician Resources, Inc.** Motion of appellee for summary dismissal sustained.

No. A-96-690: **Liss v. Liss.** Affirmed. See rule 7A(1).

No. A-96-691: **State v. Johnson.** Affirmed. See rule 7A(1).

No. A-96-692: **State v. Mindrup.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-694: **State v. Campbell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-698: **State v. Walker.** Stipulation allowed; appeal dismissed.

No. A-96-707: **Alvarez v. Alvarez.** Affirmed. See rule 7A(1).

No. A-96-709: **State v. Stevens.** Affirmed. See rule 7A(1).

No. A-96-711: **State v. Wilcox.** Affirmed. See rule 7A(1).

No. A-96-712: **State v. Harper.** Affirmed. See rule 7A(1).

No. A-96-718: **Casson v. Casson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-96-719: **State v. Rodriguez.** Affirmed. See rule 7A(1).

No. A-96-720: **State v. Lomack.** Appeal dismissed. See rule 7A(2).

No. A-96-721: **State v. Fisher.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-722: **State v. Rawson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-724: **State v. Hamilton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-725: **State v. Holbert.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-726: **State v. Lee.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-727: **State v. Lee.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-729: **Nelson v. Douglas Cty. Court ex rel. Barrett.** Affirmed. See rule 7A(1).

No. A-96-733: **Mediaworks, Inc. v. Walker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-738: **State v. Taylor.** Affirmed. See rule 7A(1).

No. A-96-739: **State v. Bjorklund**. Appeal dismissed. See rule 7A(2); Neb. Rev. Stat. §§ 25-1143 and 29-2103 (Reissue 1995).

No. A-96-742: **Hauschild v. City of Papillion**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-96-743: **State v. Starks**. Affirmed. See rule 7A(1).

No. A-96-752: **State v. Chitwood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-753: **Bourek v. C.D. Constr**. Affirmed. See rule 7A(1) and Neb. Rev. Stat. § 48-185 (Reissue 1993).

No. A-96-756: **In re Estate of Garrett**. Motion of appellee for summary dismissal sustained for failure to deposit bond under Neb. Rev. Stat. § 30-1601(3) (Reissue 1995).

No. A-96-758: **State v. Gillespie**. Order of restitution vacated and matter remanded to district court for further proceedings concerning restitution.

No. A-96-760: **State v. Vazquez**. Affirmed. See rule 7A(1).

No. A-96-761: **Breiner v. Griffin**. Appeal dismissed for lack of jurisdiction as there is no final, appealable order. See *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

No. A-96-762: **McWilliams v. McWilliams**. Stipulation allowed; appeal dismissed.

No. A-96-763: **State v. Goodwin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-764: **State v. Price**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-767: **State v. Elliott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-769: **State v. Meehan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-770: **State v. Howard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-772: **In re Interest of Barnes**. Stipulation allowed; appeal dismissed.

No. A-96-777: **McCaslin v. McCaslin**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. A-96-781: **State v. Estrada**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-790: **State v. Critel**. Affirmed. See rule 7A(1).

No. A-96-791: **State v. Critel**. Affirmed. See rule 7A(1).

No. A-96-793: **In re Interest of Hyde**. Affirmed. See rule 7A(1).

No. A-96-798: **State v. Krantz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-800: **Wagner v. Wagner**. Pursuant to appellant's motion, appeal dismissed.

No. A-96-801: **State v. Wisinger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-802: **State v. Wisinger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-805: **State v. Snyder**. Affirmed. See rule 7A(1).

No. A-96-812: **In re Estate of Capek**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-96-814: **Minzel v. Minzel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-825: **State v. Alarcon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-829: **Rochford v. City of Kearney**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-831: **Robinson v. Robinson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-838: **Sanders v. Sanders**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-839: **Kure Assocs., Inc. v. Western Enter., II**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-96-847: **State v. Floyd**. Affirmed. See rule 7A(1).

No. A-96-848: **State v. Kay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-849: **State v. Moore**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-855: **Pfeifer v. E.I. duPont de Nemours and Co.** Appeal dismissed. See rule 7A(2).

No. A-96-858: **State v. Brawner**. Appeal dismissed. See rule 7A(2).

No. A-96-860: **State v. Spale**. Appeal considered; conviction and sentence affirmed.

No. A-96-862: **State v. Fort**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-863: **Whitmore v. Whitmore**. Appeal dismissed and cause remanded with directions.

No. A-96-864: **State v. Grier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-865: **State v. Bosanek**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-867: **State v. Herrick**. Affirmed. See rule 7A(1).

No. A-96-872: **Plofkin v. Plofkin**. Affirmed. See rule 7A(1).

No. A-96-876: **State v. Shockley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-877: **State v. Herrera**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-878: **State v. Powers**. Affirmed. See rule 7A(1).

No. A-96-881: **State v. Fritzke**. Affirmed. See rule 7A(1).

No. A-96-886: **Barrientos v. Barrientos**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-96-887: **In re Guardianship of Piller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-888: **State v. Houser**. Affirmed. See rule 7A(1).

No. A-96-891: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-893: **Hove v. Taylor**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-96-895: **State v. Scdoris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-905: **Sturdevant v. Abisror**. Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No. A-96-907: **Jacobs v. Jacobs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-910: **State v. Wilder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-915: **Lackas v. Wobig**. Affirmed. See rule 7A(1).

No. A-96-919: **Bonacci v. Ticket Serv., Inc**. Affirmed. See rule 7A(1).

No. A-96-920: **State v. Moore**. Affirmed. See rule 7A(1).

No. A-96-925: **Moore v. Nebraska Bd. of Parole**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-930: **State v. Pitt**. Affirmed. See rule 7A(1).

No. A-96-933: **State v. Sorrels**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-935: **Camenzind v. Camenzind**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-940: **State v. Simmons**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-943: **Stennis v. Tyner**. Appeal dismissed. See rule 7A(2).

No. A-96-944: **State v. Van Meveren**. Appeal dismissed for lack of jurisdiction. See rule 7A(2). See, also, *State v. McCracken*, 248 Neb. 576, 537 N.W.2d 502 (1995).

No. A-96-945: **Llanes v. Dillon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-946: **State v. Rush**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-947: **State v. Rush**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-948: **State v. Sanchez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-949: **State v. Jones**. Appeal dismissed. See rule 7A(2).

No. A-96-950: **Becker v. Board of Regents**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-954: **State v. Hernoud**. Appeal dismissed as filed out of time. See rule 7A(2).

No. A-96-958: **Garza v. Garza**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-968: **Krula v. Krula**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-969: **Amento v. Shepard**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-972: **Westphal v. Westphal**. Affirmed.

No. A-96-976: **State v. Walker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-977: **State v. Walker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-978: **State v. Todd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-979: **State v. Todd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-980: **State v. Townsell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-981: **State v. Tornow**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-988: **State v. Faatz**. Appeal dismissed. See rule 7A(2).

No. A-96-989: **State v. Pinkney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-990: **State v. Whetzel**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-96-994: **Williams v. Horton**. Appeal dismissed. See rule 7A(2).

No. A-96-995: **State v. Clemens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-996: **Williams v. Stenberg**. Appeal dismissed. See rule 7A(2).

No. A-96-998: **Duarte v. Duarte**. Stipulation allowed; appeal dismissed.

No. A-96-1002: **State v. Eggers**. Affirmed. See rule 7A(1).

No. A-96-1003: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1004: **Ryba v. Ryba**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1008: **State v. Torres**. Appeal dismissed for lack of an adequate poverty affidavit. See *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-96-1009: **Labs v. Allstate Ins. Co.** By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1013: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1014: **State v. Thomas**. Affirmed. See rule 7A(1).

No. A-96-1015: **State v. Bejeris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1016: **Barton v. Barton**. Stipulation allowed; appeal dismissed without prejudice; each party to pay own costs.

No. A-96-1027: **State v. Ellis**. Motion of appellee for summary dismissal sustained.

No. A-96-1028: **Schank v. Eliker**. Affirmed. See rule 7A(1).

No. A-96-1031: **State v. Meyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1042: **State v. Haynie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1046: **State v. Martin**. Affirmed. See rule 7A(1).

No. A-96-1047: **Stokes v. Stokes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1049: **McCoy v. McCoy**. Affirmed. See rule 7A(1).

No. A-96-1051: **State v. Sanchez**. Affirmed. See rule 7A(1).

No. A-96-1052: **Mumin v. Miller**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1053: **State v. Tyler**. Appeal dismissed. See rule 7A(2).

No. A-96-1056: **Let the People Vote Comm. v. Moore**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1057: **State v. Stopp**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1058: **State v. Abler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1065: **State v. Eacker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1070: **Herbers v. Harwager**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-96-1072: **State v. Phillips**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1073: **State v. Clinton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1074: **In re Estate of Prokop**. Appeal dismissed. See rule 7A(2).

No. A-96-1077: **State v. Dunn**. Appeal dismissed. See rule 7A(2).

No. A-96-1078: **State v. Dunn**. Appeal dismissed. See rule 7A(2).

No. A-96-1079: **State v. Dunn**. Appeal dismissed. See rule 7A(2).

No. A-96-1081: **Hinn v. Menninger**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-2729 (Reissue 1995).

No. A-96-1083: **State v. Spurlock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1084: **State v. Gandert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1086: **Slaymaker v. Slaymaker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1089: **State v. Douglass**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1090: **State v. Bell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1092: **In re Interest of Vance**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1096: **Laughner v. Laughner**. Appeal dismissed. See rule 7A(2) and *Root v. School Dist. No. 25*, 183 Neb. 22, 157 N.W.2d 877 (1968).

No. A-96-1098: **State ex rel. Wattier v. Bucholz**. Stipulation allowed; appeal dismissed.

No. A-96-1099: **State v. Dixon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1101: **State v. Stephens**. Stipulation allowed; appeal dismissed.

No. A-96-1103: **State v. Walstrom**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1104: **Aleksonis-Valdez v. Blair**. Stipulation allowed; appeal dismissed.

No. A-96-1107: **Ryan v. Clarke**. Affirmed. See rule 7A(1) and *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977).

No. A-96-1108: **Love v. Clarke**. Affirmed. See rule 7A(1) and *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977).

No. A-96-1109: **State v. Austin**. Appeal dismissed. See rule 7A(2) and *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990).

No. A-96-1110: **State v. Austin**. Appeal dismissed. See rule 7A(2) and *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990).

No. A-96-1113: **Genoa Theatre Assn. v. Balka**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1116: **State v. Slapnicka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1117: **State v. Smith**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-96-1118: **Waite v. Carpenter**. Appeal dismissed. See rule 7B(1). See, also, *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989); *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

No. A-96-1119: **State v. Peterson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1122: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1123: **State v. Greene**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1125: **Havel v. Hanchera**. Pursuant to appellant's motion, appeal dismissed.

No. A-96-1126: **Maly v. Nucor Corp**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-96-1129: **Nash v. Clarke**. Affirmed. See rule 7A(1) and *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977).

No. A-96-1131: **Center v. Lincoln Northeast High School**. Appeal dismissed. See rule 7A(2).

No. A-96-1133: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1134: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1139: **National Bank of Commerce Trust & Sav. Assn. v. VanDeWalle**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-96-1140: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1141: **Marker v. Slafter Oil Co**. Affirmed. See rule 7A(1).

No. A-96-1143: **Patel v. Desai**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1145: **State v. Woodyard**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1147: **State v. Day**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1152: **State v. Van De Mark**. Appeal dismissed. See rule 7A(2).

No. A-96-1156: **Blythman v. Blythman**. Appeal dismissed. See rule 7A(2). See, also, *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-96-1157: **State v. Charles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1158: **State v. Munson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1160: **Home Real Estate v. L. A. Nigro Dev. Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1163: **State v. Scott**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1165: **Brandt v. Brandt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1166: **Kreutzer v. Kreutzer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1167: **State v. Oldson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1169: **State v. Harris**. Appeal dismissed. See rule 7A(2). See, also, rule 1B(4).

No. A-96-1170: **State v. Goodall**. Affirmed. See rule 7A(1).

No. A-96-1171: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1172: **Alger v. Goodyear Tire & Rubber Co**. Stipulation allowed; appeal dismissed with prejudice.

No. A-96-1177: **Barthel v. Liermann**. Appeal dismissed as filed out of time. See Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-96-1178: **State v. Scott**. Appeal dismissed. See rule 7A(2) and *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991).

No. A-96-1179: **State v. Scott**. Appeal dismissed. See rule 7A(2) and *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991).

No. A-96-1181: **State v. Luft**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1186: **State v. Baines**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1189: **State v. Gunn**. Remanded with instructions to vacate conviction and sentence.

No. A-96-1194: **State v. Gooden**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1195: **Mumin v. Nebraska Dept. of Corr. Servs.** Appeal dismissed as moot. See rule 7C.

No. A-96-1199: **In re Interest of Wood**. Appeal dismissed. See rule 7A(2).

No. A-96-1201: **Home Improvement Gallery v. Butler**. Motions of appellees for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1202: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1203: **State v. Onderstal**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1204: **State v. Onderstal**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1205: **State v. Peterson**. Appeal dismissed.

No. A-96-1206: **State v. Peterson**. Appeal dismissed.

No. A-96-1207: **State v. Treick**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-96-1210: **Asarco Inc. v. Wood**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-96-1212: **State v. Firoz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1213: **State v. Gutierrez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1214: **State v. Mead**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1216: **State v. Cadwallader**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1217: **State v. Cadwallader**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1220: **Hoffer v. Reeser**. Affirmed. See rule 7A(1).

No. A-96-1221: **Lyman v. Department of Corr. Servs.** Appeal dismissed. See Neb. Rev. Stat. § 25-1912 (Reissue 1995) and rule 7A(2).

No. A-96-1222: **State v. Williams**. Stipulation allowed; appeal dismissed.

No. A-96-1227: **Stalp Ag, Inc. v. Ritter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1231: **Lynch v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-96-1236: **State v. Haukaas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1238: **State v. Williams**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1242: **Fleming Cos. v. Feldman**. Motion of appellee for summary dismissal sustained. See rule 7B(1). See, also, *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Gilbert v. Vogler*, 197 Neb. 454, 249 Neb. 729 (1977).

No. A-96-1247: **Blase v. Blase**. Appeal dismissed. See rule 7A(2).

No. A-96-1249: **State v. Keilany**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1250: **State v. Jimenez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1252: **State v. Olsan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1254: **State v. Thorne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1255: **State v. Thorne**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1258: **In re Conservatorship of Wlaschin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1270: **State v. Pryjmak**. Affirmed. See rule 7B(2). See, also, *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984).

No. A-96-1271: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1272: **State v. Partee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1273: **State v. Moore**. Stipulation allowed; appeal dismissed.

No. A-96-1274: **State v. Snodgrass**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1275: **State v. Kagy**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-96-1277: **Wagner v. Department of Corr. Servs.** Affirmed. See rule 7A(1).

No. A-96-1278: **Walton v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-96-1280: **Ellis v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-96-1281: **Mumin v. Avery**. Appeal dismissed. See rule 7A(2).

No. A-96-1286: **State v. Lundholm**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1287: **State v. Payne**. Affirmed. See rule 7A(1).

No. A-96-1289: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1292: **Mills v. Salado**. Stipulation allowed; appeal dismissed.

No. A-96-1293: **Vieyra v. Nila**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1296: **State v. Clouse**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1298: **State v. Glasgow**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1299: **State v. Geary**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1302: **State v. Rivers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1303: **Villarreal v. Villarreal**. By order of the court, appeal dismissed for failure to file briefs.

No. A-96-1310: **Swackhamer v. Swackhamer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1311: **Nelson v. Barthel**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-96-1315: **Mortensen v. Mortensen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1316: **Flake v. Flake**. Affirmed. See rule 7A(1).

No. A-96-1319: **In re Guardianship of Bouge**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1324: **State v. Hardy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1329: **State v Luong**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1334: **In re Interest of Robertson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1335: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1336: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-96-1337: **State v. Fisher**. Affirmed. See rule 7A(1).

No. A-97-003: **Hyde v. Hyde**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-010: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-011: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-017: **State v. Cech**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-019: **Kampe v. Department of Corr. Servs.** Affirmed. See rule 7A(1).

No. A-97-030: **Fugate v. Fugate**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-031: **Bitterman v. Bitterman**. Affirmed. See rule 7A(1).

No. A-97-033: **State v. Wells**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-036: **State v. Giovino**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-037: **State v. Giovino**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-038: **State v. Mahlberg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-039: **State v. Pixler**. Affirmed. See rule 7A(1).

No. A-97-043: **State v. Baughman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-045: **Pope v. Department of Corr. Servs**. Appeal dismissed. See rule 7A(2).

No. A-97-046: **State v. Cudmore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-050: **State v. Slangal**. Affirmed. See rule 7A(1).

No. A-97-051: **State v. Roark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-052: **State v. Jahn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-053: **State v. Warrick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-054: **State v. Webster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-056: **Hohenstein v. Four Star Convenience Stores**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-061: **State v. Reaves**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-066: **State v. Jahn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-069: **El-Tabech v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-076: **Richards v. City of LaVista**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-082: **City of Lincoln v. Austin**. Appeal dismissed. See rule 7A(2).

No. A-97-085: **James Neff Kramper Family Farm Part. v. City of S. Sioux City**. Appeal dismissed. See rule 7A(2). See,

also, *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986).

No. A-97-088: **Blasig v. Abramson**. Stipulation allowed; appeal dismissed.

No. A-97-093: **McCamish v. McCamish**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-095: **Brooks v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-97-098: **City of Elkhorn v. State**. Appeal dismissed. See rule 7A(2).

No. A-97-100: **State v. Nelson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-101: **Obermiller v. Village of Doniphan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-102: **Jacobsen v. Civil Serv. Comm. of Grand Island**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-106: **State v. Carlson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-107: **Haugen v. Hoppens**. Stipulation allowed; appeal dismissed.

No. A-97-109: **State v. Turner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-110: **State v. Birdhead**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-111: **State v. Bates**. Affirmed. See rule 7A(1).

No. A-97-115: **State v. Virus**. Affirmed. See rule 7A(1).

No. A-97-116: **State v. Maree**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-119: **State v. Hoctor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-120: **McHenry v. Piller**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-124: **State v. Epting**. Affirmed. See rule 7A(1).

No. A-97-125: **State v. Baade**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-130: **Sonnie v. Sonnie**. Stipulation allowed; appeal dismissed.

No. A-97-132: **State v. Johnson**. Affirmed. See rule 7A(1) and *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). See, also, *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997); *State v. Stahl*, 240 Neb. 501, 482 N.W.2d 829 (1992); *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992).

No. A-97-133: **State v. Garner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-134: **State v. Cassel**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-136: **State v. Hanson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-142: **State v. Prater**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-147: **State v. Granger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-155: **State v. Espana-Alconini**. Appeal dismissed. See rule 7A(2).

No. A-97-157: **State v. Olson**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912 (Reissue 1995) and rule 7A(2).

No. A-97-161: **Davidson-Stinson Cattle Co. v. Davidson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-164: **Neel v. Nebraska State Patrol**. Stipulation allowed; appeal dismissed.

No. A-97-165: **Cline v. Nebraska State Patrol**. Stipulation allowed; appeal dismissed.

No. A-97-167: **Estate of Aschenbrenner v. Medical Imaging Assocs**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-97-169: **Jenkins v. Puhl**. Appeal dismissed for lack of final, appealable order. See *Jung v. Cole*, 184 Neb. 153, 165 N.W.2d 717 (1969).

No. A-97-171: **Dryden v. Kinney**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-175: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-176: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-178: **Baccus v. Immanuel, Inc**. Appeal dismissed for lack of a final, appealable order. See *Root v. School Dist. No. 25*, 183 Neb. 22, 157 N.W.2d 877 (1968).

No. A-97-182: **Lindvall v. Nebraska Chapter of Delta Upsilon**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-97-184: **Alfs v. Nebraska Pub. Power Dist**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-186: **State v. Lupien**. Appeal dismissed. See rule 7A(2).

No. A-97-187: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-192: **Becker v. Wood**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-194: **State v. Garza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-195: **State v. Domingo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-198: **Blankemeyer v. Federal Land Bank of Omaha**. Appeal dismissed. See rule 7A(2). See, also, *Gilbert v. Volger*, 197 Neb. 454, 249 N.W.2d 729 (1977); *Barry v. Wolf*, 148 Neb. 27, 26 N.W.2d 303 (1947).

No. A-97-223: **State v. Lash**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-224: **Billups v. State**. Appeal dismissed as filed out of time. See Neb. Rev. Stat. § 25-1912 (Reissue 1995) and rule 7A(2).

No. A-97-226: **Wzorek v. Belk**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-233: **State v. Beam**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-236: **State v. McWilliams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-237: **State v. Sumlin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-240: **State v. Zellers**. Affirmed. See rule 7A(1).

No. A-97-242: **Lincoln Trust for the Benefit of Phillip Wright v. Moss**. Motion to dismiss for lack of jurisdiction granted under rule 7B(1). See, *Lindquist v. Towle*, 164 Neb. 524, 82 N.W.2d 631 (1957); *Knoell Constr. Co., Inc. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981).

No. A-97-243: **C.P. Inv. Trust v. Walker**. Appeal dismissed for lack of jurisdiction. See *Lindquist v. Towle*, 164 Neb. 524, 82 N.W.2d 631 (1957). See, also, Neb. Rev. Stat. § 25-1143 (Reissue 1995).

No. A-97-244: **State v. Placek**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-245: **State v. Lemon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-246: **State v. Clinebell-Steele**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-248: **Wooden v. Wooden**. Remanded with directions. Each party to pay own costs.

No. A-97-251: **State v. Ipock**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-252: **Becker v. University of Nebraska**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-253: **Remmen v. Zweiback**. Appeal dismissed. See rule 7A(2).

No. A-97-254: **State v. Dewitt**. Appeal dismissed. See rule 7A(2).

No. A-97-261: **Faeller v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-262: **Nunn v. Department of Corr. Servs**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-264: **State v. Ortiz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-267: **Dvorak v. Harold K. Scholz Co**. Appeal dismissed.

No. A-97-271: **State v. Lupien**. Appeal dismissed. See rule 7A(2) and *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-97-277: **State v. Fatica**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-282: **Lair v. Lair**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-283: **McConnell v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-288: **State v. Rodenbaugh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-291: **State v. Weeks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-293: **State v. Alvarado**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-294: **Klein v. Einspahr**. Stipulation allowed; appeal dismissed.

No. A-97-300: **State v. Howard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-309: **Clary v. Clary**. Motion of appellee for summary dismissal sustained. See rule 7B(1). See, also, *Caynor v. Caynor*, 213 Neb. 143, 327 N.W.2d 633 (1982).

No. A-97-316: **State v. Roman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-317: **State v. Roman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-320: **State v. Bennett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-321: **Cotton v. Ferguson**. Appeal dismissed. See rule 7A(2).

No. A-97-322: **Cotton v. Jennings**. Appeal dismissed. See rule 7A(2).

No. A-97-323: **State v. Jones**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-329: **Geiger v. Nebraska Dept. of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-332: **State ex rel. McRorey v. Moll**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-334: **Maruska v. Maruska**. Appeal dismissed as filed out of time. See Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-337: **State v. Lemanton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-340: **Davis v. Department of Motor Vehicles**. Stipulation allowed; appeal dismissed.

No. A-97-346: **In re Guardianship of Bacon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-348: **In re Interest of Porter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-349: **Samson v. Coopers & Lybrand**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-352: **Dvorak v. Bunge Corp**. Appeal dismissed.

No. A-97-356: **Trauernicht v. Trauernicht**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-367: **Clason v. Brown**. Appeal dismissed.

No. A-97-368: **In re Estate of Stevens**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912(2) (Reissue 1995).

No. A-97-377: **Hanson v. Hanson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-379: **Citizens State Bank v. Davenport**. Appeal dismissed. See rule 7A(2). See, also, *Grimes v. Chamberlain*, 27 Neb. 605, 43 N.W. 395 (1889), and Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-97-385: **County of Sarpy v. Hunter's Crossing Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-394: **State v. King**. Appeal dismissed. See rule 7A(2).

No. A-97-396: **State v. Craigie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-400: **Monahan v. Policy Studies Inc.** Appeal dismissed for lack of jurisdiction. There is no final, appealable order. See *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

No. A-97-403: **Lueder Constr. Co. v. Portico Ltd. Partnership.** Appeal dismissed. See rule 7A(2).

No. A-97-409: **Glines v. Glines.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-415: **Reynoldson v. Reynoldson.** Appeal dismissed.

No. A-97-424: **State v. Davenport.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-425: **Russell v. Cherry.** Appeal dismissed for lack of a final, appealable order. See *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

No. A-97-430: **Groseth v. Groseth.** Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-97-432: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-433: **State v. Miller.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-437: **In re Interest of Conover.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-442: **State v. O'Neal.** Appeal dismissed. See *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995). See, also, Neb. Rev. Stat. § 29-2306 (Reissue 1995).

No. A-97-445: **Tyler v. Stennis.** Appeal dismissed for lack of a final, appealable order. See *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

No. A-97-450: **State v. Wieck.** Appeal dismissed. See rule 7A(2).

No. A-97-451: **State v. Wieck.** Appeal dismissed. See rule 7A(2).

No. A-97-452: **State v. Tyler.** Appeal dismissed. See rule 7A(2).

No. A-97-453: **JTL Corp. v. Lancaster Cty. Bd. of Equal.** Appeal dismissed. See rule 7A(2).

No. A-97-462: **Arthur v. Dobesh.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-488: **Flannigan v. Arkansas Best Corp.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-494: **State v. Reaves.** Appeal dismissed. See *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994).

No. A-97-498: **State v. Phillips.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-501: **State v. Williams.** Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-508: **Halouska v. Halouska.** Appeal dismissed. Poverty affidavit executed more than 45 days prior to filing of notice of appeal. See rule 1B(4). Moreover, appeal is premature, as decree of dissolution was not entered until June 2 and notice of appeal was filed May 12, 1997.

No. A-97-510: **State v. Hyde.** Appeal dismissed for lack of jurisdiction. See rule 7A(2). See, also, *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-97-519: **Tyler v. Finke.** Appeal dismissed. Poverty affidavit not filed within 30 days from final order. See Neb. Rev. Stat. § 25-1912 (Reissue 1995). See, also, *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-97-531: **General Cas. Ins. Co. v. Phillips.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-540: **State v. Neujahr.** Appeal dismissed. Poverty affidavit is insufficient and stale. See rule 1B(4).

No. A-97-582: **Silverman v. Lee.** Appeal dismissed. See rule 7A(2).

No. A-97-586: **Cokes v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-97-589: **Reagan Olds, Inc. v. Douglas County.** Appeal dismissed. See rule 7A(2).

No. A-97-593: **State v. Pratt.** Affirmed. See rule 7A(1).

No. A-97-598: **Bolton v. Bolton.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-97-605: **State v. Moore.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-97-609: **Ryan v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See rule 7(A)2 and Neb. Rev. Stat. § 84-917 (Reissue 1994).

No. A-97-611: **State v. Parks.** Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-622: **State v. Hays.** Stipulation allowed; appeal dismissed.

No. A-97-637: **State v. Castano.** Appeal dismissed. Poverty affidavit inadequate and filed when more than 45 days old. See rule 1B(4).

No. A-97-673: **Hart v. Bridgestone/Firestone, Inc.** Appeal dismissed as filed out of time. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-685: **Logan v. Logan.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-97-688: **Rowney v. Vondrak.** Appeal dismissed. See rule 7A(2). See, also, *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

No. A-97-694: **In re Dissolution of Holt Cty. Sch. Dist. 6.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-717: **Beda v. Hartley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-721: **State v. Booth.** Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-734: **Sharp v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2). See, also, *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-97-789: **Palacios v. IBP, inc.** Stipulation allowed; appeal dismissed.

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-94-069: **Schank v. TAS Truckline, Inc.** Petition of appellant for further review overruled on September 25, 1996.

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

No. A-94-731: **Konat v. Schmitz**, 96 NCA No. 25. Petition of appellees for further review overruled on September 18, 1996.

No. A-94-984: **Utter v. Utter**, 96 NCA No. 15. Petition of appellant for further review overruled on September 18, 1996.

No. A-94-1042: **Jamison v. Kenzy**, 96 NCA No. 21. Petition of appellant for further review overruled on September 25, 1996.

No. S-94-1142: **Blanchard v. City of Ralston**, 4 Neb. App. 692 (1996). Petition of appellee for further review sustained on September 25, 1996.

No. A-94-1252: **Light v. Glass**, 96 NCA No. 24. Petitions of appellants for further review overruled on September 18, 1996.

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

No. A-95-001: **Brown v. Safeway Cab, Inc.** Petition of appellant for further review overruled on September 18, 1996.

No. A-95-021: **Robinson v. Robinson.** Petition of appellant for further review overruled on September 18, 1996.

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

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

No. A-95-123: **State v. Green.** Petition of appellant for further review overruled on September 18, 1996.

No. S-95-125: **Pope v. Pope**, 96 NCA No. 21. Petition of appellee for further review sustained on September 18, 1996.

No. A-95-132: **Ferguson v. Village of Miller**. Petition of appellee for further review overruled on September 18, 1996.

No. S-95-177: **Dau v. Hellbusch**. Petition of appellee for further review sustained on September 18, 1996.

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

No. A-95-205: **Prince v. Prince**, 96 NCA No. 25. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-237: **Mueller v. Bohannon**, 96 NCA No. 26. Petition of appellee for further review overruled on October 2, 1996.

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

Nos. A-95-319, A-95-320: **Mach v. Schmer**, 4 Neb. App. 819 (1996). Petition of appellant for further review overruled on September 18, 1996.

No. A-95-322: **Ted Grace Homes, Inc. v. Dinklage**. Petition of appellant for further review overruled on March 12, 1997.

No. A-95-323: **Jack F. Paulson Trust v. Board of Adjustment**, 96 NCA No. 50. Petition of appellant for further review overruled on April 9, 1997.

No. A-95-334: **Shafer v. Shafer**, 96 NCA No. 33. Petition of appellee for further review overruled on October 2, 1996.

No. A-95-361: **State ex rel. Clanton v. Clanton**, 96 NCA No. 33. Petition of appellee for further review overruled on October 2, 1996.

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

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

No. A-95-406: **Yerkes v. Mark Hopkins Homes, Inc.**, 96 NCA No. 32. Petition of appellant for further review overruled on September 13, 1996.

No. S-95-413: **Klinginsmith v. Wichmann**, 96 NCA No. 29. Petition of appellant for further review sustained on September 18, 1996.

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

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

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

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

No. A-95-438: **Pritchett v. Pohlmeier**. Petition of appellees for further review overruled on May 22, 1997.

No. A-95-444: **State v. Johnson**, 4 Neb. App. 776 (1996). Petition of appellee for further review overruled on September 25, 1996.

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

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

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

No. S-95-531: **Estate of Stine v. Chambanco, Inc.** Petition of appellant for further review sustained on October 2, 1996.

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

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

No. A-95-568: **Allied Mut. Ins. Co. v. Farmers Ins. Exch.**, 96 NCA No. 32. Petition of appellant for further review overruled on September 25, 1996.

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

No. A-95-577: **State v. Flanagan**, 4 Neb. App. 853 (1996). Petition of appellant for further review overruled on September 25, 1996.

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

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

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

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

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

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

No. A-95-682: **Glasgow v. J & M Investment Co.**, 97 NCA No. 8. Petition of appellees for further review overruled on April 23, 1997.

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

No. S-95-699: **Gans v. Huffman & Assocs.**, 97 NCA No. 14. Petition of appellant for further review sustained on May 14, 1997.

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

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

No. A-95-730: **Kusek v. Burlington Northern RR. Co.**, 4 Neb. App. 924 (1996). Petition of appellee for further review overruled on September 25, 1996.

No. S-95-745: **In re Interest of Borius H. et al.**, 96 NCA No. 21. Petition of appellant for further review sustained on September 18, 1996.

No. S-95-757: **Kaminski v. Bass**, 97 NCA No. 5. Petition of appellant for further review sustained on March 19, 1997.

No. S-95-785: **In re Interest of Thomas M.**, 96 NCA No. 13. Petition for further review dismissed on October 2, 1996, as having been improvidently granted. Petition for further review filed out of time. See S-95-785, *In re Interest of Thomas M.*, 4 Neb. App., List of Cases on Petition for Further Review.

No. A-95-790: **County of York v. Tracy**, 5 Neb. App. 240 (1996). Petition of appellee for further review overruled on March 12, 1997.

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

No. A-95-809: **State v. Naber**. Petition of appellant for further review overruled on September 18, 1996.

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

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

No. S-95-821: **State v. Lee**, 4 Neb. App. 757 (1996). Petition of appellee for further review sustained on September 18, 1996.

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

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

No. A-95-876: **Cahill v. Westside Community Sch. Found.** Petition of appellee for further review overruled on March 12, 1997.

No. A-95-888: **City of Lincoln v. Stephens**. Petition of appellant for further review overruled on March 14, 1997, for lack of jurisdiction.

No. S-95-922: **State v. Kinser**. Petition of appellee for further review sustained on September 18, 1996.

No. S-95-934: **Fales v. Books**, 5 Neb. App. 372 (1997). Petition of appellee for further review sustained on June 18, 1997.

No. A-95-939: **Thomsen v. State**. Petition of appellants for further review overruled on September 25, 1996.

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

No. A-95-943: **State v. Ackerman**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-946: **Johnson v. Johnson**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-954: **Smith v. City of Omaha**. Petition of appellant for further review overruled on April 16, 1997.

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

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

No. A-95-982: **Watts v. Underriner**. Petition of appellant for further review overruled on March 12, 1997.

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

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

No. A-95-1012: **Coschka v. Gillogly**. Petition of appellant for further review overruled on March 12, 1997.

No. S-95-1024: **In re Estate of Wagner**. Petition of appellant for further review sustained on April 9, 1997.

No. S-95-1027: **State v. Freeman**, 96 NCA No. 41. Petition of appellant for further review sustained on March 26, 1997.

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

No. A-95-1040: **Swearingen v. Swearingen**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1050: **State v. Jones**. Petition of appellant for further review overruled on March 19, 1997.

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

No. A-95-1063: **State v. Mackey**. Petition of appellant for further review overruled on September 18, 1996.

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

No. A-95-1077: **Zoucha v. United Parcel Service**, 96 NCA No. 25. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1091: **Thorne v. Omaha Pub. Power Dist.**, 97 NCA No. 18. Petition of appellee Fuel Economy Contracting Co. for further review overruled on June 25, 1997.

No. A-95-1091: **Thorne v. Omaha Pub. Power Dist.**, 97 NCA No. 18. Petition of appellee OPPD for further review overruled on June 25, 1997.

No. A-95-1095: **I. P. Homeowners v. Radtke**, 5 Neb. App. 271 (1997). Petition of appellant for further review overruled on March 12, 1997.

No. S-95-1096: **Tyler v. Tyler**. Petition of appellee for further review sustained on April 9, 1997.

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

No. S-95-1120: **State v. Hingst**, 4 Neb. App. 768 (1996). Petition of appellee for further review sustained on September 18, 1996.

No. S-95-1130: **PSB Credit Servs., Inc. v. Rich**, 4 Neb. App. 860 (1996). Petition of appellee for further review sustained on September 25, 1996.

No. A-95-1143: **In re Interest of Brandon W.**, 4 Neb. App. 811 (1996). Petition of appellant for further review overruled on September 18, 1996.

Nos. A-95-1146, A-95-1147: **State v. Beeder**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1164: **Baker v. Dolan**, 97 NCA No. 14. Petition of appellee for further review overruled on May 22, 1997.

No. A-95-1178: **Getzschman v. Light**. Petition of appellant for further review overruled on June 12, 1997.

No. S-95-1180: **Martin v. Roth**. Petition of appellant for further review sustained on March 12, 1997.

No. S-95-1182: **Salazar v. Nemec**, 5 Neb. App. 622 (1997). Petition of appellee for further review sustained on May 29, 1997.

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

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

No. S-95-1207: **Enterprise Rent-A-Car Co. Midwest v. Prokop**. Petition of appellee for further review sustained on June 18, 1997.

No. A-95-1209: **Love v. Folk**. Petition of appellant for further review overruled on May 22, 1997.

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

No. A-95-1245: **State v. Freeman**, 96 NCA No. 25. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1254: **State v. Garber**. Petition of appellant for further review overruled on September 18, 1996.

No. A-95-1268: **Cole v. Kiewit Constr. Co.**, 97 NCA No. 20. Petition of appellee for further review overruled on June 18, 1997.

Nos. S-95-1275, S-95-1276: **State v. Kennedy**. Petition of appellee for further review sustained on September 25, 1996.

No. A-95-1277: **P & H Electric v. Roche, Inc.** Petition of appellant for further review overruled on April 9, 1997.

No. A-95-1283: **Diers, Inc. v. Cohrs**. Petition of appellant for further review overruled on April 30, 1997.

No. A-95-1289: **Shadel v. Landess**. Petition of appellant for further review overruled on May 22, 1997.

No. S-95-1291: **State v. Jacques**, 97 NCA No. 8. Petition of appellant for further review sustained on April 30, 1997.

No. A-95-1300: **Collection Bureau of Lincoln v. Langemeier**, 97 NCA No. 11. Petition of appellants for further review overruled on May 22, 1997.

Nos. A-95-1311, A-95-1312: **State v. Davenport**, 5 Neb. App. 355 (1997). Petition of appellant for further review overruled on March 12, 1997.

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

No. A-95-1330: **Mulligan's Inc. v. Nebraska Liquor Control Comm**. Petition of appellant for further review overruled on July 16, 1997.

No. S-95-1337: **Hynes v. Hogan**, 4 Neb. App. 866 (1996). Petition of appellee for further review sustained on September 18, 1996.

No. A-95-1338: **Bartling v. Bartling**. Petition of appellant for further review overruled on May 29, 1997.

No. A-95-1343: **State v. Hirsch**. Petition of appellant for further review overruled on June 18, 1997.

No. A-95-1353: **State v. Longoria**. Petition of appellant for further review overruled on September 18, 1996.

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

No. A-95-1363: **In re Adoption of Trabert**. Petition of appellant for further review overruled on October 2, 1996.

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

No. S-95-1370: **State v. Ready**, 5 Neb. App. 143 (1996). Petition of appellee for further review sustained on March 19, 1997.

No. A-95-1393: **Quinn v. Lincoln Public Schools**. Petition of appellant for further review overruled on June 25, 1997.

No. S-95-1396: **Wolgamott v. Abramson**, 5 Neb. App. 478 (1997). Petition of appellant for further review sustained on April 16, 1997.

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

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

No. S-96-012: **State v. Al-Zubaidy**, 5 Neb. App. 327 (1997). Petition of appellant for further review sustained on April 16, 1997.

No. A-96-016: **State v. Langone**. Petition of appellant for further review overruled on September 25, 1996.

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

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

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

No. A-96-043: **Spanyers v. Fuehrer**. Petition of appellant for further review overruled on July 23, 1997.

No. A-96-057: **State v. Holder**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-066: **Jones Air Conditioning v. Coupe**. Petition of appellant for further review overruled on June 18, 1997.

No. A-96-073: **Saltz v. Rose Lane Home**. Petition of appellant for further review overruled on October 2, 1996.

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

No. A-96-077: **State v. Caddy**. Petition of appellant for further review overruled on July 23, 1997.

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

No. S-96-079: **State v. Fiedler**, 5 Neb. App. 629 (1997). Petition of appellant for further review sustained on June 12, 1997.

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

No. A-96-087: **State v. Matthies**, 97 NCA No. 3. Petition of appellant for further review overruled on April 16, 1997.

No. A-96-094: **Margolis v. Selig**. Petition of appellee for further review overruled on July 16, 1997.

No. A-96-096: **Grebe v. Grebe**. Petition of appellant for further review overruled on June 18, 1997.

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

No. A-96-104: **State v. Valdez**, 5 Neb. App. 506 (1997). Petition of appellant for further review overruled on June 25, 1997.

No. A-96-120: **State v. Pittman**, 5 Neb. App. 152 (1996). Petition of appellant for further review overruled on March 26, 1997.

No. S-96-124: **Hilliard v. Robertson**. Petition of appellant for further review sustained on May 22, 1997.

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

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

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

No. A-96-168: **HEP, Inc. v. Gibraltar Constr. Co.** Petition of appellant for further review overruled on July 16, 1997.

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

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

No. A-96-193: **Shaffer v. Langemeier**. Petition of appellee for further review overruled on July 23, 1997.

No. A-96-199: **Betterman & Katelman v. Pipe & Piling Supplies**. Petition of appellant for further review overruled on July 16, 1997.

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

No. S-96-207: **Neumann v. American Family Ins.**, 5 Neb. App. 704 (1997). Petition of appellee for further review sustained on July 16, 1997.

Nos. A-96-228, A-96-229: **State v. Schlagenhauff**. Petition of appellant for further review overruled on October 2, 1996.

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

No. A-96-234: **State v. Tietjen**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-235: **State v. Polivka**. Petition of appellant for further review overruled on September 18, 1996.

No. A-96-236: **State v. Patrick**. Petition of appellant for further review overruled on September 18, 1996.

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

No. S-96-251: **State v. Robbins**, 5 Neb. App. 382 (1997). Petition of appellee for further review sustained on March 19, 1997.

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

No. A-96-259: **State v. Schmidt**, 5 Neb. App. 653 (1997). Petition of appellant for further review overruled on June 12, 1997.

No. S-96-274: **Chelberg v. Guitars & Cadillacs of Nebraska Inc.** Petition of appellant for further review sustained on July 23, 1997.

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

No. A-96-281: **State v. Vongrasmy**. Petition of appellant for further review overruled on September 18, 1996.

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

No. S-96-334: **State v. Chitty**, 5 Neb. App. 412 (1997). Petition of appellee for further review sustained on April 16, 1997.

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

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

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

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

No. A-96-361: **State v. Eldred**, 5 Neb. App. 424 (1997). Petition of appellant for further review overruled on March 26, 1997.

No. A-96-362: **Friedli v. Davis**, 97 NCA No. 5. Petition of appellant for further review overruled on March 26, 1997.

Nos. A-96-364, A-96-365: **In re Interest of Jean Marie M. & Scott M.** Petition of appellant for further review overruled on April 9, 1997.

No. A-96-378: **Brown v. Butler Holdings, Inc.** Petition of appellant for further review overruled on August 4, 1997.

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

No. S-96-399: **Sheridan v. Catering Mgmt., Inc.**, 5 Neb. App. 305 (1997). Petition of appellant for further review sustained on March 12, 1997.

No. A-96-402: **State v. Poppe**, 97 NCA No. 5. Petition of appellee for further review overruled on March 19, 1997.

No. A-96-417: **State v. Brooks**, 5 Neb. App. 463 (1997). Petition of appellant for further review overruled on April 16, 1997.

No. A-96-427: **Pihl v. M & O Industries**, 96 NCA No. 49. Petition of appellant for further review overruled on March 12, 1997.

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

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

No. A-96-461: **In re Interest of Pamela B.** Petition of appellant for further review overruled on March 19, 1997.

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

No. A-96-472: **State v. Fraser**. Petition of appellant for further review overruled on September 18, 1996.

Nos. A-96-476, A-96-477, A-96-499: **In re Interest of Adria C.** Petition of appellant for further review overruled on May 22, 1997.

No. S-96-511: **State v. Chojolan**, 97 NCA No. 6. Petition of appellant for further review sustained on June 12, 1997.

No. A-96-519: **State v. Elgert**, 97 NCA No. 7. Petition of appellant for further review overruled on April 9, 1997.

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

No. S-96-540: **Concord Enter., Inc. v. Vil Inn York, Ltd.** Petition of appellant for further review sustained on March 12, 1997.

No. A-96-544: **Bruggeman v. Bruggeman**, 97 NCA No. 16. Petition of appellant for further review overruled on June 18, 1997.

No. A-96-564: **In re Interest of Andrews**, 97 NCA No. 21. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-566: **Wineberg v. Austin.** Petition of appellant for further review overruled on September 18, 1996.

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

No. A-96-582: **In re Interest of John S., Jr., et al.**, 97 NCA No. 11. Petition of appellees for further review overruled on May 22, 1997.

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

No. A-96-590: **State v. Neiman.** Petition of appellant for further review overruled on May 22, 1997.

No. A-96-592: **Schluntz v. Hess.** Petition of appellant for further review overruled on May 14, 1997.

No. A-96-593: **Schluntz v. Hess.** Petition of appellant for further review overruled on August 11, 1997, as out of time.

No. A-96-593: **Schluntz v. Hess.** Petition of appellant for further review overruled on July 28, 1997.

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

No. S-96-598: **State v. Craven**, 5 Neb. App. 590 (1997). Petition of appellant for further review sustained on May 14, 1997.

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

No. A-96-616: **State v. Dennis.** Petition of appellant for further review overruled on March 12, 1997.

No. A-96-617: **In re Interest of LaDonna K. et al.** Petition of appellant for further review overruled on July 23, 1997.

No. A-96-621: **Minor v. Union Pacific RR. Co.** Petition of appellant for further review overruled on March 19, 1997.

No. A-96-625: **State v. Jensen.** Petition of appellee for further review overruled on June 18, 1997.

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

No. A-96-637: **State v. McGuire.** Petition of appellant for further review overruled on March 19, 1997.

No. A-96-638: **State v. McGuire.** Petition of appellant for further review overruled on March 19, 1997.

No. A-96-640: **State v. Cemper.** Petition of appellant for further review overruled on March 12, 1997.

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

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

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

No. A-96-664: **State v. Gallardo.** Petition of appellant for further review overruled on July 16, 1997.

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

No. A-96-670: **In re Interest of Quinn D.** Petition of appellant for further review overruled on June 12, 1997.

No. S-96-691: **State v. Johnson.** Petition of appellant for further review sustained on July 16, 1997.

No. S-96-696: **Davidson v. Davidson,** 97 NCA No. 14. Petition of appellee for further review sustained on June 12, 1997.

No. A-96-708: **State v. Price.** Petition of appellant for further review overruled on May 22, 1997.

No. A-96-712: **State v. Harper.** Petition of appellant for further review overruled on May 29, 1997.

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

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

No. S-96-741: **State v. Howard**, 5 Neb. App. 596 (1997). Petition of appellee for further review sustained on May 14, 1997.

No. A-96-743: **State v. Starks**. Petition of appellant for further review overruled on April 9, 1997.

No. S-96-751: **State v. Smith**. Petition of appellant for further review sustained on May 29, 1997.

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

No. A-96-773: **Brookes v. Lincoln Mfg. Co.**, 97 NCA No. 12. Petition of appellant for further review overruled on May 29, 1997.

No. A-96-790: **State v. Critel**. Petition of appellant for further review overruled on April 30, 1997.

No. A-96-791: **State v. Critel**. Petition of appellant for further review overruled on April 30, 1997.

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

No. A-96-803: **Morris v. Casey's Gen. Store**. Petition of appellant for further review overruled on March 26, 1997.

No. A-96-805: **State v. Snyder**. Petition of appellant for further review overruled on April 9, 1997.

No. A-96-809: **In re Interest of Lindsay M. et al.**, 97 NCA No. 18. Petition of appellant for further review overruled on June 25, 1997.

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

No. A-96-817: **State v. Tuttle**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-826: **State v. Stauffer**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-869: **State v. Malina**, 97 NCA No. 25. Petition of appellant for further review overruled on August 4, 1997, as filed out of time.

No. S-96-870: **State v. Hays**. Petition of appellant for further review sustained on July 23, 1997.

No. A-96-872: **Plofkin v. Plofkin**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-900: **State v. Schmidt**. Petition of appellant for further review overruled on March 12, 1997.

No. A-96-909: **State v. Sepulveda**. Petition of appellant for further review overruled on June 25, 1997.

No. A-96-913: **State v. Salmons**. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-916: **State v. Cervantes**, 97 NCA No. 15. Petition of appellant for further review overruled on May 22, 1997.

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

No. A-96-928: **Shikles v. Yellow Freight Sys**. Petition of appellant for further review overruled on April 30, 1997.

No. A-96-929: **Stewart v. Stewart**, 97 NCA No. 21. Petition of appellant for further review overruled on July 16, 1997.

No. A-96-950: **Becker v. Board of Regents**. Petition of appellant for further review overruled on April 16, 1997.

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

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

No. A-96-1057: **State v. Stopp**. Petition of appellant for further review overruled on July 16, 1997.

No. S-96-1069: **Varela v. Fisher Roofing Co.**, 5 Neb. App. 722 (1997). Petition of appellant for further review sustained on July 23, 1997.

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

No. A-96-1099: **State v. Dixon**. Petition of appellant for further review overruled on April 30, 1997.

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

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

No. A-96-1118: **Waite v. Carpenter**. Petition of appellant for further review overruled on July 23, 1997.

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

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

Nos. A-96-1133, A-96-1134: **State v. Miller.** Petition of appellant for further review overruled on July 23, 1997.

No. A-96-1141: **Marker v. Slafter Oil Co.** Petition of appellant for further review overruled on July 16, 1997.

No. A-96-1153: **Koch v. Hardee's.** Petition of appellee for further review overruled on July 23, 1997.

No. A-96-1156: **Blythman v. Blythman.** Petition of appellant for further review overruled on July 14, 1997.

No. A-96-1213: **State v. Gutierrez.** Petition of appellant for further review overruled on May 29, 1997.

No. A-96-1214: **State v. Mead.** Petition of appellant for further review overruled on May 14, 1997.

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

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

No. A-96-1272: **State v. Partee.** Petition of appellant for further review overruled on July 16, 1997.

No. A-96-1287: **State v. Payne.** Petition of appellant for further review overruled on July 16, 1997.

No. A-97-045: **Pope v. Department of Corr. Servs.** Petition of appellant for further review overruled on April 9, 1997.

No. A-97-085: **James Neff Kramper Family Farm Part. v. City of S. Sioux City.** Petition of appellant for further review overruled on June 12, 1997.

No. A-97-253: **Remmen v. Zweiback.** Petition of appellant for further review overruled on June 12, 1997.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

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# KIOWA CREEK LAND & CATTLE CO., INC., APPELLANT, V. SUREN GEORGE NAZARIAN, JR., AND ELLEN YVONNE NAZARIAN, AS COTRUSTEES OF THE 12/20 TRUST DATED AUGUST 24, 1993, APPELLEES.

554 N.W.2d 175

Filed September 17, 1996. No. A-95-933.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Adverse Possession.** That no title by adverse possession can be acquired against the state or general government is elementary.
3. **Easements: Real Estate.** No use of land while it is owned by the state can be support for a claim of an easement by prescription, either against the state or against anyone who acquires title from the state.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

John F. Simmons, of Simmons, Olsen, Ediger & Selzer, P.C., for appellant.

Roy Hahn, of Hahn Law Office, P.C., for appellees.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

Kiowa Creek Land & Cattle Co., Inc. (Kiowa), filed this declaratory judgment action to obtain a declaration that it held an easement of access across a section of land that was formerly school land but which had been purchased by the cotrustees of the 12/20 Trust, Suren George Nazarian, Jr., and Ellen Yvonne Nazarian. The Nazarians purchased the school section from the Nebraska Board of Educational Lands and Funds (NBEL&F) by a quitclaim deed dated September 24, 1990, and this action

was commenced on March 30, 1994. The district court granted the Nazarians a summary judgment of dismissal on the grounds that the land had been owned by the State of Nebraska until it deeded the land to the Nazarians less than 10 years before, and therefore, since the statute of limitations does not run against the state and the land had been in private ownership for less than 10 years, Kiowa could not have acquired rights by prescription regardless of the use it might have made of an access way across the land. We agree and affirm the trial court's judgment.

The Nazarians had rented the school land from the NBEL&F from January 1, 1982, until they purchased it. Kiowa owned land to the west of the Nazarians' land, and for purposes of this opinion we will assume that Kiowa traveled across the school land for such time and in such a manner as to establish an easement by prescription if the state had not been the owner of the school land until 1990.

[1] Kiowa alleges that the district court erred in granting the Nazarians a summary judgment. The questions raised by this appeal are questions of law, and when reviewing questions of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Nelson v. Metropolitan Utilities Dist.*, 249 Neb. 956, 547 N.W.2d 133 (1996); *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

[2] The trial court and the Nazarians rely principally upon the case *Topping v. Cohn*, 71 Neb. 559, 99 N.W. 372 (1904). In that case, two lots of school land to which accretion land attached itself as a river slowly changed its course were sold to the defendant in 1901. The *Topping* court concluded that the land in question accreted to the school land while it was owned by the State and stated: "That no title by adverse possession can be acquired against the state or general government is elementary. Land can not be the subject of adverse possession while the title is in the state." *Id.* at 562, 99 N.W. at 373.

In both *Kimes v. Libby*, 87 Neb. 113, 126 N.W. 869 (1910), and *Mills v. Trever*, 35 Neb. 292, 53 N.W. 67 (1892), a landowner against whom a claim of title by adverse possession

was asserted received his patent to his land less than 10 years before the relevant date, but the claimant dated his adverse use to a time before the landowner received the patent. Both cases held that the statute of limitations did not begin to run while the government owned the land. If these cases involved a claim for a prescriptive easement by adverse possession rather than a claim to ownership of a portion of a tract, they would be on point and controlling. Thus, the only question in this case is whether the above principles apply to a case involving a claim of a prescriptive easement.

The general rule is: "While there is authority apparently to the contrary, it is generally held an easement cannot be acquired, in real property, by prescription against a state, its subdivisions, or persons holding thereunder, at least where the real property is held in fee . . . ." 28A C.J.S. *Easements* § 18 at 197 (1996).

*Union Mill & Min. Co. v. Ferris et al.*, 24 F. Cas. 594 (C.C.D. Nev. 1872) (No. 14,371), considers the question with respect to a claim of an easement where the party claiming the easement bases its claim upon use during the time that title was in the government. *Union Mill & Min. Co.* involved the prescriptive right to use water in a stream, and the court stated:

> [The] statutes of limitation do not run against the state, so that no use of water while the title to the land is in the government, can avail the defendant, as a foundation of title by prescription, or defeat, or modify the title conveyed to the grantee by his patent.

*Id.* at 595-96.

[3] Similarly, the New Mexico Court of Appeals held that an easement by prescription had not been established where the party claiming an easement by prescription had used the land from 1972 until a patent was issued to a third party in 1985, but had used the land for only a short time while the land was in private ownership. *Herbertson v. Iliff*, 108 N.M. 552, 775 P.2d 754 (N.M. App. 1989). The New Mexico court held that no easement had been established because the adverse use was during the time when the land was owned by the government. We conclude that no use of land while it is owned by the state can be

support for a claim of an easement by prescription, either against the state or against anyone who acquires title from the state.

Kiowa seeks to avoid the effect of these holdings by relying upon *Test v. Reichert*, 144 Neb. 836, 14 N.W.2d 853 (1944). In that case, Test's wife owned land that adjoined land owned by the federal government, and Test planted wheat on 10 acres of the adjoining government land. Test's wife's land was purchased by Reichert, but Reichert refused to buy the crops on the adjoining government land. Over Test's objection, Reichert harvested the 10 acres of wheat on the government land. Test then brought a conversion action to recover the value of the wheat. Reichert defended upon the basis that the law of the United States prohibited the public from acquiring rights to public lands. The court held that the right to a crop which is growing upon unenclosed public land lies in the one who has planted it and looked after it, rather than in one who forcibly takes possession against the will of the planter. In the discussion of the *Test* case, the court quoted 1 Am. Jur. *Adverse Possession* § 104 at 849 (1936): "[O]ne may acquire rights in public lands by adverse occupancy against all third persons, and this is true even though the claimant admits the government's ownership; in other words, the claimant's possession may be adverse without being hostile to the government." If this rule applied to this case, it would give Kiowa an easement across the Nazarians' land. The primary reason that the *Test* case has no application to the case at hand is that in *Test*, neither party traced his rights to the government, whereas in the case at hand, the Nazarians acquired their right to the land from the state.

On a practical level, the state rarely, if ever, uses its school lands itself. Such lands are almost always leased for a period of 12 years. If the *Test* rule were applied to easements, then tenants of school lands could not stop persons who had been crossing the land for more than 10 years from claiming easements. If this rule were applied to the acquisition of an easement across lands that were once public lands, then of course any claim of an easement by prescription that is based upon 10 years of use while the land was owned by the government would be impos-

sible for a new buyer to defend against. No one could purchase that land from the government without the land being subject to the possibility of an easement immediately upon sale. The state's title to its land would be subject to the statute of limitations whenever the state sold or leased its land. Such a rule has no support in the cases and would seriously hamper the state's rights indirectly by injuring those who buy land from it. For these reasons, we affirm the trial court's judgment.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. CLINTON BROOKS, JR., APPELLANT.

554 N.W.2d 168

Filed September 17, 1996. No. A-95-1118.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
3. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld unless its findings of fact are clearly erroneous.
5. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
6. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.
7. **Investigative Stops: Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause.
8. **Investigative Stops: Probable Cause.** A finding of a reasonable suspicion must be determined on a case-by-case basis.

9. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause: Appeal and Error.** In determining whether facts known to a law enforcement officer at the time of the investigatory stop provided a reasonable basis for the stop, an appellate court must consider the totality of the circumstances, including all of the objective observations and considerations, as well as the suspicions, drawn by a trained and experienced law enforcement officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.
10. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
11. **Ordinances: Judicial Notice: Appeal and Error.** An appellate court will not take judicial notice of an ordinance not in the record, but assumes that a valid ordinance creating the offense charged exists, that the evidence sustains the findings of the trial court, and that the sentence is within the limits set by the ordinance.
12. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver.** Challenges to prior plea-based convictions for enhancement proceedings may be made only for the failure of the face of the transcript to disclose whether the defendant had counsel or knowingly, understandingly, intelligently, and voluntarily waived counsel at the time the pleas were entered.
13. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the record of a defendant's prior conviction, based on a plea of guilty, affirmatively demonstrates that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
14. **Records: Waiver.** A checklist docket entry is sufficient to establish that a defendant has been advised of his rights and has waived them.
15. **Records.** A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted, it stands as a true record of the event.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, RICHARD H. WILLIAMS, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Joseph D. Nigro for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

HANNON and SIEVERS, Judges, and HOWARD, District Judge, Retired.

HOWARD, District Judge, Retired.

Clinton Brooks, Jr., was convicted in Lancaster County Court of operating a motor vehicle while his operator's license was suspended. The sentencing court subsequently enhanced the offense to operating a motor vehicle with a suspended license, second offense. On appeal, the Lancaster County District Court affirmed the judgment of the county court. Brooks now appeals to this court, arguing that the district court erred in affirming the county court's (1) denial of his motion to suppress and (2) enhancement of the offense to operating a motor vehicle with a suspended license, second offense. For the reasons set forth below, we affirm.

## FACTUAL BACKGROUND

On October 16, 1994, Officer Mark Unvert began an investigation into allegations that Brooks had been making unauthorized telephone calls on a calling card belonging to Cindy Vorderstrasse. According to Officer Unvert, Vorderstrasse indicated that numerous calls, in the amount of $118, had been charged to her missing calling card, although neither she nor her husband had made such calls. The record reflects that $42.19 worth of the calls were made in Lincoln. Vorderstrasse also reported that an acquaintance, Prudence Waters, had informed her that she had found a slip of paper in Brooks' belongings which contained Vorderstrasse's calling card number. Officer Unvert interviewed Waters, who confirmed that she had discovered a slip of paper with a calling card number among Brooks' personal effects. Officer Unvert was given an address and a description of Brooks' vehicle, but was unable to locate him. Officer Unvert concluded that he did not, at that time, have probable cause to arrest Brooks for fraud. Having decided that he needed to speak with Brooks, on October 17, Officer Unvert issued a broadcast for Brooks and his vehicle, which Officer Unvert described as follows: "I indicated to initiate a broadcast for Clinton Brooks, Junior, indicating he was a black male, 5'10" tall, 205 pounds. I also put on the broadcast possibly driving a gray and black Cadillac with license plate number, 1-County-S-Sam-5-8-9-5." In the broadcast, Officer Unvert directed the other officers to "identify the party, interview and take the appropriate action."

The stop in question occurred on November 29, 1994, when Officer Joanne Jindrick was told by another officer that Brooks' vehicle was wanted in regards to a broadcast. According to Officer Jindrick, an Officer Ashley "observed the vehicle and since he was not able, he was on a — a bicycle, he was not able to catch up to the vehicle to stop it. He requested assistance and I was close by." Officer Jindrick caught up with the silver Cadillac, Nebraska license plate No. 1-S5895, westbound on L Street near 9th Street. Officer Jindrick activated her cruiser's red lights, and the Cadillac stopped on the Capitol Parkway West overpass. Officer Jindrick noted from a copy of the broadcast in her car that the Cadillac matched the broadcast description of the vehicle. Officer Jindrick admitted, however, that she did not stop Brooks' vehicle pursuant to a warrant nor did she stop the vehicle as the result of a traffic violation. When Officer Jindrick asked Brooks for his operator's license, he told her that it had been suspended. After verifying that Brooks' license had indeed been suspended, Officer Jindrick issued him a citation. Officer Jindrick also explained her reason for stopping him: "That there was a broadcast for his vehicle that he was driving and that we needed to discuss what had occurred in regards to this broadcast." According to Officer Jindrick, Brooks immediately started explaining the circumstances. Officer Jindrick subsequently took Brooks to the police station, where she interviewed him regarding the fraud investigation. Although it appears no charges were ever filed against Brooks as a result of the fraud investigation, Brooks was charged with operating a motor vehicle while his license was suspended, in violation of Lincoln Mun. Code § 10.16.060 (1993).

Brooks filed a motion to suppress, contending that the stop violated his constitutional rights. The Lancaster County Court overruled the motion, as well as Brooks' objection at trial, and subsequently found Brooks guilty of operating a motor vehicle with a suspended license. At Brooks' enhancement hearing, the court admitted, over Brooks' objections, two exhibits. The first exhibit contained a copy of a prior failure to appear conviction and is of no relevance. The second exhibit introduced, dated September 23, 1994, was a copy of a checklist docket entry

showing that Brooks had pled guilty in Douglas County Court, pursuant to a plea agreement, to the charge of operating a motor vehicle during a period of suspension or revocation, for which he received a sentence of 7 days' imprisonment and a license suspension for 12 months. The relevant part of the checklist is as follows:

> ☒ Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Counsel; Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt.
>
> ☒ Defendant waived each of the above and foregoing rights.
>
> ☒ Plea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found, defendant advised of right to appeal conviction and sentence.

The county court subsequently enhanced Brooks' sentence to operating a motor vehicle with a suspended license, second offense, and sentenced him to 90 days in jail, a $500 fine, and a 2-year license suspension. The Lancaster County District Court affirmed the judgment of the county court.

## ASSIGNMENTS OF ERROR

Brooks contends that the district court erred in affirming the county court's (1) denial of his motion to suppress, challenging the stop and arrest which was in violation of the Fourth Amendment to the U.S. Constitution, and (2) enhancement of the offense to operating a motor vehicle with a suspended license, second offense.

## STANDARD OF REVIEW

[1-3] Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992); *State v. Douglass*, 239 Neb. 891, 479 N.W.2d 457 (1992); *State v.*

*Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989). Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Styskal, supra*; *State v. Dean*, 2 Neb. App. 396, 510 N.W.2d 87 (1993). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996).

## ANALYSIS

*Investigatory Stop.*

[4,5] A trial court's ruling on a motion to suppress is to be upheld unless its findings of fact are clearly erroneous. *State v. Bowers, supra.* In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

[6-8] Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if, as argued here, probable cause is lacking under the Fourth Amendment. *Id.*; *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993), *cert. denied* 508 U.S. 940, 113 S. Ct. 2415, 124 L. Ed. 2d 638. Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. *State v. Bowers, supra*; *State v. Childs, supra.* A finding of a reasonable suspicion must be determined on a case-by-case basis. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

[9] In determining whether facts known to a law enforcement officer at the time of the investigatory stop provided a reasonable basis for the stop, an appellate court must consider the totality of the circumstances, including all of the objective observations and considerations, as well as the suspicions, drawn by a trained and experienced law enforcement officer by inference and deduction that the individual stopped is, has been,

or is about to be engaged in criminal behavior. *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), *cert. denied* 510 U.S. 836, 114 S. Ct. 113, 126 L. Ed. 2d 78; *State v. Mahlin, supra.*

At the suppression hearing, Officer Unvert testified that Vorderstrasse told him that unauthorized telephone calls had been charged to her missing calling card. Officer Unvert further testified that Waters had found a slip of paper containing Vorderstrasse's calling card number among Brooks' personal effects during Brooks' stay at her house. After an unsuccessful attempt at locating Brooks, Officer Unvert issued a radio broadcast which eventually led to Officer Jindrick's stop of Brooks' car. We note that Officer Unvert's testimony provided a sufficient factual foundation justifying Officer Jindrick's stop of Brooks' car. See *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977) (reasonably founded suspicion to stop vehicle cannot be based solely on receipt by stopping officer of radio dispatch to stop described vehicle without any proof of factual foundation for relayed message), *cert. denied* 434 U.S. 833, 98 S. Ct. 117, 54 L. Ed. 2d 93.

We conclude that Officer Unvert had a particularized and objective basis from the reports of Vorderstrasse and Waters for suspecting Brooks of criminal activity, namely the unauthorized use of Vorderstrasse's calling card. We further conclude, regardless of whether the stop was initiated to investigate past criminal activity or ongoing criminal conduct, that the police had a reasonable suspicion, grounded in specific and articulable facts, that Brooks had been or was currently engaged in criminal behavior. See, e.g., *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). See, also, *State v. Blankenship*, 757 S.W.2d 354 (Tenn. App. 1988). Consequently, the trial court did not err in overruling Brooks' motion to suppress.

*Enhancement Proceeding.*

[10] A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is

clearly erroneous. *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

The Lancaster County Court convicted Brooks of operating a motor vehicle while his operator's license was suspended, in violation of Lincoln Mun. Code § 10.16.060. At the enhancement hearing, the State introduced a copy of a Douglas County Court order dated September 23, 1994, over Brooks' objection. The order, which was in the form of a checklist, reflected that Brooks had pled guilty to operating a motor vehicle during a period of suspension, in violation of Neb. Rev. Stat. § 60-4,108 (Reissue 1993).

[11] We observe that a copy of the Lincoln ordinance, though present in the transcript, was not in evidence at trial or at the enhancement proceeding. The Nebraska Supreme Court has consistently held that an appellate court will not take judicial notice of an ordinance not in the record, but assumes that a valid ordinance creating the offense charged exists, that the evidence sustains the findings of the trial court, and that the sentence is within the limits set by the ordinance. *State v. Buescher*, 240 Neb. 908, 485 N.W.2d 192 (1992); *State v. Lewis*, 240 Neb. 642, 483 N.W.2d 742 (1992); *State v. King*, 239 Neb. 853, 479 N.W.2d 125 (1992). We therefore assume that the ordinance permits enhancement of the violation to second offense and that Brooks' sentence of 90 days' imprisonment, a $500 fine, and a 2-year license suspension was within the limits set by the ordinance.

[12,13] Challenges to prior plea-based convictions for enhancement proceedings may be made only for the failure of the face of the transcript to disclose whether the defendant had counsel or knowingly, understandingly, intelligently, and voluntarily waived counsel at the time the pleas were entered. *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). In a proceeding for an enhanced penalty, the State has the burden to show that the record of a defendant's prior conviction, based on a plea of guilty, affirmatively demonstrates that the defendant was represented by counsel, or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *Id.*

[14,15] A checklist docket entry is sufficient to establish that a defendant has been advised of his rights and has waived them. *Id.* A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted, it stands as a true record of the event. *Id.*

Brooks essentially contends that although the checklist shows that he was informed of his right to counsel and further that he waived that same right, it is deficient in that it fails to indicate that he voluntarily, knowingly, and intelligently waived that right. The relevant portion of the checklist is reproduced below:

> [x] Defendant advised of the nature of the above charges, all possible penalties, and each of the following rights: Counsel; Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof Beyond Reasonable Doubt.
>
> [x] Defendant waived each of the above and foregoing rights.
>
> [x] Plea(s) entered knowingly, understandingly, intelligently, voluntarily, and a factual basis for plea(s) found, defendant advised of right to appeal conviction and sentence.

The Nebraska Supreme Court in *State v. Orduna, supra*, recently dealt with the same argument to what appears to be the same checklist. The court concluded:

> Accordingly, if the trial court finds that a plea was entered knowingly, understandingly, intelligently, and voluntarily, then it is necessarily true that if the record reflects counsel was waived, this right was waived knowingly, understandingly, intelligently, and voluntarily.
>
> This is so because logically, a plea cannot be legally sufficient unless those elements underlying the plea are also legally sufficient. Thus, in the instant case, when the trial court found Orduna's guilty plea legally sufficient, it likewise found his waiver of counsel legally sufficient.

*Id.* at 611, 550 N.W.2d at 362-63.

Based on *Orduna*, we cannot say that the county court's finding was clearly erroneous.

## CONCLUSION

We conclude that the county court did not err in overruling Brooks' motion to suppress. We also conclude that the sentencing court did not err in admitting evidence of Brooks' prior conviction. The judgment of the county court, as affirmed by the district court, is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. SAMUEL STEVEN MICELI, APPELLANT.
554 N.W.2d 427

Filed September 24, 1996. No. A-95-991.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court.
2. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Plea Bargains: Contracts.** Plea agreements are like contracts; however, they are not contracts, and therefore contract doctrines do not always apply to them.
4. **Plea Bargains: Prosecuting Attorneys.** Under a diversion program agreement, a person accused of a crime must be treated fairly and equitably and the prosecution cannot take advantage of the accused.

Appeal from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, ROBERT C. WESTER, Judge. Judgment of District Court reversed, and cause remanded.

A. Michael Bianchi for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

Samuel Steven Miceli appealed his convictions in the county court for driving while under the influence of intoxicating liquor (DUI) under Neb. Rev. Stat. § 60-6,196 (Reissue 1993) and refusing to submit to a chemical test under Neb. Rev. Stat. § 60-6,197 (Reissue 1993). The district court affirmed the former and reversed the latter. The charges of which Miceli was convicted had been previously dismissed pursuant to an agreement between the county attorney and Miceli's counsel for Miceli to enter a pretrial diversion program, but were then refiled. Miceli claims he complied with the agreement, and he argues that the agreement precluded the refiling of the charges. He also claims his trial counsel was ineffective because he did not object to the evidence that Miceli refused to take a breath test. We conclude that the pretrial agreement did not preclude the refiling of the charges, but we also conclude that it was plain error for the trial court to admit evidence of Miceli's refusal to take the chemical test. Therefore, we reverse the DUI conviction and remand the cause for a new trial.

## FACTUAL BACKGROUND

The relevant evidence adduced at trial, in the light most favorable to the State, shows as follows: On February 22, 1994, Officer D.J. Barcal of the LaVista, Nebraska, police department was called to the area of 83d Street and Park View Boulevard in LaVista to investigate a report of a possible drunk driver. When Officer Barcal arrived on the scene, he observed an automobile that was stuck in a snowbank in a parking lot. Approximately 45 minutes before the officer arrived on the scene, the area had received 4 to 5 inches of snow. Officer Barcal observed tire tracks in the snow leading from the LaVista Keno Club across the street to where the car was located. Officer Barcal approached the vehicle, where Miceli was sitting. When Miceli stepped out of the vehicle, Officer Barcal noticed a strong odor of alcohol emanating from Miceli and observed Miceli stumble.

Miceli stated to Officer Barcal that he had left the LaVista Keno Club and had gotten stuck in the snow. Officer Barcal

requested that Miceli perform several field sobriety tests, and after Officer Barcal instructed him how to do so, Miceli complied. Miceli was unable to complete any of the several tests that were administered. Without the benefit of any on-the-scene chemical test, Officer Barcal reached the conclusion that Miceli was impaired and under the influence of alcohol. He arrested Miceli and transported him to the Sarpy County Jail. At the jail, Officer Barcal read Miceli the "Administrative License Revocation Advisement Post Arrest" form and then requested that Miceli consent to a chemical breath test. Miceli refused to consent to such a test. Miceli was charged with both DUI and refusing to submit to a chemical breath test.

Initially, Miceli filed a motion to suppress, and after a hearing that was held on April 28, 1994, that motion was denied. The trial was set for July 20. On July 18, Miceli's attorney initiated the first of three telephone conversations with the county attorney's office. These conversations resulted in an agreement that the charges would be dismissed if Miceli applied for the Sarpy County pretrial diversion program. The terms of the diversion program were not discussed. The evidence on this matter will be more fully discussed below. After these discussions, the State obtained dismissal of the charges. They were refiled on October 4, after Miceli withdrew from the diversion program.

Miceli moved for the court to enforce the "cooperation agreement," on the grounds that the State violated the agreement. After an evidentiary hearing on that motion, and after a separate hearing on a motion to suppress, both motions were denied, and a jury trial was held. Miceli was found guilty of both counts and subsequently sentenced to 6 months' probation, a $200 fine, and suspension of his operator's license for 60 days. Upon appeal, the district court reversed the conviction and dismissed the charge of refusing to submit to a chemical test based upon plain error pursuant to *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). However, the district court affirmed the trial court's order denying enforcement of the agreement between Miceli and the county attorney. The district court affirmed the DUI conviction. Miceli timely appeals from the district court's order.

## ASSIGNMENTS OF ERROR

Miceli alleges that the courts below erred in refusing to dismiss the charges because of the "cooperation agreement." Miceli also alleges that he was denied his constitutional right to counsel because his trial counsel did not object to the evidence of his refusing to submit to a chemical breath test. We conclude that the admission of such evidence was plain error, and therefore we do not consider the issue of the adequacy of counsel.

## STANDARD OF REVIEW

[1] Regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the trial court. *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996); *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

[2] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996); *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995).

## DISCUSSION

*Enforcement of Agreement.*

Miceli contends that the county attorney could not properly refile the charges. At the county court hearing on that issue, the only evidence was the testimony of Miceli and his attorney, who made the agreement with the county attorney's office, and the documents about the Sarpy County pretrial diversion program.

Miceli's attorney testified that the trial had been set for July 20, 1994, when on July 18 he contacted the Sarpy County Attorney's office by telephone and talked with a deputy county attorney. The gist of the conversation between them was that the "County Attorney would dismiss the then pending complaint [charging Miceli with DUI and refusing to take the test] if he [Miceli] would go to the Sarpy County Diversion Office and if he would give a written statement that he was trying to operate

the motor vehicle and was intoxicated." Miceli's attorney contacted Miceli, and Miceli agreed, except that he wanted to give only an oral statement rather than a written one. Miceli's attorney testified that in later telephone conversations the county attorney's office agreed to this change. The trial was not held, and in August, Miceli received the dismissal from the county court, and he assumed the case was over.

Pursuant to a stipulation, Miceli's counsel introduced a letter dated August 1, 1994, from the director of the diversion office addressed to Miceli and a "Synopsis of Alcohol Diversion Program." Neither the evidence nor the stipulation discloses when the "Synopsis" might have been communicated to Miceli or his counsel. In that letter, Miceli is told his case has been sent to that office by the county attorney's office, to call the diversion office for an appointment within 10 days of the date of the letter, and what he should bring to the initial meeting. The "Synopsis of Alcohol Diversion Program" in evidence is not specifically addressed to any person, but it invites the recipient to participate in the alcohol diversion program for Sarpy County. The document states that the program is intended to reduce drunk driving without resorting to the traditional sanctions of the criminal justice system. First, the recipient is advised of the criminal sanctions, and then, the letter states: "If you desire to enter this program and are accepted into it after an initial interview, you will be expected to conform to any one or more of the following conditions for a minimum of six months . . . ." The document then lists several conditions such as abstaining from the use of alcohol, attending Alcoholics Anonymous (AA) meetings, attending an alcohol education course, attending private counseling or driving school, attending a victim impact panel, and, if necessary, entering an inpatient or outpatient alcohol treatment facility. The recipient is advised he or she must pay a nonrefundable fee. The document then advises the recipient that if the directions of the diversion officer are not followed, the original charges will be refiled. The document then states: "If you are not willing to admit at least to yourself that you are guilty of the [DUI] offense charged against you by the police, we do not want you in this program." The letter does not specifically state that the charges will be dismissed.

Miceli testified that he had two appointments with the diversion officer, John Dacey. Miceli testified that at the first meeting Dacey said that unless Miceli admitted being guilty of the charges, there was no basis for accepting him into the program, and that the matter should be dealt with within the judicial system. Miceli testified that Dacey asked him to voluntarily go to AA classes and that he did attend two classes. In the course of a conversation with Dacey, Miceli inquired about having to admit 100 percent of the charges in order to be accepted into the program. Miceli was told that if he would not admit his guilt of the DUI charge, there was no basis for accepting him into the diversion program. Miceli refused to continue with the program, and the original charges were refiled against him.

Miceli's counsel argued that the agreement he made with the county attorney's office constituted an agreement that if Miceli applied for the diversion program, the charges would be dismissed and the case concluded and that the charges could not be refiled. The conversations between the county attorney and Miceli's attorney must be interpreted in the light of existing law on the effect of the State's obtaining dismissal of a criminal case before jeopardy attaches and in the light of the letter and synopsis that were communicated to Miceli before he applied for the diversion program.

"Generally, a dismissal or nolle prosequi entered before jeopardy has attached does not bar a second prosecution for the same offense . . . ." 22 C.J.S. *Criminal Law* § 225 at 273 (1989). To infer an agreement on the State's part to dismiss the charges with prejudice for the simple act of going to the diversion office would be wholly unreasonable in light of the letter to Miceli and the synopsis of the program. Furthermore, the letter and synopsis clearly imply that an applicant for the program will not necessarily be accepted. The evidence offered by Miceli does not establish that the county attorney agreed to dismissal of the case with prejudice, nor does the evidence justify inferring such an agreement. The case was dismissed about the time that Miceli applied for the diversion program, and that is what the evidence shows the State agreed to. We note that both Miceli and his counsel testified to their understanding of the agreement, but their understanding is not proof of the terms of the

agreement, and their understanding appears to be unreasonable in the light of the documentary evidence.

Miceli argues that once an agreement is shown, the government bears the burden of establishing a breach by the defendant, and he relies upon *State v. Howe*, 2 Neb. App. 766, 514 N.W.2d 356 (1994). This statement implies that the ordinary rules on contract law control the enforcement of an agreement between a prosecutor and an accused. The statement is taken out of context. Agreements between a prosecutor and an accused are not governed by contract law.

[3,4] "Plea agreements are like contracts; however, they are not contracts, and therefore contract doctrines do not always apply to them." (Emphasis omitted.) *U.S. v. Olesen*, 920 F.2d 538, 541 (8th Cir. 1990). In *State v. Copple*, 224 Neb. 672, 688, 401 N.W.2d 141, 153 (1987), the Supreme Court stated:

> "However, the courts have developed a concept of 'non-statutory' immunity whereby the courts will enforce informal or procedurally flawed grants of immunity on equitable grounds. . . . These cases indicate that where the government has entered into an agreement with a prospective defendant and the defendant has acted to his detriment or prejudice in reliance upon the agreement, 'as a matter of fair conduct, the government ought to be required to honor such an agreement.' "

(Quoting *United States v. Carpenter*, 611 F. Supp. 768 (N.D. Ga. 1985).) On the basis of this and other authority discussed in *Howe*, we stated the rule to be: "[C]ooperation agreements are enforceable on equitable grounds if (1) the agreement was made; (2) the defendant has performed whatever the defendant promised to perform; and (3) in performing, the defendant acted to his or her detriment or prejudice." *State v. Howe*, 2 Neb. App. at 774, 514 N.W.2d at 362. In this case, we conclude under the same authority that an accused agreeing to participate in a diversion program must be treated fairly and equitably and that the prosecution may not take advantage of the accused.

Of course, the existence of the agreement to participate in the diversion program, its terms, and whether it was breached are necessary factual determinations before an agreement between a prosecutor and a defendant will be enforced on equitable

grounds, but regardless of any factual determination that might be made on these issues, the defendant must have acted to his detriment or prejudice. The evidence shows that pursuant to the agreement, Miceli met with the diversion officer on two occasions and attended two AA meetings. While such acts might be sufficient to supply the consideration for a contract, they are hardly of such scope that equity requires the courts to prevent the State from prosecuting a serious criminal charge.

*Ineffective Assistance of Counsel.*

In this direct appeal, Miceli has different counsel than he had at trial and on appeal to the district court. Miceli now argues for the first time that his trial counsel was ineffective in that he failed to "use any remedy to preclude the admission of any evidence relating to [his] refusal to submit to a chemical test, which evidence was unquestionably damaging to [him] on the issue of driving under the influence of alcohol." We do not reach the merits of this assignment.

Evidence of Miceli's refusal to submit to a chemical breath test went to the jury, despite the fact that under *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), Miceli was not properly informed of all the consequences of refusing or of taking and failing a chemical breath test. The Supreme Court has held that a license revocation based upon an attempted advisement by a form identical to the form used in this case constituted plain error. *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996). In *State v. Hingst*, 4 Neb. App. 768, 550 N.W.2d 686 (1996), this court recently held under *Smith* and its progeny that such evidence should not have gone before the jury and that the fact that it did reach the jury was prejudicial and constituted plain error which required a reversal of a DUI conviction and remand for a new trial. Thus, under our holding in *Hingst*, we reverse the district court's judgment and remand the cause with directions to reverse the county court DUI conviction and remand the matter for a new trial.

REVERSED AND REMANDED.

## LORI S. ANDERSON, APPELLANT, V. RICKY D. ANDERSON, APPELLEE.

554 N.W.2d 177

Filed October 1, 1996. No. A-95-371.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Modification of Decree: Good Cause: Time: Notice.** When a party seeks modification of a divorce decree within 6 months, as provided by Neb. Rev. Stat. § 42-372 (Reissue 1993), such modifications can be made only upon a showing of good cause after notice has been given to all interested parties and a hearing has occurred.
3. **Modification of Decree: Child Custody: Visitation: Good Cause: Time.** The district court can modify custodial and visitation arrangements within 6 months of the decree upon a showing of good cause, provided that doing so is in the children's best interests.
4. **Child Custody: Sexual Misconduct: Proof.** When litigants seek to use a custodial parent's sexual activity as a basis for a change in custody or custody arrangements, the overriding factor to be considered is whether the children are directly exposed to sexual activity or whether there is other proof that the children are adversely affected.

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

Frederick S. Cassman and Sandra L. Maass, of Abrahams, Kaslow & Cassman, for appellant.

David C. Mitchell, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

On March 1, 1994, the district court for Douglas County entered a decree which dissolved Ricky D. and Lori S. Anderson's marriage and awarded custody of their two children to Lori. On July 27, Ricky filed an application to modify the divorce decree. The requested modification would prohibit both Lori and Ricky from having members of the opposite sex spend the night with them when the children were present. The district court granted Ricky's application.

## FACTUAL BACKGROUND

Ricky and Lori have two children: Lindsey, born September 21, 1982, and Blake, born December 4, 1990. The Andersons were separated in February 1992. At the time of the divorce in 1994, Lori was involved in an intimate relationship with Kirk Gardner, which had started in approximately September 1992. Shortly after the divorce decree was entered, Ricky became aware that Lori and the children were spending weekends in Sioux City, Iowa, at Gardner's residence, which is the genesis of the motion to modify the decree.

At the hearing to modify the decree, Lori testified that for the first 6 months she and the children visited Gardner in Sioux City, they spent the weekend nights in a motel. After the children adjusted to Lori's relationship with Gardner, however, Lori and the children began staying at Gardner's residence. When staying at Gardner's residence, Lindsey and Blake would sleep in separate bedrooms and Lori would sleep in Gardner's bedroom. Likewise, when Gardner was visiting Omaha, Lori would allow Gardner to spend the night at her residence.

Lori explained that she would lock the bedroom door so the children would not be exposed to her intimate relationship with Gardner. She further testified that she noticed no adverse effects upon the children and that, to the contrary, the children seemed excited when visiting Gardner. Ricky testified: "I think that just morally is the main thing. Like I said before, I don't think it's right that you spend the night with somebody of the opposite sex when you're not married with the minor children there."

The court found good cause to grant Ricky's application to modify the divorce decree. In explaining its decision, the court stated: "The Court does place considerable emphasis on the fact that Petitioner stayed at a motel during the first six months of visits to Sioux City, Iowa."

## ASSIGNMENTS OF ERROR

Lori alleges the district court erred (1) in modifying the divorce decree to prohibit her from having overnight guests of the opposite sex when the children are present and (2) in ordering the parties to abide by the terms of the modified divorce

decree pending appeal when a supersedeas bond had been posted.

## STANDARD OF REVIEW

[1] In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Ziebarth v. Ziebarth*, 238 Neb. 545, 471 N.W.2d 450 (1991).

## ANALYSIS

Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 1994) states in part:

> In determining *custody arrangements* and the *time to be spent* with each parent, the court shall consider the best interests of the minor child which shall include, but not be limited to:
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child.

(Emphasis supplied.)

[2,3] Typically, when seeking to modify a divorce decree concerning custody, support, or visitation arrangements of the children, the party seeking modification has the burden to show a material change of circumstances affecting the best interests of the children. When, however, the party seeks modification of a divorce decree within 6 months, as provided by Neb. Rev. Stat. § 42-372 (Reissue 1993), such modifications can only be made upon a showing of good cause after notice has been given to all interested parties and a hearing has occurred. *Norris v. Norris*, 2 Neb. App. 570, 512 N.W.2d 407 (1994). Because Ricky applied to modify the divorce decree within 6 months, under *Norris* and §§ 42-364 and 42-372, the district court could modify custodial and visitation arrangements upon a showing of

good cause, provided that doing so was in the children's best interests.

In addition to the statutory considerations listed above from § 42-364(2) to determine the children's best interests, the Nebraska Supreme Court has also considered

> the moral fitness of the parents, including their sexual conduct; the respective environments each offers; the emotional relationship between the child and the 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; and the capacity of each parent to provide physical care and to satisfy the needs of the child.

*McDougall v. McDougall*, 236 Neb. 873, 877, 464 N.W.2d 189, 192 (1991). Furthermore, even when the parties stipulate what constitutes the children's best interests, the courts should reach independent conclusions based upon the evidence. *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). See, also, *Norris, supra.*

In evaluating whether limitations which prohibit parents from having members of the opposite sex stay over when children are present, we find *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996), helpful. In that case, although remarried at the time of the custody proceedings, the mother admitted that she had violated a provision in the divorce decree prohibiting her from cohabitating with men to whom she was not married. The Nebraska Supreme Court found:

> The violation of a court decree [prohibiting cohabitation] is unquestionably a serious matter. But it is the best interests of the son which must be our paramount concern. While it is true that evidence concerning the moral fitness of the parents, including sexual conduct, can be considered as a factor in determining a child's best interests . . . *absent a showing* that the mother's cohabitation *adversely affected* her son, we do not give this factor much weight.

(Emphasis supplied.) *Id.* at 460, 544 N.W.2d at 101, citing *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986).

In *Kennedy,* even though the mother had been cohabitating with men prior to remarrying, the Nebraska Supreme Court

found she could retain custody, unless it was shown the children were exposed to sexual activity or otherwise adversely affected. See, also, *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984) (where there was no showing that children were exposed to sexual activity or otherwise damaged, mother could retain custody of children).

Ricky argues that the court should not have to wait until the children suffer physical or mental harm as a result of Gardner's overnight stays to impose the proposed limitations. Ricky cites *Hanson v. Hanson*, 187 Neb. 108, 187 N.W.2d 647 (1971), and *Jones v. Jones*, 183 Neb. 223, 159 N.W.2d 544 (1968), as cases where the Nebraska Supreme Court found the trial court's supervision appropriate. However, *Jones* can be distinguished, because the district court used statutory authority, § 42-364(1), in granting legal custody of the child to a third party (the chief juvenile probation officer) while allowing the parent to retain physical care and custody. Additionally, in *Jones*, there was evidence of the custodial father having intimate relationships with child-care providers; thus, the court could have found a basis to find such an environment detrimental to the child's welfare. And while the *Hanson* court did order the juvenile probation office to supervise the mother's custody, the court denied the father's request to change the custodial arrangements. The *Hanson* court observed that the children had not been exposed to sexual activity or otherwise adversely affected.

[4] When litigants seek to use a custodial parent's sexual activity as a basis for a change in custody or custody arrangements, the Nebraska Supreme Court has repeatedly found the overriding factor to be whether the children are directly exposed to sexual activity or whether there is other proof that the children are adversely affected. See, *Smith-Helstrom, supra*; *Kennedy, supra*; and *Krohn, supra*.

In applying *Smith-Helstrom*, *Kennedy*, and *Krohn* to the instant case, it is clear that unless evidence is introduced which demonstrates that Lindsey or Blake were directly exposed to sexual activity or that Lori's intimate relationship with Gardner was proved to adversely affect the children, the limitations on Lori cannot be sustained. In the case before us, Lori testified that the children did not appear to be adversely affected by

Lori's sleeping arrangements with Gardner. In fact, Lori testified that the children seemed excited before visits and that she was discreet in her intimate relationship with Gardner so the children were not exposed to sexual activity. Ricky offers no evidence which demonstrates how the fact that Lori and Gardner discreetly and privately sleep together adversely impacts the children now or will in the future. As far as Ricky's argument that Lori's conduct sends an inappropriate moral message, the law does not embrace that notion as the sole justification for the district court's order. The children obviously observe Lori and Gardner. The potential for various messages from the fact of their relationship, and how they conduct it, obviously exists. The fact that they are unmarried does not automatically connote a bad or immoral message to the children—the message the children receive depends on many factors. However, we can withhold excessive moralizing or comment on the fabric of life and relationships in today's world, because the record does not contain proof of harm, potential or actual, from Lori's relationship with Gardner. Evidence is what is needed before the State intrudes into Lori's life to the extent of the district court's restrictive order.

The district court appears to have based its decision upon the fact that Lori had previously stayed at a motel when visiting Gardner in Sioux City. If anything, this is evidence of Lori's discretion and concern for her children. It is not evidence that the children were adversely affected by Lori's intimate relationship with Gardner. Under *Smith-Helstrom*, *Kennedy*, and *Krohn*, absent evidence the children were adversely affected by Lori's intimate relationship with Gardner, we find that the district court abused its discretion in finding good cause to modify the divorce decree.

In light of our determination that the custodial and visitation limitation was improperly imposed in this case, we find no need to address the issue Lori raises concerning the supersedeas bond. In short, with our reversal, the supersedeas bond issue becomes moot. Each party has filed a motion seeking an award of attorney fees for services in this court. We award Lori an attorney fee taxed to Ricky in the amount of $2,200.

REVERSED.

GLORIA K. SASS, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY E. KEYES, APPELLANT, V. RANDALL C. HANSON AND ABRAHAMS, KASLOW & CASSMAN, A NEBRASKA PARTNERSHIP, APPELLEES.

ROBERT KEYES, APPELLANT, V. RANDALL C. HANSON AND ABRAHAMS, KASLOW & CASSMAN, A NEBRASKA PARTNERSHIP, APPELLEES.

554 N.W.2d 642

Filed October 1, 1996. Nos. A-95-611, A-95-612.

1. **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 material fact and that the moving party is entitled to judgment as a matter of law.
2. **Limitations of Actions: Negligence.** A cause of action for professional negligence accrues and the statute of limitations begins to run at the time of the alleged act or omission which is the basis for the claim of professional negligence.
3. **Limitations of Actions: Damages.** The statute of limitations may begin to run at some time before the full extent of damages has been sustained.
4. **Limitations of Actions: Pleadings.** When the petition shows on its face that it is barred by the statute of limitations, the petition must allege why the cause of action was not discovered and could not reasonably have been discovered within such 2-year period.
5. **Limitations of Actions: Words and Phrases.** For statute of limitations purposes, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of a cause of action.
6. **Limitations of Actions: Negligence.** Nebraska's statute of limitations for professional negligence utilizes the "occurrence rule," not the "damage rule," and a plaintiff need not have suffered actual damages; it is sufficient if there is an invasion of a legally protected interest.
7. **Limitations of Actions: Malpractice: Attorney and Client: Decedents' Estates: Taxation.** In a cause of action for legal malpractice based on an Internal Revenue Service assessment of estate tax deficiency, it is not necessary that the deficiency be actually and finally assessed before the cause of action accrues under the "occurrence rule" found in Neb. Rev. Stat. § 25-222 (Reissue 1995).

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

James E. Bachman for appellants.

Lyman L. Larsen and William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

IRWIN, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

These consolidated cases involve legal negligence claims alleging that an estate tax deficiency would not have been assessed by the Internal Revenue Service (IRS) had proper legal advice been given. The dispositive issue raised on appeal is whether the claims are barred by the statute of limitations. The district court dismissed both lawsuits, apparently finding both actions to be barred by the statute of limitations. The plaintiffs have appealed, and we have consolidated the two cases for argument and opinion.

## FACTUAL BACKGROUND

In March 1980, Mary E. Keyes died and left a separate piece of farm ground to each of her four children. The law firm of Abrahams, Kaslow & Cassman (Abrahams) was hired to probate the estate, and Randall C. Hanson, then an associate of the firm, did the work. Section 2032A of the Internal Revenue Code allows a special use election for inherited farm ground which values the land as farm ground for estate tax purposes instead of as commercial land or as land used for other purposes. Because farm use is valued lower than would be a commercial use, for example, the end result is lower federal estate tax. Each of the four heirs filed a § 2032A farm ground election. One of the heirs, Robert Keyes, consequently recognized a tax savings in excess of $45,000 on the 160 acres of land he inherited. To preserve the § 2032A election, however, there are limitations on subsequent use of the inherited land. The plaintiffs, Keyes and Gloria K. Sass, personal representative of the estate, claim that Hanson and Abrahams were negligent when they did not adequately advise or warn that a subsequent cash lease of the inherited land would violate § 2032A, potentially resulting in recapture tax and interest.

In 1987, the IRS contacted the four heirs, including Keyes, initially via Hanson, asking them to complete a questionnaire concerning the § 2032A farm ground election. Keyes completed his questionnaire on December 28, 1987. In February 1989, Peter Cavanaugh of the IRS received a letter from Keyes and

scheduled a meeting. The date of this meeting is uncertain, but the parties have stipulated that the meeting occurred prior to June 18, 1989. Cavanaugh advised Keyes that he owed recapture tax because Keyes cash-leased the farm ground in violation of § 2032A. After the meeting, the first document from the IRS to Keyes asserting a deficiency was the "30-day letter" in October 1989. As a result, Keyes retained counsel, who filed an appeal of the IRS audit report with the IRS Appeals Office. Penalties were ultimately waived, but Keyes paid recapture tax and interest in excess of $140,000.

Although Hanson and Abrahams deny its effectiveness for lack of delivery, the parties did sign a "Tolling Agreement" whereby the attorneys waived any statute of limitations defense as to any claim or claims that might become barred by the statute of limitations during the period from and after June 18, 1990, until 30 days after termination of the agreement. An action filed within 30 days of the termination would be deemed to have been brought on June 18, 1990. That agreement, however, did not waive the statute of limitations defense to claims which had already become barred prior to June 18, 1990. The agreement provided that either party could terminate it by written notice via certified mail to the other. Keyes and the personal representative filed separate suits against Hanson and Abrahams on January 11, 1994, in which they alleged that the tolling agreement had been terminated "by the Defendants" on December 22, 1993.

Upon Hanson and Abrahams' motions for summary judgment in each case, the court found that there was no genuine issue of material fact and that Hanson and Abrahams were entitled to judgment as a matter of law. In the personal representative's action, the court's ruling was based on the finding that Keyes was the only real party in interest because the estate did not pay any recapture tax or interest and thus the estate sustained no damage. In Keyes' case, the district court found no issue of material fact, and although not specifically explained, the trial court's decision appears to have been premised upon the ground that the statute of limitations had run on Keyes' case. The personal representative and Keyes appeal the dismissal of their lawsuits.

## ASSIGNMENTS OF ERROR

The assignments of error are that the district court erred (1) in holding that the statute of limitations bars these actions and (2) in holding that the personal representative of the estate could not bring an action on behalf of Keyes, a beneficiary.

## STANDARD OF REVIEW

[1] 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 material fact and that the moving party is entitled to judgment as a matter of law. *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995). Regarding questions of law, an appellate court has the obligation to reach a conclusion independent of that of the trial court. *Id.* Keyes and the personal representative assert that the facts of these cases are not in dispute, and our review of the record reveals that this is so with respect to the dispositive facts.

## DISCUSSION

The obvious starting place is the statute of limitations for an action for professional negligence. Neb. Rev. Stat. § 25-222 (Reissue 1995) provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

With the provisions of the statute of limitations in mind, we summarize the second amended petitions. The petitions are the same and allege that the provisions of § 2032A allow a special use election to value inherited property as farm property, despite the potential of a higher use and thus higher value, if certain conditions are met. Keyes alleges that he made the election under § 2032A. Keyes further alleges that Treas. Reg. § 20.2032A-3(b)(1) (1980) clearly provided that mere passive rental of the property would not be a qualified use under § 2032A and that a cash rental, even where the owner elects to participate in the farming operations, does not satisfy the qualified use test. Although the petitions are indefinite as to when such duty existed or was violated, the petitions allege that Hanson had a duty to warn the heirs that if they cash-leased the land in question, they would violate § 2032A and be subject to a recapture tax. The petitions then refer to two letters Hanson sent dated December 18, 1980, and March 23, 1981, as the only advice rendered on the subject of the § 2032A election.

Hanson sent Keyes and the other heirs a letter dated December 18, 1980, and sent one to Keyes dated March 21, 1981, both of which are attached to the petitions. The letters are lengthy and will not be fully repeated here. Neither letter specifically states, "Thou shalt not cash-rent," but the letter of December 18 does advise that the heir needs to "materially participate in the farming operation" if the land is leased to an unrelated third party. It further advises that "[m]aterial participation is determined from all of the facts available, but physical work and participation in management decisions are the principal factors to be considered." The letter also provides that "[i]f you contemplate the lease of your property to an unrelated third-party you should consult an attorney to review the regulations governing this matter so that you are sure your particular arrangement constitutes material participation in the farming activity."

The letter of March 23, 1981, from Hanson to Keyes was mailed in conjunction with Keyes' 1980 federal and state income tax returns. Once again, Hanson reiterated the necessity of Keyes' "material[] participa[tion] in the farming of this property." The March 23 letter further advises that it "is very desir-

able for you to lease this ground in the future on a crop share basis." The March 23 letter also cautions that if the requirements for material participation are not met, "you are taking a chance that the Internal Revenue Service will decide that you have not materially participated in farming and, accordingly, assess a deficiency in the federal estate tax . . . . [This] could amount to as much as $55,000.00." The special use valuation questionnaire completed by Keyes reveals that he cash-rented 130 of his 160 acres to an unrelated third party in 1980, 1981, and 1982.

[2,3] A cause of action for professional negligence accrues and the statute of limitations begins to run at the time of the alleged act or omission which is the basis for the claim of professional negligence. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996); *Tidwald v. Dewey*, 221 Neb. 547, 378 N.W.2d 671 (1985). In the instant case, it is also of great significance that the statute of limitations may begin to run at some time before the full extent of damages has been sustained. *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985). Given the allegation that Hanson's only advice concerning the § 2032A special use election occurred in December 1980 and March 1981, any cause of action based on such advice accrued no later than March 23, 1981 (the date of Hanson's last letter to Keyes about the IRS guidelines requiring Keyes to "materially participate" in farming to avoid the assessment of additional taxes). As this is a motion for summary judgment, we need not consider or decide whether Hanson's advice was deficient in any respect.

[4] *Zion Wheel Baptist Church*, 249 Neb. at 358, 543 N.W.2d at 450, holds that when the petition shows on its face that it is barred by the statute of limitations, as do these lawsuits, then the "petition must allege why [the] cause of action was not discovered and could not reasonably have been discovered within such 2-year period." Keyes seeks to invoke the discovery doctrine by alleging that he was not aware he had lost the special use election until the IRS notified him of such within 1 year before June 18, 1990 (the date his suit is deemed under the tolling agreement to have been filed). Keyes claims this was the earliest notice he had of the loss of the special use election.

[5,6] For statute of limitations purposes, discovery occurs "when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action." *Id.*, citing *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). Discovery occurs when one knows of injury or damage and not when one has a legal right to seek redress in court. *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414, 432 N.W.2d 18 (1988). Our statute of limitations for professional negligence utilizes the "occurrence rule," not the "damage rule." *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). See, also, Annot., When Statute of Limitations Begins To Run Upon Action Against Attorney For Malpractice, 32 A.L.R.4th 260 (1984). Moreover, a plaintiff need not have suffered actual damages; it is sufficient if there is an invasion of a legally protected interest. *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989). In such a formulation, it is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem exists. See *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988).

Although Hanson and Abrahams deny that the tolling agreement was effective, this is a motion for summary judgment, requiring that we view the evidence most favorably to Keyes. See *LaBenz Trucking v. Snyder*, 246 Neb. 468, 519 N.W.2d 259 (1994). Therefore, we consider the tolling agreement to have been in effect, as Keyes alleges. By virtue of the terms of the tolling agreement, the lawsuits are deemed to have been filed on June 18, 1990. Thus, under § 25-222 and the foregoing authority, if discovery had occurred a year or more before June 18, 1990, the statute of limitations barred the actions and the district court correctly granted summary judgment to Hanson and Abrahams.

Returning to the record, on December 18, 1987, Hanson wrote to Keyes, enclosing a copy of a letter Hanson had received from a representative of the IRS, as well as an IRS questionnaire for the heirs to answer in order to determine whether the § 2032A election was preserved. Although Keyes is

indefinite about whether he received Hanson's letter and the enclosure from the IRS, it is undisputed that he completed the questionnaire and signed it on December 28, 1987. Therein, Keyes disclosed that in the years 1980, 1981, and 1982 he cash-rented 130 acres of the land to unrelated parties. On February 8, 1989, Hanson wrote to Keyes, advising him that the IRS had reviewed the questionnaire and that as a result, "the [IRS] has now assigned an individual to make further inquiry as to whether any problems exist which would cause a recapture of part of the estate tax saved as a result of the special valuation election made in your mother's estate." The balance of that letter deals with whether Keyes wanted Hanson to represent him in dealings with the IRS regarding this matter, as well as the terms of such proposed representation. In response, Keyes signed a document addressed to Hanson indicating that he had reviewed Hanson's letter, as well as the accompanying IRS letter of February 7, 1989, "concerning matters relating to the special use valuation elected in the estate of Mary E. Keyes, particularly whether or not events may have occurred which would cause a recapture of part of the estate tax saved as a result of the election." By this document, Keyes declined to be represented by Hanson and designated himself as agent for all dealings with the IRS.

The record also contains a copy of a handwritten letter from Keyes to Senator Robert Kerrey which is undated and only partially legible. However, that letter does clearly deal with the matter of the § 2032A election, and on June 13, 1989, Senator Kerrey wrote to the IRS, forwarding a copy of Keyes' letter and asking for information "which will enable me to respond to my constituent's inquiry." Senator Kerrey also authored a separate letter to Keyes, stating in part: "Thank you for contacting my office regarding IRS dispute. I have requested information from the IRS-Omaha regarding this matter." The date of this letter from the senator is also June 13, 1989.

The record also contains a copy of a letter from Cavanaugh, an estate tax attorney with the IRS, dated April 24, 1989, and addressed to Keyes in which Cavanaugh states that a review of the questionnaire sent to Keyes in December 1987 indicated that the property was cash-rented to nonrelatives for several

years. The letter continues: "If that is in fact the case, then this may present a problem." Finally, a copy of an affidavit from Keyes which was introduced into evidence at the hearing on the motion for summary judgment states in part: "Prior to June of 1989, I was informed by an IRS agent that I had violated the terms of the special use election. I then contacted Senator Robert Kerrey's office for assistance."

Based upon Hanson's February 8, 1989, letter; Cavanaugh's April 24, 1989, letter; and the June 13, 1989, correspondence from Senator Kerrey's office, we conclude there is ample, in fact abundant, evidence that prior to June 18, 1989, Keyes knew a "problem existed." *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 684, 433 N.W.2d 478, 484 (1988). In fact, his knowledge was very complete by June 18, 1989. He knew that the IRS was making inquiry, that he had provided the IRS with information that he had cash-leased the land, and that the IRS took the position that his cash-renting of part of the land in the early 1980's caused him to lose the § 2032A election. Keyes had in hand the written advice from Hanson via letters in 1980 and 1981 which contained extensive information about the special use election. However, those letters did not expressly state, "Thou shalt not cash-rent," which is the essence of what Keyes claims he should have been told. The undisputed evidence is that Keyes had knowledge which, if not actual knowledge of his potential claim, was certainly sufficient, if pursued, to lead to the discovery of the alleged malpractice. The conclusion is inescapable that Keyes knew the exact nature of the problem, that is, that he had cash-rented the property, which could cause a recapture of the tax savings he had earlier realized, as well as an assessment of interest and a penalty. Keyes had this knowledge before June 18, 1989, 1 year prior to the date on which the lawsuits were deemed to have been filed. Thus, his action is barred by the statute of limitations.

However, Keyes argues that the cause of action did not accrue until the date of the actual IRS assessment, and thus the statute of limitations did not commence running until that date. In support of this proposition, Keyes cites a number of cases from other jurisdictions, including *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967) (holding that cause of action did not

arise until tax deficiency was assessed because had it never been assessed, plaintiff would never have been harmed and therefore would have had no cause of action), and *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657 (1984) (holding there is no loss or injury unless third party, IRS, decides to assess tax deficiency).

[7] Keyes argues that given the extensive appeals process within the IRS and the U.S. Tax Court, a cause of action does not accrue until final assessment or payment. This argument runs counter to established Nebraska law, which holds that for the statute of limitations to begin running, the plaintiff need not have suffered actual damages. See *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989). In *Seagren v. Peterson*, 225 Neb. 747, 407 N.W.2d 790 (1987), Seagren claimed legal malpractice against an attorney for failing to file an estate tax return and thus subjecting the Seagren estate to a penalty and interest. The Supreme Court rejected Seagren's argument that the estate was not damaged until the penalty and interest were assessed and thus that the statute of limitations had not yet accrued. The court stated that for purposes of extending the statute of limitations, discovery can be triggered at some time before the full extent of damages is sustained. In *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995), the court reaffirmed its prior holding that the professional negligence statute of limitations is an occurrence statute, ameliorated by the discovery rule. Thus, the statute begins to run when the legal malpractice occurs, not upon the determination of damages.

Accordingly, we find that Keyes' action was in fact barred by the statute of limitations, and we affirm the district court's decision in that case. As in *Seevers*, it is not necessary that we pinpoint a precise date—it is enough that discovery had clearly occurred more than 1 year prior to the filing of suit on June 18, 1990.

In the case brought by the personal representative, the allegations in the petition are the same as those in Keyes' case. Every action must be prosecuted in the name of the real party in interest. Neb. Rev. Stat. § 25-301 (Reissue 1995). The petition does not allege an assignment of Keyes' cause of action to the personal representative, and of course, Keyes has filed his own

lawsuit. The evidence is clear that Keyes is the one who paid over $140,000 in recapture tax and interest. It is an elementary proposition that it is Keyes, not the personal representative of his mother's estate, who is the real party in interest in such circumstances. Moreover, as the petitions allege the same facts, the statute of limitations difficulties present in Keyes' lawsuit obviously are also present in the personal representative's lawsuit. Thus, the district court was also correct in granting summary judgment in favor of Hanson and Abrahams in the personal representative's lawsuit.

AFFIRMED.

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## STATE OF NEBRASKA, APPELLEE, V. RICK STUBBS, APPELLANT.

555 N.W.2d 55

Filed October 1, 1996. No. A-95-940.

1. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
2. ____: ____. 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.
3. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Speedy Trial: Complaints: Appeal and Error.** A trial court's determination of whether a complaint should be dismissed because of the failure of the State to provide the defendant with a speedy trial is a factual question which will be affirmed by an appellate court unless the determination was clearly erroneous.
5. **Speedy Trial: Waiver.** The burden is upon the State to bring an accused to trial within the time provided by law, and if a defendant is not brought to trial within the 6 months provided for in Neb. Rev. Stat. § 29-1207 (Reissue 1995), the defendant is entitled to an absolute discharge from the offense in the absence of an express waiver or a waiver of time as provided for in the speedy trial statutes Neb. Rev. Stat. §§ 29-1208 and 29-1209 (Reissue 1995).

6. **Speedy Trial: Proof.** When the defendant is not tried within 6 months, the burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) is applicable.
7. ____: ____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
8. **Criminal Law: Convictions.** In order to convict someone of the crime of exploitation of a vulnerable adult, there must be a nexus between a vulnerable adult's impairment and the exploitation.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Conviction and sentence vacated.

Blaine T. Gillett, of Lincoln County Public Defender's Office, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

HANNON, SIEVERS, and MUES, Judges.

HANNON, Judge.

Rick Stubbs was convicted of knowing and intentional abuse of a vulnerable adult through exploitation pursuant to Neb. Rev. Stat. § 28-386 (Reissue 1995). He appeals from his conviction, arguing that the evidence was insufficient as a matter of law to sustain the jury's verdict and that he was not brought to trial within the time allowed by the speedy trial statute Neb. Rev. Stat. § 29-1207 (Reissue 1995). We find that the evidence was insufficient to prove that Stubbs exploited the alleged victim or that the victim was a "vulnerable adult" as defined by Neb. Rev. Stat. § 28-371 (Reissue 1995). We therefore reverse, and vacate his conviction and sentence.

## I. FACTS

Since Stubbs was convicted by a jury, we set forth the following pertinent facts in the light most favorable to the State, as we are required to do. See, *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995).

In the spring of 1993, Dale Edmisten was 78 or 79 years old and lived by himself in a farmhouse 7 miles from Sutherland,

Nebraska. The previous winter, while on his way to Colorado to visit his niece, Janie Knickerbocker, Edmisten had an automobile accident, which apparently adversely affected his mental and physical well-being. Knickerbocker testified that Edmisten stayed with them for a while after the accident, that he appeared "confused," and that he "shuffled" when he walked.

Sometime in January 1993, Knickerbocker drove Edmisten home. That spring, Edmisten and Rick Stubbs established a relationship. Stubbs came to Edmisten's house several times, sometimes with his wife, and would sit and talk to Edmisten. During these talks, Stubbs would sometimes offer to buy things. Edmisten testified that after Stubbs left, he would find things missing from his shop, although he never saw Stubbs take anything and did not identify what specific items, other than "tools," were missing. On at least a couple of occasions, it appears that Edmisten sold items to Stubbs.

Knickerbocker visited Edmisten in March 1993. During this visit, Knickerbocker noticed that Edmisten still had memories of the past, but that he was not always aware of what was going on in the present. She also observed that he walked by shuffling his feet and that he "got fatigued" easily. During her visit, Knickerbocker obtained powers of attorney for both Edmisten's health and his financial affairs to protect Edmisten's welfare. At this time, she and her husband also put down a deposit on a retirement home in Sutherland, into which they planned to move Edmisten in May. In preparation for this move, Knickerbocker checked a list of items her mother had made to determine if those things were still at Edmisten's farm. At this time, she noticed that an oxbow and an anvil were missing.

In early May 1993, Knickerbocker returned to the area for the Hershey High School graduation and to check on Edmisten. On May 7, she noticed that several of the items that had been in Edmisten's house in March were now missing. Specifically, she found that a war ax, a dresser set, a trunk, and quilts were missing. Knickerbocker notified the county sheriff's office of the missing items.

Cpl. Mike Dye of the Lincoln County sheriff's office testified that based on information received in the course of his investigation of the missing items, he contacted Stubbs, who

admitted that he knew Edmisten, had been to his house, and had purchased some items from him. A warrant to search Stubbs' home was never issued, and apparently, none of the missing items were ever found.

On March 2, 1994, Stubbs was charged by information with the knowing and intentional abuse of a vulnerable adult by exploitation. Stubbs was arraigned on April 11, and the case was set for jury trial on July 12. In July, Stubbs' counsel filed a motion for continuance and made further motions for continuance until the time of trial. A jury trial was held on March 21, 1995.

At trial, the State adduced testimony from several witnesses concerning Edmisten's physical and mental health. Sandra Bay, who lived directly across the road from Edmisten and could see his driveway from her house's windows, testified that approximately 2 or 3 years before the trial, Edmisten had begun driving to get the mail and that during the spring of 1993, he would sometimes misjudge the distance to the mailbox and almost drive into the ditch on occasion. Kimberly Eckhoff, whose family had been close to Edmisten, testified that in late May 1993, she had helped Edmisten clean his house, which she described as a "mess," and that Edmisten had not helped at all. Furthermore, in January 1993, in response to a call from the grocery store that Edmisten had appeared weak and had been hanging on to his grocery cart to get around, Melvin Eckhoff, a longtime friend, began taking Edmisten to get groceries and to the bank at least once a week.

Ray Seifer, a neighbor of Edmisten's, testified that he took milk to Edmisten for his cats once or twice a week during the spring of 1993. He described Edmisten as not very mobile and stated that Edmisten needed to hang on to things to get around physically and was starting to have trouble remembering things.

According to Knickerbocker, after the Christmas accident, "it became apparent he couldn't live by himself anymore." Knickerbocker testified that it was very difficult for her uncle to move around, that he sat in his chair and watched television during most of the day, and that he rarely ate solid food, but drank lots of milk. However, she admitted that Edmisten understood the powers of attorney she had him sign in March 1993 and that

she had left him home alone after the accident in January until May, when she moved him to a retirement home. On July 2, Knickerbocker became the conservator of Edmisten's estate.

Edmisten testified that before moving to the retirement home, he basically sat in his chair during the day and was not able to walk around without holding on to something. However, he testified that he cooked his own meals, dressed himself, watched television, believed that he took care of his own bills, did not have to take any medicine, and was in pretty good health.

At trial, the State called as a witness Dr. George Cooper. Dr. Cooper graduated from the University of Nebraska College of Medicine and had been a family practitioner in North Platte since 1962. Forty to fifty percent of his practice was elderly, or geriatric, patients. In July 1993, Dr. Cooper examined Edmisten for 30 to 45 minutes. In a report he prepared after seeing Edmisten, Dr. Cooper diagnosed him as being mildly senile, having vertigo, and having proprioception deficit, which is loss of a sense of balance and would explain his "shuffling." Dr. Cooper explained that individuals who are mildly senile are usually able to perform their routine, daily living tasks, but are frequently not capable of sound judgment. He testified that mild senility would have impacted upon Edmisten's ability to live independently and to take care of himself. After stating that he was aware of the definition of a vulnerable adult in the Nebraska statutes, Dr. Cooper opined that "[b]ased upon the description of the witnesses preceding me I would surmise that it's very, very likely he would constitute a vulnerable adult."

The State attempted to show Stubbs' exploitation of Edmisten by showing that Stubbs took items from Edmisten's house and that Stubbs had paid far less for the John Deere tractor than it was worth. In support of the State's claim that Stubbs took items from the house, Bay testified that a red and white pickup drove by Edmisten's house or into his driveway on four occasions when Edmisten was gone one day. When Edmisten and Knickerbocker later returned to the home, they found that some things were missing. Bay acknowledged, though, that she had not seen Stubbs take anything and that she did not see any-

thing in the pickup the times that it stopped in Edmisten's driveway.

Kimberly Eckhoff testified that one day she and her husband drove by Edmisten's house to see if anything suspicious was going on. As they drove on the road to his house, they pulled behind a red pickup driven by a man with a mustache and beard and long hair, with a woman sitting next to him who had long, dark hair. After taking a back road, the Eckhoffs again passed the pickup, which was being driven slowly past Edmisten's house, and the man was pointing at the house. Kimberly Eckhoff wrote down the license plate number of the pickup, which later proved to be the license plate number of Stubbs' pickup. Bay reported to Corporal Dye the same license plate number of the pickup she had seen coming and going from Edmisten's house.

Alta Stubbs, Stubbs' mother, testified that she purchased a tractor from Edmisten on Stubbs' behalf for $3,500. Alta Stubbs testified that on the day she purchased the tractor, Edmisten told her that he wanted "'$3,500 for [the tractor] and not a penny less.'" Alta Stubbs' check to Edmisten was dated April 29, 1993.

On April 29, Stubbs sold the tractor to Dean Weinman and Ken Anderson for $5,500. A couple of days later, they sold the tractor to Glen Weinman, Dean's father, for $7,500. The record indicates that the tractor was in a general state of disrepair. Specifically, the hydraulics were leaking, the tires did not match, one tire was "shot," the fuel injection pump was leaking badly, the interior was "ratty," and the batteries did not work.

Several individuals testified as to the value of the tractor. In summary, these witnesses opined that the value of the tractor was somewhere between $5,500 and $11,000.

At the close of the evidence, the trial court ruled that the evidence was sufficient to sustain the State's charge under only the "substantial . . . functional impairment" portion of the statute. The jury then found Stubbs guilty of abuse of a vulnerable adult. Stubbs now appeals from his conviction.

## II. ASSIGNMENTS OF ERROR

Stubbs alleges that (1) the evidence was insufficient to support his conviction, (2) the jury misapplied the applicable law, and (3) the trial court erred in denying his motion to dismiss the information based on the State's failure to try him within the time allotted by the Nebraska speedy trial statutes.

## III. STANDARD OF REVIEW

[1-3] On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. 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. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995). In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *Id.*

## IV. DISCUSSION

### 1. Speedy Trial

[4] Stubbs argues that the trial court erred in denying his motion to dismiss on speedy trial grounds. Stubbs contends that although his attorney made motions for continuance on his behalf, only he may waive his right to a speedy trial. According to Stubbs, this requires the court to properly advise him of his right to a speedy trial. A trial court's determination of whether a complaint should be dismissed because of the failure of the State to provide the defendant with a speedy trial is a factual question which will be affirmed by an appellate court unless the determination was clearly erroneous. *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992).

[5-7] Nebraska's speedy trial statutes provide that "[e]very person . . . informed against for any offense shall be brought to

trial within six months . . . from the date . . . the information [is] filed." § 29-1207(1) and (2). The burden is upon the State to bring an accused to trial within the time provided by law, and if a defendant is not brought to trial within the 6 months provided for in § 29-1207, the defendant is entitled to an absolute discharge from the offense in the absence of an express waiver or a waiver of time as provided for in the speedy trial statutes Neb. Rev. Stat. §§ 29-1208 and 29-1209 (Reissue 1995). *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982). When the defendant is not tried within 6 months, the burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) is applicable. *Beck, supra.* To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence. *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

Section 29-1207(4) provides that "[t]he following periods shall be excluded in computing the time for trial: . . . (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." At trial, Stubbs' attorney stated that he had filed a motion for continuance in July 1994 and that he had filed other motions for continuance up until the current time. At oral argument, Stubbs' attorney stated that his motions for continuance were filed in good faith.

An information was filed against Stubbs on March 2, 1994. Thus, the State had until September 2, 1994, in which to bring Stubbs to trial. Stubbs was not tried until March 21, 1995. The record is clear that before Stubbs' trial date, which was set for July 21, 1994, Stubbs' attorney filed a motion for continuance and thereafter filed several more motions for continuance up until the time of trial. Section 29-1207(4)(b) clearly excludes from the 6-month time limit periods of delay resulting from continuances granted at the request of the defendant's counsel. The trial court's denial of Stubbs' motion to dismiss was not clearly erroneous, and this assignment of error is without merit.

### 2. Insufficiency of Evidence

Stubbs first argues that the evidence was insufficient to support his conviction. The relevant portion of § 28-386 provides that a "person commits knowing and intentional abuse of a vulnerable adult if he or she through a knowing and intentional act causes or permits a vulnerable adult to be . . . [e]xploited."

#### (a) Vulnerable Adult

Stubbs contends that the evidence did not support the jury's finding that Edmisten was a "vulnerable adult." Section 28-371 defines "vulnerable adult" as "any person eighteen years of age or older who has a substantial mental or functional impairment or for whom a guardian has been appointed under the Nebraska Probate Code." "Substantial mental impairment" is defined as "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, or ability to live independently or provide self-care as revealed by observation, diagnosis, investigation, or evaluation." Neb. Rev. Stat. § 28-369 (Reissue 1995). However, at the end of trial, the trial court found that the evidence was insufficient to sustain a verdict on the "substantial mental impairment" portion of the statute. At oral argument, the State stipulated that the only issue on appeal was whether Edmisten suffered from a "substantial functional impairment." We will therefore address only this portion of the statute.

"Substantial functional impairment" is defined as "a substantial incapability, because of physical limitations, of living independently or providing self-care as determined through observation, diagnosis, investigation, or evaluation." Neb. Rev. Stat. § 28-368 (Reissue 1995). Neb. Rev. Stat. § 28-361 (Reissue 1995) provides that "living independently" "shall include, but not be limited to, using the telephone, shopping, preparing food, housekeeping, and administering medications." "Self-care" is defined as including, but not limited to, "personal hygiene, eating, and dressing." Neb. Rev. Stat. § 28-366 (Reissue 1995).

The evidence presented by the State in support of its claim that Edmisten had a substantial functional impairment consisted of the observations of several of Edmisten's friends, neighbors, and relatives, and a doctor's diagnosis. Edmisten's physical lim-

itations testified to by these witnesses may be summarized as the following: He had difficulty moving around and needed to hang on to things when he walked; he could no longer walk to the end of the lane to get his mail, but needed to drive; he was seen leaning weakly on his shopping cart for support on one occasion; he kept a "messy" house on one occasion; for a period of time, his diet consisted mainly of milk and other liquids; and he led a sedentary lifestyle, which included sitting in a chair watching television most of the day. Dr. Cooper diagnosed Edmisten as having proprioception deficit, which resulted in a loss of balance and could explain his "shuffling." Dr. Cooper also opined that Edmisten was "mildly senile," which could have impacted upon Edmisten's ability to live independently and to take care of himself.

Dr. Cooper, however, testified that Edmisten had no respiratory problems, circulatory problems, or heart problems, and that his blood pressure was normal. More significantly, Edmisten testified that he got along all right living alone and that he cooked his own meals, including steak and pizza; dressed himself; bathed himself; watched television; believed that he took care of his own bills; and considered himself to be in pretty good health.

Witnesses testified that Edmisten was not "as sharp" as he had been in the past and that he was physically slowing down. Knickerbocker also testified that "it became apparent that he couldn't live by himself anymore." These statements, however, are conclusory statements, not factual examples of how Edmisten was incapable of living independently or caring for himself.

The factual evidence supports a finding that Edmisten was physically and mentally aging. The evidence does not, however, support a finding that he was at the point in his life where he suffered from a substantial functional impairment which left him incapable of caring for himself or living independently. This conclusion is supported most clearly by Edmisten's own testimony, but is also strengthened by the fact that Knickerbocker, who had obviously assumed the primary care for her uncle, was willing to leave him to live alone from January through the end of May 1993 and then alleged he was

no longer able to live independently. We therefore find that the evidence, even when taken in the light most favorable to the State, is insufficient as a matter of law to support a finding that Edmisten was a "vulnerable adult" as defined by § 28-371.

(b) Exploitation

Stubbs also asserts that the evidence was insufficient as a matter of law for the jury to find that he exploited Edmisten. Neb. Rev. Stat. § 28-358 (Reissue 1995) provides that "exploitation" "shall mean the taking of property of a vulnerable adult by means of undue influence, breach of a fiduciary relationship, deception, or extortion or by any unlawful means."

The record shows that Stubbs visited Edmisten on several occasions. During these visits, Stubbs had access to Edmisten's entire house. Bay and Kimberly Eckhoff testified that they saw Stubbs' pickup drive slowly by Edmisten's house on different occasions, and Bay testified that she saw Stubbs' pickup drive into Edmisten's driveway three times on May 7, the day that Knickerbocker found several items missing. Bay admitted on cross-examination, however, that she did not see who was driving the pickup, nor did she see anything in the pickup when it left. Edmisten testified that he would find that things were missing from his shop after Stubbs had visited. However, he admitted that he sometimes would not go outside to the shop until a day or more later.

We find that the evidence, even when taken in the light most favorable to the State, is insufficient to support a finding that Edmisten was exploited by Stubbs. The evidence clearly does not establish that Stubbs took Edmisten's property by means of undue influence, breach of a fiduciary relationship, deception, or extortion. Edmisten testified that Stubbs was never mean to him, never threatened or yelled at him, and never scared him. The fact that Stubbs purchased a tractor for less than what its value was to someone else similarly does not establish undue influence, deception, or extortion on his part. No one is suggesting that Dean Weinman and Anderson, who purchased the tractor from Stubbs for $5,500 and sold it only a couple of days later for $7,500, deceived Stubbs in any way.

The only other unlawful means suggested by the evidence is that Stubbs took items from Edmisten's house by theft. The record shows that Stubbs had the opportunity to steal the missing items from Edmisten's house. However, no one ever saw Stubbs take anything. In addition, none of the items were ever found in Stubbs' possession. We therefore find that the evidence was insufficient to find that Stubbs stole certain items from Edmisten.

[8] Moreover, although § 28-386 does not provide that there must be a nexus between a vulnerable adult's impairment and the exploitation, it seems evident that this was the intent of the statute, and we now hold that this is a requirement of the statute. In this case, the jury determined that Edmisten suffered from a "substantial functional impairment" that left him incapable of living independently or providing care for himself. The State alleged that Stubbs exploited Edmisten by taking things from his house and by taking advantage of him mentally when Stubbs received an advantageous bargain in purchasing the tractor. It is hard to imagine, however, how Edmisten's physical limitations facilitated Stubbs' exploitation of Edmisten. Although Dr. Cooper diagnosed Edmisten as being "mildly senile," the court ruled that there was insufficient evidence to support a finding that Edmisten suffered from a "substantial mental impairment." We therefore find that the evidence was insufficient as a matter of law to support the jury's finding that Stubbs exploited Edmisten.

Since we find that Edmisten was not a vulnerable adult and that he was not exploited, we need not address Stubbs' other alleged error. The trial court's judgment is reversed, and Stubbs' conviction and sentence are vacated.

CONVICTION AND SENTENCE VACATED.

# NORTHERN BANK, A NEBRASKA BANKING CORPORATION, APPELLEE, V. PEFFERONI PIZZA CO., A NEBRASKA CORPORATION, APPELLANT.

555 N.W.2d 338

Filed October 8, 1996. No. A-95-118.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. ____: ____. 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 judgment as a matter of law for the moving party.
5. **Uniform Commercial Code: Negotiable Instruments.** In order to recover under article 3 of the Uniform Commercial Code, the writing in question must be an instrument.
6. **Negotiable Instruments.** Whether an instrument is a negotiable instrument is a question of law.
7. **Uniform Commercial Code: Negotiable Instruments: Words and Phrases.** To be a negotiable instrument, any writing must (a) be signed by the maker or drawer; (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation, or power given by the maker or drawer except as authorized by article 3 of the Uniform Commercial Code; (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer.
8. **Negotiable Instruments: Words and Phrases.** Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.
9. **Negotiable Instruments: Time: Words and Phrases.** An instrument is payable at a definite time if by its terms it is payable at a definite time subject to extension to a further definite time at the option of the maker.
10. ____: ____: ____. The time of payment is definite if it can be determined from the face of the instrument.
11. **Negotiable Instruments: Time.** If the extension of time of payment is to be at the option of the maker, a definite time limit must be stated or the time of payment remains uncertain and the instrument is not negotiable.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed.

J. Patrick Green for appellant.

Steven J. Woolley, of Polack, Woolley & Forrest, P.C., for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

Northern Bank (Northern) brought suit against Pefferoni Pizza Co. (Pefferoni) on a promissory note issued as security for the underlying obligation of Walter Peffer, Jr. The Douglas County District Court granted Northern's motion for summary judgment, having found that the note was a negotiable instrument and that Northern was a holder in due course of the note. For the reasons set forth below, we reverse.

## FACTUAL BACKGROUND

On September 30, 1987, Duane J. Dowd, as president of Pefferoni, signed a promissory note in the amount of $125,000 payable to W. E. Peffer Enterprises, Inc. (W. E. Enterprises). Attached to the note was a personal guaranty signed by Dowd and Ray L. Gustafson. The note was executed pursuant to a purchase agreement, also dated September 30, 1987, whereby Pefferoni purchased certain businesses from W. E. Enterprises. Interest on the note accrued at 11.5 percent per annum from September 30, 1987. In the event of default, W. E. Enterprises was entitled to the entire unpaid principal balance and the accrued but unpaid interest. Interest on the note would accrue at 12 percent per annum following default. Additionally, the following provision was included in the promissory note:

> 2. Principal and the interest which is provided for in the preceding paragraph shall be paid in sixty (60) equal monthly installments of $2,748.75. Such installments shall commence on November 1, 1987, and shall be paid on the first day of each month thereafter. The rate of interest provided by this Note is initially set at a rate to correspond to the interest rate presently being paid by W. E. Peffer Enterprises, Inc., a Nebraska corporation, on its separate obligations payable to Mutual State Bank and Etcetera Investments, Ltd. (collectively the "Underlying Notes"). The Maker hereof has certain rights under Purchase Agreement dated September 30, 1987, to negotiate a new

> loan for W. E. Peffer Enterprises, Inc., to replace the Underlying Notes in an amount up to $125,000.00 at a lower rate of interest and for a term extending up to 84 months from and after the closing on the purchase. In the event that the Maker hereof negotiates such a loan, then as of the date that the Underlying Notes are paid in full or reduced with the proceeds of the new loan, the remaining principal balance due and owing under this Note shall be re-amortized over such term and at such rate of interest as may be negotiated for W. E. Peffer Enterprises, Inc., by the Maker hereof on the new loan. When and if such events occurs [sic], a written amendment evidencing such modification shall be executed by the Maker and Holder hereof.

On January 14, 1988, Walter Peffer, Jr., executed a personal promissory note (Peffer note) in the amount of $35,000 for the purpose of obtaining a loan from Northern. As security for the Peffer note, W. E. Enterprises, via the signature of Walter Peffer, Jr., as president, assigned the above-described promissory note of September 30, 1987, payable by Pefferoni to W. E. Enterprises, to Northern. We shall hereafter refer to the September 30, 1987, note as the "collateral note." Walter Peffer, Jr., by his own admission, failed to make any payments on the Peffer note from and including the payment due September 1, 1988, and effective October 1, 1988, Northern elected to declare the entire unpaid principal balance and accrued interest under the Peffer note to be immediately due and filed suit. On September 1, 1989, the Douglas County District Court granted Northern's motion for summary judgment against Walter Peffer, Jr., on the Peffer note.

Regarding the collateral note, no payment was made after the regularly scheduled monthly payment of July 1, 1988. On September 22, 1988, Northern notified Pefferoni that it was in default as a result of failure to pay the installments due August 1 and September 1, 1988. After Pefferoni failed to cure the default, Northern elected to declare the entire unpaid principal balance and accrued interest under the collateral note to be immediately due and payable. Northern contends that it never received any payments on the collateral note from any person or entity.

Northern filed suit against Pefferoni on April 19, 1993, seeking judgment for the unpaid principal balance and accrued interest on the collateral note in the amount of $170,676.96. In the petition, Northern alleged that the total sum due under the Peffer note was $57,053.84. In its answer, Pefferoni denied that it was liable to Northern on the collateral note. Among other defenses, Pefferoni alleged that Northern was not a holder of the collateral note, that the collateral note did not contain an unconditional promise or order to pay a sum certain in money, that W. E. Enterprises had failed to perform its obligations under the purchase agreement, that Walter E. Peffer, Jr., had made misrepresentations for the purpose of inducing Pefferoni to execute the purchase agreement, that the collateral note lacked consideration, and that Northern had no standing to bring an action in an amount in excess of its security interest in the collateral note.

Northern subsequently filed for summary judgment, and Pefferoni responded with a motion for judgment on the pleadings. At the hearing on both matters, Northern submitted into evidence a certified copy of the judgment entered by the Douglas County District Court against Walter Peffer, Jr., on the Peffer note; two affidavits of Brenda L. Lawson, a vice president of Northern; the original $125,000 collateral note; an affidavit of Walter Peffer, Jr.; and certain portions of the deposition of Dowd. Pefferoni submitted the balance of the Dowd deposition.

The district court found that Northern was a holder in due course of the collateral note and that the collateral note was a negotiable instrument. As a result, the district court overruled Pefferoni's motion for judgment on the pleadings and granted Northern's motion for summary judgment. The court ordered that Northern be awarded an amount equal to the indebtedness on the collateral note as of November 21, 1994, but did not specify the amount of that judgment. (Our disposition of this case allows us to overlook the fact that a judgment for money must specify with definiteness and certainty the amount for which it is rendered and must be in such a form that a clerk is able to issue an execution upon it which an officer will be able to execute without requiring external proof and another hearing.

See *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986).) Northern has since become American National Bank.

## ASSIGNMENTS OF ERROR

Pefferoni contends that the district court erred in granting summary judgment in favor of Northern. Specifically, Pefferoni argues that the district court erred in awarding Northern the full amount of its prayer on the grounds that it was a holder in due course, in finding that the collateral note was a negotiable instrument, and in finding that the question of Northern's good faith in taking the collateral note did not raise a triable issue of fact.

## STANDARD OF REVIEW

[1] On questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996).

## ANALYSIS

[2] It appears that the questions presented are matters of law. We initially note that the applicable law, the Uniform Commercial Code (U.C.C.), has been amended and recodified since the issuance of the collateral note. Changes in the law became effective in 1991 and 1992. Notably, changes to article 3 on negotiable instruments became operative on January 1, 1992. The transaction in question took place prior to 1992. Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994). Consequently, the U.C.C. provisions appearing in the 1980 reissue of the Nebraska Revised Statutes apply in this case.

[3,4] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996). 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 evi-

dence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Id.* Pefferoni has disputed the collateral note's status as a negotiable instrument both in its answer and in this appeal.

[5,6] In order to recover under article 3 of the U.C.C., the writing in question must be "an instrument." See Neb. U.C.C. § 3-301 (Reissue 1980) (recodified under § 3-301 (Reissue 1992)). In article 3, "instrument" means a negotiable instrument. See Neb. U.C.C. § 3-102(e) (Reissue 1980) (recodified under Neb. U.C.C. § 3-104(b) (Reissue 1992)). See, also, § 3-102(a) (Reissue 1992) ("[t]his article applies to negotiable instruments"); § 3-104, comment 1 (Reissue 1992) ("[t]he definition of 'negotiable instrument' defines the scope of article 3"). Whether an instrument is a negotiable instrument is a question of law. *Cartwright v. MBank Corpus Christi, N.A.*, 865 S.W.2d 546 (Tex. App. 1993).

[7] Pefferoni argues that the trial court erred in finding the collateral note to be a negotiable instrument. Pefferoni raised this issue in its answer by alleging that the collateral note did not contain an unconditional promise or order to pay a sum certain in money. Pursuant to § 3-104(1) (Reissue 1980) (recodified under § 3-104(a) (Reissue 1992)), any writing, to be a negotiable instrument, must (a) be signed by the maker or drawer; (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation, or power given by the maker or drawer except as authorized by article 3; (c) be payable on demand *or* at a definite time; and (d) be payable to order or to bearer.

[8] As stated above, § 3-104(1)(c) (Reissue 1980) requires that to be a negotiable instrument, the writing must be payable on demand or at a definite time, and this seems to be the determinative point in this appeal. Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated. Neb. U.C.C. § 3-108 (Reissue 1980) (recodified under § 3-108(a) (Reissue 1992)). The collateral note, as described above, is not payable at sight or on presentation. In fact, the collateral note contains a schedule for payment. Thus, the collateral note is not payable on

demand, and the issue then becomes whether the collateral note is payable at a definite time.

[9] Neb. U.C.C. § 3-109(1)(d) (Reissue 1980) (recodified under § 3-108(b)(iv) (Reissue 1992)) states that an instrument is payable at a definite time if by its terms it is payable at a definite time subject to extension to a further definite time at the option of the maker. The collateral note was payable in 60 monthly installments of $2,748.75, commencing November 1, 1987, which is at first blush a definite time, as courts have held that monthly installments are payable at a definite time. See, e.g., *Corbin Deposit Bank & Trust Co. v. Mullins*, 641 S.W.2d 760 (Ky. App. 1982); *Standard Premium Plan Corp. v. Hirschorn*, 56 Misc. 2d 687, 290 N.Y.S.2d 226 (1968). However, the collateral note additionally provided that Pefferoni, pursuant to the purchase agreement, could negotiate a new loan to replace the underlying notes owed by W. E. Enterprises in an amount up to $125,000 "at a lower rate of interest and for a term extending up to 84 months from and after the closing on the purchase." If Pefferoni renegotiated such a loan, as of the date that the underlying notes were paid in full or reduced with the proceeds of the new loan, the remaining principal balance due and owing under the collateral note would be reamortized over such term and at such rate of interest as negotiated on the new loan.

Reamortization of the collateral note is an event uncertain as to both occurrence and time of occurrence. However, if the underlying notes are not renegotiated, then the collateral note is payable at a definite time, $2,748.75 on the first of every month. This is not a case where the note is payable only upon an act or event uncertain as to time of occurrence, which makes it not payable at a definite time. See § 3-109(2) (Reissue 1980). Nor is this a case where payment is conditioned upon an event uncertain to occur. See, e.g., *Calfo v. D.C. Stewart Co.*, 717 P.2d 697 (Utah 1986) (promissory note, which was payable only if buyers exercised their option to purchase motel, was held to be both conditional and indefinite on its face). Instead, payment in the instant case is mandated by the terms of the collateral note regardless of whether the underlying notes are renegotiated. The question before us is whether the renegotiation clause of

the collateral note makes the collateral note payable at an indefinite time.

[10,11] The time of payment is definite if it can be determined from the face of the instrument. § 3-109, comment 2 (Reissue 1980) (noting change in statutory language from "fixed or determinable future time" to "definite time"). See, also, § 3-108, comment (Reissue 1992) (broadening "former section 3-109 somewhat by providing that a definite time includes a time readily ascertainable at the time the promise or order is issued"). If the extension is to be at the option of the maker, a definite time limit must be stated or the time of payment remains uncertain and the instrument is not negotiable. § 3-109, comment 5 (Reissue 1980).

> When the maker or acceptor has the option to extend the time of payment or when the time is extended automatically upon a specified act or event, the holder has no power to determine when payment will be made. Thus, unless the option to extend is limited to an extension to a definite time, the holder will not know when he can expect payment. As a result, when the time for payment may be extended by the maker or acceptor or automatically upon the occurrence of a specified event, the instrument will be payable at a definite time only if this right is limited to extension to a further definite time.

4 William D. Hawkland & Lary Lawrence, Uniform Commercial Code Series § 3-109:05 at 141 (1994).

An instrument is payable at a definite time if by its terms it is payable (a) on or before a stated date or at a fixed period after a stated date or (b) at a fixed period after sight. § 3-109(a) and (b) (Reissue 1980) (recodified under § 3-108(b) (Reissue 1992), stating in part that "[a] promise or order is 'payable at a definite time' if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued").

The contingency known as the renegotiation clause of the collateral note leaves uncertain (1) the closing date of the purchase agreement and (2) the date the underlying notes might be paid or reduced if the loan is ever renegotiated. It is possible

that the underlying notes could be renegotiated on one date with payment or reduction of those notes not occurring until a later date. Since the terms of the reamortization of the collateral note are dependent on these two dates, it is uncertain when Pefferoni will have to pay off the collateral note. We acknowledge that the collateral note will have to be paid off within 84 months following payment or reduction of the underlying notes. The question is whether this is a further definite time.

> If the instrument is payable upon an event uncertain as to time of occurrence, it is also not payable at a definite time. It is irrelevant that the event is certain to occur or even that it has already occurred. Instruments which are payable "at death" or "upon the sale of the house" or "at earliest convenience" are not payable at a definite time. In none of these cases can a holder determine when payment is due by reference to the instrument alone.

4 Hawkland & Lawrence, *supra*, § 3-109:02 at 136. Furthermore, a note payable upon the acceptance of a loan commitment is not payable at a definite time. See, e.g., *Barton v. Scott Hudgens Realty*, 136 Ga. App. 565, 222 S.E.2d 126 (1975).

In *Cartwright v. MBank Corpus Christi, N.A.*, 865 S.W.2d 546 (Tex. App. 1993), the court found that a provision in a note allowing the maker the option to extend the note for up to 4 years constituted a definite time. However, *Cartwright* is distinguishable from the case before us. In *Cartwright*, the note was due September 24, 1985, subject to the maker's option to extend the note for up to 4 years. Thus, the note was payable at a fixed period, 4 years, after a stated date, September 24, 1985. In the instant case, the stated date, from which an extension of up to 84 months may be made, is the date of payment or reduction of the underlying notes, a date which, as discussed above, cannot be determined from the face of the collateral note.

The time of payment of the collateral note cannot be determined from the face of the note, nor was it reasonably ascertainable at the time the note was issued. Therefore, the collateral note is not payable at a definite time subject to extension to a further definite time at the option of Pefferoni. See § 3-109, comment 2 (Reissue 1980). The collateral note is not a negotiable instrument, and consequently, Northern is not a holder in

due course. See Neb. U.C.C. § 3-302(1) (Reissue 1980). The collateral note may be enforceable as a contract and therefore subject to all claims and defenses arising out of that contract, see *P P Inc. v. McGuire*, 509 F. Supp. 1079 (D.N.J. 1981), a matter which we need not decide on this appeal, but it is not enforceable as a negotiable instrument under article 3 of the U.C.C.

## CONCLUSION

We conclude that the district court erred in granting summary judgment in favor of Northern, as the collateral note is not a negotiable instrument and Northern is not a holder in due course. Accordingly, we reverse the judgment of the district court.

REVERSED.

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GEORGE ROBERT BENESCH, IN PERSON AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLANT, V. CITY OF SCHUYLER, NEBRASKA, APPELLEE.

555 N.W.2d 63

Filed October 8, 1996. No. A-95-463.

1. **Equity: Collateral Attack: Special Assessments: Appeal and Error.** A collateral attack upon a special assessment is a proceeding in equity, which an appellate court reviews de novo on the record.
2. **Special Assessments: Appeal and Error.** In its de novo review of a levy of special assessments, an appellate court must 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 conclusions reached by the district court or the fact that there may be some evidence in support thereof.
3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower court.
4. **Real Estate: Collateral Attack: Special Assessments: Fraud: Jurisdiction.** A property owner may collaterally attack a special assessment only for the limited purposes of fraud, actual or constructive, a fundamental defect, or want of jurisdiction.
5. **Real Estate: Special Assessments: Proof.** The property owner attacking the special assessment as void has the burden of establishing its invalidity.
6. **Real Estate: Special Assessments: Municipal Corporations: Streets and Sidewalks: Improvements.** Nebraska's "gap and extend" law, Neb. Rev. Stat. §§ 18-2001 to 18-2005 (Reissue 1991), provides a method by which a city may, with-

out prior approval from property owners, unilaterally decide to pave a street and assess the costs of such improvements against abutting property owners.

7. **Real Estate: Special Assessments: Streets and Sidewalks.** Although an exception to the general rule that property owners must consent to paving assessments, this exception created by the "gap and extend" law, Neb. Rev. Stat. §§ 18-2001 to 18-2005 (Reissue 1991), is only a limited one.
8. **Legislature: Intent: Municipal Corporations: Streets and Sidewalks: Appeal and Error.** It is clear that the Legislature expected the "gap and extend" procedure for street improvements in Neb. Rev. Stat. §§ 18-2001 to 18-2005 (Reissue 1991) to be used only in the case of a section which was not otherwise paved. Neither a city nor an appellate court is free to expand this intent to include a section which is paved, but not up to standards—standards which the city is free to set.
9. **Streets and Sidewalks: Words and Phrases.** A street covered with material forming a solid aggregate 3 to 5 inches thick consisting of compacted layers of gravel and an oil-type substance and creating a firm, level surface for vehicular travel is paved within the meaning of Nebraska's "gap and extend" law, Neb. Rev. Stat. §§ 18-2001 to 18-2005 (Reissue 1991).
10. **Class Actions.** Class actions are authorized when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed.

Raymond E. Baker, of Law Offices of Raymond E. Baker, P.C., for appellant.

Clark J. Grant, of Grant, Rogers, Maul, Grant & Dake, for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

## INTRODUCTION

George Robert Benesch appeals from the dismissal of his petition challenging a special assessment for street improvements levied pursuant to Nebraska's "gap and extend" law, Neb. Rev. Stat. §§ 18-2001 to 18-2005 (Reissue 1991). From our de novo review of the record, we find that the portion of the street in question was previously paved and the special assessment is therefore void.

## STATEMENT OF CASE

Benesch is the owner of property abutting Denver Street between 8th and 10th Streets in the City of Schuyler, Nebraska. On April 2, 1991, the mayor and city council of Schuyler adopted a resolution to improve Denver Street from 9th to 10th Streets and Denver Street from 8th to 9th Streets by grading, curbing, guttering, and paving said sections. The cost of such improvements, excepting street intersections, was to be assessed against the property owners abutting these sections. Minutes from the April 1991 council meeting reveal that some abutting property owners, including St. John's Lutheran Church by representative and Lumir Spulak and his wife, were present at the meeting and approved of these improvements. Moreover, the Spulaks, along with another abutting property owner, stated that they would approve an 80-percent assessment for such improvements.

Prior to this resolution, the street in question was covered by a solid aggregate of compacted layers of oil and gravel approximately 3 to 5 inches thick, creating a firm surface. Pursuant to the city's resolution, this material was removed and replaced with concrete approximately 7 inches thick. On March 24, 1992, the mayor and city council of Schuyler, sitting as a board of equalization and assessment, levied and specially assessed the total sum of $24,218 against the owners of property abutting Denver Street from 8th to 10th Streets. Benesch was individually specially assessed in the amount of $1,612. It is not clear from the record how much Benesch has paid pursuant to this assessment; however, he does appear to have paid a portion of the $1,612.

On October 12, 1993, Benesch filed a petition in district court "for the benefit of himself and all such interested persons," asserting that said assessment was fundamentally defective and therefore void because the portion of Denver Street in question was already paved and, therefore, beyond the authority of the "gap and extend" laws. Benesch sought injunctive relief from further collection of moneys owed and a refund of all sums paid. Following an evidentiary hearing on November 22, 1994, the district court dismissed Benesch's petition, stating in total: "[T]he Court finds generally for the Defendant and

against the Plaintiff and the Plaintiff's petition is dismissed at their cost." No further findings were set forth in the court's order filed March 13, 1995. The journal entry overruling Benesch's motion for a new trial was filed on April 13, 1995, and this appeal timely followed.

## ASSIGNMENTS OF ERROR

Benesch assigns four errors on appeal which may be summarized in two. The district court erred in (1) failing to find that Denver Street between 8th and 10th Streets was previously paved, thereby making a special assessment under the "gap and extend" law void, and (2) disallowing Benesch to bring this action as a class action suit.

## STANDARD OF REVIEW

[1-3] A collateral attack upon a special assessment is a proceeding in equity, which an appellate court reviews de novo on the record. *North Platte, Neb. Hosp. Corp. v. City of North Platte*, 232 Neb. 373, 440 N.W.2d 485 (1989). In its de novo review, the appellate court must 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 conclusions reached by the district court or the fact that there may be some evidence in support thereof. *Iverson v. City of North Platte*, 243 Neb. 506, 500 N.W.2d 574 (1993); Neb. Rev. Stat. § 25-1925 (Reissue 1995). Regarding questions of law, an appellate court has an obligation to reach its own conclusions independent of those reached by the lower court. *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996).

## ANALYSIS

[4,5] The parties agree that this action constitutes a collateral attack upon the street assessment and is not a direct appeal in accordance with Neb. Rev. Stat. § 19-2422 (Reissue 1991). A property owner may collaterally attack a special assessment only for the limited purposes of fraud, actual or constructive, a fundamental defect, or want of jurisdiction. *County of Red Willow v. City of McCook*, 243 Neb. 383, 499 N.W.2d 531 (1993). All defects, irregularities, and inequalities in the mak-

ing of an assessment, or in proceedings prior thereto, not raised by appeal from the assessment are waived and cannot be questioned in the collateral proceedings. *North Platte, Neb. Hosp. Corp., supra.* The property owner attacking the special assessment as void has the burden of establishing its invalidity. *NEBCO, Inc. v. Board of Equal. of City of Lincoln*, 250 Neb. 81, 547 N.W.2d 499 (1996).

In sum, Benesch's argument on appeal is that because the street in question was previously paved, Nebraska's "gap and extend" law does not apply and the city was without authority to levy the special assessment at issue. Therefore, according to Benesch, said assessment is void due to a fundamental defect and want of jurisdiction.

[6] Briefly, Nebraska's "gap and extend" law provides a method by which a city may, without prior approval from property owners, unilaterally decide to pave a street and assess the costs of such improvements against abutting property owners. Section 18-2001 provides in relevant part:

> Any city or village may, without petition or creating a street improvement district, grade, curb, gutter and pave any portion of a street otherwise paved so as to make one continuous paved street, but the portion to be so improved shall not exceed two blocks including intersections or thirteen hundred and twenty-five feet whichever is the lesser . . . .

[7] This method of specially assessing property owners for street improvements is unique in that, unlike other special assessments, it does not require approval, or at least the acquiescence, of the affected property owners. See, Neb. Rev. Stat. § 16-620 (Reissue 1991) (ordinance creating improvement district repealed if more than 50 percent of abutting property owners object); Neb. Rev. Stat. § 16-624 (Reissue 1991) (improvement district must be created if three-fourths of abutting property owners petition for such). See, also, *Iverson, supra*; *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979). Although an exception to the general rule that property owners must consent to paving assessments, this exception created by the "gap and extend" law is only a limited one. *Id.*

The statement of the bill's introducer was set forth in *Iverson, supra*:

> "Hard surface paving in most cities and villages was constructed, one district at a time and, consequently, there are frequently gaps in municipal paving systems of one or two blocks and due to the owner's unwillingness to cooperate in completing this improvement, it remains a traffic hazard as well as remaining an incompleted improvement."

243 Neb. at 512-13, 500 N.W.2d at 578 (quoting Statement of Purpose, L.B. 243, Committee on Public Works, 73d Leg. (Feb. 8, 1963)).

[8] The foregoing language was also quoted in *Turner, supra*. Similar to Benesch, the property owners in *Turner* argued that the "gap and extend" procedure may be used only in the case of previously unimproved street sections and that the street abutting their property was already paved. The issue as stated by the Supreme Court in *Turner* was whether the "gap and extend" provisions authorized the repaving or replacing of a street section already covered with a "hard surface." The Nebraska Supreme Court stated:

> It is clear that the Legislature expected the "gap and extend" procedure to be used only in the case of a section which was not otherwise paved. Neither the City nor this court is free to expand this intent to include a section which is paved but not up to standards — standards which the City is free to set. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payments thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer.

203 Neb. at 713-14, 279 N.W.2d at 873.

Accordingly, the special assessment levied in *Turner* taxing property owners for the costs associated with repaving an already paved street was rendered void as beyond the authority of the "gap and extend" law. *Turner*, however, does not provide guidance as to the type of hard surfaces which constitutes pavement within the meaning of the "gap and extend" provision, as

in that case the fact that the street was previously paved was not in dispute.

In the case now before this court, the city concedes that the "gap and extend" law is not available where a street is already paved. However, the city contends that Denver Street from 8th to 10th Streets was not paved prior to the 1991 street improvement project at issue. The issue presented on appeal is, therefore, what constitutes "pavement" for the purpose of Nebraska's "gap and extend" law. While the physical character of the street at issue presents a question of fact, we view the question of whether this street is "paved" within the meaning of the "gap and extend" law, as that provision has been interpreted by the Supreme Court as a question of law.

It is undisputed by the parties that the street in question received an application of three coats of oil and two coats of gravel in 1956. The cost associated with such was assumed by the property owners on a voluntary basis. It is further undisputed that these streets were "recoated" in 1975 by Brunswick Asphalt Company and that the property owners again were billed for such. The cost of "recoating" the two blocks was $239 and $211. The warrant issued by the City of Schuyler in association therewith describes the 1975 project as "Blacktop Streets."

The testimony, laboratory tests, and pictorial evidence adduced at trial establish that prior to 1991, the street at issue, although in disrepair in some areas, was generally covered by 3 to 5 inches of a solid aggregate composed of layers of oil and gravel, creating a firm, level surface. This conclusion is substantiated by this court's personal examination of exhibit 29, a piece of the street which purportedly is a typical representation of the street as it existed in its previous condition. The street is protected by stop signs as well as no-parking signs along its west side. Curbing and guttering have been present in the area since approximately 1941. During the early 1980's, the area at issue served as a detour route during a period of construction, causing increased traffic and an increased number of chuckholes. Routine maintenance on the section over the years has been performed by the city.

Raymond Hajek, an engineer, testified that in his expert opinion, Denver Street prior to 1991 was paved. Hajek based this opinion on photos, an inspection of Denver Street itself, and material removed from said street, as well as literature regarding asphalt paving. In contrast, Steven Parr, a licensed city and county highway superintendent, opined that Denver Street from 8th to 10th Streets had never been paved prior to this project. He described the material covering Denver Street prior to 1991 as "armor coating that was in layers."

The term "pave" was defined in *Terrill v. City of Lawrence*, 193 Kan. 229, 234, 392 P.2d 909, 913 (1964) as follows: "[t]o lay or cover with stone, brick, asphalt, concrete, or other material, so as to make a firm, level, or convenient surface for travel; to floor with brick, stone, or other solid material; to cover as a street; as, to *pave* a street." See Webster's Third New International Dictionary, Unabridged 1658 (1993).

Similarly, Webster's Tenth New Collegiate Dictionary 853 (1995) defines "pave" as follows: "to lay or cover with material (as asphalt or concrete) that forms a firm level surface for travel . . . to prepare a smooth easy way . . . ."

The definition of "paving" provided by the city's expert witness, Parr, is as follows: "materials that are installed on a prepared subgrade, that the materials installed have — would be concrete or asphalt with a thickness that would support vehicular traffic. The paving you would expect some longevity to that in the neighborhood of 15 to 20 years with normal maintenance."

[9] Whether the material covering Denver Street from 8th to 10th Streets is characterized as "armor coating" as the city contends or "asphaltic material" as Benesch contends, the evidence establishes that the material consisted of a solid aggregate 3 to 5 inches thick made up of compacted layers of gravel and an oil-type substance. It created a firm, level surface for vehicular travel. In our opinion, these characteristics bring Denver Street from 8th to 10th Streets in its previous condition within the above-stated definitions of "pave" as that term was intended by the "gap and extend" law. As previously set forth, the scope of said law was clearly stated in *Turner v. City of North Platte*, 203 Neb. 706, 279 N.W.2d 868 (1979). That court determined that

the intent of the "gap and extend" law was to enable cities to provide streets with continuous hard surfaces. It was not intended to allow cities to improve existing hard surface streets in order to bring them up to standards set by the cities themselves.

From our de novo review of the record, including a personal examination of exhibit 29, we conclude that Denver Street from 8th to 10th Streets prior to 1991 was a paved street for the purpose of the "gap and extend" law. As such, the City of Schuyler was without authority to make the levy in question pursuant to said law and absent property owner approval or acquiescence in accordance with other statutory provisions, and the assessment at issue is therefore void.

The only issue remaining is whether Benesch has properly brought this suit as a class action. In determining whether a class action is properly brought, broad discretion is vested in the trial court. *Riha Farms, Inc. v. County of Sarpy*, 212 Neb. 385, 322 N.W.2d 797 (1982). Our review of this issue is hampered by the omission in the district court's order of any reasoning for the dismissal of the petition. Absent such, we do not know whether the court decided this issue against Benesch or whether it considered the issue at all. Notwithstanding, we find this suit was not properly brought as a class action.

[10] Neb. Rev. Stat. § 25-319 (Reissue 1995) authorizes class actions "[w]hen the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court . . . ." This statute has been interpreted to require both a question of common or general interest *and* numerous parties so as to make it impracticable to bring all the parties before the court. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). Benesch failed to show the existence of any of these requirements.

The record establishes that 11 abutting property owners were specially assessed as a result of the street improvement at issue. No showing was made that it would be impracticable to bring all such owners before the court. Moreover, as previously set forth, the record shows that at least some property owners appeared at the April 1991 city council meeting and approved

the resolution and the 80-percent assessment of the costs associated therewith. While there is no mathematical test for determining whether in a particular case the class is so numerous as to satisfy the numerosity requirement, *Hoiengs, supra*, absent a showing of the foregoing elements, we find that 11 parties do not satisfy the requirement in this case.

The finding that this suit is not properly maintainable as a class action, however, does not affect our ruling herein as it applies to Benesch as an individual. See, *Roadrunner Development v. Sims*, 213 Neb. 649, 330 N.W.2d 915 (1983); *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976). Therefore, the city is ordered to refund that amount previously collected from Benesch, and the special assessment at issue herein is declared void.

## CONCLUSION

The previous street was covered with compacted layers of gravel and oil creating a solid aggregate 3 to 5 inches thick and provided a level, firm surface for vehicular travel. It was, therefore, paved within the meaning of Nebraska's "gap and extend" law. The "gap and extend" procedure does not apply to a street already paved, and special assessments purportedly levied in accordance therewith are void. Notwithstanding that this suit was not properly brought as a class action, Benesch, as an individual, is granted the relief set forth above.

REVERSED.

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## STATE OF NEBRASKA, APPELLEE, V. STEVEN M. CHAMPOUX, APPELLANT.

555 N.W.2d 69

Filed October 15, 1996. No. A-95-958.

1. **Constitutional Law: Statutes: Ordinances.** The constitutionality of a statute or ordinance is a question of law.
2. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.

3. **Ordinances: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 24-1106 (Reissue 1995) does not except from the jurisdiction of the Court of Appeals consideration of the constitutionality of an ordinance.
4. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** In passing upon the constitutionality of an ordinance, an appellate court begins with a presumption that the ordinance is valid; consequently, the burden is on the challenger to demonstrate the constitutional defect.
5. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the validity of a zoning ordinance that does not affect a fundamental right or involve a suspect classification, a litigant must prove that the conditions imposed by the city in adopting the ordinance were unreasonable, discriminatory, or arbitrary and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance.
6. **Constitutional Law: States.** A state may impose higher standards on the basis of state law and may guard individual rights more fervently than the U.S. Supreme Court does under the federal Constitution.
7. **Municipal Corporations: Ordinances: Zoning: Public Health and Welfare.** In enacting zoning ordinances to provide for the public health, safety, and general welfare, a municipality may consider the quality of living in its community and may attempt to promote values important to the community as a whole.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed.

Peter W. Katt and Lisa K. Piscitelli, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

IRWIN, Judge.

Steven M. Champoux appeals his conviction under a Lincoln municipal ordinance. The Lincoln Municipal Code generally provides that one may rent only to families property that is zoned for single-family or two-family use. The municipal ordinance in question defines a family as including not more than three unrelated persons. On appeal, Champoux challenges the constitutionality of the ordinance's definition of "family." For the reasons stated below, we affirm.

## FACTS

On February 7, 1994, a criminal complaint was filed in the county court for Lancaster County, alleging Champoux had unlawfully allowed "more than three unrelated persons to live in a building . . . in violation of the use regulations for the R-2 Residential District." On February 16, Champoux moved to quash the complaint for the reason that "Lincoln Municipal Ordinance Section 27.03.220 is unreasonable and arbitrary in violation of the Due Process Clause of the Constitution of the State of Nebraska." This motion was overruled.

On November 17, a trial was held on stipulated facts, which are as follows: Champoux owns and maintains rental property at 1840 Hartley Street in Lincoln. On the date cited in the complaint, January 26, 1994, Champoux was renting the property at issue to five unrelated persons, all of whom lived on the property. This property is one side of a duplex and is located in an "R-2 Residential District," which is zoned for single-family or two-family use. Lincoln Mun. Code § 27.03.220 (1994) defines a family as "[o]ne or more persons immediately related by blood, marriage, or adoption and living as a single housekeeping unit in a dwelling . . . . A family may include, in addition, not more than two persons who are unrelated for the purpose of this title." At trial, Champoux preserved his constitutional challenges based on his due process rights under the Nebraska Constitution and his tenants' rights to association and privacy under the 1st and 14th Amendments to the U.S. Constitution. On November 28, Champoux was found guilty and fined $25.

In his December 22 appeal to the district court, Champoux again challenged the ordinance defining "family" based on the constitutional grounds discussed above. The district court concluded that the challenged ordinance was constitutional and affirmed the judgment of the county court. This appeal timely followed.

## ASSIGNMENTS OF ERROR

Champoux assigns that the district court erred in finding that § 27.03.220 did not violate the Due Process Clause of the Nebraska Constitution and in finding that § 27.03.220 did not

violate his tenants' rights to privacy and association guaranteed by the 1st and 14th Amendments to the U.S. Constitution.

## STANDARD OF REVIEW

[1,2] The constitutionality of a statute or ordinance is a question of law. *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996); *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996).

## ANALYSIS

*Jurisdiction.*

[3] Before reaching Champoux's claims that the ordinance in question is unconstitutional, we must address whether we have jurisdiction to address his claims. Neb. Rev. Stat. § 24-1106 (Reissue 1995) provides that an appeal shall be taken to "the Court of Appeals except in capital cases, cases in which life imprisonment has been imposed, and cases involving the constitutionality of a statute." Section 24-1106 does not except from the jurisdiction of this court consideration of the constitutionality of an ordinance. See, also, Neb. Ct. R. of Prac. 9E (rev. 1996).

*Due Process Claim.*

[4] Therefore, we turn to Champoux's claim that the zoning ordinance in question violates the Due Process Clause of the Nebraska Constitution in that it unduly restricts his use of his property. In passing upon the constitutionality of an ordinance, an appellate court begins with a presumption that the ordinance is valid; consequently, the burden is on the challenger to demonstrate the constitutional defect. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *Kuchar, supra*. "The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary." *Bucholz v. City of Omaha*, 174 Neb. 862, 865-66, 120 N.W.2d 270, 273 (1963).

[5] In a challenge to a statute or ordinance under either the Due Process Clause or the Equal Protection Clause, the degree

of judicial scrutiny to be focused on the statute is a "'dispositive question.'" *Robatham v. State*, 241 Neb. 379, 382, 488 N.W.2d 533, 538 (1992) (quoting *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989)). To successfully challenge the validity of a zoning ordinance that does not affect a fundamental right or involve a suspect classification, a litigant must prove that the conditions imposed by the city in adopting the ordinance were unreasonable, discriminatory, or arbitrary and that the regulation bears no relationship to the purpose or purposes sought to be accomplished by the ordinance. See, *Robatham, supra*; *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991); *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989); *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964). "[C]lassifications appearing in social or economic legislation require only a rational relationship between the state's legitimate interest and the means selected to accomplish that end. The ends-means fit need not be perfect; it need only be rational." *State v. Michalski*, 221 Neb. 380, 389, 377 N.W.2d 510, 517 (1985).

The interests set out by the city in support of the ordinance in question are the "sanctity of the family, quiet neighborhoods, low population, few motor vehicles, and low transiency." Brief for appellee at 17. Champoux argues that although the zoning ordinance was presumably enacted pursuant to legitimate governmental objectives, the city "has provided no evidence that the lack of a biological relationship between the inhabitants of a dwelling increases traffic, parking problems, noise, disturbances, and destroys the character of the single-family neighborhood." Reply brief for appellant at 7. As a result, he argues, the city has "failed to show that the ordinance is reasonably related to these objectives." *Id.* However, as discussed above and contrary to Champoux's arguments, Nebraska jurisprudence requires that Champoux demonstrate the constitutional defect in the zoning ordinance. See, *Conklin, supra; Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

The U.S. Supreme Court has addressed the constitutionality of a zoning ordinance that defined a family to include any number of related persons or a total of two unrelated persons. The Court held that the ordinance bore a rational relationship to per-

missible state objectives and, thus, was constitutional. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974). The Court reasoned:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

416 U.S. at 9.

[6] Nonetheless, a state may impose higher standards on the basis of state law and may guard individual rights more fervently than the U.S. Supreme Court does under the federal Constitution. *State v. Hinton*, 226 Neb. 787, 415 N.W.2d 138 (1987) (Shanahan, J., dissenting); *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986). The substantive rights provided by the federal Constitution define only a minimum, a floor rather than a ceiling. *Hinton, supra* (Shanahan, J., dissenting) (citing *Mills v. Rogers*, 457 U.S. 291, 102 S. Ct. 2442, 73 L. Ed. 2d 16 (1982)).

Therefore, we must determine whether our state Constitution provides greater due process rights than the U.S. Constitution. This is a matter of first impression in Nebraska. We have reviewed the decisions of other jurisdictions regarding constitutional challenges to zoning ordinances similar to that before us. Our review shows that other jurisdictions are split on this issue.

Jurisdictions that have upheld similar zoning ordinances under their state constitutions generally hold that such ordinances are rationally related to legitimate state interests in that they promote family and youth values and protect the State's interest in preserving the family and marriage. See, e.g., *Dinan v. Board of Zoning Appeals*, 220 Conn. 61, 595 A.2d 864 (1991) (zoning restriction limiting use of single-family residences to

related persons); *Durham v. White Enterprises, Inc.*, 115 N.H. 645, 348 A.2d 706 (1975) (ordinance restricting density of occupancy by unrelated persons while not so restricting that of related persons). See, also, *Lantos v. Zoning Hearing Bd.*, 153 Pa. Commw. 591, 621 A.2d 1208 (1993) (ordinance requiring that single-family residence not be used as student housing unless given special exception); *People v. Multari*, 135 Misc. 2d 913, 517 N.Y.S.2d 374 (1987) (ordinance defining "family" to include not more than three unrelated persons over 18 years of age); *In re Miller*, 85 Pa. Commw. 407, 482 A.2d 688 (1984) (ordinance defining "family" as any number of related persons but not more than two unrelated persons); *Rademan v. Denver*, 186 Colo. 250, 526 P.2d 1325 (1974) (ordinance restricting occupancy of single-family dwellings to related persons).

The above jurisdictions point out that the constitutional rights asserted are economic in nature. See *Dinan, supra.* In addition, these courts focus on a municipality's interests in preserving the integrity of residential districts and in fostering a sense of community. See *Rademan, supra.* In justifying the distinction drawn between related and unrelated living companions, one court stated:

> The transient and separate character of residency by the plaintiffs' tenants is not as likely to stimulate on their part similar concerns about the quality of living in the neighborhood for the long term.
>
> . . . [S]uch occupants . . . are less likely to develop the kind of friendly relationships with neighbors that abound in residential districts occupied by . . . families. . . . [T]hey are not likely to have children who would become playmates of other children living in the area. Neighbors are not so likely to call upon them to . . . perform any of the countless services that families . . . provide to each other as a result of longtime acquaintance and mutual self-interest.

*Dinan*, 220 Conn. at 74, 595 A.2d at 870.

Jurisdictions which have struck down zoning ordinances similar to that before us as violative of the rights encompassed in their state constitutions generally hold that the enactment of such ordinances assumes, without support, that unrelated per-

sons who live together behave differently than traditional families. See, e.g., *McMinn v Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985) (ordinance defining "family" to include any number of related persons or two unrelated persons both over age of 62); *Delta Charter Twp v Dinolfo*, 419 Mich. 253, 351 N.W.2d 831 (1984) (ordinance allowing one unrelated person to reside in household in addition to family); *State v. Baker*, 81 N.J. 99, 405 A.2d 368 (1979) (ordinance allowing no more than four unrelated persons to reside together).

When striking down these ordinances, the jurisdictions reason that such ordinances are both overinclusive and underinclusive in that they prohibit a "plethora of uses" that are not contrary to the objectives of such ordinances. *Baker*, 81 N.J. at 107, 405 A.2d at 371. See, also, *Dinolfo, supra*. According to these jurisdictions, there are less restrictive alternatives available that focus on the size of the dwelling and the number of occupants rather than the relationship of the household members. See, *McMinn, supra*; *Baker, supra*.

However, even jurisdictions that have stricken down ordinances similar to that before us acknowledge that a municipality is not

> without authority to regulate the behavior it finds inimical to its concept of a residential neighborhood, including a rational limitation on the numbers of persons that may occupy a dwelling. [A municipality] need not open its residential borders to transients and others whose lifestyle is not the functional equivalent of "family" life. Nor are [municipalities] precluded from distinguishing between the biological family and a functional family when it is rational to do so . . . .

*Dinolfo*, 419 Mich. at 277-78, 351 N.W.2d at 843-44. See, also, *McMinn, supra*.

[7] We are not persuaded that Champoux has overcome the ordinance's presumption of validity. See *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996). In enacting zoning ordinances to provide for the public health, safety, and general welfare, see Neb. Rev. Stat. § 15-902 (Reissue 1991), a municipality may consider the quality of living in its community and may

attempt to promote values important to the community as a whole. The city's objectives are certainly legitimate. Although the means and ends employed by the city may not be a perfect fit, the zoning ordinance and the city's stated objectives are rationally related. In so concluding, we adopt the reasoning of the Supreme Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), and that of other jurisdictions upholding ordinances similar to that before us as discussed above.

We also note that the ordinance's definition of "family" is expansive enough to allow numerous other household relationships in addition to that of a traditional family.

> It is said, however, that if [three] unmarried people can constitute a "family," there is no reason why [four or five] may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.

*Village of Belle Terre*, 416 U.S. at 8.

For these reasons, we conclude that the zoning ordinance before us does not violate Champoux's due process rights under the Nebraska Constitution.

*Tenants' Alleged Rights to Association and Privacy.*

Champoux also assigns that the zoning ordinance violates his tenants' rights to association and privacy as provided by the 1st and 14th Amendments to the U.S. Constitution. We note that the U.S. Supreme Court has said that one may raise the denial of another's constitutional rights if as a direct consequence of the denial of these constitutional rights, the litigant faces substantial economic injury or criminal prosecution; the litigant's and the other person's interests intertwine; and the other person is unable to effectively vindicate his or her constitutional rights. We agree. See, e.g., *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976). In any event, the issue of whether a tenant's rights to association and privacy under the U.S. Constitution are violated by zoning ordinances such as that before us has been decided by the U.S. Supreme Court. In *Village of Belle Terre*, 416 U.S. at 7, the Court held that the

ordinance before it "involves no 'fundamental' right guaranteed by the Constitution, such as voting . . . the right of association . . . the right of access to the courts . . . or any rights of privacy."

## CONCLUSION

As we conclude that the definition of "family" in the zoning ordinance before us does not violate the Due Process Clause of the Nebraska Constitution or the 1st and 14th Amendments to the U.S. Constitution, we affirm.

AFFIRMED.

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WALTER R. FORREST AND ANN L. FORREST, APPELLANTS, V. SCOTT R. EILENSTINE, ALSO KNOWN AS SCOTT EILENSTINE, ET AL., APPELLEES.

554 N.W.2d 802

Filed October 29, 1996. No. A-95-583.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of all well-pled facts, together with any proper and reasonable inferences of fact and law which may be drawn therefrom, but does not accept the truth of any conclusions of the pleader.
2. ____: ____: ____. In reviewing a ruling on a demurrer, an appellate court cannot assume the existence of any facts not alleged, cannot make factual findings to aid the pleading, and cannot consider evidence which may be adduced at trial.
3. **Judgments: Demurrer: Appeal and Error.** On appeal, an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
4. **Actions: Parties.** Nebraska statutes provide that every action must be prosecuted in the name of the real party in interest.
5. **Actions: Parties: Standing.** In determining if a plaintiff is the real party in interest, the focus of the inquiry is on whether or not the plaintiff has standing to sue because the plaintiff has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
6. ____: ____: ____. A party must have standing to sue before he can invoke a court's jurisdiction.
7. ____: ____: ____. Standing is not a mere pleading requirement, but is an indispensable component of a party's case because only a party who has standing may invoke the jurisdiction of the court.
8. ____: ____: ____. A plaintiff's right to recover depends upon his right at the inception of a suit, and the nonexistence of a cause of action when a suit is begun is a fatal

defect which cannot be cured by the accrual of a cause of action during the pendency of the suit.

9. **Actions: Bankruptcy: Property: Standing.** Causes of action, including causes of action for negligence, constitute property rights which are vested in the trustee of the bankruptcy estate upon commencement of a bankruptcy proceeding, such that the trustee gains standing to pursue the cause of action.
10. **Bankruptcy: Property: Abandonment.** Once property, including a chose in action, is abandoned by a trustee, the property reverts to the debtor.
11. **Actions: Pleadings: Bankruptcy: Standing: Demurrer.** When the face of a petition reveals that a debtor had no standing to pursue a cause of action, the district court should sustain a demurrer.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

John S. Mingus, of Mingus & Mingus, for appellants.

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

IRWIN, SIEVERS, and INBODY, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Walter R. Forrest and Ann L. Forrest, hereinafter referred to collectively as "Forrest," appeal from district court orders sustaining the demurrer filed by appellees Scott R. Eilenstine and Ray Eilenstine, hereinafter referred to collectively as "Eilenstine," dismissing Forrest's cause of action with prejudice and denying Forrest's motion for new trial. Because we find that Forrest lacked standing to file the petition in this case, we affirm.

## II. BACKGROUND

On August 13, 1989, Scott Eilenstine, a minor child of Ray Eilenstine, was operating a motor vehicle in which Bryna Forrest, a minor child of Forrest, was a passenger. Scott Eilenstine drove the vehicle into a ditch, causing the vehicle to roll. As a result of the accident, Bryna Forrest allegedly suffered injuries.

On July 12, 1993, Forrest filed a petition for chapter 7 bankruptcy relief in the U.S. Bankruptcy Court for the District

of Nebraska. John A. Wolf was appointed as the trustee for the bankruptcy estate. On July 16, a notice of the commencement of the bankruptcy case and the meeting of creditors was issued, establishing that the meeting of creditors was scheduled for August 30.

On August 13, 1993, Forrest filed a petition in the district court for Buffalo County seeking damages from Eilenstine for the August 13, 1989, motor vehicle accident. The petition indicated that a chapter 7 bankruptcy action was pending and that the cause of action against Eilenstine was reported in the bankruptcy proceedings. On March 16, 1994, Eilenstine filed a demurrer alleging a defect in parties plaintiff and alleging that the face of the petition disclosed that Forrest was not the real party in interest. On April 8, 1994, the court sustained the demurrer and allowed Forrest 30 days to amend the petition.

On May 16, 1994, Forrest filed an amended petition. The petition again acknowledged the pendency of the chapter 7 bankruptcy proceedings, but further alleged that "on or about the 30th day of August, 1994 [sic], said trustee abandoned all real and personal property belonging to said estate." On May 25, Eilenstine filed a demurrer to the petition, again alleging a defect in parties plaintiff and that the face of the petition disclosed that Forrest was not the real party in interest. On October 11, the court sustained the demurrer and allowed Forrest 10 days to amend the petition. The court specifically found that "on the face of the plaintiffs' petition it appears that the plaintiffs are not the real parties in interest in the instant matter."

On October 31, 1994, Forrest filed a second amended petition. The petition again acknowledged the pendency of the chapter 7 bankruptcy proceedings and that the trustee had abandoned all real and personal property belonging to the estate on August 30, "1994 [sic]." In the second amended petition, Forrest appears to have amended a paragraph concerning the injuries suffered by Bryna Forrest, limiting the claim to medical expenses incurred in her treatment. The second amended petition appears identical to the amended petition, however, with respect to the allegations concerning the pending bankruptcy proceedings and alleged abandonment of the present cause of action by the bankruptcy trustee. On November 3,

Eilenstine filed a demurrer to the petition, again alleging a defect in parties plaintiff and that the face of the petition disclosed that Forrest was not the real party in interest. On December 21, the court sustained the demurrer. The court found that the pleadings established that the trustee had expressed an intention to abandon the cause of action, but that the petition failed to demonstrate that notice had been given and a hearing conducted on the proposed abandonment, as required by the bankruptcy statutes. Because the court "anticipate[d] that plaintiffs should be able to get the necessary documentation of the abandonment before the court and within their pleadings," the court allowed Forrest 20 days to amend the petition.

On January 10, 1995, Forrest filed a third amended petition. The petition acknowledged the pendency of the chapter 7 bankruptcy proceedings on the date the original petition had been filed and that the trustee had abandoned all real and personal property belonging to the estate on August 30, 1993. The petition further included a copy of the notice of meeting of creditors, which included a provision declaring that the trustee would file a schedule of property to be abandoned within 21 days after the meeting of creditors and that if no objection was filed within 10 days after the 21-day deadline, the property would be deemed abandoned. On January 11, Eilenstine filed a demurrer alleging that the face of the third amended petition contained a defect in parties plaintiff, that Forrest was not the real party in interest, and that the third amended petition failed to state a cause of action. On March 8, the court sustained the demurrer and dismissed the case with prejudice. The court found that it was "readily apparent that the trustee . . . would not have completed abandonment of . . . the plaintiffs' cause of action until approximately October 1, 1993." As a result, the court found that Forrest lacked standing to file the original petition and that the subsequent abandonment by the trustee did not "rehabilitate[] the jurisdictional defect."

On March 20, 1995, Forrest filed a motion captioned a motion "for new trial." On April 18, Forrest tendered a fourth amended petition. On April 18, a hearing was conducted on Forrest's motion for new trial and the court overruled the motion. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On appeal, Forrest assigns 17 errors, a number of which are repetitive recitations of one another. We have consolidated these 17 assignments of error for discussion into two. First, Forrest asserts that the district court erred in sustaining the demurrer to Forrest's third amended petition and in dismissing the case with prejudice and not allowing Forrest an opportunity to amend the third amended petition. Second, Forrest asserts that the district court erred in denying the motion for new trial.

## IV. STANDARD OF REVIEW

[1,2] When reviewing an order sustaining a demurrer, an appellate court accepts the truth of all well-pled facts, together with any proper and reasonable inferences of fact and law which may be drawn therefrom, but does not accept the truth of any conclusions of the pleader. *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996); *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). In reviewing a ruling on a demurrer, an appellate court cannot assume the existence of any facts not alleged, cannot make factual findings to aid the pleading, and cannot consider evidence which may be adduced at trial. *Id.* In ruling on a demurrer, the petition is to be liberally construed, and if from the facts stated in the petition it appears that the plaintiff is entitled to relief, the demurrer should be overruled. *Leader Nat. Ins. v. American Hardware Ins., supra.*

[3] On appeal, an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Fox v. Metromail of Delaware, supra.*

## V. ANALYSIS

### 1. Sustaining Demurrer

#### (a) Standing

[4,5] Neb. Rev. Stat. § 25-301 (Reissue 1995) provides that, with an exception not involved here, every action must be prosecuted in the name of the real party in interest. See, also, *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992). In determining if a plaintiff is the real party in interest as contemplated by

§ 25-301, the focus of the inquiry is on whether or not the plaintiff has standing to sue because the plaintiff has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Goff v. Weeks, supra*; *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). The purpose of the inquiry is to determine whether or not the plaintiff has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.*

[6] It is clear that a party must have standing to sue before he can invoke a court's jurisdiction. *In re Interest of Archie C.*, 250 Neb. 123, 547 N.W.2d 913 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995). Having standing to sue involves having some real interest in the cause of action that would benefit by the relief to be granted. *Id.*

[7,8] The Nebraska Supreme Court has noted that standing is not a mere pleading requirement, but is an indispensable component of a party's case because only a party who has standing may invoke the jurisdiction of the court. *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993). In this respect, the requirement of standing is a fundamental jurisdictional requirement. See *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993). It is also apparent that a plaintiff's right to recover depends upon his right at the inception of a suit, and the nonexistence of a cause of action when a suit is begun is a fatal defect which cannot be cured by the accrual of a cause of action during the pendency of the suit. See, e.g., *Sutton v. Anderson*, 176 Neb. 543, 126 N.W.2d 836 (1964).

(b) Bankruptcy Estate

[9] Upon Forrest's filing of the bankruptcy petition, all of Forrest's property, including the chose in action concerning the present case, became property of the estate created pursuant to 11 U.S.C. § 541(a) (1994). See, *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991). See, also, 9 Am. Jur. 2d *Bankruptcy* § 952 (1991). Causes of action, including causes of

action for negligence, constitute property rights which are vested in the trustee of the bankruptcy estate upon commencement of a bankruptcy proceeding, such that the trustee gains standing to pursue the cause of action. See, *Pappas v. Sommer, supra*; *State ex rel. NSBA v. Thor, supra*. As a result, once a bankruptcy petition is filed, the debtor loses standing to pursue any cause of action which accrued prior to the bankruptcy filing. See, *Pappas v. Sommer, supra*; *State ex rel. NSBA v. Thor, supra*.

[10] The bankruptcy statutes provide a means for a debtor to regain standing to pursue such causes of action through the abandonment procedure. See 11 U.S.C. § 554 (1994). The Nebraska Supreme Court has acknowledged that once property, including a chose in action, is abandoned by a trustee pursuant to § 554, the property reverts to the debtor. See *State ex rel. NSBA v. Thor, supra*.

Section 554 requires notice and a hearing to effectuate an abandonment of property by the trustee. The U.S. Court of Appeals for the Fifth Circuit has noted that a trustee's professed intent to abandon property does not constitute "abandonment" under § 554 until such time as notice is properly given and a hearing is conducted on the proposed abandonment. See *Matter of Baudoin*, 981 F.2d 736 (5th Cir. 1993).

(c) Application and Resolution

In the present case, Forrest's third amended petition acknowledged that Forrest had filed a bankruptcy petition prior to the filing of the original petition and that the bankruptcy proceedings were still pending when the original petition was filed. As such, Forrest did not have standing to pursue this cause of action on the date of the filing of the original petition. See, *Pappas v. Sommer, supra*; *State ex rel. NSBA v. Thor, supra*. Because Forrest lacked standing, Forrest was not the real party in interest as required by § 25-301. See, *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994); *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993).

Forrest argues that the trustee expressed an intention to abandon the cause of action prior to service of process on Eilenstine. However, as noted above, until such time as proper notice is

given and a hearing is conducted, a trustee cannot effectuate a proper abandonment of property under the bankruptcy statutes. See, § 554; *Matter of Baudoin, supra.* Because the trustee had not yet satisfied the procedural prerequisites to abandoning this cause of action when Forrest filed the petition in this case, and because Forrest's rights must be ascertained as of the time this case was commenced, Forrest had no right to pursue this cause of action. See *Sutton v. Anderson, supra.*

Although it serves no precedential value, we feel compelled to note the similarities between the present case and the Iowa case *Bronner v. Exchange State Bank*, 455 N.W.2d 289 (Iowa App. 1990). *Bronner* was an appeal of a summary judgment proceeding, but the issues presented on appeal were strikingly similar to the issues in the present case. In *Bronner*, the plaintiff attempted to pursue a cause of action against a bank after he filed a bankruptcy petition. The bank moved for summary judgment, alleging that the plaintiff lacked standing to pursue the cause of action and that the plaintiff should have been estopped from pursuing the cause of action because he failed to list the claim as an asset in the bankruptcy proceedings. On appeal, the Iowa Court of Appeals held that the plaintiff had no standing to pursue the cause of action because it became property of the bankruptcy estate upon filing of the bankruptcy petition. Additionally, the court held that a subsequent abandonment by the trustee did not remedy the jurisdictional deficiency. We hold similarly in the present case.

[11] Because the face of the third amended petition reveals that Forrest had no standing to pursue this cause of action, the district court was correct in sustaining the demurrer. Additionally, it is apparent that no reasonable possibility exists that amendment will correct the defect, and the district court was therefore also correct in dismissing the case and denying Forrest the opportunity to amend the petition a fourth time. See *Fox v. Metromail of Delaware*, 249 Neb. 610, 544 N.W.2d 833 (1996). Finally, the dismissal was appropriately "with prejudice" because the statute of limitations for Forrest's claim arising out of the August 13, 1989, motor vehicle accident had already run. See Neb. Rev. Stat. § 25-207 (Reissue 1995). This assigned error is without merit.

### 2. Motion for New Trial

Subsequent to the district court's order sustaining the demurrer and dismissing the case with prejudice, Forrest filed a motion "for new trial." We initially note that this motion was not, in actuality, a proper motion "for new trial," inasmuch as there was no trial in the first place, but, rather, the motion was merely a motion for reconsideration of the demurrer. See *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). All of the grounds alleged as bases for reconsideration of the court's ruling concerned the sustaining of the demurrer. Finding no error in the district court's ruling concerning that issue, we also find no error in the court's overruling of Forrest's motion "for new trial." This assigned error is without merit.

## VI. CONCLUSION

Forrest had no standing to file the petition in this case. The district court properly sustained the demurrer and properly dismissed the case with prejudice.

AFFIRMED.

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## VULCRAFT AND NUCOR COLD FINISH, DIVISIONS OF NUCOR CORPORATION, A DELAWARE CORPORATION, APPELLEES, V. M. BERRI BALKA, TAX COMMISSIONER OF THE NEBRASKA DEPARTMENT OF REVENUE, AND STATE OF NEBRASKA, APPELLANTS.

555 N.W.2d 344

Filed November 5, 1996. No. A-95-686.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
2. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Judgments: Appeal and Error.** As to 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.
4. **Taxation.** Neb. Rev. Stat. § 77-2703(1) (Cum. Supp. 1994) imposes a sales tax upon the gross receipts from all sales of tangible personal property sold at retail in

Nebraska, and § 77-2703(2) imposes a use tax on the storage, use, or other consumption in Nebraska of property purchased, leased, or rented from any retailer.

5. ____. Pursuant to Neb. Rev. Stat. § 77-2702(11)(a) (Reissue 1990), retail sale or sale at retail shall not mean the sale of tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail.
6. ____. Material 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.

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

Don Stenberg, Attorney General, and L. Jay Bartel for appellants.

Tim O'Neill, of Harding & Ogborn, for appellees.

IRWIN, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

Vulcraft and Nucor Cold Finish (Vulcraft), divisions of Nucor Corporation, filed a petition for redetermination with M. Berri Balka, the Tax Commissioner of the State of Nebraska, concerning certain use taxes paid under protest on its processing oils. The Tax Commissioner dismissed the petition, and Vulcraft appealed to the Lancaster County District Court. On appeal, the district court reversed the judgment of the Tax Commissioner. The Tax Commissioner and the State of Nebraska now appeal, contending that the district court erred in concluding that Vulcraft's use of drawing, turning, and grinding oils qualified for an exemption under Nebraska's use tax. For the reasons set forth below, we affirm.

## FACTUAL BACKGROUND

Vulcraft manufactures steel bars in its Norfolk, Nebraska, plant. As part of its manufacturing process, Vulcraft utilizes processing oils. It is these processing oils that are the subject of the instant appeal.

At Vulcraft, the final steps of manufacturing a steel bar are collectively referred to as "cold finishing." The bar, in a hot

rolled state, is initially taken through a "shot blaster," which shoots "high velocity pellets" against the bar in order to remove all scale and dirt. The bar is then inserted into a die, where a carriage grabs the end of the bar and accelerates it through the die. The die, which is smaller than the bar, is similar to a funnel. The die reduces the cross section and increases the length of the bar. The bar is then cut to length, straightened, banded in quantities, and placed in storage for shipment. The purpose of this cold-finishing process is to reduce the cross section area of the bar, to give the bar a very smooth surface, and to increase the tensile and yield strength of the bar. The process is called cold finishing because no heat is added. Some examples of cold-finished bars include shock absorbers on cars and hydraulic cylinders on tractors.

Prior to the entry of the bar into the die, drawing oil is pumped onto the bar. This oil creates a barrier which protects both the die and the surface of the bar while the bar is passing through the die. The oil also acts as a rust inhibitor that prevents oxidation during further processing. The die leaves an extremely fine film of oil on the bar. The excess drawing oil is filtered, returned to the recirculation tank, and then reused. Drawing oil is subsequently added to replace that which is "consumed" by the bar as it exits the die. Approximately 80 percent of Vulcraft's bars are complete after undergoing the drawing process.

Some of Vulcraft's customers require that the bar undergo further steps to ensure that the bar is flawless or has only minimal defects. Turning is a process designed to reduce the "depth of defect" on the bar. In this process, a cutting tool removes material as it rotates around the bar. A water soluble turning oil is flooded onto the bar to create a protective barrier between the bar and the tool. The oil is also considered to be a rust inhibitor. An air knife then removes virtually all the water aspect of the solution, leaving the oil for rust prevention purposes. The runoff solution is collected, returned to recycling tanks, cooled to eliminate the water, and then reused. Again, the oil consumed is that which is left on the bar at the completion of the turning process.

A ground bar is a higher value-added, or more sophisticated, product with an extremely fine finish. In this process, the bar enters through a pair of transport disks that forces it into a set of grinding stones. A grinding oil, which is water soluble, is applied to the stone and to the bar. As the bar leaves the grinder, the stone area where the material has been removed, an air knife and wiper remove all the water, leaving a very fine film of grinding oil. The oil provides rust protection to the bar and lubrication between the grinding stone and the bar. The bar is continuously wiped, and virtually no oil remains on it. The oil is then returned to the collection tank, recirculated, and reused. The grinding oil constantly recirculates for years, and Vulcraft adds only a minute amount of oil to compensate for the oil that is used on the bars.

Before each bar is complete, Vulcraft applies a final oil called Metkote. Metkote is a long-term rust preventative that provides the bar with an estimated 2-year shelf storage life. Metkote additionally prevents the bars from wearing on each other when stacked in bundles. Metkote does not clean the bar and does not neutralize the processing oils. Furthermore, the processing oils do not evaporate, but remain on the bar that is ultimately sold and shipped to the customer. Metkote does not, however, require the presence of the processing oils in order to be effective. It is undisputed that rusting would occur if Metkote was not applied to the bar, since the processing oils act only as short-term rust inhibitors. There is, however, a dispute as to whether the processing oils add any long-term rust prevention benefits to Metkote.

The application of Metkote can occur 10 to 12 days after going through the drawing process. If the processing oils were not applied to the bars, moisture in the air would cause the fresh metal surface to rust relatively instantaneously. Two of Vulcraft's employees testified that the processing oils add value to the finished product. Additionally, Dean Orr, a metallurgical engineer and an accredited corrosion specialist, testified that rather than adding to the product, the processing oils keep the product from losing value by preventing rust during the manufacturing process. If the processing oils were not applied to the bar, the value of the product could be affected by corrosion. The

end result would be a surface that was not acceptable to the customer. Orr also testified that the processing oils were "essential" during processing, but not as a part of the final product.

In July 1991, the Nebraska Department of Revenue issued Vulcraft a notice of deficiency determination. Based on the audit period June 1, 1988, to May 31, 1991, the department calculated that Vulcraft owed $18,633 in use tax, or $24,686 when combined with interest and penalties. Vulcraft paid the $18,633 under protest and filed a petition for redetermination. The Tax Commissioner concluded that the processing oils were not exempt from the use tax as an ingredient or component part of property manufactured, processed, or fabricated for ultimate sale at retail. The Lancaster County District Court reversed the judgment of the Tax Commissioner, concluding that the processing oils were essential ingredients or component parts of the finished steel bars.

## ASSIGNMENT OF ERROR

The Tax Commissioner and the State contend that the district court erred in holding that Vulcraft's purchase and use of drawing, turning, and grinding oils qualified for use tax exemption as ingredient or component parts of property manufactured, processed, or fabricated for ultimate sale at retail.

## STANDARD OF REVIEW

[1-3] Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Abbott v. Department of Motor Vehicles*, 246 Neb. 685, 522 N.W.2d 421 (1994); *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994). On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526

N.W.2d 422 (1995); *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Wagoner, supra*; *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *Abbott, supra.*

As to 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. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995); *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995); *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994).

*George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 95, 532 N.W.2d 18, 21-22 (1995) (appeal from district court's affirmance of order by State Tax Commissioner which sustained deficiency assessments for sales and use taxes). See, also, Neb. Rev. Stat. § 84-918 (Reissue 1994).

## ANALYSIS

[4] We initially set forth the applicable statutes in effect at the time Vulcraft's petition for redetermination was filed, August 2, 1991. See *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996) (applying statutes in effect at time claim for refund was filed). Neb. Rev. Stat. § 77-2703(1) (Cum. Supp. 1994) imposes a sales tax upon the gross receipts from all sales of tangible personal property sold at retail in Nebraska, and § 77-2703(2) imposes a use tax on the storage, use, or other consumption in Nebraska of property purchased, leased, or rented from any retailer.

[5] Pursuant to Neb. Rev. Stat. § 77-2702(11)(a) (Reissue 1990), now codified at Neb. Rev. Stat. § 77-2702.13(2) (Supp. 1995), retail sale or sale at retail shall not mean the sale of tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at

retail. Furthermore, § 77-2702(20), now codified at Neb. Rev. Stat. § 77-2702.23 (Cum. Supp. 1994), stated:

> Use . . . shall not include 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.

The Nebraska Supreme Court, in *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989), concluded that § 77-2702(11)(a) and (20) (Reissue 1986) provided an exemption from the Nebraska sales and use tax. A statute conferring an exemption from taxation is to be strictly construed, and one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption. *Nucor Steel v. Leuenberger, supra.*

The ingredient or component part exemption to Nebraska's sales and use tax has been addressed in several Nebraska cases, several of which, coincidentally, involve the Nucor Corporation. The effect of these cases makes it clear that the component or ingredient part must be "essential" to the final product before the exemption is allowed.

In *American Stores Packing Co. v. Peters*, 203 Neb. 76, 277 N.W.2d 544 (1979), the Nebraska Supreme Court determined that cellulose casings used in the manufacture of skinless meat products, such as frankfurters, did not enter into or become an ingredient or component part of the meat products. The casings contained glycerine, which moved by osmosis from the casing into the meat during manufacturing. The casings were, however, eventually cut off and discarded. In concluding that the casings were subject to Nebraska's use tax, the court stated:

> In the case before us, the casing served the apparently indispensable function of a mold. In the end, the casing is discarded. It does not become an ingredient or component in any real sense, as it does not reach the ultimate consumer of the meat product. If one judges solely by the physical evidence, i.e., a sample of unused casing and a sample of used casing, the answer seems almost obvious. The casing remains after the manufacture. The principal

> function of the glycerine and moisture is to enable the casing to serve its function. The transfer of some part of the glycerine into meat which already contains glycerine appears incidental.

*Id.* at 83, 277 N.W.2d at 548.

In *Nucor Steel v. Herrington*, 212 Neb. 310, 322 N.W.2d 647 (1982), Nucor sought to exempt graphite electrodes from taxation. Graphite electrodes were used for two purposes: to conduct electricity to melt scrap metal and to supply carbon to the molten metal, if deficient. The court held:

> Where graphite electrodes are used in the manufacture of steel for the dual purpose of providing essential carbon for the steel manufacturing process and for the conduction of electricity which provides heat for the process, and where a substantial part of the graphite electrodes enters into and becomes an essential ingredient or component part of the finished steel and the remainder is consumed in the manufacturing and refining process, the use of such graphite electrodes in the manufacturing and processing of steel for ultimate sale at retail is not subject to taxation . . . .

*Id.* at 318-19, 322 N.W.2d at 651. The court reasoned that there was no justification for holding that the purpose of using a substance which was an essential and critical ingredient of the finished product was not a primary and important purpose simply because there was also another reason for using the substance which was also important.

In *Nucor Steel v. Leuenberger, supra*, Nucor sought to exempt from taxation refractories, which were insulating and protective barriers that protected furnaces and other steel manufacturing equipment from direct exposure to molten steel and its high temperatures. These refractories wore away and deteriorated as they were used. New refractory material was purchased to replace that which was dislodged during smelting or which became exhausted as an effective insulator.

[6] Nucor claimed that because all the refractories were eventually present in slag, scale, or bag dust, the refractories were an ingredient or component part of tangible personal property manufactured for ultimate sale at retail. The court disagreed, holding:

> From *American Stores Packing Co. v. Peters, supra,* and *Nucor Steel v. Herrington, supra*, the principle evolves that material 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.
>
> So long as a material enters into and is an essential ingredient or component part of a product manufactured, processed, or fabricated for ultimate sale at retail, the material is excluded from the Nebraska sales and use tax, notwithstanding that the material may be used for more than one purpose in manufacturing, processing, or fabricating the product. *Nucor Steel v. Herrington, supra.*

*Nucor Steel v. Leuenberger*, 233 Neb. 863, 872, 448 N.W.2d 909, 914 (1989).

The court determined that the presence of refractory material in slag, scale, and bag dust was only incidental to Nucor's business activity. This was evidenced by the fact that Nucor selected refractories solely on the basis of performance and longevity as effective insulators for steel-manufacturing equipment and not on the basis of refractory material as an element of slag, scale, or bag dust. Thus, the court concluded that Nucor failed to establish that the refractories entered into and became essential ingredients or component parts of Nucor's slag, scale, or bag dust.

In *Nucor Steel v. Balka*, 2 Neb. App. 138, 507 N.W.2d 499 (1993), the tangible personal property at issue were mill rolls and billet guides, materials which were used in the steel-rolling process. During the process, the materials were worn away and eventually placed in a scrap pile, which Nucor used as part of its source of iron for steelmaking. The court held that tangible personal property that 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. However, the court also stated that 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. The court concluded that because the mill rolls and billet guides only became an ingredient or component part of the steel when their usefulness as mill rolls and billet guides had been exhausted, their presence was incidental to the final product. Therefore, the purchase price was not exempt from taxation.

With those decisions as background, we return to the instant case. On appeal, the Tax Commissioner and the State do not dispute that the processing oils serve as rust preventative during processing. Rather, the Tax Commissioner and the State articulate that the processing oils are not an essential ingredient or component part of the finished steel product because their benefits are consumed or expended during processing and no longer serve any particular purposes after Metkote is applied. We find the Tax Commissioner and the State's argument unconvincing.

The materials at issue here are not ingredients, but, rather, component parts of the finished steel product. The oils coat the outer surfaces of the steel bars, but do not actually become ingredients of the steel itself, like the graphite electrodes in *Nucor Steel v. Herrington*, 212 Neb. 310, 322 N.W.2d 647 (1982). These processing oils remain on the finished product and are not neutralized by the subsequent application of Metkote.

The processing oils serve two distinct and important purposes. First, they act as a lubricant, safeguarding the steel bar during processing and also the machines used to process the bars. Second, they function as a rust inhibitor, protecting the processed bar from corrosion until Metkote can be applied. It is undisputed that the processing oils are essential during the manufacturing process, as moisture in the air causes fresh metal surfaces to rust almost immediately if not sufficiently protected. The essential nature of immediate rust protection is shown by the evidence that the product will not meet the customers' specifications and needs if damaged by rust after processing. Furthermore, it is not determinative that the processing oils may no longer serve as a rust preventative once Metkote is applied.

If the oils are not applied during processing, the finished steel bar, which is manufactured for its precision, may very well contain defects and be altogether unacceptable to the customer. Thus, we can reach no other conclusion except that the oils are an essential component of the bars.

As essential component parts of the finished steel product, the processing oils are not subject to Nebraska's use tax. The judgment of the Lancaster County District Court is supported by the evidence and is neither arbitrary, capricious, nor unreasonable.

AFFIRMED.

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## MICHAEL R. McHENRY, DOING BUSINESS AS McHENRY'S IRISH SALOON, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

555 N.W.2d 350

Filed November 5, 1996. No. A-95-959.

1. **Administrative Law: Liquor Licenses: Revocation.** The Nebraska Liquor Control Commission may revoke the license of any licensee if it is found that the licensee has violated any provision of the Nebraska Liquor Control Act.
2. **Liquor Licenses: Convictions: Pleas.** The Nebraska Liquor Control Act provides that no license shall be issued to a person who has been convicted of or has pleaded guilty to any Class I misdemeanor pursuant to chapter 28, article 3, 4, 7, 8, 10, 11, or 12 of the Nebraska Revised Statutes, or any similar offense under a prior criminal statute or in another state.
3. **Convictions: Pleas.** A guilty plea, if accepted and entered by the court, is the equivalent of a conviction; a guilty plea is not the equivalent of a conviction unless it is accepted and entered by the court.
4. **Liquor Licenses: Revocation: Pleas: Convictions: States.** Tendering a guilty plea under the Iowa deferred judgment and sentence statutes does not merit revocation of a liquor license until such time as the plea is shown to have been accepted and entered by the court and has become the equivalent of a conviction.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded with directions.

John M. Boehm for appellant.

Don Stenberg, Attorney General, and Laurie Smith Camp for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Michael R. McHenry appeals from a district court order affirming the revocation of McHenry's liquor license by the Nebraska Liquor Control Commission (Commission). Because we find that McHenry had not been convicted of or pled guilty to a felony or Class I misdemeanor as contemplated by the Nebraska Liquor Control Act, we reverse the judgment and remand the case with directions.

## II. BACKGROUND

McHenry holds a liquor license in Bloomfield, Nebraska. On April 27, 1994, McHenry tendered a guilty plea in the district court for Woodbury County, Iowa, on a charge of possession of a controlled substance. The charge constituted a "serious" misdemeanor in Iowa and would have been a Class IV felony in Nebraska. See Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1994).

The guilty plea was offered pursuant to Iowa's deferred judgment and sentence statutes. See Iowa Code Ann. § 907.1 et seq. (West 1994). According to Iowa's deferred judgment and sentence statutes, the Iowa district court deferred acceptance of the plea, deferred entry of judgment, deferred sentencing, and ordered McHenry to complete a 1-year period of probation. Pursuant to the Iowa statutes, upon discharge of probation McHenry's criminal record would be expunged of the charge. See § 907.9.

On July 7, 1994, the Commission issued McHenry notice of a hearing to show cause why his liquor license should not be revoked pursuant to Neb. Rev. Stat. § 53-125(5) (Reissue 1993) because he had been "convicted of a Class I misdemeanor." On July 26, an amended notice was issued, alleging that McHenry was ineligible to hold a liquor license because he had been "convicted of or plead[ed] guilty to any felony or Class I Misdemeanor pursuant to Chapter 28, Article 4, or any similar offense in another state."

On August 4, 1994, a hearing was held before the Commission. On August 18, the Commission issued an order

finding that "the license should be revoked." McHenry appealed the Commission's order to the district court. On August 1, 1995, the district court entered an order affirming the Commission's order. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On appeal, McHenry asserts, inter alia, that the district court erred in "its interpretation of the phrase 'pleaded guilty' as used in Neb. Rev. Stat. §53-125(5) [Cum. Supp. 1994]." McHenry also asserts that the State's position in this case was without substantial justification and that he is therefore entitled to attorney fees and expenses. Because our resolution of these two issues is dispositive of the case, we decline to address McHenry's other assigned errors. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

## IV. STANDARD OF REVIEW

With regard to questions of law, which include the meaning of statutes, an appellate court is obligated to reach its conclusions independent of the legal determinations made by the administrative agency or the district court. *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996); *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995); *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

## V. ANALYSIS

### 1. Nebraska Liquor Control Act

[1,2] Neb. Rev. Stat. § 53-116.01 (Reissue 1993) provides that the Commission may revoke the license of any licensee if it is found that the licensee has violated any provision of the Nebraska Liquor Control Act. See, also, Neb. Rev. Stat. § 53-117.08 (Reissue 1993) (license of any licensee who violates provisions of Nebraska Liquor Control Act shall be suspended, canceled, or revoked). Section 53-125 (Cum. Supp. 1994) provides:

> No license of any kind shall be issued to . . . (5) a person who has been convicted of or has pleaded guilty to any Class I misdemeanor pursuant to Chapter 28, article 3, 4,

> 7, 8, 10, 11, or 12, or any similar offense under a prior criminal statute or in another state . . . .

In the present case, McHenry was charged with possession of a controlled substance in Iowa. Pursuant to Iowa's deferred judgment and sentence statutes, McHenry tendered a guilty plea and agreed to a 1-year period of probation. Pending McHenry's completion of the probationary period, the Iowa district court did not accept McHenry's plea, but deferred acceptance of the plea, entry of judgment, and sentencing. As a result, the primary issue in this case is whether a guilty plea that is not accepted by the court is sufficient to warrant revocation of a liquor license under § 53-125(5).

2. DEFERRED JUDGMENT AND VACATION OF CONVICTION

Section 907.3 of the Iowa statutes provides that upon a plea of guilty, "with the consent of the defendant, the court may defer judgment and place the defendant on probation upon such conditions as it may require. . . . Upon fulfillment of the conditions of probation, the defendant shall be discharged *without entry of judgment*." (Emphasis supplied.) Section 907.9 provides in part that "[u]pon discharge from probation, if judgment has been deferred under section 907.3, the court's criminal record with reference to the deferred judgment shall be expunged."

The Iowa Supreme Court has interpreted the deferred judgment and sentence procedures as providing a means for a defendant to avoid conviction and a judicial record of the criminal charge by satisfactorily completing a probationary period "voluntarily undertaken *before his guilt has been adjudicated*." (Emphasis supplied.) *State v. Farmer*, 234 N.W.2d 89, 92 (Iowa 1975). The Iowa Supreme Court has further noted that under the deferred judgment and sentence procedures, no conviction occurs if the defendant successfully completes probation "because *no adjudication of guilt is made*." (Emphasis supplied.) *Id.*

The Nebraska statutes provide for a somewhat similar effect, although through a markedly different procedure. Neb. Rev. Stat. § 29-2264(2) (Reissue 1995) provides that "[w]henever any person is convicted of a misdemeanor or felony and is

placed on probation by the court . . . he or she may, after satisfactory fulfillment of the conditions of probation . . . or after discharge from probation . . . petition the sentencing court to set aside the conviction." Section 29-2264(4) provides:

> The court may grant the offender's petition and issue an order setting aside the conviction when in the opinion of the court the order will be in the best interest of the offender and consistent with the public welfare. The order shall:
>
> (a) Nullify the conviction; and
>
> (b) Remove all civil disabilities and disqualifications imposed as a result of the conviction.

The Iowa deferred judgment and sentence statutes and the Nebraska statutes for vacation of convictions have a similar effect because both allow a defendant to be free from various legal consequences ordinarily associated with a conviction, including civil disabilities. The Iowa statutes allow a defendant to *prevent* the imposition of these consequences through deferred judgment and successful completion of a probationary period. The Nebraska statutes allow a defendant to *remove* these consequences through successful completion of a probationary period and subsequent vacation of the conviction. Under either procedure, a defendant becomes free from civil disabilities, such as the revocation of a liquor license. See, § 29-2264 (order setting aside conviction nullifies conviction and removes civil disabilities); *Iowa Beer and Liquor Control Dept. v. McBlain*, 263 N.W.2d 226 (Iowa 1977) (deferred sentence does not warrant suspension of liquor license).

### 3. Resolution

#### (a) Revocation of McHenry's License

[3] The Nebraska Supreme Court has long recognized that a guilty plea, if accepted and entered by the court, is the equivalent of a conviction. *State v. McKain*, 230 Neb. 817, 434 N.W.2d 10 (1989); *Wolff v. State*, 172 Neb. 65, 108 N.W.2d 410 (1961). The corollary must also be true, that a guilty plea is not the equivalent of a conviction *unless* it is accepted and entered by the court. The Supreme Court has not attached any legal signifi-

cance to the mere *tender* of a guilty plea, rather than *acceptance* by the court.

In *Jacobson v. Higgins*, 243 Neb. 485, 489, 500 N.W.2d 558, 562 (1993), the Supreme Court held that "the mere entry of a guilty plea, standing alone, is insufficient to support a judgment of conviction." In *Jacobson*, the court ultimately held, in the context of revocation of a motor vehicle operator's license, that the Nebraska statutes did not require the record to affirmatively demonstrate that the district court had accepted a guilty plea *in addition to* demonstrating that the court had entered an official judgment of conviction. This is in accordance with the above-noted proposition that a judicially accepted guilty plea and a conviction are equivalents, and *Jacobson* clarified that the judicial acceptance of the guilty plea and the subsequent conviction did not *both* need to be demonstrated by the record to support revocation of the motor vehicle operator's license.

On appeal, the Commission argues that the phrase "has been convicted of or has pleaded guilty to any Class I misdemeanor" in § 53-125(5) should include a defendant who has tendered a guilty plea and that the Commission should be able to revoke such a defendant's liquor license whether or not the plea has yet been accepted by the court. Taken to its extreme, the Commission's argument would suggest that if a defendant tendered a guilty plea and the court affirmatively declined to accept the plea, for example, if the plea was not voluntary or knowing, then the Nebraska Liquor Control Act would authorize revocation of the defendant's liquor license merely because he tendered a guilty plea, although he did so neither voluntarily nor with adequate knowledge of the consequences of such a plea being accepted and entered by the court. We decline to construe the statutes as authorizing such action.

[4] Finally, we note that the district court's order affirming the Commission's action in this case recognized that other provisions of § 53-125 allow the Commission to revoke a licensee's license for a variety of other good causes which do not have a conviction as their primary focus. Our opinion today is not intended to foreclose the possibility that McHenry's actions could merit revocation under any of these other subsections, but, rather, holds that tendering a guilty plea under the Iowa

deferred judgment and sentence statutes does not merit revocation under § 53-125(5) until such time as the plea is shown to have been accepted and entered by the court and has become the equivalent of a conviction. As such, the order of the district court is reversed and the case is remanded with directions to reverse the Commission's ruling revoking McHenry's license.

### (b) Attorney Fees

McHenry argues on appeal that the State's position in this case regarding the meaning of § 53-125(5) was not "substantially justified." Neb. Rev. Stat. § 25-1803 (Reissue 1995) provides that the court having jurisdiction over a civil action brought by the State or an action for judicial review brought against the State pursuant to the Administrative Procedure Act shall award fees and other expenses to the prevailing party unless the prevailing party is the State, except that the court shall not award fees and expenses if it finds that the position of the State was substantially justified.

We initially note that it is not clear whether judicial review of the Commission's decisions is brought "pursuant to the Administrative Procedure Act" or through some other procedure. We need not specifically decide this issue, however, because even if § 25-1803 is considered to be applicable to this case, as the case appears to be one of first impression in Nebraska, we cannot say that the State's position was not substantially justified. The assigned error concerning attorney fees and expenses is without merit.

## VI. CONCLUSION

For the reasons stated herein, the order of the district court is reversed and the case is remanded with directions to reverse the Commission's decision to revoke McHenry's license.

REVERSED AND REMANDED WITH DIRECTIONS.

# PAPILLION/LAVISTA SCHOOLS PRINCIPALS AND SUPERVISORS ORGANIZATION (PLPSO), APPELLEE, V. PAPILLION/LAVISTA SCHOOL DISTRICT, SCHOOL DISTRICT NO. 27, APPELLANT.

555 N.W.2d 563

Filed November 12, 1996. No. A-95-621.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing a decision of the Nebraska Commission of Industrial Relations, an appellate court will consider whether the decision is supported by substantial evidence, whether the Commission of Industrial Relations acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Commission of Industrial Relations: Labor and Labor Relations: Appeal and Error.** In the jurisprudence of Commission of Industrial Relations appeals pertaining to bargaining unit determinations, it is clear that each case must be decided on its own facts.
3. **Labor and Labor Relations.** The factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from case to case depending upon its particular applicability in each case.
4. **Commission of Industrial Relations: Appeal and Error.** In considering a Commission of Industrial Relations appeal, it is not for an appellate court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as the trier of fact.
5. **Statutes.** The words of a statute shall be given their plain, ordinary meaning.
6. **Commission of Industrial Relations: Labor and Labor and Relations.** Except as provided in Neb. Rev. Stat. § 48-816(3)(b) and (c) (Reissue 1993), a supervisor may be in the same bargaining unit with another supervisor, and a supervisor may not be in the same bargaining unit as an employee who is not a supervisor.
7. ____: ____. Neb. Rev. Stat. § 48-816(3)(a) (Reissue 1993) comports with case law which permits supervisors to belong to the same bargaining unit.
8. **Labor and Labor Relations.** Case law disfavors bargaining units composed of supervisors and rank and file workers.
9. ____. The Nebraska Supreme Court has commented on the "spirit of collegiality" found in the education environment.
10. **Labor and Labor Relations: Public Officers and Employees: Legislature: Intent.** It is the intent of the Legislature that fragmentation of bargaining units within the public sector is to be avoided.
11. **Labor and Labor Relations.** It has long been held that a basic inquiry in bargaining unit determinations is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit.
12. ____. The Nebraska Supreme Court has determined that decisions of the National Labor Relations Board with respect to appropriate bargaining units are helpful.
13. ____. Factors to be considered in determining the appropriate bargaining unit include mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; and the extent of union organization among the employees.

14. **Commission of Industrial Relations: Labor and Labor Relations: Teacher Contracts.** The Nebraska Teachers' Professional Negotiations Act was repealed by 1987 Neb. Laws, L.B. 524, thereby placing teacher collective bargaining under the Industrial Relations Act.
15. **Labor and Labor Relations: Schools and School Districts: Teacher Contracts.** The enactment of 1988 Neb. Laws, L.B. 942, specifically allowed a bargaining unit of administrators and teachers in a Class V school district.
16. **Labor and Labor Relations: Public Officers and Employees.** Nebraska law avoids undue fragmentation of bargaining units within the public sector.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

Kelley Baker and Jerry L. Pigsley, of Harding & Ogborn, for appellant.

Robert E. O'Connor, Jr., for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Papillion/LaVista School District, School District No. 27 (District), appeals the April 18, 1995, "Findings and Order" of the Nebraska Commission of Industrial Relations (CIR), which determined that the bargaining unit generally described as the Papillion/LaVista Schools Principals and Supervisors Organization (PLPSO) was the appropriate bargaining unit for representation election purposes for certain employees of the District. For the reasons recited below, we affirm.

## BACKGROUND AND FACTS

The PLPSO filed a petition with the CIR on September 28, 1994, requesting, inter alia, that the PLPSO be certified as the appropriate bargaining unit for employees in the unit. The PLPSO produced 23 out of a potential 26 or 27 authorization cards of members of the proposed bargaining unit authorizing the PLPSO to represent them.

Following the filing of an answer denying the allegations in the petition, a hearing was conducted on January 25, 1995, at which five witnesses testified and 23 exhibits were received in evidence. The witnesses in favor of the PLPSO as the appropriate bargaining unit were an elementary school principal, a high

school assistant principal, and a junior high school principal. The witnesses called by the District were the assistant superintendent for personnel of the District and the superintendent of the District. The exhibits included the "Constitution and By Laws" of the PLPSO, an administrator salary schedule, an organizational chart, a list of central office administrators, numerous job descriptions, administrator evaluation and evaluation indicator forms, an administrator performance appraisal, a list of administrators, and a letter dated March 2, 1994, from the president of the board of education to the president of the PLPSO regarding proceeding with 1994-95 salary discussions.

On April 18, 1995, findings were made by the CIR. As to some of these findings, the District either disputes their accuracy or challenges their legal significance. The following findings were made by the CIR: The PLPSO is composed of principals, assistant principals, and directors of programs in the District. The PLPSO has been organized since at least 1982. There was a predecessor organization to the PLPSO. The predecessor organization adopted bylaws in the early 1970's. The PLPSO or its predecessor "has existed for over twenty years." The PLPSO "worked through the central office administration, and on occasion even met directly with the Board, to negotiate informally wages, salary schedules, length of contracts, and other working conditions."

The CIR decision listed the job titles of the members of the proposed bargaining unit, the majority of whom were principals or assistant principals. The CIR order noted that the PLPSO and the District "stipulated that all of these employees have supervisory duties to varying degrees. All of these supervisory employees are state certified administrators and have at least a Master's Degree."

The CIR found that the individuals in the group use a " 'team approach' " to administrative duties and that the power in the group is diffused in a "collegial educational environment." The CIR defined the central office administration as generally composed of the superintendent and assistant superintendents of varying descriptions.

The CIR found as follows:

All school principals and the Library/Media Coordinator report to the Superintendent of Schools through the Assistant Superintendent of Personnel. The assistant principals report to their respective school principals. The Director of Special Services and the Challenge Coordinator report to the Assistant Superintendent for Curriculum and Instruction. The Special Services Coordinator and the English as a Second Language Project Director report to the Director of Special Services. The Director of Business Operations reports to the Assistant Superintendent for Business Services.

Performance evaluations are generally conducted on the supervisory employees by the person to whom they report. Principals are required to conduct performance evaluations on their respective assistant school principals. These evaluations may contain recommendations with respect to continued employment. These evaluations will also be used in the future as one of three equally weighted components for the distribution of merit pay.

None of the supervisory employees for at least the past six years has been recommended for termination of employment. Decisions on employment continuation or termination are ultimately made by the Board. Although principals have general supervisory authority over assistant principals, the collaborative team approach is used. The principals do not generally supervise the day-to-day work of their assistant principals. Instead, the assistant principals generally confer with, and report to, the principals with respect to specific problems that arise. The principals do not "micro manage" their assistant principals, and to that extent, the assistant principals are autonomous. Depending on the issue, the assistant principals sometimes interact directly with the assistant superintendents.

The CIR evaluated the legal significance of the foregoing findings vis-a-vis the following factors: mutuality of interest in wages, hours, and working conditions among PLPSO members; duties and skills of employees within the PLPSO; extent of union organization and desires of employees in the PLPSO;

established policies of the employer; and the policy against undue fragmentation of units in public employment.

The CIR concluded that the appropriate supervisory employee bargaining unit should be as follows:

> All school principals, and assistant school principals, the Director of Special Services, the Special Services Coordinator, the English as a Second Language Project Director, the Challenge Coordinator, the Library/Media Coordinator, and the Director of Business Operations, all employed by the Papillion/LaVista School District, School District No. 27.

In designating the foregoing as the appropriate bargaining unit, the CIR noted that the Legislature has provided that supervisors may organize with other supervisors for purposes of collective bargaining pursuant to Neb. Rev. Stat. § 48-816(3)(a) (Reissue 1993). In this regard, the CIR stated that the

> Nebraska Legislature has even provided statutory presumptions that certain firefighter and police officer supervisors shall have a community of interest with other firefighter and police officer employees, and that school administrators employed in a Class V school district shall have a community of interest with teachers and other certificated employees for purposes of joining a single bargaining unit. Neb. Rev. Stat. § 48-816(3)(b) and (c) (1993).

The CIR decision continues:

> If the Legislature does not believe that public sector supervisors having a community of interest should have a right to organize for purposes of collective bargaining, then it is the duty of the Legislature to enact legislation to limit supervisors from organizing with other supervisors. This Commission does not have the authority or power in deciding cases to attempt to legislate such a statutory change.

Following the designation of the appropriate bargaining unit, an election was conducted. Following the "Report of Election," and the "Certification Order" certifying the PLPSO as the exclusive collective bargaining agent for the bargaining unit

identified in the April 18, 1995, order, the District appealed. See Neb. Rev. Stat. § 48-812 (Reissue 1993).

## ASSIGNMENT OF ERROR

In its "Statement of Error and Issue on Appeal," the District declared the following to be at issue: "Whether the Commission erred in its determination of the appropriate employee bargaining unit." In its appellate brief, the District states: "The Commission of Industrial Relations erred in ordering that supervisors and the supervisory employees whom they supervise be included in the same bargaining unit. The Commission's order is contrary to law and is therefore arbitrary, capricious and unreasonable."

## STANDARD OF REVIEW

[1] The parties agree that the applicable standard of review, as stated in *Nebraska Pub. Emp. v. City of Omaha*, 235 Neb. 768, 769, 457 N.W.2d 429, 430 (1990), is as follows:

> "In reviewing a decision of the CIR, this court will consider whether the decision is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable." (Emphasis [omitted].) *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 304, 427 N.W.2d 28, 33 (1988).

## ANALYSIS

The District argues generally that the CIR order pertaining to the appropriate bargaining unit is erroneous and that the CIR order is contrary to law and is, therefore, arbitrary, capricious, and unreasonable. Specifically, the District argues that Nebraska law prohibits the CIR-defined bargaining unit, which the District describes as being composed of supervisors and the people they supervise. The PLPSO responds that a community of interest exists among the members of the PLPSO, that the CIR finding of the appropriate bargaining unit is consistent with the bargaining units in the area of education labor law, and that the bargaining unit, composed largely of principals and assistant principals, is supported by the policy against undue frag-

mentation of bargaining units in the area of public employment. We agree with the PLPSO.

[2-4] At the outset, this court notes that in the jurisprudence of CIR appeals pertaining to unit determinations, it is clear that each case must be decided on its own facts. See *Sheldon Station Employees Assn. v. Nebraska P. P. Dist.*, 202 Neb. 391, 275 N.W.2d 816 (1979). The Nebraska Supreme Court has stated that "[t]he factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from case to case depending upon its particular applicability in each case." *Id.* at 396, 275 N.W.2d at 819. See, also, *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977). Furthermore, in considering a CIR appeal, it has been stated: "It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given their testimony are for the administrative agency as the trier of fact." *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 304, 427 N.W.2d 28, 33 (1988). The findings of the CIR are to be accorded great weight. *Crete Education Assn. v. School Dist. of Crete*, 193 Neb. 245, 226 N.W.2d 752 (1975).

In claiming that the CIR erred, the District argues that the bargaining unit identified in the April 18, 1995, order is improper under Nebraska law because included in it are "the School District's Administrators [and] Other Supervisors Whom They Supervise." Brief for appellant at 14. The District refers this court to case law and § 48-816(3)(a). Section 48-816(3)(a) states: "Except as provided in subdivisions (b) and (c) of this subsection, a supervisor shall not be included in a single bargaining unit with any other employee who is not a supervisor." Section 48-816(3)(b) pertains to fire and police department bargaining units, and § 48-816(3)(c) pertains to Class V school district administrators. In relevant part, § 48-816(3)(c) provides:

> All administrators employed by a Class V school district shall be presumed to have a community of interest and may join a single bargaining unit composed otherwise of teachers and other certificated employees for purposes of the Industrial Relations Act, except that the following

> administrators shall be exempt: [superintendents, secretaries of the board of education, and others]. . . . In addition, all administrators employed by a Class V school district, except the exempt administrators, may form a separate bargaining unit represented either by the same bargaining agent for all collective-bargaining purposes as the teachers and other certificated employees or by another collective-bargaining agent of such administrators' choice.

[5-8] The words of a statute shall be given their plain, ordinary meaning. *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996). A plain reading of § 48-816(3)(a), stated in positive form, is that except as provided in § 48-816(3)(b) and (c), a supervisor may be in the same bargaining unit with another supervisor. Further, under § 48-816(3)(a), a supervisor may not be in the same bargaining unit as an employee who is not a supervisor. Section 48-816(3)(a) comports with case law which permits supervisors to belong to the same bargaining unit, see, e.g., *Nebraska Assn. of Pub. Emp. v. Nebraska Game & Parks Commission*, 197 Neb. 178, 247 N.W.2d 449 (1976), and additional case law which disfavors bargaining units composed of supervisors and rank and file workers, e.g., *City of Grand Island v. American Federation of S. C. & M. Employees*, 186 Neb. 711, 185 N.W.2d 860 (1971). Section 48-816(3)(a) clearly does not preclude the outcome in the CIR order.

The District argues that certain of the supervisors in the designated bargaining unit, in general the assistant principals, the coordinator of special services, and the director of English as a second language, are more akin to supervisees or employees, who may not be in the same bargaining unit as supervisors, such as principals and the director of special services. In connection with this argument, the District emphasizes the portion of the record which includes evidence that according to the assistant superintendent for personnel, the principal is the "boss," and that the principal evaluates the performance of the assistant principal in connection with merit pay. As a complement to this argument, the District notes, and the record shows, that in connection with taking days off from work, the assistant principals

submit a form to the principals and that when absent unexpectedly, the assistant principals notify the principals.

The record shows that the assistant superintendent for personnel testified that in connection with salaries, the District has worked with the PLPSO informally and that apparently the salary issues were resolved through this mechanism. However, she continued, were the principals and assistant principals to be officially recognized in one group, there would be a potential for conflict.

The PLPSO claims on appeal that the CIR determination of the appropriate bargaining unit is legally sound and supported by the evidence. The PLPSO argues that the record shows that there is a community of interest among the individuals in the bargaining unit designated by the CIR, that case law pertaining to educational settings supports the bargaining unit defined by the CIR, and that the bargaining unit defined by the CIR comports with the policy against undue fragmentation of bargaining units in the area of public employment.

With regard to the community of interest, the PLPSO refers to evidence in the record to the effect that principals and assistant principals are paid according to the same administrative salary scale based on negotiations in which the principals and assistant principals had met with the board of education in the early 1980's and that the principals and assistant principals share from the same merit pay pool. According to the record, the PLPSO has met with the board of education to discuss working conditions. Both high school principals and assistant high school principals are on a 260-day contract. All persons in the designated bargaining unit receive the same fringe benefits, and all persons in the designated bargaining unit have a master's degree and an administrator's license. There is evidence in the record that all persons in the designated bargaining unit, as well as the teachers, treat the superintendent as the "boss." Testimony indicates that the principals and the assistant principals meet twice a month to deal with issues within the school district. Both principals and assistant principals serve on committees at the district level. A principal testified that he did not supervise the assistant principals at the same school "on a daily basis." A principal and an assistant principal both testified that

they did not see a problem being in the same bargaining unit. The parties stipulated that in varying degrees, the principals, the assistant principals, and the other individuals in the proposed bargaining unit all have supervisory duties.

[9] The PLPSO refers the court to case law pertaining to the educational setting including *American Assn. of University Professors v. Board of Regents*, 203 Neb. 628, 279 N.W.2d 621 (1979), and *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977). In the 1977 case, the Nebraska Supreme Court approved a bargaining unit composed of department chairs and other faculty based in part on the evidence of collegiality within the group in the educational setting. In this regard, the Nebraska Supreme Court commented on the "spirit of collegiality" found in the education environment. *Id.*, 198 Neb. at 271, 253 N.W.2d at 15.

[10] The PLPSO also refers this court to the cases which demonstrate a public policy against undue fragmentation of bargaining units in the public sector such as *House Officers Assn. v. University of Nebraska Medical Center*, 198 Neb. 697, 255 N.W.2d 258 (1977), and *Sheldon Station Employees Assn. v. Nebraska P. P. Dist.*, 202 Neb. 391, 275 N.W.2d 816 (1979). See, also, Neb. Rev. Stat. § 48-838(2) (Reissue 1993). In *Sheldon Station Employees Assn.*, the Nebraska Supreme Court stated: "Clearly, it is the intent of the Legislature that fragmentation of bargaining units within the public sector is to be avoided." 202 Neb. at 396, 275 N.W.2d at 819.

We have reviewed the CIR order of unit determination and the record in accordance with the standard of review recited above. The order evaluates the evidence in light of the factors that are set forth in cases such as *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977), and *City of Grand Island v. American Federation of S. C. & M. Employees*, 186 Neb. 711, 185 N.W.2d 860 (1971), but not repeated here in detail. Our review of the record shows that the factual conclusions of the order are supported by substantial evidence.

The District does not quarrel directly with specific factual findings, but seeks reversal based on the argument that the legal

conclusions of the CIR order are contrary to law and, therefore, are arbitrary, capricious, and unreasonable. We do not agree.

There is a melange of legal principles applicable to this case. Although conceding that supervisors and supervisory employees are not absolutely prohibited from bargaining units, see, e.g., *Nebraska Assn. of Pub. Emp. v. Nebraska Game & Parks Commission*, 197 Neb. 178, 247 N.W.2d 449 (1976), the District urges this court to reverse the CIR order primarily on the basis that supervisors and the people they supervise should not be in the same bargaining unit. The District relies heavily on *Supervisory, Managerial, and Professional Employees Bargaining Association v. City of Bellevue*, 11 CIR 48 (1991). The proposition in *City of Bellevue* that supervisors and supervisory employees whom they supervise should not be in the same unit was specifically overruled by the order in the instant case. Even if it were conceded that the assistant principals are supervised in some measure by the principals, such characterization would not necessarily require separate bargaining units.

[11-13] In *American Assn. of University Professors v. Board of Regents*, 198 Neb. at 261-62, 253 N.W.2d at 11, the Nebraska Supreme Court stated:

> It has long been held that a basic inquiry in unit determinations is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. See Note, 59 Va. L. Rev. 492, The Appropriate Faculty Bargaining Unit in Private Colleges and Universities (1973).

In *City of Grand Island, supra*, the Nebraska Supreme Court determined that decisions of the National Labor Relations Board with respect to appropriate bargaining units were helpful. The court listed factors to be considered in determining the appropriate bargaining unit, including "mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; and the desires of the employees." 186 Neb. at 714, 185 N.W.2d at 863. In *Cornell University*, 183 NLRB 329, 336 (1970), the National Labor Relations Board said:

> In determining whether a particular group of employees constitutes an appropriate unit for bargaining where an

> employer operates a number of facilities, the Board considers such factors as prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or autonomy of the plants, differences or similarities in skills and functions of the employees, and geographical location of the facilities in relation to each other.

The factors in *Cornell University* were cited with approval in *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977). See, also, *City of Grand Island, supra.*

The CIR order properly considered the many factors relevant to the determination of an appropriate bargaining unit noted in the cases cited above. The CIR thereafter concluded that there was a community of interest in the proposed bargaining unit and that it was, therefore, appropriate. See, also, *IBEW Local 1536 v. Lincoln Elec. Sys.*, 215 Neb. 840, 341 N.W.2d 340 (1983). Our review of the evidence and the case law leads us to conclude that the CIR did not err on the facts or the law in finding the existence of a sufficient community of interest to warrant designation of the PLPSO as the appropriate unit.

In its brief on appeal, the District refers this court to § 48-816(3)(c), quoted earlier in this opinion, which in its first sentence provides a statutory presumption that administrators employed by a Class V school district have a community of interest and permits administrators in a Class V school district to join a bargaining unit with teachers. Elsewhere, § 48-816(3)(c) provides that such administrators may form a separate bargaining unit represented either by the teachers' bargaining agent or by a different bargaining agent. The parties note that Omaha is the only Class V school district in Nebraska and that Papillion/LaVista is a Class III school district. The District claims that § 48-816(3)(c) is limited by its language to a Class V school district and, therefore, that § 48-816(3)(c) prevents a finding that a group of administrators in a Class III school district is or may be an appropriate bargaining unit. We do not agree.

[14,15] The Nebraska Teachers' Professional Negotiations Act was repealed by 1987 Neb. Laws, L.B. 524, thereby placing teacher collective bargaining under the Industrial Relations Act, Neb. Rev. Stat. § 48-801 et seq. (Reissue 1993). The following year, 1988 Neb. Laws, L.B. 942, was enacted, specifically allowing a bargaining unit of administrators and teachers in a Class V school district. This provision overcame CIR case law, to which educators became subject in 1987, which disfavored bargaining units composed of administrators and rank and file employees. To the extent there is ambiguity in the statute, a review of the legislative history of L.B. 942 shows that administrators and teachers in Omaha had organized together since 1917 and that § 48-816(3)(c) was enacted to preserve that arrangement, notwithstanding the fact that the teachers and administrators had become subject to the Industrial Relations Act in 1987. Committee on Business and Labor Hearing, 90th Leg., 2d Sess. 61-64 (Feb. 8, 1988). The fact that § 48-816(3)(c) additionally permits Class V school district administrators to join with each other, instead of with teachers, in a bargaining unit does not preclude a comparable outcome in the context of litigation where the evidence shows a community of interest within a group of administrators with varying degrees of supervisory duty in a Class III school district.

The CIR made reference to case law in the educational setting in its unit determination order. In *American Assn. of University Professors v. Board of Regents,* 198 Neb. 243, 253 N.W.2d 1 (1977), the finding of a bargaining unit composed of both department chairs and faculty was affirmed. As indicated elsewhere in this opinion, the Nebraska Supreme Court noted that there existed a "spirit of collegiality" within this group. *Id.*, 198 Neb. at 271, 253 N.W.2d at 15. In this regard, among the facts noted by the Nebraska Supreme Court was the evidence showing that the department chairs made recommendations to a higher authority, i.e., the deans, regarding departmental matters after consulting with the faculty, a process similar to that shown by evidence in this case. See *id.* The CIR order, noting a "collegial educational environment" in the instant matter, is consistent with the facts of this case and case law in the educational setting.

[16] The CIR correctly noted in its order that Nebraska law avoids undue fragmentation of bargaining units within the public sector. See, *Sheldon Station Employees Assn. v. Nebraska P. P. Dist.*, 202 Neb. 391, 275 N.W.2d 816 (1979); *House Officers Assn. v. University of Nebraska Medical Center*, 198 Neb. 697, 255 N.W.2d 258 (1977). Our review of the CIR decision shows that its factual findings are supported by the record. Further, the conclusions of the CIR are consistent with the case law disfavoring undue fragmentation of bargaining units within the public sector, with the statutes, and with existing case law pertaining generally to organizing supervisors.

Because we find that there is substantial evidence to support the CIR decision and we conclude that the CIR acted within its authority and that the CIR action was not arbitrary, capricious, or unreasonable, we affirm.

AFFIRMED.

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BRADLEY L. POPPEN AND LAURIE L. POPPEN, APPELLEES, v. RESIDENTIAL MORTGAGE SERVICES, INC., A NEBRASKA CORPORATION, APPELLANT.

556 N.W.2d 49

Filed November 12, 1996. No. A-95-625.

1. **Judgments: Appeal and Error.** 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 erroneous.
2. ____: ____. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Contracts: Parol Agreement: Consideration.** A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration, and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof.
4. **Damages: Appeal and Error.** A fact finder's determination of damages is given great deference on appeal.
5. **Damages: Proof.** The party seeking recovery has the burden of proving damages with as much certainty as the case permits.
6. ____: ____. Damages must be proven with a reasonable degree of certainty and exactness.

7. **Breach of Contract: Damages.** In a breach of contract action, the ultimate objective of a damages award is to put the injured party in the same position that the injured party would have occupied if the contract had been performed.
8. **Breach of Contract: Loans: Damages: Interest.** The measure of damages for a breach of contract to lend money is usually the difference between the contract interest rate and the increased interest rate the borrower is obliged to pay in procuring a new loan.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Donald L. Stern and Arnold J. Stern, of Stern & Stern, for appellant.

Russell S. Daub for appellees.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

## INTRODUCTION

Bradley L. Poppen and Laurie L. Poppen sued Residential Mortgage Services, Inc. (RMS), alleging that RMS breached its contract to provide a 7-percent interest rate on the Poppens' mortgage and, instead, provided said mortgage with an 8-percent interest rate. From a judgment against RMS for $18,966, RMS appeals.

## FACTUAL BACKGROUND

RMS is a mortgage broker company. It enters into agreements to provide mortgages to prospective borrowers at a specified interest rate, provided a loan closes within a specified time period. It then sells the mortgages to lending institutions.

Bradley, an accountant and the chief financial officer for an Omaha company, met with Gary Nachman, president of RMS, in mid-August 1993 to discuss a 30-year fixed interest rate loan regarding a newly constructed home. On August 31, 1993, the Poppens and Nachman entered into a written agreement in which RMS agreed to provide a 30-year fixed interest loan at a rate of 7 percent. The agreement provided that "[t]he rate and discount points are both guaranteed for a period of 180 days expiring Mar[ch] 1, 1994." It further provided that after this date, the rate and discount points would "float" until 3 days

prior to closing, at which time they would automatically be locked according to the current market rate or 7 percent, whichever was higher. It also stated that "[i]n consideration of . . . $1320.00, Residential Mortgage Services, Inc. shall grant the ability to re-lock your rate and or points one additional time within sixty (60) days of your anticipated closing date." Finally, the agreement provided that its provisions could not be modified or amended except in writing.

Despite this written agreement, Bradley contends that Nachman orally agreed, during August 1993, to provide this 7-percent interest rate for an additional 10 days, for a total of 190 days. Nachman denies any discussion regarding an additional 10 days occurred.

In November 1993, Bradley contacted RMS to discuss the 10-day extension and spoke with a loan processor, Donna Jorgensen. Bradley offered the following typed message, which is a transcribed message left by Jorgensen on Bradley's answering machine on November 24, 1993: "Hey, Brad, this is Donna from Residential. Gary called in this morning and I asked him about that 10 day leeway, and he said there shouldn't be a problem with that on your lock-in extension. . . ."

Due to a builder's delay, Bradley contacted Nachman on January 10 or 11, 1994, requesting another extension. Nachman agreed to guarantee the 7-percent interest rate for an additional 30 days for $330. Laurie, also an accountant, delivered a check in that amount on January 11, 1994, and received a receipt which stated, "Extended lock." A memorandum written by Laurie on her check stated, "30 day rate lock ext. -till 4/10/94." Nachman did not become aware of this notation until he was sued in this matter. The Poppens increased their loan from $132,000 to $135,200 in approximately February 1994.

Bradley testified that he had other conversations with Nachman on March 29 and 30, 1994, in which Nachman offered him $5,000 and a return of lock fees if Bradley would accept an 8-percent interest rate; however, Bradley never agreed to such terms. Nachman denies any such conversations took place.

At this time, the anticipated closing date for the Poppens' house was March 31, 1994. Bradley testified that on March 30, 1994, he learned from Jorgensen that the Poppens would not be

able to close upon their house because permanent power had not been hooked up. According to Nachman, his attempts to get Commercial Federal Mortgage Corporation to waive this closing requirement were unsuccessful. Nachman testified that he spoke with Bradley on March 30 to tell him that his lock would expire and that while RMS could provide the Poppens a no-cost loan at 8 percent, a loan at 7 percent would cost between $5,000 and $6,000. Bradley denies any such conversation occurred.

The Poppens closed their loan on April 8, 1994. It was at this time, Bradley alleges, that he was first made aware that the loan was for 8 percent rather than 7 percent. Kathryn Tippery, escrow closer for Classic Title Company, testified that the Poppens were surprised and angry when learning of the 8-percent rate. Tippery then contacted RMS, and although she does not recall whom she spoke to, she thinks it was Jorgensen. Jorgensen, however, does not recall speaking to anyone from Classic Title on that day. According to Tippery, the RMS representative told her that the lock-in at 7 percent was good until April 10, 1994. Tippery noted this on a fax cover sheet, and this sheet was admitted into evidence. Tippery further attested that she was told by the RMS representative that the 8-percent rate was caused by the Poppens' failure to comply with a 48-hour notice provision required by Commercial Federal. In fact, upon Bradley's request, Nachman had spoken with Commercial Federal, and this notice requirement had been waived. Nevertheless, without proper authorization to adjust the interest rate, the Poppens closed their loan on April 8, 1994, under protest, at 8 percent.

The Poppens filed suit on May 10, 1994. A second amended petition was filed on September 2 in which the first cause of action asserted that RMS breached its contract to provide a loan at 7 percent until April 10. In their second cause of action, the Poppens alleged deceptive trade practices on the part of RMS. The Poppens requested damages in the amount of $18,966 and attorney fees.

Following a trial on April 25 and 26, 1995, the trial court found for the Poppens on their first cause of action and for RMS on the second cause of action. Specifically, the court found that the original lock-in period set to expire on March 1, 1994, had

been extended an additional 10 days pursuant to the phone call from Jorgensen to Bradley on November 24, 1993. The court also found that on January 11, 1994, the parties extended the lock-in agreement for another 30 days, from March 10 until April 10.

## ASSIGNMENTS OF ERROR

RMS asserts that the trial court erred in finding (1) that the alleged 10-day oral extension of the parties' written agreement was supported by consideration, (2) that the memorandum on the Poppens' check dated January 11, 1994, was binding upon RMS, and (3) that the Poppens sustained their burden of proof as to the extent of their damages and the correct method of calculation.

## STANDARD OF REVIEW

[1,2] 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 erroneous. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995). However, when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Lee Sapp Leasing, supra*; *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995).

## DISCUSSION

*Consideration.*

In its first assigned error, RMS asserts that the trial court erred in finding that the 10-day oral extension on November 24, 1993, of the parties' written agreement was supported by consideration. RMS contends that because this agreement was not supported by consideration, it is invalid and, therefore, that the Poppens' lock-in period ended prior to April 8, 1994.

In fact, it is not clear from the trial court's comments that it found consideration with regard to this 10-day extension. The Poppens argue that the $330 provided consideration to support both the 30-day extension and the earlier 10-day extension. Contrary to the Poppens' position, the trial court clearly viewed the $330 as payment for 30 days rather than 40. The Poppens

make no other argument regarding this issue. Deferring to the trial court's factual findings that an oral agreement took place in which both parties mutually assented to extending the lock-in period 10 days, such an agreement was a modification to the parties' written contract. This disposes of the need for additional consideration.

[3] It is well settled that a written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration, and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991); *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 466 N.W.2d 73 (1991), *overruled on other grounds, Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992); *Frenzen v. Taylor*, 232 Neb. 41, 439 N.W.2d 473 (1989); *Cole v. Hickey*, 215 Neb. 728, 340 N.W.2d 418 (1983); *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982); *Havelock Bank of Lincoln v. Bargen*, 212 Neb. 70, 321 N.W.2d 432 (1982). Clearly, the November 1993 phone call occurred while the August 1993 written agreement was executory, since neither side had fully performed its provisions. The effect of this phone call was to modify a term of the prior written contract.

RMS' reliance upon *McGrath v. Paul Logan Motor Co.*, 168 Neb. 254, 95 N.W.2d 543 (1959), does not persuade us otherwise. *McGrath* involved a replevin action in which the plaintiff alleged that a note was not past due because the defendants had orally agreed to extend the due date of the note by 6 months. Finding no consideration for this extension, the Nebraska Supreme Court found the agreement to be void. Unlike the aforementioned cases, however, the facts set forth in *McGrath* do not establish when the oral extension in that case took place. However, it is reasonable to conclude based upon the facts which are provided that the alleged oral extension occurred only after the plaintiff had failed to pay on time, or after he had breached the terms of the written contract. The rule set forth above applies to contracts which have not been breached, which is what we have in this case. Therefore, *McGrath* is distinguishable.

RMS does not seriously challenge the Poppens' ability to orally modify the terms of the written contract. In fact, Nachman admits to orally modifying the agreement; however, he contends that he merely intended to extend the "relock" period from 60 days to 70 days rather than the "lock-in" period from 180 days to 190 days. Furthermore, it appears from the record that the 30-day extension, which neither party contests, was granted orally.

Although RMS does not specifically challenge the court's factual findings in this regard, we briefly note that its findings are supported by the record. The court specifically found that the November 1993 phone call took place. Nachman and Jorgensen testified, however, that the "10 day leeway" referred to therein was with regard to the Poppens' ability to extend their above-mentioned "relock" period from 60 days to 70 days. The trial court did not believe this testimony, noting that Nachman clearly explained the difference between a "relock" and an "extension" and that, with knowledge of these specific terms, Jorgensen specifically referred to a "lock-in extension" in the November 1993 phone call. Tippery's testimony lends credence to the Poppens' position. The court further explained its decision, stating:

> [W]hat I choose to believe in this case is that he [Nachman] was simply in a position where he has so many plates in the air on sticks at the same time, he has people who are agents of his company that are doing things for the company and binding the company, and when he finds out about it, it's just simply too little too late.

Whether an oral modification took place is an issue of fact. See *Omaha World-Herald Co. v. Nielsen*, 220 Neb. 294, 369 N.W.2d 631 (1985). Likewise, whether there is mutual assent raises a question of fact. See *Atokad Ag. & Racing, supra*. As noted earlier, the trial court's factual findings in a bench trial have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). It is apparent from the record that sufficient evidence was presented from which the trial court could conclude that on November 24, 1993, the parties modified their ini-

tial written agreement, thereby extending the original lock-in period by 10 days.

Neither side contests that the Poppens and Nachman agreed to extend the lock-in period an additional 30 days for $330 in January 1994. The only dispute with regard to this 30 days is when it began to run. Because, as already discussed, the record supports the trial court's conclusion that this period began to run on March 10, 1994, and neither party contests the additional 30-day extension, it is unnecessary for this court to address RMS' second assignment of error, that is, that the trial court erred in finding RMS was bound by the memorandum on the Poppens' check. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

*Damages.*

In its third assigned error, RMS challenges the court's determination that the Poppens sufficiently proved damages in the amount of $18,966. Also in its third assigned error, RMS asserts that the trial court applied an incorrect method of calculation when reaching this amount.

The evidence is that an 8-percent mortgage over 30 years will cost $357,137, whereas a 7-percent mortgage over 30 years would have cost $323,816, for a difference of $33,321, or an additional $92 per month for 30 years. The award in this case was reached by discounting $33,321 at 4.5 percent to present value to reach $17,862 and adding this number to the increased amount already paid by the Poppens ($1,104 = $92 × 12). Bradley also proposed discounting this amount at 2.78 percent, for which he would need $21,962 to pay an additional $92 per month. Finally, Bradley testified that he could buy an annuity for $15,504 to generate this same amount.

RMS, on the other hand, contends that based on Nachman's testimony, the Poppens should recover only that amount which a 7-percent loan would have cost on April 8, 1994, approximately $7,425, minus the cost of the 8-percent loan on said date, approximately $2,735, or approximately $5,000. That is the amount Nachman claims he told the Poppens of in late March. Of course, a party has a duty to mitigate damages. RMS affirmatively pled failure to mitigate in this case. Apparently, it

is RMS' contention that on the date of closing, the Poppens could have paid approximately $5,000 to obtain a 7-percent loan, with that being the only damages suffered, and that this should limit their damages recoverable at trial. The only evidence that the Poppens knew, or reasonably should have known, of this option is Nachman's testimony that he advised Bradley of such on March 30. Bradley, however, denies any such conversation took place. Moreover, there is no evidence that a 7-percent loan was still available to the Poppens at the time of trial or that the cost to convert the loan remained at $5,000. Whether the Poppens failed to use reasonable efforts to mitigate their damages when faced, on April 8, with the denial of a loan which they had been relying on was a question of fact which the trial court obviously determined against RMS. That finding was not clearly wrong based on the evidence.

[4] A fact finder's determination of damages is given great deference on appeal. See *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993).

> "In awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. . . . The amount of damages to be awarded is [a determination] solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved."

*Id.* at 443, 500 N.W.2d at 542.

The trial court's award in this case was supported by the record. RMS argues, however, that the Poppens' proof of damages is speculative and conjectural. Specifically, RMS asserts that the Poppens' obligation to pay an additional $92 per month may expire prior to the end of the 30-year term for various reasons including death, illness, relocation, or natural disaster. Further, RMS challenges the use of the 4.5 percent by the trial court.

[5,6] Both Poppens testified as to their intent to live in this house "forever." Moreover, the trial court was presented with several investment alternatives. The party seeking recovery has

the burden of proving damages with as much certainty as the case permits. *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987). Such evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness. *Id.* We believe the Poppens proved damages with as much certainty as the case permitted and that the trial court had sufficient evidence to estimate damages with a reasonable degree of certainty.

[7,8] Aside from factual determinations, RMS also asserts that the trial court applied the wrong method of calculation. In a breach of contract action, the ultimate objective of a damages award is to put the injured party in the same position that the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994). Both parties agree that the measure of damages for a breach of contract to lend money is usually the difference between the contract interest rate and the increased interest rate the borrower is obliged to pay in procuring a new loan. See, *Rubin v. Pioneer Fed. S. & L. Assn.*, 214 Neb. 364, 334 N.W.2d 424 (1983); *Shurtleff v. Occidental B. & L. Ass'n.*, 105 Neb. 557, 181 N.W. 374 (1921). See, also, *Rayman v. American Charter Federal Sav. & Loan Ass'n*, 75 F.3d 349 (8th Cir. 1996).

In *Rubin*, the defendant attacked a jury instruction on the measure of plaintiff's damages which stated:

> "The measure of damages in such event would be the difference between that amount which the plaintiff would be required to pay at 14.5% interest on a $400,000.00 loan for the duration of the loan and what he would be required to repay at an interest rate of 15.625% over the duration of the loan."

214 Neb. at 367, 334 N.W.2d at 426. The Supreme Court found that the instruction was erroneous because by including a specific interest rate for a substitute loan, the court withdrew from the jury its right to determine what that rate should be. However, the court in no way criticized the *method* of determining plaintiff's damages as set out in the instruction. Here, the trial court used a similar measure and then reduced it to present value to the benefit of RMS. We find no error in this regard.

RMS asserts, however, that the rule set forth in *Rubin* and *Shurtleff* is inapplicable in this case because RMS is not a lender, but, rather, a mortgage broker. As such, RMS argues, its obligation to the Poppens is contingent upon a number of things beyond RMS' control, i.e., completion of the home within the allotted time. RMS' argument overlooks the fact that its obligation is limited to a certain time period. If a circumstance beyond RMS' control prevents closing by a certain date, RMS is no longer obligated to provide a mortgage. We find the rule set forth in *Rubin* and *Shurtleff* applicable to this case. The trial court's award of damages is affirmed.

## CONCLUSION

An oral modification to an executory contract which has not been breached does not require additional consideration. Further, where the record supports the trial court's award of damages, that award will not be disturbed on appeal.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
HAROLD L. WILSON, APPELLANT.
556 N.W.2d 643

Filed November 19, 1996. No. A-95-1351.

1. **Pleadings: Double Jeopardy.** Neb. Rev. Stat. § 29-1817 (Reissue 1995) provides that a plea in bar may be offered alleging that the defendant has before had judgment of acquittal, been convicted, or been pardoned for the same offense; the statute does not specifically authorize a defendant to raise, pretrial, a plea in bar alleging the risk of multiple punishments.
2. **Criminal Law: Identification Procedures.** In regard to photographic arrays, whether identification procedures are unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
3. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless the court's findings of fact are clearly erroneous.
4. **Rules of Evidence: Hearsay.** It is a fundamental rule of evidence that a statement is not hearsay if it is offered against a party and is the party's own statement.
5. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), provides for the admissibility of evidence of other crimes, wrongs, or acts for purposes other than to show that a person acted in conformity with his or

her character, and such evidence may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

6. **Rules of Evidence: Other Acts: Proof.** When evidence is admissible pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act, and such proof shall first be made outside the presence of any jury.
7. **Rules of Evidence.** The evidence rules apply generally to all civil and criminal proceedings before the district courts, except that the rules, other than the privilege rules, do not apply in the situations enumerated in Neb. Evid. R. 1101(4), Neb. Rev. Stat. § 27-1101(4) (Reissue 1995).
8. **Rules of Evidence: Other Acts.** The evidence rules do apply at a Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 1995), hearing.
9. **Rules of Evidence: Hearsay.** Testimony given as a witness at another hearing of the same or a different proceeding, against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, if the party had a motive and interest similar to those of the party against whom the statement is now being offered, although hearsay, is admissible if the witness is deemed legally unavailable to testify in the proceeding at which the prior testimony is offered.
10. **Judicial Notice.** A judicially noticed fact must be one not subject to reasonable dispute, in that it is either generally known within the territorial jurisdiction of the court or capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned.
11. ____. A trial court is not allowed to take judicial notice of disputed facts.
12. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
13. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely within the discretion of the trial court.
14. **Homicide: Photographs.** Photographs of the victim in a murder case are admissible to show, inter alia, the condition of the body or the nature and extent of the injuries, to establish malice or intent, or for purposes of identification.

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

Dennis R. Keefe, Lancaster County Public Defender, and Kristi J. Egger for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

IRWIN, Judge.

## I. INTRODUCTION

This appeal arises from Harold L. Wilson's convictions of attempted second degree murder, third degree assault, and use of a weapon in the commission of a felony. On appeal, Wilson contends the district court erred in overruling his plea in bar, in overruling his motion to suppress both photographic and in-court identifications, in overruling his motion in limine concerning statements he made to his girl friend, in denying him a "full and fair hearing" on the admissibility of evidence of a prior crime pursuant to Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 1995), in allowing enlarged photographs of the victim into evidence, in denying his motion to dismiss at the end of the State's case, in denying his motion for new trial, and in imposing excessive sentences. For the reasons set forth herein, we affirm.

## II. BACKGROUND

On July 11, 1994, an information was filed charging Wilson with attempted second degree murder, first degree assault, and use of a weapon in the commission of a felony. The crimes charged resulted from an attack on Kimberly Gentrup, an employee of a Little King restaurant in Lincoln, Nebraska, on May 9, 1994. On October 4, the State filed a request for leave to amend the information to add an additional count of use of a weapon in the commission of a felony, which was granted after a hearing on October 18. At his arraignment, Wilson pled not guilty to all counts.

Prior to trial, Wilson filed a plea in bar, numerous motions in limine, and a motion to suppress photographic identifications. Specifically, Wilson filed a motion in limine seeking to prevent the State from producing testimony at trial about a prior attack on a convenience store worker, Peggy Kinney, on May 8, 1994, in Crete, Nebraska. This prior attack was the subject of a separate prosecution and conviction, and the attempted second degree murder conviction from that case was affirmed by this court in *State v. Wilson*, 4 Neb. App. 489, 546 N.W.2d 323 (1996) (*Wilson I*). *Wilson I* was on appeal to this court at the

time of the prosecution in the present case. Details of Wilson's attack of Kinney are contained in *Wilson I*.

On September 6, 1995, a hearing was held on Wilson's various motions in limine. During the hearing, the State disclosed that pursuant to § 27-404(2), it intended to produce testimony at trial concerning the assault on Kinney in Crete. Wilson's attorney then argued that Wilson was entitled to a full evidentiary hearing on the admissibility of such evidence, pursuant to § 27-404(3). The State argued that a full evidentiary hearing was unnecessary. In support of the admissibility of the § 27-404 evidence, the State offered a transcription of Kinney's testimony during the prosecution of the Crete attack and requested the district court to take judicial notice of testimony provided during the hearing on Wilson's motion to suppress the photographic identifications in the instant case. The court received the transcription of Kinney's testimony and agreed to take judicial notice of the suppression testimony, both over the objection of Wilson's attorney. Although the court offered Wilson an opportunity to present evidence, Wilson declined to do so.

In an order dated October 5, 1995, the district court overruled Wilson's motion in limine regarding testimony about the Crete assault. The court found that "evidence regarding the 'Crete Case' is admissible . . . to prove motive, intent, preparation, plan and identity or absence of mistake or accident." The court further found that there was clear and convincing evidence that the defendant committed the Crete crime and that the probative value of the evidence outweighed any danger of unfair prejudice.

A jury trial was held on October 23 through October 30, 1995. At trial, the victim, Gentrup, testified that she was employed at a Little King restaurant in Lincoln on May 9, 1994. Gentrup testified that she worked at Little King on Monday nights only, from 5 p.m. to close. On May 9, Gentrup was working with another employee, Syed Iftikhar, when Wilson entered the restaurant at approximately 8:15 p.m. Wilson spoke to Iftikhar, used the restaurant's phonebook, and left. Wilson returned, used the phonebook again, and left again. Wilson then returned to the restaurant, inquired about the hours of operation, and placed an order with Iftikhar for a sandwich and a beverage. Gentrup testified that Wilson was only a few feet away from her

while he placed his order and that he proceeded to sit and eat his sandwich in the restaurant.

Gentrup testified that she told Iftikhar he could go home for the evening because there were no other customers in the restaurant and it was almost time to close the restaurant for the evening. After Iftikhar left, Wilson ordered another sandwich. Gentrup testified that she began to make the sandwich, but was delayed when she heard the drive-through buzzer sound. Gentrup walked to the microphone for the drive-through and told the customer waiting at the drive-through that she would be with the customer in a minute, then returned to complete Wilson's sandwich.

As Gentrup bent down to get cheese for Wilson's sandwich out of a refrigerator that was located underneath the counter, she was attacked. Gentrup testified that Wilson grabbed her from behind and started cutting her neck with a knife. Wilson was holding the knife in his left hand, and Gentrup estimated that she felt the cutting motion on her neck approximately 10 times. After cutting her neck, Wilson attempted to stab Gentrup in the back three or four times, then attempted to stab her in her chest area. Gentrup also suffered a laceration on the back of her left arm as she attempted to block Wilson from cutting her throat again. Gentrup testified that Wilson stopped abruptly and ran out the door. Wilson did not say anything to her during the attack, did not demand any money, and made no attempt to steal anything from the store.

During her testimony, Gentrup further identified Wilson as the perpetrator, both through an in-court identification and through testimony about her identification of Wilson from a photographic array shown to her the day after the attack. Gentrup identified the clothing Wilson was wearing when arrested as being the same clothing that her attacker wore. Finally, Gentrup identified a knife found within one block of the restaurant as being a knife that she had been using in the preparation of Wilson's sandwich prior to the attack.

The State provided further testimony from Iftikhar, from the doctor who treated Gentrup's injuries, from the police officer who showed the photographic array to Gentrup, from the officer who conducted the investigation of the crime scene, and

from a forensic serologist who testified that some blood found on Wilson's clothing was of a type other than his own. Gentrup's treating physician testified that the cut on her neck was approximately 4 inches long and ¾ to 1 inch deep and was within ¼ inch of cutting the major vessels of the neck, the carotid artery and the jugular vein. The State then adduced evidence from Kinney regarding a similar incident that occurred to Kinney while she was working at a convenience store in Crete. This testimony was admitted over Wilson's continuing objection on the basis of the § 27-404 hearing.

Kinney testified that she was working alone at a Crete convenience store named "First & Last Stop" in the early morning hours of May 8, 1994. Kinney testified that Wilson was the store's first customer of the day and that he entered the store at approximately 6:30 a.m. After Wilson entered the store, he walked around for a few minutes, picked up a bag of chips, and placed the bag on the counter. She testified that Wilson left the store to go to his car and get money.

When Wilson returned, he was walking toward Kinney very quickly. Wilson then grabbed Kinney's hair with his right hand, pulled her head down behind the counter, and stabbed her in the neck six or seven times with some kind of sharp instrument. During this attack, Wilson did not say anything to Kinney. Kinney eventually told Wilson to take the money in the cash register, at which time Wilson let go of her, grabbed the money, and ran out of the store. Kinney testified that she would never forget the face of her attacker, and she identified Wilson as being the perpetrator.

Wilson took the stand in his own defense, testifying that he did not attack Gentrup. Wilson testified that he was at the Little King restaurant on the night in question and that he did order the second sandwich which Gentrup testified that she was preparing at the time of the attack. However, Wilson testified that he had to go out to his car to get some money and that upon returning, he ran into an individual leaving the store carrying what he believes was a knife. At this time, Wilson alleges, his hand was cut by the other individual. Wilson testified that he heard somebody screaming inside the restaurant, so he took off

running to avoid "get[ting] hemmed up with something [he] didn't do."

The jury returned a verdict convicting Wilson of attempted second degree murder, third degree assault, and one count of use of a weapon in the commission of a felony. The district court sentenced Wilson to 30 to 50 years' imprisonment for the attempted second degree murder conviction, 1 year's imprisonment for the third degree assault conviction, and 10 to 20 years' imprisonment for the use of a weapon conviction, all to be served consecutively to each other and consecutively to any other time Wilson was already serving for separate convictions. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On this appeal, Wilson has assigned the following errors from the proceedings in the district court: (1) that the district court violated his rights against double jeopardy, (2) that the district court erred in overruling his motion to suppress identification evidence, (3) that the district court erred in overruling his motion in limine concerning statements he made to his girl friend, (4) that the district court erred in failing to provide a full and fair evidentiary hearing concerning the admissibility of evidence about the Crete assault, (5) that the district court erred in allowing enlarged photographs of the victim into evidence, (6) that the district court erred in overruling his motion to dismiss at the end of the State's case, (7) that the district court erred in denying his motion for new trial, and (8) that the district court imposed excessive sentences.

## IV. ANALYSIS

### 1. Double Jeopardy

Prior to trial, Wilson filed a plea in bar asserting that his constitutional rights against double jeopardy were being violated because he was charged with both attempted second degree murder and first degree assault arising out of his alleged attack on Gentrup. The district court overruled Wilson's plea in bar. On appeal, Wilson asserts that the district court erred in overruling the plea in bar and also asserts that his double jeopardy rights were further violated because he was convicted of and

sentenced on both attempted second degree murder and third degree assault.

[1] Neb. Rev. Stat. § 29-1817 (Reissue 1995) provides that a plea in bar may be offered alleging that the defendant "has before had judgment of acquittal, or been convicted, or been pardoned for the same offense." The statute does not specifically authorize a defendant to raise, pretrial, a plea in bar alleging the risk of multiple punishments. The statute is confined to the factual scenario where an initial trial has been completed, ending with an acquittal, conviction, or mistrial, and a second trial has been commenced involving the same or a similar offense. See, e.g., *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990). As a result, Wilson was premature in filing his plea in bar, and the district court properly overruled it.

Additionally, with regard to whether prosecution of Wilson for both attempted second degree murder and first degree assault and the multiple punishments which Wilson received for his convictions of attempted second degree murder and third degree assault run afoul of double jeopardy principles, we are guided by well-established principles of constitutional law concerning double jeopardy. See, U.S. Const. amend. V; Neb. Const. art. I, § 12; *State v. Smith*, 3 Neb. App. 564, 529 N.W.2d 116 (1995). The test for determining whether attempted second degree murder and third degree assault constitute the "same offense," such that multiple punishments would be prohibited, has been set forth by the U.S. Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), which states:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is *whether each provision requires proof of a fact which the other does not.*

(Emphasis supplied.) The *Blockburger* test was readopted by the Court in *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

Under the principles of *Blockburger* and *Dixon*, if *each* offense contains an element that is not contained in the other, then they are not the "same offense" and double jeopardy does

*not* bar successive prosecution or multiple punishments. See *State v. Smith, supra.* In *Smith*, this court discussed at some length whether or not successive prosecution for attempted second degree murder and first degree assault violated double jeopardy principles.

In *Smith*, we concluded that actual injury, a necessary element of the crime of first degree assault, is not a necessary element of the crime of attempted second degree murder and that malice and intent to kill, necessary elements of the crime of attempted second degree murder, are not necessary elements of the crime of first degree assault. As a result, each offense requires proof of an element which the other does not, and double jeopardy principles are not violated by prosecuting a defendant for both crimes. See *State v. Smith, supra.* Consequently, even if Wilson's plea in bar were deemed to have been timely, the district court would not have erred by overruling the motion.

Similarly, either actual bodily injury or a threat delivered in a menacing manner is a necessary element of the crime of third degree assault, but not of the crime of attempted second degree murder, while malice and intent to kill are necessary elements of the crime of attempted second degree murder, but not of the crime of third degree assault. See, Neb. Rev. Stat. §§ 28-201, 28-304, and 28-310 (Reissue 1995); *State v. Smith, supra.* As a result, each of these offenses also requires proof of an element which the other does not. Consequently, Wilson's eventual convictions and multiple punishments for these two offenses do not violate double jeopardy principles. This assigned error is without merit.

### 2. Identifications

Wilson asserts that the photographic identifications in this case were unduly suggestive and that Wilson was, therefore, denied due process. Additionally, Wilson asserts that any in-court identifications were likewise tainted and should have been ruled inadmissible by the district court.

[2] In regard to photographic arrays, the Nebraska Supreme Court has held that whether identification procedures are unduly suggestive and conducive to a substantial likelihood of

irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. See *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991). Among the factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification. See *State v. Newman*, 4 Neb. App. 265, 541 N.W.2d 662 (1996). With regard to an in-court identification, the test is whether the witness' identification at trial is supported, independently, by the witness' observations at the time of the robbery.

Our review of the photographic lineup used in the pretrial identifications in the present case leaves us at a loss to see what Wilson allegedly sees as unduly suggestive. Although the photographs were obviously of separate individuals with individual and unique characteristics who, therefore, did not look exactly alike, the array was not unduly suggestive. Upon consideration of the totality of the circumstances in this case, it is apparent to us that the witnesses who identified Wilson from the photographic lineup had ample opportunity to view Wilson at the time of the attacks, the witnesses provided accurate prior descriptions of the perpetrator which coincided with Wilson's actual appearance, the witnesses were attentive at the time of the attacks and were able to express reasonable certainty in choosing Wilson from the lineup, and the identifications from the lineup were conducted in close proximity of time to the attacks. We find that the photographic lineup in this case was not unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification.

Even if the photographic array had been somehow improper, the witnesses identified Wilson during the trial as well. The in-court identifications were completely supported by the witnesses' observations at the time of the attacks. In that regard, the totality of the circumstances supports the finding of the trial court that the identifications were based on the witnesses' observations of Wilson at the time of the attacks.

[3] A trial court's ruling on a motion to suppress is to be upheld on appeal unless the court's findings of fact are clearly erroneous. *State v. Williams*, 249 Neb. 582, 544 N.W.2d 350 (1996); *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992). The trial court's findings with regard to the identifications in this case were not clearly erroneous, and this assigned error is without merit.

### 3. Motion in Limine

Wilson asserts that the district court erred in overruling his motion in limine concerning statements he made to his girl friend, Laura Liegh. Specifically, testimony was elicited from Liegh concerning statements Wilson had previously made about wondering how it would feel to kill somebody or what it would be like to kill somebody. Wilson argues that the motion in limine should have been granted because the statements were hearsay and were unfairly prejudicial.

[4] It is a fundamental rule of evidence that a statement is not hearsay if it is offered against a party and is the party's own statement. See, Neb. Evid. R. 801(4)(b)(i), Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 1995); *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). As a result, Wilson's statements to Liegh, offered against him at trial, were not hearsay.

Evidence which is otherwise admissible may be excluded if its probative value is substantially outweighed by other considerations. Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995); *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994). In determining whether the probative value of testimony outweighs its potential for unfair prejudice, the Nebraska Supreme Court has noted that most evidence offered against a defendant is prejudicial, and it is unfairly prejudicial only if it tends to suggest a decision on an improper basis. *State v. Wood, supra.* Wilson cites, and our review reveals, nothing in the record which would suggest that the statements caused the jury to convict him on an improper basis. Any prejudice resulting from the statements was not unfair and did not substantially outweigh the probative value of the statements.

4. § 27-404(3) HEARING

Wilson argues that the § 27-404(3) hearing which was afforded him in this case denied him the right to a full and fair hearing. Wilson argues that the rules of evidence should have been applied at the hearing and that he was entitled to protection of his rights to cross-examination and confrontation.

(a) § 27-404(3)

[5,6] Section 27-404 provides for the admissibility of evidence of other crimes, wrongs, or acts for purposes other than to show that a person acted in conformity with his or her character. § 27-404(2). Such evidence may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* Section 27-404(3) provides:

> When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

(b) Applicability of Evidence Rules

[7] Wilson argues that the evidence rules should apply to a hearing conducted by the court pursuant to § 27-404(3). Neb. Evid. R. 1101, Neb. Rev. Stat. § 27-1101 (Reissue 1995), provides that the evidence rules apply generally to all civil and criminal proceedings before the district courts, except that the rules, other than the privilege rules, do not apply in the situations enumerated in § 27-1101(4). Section 27-1101(4) provides that the rules do not apply in "[p]roceedings for extradition or rendition; preliminary examinations or hearings in criminal cases; sentencing or granting or revoking probation; issuance of warrants for arrest; criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise."

[8] Because § 27-1101 provides that the rules "apply generally to *all* civil and criminal proceedings" except proceedings specifically excepted from the rule, and because a § 27-404(3)

hearing is not excepted from the rule, we hold that the evidence rules do apply at such a hearing. (Emphasis supplied.) The State argues that a § 27-404(3) hearing is excepted because § 27-1101(4)(b) provides, inter alia, that the rules do not apply to "preliminary examinations or hearings in criminal cases."

Contrary to the State's assertion, we read § 27-1101(4)(b) to mean that the rules do not apply at a preliminary examination or a *preliminary* hearing, and not to mean that the rules are inapplicable at a preliminary examination or *any* hearing in a criminal case. The latter interpretation would mean that the rules of evidence do not apply in any criminal hearings, including hearings on motions to suppress. Taken to its extreme, this interpretation would also mean that, to the extent the trial is a "hearing in criminal cases," the rules of evidence are inapplicable at the trial itself. For obvious reasons, we decline to adopt such an interpretation.

(c) Evidence in Wilson's Hearing

Having concluded that the evidence rules should apply in a § 27-404(3) hearing, we will examine the "evidence" received at the hearing and determine if it was received in accordance with the evidence rules. The district court received as an exhibit a transcription of Kinney's testimony from the prosecution of the Crete assault and took judicial notice of the testimony given by Kinney and Gentrup during the hearing on Wilson's motion to suppress in the instant case.

*(i) Transcription of Kinney's Crete Testimony*

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 is hearsay. § 27-801. According to Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 1995), hearsay is not admissible except as provided in the evidence rules. A review of these rules reveals that the transcription of Kinney's testimony from the Crete trial was inadmissible hearsay.

The transcription of Kinney's testimony constituted a statement made by Kinney outside the trial or hearing at which it was offered. This testimony was offered in furtherance of the

State's obligation under § 27-404(3) to prove by clear and convincing evidence that Wilson committed the Crete assault, so the statement was clearly offered to prove the truth of the matter asserted, namely, that Wilson assaulted Kinney in a manner similar to the assault of Gentrup. As such, the statement was inadmissible under the evidence rules unless the rules provide an exception to the hearsay rule.

[9] Neb. Evid. R. 804(2)(a), Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995), provides an exception to the hearsay rule for testimony given as a witness at another hearing of the same or a different proceeding against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, if the party had a motive and interest similar to those of the party against whom the statement is now being offered. Section 27-804 requires, as a prerequisite to the admissibility of such a statement, however, that the witness be deemed legally unavailable to testify in the proceeding at which the prior testimony is offered. § 27-804(1). The record does not indicate that Kinney was in any way unavailable pursuant to § 27-804(1), and the exception is thus inapplicable to the present case. The transcription of the testimony from the Crete case was therefore inadmissible hearsay.

*(ii) Judicial Notice of Suppression Testimony*

The district court also took judicial notice of the testimony of Kinney and Gentrup from a prior suppression hearing held in the present case. The Nebraska Supreme Court has discussed at length the subject of judicial notice. See, e.g., *In re Interest of N.M. and J.M.*, 240 Neb. 690, 484 N.W.2d 77 (1992); *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992); *In re Interest of S.B.E. et al.*, 240 Neb. 748, 484 N.W.2d 97 (1992); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990); *State v. Norwood*, 203 Neb. 201, 277 N.W.2d 709 (1979).

[10] Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1995), governs judicial notice in Nebraska. According to § 27-201, a court may take judicial notice at any stage of the proceeding. However, a judicially noticed fact must be one not subject to reasonable dispute, in that it is either generally

known within the territorial jurisdiction of the court or capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned. § 27-201(2). The Supreme Court has noted that " '[a]s a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.' " *In re Interest of C.K., L.K., and G.K.*, 240 Neb. at 708, 484 N.W.2d at 73 (quoting *Gottsch v. Bank of Stapleton, supra*).

[11] The Supreme Court has drawn a clear distinction, however, between a court's judicially noticing its own proceedings and judgments where matters have been considered and determined and judicially noticing controverted facts. See *In re Interest of N.M. and J.M., supra.* Although a court may take judicial notice of its own proceedings and judgments where the same matters have been previously considered and determined in the case, see *State v. Norwood, supra*, when the matters being raised differ from the matters being raised in the previous proceeding and the request is for the court to take judicial notice of controverted facts, judicial notice is improper, see *In re Interest of N.M. and J.M., supra.* A trial court is not allowed to take judicial notice of disputed facts. *Id.*

In the present case, the matter before the court was whether there existed clear and convincing evidence that Wilson perpetrated a similar assault on Kinney in Crete. The court was requested to take judicial notice of testimony from a suppression hearing. Such judicial notice as was taken by the trial court in this case constituted judicial notice of controverted facts, namely, whether or not Wilson assaulted Kinney. Judicial notice was improper, and the testimony from the suppression hearing was improperly considered by the trial court in the § 27-404(3) hearing.

(d) Resolution

Under § 27-404(3), the State bears the burden of proving by clear and convincing evidence that the accused committed the prior crime, wrong, or act. In the present case, the State failed

to produce any admissible evidence at the § 27-404(3) hearing and therefore failed to satisfy the burden of proof established by the statute. As such, the court erred in admitting testimony at trial concerning the prior crime.

[12] In a jury trial of a criminal case, whether an error in admitting evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993). A review of the evidence received by the court at trial reveals that the testimony of Kinney establishes, clearly and convincingly, that Wilson committed the crime against Kinney. Although the trial court failed to properly conduct the § 27-404(3) hearing by not following the rules of evidence and not requiring admissible evidence at the hearing, it is apparent that the evidence in this case would clearly have been admissible had the trial court done so. As such, on the facts and circumstances of this case, the error was harmless beyond a reasonable doubt. This assigned error is without merit.

### 5. Enlarged Photographs

At trial, several enlarged photographs of Gentrup were admitted, over Wilson's objection, to demonstrate the extent of her injuries. On appeal, Wilson asserts that the district court erred by admitting the photographs because "[s]maller photographs existed and the State deliberately chose to offer the greatly enlarged photographs to impermissibly inflame the passions of the jury." Brief for appellant at 29.

[13] The admission of photographs of a gruesome nature rests largely within the discretion of the trial court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Parsons*, 226 Neb. 543, 412 N.W.2d 480 (1987). The gruesome nature of photographs alone will not keep them from the trier of fact, so long as the probative value of the photographs is not outweighed by their prejudicial effect. *State v. Hankins, supra*; *State v. Parsons, supra*; *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987). As the Nebraska Supreme Court has noted, "[g]ruesome crimes

produce gruesome photographs." *State v. Lynch*, 215 Neb. 528, 535, 340 N.W.2d 128, 133 (1983).

[14] The Nebraska Supreme Court has noted that photographs of the victim in a murder case are admissible to show, inter alia, the condition of the body or the nature and extent of the injuries, to establish malice or intent, or for purposes of identification. *State v. Parsons, supra*; *State v. Krimmel*, 216 Neb. 825, 346 N.W.2d 396 (1984). The photographs admitted in the present case were admitted for these purposes, were not excessively gruesome, and were not unfairly prejudicial. Wilson cites us to, and our research has revealed, no authority which suggests that "enlarged" photographs should not be admitted if "smaller" ones are available. This assigned error is without merit.

### 6. Sufficiency of Evidence

Wilson has assigned three errors concerning the sufficiency of the evidence: First, that the evidence adduced at trial is insufficient to support the jury's verdict of conviction; second, that the district court erred in overruling his motion to dismiss made at the conclusion of the State's evidence; and third, that the district court erred in overruling his motion for directed verdict at the end of all evidence.

Wilson's argument concerning the sufficiency of the evidence is primarily based upon his contention that the identification testimony should have been suppressed, that his motion in limine concerning the statements made to Liegh should have been granted, and that the enlarged photographs should not have been admitted. Wilson argues that the district court should have kept those items from the jury and that the remaining evidence was insufficient to support a conviction.

We initially note that we have already determined that the district court did not err in admitting the complained-of evidence. Our review of the record reveals that the evidence was sufficient for the jury to find each of the elements of the crimes which Wilson was convicted of committing.

With regard to the motion to dismiss made by Wilson at the conclusion of the State's evidence, we note that after the district court overruled the motion, Wilson proceeded to present a

defense, call witnesses, and adduce evidence on his behalf. The Nebraska Supreme Court has indicated that a motion to dismiss for failure to make a prima facie case is substantially identical to a motion for directed verdict. *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995). A criminal defendant who moves for dismissal or for directed verdict at the close of the State's evidence and who, after the court overrules the dismissal or motion for directed verdict, proceeds with trial and introduces evidence, waives the appellate right to challenge the trial court's overruling of the motion. *State v. Morris*, 3 Neb. App. 835, 533 N.W.2d 110 (1995). As such, we will not further discuss the propriety of the district court's overruling of Wilson's motion to dismiss at the conclusion of the State's case.

Finally, Wilson assigns as error that the district court erred in overruling his motion for directed verdict at the conclusion of all evidence. However, Wilson fails to specifically argue this assigned error in his brief. Absent plain error, assignments of error not discussed in the appellant's brief will not be addressed by an appellate court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993). Additionally, because Wilson's motion for directed verdict was based upon the alleged insufficiency of the evidence, our finding that the evidence was sufficient also means that the district court did not err in overruling the motion for directed verdict. These assignments of error are without merit.

### 7. Motion for New Trial

Wilson asserts that the district court erred in overruling his motion for new trial. Wilson's motion for new trial was based upon the alleged insufficiency of evidence. Additionally, although Wilson has assigned this as an error, he has failed to argue this assignment in his brief. As noted above, the evidence was sufficient, and we will not further address this assignment of error because it was not discussed in Wilson's brief.

### 8. Excessive Sentences

The district court sentenced Wilson to 30 to 50 years' imprisonment for the attempted second degree murder conviction, 1 year's imprisonment for the third degree assault conviction, and 10 to 20 years' imprisonment for the use of a weapon in the

commission of a felony conviction, all to be served consecutively to each other and consecutively to any other time Wilson was already serving for separate convictions. On appeal, Wilson asserts that these sentences are excessive.

Attempted second degree murder is a Class II felony, see §§ 28-201 and 28-304, and the potential sentence under the Nebraska statutes is 1 to 50 years' imprisonment, Neb. Rev. Stat. § 28-105 (Reissue 1989). Third degree assault is a Class I misdemeanor, see § 28-310, and the potential sentence under the Nebraska statutes is 0 to 1 year's imprisonment, up to a $1,000 fine, or both, Neb. Rev. Stat. § 28-106 (Reissue 1995). Use of a weapon in the commission of a felony is a Class III felony, see Neb. Rev. Stat. § 28-1205 (Reissue 1989), and the potential sentence under the Nebraska statutes is 1 to 20 years' imprisonment, a $25,000 fine, or both, § 28-105.

The law is very clear in Nebraska that " '[a] sentence within statutory limits will not be disturbed upon appeal absent an abuse of discretion.' " *State v. Jackson*, 4 Neb. App. 413, 419, 544 N.W.2d 379, 383 (1996) (quoting *State v. Juarez*, 3 Neb. App. 398, 528 N.W.2d 344 (1995)). The sentences imposed by the district court are well within the statutory limits, and we find no abuse of discretion in the sentences. This assigned error is without merit.

## V. CONCLUSION

Finding no error which requires reversing Wilson's convictions, we affirm.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
MICHELE S. READY, APPELLANT.
556 N.W.2d 264

Filed November 19, 1996. No. A-95-1370.

1. **Motions to Suppress: Appeal and Error.** In deciding whether to uphold a trial court's ruling on a motion to suppress evidence, an appellate court will uphold the lower court's findings of fact unless those findings are clearly erroneous.
2. **Judgments: Appeal and Error.** Concerning questions of law, an appellate court has an obligation to reach an independent conclusion.

3. **Motions to Suppress: Appeal and Error.** In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
4. ____: ____. In analyzing a motion to suppress, an appellate court may review the evidence from the suppression hearing as well as the evidence brought forth at trial.
5. **Police Officers and Sheriffs: Motor Vehicles: Probable Cause.** When a police officer observes a traffic offense—however minor—the officer has probable cause to stop the driver of the motor vehicle.
6. **Police Officers and Sheriffs: Motor Vehicles: Investigative Stops.** A police officer may properly ask the driver of a motor vehicle for his or her driver's license and vehicle registration. The officer may properly run a check on those documents and may also request that the driver sit in the patrol car during this time. Additionally, the officer may ask the driver about his or her destination and purpose and may verify the driver's responses by questioning the driver's passengers. If the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, the officer may broaden the inquiry and satisfy those suspicions.
7. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may not detain a person for investigative purposes unless the officer has specific and articulable facts that make the officer reasonably suspicious that the person has committed or is committing a crime.
8. **Constitutional Law: Investigative Stops: Search and Seizure.** The fact of an illegal detention is only the start, and not the end, of the Fourth Amendment analysis. Even given the illegal detention, a court must still decide if the consent to search was nevertheless sufficiently an act of free will to purge the primary taint.
9. **Police Officers and Sheriffs: Search and Seizure.** For consent to search to be voluntary, it is not necessary that the individual sign a consent form, nor is the police officer required to inform the individual of his or her right to refuse consent, although these factors are relevant to the assessment of voluntariness of consent.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Reversed.

Dorothy A. Walker, of Mowbray & Walker, P.C., for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

SIEVERS and INBODY, Judges, and NORTON, District Judge, Retired.

NORTON, District Judge, Retired.

## BACKGROUND

On October 24, 1995, the appellant, Michele S. Ready, was charged in an information filed by the county attorney of Cass

County, Nebraska, with unlawful possession of a controlled substance, in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1994), a Class IV felony. Ready filed a motion to suppress evidence, which was later amended with the court's permission to include a request to suppress statements Ready made to Nebraska State Patrol Sgt. Lloyd Peters. A hearing on the amended motion to suppress evidence and statements was held on October 24, 1995. Following oral argument, the district court for Cass County suppressed the statements, but overruled the portion of the amended motion seeking to suppress physical evidence. On November 14, the State dropped the felony charge against Ready and filed a complaint charging Ready with criminal attempt of unlawful possession of a controlled substance, in violation of Neb. Rev. Stat. § 28-201(1)(b) and (4)(d) (Reissue 1995), a misdemeanor.

On November 14, 1995, trial without jury was held. Ready reasserted her objection to the admission of the physical evidence seized from her purse following a traffic stop, as explained more fully below. After trial, the district court determined that Ready was guilty of the misdemeanor charge in the complaint and ordered a presentence investigation. On December 18, the district court sentenced Ready to an 18-month term of probation. On the same date, Ready filed her notice of appeal and the district court released Ready on her previously posted bond and suspended the sentence of probation pending this appeal.

## SUMMARY OF FACTS

The record contains the following facts: On August 19, 1995, at 9:10 p.m., Peters, dressed in a Nebraska State Patrol summer uniform, was driving his marked patrol car when he stopped Ready for an alleged unsignaled left-hand turn. The stop occurred on a dirt road at the intersection of Rock Creek Road and U.S. Highway 6 in Cass County. After stopping Ready, Peters requested her driver's license, vehicle registration, and proof of insurance, which she produced. During this initial contact, Peters noticed a cooler in Ready's car, as well as a slight odor of alcohol. Peters then asked Ready to accompany him to his patrol car to perform two field sobriety tests: the horizontal

nystagmus test and recitation of the alphabet. Ready passed both tests.

Peters then issued Ready a warning for failure to signal a turn and returned the documents he had requested. Thereafter, Peters proceeded to ask Ready three questions: "[D]o you have any drugs in your car?" "[D]o you have any weapons in your car?" "[D]o you have anything at all that's illegal in your car?" After Ready responded no to each question, Peters asked Ready if he could search her car. Peters does not recall Ready's exact response, whether she said "yes or okay or all right," but did seem to recall that Ready did not have any objection to him searching the car. At that point, Peters asked Ready to get her keys, which were still in her car's ignition. Peters noted that Ready did not retrieve her keys immediately, but, rather, "fiddled" around in her purse for nearly a minute before she took the keys out of the ignition. When returning with her keys, Ready also returned with her purse, which she had left in her car up until this time. After doing so, Ready handed her keys to Peters, who then searched the trunk, but found nothing. He then asked to search Ready's purse. Ready did not verbally respond, but, instead, handed her purse to Peters. Upon searching the purse, Peters found what was later tested to be methamphetamine. After the search, Ready was handcuffed and placed under arrest. Peters then searched the rest of the car, but found no other controlled substances.

Ready contends that the search of her car and purse was unconstitutional. Thus, any physical evidence found during the search should have been considered fruit of an unlawful search and should have been suppressed pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The State contends that the trial court properly overruled the portion of the amended motion seeking to suppress physical evidence, because Ready's consent to search was voluntary and any evidence obtained thereby was admissible. We agree with Ready and find that the trial court's decision denying that portion of Ready's motion seeking to suppress physical evidence was in error.

## ASSIGNMENTS OF ERROR

Ready asserts that the district court erred in overruling that portion of her motion seeking to suppress physical evidence by (1) failing to find that the search of Ready's car and purse was unconstitutional, (2) failing to find that Ready's consent to search her purse and car was involuntary, (3) failing to find that the search of Ready's purse violated the *Wong Sun* doctrine.

## STANDARD OF REVIEW

[1,2] In deciding whether to uphold a trial court's ruling on a motion to suppress evidence, an appellate court will uphold the lower court's findings of fact unless those findings are clearly erroneous. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). Concerning questions of law, an appellate court has an obligation to reach an independent conclusion. *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995).

[3] In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996).

[4] In analyzing a motion to suppress, an appellate court may review the evidence from the suppression hearing as well as the evidence brought forth at trial. *State v. Huffman*, 181 Neb. 356, 148 N.W.2d 321 (1967), *cert. denied* 386 U.S. 1024, 87 S. Ct. 1384, 18 L. Ed. 2d 466.

## ANALYSIS

[5] Ready does not argue that Peters improperly stopped her. " 'When an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle.' " *State v. Chronister*, 3 Neb. App. 281, 285, 526 N.W.2d 98, 103 (1995), quoting *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990), *cert. denied* 502 U.S. 962, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991). Nebraska law requires that a motorist moving left or right on a roadway signal appropriately. See Neb. Rev. Stat. §§ 60-6,161 to 60-6,163 (Reissue 1993). Clearly, the initial stop was proper.

*Detention.*

[6] Ready generally challenges Peters' actions after the initial stop. In effect, Ready claims that when Peters detained her and questioned her further after issuing her a warning ticket, the detention was unconstitutional. A police officer may properly ask a driver of a motor vehicle for his or her driver's license and vehicle registration. The officer may properly run a check on those documents and may also request that the driver sit in the patrol car during this time. Additionally, the officer may ask the driver about his or her destination and purpose and may verify the driver's responses by questioning the driver's passengers. *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995), citing *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994) (en banc), *cert. denied* 514 U.S. 1113, 115 S. Ct. 1970, 131 L. Ed. 2d 859 (1995). Moreover, "'if the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions.'" 58 F.3d at 357, quoting *U.S. v. Barahona*, 990 F.2d 412 (8th Cir. 1993).

In *U.S. v. Pereira-Munoz*, 59 F.3d 788 (8th Cir. 1995), the trial court held and the appellate court affirmed that an officer's detention of a driver was constitutional, where, after stopping the driver, the officer noticed that the driver was very nervous and that even his hands were trembling. The officer notified the driver, Pereira-Munoz, that he had been speeding, and Pereira-Munoz became very agitated. Additionally, Pereira-Munoz could not produce proof of insurance, but did present to the officer a warning ticket for speeding that he had recently received from Texas authorities at the Texas-Arkansas border. The warning ticket had the word "searched" written on it. The circumstances were enough to make the officer in *Pereira-Munoz* reasonably suspicious and warranted the officer's request to search Pereira-Munoz' car, in which 6 kilos of cocaine were eventually discovered.

Similarly, in *Johnson, supra*, an officer stopped Johnson for tailgating while exceeding the speed limit. After the stop, the officer asked Johnson to sit in the patrol car while he checked Johnson's driver's license and vehicle registration. While running a check on the documents, he asked Johnson where he was

going. Johnson replied that he, his wife, and their child were returning to Indiana after a short trip to Las Vegas. The computer check showed that Johnson could only drive with another licensed driver. With Johnson still in the patrol car, the officer then went to verify that Johnson's wife was a licensed driver. After inspecting her license, the officer asked her about their trip. Her response did not match that of her husband's. At this point, the officer then asked both Johnson and his wife if they had anything illegal in their car and then received both parties' permission to search. The trial court held and the appellate court affirmed that the inconsistent answers by the Johnsons justified their further detention, the additional questioning, and the resultant search.

In a similar case, *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990), *cert. denied* 502 U.S. 962, 112 S. Ct. 428, 116 L. Ed. 2d 448 (1991), both the trial court and the appellate court found that an officer properly detained an automobile driver and his passenger following an initial stop for failure to signal a turn because the officer had reasonable and articulable suspicion that the parties may have committed a crime. In *Cummins*, the officer asked the driver the name of his passenger. The driver replied that the passenger's name was Tim. Later, when the officer asked the passenger to state his name, the passenger replied that his name was Michael Mayfield. This, coupled with the fact that the two men had appeared very nervous before the officer stopped them, amounted to reasonable suspicion.

[7] In the instant case, Peters properly stopped Ready and asked her to produce her driver's license and vehicle registration. Because he had noticed a cooler in her car and a slight odor of alcohol, Peters asked Ready to perform two field sobriety tests: the horizontal nystagmus test and recitation of the alphabet. Ready passed both tests. Peters then gave Ready a warning for not signaling a left turn and returned her driver's license and vehicle registration. "[T]he proper scope of a stop for a traffic violation ends when the reasons for the initial stop have been completely processed and no further matters suggesting a broadening of the inquiry have been presented or such further matters have also been processed." *U.S. v. Morris*, 910 F. Supp. 1428, 1443 (N.D. Iowa 1995). At this point, Peters stated

that the purpose of the stop was over. He did not testify or suggest that he had any reason to continue detaining Ready. In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the Court stated that an officer may not detain a person for investigative purposes unless the officer has specific and articulable facts that make the officer reasonably suspicious that the person has committed or is committing a crime.

Thus, under the facts of this case, Peters improperly detained Ready under *Terry* after the warning had been issued.

The testimony shows that, and Peters stated that, he did not have probable cause to search. He testified that he did not believe that Ready's car contained any drugs, weapons, or illegal material, nor did Ready do or say anything to invoke reasonable suspicion, justifying Peters' further questioning. Ready did not give Peters any inconsistent statements, nor did he note that she appeared unusually nervous either before or during the period in which Peters issued a warning. Peters did testify that later, after he requested to search her car, Ready "fiddled" around in her purse while retrieving her keys. He also mentioned that after Ready consented to the search, Ready took her purse from her car and clutched it to her side. Peters stated that these actions evoked his suspicions. Because this behavior occurred after Ready consented to the search, it came too late to justify Peters' questions regarding the possession of drugs, weapons, or illegal items. Thus, because there is no evidence to support the detention of Ready for questioning, we find that Peters illegally detained Ready.

*Consent.*

[8] "[T]he fact of an illegal detention is only the start, and not the end, of the Fourth Amendment analysis." *U.S. v. Thomas*, 83 F.3d 259, 260 (8th Cir. 1996), citing *U.S. v. Ramos*, 42 F.3d 1160 (8th Cir. 1994), *cert. denied* 514 U.S. 1134, 115 S. Ct. 2015, 131 L. Ed. 2d 1013 (1995). "Even given the illegal detention, a court must still decide if the consent was nevertheless 'sufficiently an act of free will to purge the primary taint.' " 83 F.3d at 260, quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

In *U.S. v. White*, 81 F.3d 775 (8th Cir. 1996), the Court of Appeals for the Eighth Circuit held that the only consideration

in a consent case was whether the defendant consented, and if so, there could be no Fourth Amendment violation. A subsequent case, however, *Thomas, supra*, indicates that whether a defendant's consent was sufficient to purge the taint of an illegal detention is a more complicated analysis.

In *Thomas, supra*, the appellate court followed the analysis of *Ramos, supra*, and in both cases, the court found the defendant's consent sufficient. In this regard, we note that in both of these cases, the officer told the defendant he had the right to refuse to consent and the defendant signed a written consent form, and in both cases, the court noted that the violation of *Terry* was not flagrant. In fact, in both cases, the defendant had engaged in at least some suspicious behavior, warranting further intrusion by the officer.

[9] The facts in the instant case are clearly distinguishable from *Thomas* and *Ramos*. In the instant case, Peters did not advise Ready that she could refuse his request to search, nor did Peters have Ready sign a consent form. While it is true that Peters was not required to do either, these factors are relevant to the assessment of voluntariness of the consent. See *Thomas, supra*, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). In both *Thomas* and *Ramos*, the court held that because the defendant signed a consent form and was told he had a right to refuse consent, it was clear that the officer was not attempting to exploit the situation. We cannot reach that conclusion here. Under the relevant case law, we must look at the entire circumstances of this case to decide whether Ready voluntary consented. See *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990).

In this case, it was nighttime, and Ready was alone when she was stopped. The stop occurred just off a dirt road, and Peters testified that there was no other traffic on this road when he stopped Ready. See *U.S. v. Barahona*, 990 F.2d 412 (8th Cir. 1993) (assessing importance of whether stop was in public or secluded place). Additionally, Peters could not remember the nature of Ready's response when he asked to search her car. He generally testified that he believed that Ready did not have any objection to him searching her car, but the officer could not remember whether Ready said "yes or okay or all right."

Most importantly, unlike in *Thomas* or *Ramos*, the *Terry* violation in this case was flagrant. There is no evidence we can point to that could have given Peters the right to continue questioning Ready after issuing her a warning for improper signaling. Neither Ready's words nor deeds gave Peters cause to be reasonably suspicious. Peters testified that he asked Ready whether she had any drugs, weapons, or illegal items, not because he had reasonable suspicion, but, rather, because he routinely asks such questions after stopping people for traffic violations. This court does not approve of such a practice. Absent probable cause or reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), we hold that the detention of a citizen for questioning, no matter how briefly, after the purpose of a traffic stop has been accomplished is an unreasonable seizure and a violation of the 14th Amendment. Thus, we find that Ready's consent was insufficient to purge the taint of what we consider to be an illegal detention. Accordingly, the contraband found in Ready's purse was the product of an illegal search and seizure; therefore, the district court's order denying suppression of the physical evidence is reversed.

REVERSED.

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STATE OF NEBRASKA, APPELLEE,
v. RUSSELL S. PITTMAN, APPELLANT.
556 N.W.2d 276

Filed November 19, 1996. No. A-96-120.

1. **Criminal Law: Judgments: Appeal and Error.** While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
2. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
3. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

4. **Arrests: Search and Seizure: Weapons: Evidence.** Once there has been a valid arrest, a search incident to that arrest is valid if conducted in the area within the arrestee's immediate control, the area from within which the arrestee could gain possession of a weapon or destructible evidence.
5. **Police Officers and Sheriffs: Arrests: Search and Seizure: Motor Vehicles.** When a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile and containers found within the passenger compartment.
6. **Search Warrants: Evidence.** The invalidity of part of a search warrant does not require the suppression of all evidence seized pursuant to valid portions of the warrant.
7. **Trial: Judges: Presumptions.** It is presumed in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.
8. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
9. ____: ____. Neb. Rev. Stat. § 27-404(2) (Reissue 1995) is a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person in order to prove that the person acted in conformity with that character.
10. ____: ____. Evidence of other crimes or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
11. **Rules of Evidence: Other Acts: Time.** The admissibility of evidence concerning other conduct under the provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1995) must be determined upon the facts of each case; no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote.
12. ____: ____: ____. The question of remoteness in time is largely in the discretion of the trial court; while remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify the exclusion of the evidence.
13. **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.
14. ____: ____. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
15. **Criminal Attempt: Trial.** Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact.
16. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

Appeal from the District Court for Saunders County: ALAN G. GLESS, Judge. Affirmed.

Jeanelle S. Kleveland, of Kleveland Law Office, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Russell S. Pittman was arrested on March 17, 1995, and subsequently charged with violation of a protection order, a Class II misdemeanor, and possession of a short shotgun, a Class IV felony. The charges were later amended to include a Class II felony, attempted kidnapping, and a Class III felony, possession of a deadly weapon during commission of a felony, to wit: attempted kidnapping. Following a bench trial in the district court for Saunders County, Pittman was convicted of all four counts and sentenced consecutively to 6 months' imprisonment for violation of a protection order, 4 to 5 years' imprisonment for possession of a short shotgun, 20 to 25 years' imprisonment for attempted kidnapping, and 10 to 15 years' imprisonment for possession of a deadly weapon during commission of a felony. Pittman appeals his convictions and sentences to this court. For the reasons set forth below, we affirm the judgment of the district court.

## ASSIGNMENTS OF ERROR

As summarized, Pittman alleges that the district court erred in (1) overruling his motions to suppress evidence obtained from his vehicle and his home, (2) determining that there was probable cause to arrest him, (3) admitting certain evidence and testimony, (4) finding that there was sufficient evidence to convict him of each of the charges, and (5) imposing on him excessive sentences.

## STANDARD OF REVIEW

[1] While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach

an independent, correct conclusion regarding questions of law. *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996).

## FACTS

*Background.*

Around 1:45 a.m. on March 17, 1995, Dina F., manager of the Czechland Inn in Prague, Nebraska, was working alone while completing her closing duties at the bar. As she prepared to leave, she saw a man peeking at her through a window. Dina looked outside to see if any cars were parked nearby. Looking out the back door, she noticed an unfamiliar unlicensed car parked at the back of the bar, and she observed someone ducking to the side of the car. Dina testified that she believed that the person was Pittman, her estranged husband. Dina and Pittman each had a protection order against the other. Dina stated that she called out to Pittman by name and called him "chicken shit" and that, after a few minutes, he stood and began walking toward the bar. Dina testified that she told him to leave or she would call the police and that Pittman responded by saying that he intended to contact the police himself because Dina had called him "fucker," a violation of the protection order. Pittman then drove the car to the front of the bar, parked it next to Dina's car, and stood in front of his car. He told Dina that he would not leave until they talked, but eventually, apparently believing that Dina had called police, he walked to a pay phone a block away, called the 911 emergency number, and spoke with Saunders County Deputy Sheriff Shannon Sydik. Sydik stated that Pittman asked if a call had been received from Dina and that Sydik told him that no such call had been received. Pittman complained to Sydik that Dina was harassing him, and Sydik advised him to go home. Pittman returned to the bar area, and Dina called a friend and asked that she call the police for Dina.

*Suppression Hearing.*

Sydik testified at the suppression hearing that she arrived at the scene to find Pittman sitting in a brown vehicle in front of the bar. The vehicle had no license plates, and Pittman carried no identification with him. After speaking with Pittman and learning his name and birth date, Sydik contacted the dispatcher

and ascertained that there were no outstanding warrants for Pittman. Sydik initially testified that she asked the dispatcher at this time if there was a protection order for Pittman and was informed that there was. On cross-examination, Sydik could not state at what point while she was at the scene of the incident she was informed of the protection order. Sydik acknowledged that neither Pittman nor Dina showed her a copy of a protection order.

Pittman told Sydik that he had been awakened by a bad dream at his home in Schuyler, Nebraska, went for a drive, and ended up in Prague, where he decided to drive by and say hello to Dina. Pittman denied to Sydik that he had any weapons in the car. After a backup officer arrived, Sydik spoke with Dina inside the bar. Sydik testified that she arrested Pittman for violation of a protection order because "it was after 2 o'clock in the morning; the business was normally closed; he wasn't from Prague, and that Dina [F.] did seem quite frightened."

Pittman was arrested and placed in the backup officer's vehicle. Sydik testified that she then searched Pittman's car incident to his arrest. She described the car as a hatchback model that had a large cargo area because the rear seat was folded down. When Sydik folded the rear seat back up, she discovered a duffelbag, on top of which lay a sawed-off shotgun and a pry bar. The shotgun contained a single shotgun shell. Inside the duffelbag were a shotgun shell, a pair of wirecutters, and a number of plastic cable ties, referred to by Sydik as "Flex-cufs." Two Flex-cufs were hooked together in a figure-eight form, similar to handcuffs. Pittman was charged with possession of a short shotgun and violation of a protection order.

Edward Mentzer, a detective sergeant with the Saunders County Sheriff's Department, testified that Sydik contacted him on March 17, 1995, stating that she had arrested Pittman for violation of a protection order and that "she had some concerns that he may have been involved in something more serious than that even." Based primarily on Sydik's written police report of the bar incident, Mentzer drafted an affidavit and search warrant for Pittman's residence in Schuyler, which warrant was signed by a judge.

The affidavit stated that the affiant had reasonable grounds to believe that Pittman's residence contained the sawed-off portion of the barrel of the shotgun and "[l]etters, Diaries, or correspondence which indicate Russell Pittman's lethal intentions toward Dina [F.]" The affidavit contained information Mentzer received from Sydik recounting the events at the bar. In addition, the affidavit stated that Pittman's criminal history had been checked and that he had an extensive record, including charges for kidnapping, false imprisonment, and sexual assault. Quoting Sydik, the affidavit stated, in part, that

> [a]fter finding the sawed off shotgun, the pry bar, the flexicuffs [sic] and wire cutters in Mr. Pittman's vehicle I have some real concerns as to what Mr. Pittman's intentions were for coming to Prague and contacting his ex-wife. The fact that he was behind the bar hiding behind his vehicle when she went out the back door. If Mr. Pittman was waiting in hiding for her to leave the bar through the back door. The [s]awed off shotgun, the prybar, flexicuffs and wire cutters were altogether [sic] in the vehicle, possibly he brought the pry bar to break into the bar or her residence[,] the flexicuffs to restrain her and the wire cutters possibly to cut telephone lines. The shotgun was loaded and one extra shell was found in the duffel bag, possibly one shell would be intended for Dina and the second shell for himself. This may be speculation but due to his past criminal record, I think it shows Mr. Pittman could be a real danger.

During the search of Pittman's residence, officers discovered in the master bedroom closet a cardboard box used to ship a firearm. The box contained the same serial number as that on the sawed-off shotgun found in Pittman's car. During the search, Mentzer discovered six audiotapes in a paper bag on top of a shelf in the living room. The tapes were reviewed on site and seized because officers felt they contained material coming within the scope of the search warrant. In addition, 10 handwritten notes or poems were found in a dresser drawer and underneath a shelf in the master bedroom.

Most of the notes and poems appear to be suicide notes to Pittman's sons, mother, and siblings. The note addressed to Dina does not specifically refer to suicide, although it says that

"[t]his poem I write will be the last you see for you don't want to know the Best of me." This letter does not appear to contain a threat to Dina. However, one unaddressed note, exhibit 17, refers to someone who "never really had time for me" and ends with the following:

> The sting is so deep to me that one last specticle [sic] you will see[.] As I place a gun to my head and pull the trigger in front of you and I'm dead. The things I'll do to you before I go should help ease your consience [sic] after the show.

It appears that the audiotapes were meant to be suicide tapes to Dina and to Pittman's mother, father, sons, and siblings. Mentzer stated that he understood exhibit 17, in conjunction with the other items found at Pittman's residence, to mean that Pittman "intended to commit suicide after he had done whatever it is he thought he was going to do." Mentzer then seized the remaining notes, poems, and audiotapes, items that he felt reinforced his impression that Pittman intended suicide.

The trial court overruled Pittman's motion to suppress the notes, poems, and audiotapes, stating that they "all either relate to the alleged victim, Dina [F.], or present admissions relating to defendant's past offenses against Dina [F.], or complete the picture of a person with nothing left to lose by committing yet more offenses against Dina [F.] and then committing his planned suicide in front of her." The court held that seizure of those items, as well as seizure of the shotgun shipping container, did not exceed the scope of the warrant. The trial court also overruled, without comment, Pittman's motion to suppress evidence taken from the vehicle.

*Trial.*

The trial court took judicial notice of much of Mentzer's testimony from the suppression hearing. In addition, Mentzer testified that on April 4, 1995, a second search warrant was executed at Pittman's home. The search warrant was based on items discovered at Pittman's home during the first search but which Mentzer felt were beyond the scope of the first search warrant. Officers executing the first search warrant had discovered in the master bedroom chains and dog collars affixed to Pittman's bed

and also found what Mentzer called "marital aids," which were a variety of sex toys, collars, and restraints (hereinafter referred to as "devices"). Photographs taken by officers at the time of the first search were introduced into evidence. The photographs show that the bedding had been removed and that chains and collars were attached to the bedposts. Additional collars were set on furniture nearby. With the exception of one chain, these chains, collars, and devices were no longer at Pittman's residence when officers returned on April 4 to execute the second search warrant.

Dina testified at trial to the events at the bar. In addition, she described a number of incidents of nonconsensual sex, estimated by her at 20 in number, that took place during her marriage to Pittman. She identified some of the devices as having been forcibly used on her by Pittman.

Pittman's ex-wife from an earlier marriage, Lisa K., testified over Pittman's continuing objection based on relevancy and on inadmissibility as a prior "bad act." Lisa testified that she had been raped by Pittman several times during their marriage. Following one of those incidents, Pittman was charged with sexual assault. Lisa stated that Pittman had never kidnapped her or used restraints on her. The trial court ruled that Lisa's testimony was admissible only with regard to the issue of intent as it related to the kidnapping charge against Pittman.

Lisa also testified that the cable ties found in Pittman's car were similar to those Pittman often used when he worked installing car stereos during their marriage. She said that he had never used the ties for any other purpose.

The trial court found Pittman guilty of all four counts. He was sentenced to 6 months' imprisonment for violation of a protection order; 4 to 5 years' imprisonment for possession of a short shotgun; 20 to 25 years' imprisonment for attempted kidnapping; and 10 to 15 years' imprisonment for possession of a deadly weapon in the commission of a felony. The sentences are to run consecutively.

## ANALYSIS

*Search of Vehicle.*

Pittman argues that Sydik had no probable cause to believe that he was in violation of a protection order at the time of

arrest. Thus, according to Pittman, the arrest was unlawful, the subsequent search incident to arrest was invalid, and the trial court's decision to overrule Pittman's suppression motion was erroneous.

[2,3] A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). This court is also aware that on May 28, 1996, the U.S. Supreme Court stated in *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), that

> as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.

In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

Pittman correctly notes that Neb. Rev. Stat. § 42-928 (Reissue 1993) provides that an officer shall arrest a person for violation of a protection order if (1) the officer has probable cause to believe that the person has violated such an order and (2) the applicant for the protection order has provided the officer with a copy of the order or the officer determines that such an order exists after communicating with the local law enforcement agency. Pittman contends that Sydik did not have probable cause to believe that he had violated a protection order. He points to evidence which he asserts shows that he had called police to the scene; that when Sydik arrived, Pittman was sitting in his vehicle in a well-lit area in front of the bar; that he did not attempt to enter the bar or to remove Dina from the bar; that he stayed in front of the bar in a well-lit area; that he made no gestures or motions of any kind toward Dina; and that he did not threaten, assault, molest, stalk, attack, or otherwise disturb Dina's peace, as prohibited by the protection order.

A fair reading of the record consistent with the trial court's denial of the motion to suppress is that Pittman was prowling around the bar area after hours and peeking in the windows until spotted by Dina; that he initially parked his vehicle in back of the bar where Dina apparently could not see it through the windows; that he refused to identify himself to Dina for a time; that he subsequently parked his vehicle in such a way that Dina could not reach her own vehicle without passing Pittman; and that he refused to leave the area even after Dina threatened to call police. The protection order prohibited Pittman from, inter alia, "[i]mposing any restraint upon the personal liberty" of Dina. Pittman's actions clearly resulted in Dina's inability to leave her workplace in the early morning hours to return home, despite her repeated requests that Pittman simply leave. The above actions provided Sydik with probable cause to believe that Pittman had violated the protection order. Although we recognize that Sydik's testimony is at times unclear and tentative, the trial court, in overruling Pittman's motion to suppress evidence obtained from the vehicle, implicitly accepted the officer's testimony that she gained knowledge of the protection order before Pittman's arrest.

[4,5] Once there has been a valid arrest, a search incident to that arrest is valid if conducted in the area within the arrestee's immediate control, the area from within which the arrestee could gain possession of a weapon or destructible evidence. *State v. Sassen*, 240 Neb. 773, 484 N.W.2d 469 (1992). When a "[police officer] has made a lawful custodial arrest of the occupant of an automobile, [the officer] may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and "containers found within the passenger compartment." *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). It has been held that a search of a defendant's vehicle while the defendant was at the scene handcuffed in a police car was proper. *U.S. v. White*, 871 F.2d 41 (6th Cir. 1989).

At the time of Pittman's arrest, Sydik told him to step out of his vehicle and he was patted down, handcuffed, and placed in the backup patrol car. Sydik then conducted the search of Pittman's vehicle. The evidence in question was found in the

back area of the car, from which Pittman could have gained possession of the shotgun and other items. Thus, Sydik conducted a valid search incident to Pittman's arrest. Because the trial court was not clearly wrong in overruling Pittman's motion to suppress evidence taken from the vehicle, Pittman's first assignment of error is without merit.

*Search of Home.*

Pittman argues generally that the trial court erred in overruling his motion to suppress evidence obtained from his home. He specifically contends that the affidavit was insufficient in that it failed to establish probable cause to believe that there would be any letters, diaries, or correspondence relating to Dina at his residence. We need not reach this issue.

In the instant case, the affidavit indicates that a search of the house was appropriate to search, inter alia, for the sawed-off portion of the shotgun. In view of the condition of the gun found in Pittman's vehicle, there was probable cause to believe the remainder of the barrel would be found at his residence. At the time of the search, Pittman had been arrested for possession of a short shotgun and violation of a protection order. It is reasonable to assume that in searching for the remainder of the barrel, officers would search in closets and bureau drawers and in paper sacks or other containers for such an item. The chains, dog collars, and devices were physical items in plain view as officers entered the master bedroom or were otherwise properly observed by the officers pursuant to the valid portion of the search warrant pertaining to the sawed-off shotgun.

[6] Pittman's assignment of error pertains only to the portion of the search warrant relating to the letters, diaries, or correspondence. "The invalidity of part of a search warrant does not require the suppression of all evidence seized pursuant to valid portions of the warrant." *State v. Parmar*, 231 Neb. 687, 695, 437 N.W.2d 503, 509 (1989). Quoting *United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983), the Nebraska Supreme Court discussed the severability of a warrant in *State v. LeBron*, 217 Neb. 452, 454-55, 349 N.W.2d 918, 921 (1984), as follows:

> "Accordingly, we follow the approach which the First, Third, Fifth, Sixth, and Ninth Circuits, and several states,

> have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during their execution). This approach, we think, complies with the requirements of the fourth amendment."

In view of the fact that the affidavit and search warrant pertaining to the remainder of the sawed-off shotgun were proper, and because the search therefor revealed the chains, collars, and devices in plain view, we find that these items were properly seized and admitted into evidence. The seizure of the notes, letters, and correspondence may well have exceeded the portion of the warrant permitting a search for physical items; however, even if we assume that the portion of the search warrant authorizing the search for notes, letters, and correspondence was invalid, the admission of these items was not necessary to sustain Pittman's conviction, and, therefore, we need not rule on this assignment of error pertaining to their seizure. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (holding that appellate court need not decide issue not necessary for resolution of case).

*Relevancy of Poems and Audiotapes.*

[7] Pittman contends that the admission into evidence of the poems and audiotapes over his relevancy objection was an abuse of discretion which resulted in unfair prejudice to him. It is presumed in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise. *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). We note that the evidence as to attempted kidnapping was sufficient to convict Pittman without the admission of the tapes

and notes. The remaining evidence includes Pittman's actions at the bar, the evidence found in his vehicle, and the chains, dog collars, and devices found in plain view in Pittman's bedroom. This assignment of error is without merit.

*Testimony of Lisa.*

[8] Pittman argues that the trial court erred in admitting the testimony of his ex-wife from an earlier marriage, Lisa, who testified that Pittman had raped her a number of times during their marriage. The State offered her testimony as relevant to the issue of Pittman's motive and intent in attempting to kidnap Dina. The trial court ruled that Lisa's testimony was admissible only with regard to the issue of intent related to the charge of attempted kidnapping. Neb. Rev. Stat. § 27-404(2) (Reissue 1995) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[9,10] Section 27-404(2) is a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person in order to prove that the person acted in conformity with that character. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). Evidence of other crimes or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

[11,12] Pittman first claims that Lisa's testimony was insufficiently related to the offenses charged against him because the events she related were remote in time, having occurred in 1989. The admissibility of evidence concerning other conduct under the provisions of § 27-404(2) must be determined upon the facts of each case; no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. *State v. White, supra*. The question of

remoteness in time is largely in the discretion of the trial court; while remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify the exclusion of the evidence. *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988). In this case, Pittman's history of sexually assaulting his ex-wife from an earlier marriage was not so remote in time as to justify its exclusion from evidence.

Pittman also notes that there was no kidnapping or restraint involved in the incidents with Lisa. He argues that, therefore, the incidents are not sufficiently related in circumstance to the current charges against him. We disagree. The State's theory of this case was that Pittman intended to abduct Dina for the purpose of sexually assaulting her. Pittman's history of sexually assaulting Lisa is relevant to show his intent with regard to Dina. Pittman's assignment of error regarding Lisa's testimony is without merit.

*Sufficiency of Evidence.*

[13,14] Pittman argues that the evidence was insufficient to convict him of the charges against him. 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. *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996). A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *Id.*

With regard to the charge of violation of a protection order, Pittman argues that he did not commit any of the acts prohibited by the protection order. The protection order prohibited Pittman from, inter alia, "[i]mposing any restraint upon the personal liberty" of Dina. As stated above, Pittman's actions in refusing to leave the bar area where he was parked, so as to require Dina to pass him to reach her own vehicle, constitute sufficient evidence that he violated the protection order.

With regard to the charge of attempted kidnapping, Pittman contends that there is no evidence that he took a substantial step toward kidnapping Dina. We disagree.

"A person commits kidnapping if he abducts another . . . with intent to . . . [c]ommit a felony." Neb. Rev. Stat. § 28-313 (Reissue 1995). "Abduct shall mean to restrain a person with intent to prevent his liberation by: (a) Secreting or holding him in a place where he is not likely to be found; or (b) Endangering or threatening to endanger the safety of any human being." Neb. Rev. Stat. § 28-312 (Reissue 1995).

Criminal attempt is defined by Neb. Rev. Stat. § 28-201 (Reissue 1995) as follows:

> (1) A person shall be guilty of an attempt to commit a crime if he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

In *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981), a defendant appealed his conviction for attempted first degree murder, claiming, in part, that Nebraska's criminal attempt statute was unconstitutionally vague. In rejecting the defendant's argument, the Nebraska Supreme Court discussed § 28-201 as follows:

> In adopting § 28-201(1)(b), our Legislature has accepted the position of the Model Penal Code that attempt liability is primarily concerned with the dangerous disposition of the actor, rather than just the dangerousness of such actor's conduct. However, it recognizes the legal

> principle that the law does not seek to punish evil thought alone. Therefore, the statute requires that the dangerous disposition be manifested by some intentional act which would constitute a substantial step toward the completion of the crime if the circumstances were as the actor believed them to be. Model [Penal] Code art. 5, Comments (Tent. Draft No. 10, 1960); Hawaii Rev. Stat. § 705-500, Commentary at 285 (Repl. 1976).

*State v. Sodders*, 208 Neb. at 506-07, 304 N.W.2d at 64-65.

[15] We appreciate the difficulty of identifying when an actor's disposition matures into an inchoate crime. Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact. *State v. Green*, 238 Neb. 475, 471 N.W.2d 402 (1991). Model Penal Code § 5.01(2) (1985) lists the following examples of such conduct:

> (a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
>
> (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Under the above analysis, it is clear that Pittman's conduct constitutes a "substantial step" in several respects: Pittman was prowling around the bar after hours, peeking at Dina through

the windows, while apparently trying to keep her from identifying him; he repeatedly urged Dina to come out of the bar to "talk" and, when she refused, told her he would not leave until she did so; he had in his possession a loaded shotgun, a pry bar, wirecutters, and cable ties shaped into Flex-cufs, items which could serve no lawful purpose under the circumstances; and attached to his bed at home were chains and dog collars. Thus, Pittman's actions and the evidence found outside the bar supported the finding of attempted kidnapping, and the evidence properly seized at the house identified a felonious sexual assault as the object of the attempted kidnapping. In this regard, we note that given the scene at Pittman's house, the only logical inference at the time of the search was that Pittman intended to perpetrate nonconsensual activity on Dina, to wit: first degree sexual assault.

In addition, the testimony of Dina and Lisa supports the State's theory that Pittman's purpose in kidnapping Dina was to commit a sexual assault against her. The evidence, viewed and construed most favorably to the State, was sufficient to find that Pittman attempted to abduct Dina with the intent to commit a felony, i.e., sexual assault. This assignment of error is without merit.

Pittman also argues that the evidence is insufficient to convict him of the charges of possession of a short shotgun and possession of a deadly weapon in the commission of a felony. His arguments are premised on the issues of the legality of the search of his home and insufficiency of evidence to convict him for attempted kidnapping, respectively, which issues have been resolved against him. The evidence supports his conviction of possession of a short shotgun and possession of a deadly weapon in the commission of a felony. These assignments of error are without merit.

*Excessive Sentences.*

In his final assignment of error, Pittman claims that the sentences imposed by the trial court were excessive and constituted an abuse of discretion, particularly in light of the fact that no violence was actually committed by Pittman on March 17, 1995.

Pittman was sentenced to 6 months' imprisonment for violation of a protection order, in violation of Neb. Rev. Stat. § 42-924 (Reissue 1993), a Class II misdemeanor; 4 to 5 years' imprisonment for possession of a short shotgun, in violation of Neb. Rev. Stat. § 28-1203(1) (Reissue 1995), a Class IV felony; 20 to 25 years' imprisonment for attempted kidnapping, in violation of §§ 28-313 and 28-201, a Class II felony; and 10 to 15 years' imprisonment for possession of a deadly weapon in the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989), a Class III felony. The sentences are to be served consecutively.

[16] A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). Pittman has an extensive criminal history, including convictions for assault and false imprisonment. Pittman's sentences are well within the statutory limits. The trial court did not abuse its discretion in sentencing Pittman.

Pittman's assignments of error are without merit, and his convictions and sentences are affirmed.

AFFIRMED.

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JANET K., PATERNAL GRANDMOTHER AND NEXT FRIEND OF RYAN B., A MINOR CHILD, APPELLANT, V. KEVIN B., NATURAL FATHER, AND DEBRA F., NATURAL MOTHER, APPELLEES.

556 N.W.2d 270

Filed November 19, 1996. No. A-96-174.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Constitutional Law: Habeas Corpus.** Habeas corpus is a civil remedy constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty.
3. **Habeas Corpus: Child Custody.** A habeas corpus proceeding is appropriate to test the legality of custody and best interests of a minor, when the party having physical custody of the minor has not acquired custody under a court order or decree.
4. **Habeas Corpus: Appeal and Error.** A writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error.
5. **Actions: Habeas Corpus: Collateral Attack.** An action for habeas corpus constitutes a collateral attack on a judgment.

6. **Final Orders: Appeal and Error.** An order of dismissal is a final, appealable order.
7. **Evidence: Records: Appeal and Error.** In a law action, before an appellate court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with the appellate court.
8. ____: ____: ____. A bill of exceptions is the only vehicle for bringing evidence before an appellate court.
9. **Habeas Corpus: Child Custody.** Habeas corpus may be maintained by a complete stranger to a child to test the question of custody between the stranger and the natural parent.
10. **Courts: Jurisdiction: Guardians and Conservators.** Each county court shall have exclusive original jurisdiction of all matters relating to guardianship or conservatorship of any person.
11. **Habeas Corpus: Courts: Jurisdiction.** It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, unless the prior jurisdiction has been terminated.
12. ____: ____: ____. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings or to interfere with the exercise of jurisdiction of other courts.
13. **Attorney Fees.** Neb. Rev. Stat. § 25-824(2) (Reissue 1995) allows a court to award reasonable attorney fees and court costs against an attorney or party who has brought or defended a civil action that alleges a claim or defense which the court determines is frivolous or made in bad faith.
14. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing an attorney fee under Neb. Rev. Stat. § 25-824 (Reissue 1995) will be upheld in the absence of the trial court's abuse of discretion.
15. **Actions: Attorney Fees: Words and Phrases.** Frivolous, for the purposes of Neb. Rev. Stat. § 25-824 (Reissue 1995), is defined as being a legal position wholly without merit, that is, without a rational argument based on law and evidence to support the litigant's position in the lawsuit.
16. **Actions.** An action is frivolous or in bad faith if a party attempts to relitigate the same issue previously resolved in an action involving the same party.
17. ____. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Saunders County: ALAN G. GLESS, Judge. Affirmed.

Avis R. Andrews for appellant.

Josephine Walsh Wandel and Kimberly Taylor Riley, of Wandel Law Offices, P.C., for appellees.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

## PROCEDURAL BACKGROUND

The instant case concerns a custody dispute between Janet K., paternal grandmother of Ryan B., a minor child, and Kevin B. and Debra F., Ryan's natural parents. On December 22, 1995, Janet filed a petition for writ of habeas corpus, in Saunders County District Court, as paternal grandmother and next friend of Ryan, seeking custody from Debra. The petition listed both Kevin and Debra as respondents. That same day, the Saunders County District Court issued an order in lieu of writ of habeas corpus, ordering the Saunders County sheriff to locate and deliver Ryan to Janet. Kevin and Debra subsequently filed a motion to quash the habeas corpus proceeding and the order in lieu of a writ of habeas corpus and to request attorney fees and costs. On January 10, 1996, the Saunders County District Court, having found no basis for jurisdiction, vacated the earlier order in lieu of writ and dismissed Janet's habeas corpus action. Janet now appeals the dismissal, and we affirm.

## FACTUAL BACKGROUND

We observe from the record that no evidence was ever presented to the district court in Janet's habeas corpus action. The record includes a 19-page bill of exceptions from a January 8, 1996, hearing on Kevin and Debra's motion to quash. However, the bill of exceptions consists only of conversations between counsel and the judge, and there are no stipulations. The record also contains, without explanation, a bill of exceptions from a December 19, 1995, guardianship hearing in Saunders County Court. The resulting county court journal entry, dated December 27, 1995, has been made a part of the transcript, but neither the bill of exceptions nor the journal entry were offered or received into evidence by the district court.

Our factual understanding of the instant case is based solely on the allegations and admissions contained in Janet's petition for writ of habeas corpus. On January 28, 1992, the Pottawattamie County, Iowa, District Court entered a decree dissolving the marriage of Kevin and Debra. The court awarded custody of Ryan, born April 4, 1991, to both parents jointly. Janet contends that Debra has since abandoned Ryan and has not seen him for

years. Janet further claims that Ryan "has been in the intermittent possession of the grandmother throughout his life." Janet also alleges that Kevin, her son, has been declared "unfit" by a court and is currently living with Debra in Iowa, even though he is married to another woman.

In the petition, Janet complains that the Saunders County Court, on December 19, 1995, removed Ryan from her custody as the lawfully appointed guardian and placed custody with Debra without allowing Janet to present evidence weighing on the fitness of Kevin and Debra. Janet contends that such action placed Ryan in "grave danger." Janet also asserts that the county court refused to dismiss the guardianship petition, precluding appellate review and rendering moot a previous temporary order awarding Janet guardianship.

## ASSIGNMENTS OF ERROR

Janet contends that the district court erred in (1) sustaining Debra's motion to quash, (2) determining that the habeas corpus proceedings were subject to a motion to quash, (3) finding that the order in lieu of a writ of habeas corpus was subject to a motion to quash, (4) vacating its order in lieu of a writ of habeas corpus, (5) finding that the order in lieu of a writ of habeas corpus was granted improvidently, (6) finding that there was no basis upon which the court could take jurisdiction through a habeas corpus action, (7) applying a standard requiring a showing of illegality infecting the county court's custody order as a basis for a habeas corpus order, (8) dismissing the habeas corpus proceeding without a hearing, (9) finding that the habeas corpus action constituted a frivolous filing, (10) imposing a sanction of attorney fees, (11) determining the amount of attorney fees and expenses awarded as a sanction, (12) using an unsolicited journal entry from the Saunders County Court, (13) issuing an order unsupported by sufficient evidence, and (14) issuing an order contrary to law.

## STANDARD OF REVIEW

[1] This appeal involves only a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

## ANALYSIS

[2,3] Habeas corpus is a civil remedy constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty. *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). A habeas corpus proceeding is appropriate to test the legality of custody and best interests of a minor, when the party having physical custody of the minor has not acquired custody under a court order or decree. *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995); *Uhing v. Uhing, supra.*

[4,5] We note that much of Janet's petition concerns alleged errors made by the county court. However, a writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error. *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979). Rather, an action for habeas corpus constitutes a collateral attack on a judgment. *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[6-8] An order of dismissal is a final, appealable order. *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994) (dismissal for want of prosecution). In a law action, before an appellate court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with the appellate court. *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995). A bill of exceptions is the only vehicle for bringing evidence before an appellate court. *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995). As stated above, the bill of exceptions from the district court contains only colloquy between counsel and judge. No evidence was presented on the issue of guardianship or custody.

[9] Janet alleges facts which, if true, would establish that Debra is unfit. Janet also alleges that she is the grandmother of the child and has been in intermittent possession of the child throughout his life. The Nebraska Supreme Court has held that habeas corpus may be maintained by a complete stranger to a child to test the question of custody between the stranger and the natural parent. *Hausman v. Shields*, 184 Neb. 88, 165 N.W.2d 581 (1969). Thus, a grandmother may institute a habeas corpus action in order to test the question of custody between her and the child's mother.

Janet alleges in her petition that the matter of the guardianship of Ryan was simultaneously being litigated in county court. The petition alleges that on December 19, 1995, 3 days before the petition for habeas corpus was filed with the district court, the Saunders County Court removed Ryan from Janet's custody, as lawfully appointed guardian, and placed him with Debra without allowing Janet to present evidence bearing on Debra's fitness, or lack thereof. The petition further indicates that the county court refused to dismiss the guardianship petition, thus preventing any avenue of appellate review. In essence, Janet seeks a reversal of the county court's procedure and interlocutory order.

[10] Neb. Rev. Stat. § 24-517 (Reissue 1995) provides, in significant part: "Each county court shall have the following jurisdiction . . . (2) Exclusive original jurisdiction of all matters relating to guardianship or conservatorship of any person . . . ."

[11,12] In *Miller v. Department of Public Welfare*, 182 Neb. 155, 153 N.W.2d 737 (1967), a mother brought a habeas corpus action in district court after the juvenile court had committed the care and custody of her children to the Department of Public Welfare. The district court denied the mother's application for writ of habeas corpus. On appeal, the Nebraska Supreme Court affirmed the dismissal, finding that the separate juvenile court had exclusive and continuing jurisdiction. Significantly, the court stated:

> It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, unless the prior jurisdiction has been terminated. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts.

*Id.* at 159, 153 N.W.2d at 740.

In the instant case, if we accept Janet's allegations in her petition as true, then we must conclude that the county court had exclusive original jurisdiction. See § 24-517. Furthermore, based on Janet's pled admission that the county court refused to

dismiss the guardianship petition, we must also conclude that (1) the county court's removal of Ryan from Janet's custody was only a temporary order and (2) the county court continued to have jurisdiction. Janet's petition is a blatant attempt at circumventing the authority of the county court. As stated above, a writ of habeas corpus cannot be used to unsettle valid legal proceedings or to interfere with the exercise of jurisdiction of other courts. *Miller v. Department of Public Welfare, supra.* It is clear that the county court retained jurisdiction in the guardianship proceeding. Thus, the district court properly dismissed Janet's petition for lack of jurisdiction.

[13,14] The Saunders County District Court found that Janet's action constituted a frivolous filing, meriting the imposition of an award of attorney fees in the amount of $1,316.55. Neb. Rev. Stat. § 25-824(2) (Reissue 1995) allows a court to award reasonable attorney fees and court costs against an attorney or party who has brought or defended a civil action that alleges a claim or defense which the court determines is frivolous or made in bad faith. See *In re Estate of Snover*, 4 Neb. App. 533, 546 N.W.2d 341 (1996). On appeal, a trial court's decision allowing or disallowing an attorney fee under § 25-824 will be upheld in the absence of the trial court's abuse of discretion. *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

[15-17] The Nebraska Supreme Court has defined "frivolous," for the purposes of § 25-824, as being a legal position wholly without merit, that is, without a rational argument based on law and evidence to support the litigant's position in the lawsuit. *Sports Courts of Omaha v. Meginnis, supra*; *In re Estate of Snover, supra.* An action is frivolous or in bad faith if a party attempts to relitigate the same issue previously resolved in an action involving the same party. *Sports Courts of Omaha v. Meginnis, supra.* Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. *Sports Courts of Omaha v. Meginnis, supra*; *In re Estate of Snover, supra.*

Janet, after receiving an unfavorable but temporary ruling in county court, attempted to divest the county court of jurisdic-

tion and relitigate essentially the same issue, that of custody, in district court. Janet's admission that the county court refused to dismiss the guardianship petition was an acknowledgment of the county court's continuing jurisdiction. As stated above, Janet's habeas corpus action was not proper as long as the county court retained jurisdiction. We conclude that the district court did not abuse its discretion in imposing attorney fees, as a sanction, against Janet. Kevin and Debra are further allowed an attorney fee of $1,000 for fees in this court.

The judgment of the district court is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLANT,
V. HAROLD D. CONNICK, JR., APPELLEE.
557 N.W.2d 713

Filed December 3, 1996. No. A-96-138.

1. **Judgments: Appeal and Error.** In regard to a question of law, an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Police Officers and Sheriffs: Arrests: Jurisdiction.** A peace officer does not have authority to arrest someone outside of the boundaries of his or her jurisdiction unless the peace officer is authorized by statute to do so.
3. **Police Officers and Sheriffs.** Neb. Rev. Stat. § 37-603 (Reissue 1993) gives conservation officers the powers of sheriffs and makes them peace officers.
4. **Police Officers and Sheriffs: Jurisdiction.** A conservation officer is employed by the State of Nebraska, and his or her primary jurisdiction is statewide.
5. **Police Officers and Sheriffs: Rules of the Road: Jurisdiction.** A conservation officer has statewide authority to enforce traffic laws.
6. **Trial: Drunk Driving: Blood, Breath, and Urine Tests: Appeal and Error.** The erroneous admission of a breath test in a bench trial is not grounds for reversal when there is other admissible evidence to establish the defendant was driving under the influence.
7. **Courts: Drunk Driving: Appeal and Error.** Where a district court, acting as an intermediate appellate court, erred in failing to affirm the conviction and sentence of the county court in a drunk driving case, a higher appellate court may remand the cause to the district court with direction to reinstate and affirm the county court's judgment of conviction.

Appeal from the District Court for Lancaster County, PAUL J. HICKMAN, Judge, Retired, on appeal thereto from the County

Court for Lancaster County, GALE POKORNY, Judge. Exception sustained, and cause remanded with directions.

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

John M. Lefler for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

The State brings this error proceeding under Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) from a ruling of the district court reversing the county court's conviction of Harold D. Connick, Jr., for third-offense driving while under the influence of alcohol (DUI), in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). In county court, Connick moved to suppress all evidence on the grounds that the conservation officer employed by the Nebraska Game and Parks Commission who stopped and arrested him was without the authority to do so. The county court overruled the motion. Connick saved this alleged error and appealed to district court. The district court concluded that the conservation officer was without the authority to detain and arrest Connick and therefore that the evidence obtained as a result was not admissible. The district court ordered the conviction reversed, the sentence vacated, and the charge dismissed. We conclude that the conservation officer did have the statutory authority to detain and arrest. Therefore, we sustain the State's exception and remand the cause to the district court with directions to reinstate and affirm the conviction and sentence of the county court.

## I. FACTUAL BACKGROUND

On June 25, 1994, a conservation officer with the Game and Parks Commission was driving westbound on West Denton Road in Lancaster County when he met a pickup truck that he observed being driven erratically. It was being driven with its passenger-side tires on the shoulder, creating a lot of dust. The conservation officer turned his vehicle around and followed the truck for approximately 4 miles. During that time, he witnessed

the truck being driven on the shoulder twice and crossing the centerline three times. At one point, the pickup was so far to the left of center that the passenger-side tires were touching the centerline. The conservation officer activated his emergency lights and continued to follow the truck. The truck did not stop. At one point, the officer pulled alongside the truck and motioned for it to pull over. The driver of the pickup waved and kept going until he stopped for a red light. The conservation officer stopped, got out of his vehicle, walked over to the pickup, reached into the pickup, and turned the ignition off. He then requested that the driver give him the keys and his operator's license. The driver of the pickup was Connick. The conservation officer detected the odor of alcohol, and, when asked by the conservation officer if he had been drinking, Connick admitted that he had had a couple of beers. Upon request, Connick went to the conservation officer's vehicle.

While following the pickup, the conservation officer had requested the assistance of the Lancaster County Sheriff's Department. While the conservation officer and Connick were sitting in the conservation officer's vehicle waiting for a deputy sheriff to arrive, the conservation officer continued to observe the odor of alcohol about Connick. After approximately 15 minutes, a Lancaster County deputy sheriff arrived on the scene. The conservation officer then related his observations to the deputy. Upon speaking to Connick, the deputy detected the odor of alcohol about Connick, that Connick's eyes were red, and that his speech was "lethargic." The deputy then requested that Connick perform several field sobriety tests, which the deputy concluded that Connick did not pass. The deputy radioed for a Lincoln police officer to come to the scene to administer a preliminary breath test, which was done, and Connick failed the test. He was then formally arrested and transported to jail.

The police officer then read the administrative license revocation advisement form to Connick, prior to administering a chemical breath test. The breath test showed Connick had more alcohol in his system than is allowed by law.

## II. PROCEDURAL BACKGROUND

A complaint was filed charging Connick with third-offense DUI pursuant to § 60-6,196. Connick filed a motion to suppress

the evidence obtained by the stop. At the suppression hearing, the conservation officer, the deputy, and the police officer testified. Connick argued that the conservation officer did not have authority to stop and detain him and therefore that the stop, detention, and arrest were illegal. He did not challenge the evidence upon other grounds. The county court overruled the motion without making any specific findings. The parties then agreed to a bench trial, with exhibit 1 being the only evidence. The defense renewed its objection, making the same argument it had made at the suppression hearing. The objection was overruled, and exhibit 1 was introduced without further objection. It is a 14-page document containing the following: the citation given to Connick the night of the incident, incident reports filed by the conservation officer and the deputy, a preliminary breath test advisement form, an administrative license revocation advisement form, a checklist for using the Intoxilyzer, the Intoxilyzer results, a DUI interview report, and a supplementary report by the deputy containing a narrative of the events that night as observed by the deputy. Connick saved any error raised for appeal.

The county court found Connick guilty of the underlying DUI offense, and after an enhancement hearing, sentenced him to 120 days in jail, fined him $500, and ordered his operator's license suspended for 15 years. Connick appealed to the district court, alleging that the county court erred in finding that he was properly advised of the consequences of taking or refusing to take the chemical breath test and also alleging that the conservation officer did not have authority to stop and detain him.

The district court found that the conservation officer acted outside the scope of his jurisdiction and thus that his detention of Connick constituted an illegal arrest. It also found, pursuant to the holding in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), that the trial court erred in receiving the results of the breath test. After reaching these conclusions, the district court ordered the trial court to reverse the conviction, vacate the sentence, and dismiss the charge. The State then filed this error proceeding.

## III. ASSIGNMENTS OF ERROR

The State has alleged six assignments of error, which restated and summarized are that the district court erred (1) in finding

that the holding in *Smith v. State, supra*, is applicable to a criminal proceeding and (2) in finding that the conservation officer acted outside of the scope of his jurisdiction.

## IV. STANDARD OF REVIEW

[1] In regard to a question of law, an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

## V. DISCUSSION

### 1. Power of Conservation Officer to Arrest

[2] The controlling question in this appeal is the powers that are granted to conservation officers by the Nebraska Revised Statutes. The several statutory provisions that purport to grant powers to conservation officers specifically and to peace officers generally and the definition of a peace officer cause some difficulty in determining what power, if any, the statutes give conservation officers to arrest for traffic offenses outside of state lands. Connick argues that the 1965 legislative history of Neb. Rev. Stat. § 29-829 (Reissue 1995) clearly establishes that the Legislature never intended for conservation officers to have jurisdiction over anything but the Game Law. In *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991), the defendant challenged the authority of a city police officer to arrest the defendant outside of the territory of the city the officer served. In *Tingle*, the Supreme Court held that a peace officer does not have authority to arrest someone outside of the boundaries of his or her jurisdiction unless the peace officer is authorized by statute to do so.

In 1994, in response to the effect of the holding in *Tingle*, the Legislature adopted 1994 Neb. Laws, L.B. 254, § 1, now codified as Neb. Rev. Stat. § 29-215 (Reissue 1995). Section 29-215, which became effective March 1, 1994, provides in part:

> (1) *Every sheriff*, deputy sheriff, marshal, deputy marshal, police officer, or *peace officer as defined in subdivision (15) of section 49-801* shall have the power and authority to enforce the laws of this state and of the polit-

ical subdivision which employs the law enforcement officer or otherwise perform the functions of that office anywhere *within his or her primary jurisdiction. Primary jurisdiction shall mean the geographic area within territorial limits of the state or political subdivision which employs the law enforcement officer.*

(2) Any such law enforcement officer who is within this state, but *beyond the territorial limits of his or her primary jurisdiction,* shall have the power and authority to enforce the laws of this state or any legal ordinance of any city or incorporated village or otherwise perform the functions of his or her office, including the authority to arrest and detain suspects, as if enforcing the laws or performing the functions within the territorial limits of his or her primary jurisdiction in the following cases:

(a) [Deals with fresh pursuit of a person suspected of committing a felony];

(b) [Deals with fresh pursuit of a person suspected of committing a misdemeanor or a traffic infraction];

(c) [Provides for responding to a call for assistance by another officer].

(Emphasis supplied.)

Pursuant to this statute, several questions need to be considered. First, is the conservation officer a peace officer as defined in Neb. Rev. Stat. § 49-801 (Reissue 1993)? Second, was the arrest made within the conservation officer's primary jurisdiction? Third, if not, was the arrest made within any exception to his primary jurisdiction?

(a) Is a Conservation Officer a Peace Officer?

A conservation officer is not specifically listed as one of the law enforcement officers encompassed by § 29-215. However, "peace officer" is defined in § 49-801(15), which provides: "Peace officer shall include sheriffs, coroners, jailers, marshals, police officers, state highway patrol officers, members of the National Guard on active service by direction of the Governor during periods of emergency, and *all other persons with similar authority to make arrests.*" (Emphasis supplied.) Section 49-801(15) does not appear to be an exclusive list, but a con-

servation officer is not specifically enumerated. However, a conservation officer may be included in "all other persons with similar authority to make arrests." An examination of the conservation officer's "authority to make arrests" is required to determine whether the conservation officer has "similar authority" to that of those persons defined as peace officers.

Neb. Rev. Stat. § 37-603 (Reissue 1993) provides:

> It shall be the duty of all conservation officers [and] deputy conservation officers . . . to make prompt investigation of and *arrests for any violations of the Game Law* [Neb. Rev. Stat. §§ 37-101 to 37-726 and 37-1401 to 37-1408 (Reissue 1993)] or of sections 81-801 to 81-815.36 observed or reported by any person . . . . *All full-time conservation officers* and full-time deputy conservation officers *are hereby made peace officers of the state with the powers of sheriffs.*

[3] Connick contends that § 37-603 grants conservation officers the powers of sheriffs, but that it does not give conservation officers the same jurisdiction as sheriffs. However, § 37-603 does two things: it gives conservation officers the powers of sheriffs, and it also makes them peace officers. Thus, § 37-603 provides that a conservation officer is a peace officer who can make arrests, and therefore a conservation officer comes within the definition in § 49-801(15) and the purview of § 29-215.

(b) Primary Jurisdiction of Conservation Officer

[4,5] The defendant contends that the primary jurisdiction of a conservation officer is in or on any area under the ownership or control of the Game and Parks Commission. We do not agree. As stated above, § 29-215 defines "primary jurisdiction" as "the geographic area within territorial limits of the state or political subdivision which employs the law enforcement officer." This definition does not relate to the powers of a law enforcement officer, but, rather, relates to where the officer may exercise these powers. Under the above statute, a conservation officer is employed by the State of Nebraska and his or her primary jurisdiction is statewide. See, e.g., Neb. Rev. Stat. § 37-607 (Reissue 1993) (recognizing that conservation officers can seize and confiscate contraband "within this state"). See, also, *State v.*

*Giessinger*, 235 Neb. 140, 142, 454 N.W.2d 289, 291 (1990) (wherein court recognized in factual section of its opinion that conservation officer, participating in roadblock with State Patrol officers, has "statewide authority to enforce traffic laws as well as game, fish, and park regulations"). The Supreme Court seems to have rather clearly stated that a conservation officer has statewide authority to enforce traffic laws.

We conclude that the conservation officer had the authority to stop Connick pursuant to § 29-215(1) and, therefore, that the trial court properly denied Connick's motion to suppress based upon these grounds. We conclude that the evidence is sufficient to sustain the conviction. Thus, the State's exception is sustained.

### 2. Effect of Improper Advisement

The Nebraska Supreme Court has yet to rule on whether the holding of *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), is applicable to criminal proceedings. This court has held the effect of improper advisement is the same in a criminal case as in a civil case. See *State v. Hingst*, 4 Neb. App. 768, 550 N.W.2d 686 (1996) (citing several unpublished opinions addressing issue in criminal context). The advisory form read to Connick is virtually the same as the advisory form read to the defendant in *Smith v. State, supra*. In *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996), the Supreme Court held that regardless of the defendant's failure to object to a similar advisory form, its inadequacy constituted plain error. Thus, we conclude that the advisory form and the results from the breath test were erroneously admitted, despite the lack of an objection from Connick's attorney.

[6] However, that does not end the analysis. The case was tried to the court, and exhibit 1 contains more than enough evidence to sustain Connick's conviction without the breath test. It is well established that the erroneous admission of a breath test in a bench trial is not grounds for reversal when there is other admissible evidence to establish the defendant was driving under the influence. See *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). The admissible evidence is sufficient to sustain the conviction, and Connick was not prejudiced by any error concerning the breath test.

### 3. Effect of Sustaining State's Exception

[7] In *State v. Schall*, 234 Neb. 101, 103, 449 N.W.2d 225, 227 (1989), the Supreme Court stated:

> [W]here a district court, acting as an intermediate appellate court, erred in failing to affirm the conviction and sentence of the county court in a drunk driving case, this court remanded the cause to the district court with direction to reinstate and affirm the county court's judgment of conviction.

We therefore do likewise and remand the cause with directions to the district court to reinstate and affirm the judgment and sentence of the county court.

Exception sustained, and cause remanded with directions.

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## In re Estate of Clara M. Watson, deceased. Evelyn M. Volkmer, personal representative of the Estate of Clara M. Watson, deceased, appellee, v. Martha L. Brown, special administrator of the Estate of Clara M. Watson, deceased, et al., appellants.

557 N.W.2d 38

Filed December 10, 1996. No. A-95-1238.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Decedents' Estates: Attorney Fees.** A county court may review the propriety of the employment by a personal representative of an attorney, as well as the reasonableness of the attorney's compensation while working for a personal representative.
3. **Attorney Fees.** An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and are inconsistent with the character of the profession.
4. ____. Counsel cannot recover fees when the representation is plainly in violation of the ethical requirements of the profession.

Appeal from the County Court for Fillmore County: J. Patrick McArdle, Judge. Affirmed as modified, and cause remanded with directions.

James E. Bachman for appellants.

Frank C. Heinisch and Jerry D. Anderson, of Heinisch Law Office, and David B. Downing, of Downing, Alexander & Wood, for appellee.

SIEVERS, MUES, and INBODY, Judges.

SIEVERS, Judge.

This appeal concerns whether attorney fees can be paid to a law firm notwithstanding that the firm withdrew from representation due to a conflict of interest. The county court approved the fees, but for the reasons set forth below, we modify the judgment.

## FACTUAL BACKGROUND

The material facts are undisputed. Clara M. Watson, a widow with no living children, owned farmland which she rented to the Les Stephenson family, among other tenants. Beginning in 1972 and continuing to her death, Clara was represented by Frank Heinisch, and later Jerry Anderson, of the Heinisch law firm. The firm also began representing the Stephensons in 1973. Clara died testate on September 16, 1994, with assets totaling over $800,000.

In Clara's will of June 27, 1990, drafted by Anderson, Clara nominated Evelyn M. Volkmer to serve as personal representative of her estate. Evelyn had helped Clara with her income tax returns and other matters since 1958. Evelyn had also been granted power of attorney over Clara in approximately 1990 (the precise date is unclear from the record) and had further been appointed by the court as Clara's conservator on January 19, 1994, at which time the court apparently found that Clara had an " 'organic brain syndrome.' " In her will, Clara made bequests to Evelyn and several members of the Stephenson family, namely Les, Les' children, and Les' grandchildren. Additionally, Clara provided that her late husband's nieces and nephew, Martha L. Brown, Laura Koontz, Dorothy Gaither, and Richard Watson (hereinafter the objectors), would receive a half interest in her residuary estate.

On September 17, 1992, Heinisch was informed by Les that Les and Clara had worked out the details of a sale of 2 quarters

of farmland from Clara to James, Lowell, and Loren Stephenson, Les' sons and grandson. It was Heinisch's understanding that Clara desired to sell to the Stephensons, who had treated Clara like family, the land that the Stephensons had rented from her over the years. At this time, Clara and the Stephensons were all clients of the Heinisch law firm. Heinisch testified that Clara and the Stephensons knew of and favored the firm's continued representation of the other.

Anderson drafted the purchase agreements, which were signed by Clara on September 28, 1992, at the Fillmore County Hospital. Anderson claimed that he did not negotiate the terms, but, rather, merely drafted the provisions related to him by Les. Anderson also claimed that Clara declined independent counsel regarding the transaction. According to Heinisch, Evelyn felt Clara understood the transaction and wanted it to take place. While the purchase agreements are not in the record, it appears that the land was not sold at market value. Evelyn testified that one of the parcels was sold for less than $1,000, and both Anderson and Heinisch claimed that the words "bargain sale" were incorporated into the agreement. According to Heinisch, a similar transaction for another piece of land occurred between Clara and Orville Hafer, another of Clara's long-term tenants, in the spring of 1993.

On February 15 and March 2, 1994, Anderson and Heinisch, respectively, sent letters to Dennis Carlson, Counsel for Discipline for the Nebraska State Bar Association, detailing the above-described transactions. Heinisch's letter was apparently written because of an inquiry, presumably to Carlson, about whether there was a conflict of interest from the Heinisch law firm's simultaneous representation of Clara and the Stephensons. The record does not contain a response from Carlson.

Les died on September 10, 1994, and Clara died 6 days later. Evelyn, whom Clara had nominated as personal representative, retained the Heinisch law firm to represent her concerning Clara's estate. On October 20 and 24, the objectors filed objections to the appointment of Evelyn as personal representative, claiming that Evelyn should not serve as personal representative

because, among other things, (1) Evelyn knew of and participated in three transfers of Clara's real property for less than market value prior to her death; (2) Evelyn knew or should have known that the firm, which represented Clara in the three transfers, had a serious conflict of interest regarding two of the transfers; and (3) Clara did not have the capacity to understand the nature and consequences of her actions when the transfers were made. Additionally, on November 9, the objectors filed a motion to disqualify Heinisch and Anderson as counsel for Evelyn. At a November 23 hearing, the county court granted Heinisch and Anderson leave to withdraw as counsel for Evelyn and accepted the appearance of David Downing as the attorney for Evelyn.

On December 24, 1994, the Heinisch law firm received an opinion from Deryl Hamann, as chairperson of The Advisory Committee for the Nebraska State Bar Association. According to Anderson, the opinion was issued in response to the firm's inquiry as to whether it could represent both Clara's and Les' estates. The advisory committee concluded that continued representation of Evelyn, if she was appointed Clara's personal representative, would violate the provisions of Canon 5 (lawyer should exercise independent professional judgment on behalf of client) and Canon 9 (lawyer should avoid even appearance of professional impropriety) of the Code of Professional Responsibility. Despite their withdrawal as counsel for the personal representative on November 23, Heinisch and Anderson continued to perform legal work on behalf of Clara's estate through January 26, 1995, and such services are included in the fees at issue.

In January 1995, Evelyn, through her counsel Downing, agreed not to object to the appointment of Martha, one of the objectors, as special administrator for the limited purpose of investigating whether it was necessary to bring litigation with respect to the land transfers from Clara to the Stephensons and to the Hafers. In exchange, the objectors agreed to withdraw their objection to Evelyn as personal representative. The county court later appointed Evelyn as personal representative and

Martha as special administrator only with respect to the parcel of real estate transferred from Clara to the Hafers.

In July 1995, the Heinisch law firm filed a claim for attorney fees and expenses against Clara's estate in the amount of $5,671.51, for work performed from September 19, 1994, through January 26, 1995. Evelyn initially filed a notice of disallowance, but later filed a petition for allowance of the claim. The firm also filed a petition in support of its claim for legal fees, which the objectors resisted. At a hearing on October 23, 1995, in Fillmore County Court, counsel for both the firm and the objectors stipulated that the requested attorney fees through and including October 23, 1994 (the day Heinisch recorded 2.2 hours researching conflict of interest issues), were reasonable and should be paid by the estate. Counsel further agreed that the only issue remaining for determination was the liability of Clara's estate for legal services rendered by the firm after October 23.

The county court found that the evidence was clear that "a conflict of interest existed which necessitated the Heinisch firm to withdraw as counsel." The court then evaluated each billing individually to determine if the work performed benefited the estate. The court awarded the firm $5,393.51 of the $5,671.51 requested. The objectors filed a motion for new trial, and the county court, finding that such a remedy was not available, denied the motion. The objectors now timely appeal.

## STANDARD OF REVIEW

[1] This appeal solely concerns a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

## ANALYSIS

The county court found that the evidence was clear that a conflict of interest existed which required the Heinisch law firm to withdraw as counsel. This conclusion is not attacked on appeal by the firm. We operate on the premise that the firm was disqualified from representation of Evelyn as Clara's personal representative because of a conflict of interest. Indeed, the con-

flict of interest is obvious. Nonetheless, the county court awarded the firm $5,393.51 for work which the court determined had benefited the estate. The question is whether an attorney who performs services despite a conflict of interest may receive compensation for such services. Part of that question is whether it makes any difference that the services were of benefit to the estate.

[2] The trial court determined that the instant case was controlled by Neb. Rev. Stat. § 30-2482 (Reissue 1995), which provides that the county court may review the propriety of the employment by a personal representative of an attorney, as well as the reasonableness of the attorney's compensation while working for a personal representative. Section 30-2482 also lists the factors to be considered as guides in determining the reasonableness of a fee, but reasonableness of the charges is not the issue. Section 30-2482 does not speak directly to the issues presented by this appeal, where the personal representative's attorney withdraws due to a conflict of interest.

Many courts have held that once a conflict of interest or other ethical violation has been established, the attorney is prohibited from collecting fees for his or her services. *Pessoni v. Rabkin*, 220 A.D.2d 732, 633 N.Y.S.2d 338 (1995) (attorney whose multiple representation created conflict of interest was not entitled to legal fees for any services rendered); *Eriks v. Denver*, 118 Wash. 2d 451, 824 P.2d 1207 (1992) (attorney who failed to fully disclose conflict before undertaking multiple representation was disgorged of attorney fees); *In re Estate of McCool*, 131 N.H. 340, 553 A.2d 761 (1988) (attorney not permitted to recover attorney fees where representation of estate was fraught with conflicts of interest from its inception); *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982) (firm deemed to have forfeited attorney fees for failing to disclose to client-plaintiff its ongoing relationship with defendant's claims adjuster who was negotiating with plaintiff); *Moses v. McGarvey*, 614 P.2d 1363 (Alaska 1980) (attorneys disqualified from representing shareholders in suit against corporation for conflict of interest were barred as matter of public policy from recovering any fee from either of opposed interests, although there was no indication that attor-

neys acted with improper motive); *White v. Roundtree Transport, Inc.*, 386 So. 2d 1287 (Fla. App. 1980) (attorney's right to fee terminates when attorney realizes or should have realized that he cannot ethically represent client's interests); *Jeffry v. Pounds*, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (1977) (firm which undertook representation of wife of current client in marital dissolution proceedings was limited to value of services rendered preceding breach of professional standards in action to recover attorney fees in husband's unrelated suit). See, also, 1 Robert L. Rossi, Attorneys' Fees § 3.4 (2d ed. 1995).

Some courts, however, have applied a case-by-case approach, weighing all relevant factors in determining whether attorneys are entitled to the reasonable value of their services. *Kidney Association of Oregon v. Ferguson*, 315 Or. 135, 843 P.2d 442 (1992) (trial court has authority, which may be exercised at court's discretion after consideration of facts, to address breaches of lawyer's duty of loyalty to client by denying part of or all attorney fees); *In re Life Ins. Tr. Agreement of Seeman*, 841 P.2d 403 (Colo. App. 1992) (attorney conflict of interest is only one of many factors to be considered in determining award of fees and does not mandate denial of all compensation). *Garrick v. Weaver*, 888 F.2d 687 (10th Cir. 1989) (where ethics violation lacked actual or substantial prejudice to client, court could award attorney fees equal to reasonable value of legal services rendered); *Crawford v. Logan*, 656 S.W.2d 360 (Tenn. 1983) (each case involving misconduct of attorney does not automatically bring about forfeiture of attorney fees, and any forfeiture must be viewed in light of particular facts and circumstances of case).

[3] The Nebraska Supreme Court's ruling in *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995), persuades us that an attorney who performs work, despite a conflict of interest, is generally prohibited from recovering any fees for the work. In *Mullen*, plaintiff's successor counsel to a disqualified law firm sought to protect a fee agreement between it and the disqualified firm from discovery. In this context, successor counsel argued that its disqualified predecessor was entitled to quantum meruit fees for its representation of the client. The court rejected the attorney's argument, specifically holding:

> We do not accept the contention that an attorney can receive fees for representation which from the outset gives the appearance of impropriety and is violative of established rules of professional conduct. An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and inconsistent with the character of the profession. See, *Eriks v. Denver*, 118 Wash. 2d 451, 824 P.2d 1207 (1992); *In re Estate of McCool*, 131 N.H. 340, 553 A.2d 761 (1988); *Moses v. McGarvey*, 614 P.2d 1363 (Alaska 1980).

*Id.* at 390, 534 N.W.2d at 580. The three cases cited by the Nebraska Supreme Court are cases we have cited above, and they all stand for the general principle that once a conflict of interest has been established, an attorney is prohibited from recovering fees for his services, regardless of any benefit to the client.

[4] From these cases, and the Supreme Court's decision in *Mullen, supra*, we conclude that counsel cannot recover fees when the representation is plainly in violation of the ethical requirements of the profession. Here, the Heinisch law firm was faced with the situation that if the transfers to the Stephenson family were not attacked by the personal representative, the residual beneficiaries of Clara's estate would be unhappy—and if the transfers to the Stephenson family were attacked, obviously the Stephensons would be unhappy. Apart from the unhappiness of one or the other of the firm's clients, it is not possible for the firm to give independent advice on the matter of the transfers and avoid the appearance of impropriety. Representation of Clara's estate in such circumstance is plainly against the ethical requirements of the profession. Additionally, we note that 8 months earlier, attorneys Heinisch and Anderson wrote to the Counsel for Discipline as to whether conflicts existed—and at that time both Clara and Les were alive. However, upon Clara's and Les' deaths, the facts concerning the land transaction became "frozen" and not subject to remediation by either Clara or Les.

Although the conflict likely predated the deaths of Clara and Les to the time of the real estate transfer, it unquestionably

loomed large and plain upon their deaths. Accordingly, the representation of the personal representative of Clara's estate by the Heinisch law firm was in plain violation of the ethical requirements of the legal profession and as such it cannot be the basis for compensation.

At trial, counsel for both parties orally stipulated that the fees charged by the Heinisch law firm through October 23, 1994, should be paid by the estate. October 23 is the date the firm billed 2.2 hours for researching conflict of interest issues.

> "[s]tipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. [Citation omitted.]
>
> "Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances."

*In re Estate of Mithofer*, 243 Neb. 722, 726-27, 502 N.W.2d 454, 457-58 (1993) (quoting *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972)).

The disallowance of fees generated after a plain violation of the rules of the profession rests upon an obvious policy of prophylaxis. Therefore, we are concerned about according force and effect to a stipulation which authorizes payment for services performed prior to October 23 for Clara's estate, even though the conflict was plain, certainly at least from the time of the deaths of Clara and Les. In short, the stipulation may be contrary to public policy. However, we recognize that appellate courts determine cases on the theory upon which they were tried. *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992).

Although this doctrine typically relates to the pleadings upon which a case was tried, see *Central States Resources v. First*

*Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993), we think it can fairly be said that the parties tried this case to the lower court on the theory that the only issues were whether Clara's estate owed fees to the Heinisch law firm for work performed after October 23, 1994. For this reason, the trial court did not err when it gave effect to the stipulation. However, the stipulation was strictly limited to fees, and therefore, the photocopying, faxing, mailing, and publishing expenses incurred by the firm prior to and including October 23 are not included in the stipulation. The firm's billing record in evidence reveals that Heinisch and Anderson performed 6.4 hours and 11.6 hours of work, respectively, on Clara's estate through October 23. At stipulated billing rates of $95 per hour for Heinisch and $85 per hour for Anderson, the firm is due a total of $1,594.

In summary, we conclude that any attorney services performed by the Heinisch law firm after October 23, at the very latest (given that we accord the parties' stipulation its intended force and effect), were inconsistent with the requirements of professional responsibility and cannot be compensated. Given the need for fealty to the Code of Professional Responsibility, the fact that there may have been benefit to the estate is insufficient to justify payment for services rendered at a time when counsel should not have been representing the client.

Finally, while not determinative of the appeal, we note in passing that the county court erred in concluding, on the Heinisch law firm's motion for new trial, that such a remedy was not available in the instant case. See *132nd Street Ltd. v. Fellman*, 245 Neb. 59, 511 N.W.2d 88 (1994) (pursuant to Neb. Rev. Stat. § 25-2701 (Reissue 1995), provisions for motions for new trial applicable in district court shall apply in county court). See, also, Neb. Rev. Stat. § 30-2437 (Reissue 1995), *DeVries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979). In any event, the appeal was timely filed.

## CONCLUSION

We conclude that an attorney who has a conflict of interest of which he or she knew, or should plainly have known, may not receive attorney fees for legal services rendered to a client after acquiring such knowledge. The judgment of the county court in

the instant case includes fees for services after October 23, 1994, and expenses. Thus, as said above, the judgment must be modified to limit the Heinisch law firm's recovery to what the parties stipulated—which is $1,594. We remand the matter to the county court for entry of judgment in accordance with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

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## KATHRYN ROSS, APPELLANT, V. BALDWIN FILTERS AND LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEES.

557 N.W.2d 368

Filed December 10, 1996. No. A-96-300.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside the judgment of a Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing.
3. ____: ____. As in other cases, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Words and Phrases.** An occupational disease is a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed.
5. **Workers' Compensation: Time.** Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation.
6. ____: ____. The date of disability in the case of an occupational disease is that date upon which the employee's condition progresses to the point where his or her employment must cease.

7. **Workers' Compensation: Appeal and Error.** Under the provisions of Workers' Comp. Ct. R. of Proc. 11 (1995), all parties are entitled to reasoned decisions which contain findings of fact and conclusions of law which clearly and concisely state and explain the rationale for the decision.

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

William J. Ross and Vikki S. Stamm, of Ross, Schroeder & Romatzke, for appellant.

Thomas D. Wulff and Douglas E. Baker, of Welch, Wulff & Childers, for appellees Baldwin Filters and Liberty Mutual Insurance Company.

SIEVERS, MUES, and INBODY, Judges.

MUES, Judge.

## INTRODUCTION

Kathryn Ross appeals from a decision of the Nebraska Workers' Compensation Court finding that her claim was barred by the statute of limitations and dismissing her petition.

## STATEMENT OF FACTS

Ross, 53 years old at the time of the hearing, began working at Baldwin Filters on September 20, 1976. Although the date is unclear, it appears that Ross first became aware of a skin problem associated with the paper at Baldwin Filters in November 1976. After informing her supervisor, Ross was moved to the "boxing" area, where she did not experience any further problems until 1986. In 1986, Ross suffered from a condition in which her eyes swelled, her whole body itched, and her elbows broke out in a rash. At this time, Ross consulted Dr. L.R. Smith, who treated her condition with shots and medication. Ross also filed a workers' compensation first report with her employer on November 25, 1986, in which she reported swollen eyes and itching due to the paper.

In 1989, Ross was transferred to the "can" department, where her skin broke out again within 2 weeks. Also in 1989, Ross saw Dr. David Kingsley regarding her skin condition. Dr. Kingsley stated in his 1989 report, "It is very possible this is an airborne

and contact irritant dermatitis." The record indicates that Ross continued to see Dr. Smith during 1993 and 1994, complaining of the rash condition. Dr. Smith's reports described Ross' condition in 1994 as "recurrent allergies, on ears, neck, arms and eyes. Probably secondary to exposure at work." According to a letter from Dr. Smith admitted at trial, Ross was suffering from "contact dermatitis, felt secondary to the cardboard."

Ross testified that her skin problems continued from 1986 through 1994; however, she described her outbreaks in 1994 as more severe, more frequent, and affecting more areas of her body. She also stated that by 1986 or at least by 1990, she had been informed by both Dr. Smith and Dr. Kingsley that her exposure to the paper at Baldwin Filters was causing her skin problems.

On April 22, 1994, Dr. Smith recommended to Ross that she quit her job because of the contact dermatitis. According to Ross, she was informed that her condition would only worsen if she continued to work at Baldwin Filters. Ross returned to work at Baldwin Filters on May 3, but immediately broke out into a rash again. She subsequently quit her job on May 5. She has not experienced any similar problems since this date.

Ross could not recall any time that she had missed work prior to the last year due to her contact dermatitis. Sharon Marzolf, a nurse at Baldwin Filters, testified that to the best of her recollection, Ross missed very little, if any, work as a result of her allergies. Ross testified that while she never submitted any of Dr. Smith's medical bills associated with the contact dermatitis or treatment thereof, Dr. Kingsley was paid by workers' compensation, as was a Dr. Hanich, whom she saw on an unknown date. A claims case manager for Liberty Mutual Insurance Company testified, however, that no medical or indemnity benefits had been paid to Ross as a result of her contact dermatitis and that to the best of her knowledge, no such bills had ever been submitted.

On October 6, 1994, Ross filed a petition alleging that on or about May 5, while employed by Baldwin Filters as a production line worker, she sustained personal injuries. According to Ross, she suffered from contact dermatitis, causing swollen

eyes and a rash all over her arms, neck, ears, and eyes. Baldwin Filters and Liberty Mutual filed their answer on November 4, alleging that any substance complained of was ubiquitous rather than characteristic of Ross' employment. A third party petition was filed on March 31, 1995, against the Nebraska Second Injury Fund, which responded by answer on April 5.

## DECISION OF WORKERS' COMPENSATION COURT TRIAL JUDGE

A hearing was held on July 19, 1995, before the Workers' Compensation Court. While Ross testified on her own behalf, Marzolf and the claims case manager testified on behalf of Baldwin Filters and Liberty Mutual. Following Marzolf's testimony, Baldwin Filters and Liberty Mutual moved to amend their answer to allege the statute of limitations. Ross' objection to the motion because it was out of time was overruled.

By order dated August 10, 1995, Ross' petition was found to be barred by the statute of limitations and was dismissed. The court stated in relevant part:

> It is the plaintiff's position that since she missed little work until she was advised to completely quit her employment in May, 1994, that she had no claim until that time. The Court finds, however, the plaintiff knew as early as 1986 she was suffering from dermatitis which she believed to be caused by exposure to paper at work. Two doctors confirmed that possibility.

The court specifically declined to toll the statute of limitations because Ross was unaware that the dermatitis would eventually require her to leave her employment. Finally, the court stated:

> Even if the Court were to find that the statute of limitations had not expired on the plaintiff's claim, it is doubtful the plaintiff has sustained her burden of showing by a preponderance of the medical evidence the necessary causation to sustain a claim. While no magic words are required, a plaintiff must show with reasonable certainty that the disability of which he or she complains is causally connected to her work. While they state their belief that her condition is most likley [sic] related to her work, nei-

> ther the opinion of Dr. Smith . . . [n]or the opinion of Dr. Kingsley . . . [is] stated in sufficiently definite and certain terms to sustain the plaintiff's burden of proof.

## DECISION OF REVIEW PANEL

Ross filed an application for review on August 21, 1995, and a review hearing was held on December 13. By order dated March 1, 1996, the review panel affirmed the trial court's finding that the statute of limitations had run. The review panel also found that the trial court did not abuse its discretion in permitting Baldwin Filters and Liberty Mutual to amend their answer by interlineation to include the statute of limitations defense after Ross had rested. The review panel also stated that had the case not been resolved by the aforementioned, it would have remanded the case for clarification on the finding of causation.

One judge dissented and cited *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995), in support of the conclusion that the statute of limitations had not run in this case. The dissenting judge also opined that the court abused its discretion in allowing Baldwin Filters and Liberty Mutual to amend their answer at the conclusion of Ross' case.

Ross timely appealed to this court. The Second Injury Fund declined to file a brief on appeal.

## ASSIGNMENTS OF ERROR

In sum, Ross asserts on appeal that the court erred in (1) finding that her petition was barred by the statute of limitations, (2) allowing Baldwin Filters and Liberty Mutual to amend their answer at trial to allege the statute of limitations defense, and (3) finding that Ross had failed to sustain her burden of showing that her injury arose out of her employment with Baldwin Filters.

## STANDARD OF REVIEW

[1-3] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, or award;

or (4) the findings of fact by the compensation court do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1993); *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996); *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996). In determining whether to affirm, modify, reverse, or set aside the judgment of the review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing. *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994). However, as in other cases, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Berggren, supra*; *Shilling v. Moore*, 249 Neb. 704, 545 N.W.2d 442 (1996).

## ANALYSIS

*Statute of Limitations.*

The first issue presented is whether the statute of limitations applicable to workers' compensation actions bars Ross' action. Ross argues that since this is an occupational disease case, the statute of limitations did not begin to run until the date her physician informed her she could no longer work (April 1994) or, alternatively, when she actually ceased working (May 1994). In contrast, Baldwin Filters and Liberty Mutual argue that Ross' cause of action accrued on the date she acquired knowledge of her work-related illness (1986 or at least by 1990).

[4] Neb. Rev. Stat. § 48-137 (Reissue 1993) provides that in cases of personal injury, all claims are barred unless a petition is filed within 2 years of the accident or the last payment of compensation. An accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Neb. Rev. Stat. § 48-151(2) (Reissue 1993). An occupational disease is defined as "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and shall exclude all ordinary diseases of life to which the general public is exposed." § 48-151(3). Accord, *Berggren, supra*; *Ritter v. Hawkeye-Security Ins. Co.*, 178 Neb. 792, 135 N.W.2d 470 (1965). It is not necessary that the disease originate exclu-

sively from the employment, but only that "the conditions of the employment must result in a hazard which distinguishes it in character from employment generally." *Ritter*, 178 Neb. at 795, 135 N.W.2d at 472.

[5] The issue of when the statute of limitations begins to run in occupational disease cases was first decided in *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956). In *Hauff*, the employee worked as a granite cutter from 1915 until July 1954. In the spring of 1954, the employee experienced difficulty breathing when he was lying down or exerting himself. With his condition worsening, the employee became unable to work on July 3, 1954, was hospitalized in August 1954, and died in November 1954. The cause of death was silicosis, which the court determined was an occupational disease. The court then held that the employee's cause of action did not accrue until the injury to the employee culminated in his disability in July 1954. In so holding, the court quoted *Associated Indem. Corp. v. Indus. Acc. Com.*, 124 Cal. App. 378, 12 P.2d 1075 (1932):

> "Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be 'injured' only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation; and the 'date of injury', within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred, and the six months' period of limitations runs from that date *and not from the time the employee has knowledge of the disease*."

(Emphasis supplied.) *Hauff*, 163 Neb. at 61, 77 N.W.2d at 687.

This language was again quoted with the emphasized portion omitted in *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). Similar to the situation in *Hauff*, the date the employee quit working in *Osteen* was nearly simultaneous to the date of diagnosis and resulting death. In *Osteen*, the employee ceased working and entered the hospital on February 1, 1977. Cancer was subsequently discovered, and the employee

died on March 18. It was only after the autopsy that the cause of death, peritoneal mesothelioma, was found to be employment related. The court stated, "The earliest date upon which we could hold that the disease manifested itself in disability was February 1, 1977." *Id.* at 286, 307 N.W.2d at 518.

Both sides contend that *Osteen, supra*, states the applicable rule for occupational diseases. We agree. The issue then becomes, Upon what date did Ross become disabled for the purpose of the *Osteen* rule?

Unlike *Hauff* and *Osteen*, in which the employee experienced a manifestation of symptoms, the complete inability to work, and medical diagnosis almost simultaneously, Ross clearly had knowledge of her employment-related disease prior to ceasing her employment with Baldwin Filters. Baldwin Filters and Liberty Mutual rely upon this distinction and assert the well-established rule in Nebraska applicable to latent injuries that the statute of limitations begins to run once the employee has knowledge of a compensable injury. See, *Gloria v. Nebraska Public Power Dist.*, 231 Neb. 786, 438 N.W.2d 142 (1989); *Cemer v. Huskoma Corp.*, 221 Neb. 175, 375 N.W.2d 620 (1985); *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985); *Thomas v. Kayser-Roth Corp.*, 211 Neb. 704, 320 N.W.2d 111 (1982); *McGahan v. St. Francis Hospital*, 200 Neb. 406, 263 N.W.2d 845 (1978); *Novak v. Triangle Steel Co.*, 197 Neb. 783, 251 N.W.2d 158 (1977); *Ohnmacht v. Peter Kiewit Sons Co.*, 178 Neb. 741, 135 N.W.2d 237 (1965).

Baldwin Filters and Liberty Mutual go on to argue that knowledge that there is a compensable disability and not awareness of the full extent thereof is controlling. See *McGahan, supra*. While a well-based argument, it ignores the fact that a different rule has been applied to occupational diseases.

Accordingly, Ross argues that *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995), is controlling. In that case, Hull, a dentist, experienced an outbreak of contact dermatitis in 1960 and again in 1987. He subsequently suffered a severe outbreak in June 1988, causing him to miss approximately 1 week of work, and his condition, thereafter, progressively worsened.

On March 13, 1989, a dermatologist treating the contact dermatitis recommended that Hull cease practicing dentistry. Another physician made the same recommendation that same month. In January 1991, Hull ceased practicing dentistry. He then sought workers' compensation benefits.

The issue presented in *Hull* was, for liability purposes, whether the last injurious exposure rule focuses on the date of injury or on the date of last exposure to the disability-causing substance. In its analysis, the court had to first determine, in the case of an occupational disease, the date of injury. It stated that "an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation." *Id.* at 719, 529 N.W.2d at 789 (citing *Osteen, supra*). The *Hull* court then had to determine, as we do here, in the case of an occupational disease, the date upon which the employee becomes "disabled." It stated:

> Hull suffered from contact dermatitis due to substances in the workplace in 1960 and 1987 through 1990. It was not until March 1989, however, that his occupational disease manifested itself to a level of disability. Therefore, Hull became disabled and entitled to the workers' compensation he seeks on March 13, 1989 . . . .

249 Neb. at 719, 529 N.W.2d at 789.

[6] Thus, while Baldwin Filters and Liberty Mutual correctly point out that the statute of limitations was not an issue in *Hull*, that court clearly defined the date of disability in the case of occupational diseases.

We also note that Hull was not found to be disabled until March 1989, although he had evidently experienced at least temporary disability as early as 1988, when he missed approximately a week of work as a result of the contact dermatitis. Using that court's rationale, we likewise find that Ross became disabled and first entitled to the workers' compensation benefits she seeks in April 1994. We reach this result, even though Ross, like Hull, was affected somewhat in her employment before the date of disability, as evidenced by Baldwin Filters' adjusting her

work environment in response to her complaints and possibly by a minimal amount of missed work.

This analysis is consistent with the definition and general treatment of the concept of "disability" under Nebraska workers' compensation laws. For example, "disability" within the meaning of Neb. Rev. Stat. § 48-128 (Reissue 1993), which addresses preexisting disabilities for the purpose of the Second Injury Fund, is defined as "an employee's diminution of employability or impairment of earning power or capacity." *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 909, 464 N.W.2d 343, 349 (1991). For the purpose of Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1993) (schedule of compensation), "disability" is defined "in terms of employability and earning capacity." *Minshall v. Plains Mfg. Co.*, 215 Neb. 881, 885, 341 N.W.2d 906, 909 (1983). Ross' employability at Baldwin Filters first diminished in April 1994, when her condition had progressed to the point where her employment there had to cease.

Thus, we conclude that the statute of limitations did not begin to run until April 1994, and the trial court erred in dismissing Ross' petition. As such, we need not address Ross' second assigned error, that the trial court erred in allowing Baldwin Filters and Liberty Mutual to amend their answer to include the statute of limitations defense. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

*Causation.*

[7] Regarding Ross' third assigned error, we agree with the review panel that the language of the trial court's order of dismissal which addressed the causation issue is unclear. We cannot determine whether the trial court's comments were based on a conclusion that the medical evidence was insufficient as a matter of law to establish causation or on a factual finding that causation had not been proved by a preponderance of the evidence. Under the provisions of Workers' Comp. Ct. R. of Proc. 11 (1995), all parties are entitled to reasoned decisions which contain findings of fact and conclusions of law which clearly and concisely state and explain the rationale for the decision. See *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424

(1996). The rule also requires a specification of the evidence upon which the judge relied. *Id.*

If the trial court determined the medical evidence to be legally insufficient because the degree of certainty required of the medical evidence was not met, such conclusion is contrary to law, as correctly noted by the review panel. See *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996) (in workers' compensation cases, expert medical testimony couched in terms of "probability" is sufficient). We, of course, render no opinion as to the weight to be given such testimony, as that issue is not before us.

The order of the review panel affirming the trial court's dismissal based on the running of the statute of limitations was legally erroneous and thus in excess of its powers. The order is reversed and the judgment of dismissal vacated. The cause is remanded to the compensation court with directions that the judge who conducted the initial hearing enter an order on the evidence adduced which complies with rule 11, and for such further review thereof as the parties may institute under law.

## CONCLUSION

In workers' compensation cases involving a claim for occupational diseases, the statute of limitations begins to run only when the accumulated effects of the disease manifest themselves, which is when the employee becomes disabled and entitled to compensation. Therefore, the statute of limitations began to run on Ross' claim in April 1994, and her petition is not barred by the statute of limitations.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

# FRANCISCO J. GUTIERREZ, APPELLEE, V. ZENAIDA GUTIERREZ, APPELLANT.

557 N.W.2d 44

Filed December 17, 1996. No. A-95-708.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of that of the trial court.
3. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion.
4. **Motions for Mistrial: Appeal and Error.** A trial court's decision on a motion for mistrial will not be disturbed on appeal absent an abuse of discretion.
5. **Words and Phrases.** An abuse of discretion means that the reasons for the ruling are untenable and unfairly deprive a litigant of a substantial right and deny a just result in the matter submitted for disposition.
6. **Motions for Continuance: Affidavits: Good Cause.** An application for a continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of the proceedings.
7. **Motions for Mistrial: Waiver: Time.** A motion for mistrial should be made at the first reasonable opportunity. If not timely made, it is waived.
8. **Motions for Mistrial.** A motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice.
9. **Judgments: Proof.** A district court may, on motion and satisfactory proof that a judgment has been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.
10. **Judgments: Final Orders.** Neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.
11. **Judgments: Debtors and Creditors: Equity.** A judgment debtor or debtor under a decree in equity may satisfy the obligation of such judgment or decree by performance of an agreement to satisfy in some manner other than that provided by the judgment or decree.
12. **Contracts.** Evidence of a conversation in which one party states mere conclusions as to a contract is not evidence of the contract.

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

Marsha L. Babcock and Bernard J. Glaser, Jr., for appellant.

Thomas R. Lamb, of Anderson, Creager & Wittstruck, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

MUES, Judge.

## I. INTRODUCTION

Zenaida Gutierrez appeals from a judgment granting her ex-husband, Francisco J. Gutierrez, credit for payment of a property settlement judgment and ordering that the judgment lien against Francisco be released.

## II. STATEMENT OF CASE

Francisco and Zenaida were divorced by decree on June 1, 1990. Prior to entry of this decree, a guardian ad litem was appointed on behalf of Zenaida as she was reportedly unable to adequately assist her attorney or understand the nature of the legal proceedings. The decree approved the parties' property settlement agreement and ordered three of the parties' rental properties to be sold as soon as practicable. After payment of outstanding mortgages and costs of sale, Zenaida was to receive the first $10,000, with the remaining proceeds to be applied to several debts specified in the decree. Portions of the decree will be set forth later as necessary.

On June 4, 1993, Francisco filed a "Petition for Credit and Release of Lien & Praecipe," in which he requested full credit for the decree obligations and release of judgment. The petition alleged that of the three properties ordered to be sold, one was unsalable due to deterioration; Francisco had to pay $850 to close the sale of the second property, and the parties netted $7,021 from the sale of the third. The petition further alleged that the parties agreed that Francisco was to use the $7,021 to pay the debts at Sears, Roebuck and Co. and Montgomery Ward & Co.; Zenaida was to receive the remainder of the $7,021; and Zenaida was to release Francisco from his obligation under the decree and grant him credit for the full $10,000 judgment.

A demurrer was filed July 8, 1993. Although the record contains no written order, comments from the trial judge indicate that a demurrer was overruled on August 13. On October 26, Zenaida filed an answer denying the allegations and a cross-

petition, in which she sought alimony. A motion to continue was filed April 12, 1994, and Zenaida's attorney filed a motion to withdraw on April 15. This request to withdraw was granted by journal entry on May 16.

The matter came on for hearing on June 1, 1994. Zenaida requested another continuance, which was denied. Zenaida then orally moved to dismiss for lack of subject matter jurisdiction. This motion was overruled.

Francisco was then called to testify on his own behalf. He testified as to the condition of the properties and further stated that since the time of the decree, Zenaida had received nearly all of the rent from the properties while he had made all of the mortgage payments and necessary repairs. Francisco further testified that the sale of only one of the properties resulted in a profit to the parties and that this amount was $7,021. Francisco also attested as to the alleged oral agreements between the parties. This testimony will be set out in more detail in the discussion portion of this opinion. Finally, Francisco testified regarding the amounts owed and paid to Sears and Wards. Three real estate agents then testified regarding the properties sold, and Francisco rested. Zenaida's renewed motion to dismiss for lack of subject matter jurisdiction and motion for insufficient evidence were overruled. Zenaida's motion to dismiss her cross-appeal without prejudice was granted.

Called as witnesses on behalf of Zenaida were Francisco's current wife, who denied forging Zenaida's name on the cashed check for $7,021; Zenaida's former attorney, Sandra Hernandez Frantz, who denied being present during a conversation in which Zenaida agreed to give Francisco full credit for the $10,000; and the parties' daughter, who testified that the signature on the cashed check was not her mother's. Last, Zenaida testified, denying any oral agreement between the parties and also denying that it was her signature on the cashed check. She then rested. The matter was continued to allow rebuttal testimony and was set for August 12, 1994.

On August 5, on Zenaida's motion, the court appointed a guardian ad litem and continued the matter. On December 9, on the guardian ad litem's motion, the hearing rescheduled for December 16 was continued so that a psychological evaluation

could be done on Zenaida. The trial was reset for February 16, 1995. This evaluation was admitted into evidence at a pretrial conference held February 2. At that hearing, Zenaida was found incompetent to participate further in the proceedings. Francisco's attorney moved to strike testimony elicited from Zenaida at the June 1, 1994, hearing based on her incompetency. The court took the matter under advisement and advised the parties that a continuance of the February 16, 1995, hearing was unlikely.

On February 16, the court advised it had sustained Francisco's motion to strike Zenaida's testimony. The court denied Zenaida's followup oral motion to strike from the June 1, 1994, hearing, statements or conduct of Zenaida since the time of the decree. Zenaida then orally moved for another continuance until she could testify regarding the alleged agreement. This request was overruled. She then moved for a mistrial, which was also denied. At this hearing, Francisco testified as a rebuttal witness and Zenaida called one additional witness on surrebuttal. At the close of all of the evidence, Zenaida proceeded to renew all of her motions, which were again overruled.

On May 30, 1995, the district court, after finding the allegations contained in Francisco's petition generally true, granted Francisco credit for payment of the $10,000 property settlement judgment and released the judgment lien against him.

## III. ASSIGNMENTS OF ERROR

Zenaida's assignments of error can be consolidated as asserting that the trial court erred in (1) overruling her demurrer and her motion to dismiss as this action constitutes an invalid request to modify the property settlement portion of the parties' dissolution decree; (2) overruling her June 1, 1994, motion to continue to give her new counsel sufficient time to prepare for the hearing; (3) overruling her motion for a mistrial upon finding her incompetent and striking her testimony, because such was an abuse of discretion and violated her right to due process of law; (4) overruling her motion to dismiss based on insufficient evidence because of her stricken testimony; and (5) granting Francisco credit for $10,000, which was not supported by the evidence.

## IV. STANDARD OF REVIEW

[1] Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). See *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996).

[2] In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of that of the trial court. *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996).

[3-5] A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995). Likewise, a trial court's decision on a motion for mistrial will not be disturbed on appeal absent an abuse of discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). An abuse of discretion means that the reasons for the ruling are untenable and unfairly deprive a litigant of a substantial right and deny a just result in the matter submitted for disposition. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996).

## V. DISCUSSION

### 1. Motions for Continuance and Mistrial

Zenaida's second and third assignments of error are directed to prejudice caused to Zenaida when the hearings proceeded on June 1, 1994, despite her request for a continuance and on February 16, 1995, despite her request for a mistrial. According to her, the court's denial of her June 1, 1994, motion for continuance denied her new counsel sufficient time to prepare for the June 1 hearing or to familiarize himself with Zenaida's mental condition. Similarly, she claims the court, once aware of Zenaida's incapacity to testify and having stricken her testimony, should have granted her motion for a mistrial to allow her to regain her competency, start anew, and present testimony as to her incapacity to agree to the matters as alleged by Francisco. We find Zenaida's arguments to be without merit.

(a) June 1 Continuance

[6] First, we address Zenaida's motion for continuance of June 1, 1994. Zenaida's sole basis for said motion was that her attorney had been very recently retained and unable to properly prepare. She argues that the prejudice is obvious because he put her on the stand when it was later determined she was mentally incompetent to testify. At the outset, we note that an application for a continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of the proceedings. Neb. Rev. Stat. § 25-1148 (Reissue 1995); *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). An oral request is not sufficient to comply with this requirement. See *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987). No written request or affidavit is found in the record. The only ground asserted as of June 1, 1994, was that Zenaida's counsel had just been retained. A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion. *Adrian, supra.*

Francisco's petition was filed June 4, 1993. Zenaida's first attorney withdrew, and another attorney appeared and filed an answer out of time on October 26. A motion for a continuance filed April 12, 1994, was allowed based upon the second attorney's April 15 motion to withdraw. According to the court's docket notes of May 16, this attorney was directed to notify Zenaida that trial "remains set for 5-31-94 trial panel." Based on the record and the facts obtained at that time, we cannot say that the denial of this continuance was an abuse of discretion.

(b) Motion for Mistrial

Regarding her motion for a mistrial made at the commencement of the February 16 final hearing, Zenaida argues that its denial was an abuse of discretion which operated to deny her due process of law.

[7,8] A motion for mistrial is directed to the discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of that discretion. *Nichols v. Busse*, 243 Neb. 811, 503

N.W.2d 173 (1993). A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction of incompetent matters provide examples of events which may require the granting of a mistrial. *Id.* A motion for mistrial should be made at the first reasonable opportunity. If not timely made, it is waived. *Nichols, supra.* Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Id.* In addition to being timely, a motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice. *Groves, supra.*

In essence, it is Zenaida's position that the court should have declared a mistrial after it struck her testimony from the June 1, 1994, hearing upon a finding that she was not competent to participate in further proceedings. Before addressing this, however, we note that Zenaida does not assign as error the February 2, 1995, finding of her incompetency to participate in further proceedings, the striking of her testimony from the June 1 hearing, the denial of her motion to strike her postdecree statements and conduct, or the denial of her February 16, 1995, motion for continuance. We also note that at no time did Zenaida seek to reopen her June 1 rest to offer additional testimony in opposition to Francisco's petition, nor did she seek to amend the answer which she filed in October 1993 to add an allegation of her incapacity to contract.

Zenaida's behavior at the June 1, 1994, hearing was, according to her counsel, suspect. Her August 5 motion to appoint a guardian ad litem was so "such person [could] conduct an independent investigation to assure that the welfare and interests of [Zenaida] are protected." The guardian ad litem's motion for continuance sought a psychological evaluation of Zenaida "for the purpose of providing an assessment as to her cognitive functioning and mental capacity to meaningfully participate in the pending litigation . . . and specifically to address whether Zenaida . . . has the sustained ability to adequately assist her attorney and to understand the nature of these legal proceedings."

On February 2, 1995, a psychological evaluation of Zenaida conducted by Joseph S. Swoboda, Ph.D., a licensed and certified psychologist, was received in evidence. Its stated purpose was "to ascertain [Zenaida's] mental condition in relation to *upcoming* legal proceedings, specifically relating to [Zenaida's] *current* mental capacity and cognitive functioning, i.e. her ability to assist her attorney in preparing for court and her ability to competently testify as a material witness in a pending case." (Emphasis supplied.) When asked about her testimony, the report stated that Zenaida had "declared it all to be 'nonsense' and could not recall what her testimony was . . . ." With regard to medications, Swoboda reported that Zenaida "acknowledged that she has overused them in the past, referencing a time when she was in court last August [sic] where she overtook some of her Amitriptyline and stated she spent much of the time on the stand 'in a fog.'" Swoboda's diagnosis was that Zenaida experiences several personality disorders of some sort with histrionic and dependent features and that under extreme emotional duress, she experiences severe thought disintegration, deluded ideation, problems with memory and concentration, and excessive emotional reactivity. Swoboda concluded Zenaida was capable of functioning marginally on a daily basis and appears to have "adequate intellective functioning," but she was "not *currently* competent to undertake court proceedings, nor to make an active effort in working with her attorney on her own behalf. It seems apparent that she has disorganized thinking and behaviors sufficient to preclude her being a witness in a court proceeding *at the present time* also." (Emphasis supplied.) Finally, Swoboda opined that given her levels of disorganization, the prognosis for Zenaida's response to treatment was "poor to guarded" and due to her inconsistency in attending treatment sessions, it was his prognosis that "treatment effects would at best have marginal impact."

On February 2, 1995, the court determined that Zenaida was not capable of participating in further proceedings. Francisco's motion to strike Zenaida's June 1, 1994, testimony was eventually sustained. On February 16, 1995, Zenaida moved to strike from the evidence any statement or conduct made by her since the date of the decree of dissolution on the basis that Zenaida

was not competent during that timeframe. This motion was overruled. Zenaida's motion to continue the matter until she regained competency to act as a witness and to assist in her case was also overruled. Her motion for a mistrial was similarly overruled.

Several things are apparent from this history. First, there can be little question that Zenaida's mental stability was suspect as of August 5, 1994. Four months passed. The December 12 continuance was granted for the very purpose of a psychological evaluation, with her mental capacity being an open and obvious concern to all. Another 1½ months passed. On February 2, 1995, at the "pretrial conference," Zenaida's mental instability, at least as far back as the June 1, 1994, hearing, was clear. While her mental capacity preceding June 1 was not specifically addressed in Swoboda's report, the district court file reflected that a guardian ad litem had been appointed in the original divorce proceedings. No motion for mistrial was made until February 16, 1995, over 6 months after the obvious simply became more obvious and far later than the first reasonable opportunity to do so.

More important, we fail to see how Zenaida was prejudiced by the denial of this motion. The basis for Zenaida's motion is that she is entitled to start anew because the striking of her testimony eradicated all evidence which could have been offered to challenge Francisco's version of the agreement on the distribution of these sales proceeds. This is not entirely true. Zenaida's daughter testified that the check did not bear her mother's signature and was, by inference, forged; Zenaida's former attorney also disputed Francisco's claim that an agreement was reached between him and Zenaida in her presence. Moreover, the Nebraska Supreme Court has noted that while a party to a civil action ordinarily has the right to attend trial, the party's inability to attend does not necessarily require a continuance of the matter. *Jordan v. Butler*, 182 Neb. 626, 156 N.W.2d 778 (1968) (court did not abuse discretion in denying continuance even though party absent due to illness where no prejudice occurred). If such a situation should arise, an application showing that the party is a material witness and a recitation of the material facts the party would attest to is required. *Id.* Compare

*Juckniess v. Howard*, 120 Neb. 213, 231 N.W. 843 (1930) (party has right to be present and participate in proceedings even if incompetent to testify; therefore, court erred in denying continuance). Unlike *Juckniess*, however, in which the party's inability to participate in the proceedings was unforeseen, the timeliness here shows that Zenaida's representatives anticipated a problem and had adequate time to deal with the potential unavailability of Zenaida's testimony.

Zenaida also asserts prejudice in that she was given no opportunity to raise the "real" defense of her incompetency. However, the record discloses no impediment between August 5, 1994, and February 16, 1995, to Zenaida's developing evidence on the issue of her mental capacity in February 1992, the timeframe of the agreements as testified to by Francisco. No attempt was made to offer any such evidence at any point. Contrary to Zenaida's contentions, the evidence offered does not address Zenaida's mental situation during that timeframe. Swoboda's report addresses only Zenaida's testimony at the June 1 hearing and his opinion as to her *current* (as of the date of his report—January 1995) ability to participate and to testify. It did not address her mental state between the date of the final decree hearing in April 1990 and the June 1, 1994, hearing.

Some 8½ months passed from June 1, 1994, to February 16, 1995. For at least 6 of those 8½ months, Zenaida's mental capacity was at the forefront of the delays in this litigation. During those 6 months, a guardian ad litem was in place to guard, protect, and further her interests. Zenaida was not denied the opportunity to raise the defense of incapacity to contract.

We agree that Zenaida's ability to present her own testimony was precluded by the unique circumstances of this case. Yet, at most, a mistrial would have delayed resolution to an indefinite future time. As Swoboda's report discloses, the future looks no brighter for Zenaida's mental ability to testify than does the present. Moreover, Zenaida's regaining of her mental capacity to testify would in no way assure her competency to then relate events which occurred during a time when she was allegedly incompetent. Indeed, the contrary appears to be the case. Zenaida's argument ignores the fact that her current incapacity to testify did not preclude her from proving incapacity to con-

tract during the relevant time periods. Logic suggests that such incapacity is more often proved through observation and opinion of third persons than through the testimony of the one whose capacity is questioned. Zenaida was not denied the opportunity to offer such evidence to challenge her mental capacity at the time of these alleged agreements.

Faced with a difficult issue, the district court denied the motion for mistrial and moved forward to resolve a matter then pending for nearly 20 months. Because the motion was untimely and because Zenaida has failed to convince us that the denial of it was an abuse of discretion, we find no merit in this assignment of error.

### 2. Court's Authority to Decide Dispute

In her first assignment of error, Zenaida essentially argues that the trial court erred in allowing this case to proceed as Francisco's petition for credit constitutes an invalid request to modify a property settlement provision of the parties' dissolution decree. In sum, Zenaida claims that the trial court should have dismissed this action because it had no authority to grant the relief sought.

[9] Neb. Rev. Stat. § 25-2210 (Reissue 1995) provides in relevant part: "Whenever any judgment is paid and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." Referring thereto, the Nebraska Supreme Court has long stated: " 'The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.' " *Hopwood v. Hopwood*, 169 Neb. 760, 761, 100 N.W.2d 833, 834 (1960) (citing *Manker v. Sine*, 47 Neb. 736, 66 N.W. 840 (1896)). See, also, *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991); *Scott v. Scott*, 223 Neb. 354, 389 N.W.2d 567 (1986); *Cotton v. Cotton*, 222 Neb. 306, 383 N.W.2d 739 (1986).

Referring to the "inherent power of a court to determine the status of its judgments," the court in *Cotton*, 222 Neb. at 306-07, 383 N.W.2d at 740, granted the respondent credits against a judgment for alimony and child support as a result of payments he made directly to the petitioner, rather than, as required by the

decree, through the clerk of the court. Similarly, in *Berg, supra*, the Supreme Court affirmed a decision granting a father credit against child support arrearages where the evidence established that two of the children for whom the father was ordered to pay support lived with him for a definite period of time, during which he directly provided for their full support. In both *Cotton, supra*, and *Berg, supra*, the Supreme Court rejected the argument that by granting a credit, it was modifying a previous order of the court. See, also, *Hopwood, supra*.

Likewise, we do not view Francisco's motion as seeking a modification of the decree. Rather, it seeks to prove that the judgment had been fully satisfied. Consequently, the court did not err by allowing the case to proceed. However, Zenaida's argument that the *effect* of the trial court's order was to modify the decree merits discussion.

According to Zenaida, the trial court effectively modified the terms of the dissolution decree in two respects. First, she claims the trial court's order reduced the amount of Zenaida's "lien" to less than $10,000. Second, she contends the trial court's order changed the priority of the obligations to be paid from the realty sale proceeds. In support of her argument that the court's decision constitutes a modification, Zenaida cites *Mays v. Mays*, 229 Neb. 674, 428 N.W.2d 618 (1988), and *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988). In both of these cases, the Supreme Court stated that a trial court lacks the authority to modify, during contempt proceedings, the terms of an earlier order for support or division of property. See, also, *Neujahr v. Neujahr*, 218 Neb. 585, 357 N.W.2d 219 (1984). *Mays* and *Meisinger* are distinguishable. First, this action was not a contempt proceeding. Second, the trial court did not modify the terms of the decree. Our discussion requires us to determine what the decree means.

To determine the amount due under the decree, we must look to the decree itself. As previously set forth, the decree approved the terms of the parties' property settlement agreement and specifically ordered that three of the parties' rental properties be sold as soon as practicable. The decree then provided:

> The net proceeds from the sale of the rental properties listed above, after payment of the expenses of sale of said

properties, and any mortgage amounts against said properties, shall be applied as follows:

a. Respondent shall receive as property settlement, and not as alimony, the sum of Ten Thousand Dollars ($10,000.00);

b. The payment of any remaining mortgage amounts due at the Goodyear Employee's Credit Union, which sums represent mortgages covering any of the properties of the parties;

c. To the payment of any capital gains tax due as a result of the sale of the properties;

d. To payment of the joint obligation of the parties at FirsTier Bank;

e. To the payment of the joint obligation of the parties to Montgomery Ward and Company;

f. To the payment of the joint obligation of the parties to Sears, Roebuck and Company[.]

The decree also provided:

> [P]ending sale of the rental properties of the parties, the financial obligation of the parties shall remain in tact, and the mortgage amounts due to the Goodyear Employee's Credit Union shall continue to be paid by [Francisco] provided, however, that the parties are ordered to cooperate fully with one another to list the rental properties for sale, and to use every effort to sell the properties.

[10] In interpreting the terms of a decree, the Nebraska Supreme Court has stated:

> [T]he fact is that neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.

*Neujahr v. Neujahr*, 223 Neb. 722, 728, 393 N.W.2d 47, 50-51 (1986).

It is clear that the decree anticipated that Zenaida's $10,000 payment was dependent upon the realty proceeds. The decree does not provide what is to occur if the realty proceeds are insufficient to pay the items listed. The only reasonable inter-

pretation of the decree is that Zenaida was to receive up to $10,000 of proceeds remaining after payment of "expenses of sale . . . and any mortgage amounts against said properties" with the remaining obligations to be paid in the order that they appear in the decree, to the extent the remaining proceeds, if any, allowed it.

Therefore, Zenaida's argument that approving her receipt of anything less than $10,000 as satisfaction of her judgment worked a modification of the decree is without merit. The decree did not guarantee her a judgment of $10,000.

[11] Next, Zenaida contends that the trial court modified the terms of the decree by approving Francisco's use of proceeds to pay creditors of lower priority in the decree than Zenaida, i.e., Sears and Wards, creditors listed as items e and f. We disagree. The trial court's order was based on a finding that there was an oral agreement made between the parties in which both agreed to something different than that provided in the decree.

> The general aspect of a decree or judgment represents a right on the one hand and an obligation to respond on the other. Responses may be made agreeable to the terms of the decree or judgment but this is not exclusive. If the holder of the right is willing to and does accept something different he may do so. . . .
>
> It is well established by reported cases in numerous jurisdictions that a judgment debtor or debtor under a decree in equity may satisfy the obligation of such judgment or decree by performance of an agreement to satisfy in some manner other than that provided for by the judgment or decree.

*Powell v. Van Donselaar*, 162 Neb. 96, 98, 75 N.W.2d 105, 106 (1956). In *Powell*, the plaintiff filed suit alleging that the defendant had failed to comply with the court's decree. The defendant responded that he had performed in accordance with an oral agreement reached by the parties which varied the requirements of the decree. Pursuant to a local court rule requiring that all stipulations be in writing or in open court, the trial court disallowed all evidence pertaining to the existence of this oral agreement. The Nebraska Supreme Court found that the omission of such evidence was error.

Francisco's petition sought to prove that the parties had agreed to, and Francisco had performed, something other than that required by the decree. The order of the court found such an agreement. Zenaida's argument that the court was without authority to enter an order based upon such a finding is without merit.

### 3. Sufficiency of Evidence

In her fourth and fifth assignments of error, Zenaida attacks the sufficiency of the evidence to support the court's order. We have already determined that the court was not required to find that Zenaida received a sum no less than $10,000 in order to release Francisco from this judgment. As to the court's factual findings, both parties agree that our standard of review in this case is de novo on the record. See, also, *Cotton v. Cotton*, 222 Neb. 306, 383 N.W.2d 739 (1986); *Hopwood v. Hopwood*, 169 Neb. 760, 100 N.W.2d 833 (1960); *Knaack v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927).

Our de novo review of the record leads us to conclude that the district court's finding that Francisco and Zenaida agreed to use the realty proceeds to pay Sears and Wards first was not an abuse of discretion. Francisco testified that Zenaida telephoned him shortly after closing and told him that she could not afford to pay these two creditors. According to Francisco, Zenaida asked him to use the $7,021 to pay Sears and Wards. He did this and gave the remaining money, approximately $744, to Zenaida. Thus, we agree with the trial court that Zenaida agreed to use a portion of the $7,021 to pay Sears and Wards.

However, we disagree with the trial court that Zenaida agreed to fully release Francisco from his obligation to pay her any further under the decree. Francisco admits that the parties did not discuss the sums owed to Zenaida under the decree in the aforementioned conversation. Rather, Francisco testified that the $10,000 was discussed in a meeting attended by himself, Zenaida, and her then attorney, Frantz, some time after July 1992. However, when asked specifically if Zenaida said anything about the $7,000 being in lieu of the $10,000, Francisco testified, "I don't remember — be truthful."

However, Frantz testified that she was never present during a conversation with Francisco and Zenaida in which Zenaida agreed to give Francisco full credit for the $10,000 and a receipt representing satisfaction of the same. Rather, she testified that Francisco told her that he had agreed to pay off some debts and that he now wanted credit for the $10,000 as a result. Francisco reaffirmed on rebuttal that an agreement was reached between himself, Zenaida, and Frantz that the money as applied would be in satisfaction of the $10,000 judgment.

[12] We find the evidence insufficient to establish that an agreement to release was ever made. Francisco's testimony on June 1, 1994, does not even attempt to establish that Zenaida agreed to provide a receipt or release in exchange for payment of the debts and the $700 to her. Francisco merely testified that the parties agreed that the $10,000 payment was to come from the realty proceeds. That is clear from the decree itself without agreement of the parties. An agreement requires a meeting of the minds. See *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995). Addressing oral contracts, the Supreme Court has noted that the assertion of such "'"should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established."'" *Yates v. Grosh*, 213 Neb. 164, 167, 328 N.W.2d 200, 202 (1982). Moreover, evidence of a conversation in which one party states mere conclusions as to a contract is not evidence of the contract. *Red Line Mutual Telephone Co. v. Pharris*, 82 Neb. 371, 117 N.W. 995 (1908). Francisco failed to prove the existence of an agreement in which he was to be fully released from his obligations under the decree by virtue of his paying Sears and Wards in full from the realty proceeds and giving Zenaida the remaining balance.

This does not mean that the trial court's grant to Francisco of some credit was an abuse of discretion. As set forth above, we believe the evidence supports a finding that Zenaida knew that the $7,021 was realty proceeds and that she requested that Sears and Wards be paid first, notwithstanding the terms of the decree. Apparently, Sears was paid $3,804, while Wards received $2,073. There is no evidence as to *when* these debts

were incurred, although it is evident from the decree that they existed, in some amount, at the time of the decree. The decree provides, somewhat unconventionally, that the parties' financial obligations would remain "intact" pending sale of the properties. We interpret the decree to mean that the financial obligations of the parties *existing at the time of the decree* would continue as they were, including the joint obligation to Sears and Wards.

The decree does not address postdecree obligations, which naturally would be the sole responsibility of the party incurring them. Moreover, the evidence does not disclose what portion of these debts, if any, was incurred postdecree. It was Francisco's burden, as the moving party, to prove such matters. Indeed, Francisco's testimony seems to conclude that he and Zenaida were jointly, and thus equally, liable for the Sears and Wards debts as of the date he paid them. Therefore, we treat them as such.

Thus, the payment resulted in each party's obligation on the joint debts being paid in full, each benefiting in the amount of half of the combined debt. Zenaida received the remaining $744 in cash. Thus, Zenaida received the benefit, at her request, of $3,683 of the real estate proceeds. Francisco should be credited for that amount. Accordingly, in order to satisfy the decree, Francisco owes Zenaida $3,338, the difference between $7,021 and $3,683.

## VI. CONCLUSION

Francisco is entitled to a credit of $3,683. He continues to owe Zenaida, pursuant to the parties' dissolution decree, $3,338. These findings do not constitute an improper modification of the decree of dissolution. Further, the trial court did not err in denying Zenaida's motion for a continuance or her motion for a mistrial.

AFFIRMED AS MODIFIED.

TEG P. DAHLHEIMER, APPELLANT, V.
WILLIAM ANTHONY DAHLHEIMER, APPELLEE.
557 N.W.2d 719

Filed December 17, 1996. No. A-96-293.

1. **Marriage: Property Division: Child Support: Child Custody: Words and Phrases.** Neb. Rev. Stat. § 42-347 (Reissue 1993) defines "legal separation" as a decree providing that two persons who have been legally married shall live apart and providing for any necessary adjustment of property, support, and custody rights between the parties but not dissolving the marriage.
2. **Marriage: Property Division: Child Support: Child Custody: Alimony: Jurisdiction.** The district court has jurisdiction to render temporary and final orders as are appropriate concerning the custody and support of minor children, the support of either party, and the settlement of property rights of the parties.
3. **Divorce: Property Division: Res Judicata.** Principles of res judicata do not bar a district court from dividing property in a dissolution action if the property was not distributed in the separation proceeding.
4. **Marriage: Property Division: Child Support: Child Custody: Final Orders.** A legal separation decree constitutes a final, appealable order and may include custody and support awards and property distributions just as a dissolution decree may.
5. **Modification of Decree: Child Custody.** Custody of minor children will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the children require such action.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed.

Richard A. Rowland and Philip G. Wright, of Quinn & Wright, for appellant.

Lloyd R. Bergantzel for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Teg P. Dahlheimer appeals from the district court's order dissolving her marriage to William Anthony Dahlheimer. Teg alleges the district court erred in modifying the custody award and the property award previously granted by the district court in a decree of legal separation. Because we find that the decree of legal separation was a final, appealable order and that the district court erred in modifying the custody award and property award, we reverse the judgment of the district court.

## II. BACKGROUND

Teg and William were married on June 21, 1986. Two children were born during the marriage, namely, William George, born September 19, 1988, and Jacquelyn, born December 22, 1990.

On March 16, 1992, Teg filed a petition for legal separation. Teg requested the district court to enter an order granting her temporary and permanent custody of the parties' two minor children, dividing the personal property and debts of the parties, ordering William to pay child support and alimony, and granting "other and further relief" as the court might deem just and equitable. On April 3, William signed and filed a voluntary appearance, waiving the necessity of having process served upon him, reserving his right to file a responsive pleading within the statutory time, and acknowledging receipt of a copy of the petition. On August 3, a hearing was conducted on Teg's petition. William did not appear at the hearing and did not file any responsive pleadings other than the voluntary appearance.

On August 3, 1992, the district court entered a decree of legal separation. The court awarded custody of the children to Teg, divided the personal property and the debts of the parties, and ordered William to pay child support and alimony. In addition, the court awarded Teg "possession of the family home" and ordered William to "execute and deliver a Quitclaim Deed conveying his interest in the family home to [Teg]." On August 12, William executed a quitclaim deed. William did not appeal from the legal separation decree or file any other action to have the decree set aside.

On January 21, 1994, Teg filed an "Application to Modify Decree of Legal Separation." Teg requested that the legal separation decree "be modified and changed to a Decree of Dissolution." On February 23, William filed an answer admitting that the legal separation decree had been entered, but denying that the marriage was irretrievably broken and that the legal separation decree should be modified and changed to a dissolution decree. Additionally, William alleged that several provisions of the legal separation decree, including the division of property and the child support order, were unconscionable and should be modified. Finally, William alleged that he was not

represented by counsel at the time the legal separation decree was entered and that "certain items" of the legal separation decree were misrepresented to him or that he misunderstood them.

The court conducted a hearing on Teg's application on October 5, 1995. At the commencement of the hearing, William orally made a motion to amend his answer to include a request for custody of the children. The court allowed the amendment over Teg's objection.

On December 13, 1995, the district court entered a decree of dissolution. The court dissolved the marriage. The court found that "both parties are caring parents, but that it would be in the best interests of the children to give permanent physical custody . . . to [William]." The court also ordered Teg to pay child support. Additionally, the court ordered that neither party should receive alimony. Finally, the court found that "the Quit Claim Deed . . . signed by [William] is void and held for naught based on a finding that the document was executed to keep the family together and for possible reconciliation of the marriage" and awarded the family home to William.

On December 19, 1995, Teg filed a motion for new trial. An amended motion for new trial was filed on February 2, 1996. On February 9, the court held a hearing on the amended motion for new trial. On March 4, the court denied the new trial. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On appeal, Teg assigns four errors, which we have consolidated for discussion to two. First, Teg asserts that the district court erred in modifying the legal separation decree and awarding custody of the children to William. Second, Teg asserts that the district court erred in modifying the legal separation decree and awarding William the family home.

## IV. STANDARD OF REVIEW

On questions of law, an appellate court has an obligation to reach its own independent conclusions, irrespective of the conclusion reached by the trial court. *Watts v. Watts*, 250 Neb. 38, 547 N.W.2d 466 (1996).

## V. ANALYSIS

### 1. Legal Separation Decree

The primary issue in the present case is what effect is to be given to the legal separation decree entered by the district court on August 3, 1992. The legal separation decree divided the property and debts of the parties, awarded custody of the children to Teg, ordered William to pay child support and alimony, and awarded the family home to Teg. On appeal to this court, as she did in the court below, Teg argues that the legal separation decree was a final, appealable order which resolved the issues of custody, support, and property distribution. Teg argues that because William failed to appeal from the legal separation decree, the district court should not have modified those aspects of the legal separation decree in the dissolution decree. William argues that the legal separation decree was only a temporary order and therefore that the district court was proper in resolving the custody, support, and property issues.

[1,2] Neb. Rev. Stat. § 42-347 (Reissue 1993) defines "legal separation" as a decree providing that two persons who have been legally married shall live apart and "providing for any necessary adjustment of property, support, and custody rights between the parties but not dissolving the marriage." Neb. Rev. Stat. § 42-351 (Reissue 1993) gives the district court jurisdiction to render temporary and final orders as are appropriate concerning the custody and support of minor children, the support of either party, and the settlement of property rights of the parties.

The parties direct us to no cases, and our research reveals none, where the Nebraska Supreme Court has addressed whether the district court may disregard the terms of a legal separation decree when issuing a dissolution decree. The Supreme Court has, however, analogized legal separation decrees and dissolution decrees. In *Anderson v. Anderson*, 222 Neb. 212, 382 N.W.2d 620, 621 (1986), the Supreme Court stated that "we apply to this decree of legal separation the same standards as are applied for reviewing property divisions and alimony awards in decrees of dissolution."

[3] In *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993), the Nebraska Supreme Court was confronted with a sit-

uation somewhat similar to that in the present case. In *Pendleton*, the parties received a decree of legal separation which divided the marital property and, later, the parties received a dissolution decree. In the dissolution proceedings, the wife requested the district court to, inter alia, divide the marital property which had accrued after the entry of the separation decree. The district court denied the wife's request. On appeal, the *Pendleton* court recognized that a division of property in a separation case is as broad in scope as in an absolute divorce and that a district court has the power to adjust all the property rights of the parties when the evidence and circumstances require it. The *Pendleton* court went on to conclude that principles of res judicata do not bar a district court from dividing property in a dissolution action if the property was *not* distributed in the separation proceeding.

[4] We conclude that a legal separation decree entered by the district court, under the authority of §§ 42-347 and 42-351, constitutes a final, appealable order. Such an order may include custody and support awards and property distributions just as a dissolution decree may. See, § 42-351; *Pendleton v. Pendleton, supra*; *Anderson v. Anderson, supra*. Accordingly, an aggrieved party must duly file a notice of appeal within 30 days of entry of the legal separation decree to challenge the provisions thereof. See, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994); *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

### 2. Custody

Having concluded that a legal separation decree is a final, appealable order, we turn to Teg's assignment of error concerning the district court's award of custody of the minor children to William in the dissolution decree. Teg asserts that William should not have been allowed to amend his answer at the hearing to include his claim for custody of the children. Additionally, Teg asserts that William failed to demonstrate any changed circumstances from the time of the legal separation decree which would result in the best interests of the children being served by a change of custody.

[5] Ordinarily, custody of minor children will not be modified unless there has been a material change of circumstances

showing that the custodial parent is unfit or that the best interests of the children require such action. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). The party seeking modification of child custody bears the burden of showing such a change in circumstances. *Id.* Because we analogize a legal separation decree with a dissolution decree, we conclude that the same principles govern changing custody of the minor children in a dissolution proceeding where a prior legal separation decree included a custody award. See *Anderson v. Anderson, supra.*

In the present case, the district court entered a legal separation decree on August 3, 1992, in which Teg was awarded custody of the parties' two minor children. Teg filed the application to modify the legal separation decree on January 21, 1994, alleging only that the decree should be modified to grant a dissolution rather than a legal separation. Teg did not raise the issue of modifying the custody award. William was allowed to raise the issue by amending his answer on the day of the hearing on Teg's application.

During the hearing on the motion for new trial, the district court stated that "there are some interesting aspects of law here in the sense that — and that I was really never confronted with it before, where there was a legal separation and in effect a modification to modify the legal separation into a divorce." The court continued, "[I]t was the Court's position, as evidenced by my ruling, that basically we were in a divorce action. I understand that we weren't maybe technically in that, but that's the way I looked at it. And, you know, obviously I could very well be wrong . . . ." Finally, the court further stated, "I did not approach it as a full blown custody determination in the decree of legal separation . . . ." We note that the judge at this hearing and at the hearing on Teg's application was *not* the same judge who issued the decree of legal separation.

As noted above, we conclude that the district court should have treated this proceeding for modification like a proceeding to modify a dissolution decree. However, it is apparent from the court's comments that the court treated the proceeding like an initial dissolution proceeding. As a result, the court failed to apply the correct principle of law, namely, that modification of

custody is proper only where there has been a material change of circumstances which would suggest that the custodial parent is an unfit parent or that the best interests of the children dictate changing custody. *Smith-Helstrom v. Yonker, supra.* In the present case, the burden to make such a showing was on William. See *id.*

Upon our review of the evidence in this case, it is apparent that William failed to sustain his burden. There is no evidence of *any* material change in circumstances from the time of the entry of the legal separation decree. Additionally, there is no evidence which would suggest either that Teg is an unfit mother or that the best interests of these children would be served by a change of custody. Indeed, the dissolution decree specifically stated that "both parties are caring parents." As such, the district court's judgment is reversed with regard to the custody of the minor children.

In light of our decision that Teg should receive custody of the two minor children, we also determine that Teg is entitled to receive child support rather than being obligated to pay support to William. According to the legal separation decree, William was ordered to pay $458 per month in child support. The child support award from the legal separation decree is to remain in effect.

### 3. Family Home

We next turn to Teg's assignment of error concerning the district court's award of the marital home to William. In the legal separation decree, William was ordered to execute a quitclaim deed to the property, which he did on August 12, 1992. The record further indicates that this deed has been filed with the register of deeds. The district court, in the dissolution decree, awarded the home to William and held that "the Quit Claim Deed . . . is found to be void and held for naught based on a finding that the document was executed to keep the family together and for possible reconciliation of the marriage."

We have already held that the legal separation decree was a final, appealable order. As such, William was entitled to file a notice of appeal from the decree within 30 days of its issuance if he wished to challenge the district court's order concerning

the home. See § 25-1912. Indeed, William was obligated to file such a notice if he wished to challenge the district court's order. See *id.* William did not file an appeal from the legal separation order, and he may not attack that order in the present case.

It is apparent that the district court treated the property distribution in much the same manner as it did the custody determination, as if the proceeding was one for dissolution rather than one for modification of the legal separation decree. Because the legal separation decree was a final, appealable order which distributed the property of the parties, the court erred in *re*-distributing the house. We are unable to find any legal authority for voiding a quitclaim deed because it was executed "to keep the family together and for possible reconciliation of the marriage." The judgment of the district court concerning the family home and the quitclaim deed is reversed, and the home is to remain in Teg's possession.

## VI. CONCLUSION

Because the district court erred in modifying custody of the children and in modifying the property distribution, we reverse the judgment of the district court.

REVERSED.

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RENET M. GERARD-LEY, APPELLEE AND CROSS-APPELLANT, V. JONATHAN H. LEY, APPELLANT AND CROSS-APPELLEE.

558 N.W.2d 63

Filed December 31, 1996. No. A-95-760.

1. **Marriage: Joint Tenancy: Consideration: Gifts: Presumptions.** When a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other.
2. **Divorce: Property Division: Gifts.** When distributing property in a dissolution proceeding, property acquired by one of the parties through either gift or inheritance should ordinarily be set off to the individual who received the gift or inheritance and not be considered a part of the marital estate; this general rule does not apply, however, if both of the spouses have contributed to the improvement or operation of the property.

3. **Divorce: Property Division.** All pertinent facts must be considered in reaching a just and equitable award of property in a dissolution proceeding.
4. **Property Division.** How property, inherited by a party before or during the marriage, will be considered in determining division of property must depend upon the facts of the particular case and the equities involved.
5. **Alimony.** In determining whether alimony should be awarded, in what amount it should be awarded, and over what period of time it should be awarded, the ultimate criterion is one of reasonableness.

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

Hal W. Anderson and Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., for appellant.

R. Kent Radke for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Jonathan H. Ley appeals from the district court order dissolving his marriage to Renet M. Gerard-Ley. On appeal, Jonathan challenges the district court's inclusion of the marital residence and an automobile in the marital estate, alleging that the property was purchased with proceeds from his inheritance. Renet cross-appeals, alleging the district court erred in refusing to award her nominal alimony. For the reasons stated herein, we affirm.

## II. BACKGROUND

Jonathan and Renet were married on October 27, 1984. Three children were born of the marriage: Gerard, who was 9 years old at the time of trial; Justin, who was 6 years old; and Lauren, who was 5 years old. Throughout the marriage, Renet was employed as an elementary school teacher in the Lincoln Public Schools. Throughout the marriage, Jonathan was not regularly employed, although he did contribute financially to the marriage with income from stock dividends and interest.

Renet filed a petition for dissolution of the marriage on November 12, 1992. By stipulation of the parties, trial was bifurcated so that custody, visitation, and child support issues

were tried separately from property distribution issues. Renet was awarded custody of the three children, and Jonathan was ordered to pay child support in accordance with the child support guidelines. For purposes of this appeal, the portion of the trial regarding property distribution issues is the only part that needs to be discussed in detail.

The primary dispute concerning the property distribution was whether the parties' residence and one of the parties' vehicles, a Nissan Quest van, should have been included in the marital estate. According to the testimony at trial, the parties purchased a home in October 1984, where they lived until they bought the "Campbell property" in June 1990. The Campbell property was purchased for approximately $191,000. The Campbell property is the subject of dispute on appeal. The parties sold their original home and applied a portion of the sale proceeds toward the Campbell property. Additionally, the parties sold a property which Renet brought into the marriage and applied a portion of the sale proceeds toward the Campbell property. The remainder of the purchase price was financed through a bank loan. Title to the Campbell property was taken by Jonathan and Renet as joint tenants, with a right of survivorship.

In January 1992, Jonathan sold some shares of bank stock which he had received from his parents through inheritance and through gifts. In July, Jonathan used some of the proceeds from the stock to pay off the mortgage on the Campbell property. After the initial mortgage was paid off, various other smaller loans were secured with another mortgage on the Campbell property.

In June 1992, the parties purchased a Toyota 4-Runner. Jonathan testified at trial that the 4-Runner was also purchased with proceeds from his stock sale. In July 1993, the 4-Runner was traded in and the van was purchased. According to the testimony at trial, after the allowance for the trade-in of the 4-Runner, an additional $4,000 loan was required to pay for the van. Both Jonathan and Renet testified at trial that Renet had been in exclusive possession of the van and that she used the vehicle to transport herself to and from work and to transport the children to and from school and day care.

In August 1992, Jonathan created a family trust with the remaining proceeds from his stock sale. The trust agreement was designed to provide Jonathan with income, while preserving the corpus of the trust for the parties' children. One provision in the trust agreement dealt with a residential asset. The trust agreement provided that the trust may, at some time, own a residence occupied by Jonathan and Renet. The agreement additionally provided:

> In the event of the dissolution of marriage of Jon and Renet Ley, each of them shall have and enjoy an equal one-half interest in the equity in their current residence at 6325 Campbell, Lincoln NE [Campbell property]. In the event of the death of either of them during their marriage, the surviving spouse shall succeed to the full ownership of the residence. Upon the death of the second of them to die, in the event the first of them dies while they are married, the second to die shall convey the residence owned by him or her to this trust by deed or testamentary instrument.

Renet signed the trust agreement containing the above-quoted language. According to the testimony at trial, Renet insisted that the above-quoted language be added to the agreement.

At trial, Renet requested that the court allow her and the children to remain living in the Campbell property. Renet argued that her understanding of the trust agreement was that she would get one-half of the equity in the home if she and Jonathan divorced. Additionally, Renet requested that she be awarded the van, because it was the only vehicle in her possession. Finally, Renet testified that she suffered from various health problems which could, at some point in the future, interfere with her ability to work. As a result, Renet requested the court to award a nominal amount of $1 per year in alimony.

At trial, Jonathan requested that the court set aside both the Campbell property and the van as being nonmarital assets. Jonathan argued that the property was readily identifiable and traceable to his inheritance proceeds. Additionally, Jonathan testified that he was not aware of any health problems which would interfere with Renet's ability to work. As a result, Jonathan requested that the court deny Renet's request for alimony.

On May 31, 1995, the court issued a decree dissolving the marriage. The court found that Jonathan had intended to make a gift of a one-half interest in the Campbell property by including the above-quoted language in the trust agreement. As a result, the court included the Campbell property in the marital estate and awarded the home to Renet. The court also included the van in the marital estate. The court awarded approximately $171,000 worth of assets to Renet, including the Campbell property, and approximately $25,000 worth of assets to Jonathan. To balance the property distribution, the court ordered Renet to pay Jonathan approximately $74,000 in a 5-year property settlement, to be paid in annual installments of $14,500 for 4 years and approximately $16,000 in the fifth year. The court denied Renet's request for alimony.

On June 7, 1995, Jonathan filed a motion for new trial. The court denied Jonathan's motion on June 16. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On appeal, Jonathan assigns two errors. First, Jonathan asserts that the district court erred in including the Campbell property in the marital estate. Second, Jonathan asserts that the district court erred in including the van in the marital estate.

On cross-appeal, Renet assigns as error the district court's refusal of her request for nominal alimony.

## IV. STANDARD OF REVIEW

An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996); *Mathis v. Mathis*, 4 Neb. App. 307, 542 N.W.2d 711 (1996). The division of the marital estate in a dissolution case is initially left to the discretion of the trial court and will be reviewed by an appellate court de novo on the record and affirmed absent an abuse of discretion. *Mellor v. Mellor*, 235 Neb. 361, 455 N.W.2d 177 (1990).

In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its

own independent conclusions with respect to the issues. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Mathis v. Mathis, supra.* If the evidence as presented by the record is in conflict, an appellate court considers, and may give weight to, the fact that the trial court had the opportunity to hear and observe the witnesses and accept one version of the facts rather than another. *Id.*

## V. ANALYSIS

### 1. APPEAL

On appeal, Jonathan has assigned as error the trial court's inclusion of the Campbell property and the van in the marital estate. Jonathan argues with respect to both that the property is readily identifiable and traceable to the proceeds from the sale of his inherited bank stock. Because the property is traceable to his inheritance, Jonathan argues that both items should be set aside and considered nonmarital property.

#### (a) Campbell Property

According to the testimony at trial, when Jonathan and Renet were married, Renet owned a house which was rented out during the first 6 years of the marriage. Additionally, the parties purchased their first marital home on or about October 15, 1984. The parties purchased the Campbell property on or about June 5, 1990. The funds to pay for the Campbell property initially came from three sources: (1) The parties sold the rental property which Renet brought into the marriage and applied a portion of the proceeds toward the Campbell property, (2) the parties sold their first marital home and applied a portion of the proceeds toward the Campbell property, and (3) the parties secured a loan for the remainder of the purchase price.

There was a great deal of testimony at trial concerning various loans which were taken out for remodeling and improvements on the Campbell property and concerning how the loans were consolidated and "rolled over" into one another. The progression of these loans is unimportant to our analysis, except to note that approximately $140,000 worth of notes was still outstanding on or about July 1, 1992. On July 1, Jonathan received the proceeds from the sale of his inherited bank stock, in an

amount slightly under $1,750,000, and on that date, he used some of these proceeds to pay off the outstanding notes on the Campbell property.

[1] During the course of Jonathan's testimony at trial, the parties stipulated that "the Campbell property is a joint-tenancy deed between [Jonathan and Renet] with rights of survivorship." The Nebraska Supreme Court has held that "when a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other . . . ." *Brown v. Borland*, 230 Neb. 391, 395, 432 N.W.2d 13, 17 (1988). See, also, *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976); *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958); *Peterson v. Massey*, 155 Neb. 829, 53 N.W.2d 912 (1952). This presumption is a rebuttable presumption. *Brown v. Borland, supra*; *Marco v. Marco, supra*.

The testimony at trial did not, in any way, rebut the above presumption concerning Jonathan and Renet taking title to the Campbell property in joint tenancy. The primary dispute in the testimony at trial regarding the Campbell property concerned the language in the trust agreement. The parties disputed the meaning and effect of the clause in the trust agreement that "[i]n the event of the dissolution of marriage of Jon and Renet Ley, each of them shall have and enjoy an equal one-half interest in the equity in their current residence." We need not determine what, if any, legal effect this clause may have, except to note that it does not provide rebuttal of the presumption that Jonathan intended to gift an equal share of the Campbell property to Renet when the parties took title to the property in joint tenancy.

[2] Jonathan urges us to decide this case on the basis of the Nebraska Supreme Court's holding in *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). In *Van Newkirk*, the Supreme Court held that when distributing property in a dissolution proceeding, property acquired by one of the parties through either gift or inheritance should ordinarily be set off to the individual who received the gift or inheritance and not be considered a part of the marital estate. The Supreme Court noted an exception exists where both of the spouses have con-

tributed to the improvement or operation of the property. *Van Newkirk v. Van Newkirk, supra.*

The general rule, as well as the exception, set out by the Nebraska Supreme Court in *Van Newkirk* has been applied in numerous cases since. See, e.g., *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *DaMoude v. DaMoude*, 229 Neb. 851, 429 N.W.2d 368 (1988); *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988); *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986); *Applegate v. Applegate*, 219 Neb. 532, 365 N.W.2d 394 (1985); *Ross v. Ross*, 219 Neb. 528, 364 N.W.2d 508 (1985); *Shald v. Shald*, 216 Neb. 897, 346 N.W.2d 406 (1984).

Our holding today is not inconsistent with *Van Newkirk* or its progeny. None of the above-cited cases reveals a similar factual situation, where one of the parties receives property through inheritance or gift, sells or "cashes in" that inherited or gifted property, and then uses the proceeds to purchase property and take title as joint tenants with the party's spouse. In that regard, we believe the Nebraska Supreme Court's holding in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), to be helpful.

[3,4] In *Grace*, the Nebraska Supreme Court recognized the general rule and exception set forth in *Van Newkirk*, but recognized that "[t]here are other considerations." *Grace*, 221 Neb. at 699, 380 N.W.2d at 284. The Supreme Court specifically held that "[t]he *Van Newkirk* rule itself does not purport to be an ironclad, rigid rule for all circumstances." *Id.* Relying on the earlier case *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980), the Supreme Court iterated that all pertinent facts must be considered in reaching a just and equitable award and that the court must regard the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, including the contributions to the care and education of the children. *Grace v. Grace, supra.* The Supreme Court held that " '[h]ow property, inherited by a party before or during the marriage, will be considered in determining division of property . . . must depend upon the facts of the particular case and the equities involved.' " *Id.* at 700, 380 N.W.2d at 284.

Much like the present case, *Grace* involved a husband's inheritance of stock. The husband inherited stock in a family

business, which the wife did not contribute to as contemplated by the exception in *Van Newkirk*. In *Grace*, the trial court refused to award any of the stock or its value to the wife because it had been inherited by the husband. Unlike the present case, the stock was not sold and the proceeds reinvested in the family home. Nonetheless, on appeal the Nebraska Supreme Court, considering the equities of the case, awarded the wife a share of the value of the stock because the parties did not have significant other property to be divided. Similarly, in the present case, the parties did not acquire significant assets other than the house, and that factor, along with the other equities of the case, requires that Renet receive an interest in the home.

The Nebraska Supreme Court has repeatedly stated that the ultimate test for determining an appropriate division of marital property is one of fairness and reasonableness as determined by the facts of each case. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Preston v. Preston, supra*. Additionally, the Supreme Court has held that although " 'the source of funds brought into a marriage is a consideration in the division of property, it is not an absolute.' " *Grace*, 221 Neb. at 701, 380 N.W.2d at 285.

In the present case, although Jonathan utilized proceeds from the sale of his inherited stock to pay off the debt on the Campbell property, because he took title to the property along with Renet as joint tenants, it is appropriate to presume that he intended to make a gift to Renet of a one-half interest in the property. Recognizing that this presumption is rebuttable, we find no testimony or evidence in the record to rebut the presumption. Jonathan's testimony reflects that he did not intend to make a gift of the property through the language in the trust agreement, but he never addressed the fact that title to the property had already been taken in joint tenancy. The district court did not abuse its discretion in including the Campbell property in the marital estate. This assigned error is without merit.

(b) Nissan Van

Jonathan asserts that the district court should have set aside the van as his nonmarital property because the van was paid for

by proceeds from the sale of his inherited bank stock. As noted above, if a husband and wife take title to property jointly, even if one of the parties provided all of the consideration for the purchase of the property, the law in Nebraska creates a rebuttable presumption that the party furnishing the consideration intended to make a gift to the other party. See, *Brown v. Borland*, 230 Neb. 391, 432 N.W.2d 13 (1988); *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976); *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958); *Peterson v. Massey*, 155 Neb. 829, 53 N.W.2d 912 (1952). Renet testified at trial that the van was titled in both Jonathan's name and her own. Jonathan provided no evidence to rebut this testimony or the presumption that arises because of it. In accordance with our analysis above concerning the Campbell property, we similarly hold that the district court did not abuse its discretion by including the van in the marital estate.

We note that the appellant's praecipe for transcript included a request for the dissolution decree. However, the decree contained in the transcript prepared for us by the clerk of the district court did not contain page 11. The absence of this was problematic not only for the obvious reason that we did not have an accurate copy of the decree, but also because page 11 contained the judge's award of the van to Renet. In order to reach a fully informed resolution of the issues in this case, we were obligated to specifically request page 11, which was subsequently provided by the clerk of the court. This is an example of why care must be taken in the preparation of the transcript by the clerk of the court. This assigned error is without merit.

### 2. Cross-Appeal

On cross-appeal, Renet asserts that the district court erred in rejecting her request for a nominal award of $1 per year alimony. Renet sought the nominal award because of alleged health problems which Renet testified could, at some date in the future, interfere with her ability to work and provide for herself and the children. Jonathan testified that he was unaware of any health problems which would interfere with Renet's ability to work.

[5] The Nebraska Supreme Court has held that in determining whether alimony should be awarded, in what amount it should be awarded, and over what period of time it should be awarded, the ultimate criterion is one of reasonableness. *Thiltges v. Thiltges, supra.* Regarding the payment of alimony, Neb. Rev. Stat. § 42-365 (Reissue 1993) provides in part:

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

A decision on whether to award alimony must be made on the particular facts and equities of each individual case, and the court must consider all of the facts and equities, in addition to those specifically enumerated in § 42-365. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

Although we recognize that the Nebraska Supreme Court has approved of nominal alimony awards in other cases, see, *Kouth v. Kouth*, 238 Neb. 230, 469 N.W.2d 791 (1991); *Hamm v. Hamm*, 228 Neb. 294, 422 N.W.2d 336 (1988); and *Dobesh v. Dobesh*, 216 Neb. 196, 342 N.W.2d 669 (1984), upon a consideration of all the facts and equities in this case, including the property distribution, the duration of the marriage, and the circumstances of the parties, we cannot say that the district court abused its discretion by denying the alimony request. This assigned error is without merit.

## VI. CONCLUSION

Because we find that the district court did not abuse its discretion by including the Campbell property and the van in the marital estate or by denying the request for alimony, we affirm.

AFFIRMED.

# COUNTY OF YORK, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE, V. LLOYD TRACY, DOING BUSINESS AS TRACY ENTERPRISES, APPELLANT.

558 N.W.2d 815

Filed December 31, 1996. No. A-95-790.

1. **Ordinances: Zoning: Presumptions: Proof.** A zoning ordinance or regulation will be presumed valid in the absence of clear and satisfactory evidence to the contrary.
2. **Ordinances: Zoning: Proof.** The party challenging the validity of a zoning ordinance or regulation has the burden of proving it is invalid.
3. **Counties: Records.** The county clerk has the duty under statute to maintain the minutes of the county board.
4. **Records: Proof.** At common law, the absence of entries which should appear in the usual course of business proves that an event did not take place or that something was not done.
5. **Municipal Corporations: Ordinances: Records.** The minutes of city councils must show that all acts of the council required by statute to effectuate the passage and adoption of a valid ordinance have been done by the council.
6. **Records.** Where the law requires that a record of proceedings be kept, but does not prescribe what such record shall contain, the omission from the record of such items not specifically required to be recorded is not a fatal defect.
7. **Governmental Subdivisions: Records: Evidence: Proof.** When the law requires that a certain event be recorded by a public body, the absence of such a record in the records of that body is evidence that the event which should have been recorded did not occur, and absent secondary evidence that the event did occur, the absence of a record is clear and convincing evidence that the event did not occur.
8. **Zoning: Legislature.** A zoning resolution is in derogation of the right of an owner under the common law, and it follows that the procedure prescribed by the Legislature in the exercise of the police power is strictly construed and must be rigidly followed.
9. **Counties: Records.** The county clerk's duty to keep records for the county board is a matter controlled by statute.
10. **Nuisances: Words and Phrases.** A public nuisance is an unreasonable interference with a right common to the general public.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed.

Earl D. Ahlschwede, of Mayer, Burns & Ahlschwede, for appellant.

Charles W. Campbell, York County Attorney, for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

York County brought this action to enjoin Lloyd Tracy from operating his refuse disposal and recycling business on certain land located in York County. The county sought this relief on the ground that Tracy was operating his business in violation of its zoning regulation and because, as operated, the business constituted a public nuisance. The district court granted the injunction, and Tracy appeals, arguing that the zoning regulation was invalid and that his business does not constitute a public nuisance. We conclude that the York County Board of Commissioners did not hold a public hearing as required by the statute which authorized the zoning regulation and therefore that the regulation was invalid; we also conclude that Tracy's activity did not constitute a public nuisance. Therefore, we reverse with directions to dismiss the action.

## FACTUAL BACKGROUND

Tracy's real estate is a tract of approximately 6.9 acres located roughly 4½ miles west of York, Nebraska, on Highway 34. A building is located in approximately the middle of the tract. Under the zoning regulation passed in 1974, this property is zoned "General Agriculture." This regulation was adopted by a resolution of the York County Board of Commissioners. It is a comprehensive regulation of zoning in York County and is comparable to comprehensive zoning ordinances passed by cities. For ease of expression, we will call Tracy's real estate the "tract," the plaintiff will be referred to as the "County," and the defendant will be referred to as "Tracy." Unless clarity otherwise requires, we will not separately identify the various governmental agencies or officers as officials of York County.

On July 3, 1991, Victor Johnson, Tracy's predecessor in title to the tract, requested a special exception to the zoning regulation which would allow the tract to be used for truck repair and storage. The County granted this special exception, but placed conditions on the storage of material. Johnson then sold the tract to Tracy.

On June 22, 1992, Gary Charlton, county zoning administrator, sent Tracy a letter informing him that he was violating the zoning regulation as well as the special exception granted on

the tract. On November 3, Tracy applied for a special exception for the purposes of "a Garbage Hauling, Transferring, Recycling of garbage and trash business." On November 23, the County granted Tracy's special exception, but again placed conditions on the special exception. As the conditions on the special exception have no bearing on this opinion, we will not describe them. The County sent Tracy a letter, dated July 6, 1993, which advised Tracy that he was not complying with the November 1992 special exception. The County later brought this action to enjoin Tracy from operating his business in violation of the zoning regulation and in violation of the special exceptions granted on the tract.

## PLEADING

In its operative petition, the County alleges, in substance, that since December 9, 1991, Tracy has owned the tract, upon which he has operated a garbage hauling and refuse business since July 22, 1992. In its first cause of action (referred to as a "theory of recovery"), the County seeks an injunction which would prohibit Tracy from operating his business. The County alleges that Tracy's business violates the zoning regulation as well as the special exceptions mentioned above. The County alleges that Tracy's tract is zoned "General Agriculture" and that his business cannot operate upon land that is located in a district which is zoned "General Agriculture." Tracy does not claim the regulation would allow him to operate his business in its present location without the special exceptions that were granted. Therefore, we will not set forth the specific terms of the "General Agriculture" classification.

In its second "theory of recovery," the County seeks to have Tracy's operation enjoined on the basis that the operation is a public nuisance because of improperly stored refuse, trash, and garbage on the tract which has blown or washed onto adjoining land, because the operation poses a health and environmental hazard, and because it depreciates the value of neighboring land and constitutes a public nuisance. The County maintains it is entitled to a permanent injunction to abate the nuisance and prohibit Tracy from operating his business on the tract.

In its third "theory of recovery," the County alleges Tracy installed I-beams in a certain place on the tract, that the I-beams are the beginning of a building, that Tracy did not obtain a building permit as required by the applicable zoning regulation, and that he has allowed the I-beams to remain upon the land. The County requested that the court prohibit further construction and that Tracy be ordered to remove the existing partial construction. The parties litigated this issue in the trial below, and in its decree, the trial court made certain findings in regard to the I-beams. In this appeal, Tracy assigns these findings as error. However, the trial court ordered Tracy only to cease his business operation on the land; it did not specifically order Tracy to remove the I-beams or any alleged partial building. The County did not cross-appeal from the trial court's failure to grant it any relief concerning the I-beams or the partially constructed building. The trial court's findings that Tracy started construction of a building without a building permit might well justify an order to remove that construction, but such findings without an order do not require Tracy to remove the building. As a result, the trial court's findings are clearly immaterial and moot. We have concluded the entire third "theory of recovery" is moot, and we do not discuss the issues concerning it further.

In his answer, Tracy admits he owns the tract, that he operates a garbage hauling and refuse business upon it, and that he applied for the exception and modification under the regulation. He alleges the zoning regulation upon which the County relies was not properly adopted, that it is void, and therefore that he is not operating his business under the special exception granted to him because the zoning regulation is void. He also denies all allegations which support the County's claim that he has violated the special exceptions or that his business operation is a public nuisance.

After a trial, the district judge found that the zoning regulation was validly enacted; that Tracy applied for a special exception to it and for an amendment and modification of that exception; that he failed to comply with the conditions imposed under the special exception; that his failure to properly deposit, store, and maintain garbage, refuse, debris, and other items posed a health hazard and a threat to the environment; and that the

premises constitute a public nuisance. The court granted a permanent injunction, effective July 1, 1995, which prohibited Tracy from operating a garbage hauling, transferring, and recycling business on the tract.

## ASSIGNMENTS OF ERROR

Tracy alleges the district court erred (1) in not finding he met the burden of proof in showing the 1974 zoning regulation was invalid, (2) in allowing the County to proceed with the public nuisance action, and (3) in determining Tracy's use of the tract constituted a public nuisance.

## STANDARD OF REVIEW

With regard to questions of law, an appellate court is obligated to reach conclusions independent of the decision reached by the trial court. *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993).

An action for an injunction sounds in equity. *Id.* In an equity action, an appellate court reviews the record de novo. *Id.* In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Id.*

## ANALYSIS

Obviously, Tracy's business is a lawful one, and it may not be enjoined unless it is unlawful because it violates the County's zoning regulation or because it is a nuisance. The threshold question is the validity of the County's zoning regulation.

### *Is Zoning Regulation Valid?*

The parties agree that the County adopted a zoning resolution containing the regulation on February 26, 1974. On the record presented, this regulation is the only zoning regulation which could prohibit Tracy's present use of the premises. Tracy maintains this regulation was not lawfully adopted because proper statutory procedures were not followed. Specifically, Tracy contends the minutes of the York County Board of Commissioners (County Board) do not show that a public hearing concerning the zoning regulation was advertised or held.

[1,2] We start by recognizing that a zoning ordinance or regulation will be presumed valid in the absence of clear and satisfactory evidence to the contrary. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995). See, also, *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989). The party challenging the validity of a zoning ordinance or regulation has the burden of proving it is invalid. See *Jamson v. City of Grand Island*, 180 Neb. 438, 143 N.W.2d 877 (1966). In this case, the issue is whether Tracy met his burden of proving the zoning regulation was invalid.

In 1974, the statute authorizing county zoning provided in significant part:

> *Provided*, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, when its parties in interest and citizens shall have an opportunity to be heard. Notice of the time and place of such hearing shall be given by the publication thereof in a legal newspaper of general circulation in such county one time at least ten days prior to such hearing.

Neb. Rev. Stat. § 23-164 (Reissue 1974).

Tracy's attorney called the county clerk as a witness to establish a foundation for the minutes of the County Board from October 23, 1973, through February 26, 1974. These minutes consist of pages numbered consecutively. The clerk testified these minutes contain all of the minutes of the County Board between October 23, 1973, and February 26, 1974, inclusive, and that there are no other minutes of any hearing on zoning. The clerk's testimony established the basis for the introduction of an index setting "forth different hearings that were held by the York County Board." The clerk testified that she had been subpoenaed to bring with her an affidavit of publication of a notice of hearing for the adoption of the zoning regulation in question. The clerk testified she searched for the affidavit, and she stated, "We didn't have any on record."

The February 26, 1974, minutes are either silent or minimal on certain points, and the effect of the lack of information on these points has a great bearing on our decision concerning the validity of the zoning regulation. The minutes of February 26 state: "The agenda of the meeting was poste[d] on the bulletin

board in the County Clerk's office." With regard to the zoning regulation, they state: "John Brogan, Allen Barney and Harry Hecht, met with the Board in regard to the adopting of the York County Zoning Regulation Resolution." They further state: "Moved by Bergen, seconded by Roberts, that the following Resolution be adopted."

The minutes also contain the "York County Zoning Regulation" in full. The regulation's preamble states:

> WHEREAS the Planning Commission has made a preliminary report and *held public meetings* thereon, and submitted its final report to the County Commissioners, and
>
> WHEREAS the County Commissioners have given due *public notice* of hearings relating to zoning districts, regulations, and restrictions, and ha[ve] held such *public hearings*, and
>
> WHEREAS all requirements of Chapter 23, Laws of Nebraska, with regard to the preparation of the report of the Planning Commission and subsequent action of the County Commissioners have been met . . . .

(Emphasis supplied.)

The adopting clause is followed by the statement: "Roll call for the foregoing Resolution as follows: yeas, 4; nays, Watson; motion carried." The record also contains minutes concerning other business before the board that is not relevant to our inquiry.

The other minutes in evidence cover 18 meetings held from October 22, 1973, to February 26, 1974, not inclusive, and they contain only three references to zoning. An entry made on October 30, 1973, states:

> Claude Walkup, met with the Board in regard to the Comprehensive Plan submitted to the County Board by the York County Planning Commission.
>
> Moved by Whitemore, seconded by Watson, that the York County Board of Commissioners accept the York County Comprehensive Plan for rural zoning 1972-1990 which was submitted to the county board at a *public hearing held October 24, 1973*; roll call: yeas, 5; nays, none; motion carried.

(Emphasis supplied.) The minutes of January 29, 1974, contain the note: "Allen Barney and John Brogan of the County Planning Commission met with the Board in regard to the final approval to the zoning plan. The Board must establish administrative procedures for the enforcement of regulations . . . . The Board agreed to have these details resolved by February 12." An entry in the February 12 minutes states: "John R. Brogan, Secretary for the Planning and Zoning Committee met with the Board and presented each member with a York County Zoning Regulation Resolution." No action concerning zoning matters is documented in the minutes of a meeting held on February 19, and the minutes of the next meeting, that of February 26, have been summarized above.

The minutes of all but one meeting start with a note that the meeting is "as per notice in the York Daily News Times." The minutes show that the clerk was directed on several occasions to advertise public hearings, but the minutes never direct the clerk to advertise any hearing on zoning.

Section 23-164, the statute which grants county boards the authority to adopt zoning regulations, at the relevant time provided, "The county board shall provide for the manner in which such regulations and restrictions . . . shall be . . . enforced . . . ." In this case, the minutes show that on January 29, 1974, the Board was told it must "establish administrative procedures for the enforcement of regulations [and] provide a procedure for applications and variances" and that the Board agreed to "have these details resolved by February 12."

Additionally, on October 30, 1973, the minutes state, "Moved by Whitemore, seconded by Watson, that the York County Board of Commissioners accept the York County Comprehensive Plan for rural zoning 1972-1990 which was submitted to the county board at a public hearing held October 24, 1973 . . . ." There are no minutes in the record from any public hearing or meeting held on October 24, 1973. If there was a public hearing held October 24, the regulation would not have been complete at that time, at least with regard to the manner of enforcement. Other than this reference, the minutes do not record a public hearing occurring October 24. The minutes in evidence show the regulation was not officially presented to the

board until February 12, 1974, and after that date, the minutes do not show the board set or held any public hearing.

[3] The county clerk has the duty under statute to maintain the minutes of the county board. Neb. Rev. Stat. § 23-1301 (Reissue 1974) provides in pertinent part, "The county clerk shall . . . keep the seal, records and papers of said board . . . ." Neb. Rev. Stat. § 23-1302 (Reissue 1995) provides in pertinent part, "It shall be the general duty of the county clerk: (1) To record in a book for that purpose all proceedings of the board." The county clerk's records in evidence fail to show a record of any public hearing for the zoning regulation upon which the County relies. These records also fail to establish the public was notified of the terms of the zoning regulation or the territory to be zoned.

[4] With regard to the absence of facts from an official record, the general notion is the following:

> At common law, records and reports of public officers made in the course of the discharge of their official duties are admissible not only as proof of the facts stated in them, but also to show the absence of entries that in the usual course should appear therein, and to prove, by reason of the absence of any entry, that an event did not take place or that something was not done.

29A Am. Jur. 2d *Evidence* § 1375 at 767-68 (1994).

Neb. Rev. Stat. § 27-803 (Reissue 1995) provides in significant part as follows:

> Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (9) *To prove* the absence of a record, report, statement, or data compilation, in any form, or *the nonoccurrence* or nonexistence *of a matter of which a record*, report, statement, or data compilation, in any form, *was regularly made and preserved by a public office or agency*, evidence in the form of a certification in accordance with section 27-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation or entry.

(Emphasis supplied.)

The evidence of the minutes of the meeting of the County Board as summarized above discloses no public hearing was held. The statute summarized above also discloses that the county clerk had the duty to take and to preserve the minutes of any public meeting which was held by the County Board. The county clerk's testimony clearly establishes that she does not have such a record, and therefore this is strong evidence that no public hearing was held by the County Board as required by § 23-164. A review of Nebraska case law considering similar matters reinforces this conclusion.

[5] *City of Scottsbluff v. Kennedy*, 141 Neb. 728, 4 N.W.2d 878 (1942), discusses the effect of the lack of minutes of a public meeting. In that case, the validity of a special assessment was contested. The minutes did not contain a record of the publication of certain required notices. Both the proof of publication and the testimony of the newspaper employee familiar with the facts proved that notice was actually given. The defendant, however, maintained such proof was not competent. The *Kennedy* court rejected this argument, but in so doing discussed cases concerning city council minutes regarding ordinances. The *Kennedy* court stated:

> We have repeatedly held that the minutes of the city council must show that all acts of the council required by statute to effectuate the passage and adoption of a valid ordinance . . . have been done by the council. But we know of no statute or rule of law that requires a proof of publication, a matter extraneous to the official acts of a city council, to be copied into, or noted in, the minute record. We think that any competent proof of the fact of the publication which the statute requires is admissible . . . .

*Id.* at 735, 4 N.W.2d at 882. We conclude that the same principle applies to the adoption of valid zoning regulations by the County. The above-quoted statutes clearly require that a record be kept of such meetings.

In *John v. Connell*, 64 Neb. 233, 89 N.W. 806 (1902), the minutes reflected that the board of equalization recessed after a brief meeting, but the minutes did not show the board ever reconvened or adjourned, although a statute required the board to meet from 9 a.m. to 5 p.m. The only other evidence presented

was the testimony of an individual that the board recessed before noon. The absence of minutes evidencing that the board reconvened and otherwise met from 9 a.m. to 5 p.m., as required by statute, was the basis of the Nebraska Supreme Court's holding that the board acted without jurisdiction.

[6,7] The Supreme Court has said, "where the law requires that a record of proceedings be kept, but does not prescribe what such record shall contain, the omission from the record of such items not specifically required to be recorded is not a fatal defect." *School District No. 49 v. School District No. 65-R*, 159 Neb. 262, 270, 66 N.W.2d 561, 567 (1954). Secondary evidence may prove the passage and existence of an ordinance or regulation. See *Clough v. North Central Gas Co.*, 150 Neb. 418, 34 N.W.2d 862 (1948) (holding that if public body merely failed to record event that did, in fact, occur, then secondary evidence can be used to establish event occurred). Based upon the above cases, we conclude that when the law requires that a certain event be recorded by a public body, the absence of such a record in the records of that body is evidence that the event which should have been recorded did not occur, and absent secondary evidence that the event did occur, the absence of a record is clear and convincing evidence that the event did not occur.

In *Board of Commissioners v. McNally*, 168 Neb. 23, 95 N.W.2d 153 (1959), the Supreme Court found zoning regulations to be invalid because inadequate notice of the public hearing was given and because adequate description of the real estate affected was not published either by description or by adequate reference to a map. The *McNally* court held notice was necessary and should have been given in the statutorily prescribed manner. The *McNally* court stated that " '"[notice] is not a technical requirement difficult of performance."' " *Id.* at 33, 95 N.W.2d at 159.

[8] In the case at hand, the minutes from February 26, 1974, state notice was given in the York Daily News Times, although the specific date of notice in the Times was not documented. In *McNally*, the Nebraska Supreme Court found the zoning regulations to be invalid because the evidence showed that the zoning areas were not clearly described and published as the law required. In so doing, it stated: "A zoning resolution is in dero-

gation of the rights of an owner under the common law and it follows that the procedure prescribed by the Legislature in the exercise of the police power is strictly construed and must be rigidly followed." *Id.* at 35, 95 N.W.2d at 160. In *McNally*, the public was at least given notice of the zoning hearing, whereas the record before us fails to show a public hearing. The evidence in this case shows the public may well not even have been aware that the zoning regulation was adopted.

It is true that the preamble contained sketchy findings to the effect that the law was followed, but the record does not bear out such findings. We can find no authority that the findings of a public body in a preamble of an ordinance or regulation that the law has been followed establish the validity of the public body's action. It should require no authority to support the proposition that findings in a preamble that "due public notice" was given, that "public hearings" were held, or that "all requirements of Chapter 23 . . . have been met" would not be effective when records show no such action was taken. In this case, the records of the county clerk do not show that a notice of the time and place of the hearing was published in a legal newspaper of general circulation in the county at least 10 days prior to such hearing as required by § 23-164.

Section 23-1301 provides, "The county clerk . . . shall attend the sessions of the county board; shall keep the seal, records and papers of said board; and shall sign the record of the proceedings of the board, and attest the same with the county seal . . . ." Section 23-1302(1) requires the clerk to record all proceedings of the county board. These statutes still require the county clerk to perform these duties.

[9] Upon cross-examination by the County, the county clerk testified that she is familiar with the regulations the State has adopted pursuant to the Records Management Act. She stated that under that act, county clerks are required to keep records of agendas of meetings and of publications of public hearings for only 2 years. She also testified that it was not unusual for the York County clerk's office to no longer have proofs of publication or meeting agendas after 10 years or longer, since the office tries to keep "our cage cleaned." She was under the impression she was not required to keep such records. The

county clerk's duty to keep records for the County Board is a matter controlled by statute, and the clerk's opinion on such matters is immaterial.

The absence of any evidence of the notice of a public hearing before the County Board is also convincing evidence that no public hearing was held. To anyone remotely familiar with the routine newspapers use to preserve their publications, the County's failure to produce a copy of the published notice of the required hearing makes a finding that no public hearing was held almost a certainty. If a hearing was held without published notice, then that hearing would hardly be a public hearing. Therefore, we must find the zoning regulation in question to be invalid because the required public hearing was not held. We make this finding based on the clear and convincing evidence that the minutes do not show that a public hearing was held or that notice of a public hearing was given as required by § 23-164, and there is no secondary evidence to otherwise establish these facts.

*Is Tracy Estopped From Attacking Regulation's Validity?*

The County argues that Tracy is estopped from attacking the zoning regulation because he relied upon its validity when he applied for special exceptions to it. The application of the estoppel doctrine was specifically rejected in *Board of Commissioners v. McNally*, 168 Neb. 23, 36, 95 N.W.2d 153, 161 (1959), when, in answer to a similar argument, the court said: "The conclusive answer to the challenge of the right of appellant to assert the invalidity of the alleged zoning regulations is that they were invalid from the time of their origin. Invalid legislation is not law. It confers no rights and imposes no duties or obligations." We note that the zoning regulation in *McNally* was adopted 17 years before that action, and that relatively long period was not found to breathe life into a void regulation. We find no basis for a different holding in this case because the zoning regulation was adopted approximately 20 years before this action was commenced.

*Is Tracy's Business a Public Nuisance?*

[10] In the County's second cause of action against Tracy, the County alleges the current operation of Tracy's business consti-

tutes a public nuisance. The Supreme Court stated by way of a quote from the Restatement (Second) of Torts § 821B (1979) that a public nuisance is "'an unreasonable interference with a right common to the general public.'" *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 9, 473 N.W.2d 428, 435 (1991). At the same time, the court stated: "[P]ublic nuisance 'comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community [and] includes interferences with . . . public morals.'" *Id.*, quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 90 (5th ed. 1984).

The Restatement, *supra* at 87, cited favorably in *State ex rel. Spire, supra*, goes on to state:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

To further explain what constitutes interference with a public right, the Restatement, *supra*, comment *g.* at 92, states:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills

> the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

The question before us is whether Tracy's operation of his refuse and recycling business constitutes a public nuisance and not whether it constitutes a private nuisance to several persons.

In an apparent effort to show a public nuisance, the County called as a witness an adjoining landowner who testified that material from Tracy's property had blown onto his property on several occasions, that material had washed onto his property and still remained there, and that his fence was damaged from material on Tracy's property. The neighbor also testified he had concerns about water draining from Tracy's property onto his property, possibly contaminating ground water. A previous and the current York County zoning administrator both testified the County received several complaints about the manner in which Tracy was operating his business on the property. This evidence does not establish a public nuisance under the definition of "public nuisance" quoted above.

In determining whether Tracy's business operation constitutes a public nuisance, we find no evidence in the record which causes us to conclude that the operation of Tracy's business rises to the level of public nuisance. While material blowing onto a neighbor's property might create a cause of action for a private nuisance, this question is not before us. The neighbor also testified he had concerns about the ground water. The neighbor's concerns are not evidence or proof that Tracy's business operation has contaminated the ground water. Furthermore, the County offered no evidence or proof that the ground water was in any way contaminated. Rodney DeBuhr, the water department manager for the Upper Big Blue Natural Resources District, testified that the only pollution in a nearby recharge lake was from pesticide as a result of runoff from cropland. Tracy's business cannot be found to constitute a public nuisance absent evidence or proof that the environment has been adversely impacted or that the public, as opposed to the immediate neighborhood, was in some way damaged. Neither does mere depreciation in neighboring property values constitute a public nuisance. In short, there is no evidence or proof in the

record which would support a finding that Tracy's business adversely impacts public health or the safety of the general public or otherwise interferes with a right "common to all members of the general public."

We find that Tracy's business does not sufficiently interfere with a public right that it can result in a public nuisance.

## CONCLUSION

We find the zoning regulation under which the county sought to enjoin Tracy from operating his business to be invalid. Likewise, we find that Tracy's business is not a public nuisance. For these reasons, we reverse the district court's order enjoining Tracy from operating his business and direct that the cause be dismissed.

REVERSED.

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WAYNE TREW, APPELLANT, V. ARLENE TREW, APPELLEE.
558 N.W.2d 314

Filed December 31, 1996. No. A-96-038.

1. **Garnishment.** Garnishment is a legal remedy.
2. **Judgments: Appeal and Error.** In actions at law, factual findings of a trial court in a jury-waived case have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
3. ____: ____. Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of the conclusion reached by the trial court.
4. **Decedents' Estates: Wills.** Neb. Rev. Stat. § 30-2401 (Reissue 1995) provides that upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate.
5. **Decedents' Estates.** Neb. Rev. Stat. § 30-2352(a)(1) (Reissue 1995) provides that a person who is a beneficiary of an estate may renounce his or her interest in the estate in whole or in part by filing a written renunciation.
6. ____. Neb. Rev. Stat. § 30-2352(c) (Reissue 1995) provides that if a timely renunciation is made, unless the transferor of an interest in an estate has otherwise indicated in an instrument creating the interest, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent or had died prior to the date on which the transfer creating the interest in such person is made, as the case may be.

7. ____. Neb. Rev. Stat. § 30-2352(c) (Reissue 1995) includes a "relation back" provision, which provides that a timely renunciation of an interest in an estate relates back for all purposes to the date of death of the decedent or the date on which the transfer creating the interest in such person is made, as the case may be.
8. **Debtors and Creditors: Fraud.** The Uniform Fraudulent Transfer Act allows a creditor to reach an asset that a debtor has transferred if the transfer meets certain criteria.
9. **Debtors and Creditors: Fraud: Words and Phrases.** Neb. Rev. Stat. § 36-702(12) (Reissue 1993) of the Uniform Fraudulent Transfer Act defines "transfer" as every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.
10. **Debtors and Creditors: Fraud.** Neb. Rev. Stat. § 36-707(4) (Reissue 1993) provides that a transfer of an asset cannot be made until a debtor has acquired rights in the asset transferred.
11. **Decedents' Estates: Fraud.** A beneficiary of an estate who has renounced his or her interest in property does not have possession of it; thus, the beneficiary cannot make a transfer within the meaning of the Uniform Fraudulent Transfer Act.
12. **Decedents' Estates: Debtors and Creditors.** Absent an express statutory provision to the contrary, a renunciation of an interest in an estate is not treated as a fraudulent transfer of assets and creditors of the renouncer cannot claim any rights to the renounced property.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed.

Thomas A. Wagoner for appellant.

David C. Huston, of Huston & Higgins, for appellee.

SIEVERS, MUES, and INBODY, Judges.

INBODY, Judge.

## INTRODUCTION

The instant case involves an ex-husband, Wayne Trew, who owes over $100,000 in alimony to his ex-wife, Arlene Trew. Wayne was the beneficiary of a one-eighth interest in his deceased brother's estate, but renounced that interest after Arlene filed a garnishment action in an attempt to recover delinquent alimony owed to her. The Custer County District Court determined that no regard was to be given to Wayne's purported renunciation and that Arlene was entitled to Wayne's one-eighth interest in the decedent's estate up to the extent of the unpaid alimony judgment. Wayne has appealed that order to this court.

## STATEMENT OF FACTS

Wayne and Arlene were divorced in 1975. In the decree of dissolution, Wayne was ordered to pay $400 per month in alimony to Arlene until her death or remarriage. As of August 31, 1995, the alimony judgment was $58,203.80 in arrears and $42,521.89 in interest had accrued thereon, for a total of $100,725.69.

On August 4, 1995, Wayne's brother passed away, leaving a will devising a one-eighth interest in his estate to Wayne. On September 18, Arlene filed a garnishment action against the personal representative of the decedent's estate. On September 29, Arlene filed an application to determine garnishee liability. Thereafter, on November 8, Wayne filed a renunciation of his interest in the estate in the Custer County Court.

On November 16, 1995, this case came on for hearing upon Arlene's application to determine garnishee liability. The only evidence adduced at the hearing was a copy of the county court proceedings concerning the probate of the estate of the decedent. On December 14, the court entered an order finding Wayne was entitled to a one-eighth interest in the residue of the decedent's estate after payment of expenses, claims, and inheritance taxes. The court found that Arlene was entitled to the one-eighth interest in the decedent's estate to the extent of her alimony judgment and ordered the personal representative to pay Wayne's one-eighth share in the decedent's estate to the clerk of the district court to be applied toward the alimony judgment. The court also specifically found that no regard was to be given to Wayne's purported renunciation. It is from this order that Wayne has perfected this appeal.

## ASSIGNMENT OF ERROR

Wayne's three assignments of error can be consolidated into the following issue: whether the district court erred in determining that Wayne's renunciation of the one-eighth interest in the decedent's estate was ineffectual.

## STANDARD OF REVIEW

[1-3] Garnishment is a legal remedy. *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 429 N.W.2d 1 (1988). In

actions at law, factual findings of a trial court in a jury-waived case have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. *Id.* However, regarding questions of law, an appellate court has an obligation to reach a conclusion independent of the conclusion reached by the trial court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993).

## DISCUSSION

*Statutory Requirements for Renunciation.*

The first issue that we must address is whether Wayne's renunciation was valid and prevented Arlene from reaching his interest in the decedent's estate. Arlene does not claim that Wayne's renunciation was not timely filed or that it failed to contain the necessary elements listed in Neb. Rev. Stat. § 30-2352(a)(2) (Reissue 1995). Indeed, our review of the record establishes that Wayne's renunciation was filed within the statutory time limits and did contain all statutorily required information. Instead, Arlene contends that Wayne failed to properly perfect his renunciation because he did not file his renunciation in the register of deeds' office.

Section 30-2352(b) provides that a renunciation

> must be received by the transferor of the interest, his or her legal representative, the personal representative of a deceased transferor, the trustee of any trust in which the interest being renounced exists, or the holder of the legal title to the property to which the interest relates. . . . If the circumstances which establish the right of a person to renounce an interest arise as a result of the death of an individual, the instrument shall also be filed in the court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. *If an interest in real estate is renounced, a copy of the instrument shall also be recorded in the office of the register of deeds in the county in which said real estate lies.*

(Emphasis supplied.)

The record shows that on November 8, 1995, Wayne filed a renunciation of his entire interest in the decedent's estate in the Custer County Court, where he was required to do so. We agree

with Arlene's claim that there is no showing in the record that the renunciation was filed with the office of the register of deeds. However, pursuant to § 30-2352(b), an individual is only required to file a renunciation with the register of deeds when an interest in real estate is renounced.

Although the decedent's estate did contain real property, the will directed that the real estate was to be sold and that the proceeds were to be divided as directed in the will. Thus, Wayne's interest in the decedent's estate did not include real estate, only the proceeds resulting from its sale. It follows then that Wayne had no interest in real estate to renounce and that, consequently, he was not required to file his renunciation with the register of deeds' office. Thus, Wayne's renunciation met statutory requirements and was filed within the statutory time limit as required by § 30-2352. We must now proceed to determine at what point in time the renunciation took effect.

*Operation of Renunciation Statute.*

[4-6] Nebraska law provides that "[u]pon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate . . . ." Neb. Rev. Stat. § 30-2401 (Reissue 1995). However, Nebraska law also provides that a person who is a beneficiary of an estate may renounce his or her interest in the estate in whole or in part by filing a written renunciation. § 30-2352(a)(1). If a timely renunciation is made,

> [u]nless the transferor of the interest has otherwise indicated in the instrument creating the interest, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent or had died prior to the date on which the transfer creating the interest in such person is made, as the case may be . . . .

§ 30-2352(c).

[7] Nebraska law also includes a "relation back" provision, which provides that a timely renunciation to an estate "relates back for all purposes to the date of death of the decedent or the

date on which the transfer creating the interest in such person is made, as the case may be." § 30-2352(c). But see *Hoesly v. State*, 243 Neb. 304, 498 N.W.2d 571 (1993) (exception to general rule that renunciation relates back "for all purposes" exists for individuals depriving themselves of any property whatsoever for purposes of qualifying for public assistance).

In sum, because Wayne filed a renunciation meeting statutory requirements within the time limit, pursuant to the statutory language contained in § 30-2352, Wayne's renunciation relates back to the date of the decedent's death for all purposes unless, for some other reason, the renunciation was invalid.

Despite these statutory provisions allowing beneficiaries to renounce their interests, Arlene argues that the Uniform Fraudulent Transfer Act (UFTA), Neb. Rev. Stat. §§ 36-701 to 36-712 (Reissue 1993), precludes Wayne's right to renounce his interest in the decedent's estate. This is a question of first impression in Nebraska.

*UFTA.*

[8] UFTA allows a creditor to reach an asset that a debtor has transferred if the transfer meets certain criteria. See §§ 36-705 and 36-706. Thus, the threshold issue in the instant case is whether the renunciation of an interest under a will is a "transfer" for the purposes of UFTA.

[9,10] UFTA defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." § 36-702(12). A transfer of an asset cannot be made until a debtor has acquired rights in the asset transferred. § 36-707(4). Thus, implicit in the act of transferring property is the requirement that the debtor possess the asset. *Dyer v. Eckols*, 808 S.W.2d 531 (Tex. App. 1991). This is so because a person cannot transfer or otherwise dispose of something which he or she does not possess. *Id.* Therefore, we must determine whether a beneficiary "possesses" property that has been renounced.

[11] A renunciation is irrevocable, and after renunciation, property passes as if the beneficiary predeceased the decedent.

§ 30-2352(c). Because the property passes as if the beneficiary predeceased the decedent, the beneficiary has no control over the distribution of the property and does not gain possession of the property. *Dyer, supra.* Cf. *Mahlin v. Goc*, 249 Neb. 951, 547 N.W.2d 129 (1996) (operation of joint tenancy upon one joint tenant's death is not "transfer" within meaning of UFTA). Thus, because a beneficiary who has renounced his or her interest in property does not have "possession" of it, the beneficiary cannot make a "transfer" within the meaning of UFTA. Furthermore, because no "transfer" occurs when a beneficiary renounces his or her interest, the beneficiary's reasons for doing so are irrelevant. *Matter of Scrivani,* 116 Misc. 2d 204, 455 N.Y.S.2d 505 (1982).

[12] A majority of courts have taken the position that a creditor cannot prevent a debtor from disclaiming an inheritance. *Dyer, supra*; Annot., *Creditor's Right to Prevent Debtor's Renunciation of Benefit Under Will or Debtor's Election to Take Under Will*, 39 A.L.R.4th 633 (1985). We adopt the majority view and hold that, absent an express statutory provision to the contrary, a renunciation is not treated as a fraudulent transfer of assets and that creditors of the renouncer cannot claim any rights to the renounced property. *Bank v. Martin*, 666 N.E.2d 411 (Ind. App. 1996); *Dyer, supra*; *National City Bank v. Oldham*, 537 N.E.2d 1193 (Ind. App. 1989); *Estate of Goldammer v. Goldammer*, 138 Wis. 2d 77, 405 N.W.2d 693 (Wis. App. 1987).

The "relation back" doctrine is based on the principle that a bequest or gift is merely an offer which can either be accepted or rejected. *Dyer, supra.*

> Any post-mortem distribution, whether by will or by operation of law, is a donative transfer like any other. The law forces no one to accept a gift. To hold otherwise may impose an unintended hardship on the recipient intended to [be] benefitted, as by triggering unanticipated and unnecessary additional tax liability. Moreover, it may frustrate the intent of the deceased, who sought to benefit the distributee and not a private or public creditor.

*Matter of Scrivani*, 116 Misc. 2d at 208, 455 N.Y.S.2d at 509.

We recognize that this determination may, at first glance, appear to directly conflict with other longstanding and well-established values by seeming to encourage beneficiaries to renounce interests to avoid payment of creditors. See §§ 36-701 to 36-712. See, also, predecessor act, Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 to 36-613 (Reissue 1988) (repealed 1989). However, if this court held otherwise, it would require us to legislate by judicial fiat, which we simply do not have the power to do. See, Neb. Const. art. II, § 1; *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994) (Wright, J., dissenting). It is not the province of the courts to legislate through decisions. *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982); *Anderson v. Carlson*, 171 Neb. 741, 107 N.W.2d 535 (1961). Cf., *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978); *Eliker v. D. H. Merritt & Sons*, 195 Neb. 154, 237 N.W.2d 130 (1975). The remedy, if one is needed, lies with the legislature, not with the courts. For example, Minnesota has enacted a statute which bars a beneficiary's right to disclaim if the beneficiary is insolvent at the time of the event, giving rise to the right to disclaim. Minn. Stat. Annot. § 525.532, subd. 5 (West 1997). See *In re Estate of Abesy*, 470 N.W.2d 713 (Minn. App. 1991). Cf. *Pennington v. Bigham*, 512 So. 2d 1344 (Ala. 1987) (Alabama Code § 43-8-295 (1991) provides that right to disclaim property or interest therein is barred if property is encumbered).

In sum, a renunciation is not a "transfer" as contemplated by UFTA because the beneficiary is merely rejecting a gift and has no interest that he or she can transfer to another person. See *Bank v. Martin, supra*. Consequently, Wayne's renunciation was not barred by UFTA, and the decision of the district court must be reversed.

REVERSED.

# MARVIN SIMONSEN, APPELLEE, V. HENDRICKS SODDING & LANDSCAPING INC., APPELLANT.

558 N.W.2d 825

Filed January 7, 1997. No. A-95-566.

1. **Appeal and Error.** To be considered by an appellate court, claimed prejudicial error must not only be assigned, it must also be discussed in the brief of the asserting party.
2. **Motions for Continuance: Affidavits: Good Cause.** An application for continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.
5. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
6. **Employer and Employee: Termination of Employment.** When employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses.
7. **Termination of Employment: Damages: Public Policy.** An at-will employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
8. **Employer and Employee: Termination of Employment: Public Policy.** An at-will employee has a cause of action for wrongful discharge against his or her former employer if the employee was discharged in violation of a contractual right or a statutory restriction or when the motivation for the discharge contravenes public policy.
9. **Employer and Employee: Public Policy.** It is against the public policy of this state for employers to require employees to violate the law in order to remain employed.
10. **Jury Instructions.** A trial judge is under a duty to correctly instruct on the law without any request to do so.

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

Alan L. Plessman, of Plessman Law Offices, for appellant.

Thom K. Cope, of Bailey, Polsky, Cope & Nelson, for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

In this action, appellee, Marvin Simonsen, an employee at will, recovered a jury verdict of $81,240 against appellant, Hendricks Sodding & Landscaping Inc., for wrongfully discharging him because he refused his supervisor's order to drive a truck which had defective brakes. Hendricks appeals on the grounds that the evidence is insufficient to support the verdict and that the court committed plain error in instructing the jury. We conclude that driving a truck with defective brakes on the roads is against the laws of this state and that it is against public policy for an employer to discharge an at-will employee when that discharge is motivated by the employee's refusal to violate the criminal laws or public policy of the state. We also find no plain error in the court's instructions to the jury, and we therefore affirm.

## FACTUAL BACKGROUND

In substance, Simonsen alleges that he was employed by Hendricks as a mechanic; that on May 22, 1991, he was driving Hendricks' truck in the course of his employment when he ran a stoplight because its brakes were defective; that a U.S. Department of Transportation (DOT) inspector ordered that the truck not be moved until the truck was repaired; that on May 24 Simonsen was attempting to repair the brakes when his supervisor ordered him to put the wheels on and take the truck on the road; that Simonsen was aware that the appropriate repairs had not been made; and that "[Simonsen] had reasonable cause to believe that placing the truck back in service without further repair would result in a violation of state or federal law and would endanger the safety of the public." Simonsen alleges he was fired for refusing to drive the truck with defective brakes. In its answer, Hendricks admits the employment and the events of May 22, but specifically denies Simonsen was fired for refusing to drive the truck.

Since the jury verdict was in favor of Simonsen, we will summarize the evidence in a light most favorable to Simonsen and mention Hendricks' evidence to the contrary only as necessary

to frame the issues. Simonsen was hired by Norman LeGrande, the owner of Hendricks, to work as a diesel mechanic repairing the company's trucks and other heavy equipment for compensation of $9 per hour plus fringe benefits. Their agreement was not reduced to writing, but the evidence established that Simonsen was an at-will employee. Simonsen testified that several trucks in Hendricks' fleet were old and in constant need of repair and that repairs were made to old parts which should have been replaced. On May 22, Simonsen, while driving one of Hendricks' trucks, was unable to stop the truck at a red light and ran through the intersection. He was cited by both the Lincoln Police Department and DOT for having defective brakes. Another driver of one of Hendricks' other trucks was also ticketed at the same time by DOT. The DOT officer would not permit either truck to be driven until the brakes were at least temporarily fixed so the brakes could stop the truck. The next day, May 23, Simonsen and the other driver spent 7 hours at the site repairing the trucks. With DOT's permission, the other driver drove both trucks back to the shop, because Simonsen refused to drive them.

On May 24, Simonsen worked on the brakes of one of these trucks. Tim LeGrande, one of the owner's sons and Simonsen's supervisor at that time, asked Simonsen if the truck was available for service. Simonsen told him that the truck would not be available that day. Simonsen continued to work on the truck's brakes for another hour by taking wheels off and dismantling other parts of the truck. He was questioned by another of the owner's sons, Dan LeGrande, as to the availability of the truck. Simonsen's testimony and Dan LeGrande's testimony differ at this point.

Simonsen testified that he told Dan LeGrande that the truck would not be available because of the many problems with the braking system. Dan LeGrande became agitated and told Simonsen either to get the truck together and drive it to the job site or he was fired. Simonsen refused to drive the truck and turned and walked away from Dan LeGrande. He wrote on his work ticket for the day that "Danny Boy fired me, I guess." In Simonsen's opinion, the brakes in their condition at the time were defective. Simonsen testified that he spoke with another

supervisor, who told him to go home and to work it out with Norman LeGrande, the owner, when Norman LeGrande returned from vacation. Simonsen packed his tools and left. After contacting Norman LeGrande several days later, Simonsen determined that Dan LeGrande had fired him.

Dan LeGrande testified and denied Simonsen's version of these events. While Hendricks argues that the evidence is insufficient to support the verdict, it bases that argument on the fact that Simonsen was an employee at will, not that the evidence would not support a finding that Simonsen was fired for refusing to drive the truck. Hendricks offered no evidence to dispute Simonsen's testimony that the brakes were defective. The jury verdict makes it unnecessary to further summarize the evidence on these issues.

Simonsen testified that when employed by Hendricks he was paid an average of $560 per week; that he was unable to find comparable employment as a mechanic or maintenance person after he was fired; that as a result he became self-employed as a mechanic, also putting basements in houses and performing "all kinds of odd jobs"; and that his total taxable income since leaving Hendricks had been about $2,500. Since Hendricks does not argue regarding the sufficiency of the evidence to support the amount of the verdict, we need not elaborate further on the evidence on damages.

Hendricks filed a motion for new trial and appealed after it was overruled.

## ASSIGNMENTS OF ERROR

Hendricks alleges seven errors, which summarized and restated are that the trial court committed plain error (1) by not directing a verdict in its favor, (2) by instructing the jury that Simonsen claimed he refused to drive a defective truck when he alleged in his operative petition that he refused to drive a truck because he *believed* the truck to be defective, and (3) by instructing the jury that it is the law of the state, as declared by the Legislature, that defective vehicles shall not be driven on the roads of Nebraska.

[1] Hendricks also alleges that the court erred in instructing the jury on damages, in overruling its motion for a continuance,

and in overruling its motion for new trial. Hendricks does not argue any error concerning the damages instruction. To be considered by an appellate court, claimed prejudicial error must not only be assigned, it must also be discussed in the brief of the asserting party. An appellate court will not consider assignments of error which are not discussed in the brief. *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). Therefore, we will not address this assignment.

[2] Hendricks also alleges the trial court erred in not granting its motion to continue the trial. " 'An application for continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings.' " *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 60, 480 N.W.2d 211, 216 (1992) (quoting *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989)). Here, Hendricks orally moved for a continuance without a supporting affidavit. Therefore, the trial court properly denied the motion for a continuance. The motion for new trial did not raise any issue that is argued separately from those listed above, and therefore this alleged error is not considered as a separate assignment.

## STANDARD OF REVIEW

[3] The only questions presented by the appeal are legal questions. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995); *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995).

## DISCUSSION

*Failure to Direct Verdict.*

[4,5] Although Hendricks did not move for a directed verdict at any time during the trial, Hendricks alleges on appeal that the trial court erred in not directing a verdict in its favor. In the absence of plain error, where an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition. See *In re Estate of Trew*,

244 Neb. 490, 507 N.W.2d 478 (1993). Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994).

Hendricks contends that Simonsen was an at-will employee, who under Nebraska law could be terminated at any time with or without reasons unless his employer was constitutionally, statutorily, or contractually prohibited from doing so. Hendricks alleges that the evidence was insufficient to show that Simonsen had any rights other than those of an at-will employee and thus, relying on *Borland v. Gillespie*, 206 Neb. 191, 292 N.W.2d 26 (1980), that the trial court erred in giving the case to the jury. The record shows that Simonsen is an at-will employee.

[6,7] Simonsen relies upon the holdings in *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988), and *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). In *Ambroz*, the trial court held a security guard who sued for wrongful discharge did not state a cause of action when he alleged that he was fired for refusing to take a polygraph examination, when the statute provided no employer could require an employee in the security guard's position to submit to such an examination as a condition of employment. The Supreme Court reversed the judgment and in so doing recognized the rule that " 'when employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses.' " (Emphasis omitted.) *Id.* at 902, 416 N.W.2d at 513 (quoting *Jeffers v. Bishop Clarkson Memorial Hosp.*, 222 Neb. 829, 387 N.W.2d 692 (1986)). The *Ambroz* court observed that other jurisdictions have recognized a public policy exception, that is, that an at-will employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. The *Ambroz* court held that the statute's provision that an employer could not require an employee to submit to a poly-

graph examination was a pronouncement of public policy on the issue of wrongful discharge.

[8] In *Schriner*, the public policy exception was recognized, but the court determined that the evidence did not support its application in that case. The employee had been fired after he reported his employer for the suspected criminal activity of setting back odometers. The *Schriner* court listed several cases from other jurisdictions where discharged employees were allowed to recover for wrongful discharge after refusing to set back odometers or to violate similar laws, and it distinguished the situation in *Schriner* from "those cases in which an action for wrongful discharge was based on an employee's refusal to participate in criminal conduct." *Id.* at 89, 421 N.W.2d at 758. In *Schriner*, the employee was held not to have had reasonable cause to believe his employer had violated the law in the manner that the employee had reported to public officials. There was a dissent on the grounds that Schriner did have reasonable grounds to report his employer. We therefore conclude that the law in Nebraska is that an at-will employee has a cause of action for wrongful discharge against his or her former employer if the employee was discharged in violation of a contractual right or a statutory restriction or when the motivation for the discharge contravenes public policy.

[9] We also conclude that employees who are discharged because they refused to commit an act that violates the criminal laws of the state are discharged for a motive that contravenes public policy, and they have a cause of action notwithstanding that they are at-will employees. We come to this conclusion because of the discussion in *Schriner* and because the Legislature has specifically so provided in the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 through 48-1125 (Reissue 1993). Section 48-1114 provides in part: "It shall be an unlawful employment practice for an employer to discriminate against any of his or her employees . . . because [the employee] (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state." We realize that Simonsen did not state a cause of action under the Nebraska Fair Employment Practice Act because the record does not establish Hendricks was an "employer" as that

term is defined in § 48-1102(2), that is, there is no evidence that Hendricks had at least 15 employees. That statute does, however, support the rather obvious conclusion that it is against the public policy of this state for employers to require employees to violate the law in order to remain employed.

Would the operation of the truck with defective brakes violate the law of Nebraska? "Yes" seems to be the obvious answer. Neb. Rev. Stat. § 75-363 (Reissue 1990) adopts portions of the federal motor carrier safety regulations. The relevant portion of those regulations is found at 49 C.F.R. § 393.40(a) (1995), which provides that a truck must have brakes adequate to control the movement of and to stop and hold the vehicle. A violation of the provisions adopted under § 75-363 is a misdemeanor. Neb. Rev. Stat. § 75-367 (Reissue 1990). Thus, we conclude that the Legislature has made driving with defective brakes a misdemeanor and in so doing has declared that to do so violates public policy. Therefore, we conclude that the trial court did not err in giving this case to the jury and that the evidence supports the verdict.

*Jury Instructions.*

[10] Hendricks contends that despite its failure to object to the instructions at issue, the court committed plain error in instructing the jury. While ordinarily the failure to object to jury instructions after they have been submitted for review will preclude raising an objection thereafter, a trial judge is nonetheless under a duty to correctly instruct on the law without any request to do so, and an appellate court may take cognizance of plain error and thus set aside a verdict because of a plainly erroneous instruction to which no previous objection was made. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). Thus, we first consider whether the alleged plain error was in fact error.

Hendricks alleges that portions of jury instructions Nos. 2 and 5 are incorrect statements of the law and are not supported by the evidence or the pleadings. Instruction No. 5 states in part, "It is the law of this state, as declared by the Legislature, that defective vehicles are not to be driven on the roads of Nebraska." As discussed above, § 75-363 prohibits the use of a

truck without proper brakes. Thus, this is a proper statement of the law and therefore could not be plain error.

Instruction No. 2 provides in part that "[t]he plaintiff, Marvin Simonsen, claims that he was terminated from his employment because he refused to drive a defective truck" and that it is Simonsen's burden to prove that "the plaintiff's employment was terminated by the defendant because he refused to drive a defective truck."

Hendricks correctly states that Simonsen alleges in his petition that he was terminated because he refused to drive Hendricks' truck, which Simonsen "believed" to be in violation of federal and state law. Hendricks contends that the petition is based upon Simonsen's belief that the truck was defective and not upon whether or not the truck was actually in violation of the law. The court instructed the jury that Simonsen claimed the brakes were defective. Hendricks argues that the instructions changed the issues from those that were pled and that as given the instructions are not supported by sufficient evidence. We do not agree.

Simonsen's "belief" is not one of the elements of his cause of action against Hendricks. The allegation of his belief merely explains why he refused to drive the truck. Such an allegation is immaterial, but the petition otherwise sets forth sufficient facts to state a cause of action. The court properly instructed the jury on the elements of that cause of action. There is no error in the jury's instructions, and therefore we may not consider any claim of plain error.

AFFIRMED.

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I. P. HOMEOWNERS, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. HAROLD RADTKE AND JUANITA RADTKE, APPELLANTS AND CROSS-APPELLEES.

558 N.W.2d 582

Filed January 7, 1997. No. A-95-1095.

1. **Attorney and Client: Notice.** Notice to, or knowledge of facts by, an attorney is notice to, or knowledge of, his client.

2. **Corporations: Partnerships.** Shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership.
3. **Partnerships.** Partners owe to one another to act among themselves in the utmost good faith and loyalty.
4. **Corporations: Partnerships.** The mere fact that a business is run as a corporation rather than a partnership does not shield the business venture from a fiduciary duty similar to that of true partners.
5. **Partnerships: Trusts.** Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
6. **Partnerships.** Partners must not take advantage of one another by the slightest concealment or misrepresentation of any kind.
7. **Trusts: Property: Title: Equity.** A court sitting in equity will not impose a constructive trust and constitute an individual as a trustee of the legal title for property unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relation and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
8. ____: ____: ____: ____. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment.
9. **Trusts: Statute of Frauds.** It has long been held that constructive trusts are excepted from the operation of the statute of frauds.
10. **Courts: Trusts: Accounting.** After a court imposes a constructive trust, it may determine the matter of the accounting of rents and profits.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed as modified.

Thomas F. Hoarty, Jr., and Christopher R. Hedican, of McGowan & Hoarty, for appellants.

Michael F. Pistillo and Thomas G. Incontro, of Pistillo & Pistillo, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

HANNON, Judge.

Homeowners of Iske Place property brought suit as a corporation, I. P. Homeowners, Inc., against Harold Radtke and Juanita Radtke to obtain specific performance of an alleged oral contract or, in the alternative, to impress a constructive trust

upon real estate that the Radtkes purchased from a third party. The corporation based its action upon three separate theories: (1) an alleged breach of contract, (2) an alleged fraudulent misrepresentation, and (3) an alleged breach of fiduciary duty. We conclude that as stockholders of a close corporation, the Radtkes owed a fiduciary duty to the corporation and that the trial court was correct in imposing a constructive trust in favor of the corporation on the Radtkes' purchase.

The corporation cross-appeals because it was required to pay interest to the Radtkes on the money the Radtkes used to purchase the property. We conclude that the payment of interest is not required under the circumstances of this case, and therefore, we affirm the trial court's judgment as herein modified.

## FACTUAL BACKGROUND

Initially, we recount a brief overview of the undisputed facts contained in the instant suit. The land in question, referred to as "Iske Place," is a 35.6-acre tract of land in Sarpy County, Nebraska, which borders the Missouri River. The former owners of Iske Place, Gail Iske and Sally Iske, rented at least 47 individual parcels of the property to several tenants for $250 to $300 per year. Over the years, the tenants constructed homes on Iske Place, even though they did not own the underlying land. In January 1994, the Papio-Missouri River Natural Resources District (NRD) offered to purchase Iske Place for $150,000, whereupon the Iskes gave their tenants the opportunity to purchase the land for the same price and terms as the NRD offered. A group of tenants met and agreed to quickly form a corporation, I. P. Homeowners, Inc., and they made at least one offer to purchase Iske Place. Corporate representatives had agreed to meet with Gail Iske or his attorney on February 4 to further negotiate the sale. However, on February 3, the Iskes and the Radtkes entered into a "Lease and Purchase Agreement" under which the Radtkes agreed to lease the real estate for $20,000 until closing (at latest, February 1, 1995) and to pay a $130,000 purchase price.

The activities of the homeowners, the corporate officials, the Radtkes, the Iskes, and their attorneys during January and the first 3 days of February 1994 are much disputed and will be out-

lined in detail later in this opinion. After a full trial on the matter, the district court found that the Radtkes held Iske Place in a constructive trust for the corporation, subject to the corporation's reimbursement of the Radtkes for their payment on the property plus interest and any extra costs.

## ASSIGNMENTS OF ERROR

The Radtkes contend that the district court erred in (1) concluding that Harold Radtke made any promises to I. P. Homeowners, Inc., either before or after the signing of the purchase agreement on February 3, 1994; (2) finding that any promises of Harold Radtke to I. P. Homeowners, Inc., after February 3 were enforceable, because there was no consideration for them; (3) concluding that any alleged promises of Harold Radtke were enforceable because the evidence was clear that the corporation was financially unable to purchase the property; (4) finding that either Harold Radtke or Juanita Radtke was a promoter of I. P. Homeowners, Inc.; (5) finding that I. P. Homeowners, Inc., had any valid business opportunity, as the evidence showed that the corporation was financially unable to purchase the property; (6) ordering the equitable remedy of a constructive trust in light of the corporation's attempts to use Harold Radtke as its "ace in the hole"; and (7) failing to find that the alleged agreement between Harold Radtke and I. P. Homeowners, Inc., was barred by the statute of frauds.

I. P. Homeowners, Inc., cross-appeals, contending the district court erred in (1) ordering the corporation to pay interest on the principal sum paid for Iske Place and not ordering the Radtkes to pay all rents received from the residents of Iske Place since February 3, 1994, a total of $39,400 plus interest, and (2) failing to confirm title to Iske Place in the name of I. P. Homeowners, Inc., after the corporation deposited the requisite funds with the clerk of the district court.

## STANDARD OF REVIEW

In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where 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. *NEBCO, Inc. v. Board of Equal. of City of Lincoln*, 250 Neb. 81, 547 N.W.2d 499 (1996); *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

## DISPUTED FACTS

Before diving into a legal analysis, we feel it is important, in our de novo review, to set forth the heavily disputed facts as presented at trial. For convenience, we refer to the tenants of Iske Place as the "homeowners."

On January 24, 1994, Gail Iske informed Esther Eby, one of the homeowners, that he was willing to give the homeowners 30 days to purchase Iske Place before selling it to the NRD. Iske gave Eby an unsigned offer of sale for $150,000 ($50,000 as a downpayment and $25,000 per year for 4 years with no interest), but excluded a dike and farm ground from the offer. Eby, who appears to have been the leader of the homeowners, communicated the offer to the other homeowners.

After hearing of the offer, Ursula Braesch, another homeowner, contacted Wandel Law Offices for the purpose of forming a corporation. Josephine Wandel and Bernard McNary, attorneys for Wandel Law Offices, subsequently met with Iske Place homeowners Ursula Braesch and Steven Braesch, Curtis Morrow, James Walker, and Eby at a bar on January 27, 1994, to discuss the possibility of purchasing Iske Place. As a result of the meeting, Wandel prepared articles of incorporation for I. P. Homeowners, Inc., which were filed with the Secretary of State on January 31.

Walker testified that after the meeting on January 27, 1994, he contacted Harold Radtke, who was vacationing in Arizona with Juanita Radtke, and informed Harold Radtke that the homeowners were attempting to form a corporation in order to

purchase Iske Place. Walker testified that Radtke replied that he "wanted to be counted in regardless." Radtke, on the other hand, testified that Walker called on January 24, that Walker never mentioned a corporation, and that Radtke rejected Walker's offer to participate in Walker's effort to purchase the property. Walker later spoke to Eby on the telephone and, according to Eby, told her that Radtke wanted her to "put in" for him. Eby testified that she called Radtke in Arizona to verify the substance of her conversation with Walker. Eby testified that she told Radtke that the homeowners had formed a corporation and asked if he wanted in. According to Eby, Radtke told her to contribute $100 for him, as each homeowner was going to contribute $100 for "a hundred shares" of stock, and to further contribute "whatever else amount it took to keep him in." Radtke, however, testified that Eby did not want anything to do with Walker's attempt at purchasing Iske Place and that she wanted to hire another attorney, Mike Lustgarten, to straighten things out and to prevent the NRD from purchasing the property. Radtke further testified that his $100 was to go toward the hiring of Lustgarten and that Eby never told him that his money had gone into a corporation.

On January 28, 1994, Eby and Morrow hired Lustgarten to oversee the formation of the corporation and to represent Eby's, Morrow's, and Harold Radtke's individual interests, rather than those of the corporation. Lustgarten confirmed that Eby asked him to represent Radtke.

The homeowners held a second meeting, on January 30, 1994, to determine who wanted to become members of the corporation. Twenty or more homeowners were present, as well as McNary, Wandel, and Lustgarten. Lustgarten agreed, upon Eby's request, to also represent Samuel Caniglia. McNary and Wandel passed out stock subscription agreements, which were signed by 12 homeowners, including Eby, Linda Morrow and Curtis Morrow, Samuel Caniglia and Gloria Caniglia, the Braesches, and Walker. One of the subscription agreements was signed "Harold Radtke by Esther Eby." Eleven of the homeowners also contributed $100 each for one share of stock. Eby testified that she had the authority to pay Harold Radtke's subscription fee and wrote two $100 checks, one for herself and her

husband and one with a notation "For Harold Radtke." A subscription receipt indicates that the corporation received $100 from Radtke in exchange for one share of stock. The receipt was signed by Eby, and underneath her signature, Lustgarten wrote, "Esther Eby, on behalf of Harold Radtke." The subscribers then elected three corporate representatives: Eby, Walker, and Steven Braesch.

Following the meeting, Wandel, McNary, and Eby went to the Iskes' house to present them with a proposed real estate land contract and a $1,000 earnest deposit. According to the proposed contract, the corporation offered to purchase Iske Place for $150,000, consisting of a $1,000 downpayment, a $49,000 payment at closing, and four annual payments of $25,000 plus interest. However, the agreement was never signed, and the check was never cashed. McNary testified that the Iskes made a counterproposal, the terms of which McNary wrote in on the last page of his copy of the proposed agreement. It appears from McNary's copy of the proposed agreement that the Iskes desired additional compensation for a dike and farm ground, which is consistent with the offer of sale originally given to Eby by Gail Iske. On January 31, 1994, McNary spoke with the attorney for the Iskes, Dean Jungers, concerning the proposed contract and made arrangements to meet with him on February 4, presumably to finalize the purchase. No agreement was ever entered into between the Iskes and the corporation.

Lustgarten testified that he was informed by Eby on February 1, 1994, that the corporation's first offer had not been accepted by the Iskes and that the corporation was discussing making a second offer, of $175,000. Lustgarten specifically admitted that as of February 1, he believed that Eby, Samuel Caniglia, and Harold Radtke were going to go through with the purchase of Iske Place as part of the corporation. This information was reflected in a February 1 letter from Lustgarten to Eby, Curtis Morrow, Caniglia, and Radtke in which Lustgarten refers to his four clients as "stock holders" in the corporation.

The Radtkes returned from Arizona on January 31, 1994, and that night, Harold Radtke called Gail Iske. According to Radtke, Iske told him that both Walker and Eby had made offers, but that "it didn't look good." Radtke specifically testified that Iske

also told him that a group of Iske Place residents had made offers to purchase the property. After talking with his banker, Radtke spoke with Iske again on February 1 or 2. According to Radtke, Iske told him that it did not look like "they" were getting a deal together. Radtke further testified that Eby told him that "they" could not come up with the money and that he should contact Lustgarten about purchasing the place himself. Interestingly, at trial, Radtke was unable to define his use of the term "they" and continued to maintain that he was unaware of the homeowners' attempt to purchase the property.

Eby's version of the events of February 1 and 2, 1994, varies significantly from Harold Radtke's version. According to Eby, on February 1, she told Radtke that he was in the corporation, that Lustgarten was representing them, and that the corporation was proceeding to buy Iske Place. On February 2, Radtke came to her house to ask permission to purchase Iske Place himself. Radtke told Eby that if he was allowed to purchase the property, the homeowners could have 10-year leases, the homeowners could have a 5-year option to purchase the property at the same price, and the homeowners' rent would not increase unless taxes increased (hereinafter referred to as the "representations"). In Eby's presence, Radtke made the same representations to Steven Braesch, another representative of the corporation. After speaking with Walker, the third representative, Braesch and Eby told Radtke that if the corporation was unable to reach an agreement with the Iskes on February 4, then Radtke could purchase the property himself.

Lustgarten testified as to his own version of the events of February 1 and 2, 1994. According to Lustgarten, Eby called him on February 2 "in a state of panic," claiming that everyone was "ba[i]ling out" and that she only had until February 4, the date that the Iskes were going to sell to the NRD, to purchase the property. Eby then asked Lustgarten if he would represent Harold Radtke in an individual purchase of the property. Lustgarten told Eby that Radtke would have to call him and further that if he represented Radtke, he could no longer represent the other three individuals. Radtke called and retained Lustgarten, and Lustgarten informed Eby, as spokesperson, that he would no longer be representing the three remaining clients.

Lustgarten also informed Eby that if Radtke bought the property, he could do whatever he wanted with it. At trial, Lustgarten could not recall whether he ever discussed the corporation or the corporation's efforts to purchase Iske Place with Radtke.

Gail Iske also testified concerning the events prior to February 3, 1994. Iske, who could not remember certain undisputed events, testified that he knew that a group of homeowners was attempting to purchase Iske Place. At one point in his testimony, Iske stated that Harold Radtke had told him that the members of the group had agreed among themselves to allow Radtke to purchase the property. However, later in his testimony, Iske stated that Eby had told him that Radtke, instead of the corporation, could buy the property.

On February 3, 1994, Juanita Radtke called Eby and told her to meet her and Harold Radtke at Jungers' office. According to Eby, she met the Radtkes outside the building, where Harold Radtke told her that he was going to purchase Iske Place for $150,000 and that the corporation " 'would be taken care of.' " Radtke again made the representations concerning the 10-year leases, rent, and the 5-year option to purchase. Lustgarten backed up Radtke's promises and asked Eby if she had any problems with him also representing Radtke, presumably in an individual capacity. Lustgarten and the Radtkes all denied that any representations were made to Eby outside of Jungers' office. Lustgarten testified that he told Eby that if Radtke purchased the property, Radtke could do whatever he wanted with it.

It is undisputed that the persons present at the meeting were the Radtkes, the Iskes, Eby, Lustgarten, and Jungers. Without objection by Eby, the Radtkes and the Iskes entered into a lease and purchase agreement whereby the Iskes agreed to lease the property for $20,000 until closing, at which time the remaining $130,000 was to be paid to purchase the property. Eby testified that following the signing of the agreement, she and the Radtkes went down to Iske Place, where Harold Radtke made the representations to the Morrows, the Braesches, the Caniglias (on February 10, 1994), and Walker (on February 11). Eby was also present at the closing on July 11, when the deeds to Iske Place were transferred. Either in March or in April, the Radtkes raised

the annual rent from $250 to $300 per lot to $500 per lot, and according to Steven Braesch, the Radtkes further increased the rent after the corporation decided to file the lawsuit. Furthermore, although Lustgarten claimed that he no longer represented Eby, Curtis Morrow, and Samuel Caniglia, he did bill Eby for phone calls and a conference in April concerning leases.

Harold Radtke testified that he never made any of the representations to any of the homeowners. Radtke also testified that he had no knowledge of the corporation until the suit was filed against him. Concerning the February 1, 1994, letter from Lustgarten to Radtke which informed Radtke that he was a stockholder of the corporation, Radtke testified that he did not receive it until February 4, after he had purchased Iske Place, and further that he only glanced at it before throwing it away. Juanita Radtke also testified that the Radtkes never made any promises before the purchase. At trial, the corporation introduced a taped conversation between Eby and Juanita Radtke in which Juanita Radtke admitted to the representations. However, as Eby can clearly be heard whispering the desired answers to Juanita Radtke, we find that the tape is of no value.

Eby gave various accountings of how the corporation was going to finance a $175,000 purchase. At trial, Eby testified that the corporation was going to put $10,000 down on February 4, 1994; put $50,000 down at closing; borrow $100,000 from Walker's bank, Bank of Bellevue; and also borrow from Walker's friend, Russell Langdon. Eby testified that each subscriber was going to pay $5,000 in order to raise the $50,000. According to Eby, "[t]here was no way that we would have failed in acquiring Iske Place." However, Eby admitted that at an earlier deposition she claimed that the corporation was going to borrow $165,000 from Bank of Bellevue.

There was also testimony about an "ace in the hole" who would help the corporation out with any financing problems. McNary testified that after the land was purchased, Walker told him that Harold Radtke was the ace in the hole. However, Walker testified that the ace in the hole was Langdon. Langdon testified that he gave Walker the unlimited authority to write a check against Langdon's account, interest free. Langdon testi-

fied that at that point in time, he had sufficient funds to put up $100,000. Thomas Wilson, a commercial lender for Bank of Bellevue, testified that Walker and a group of individuals were discussing borrowing $100,000 to purchase the property. It does not, however, appear that any applications for a loan were ever submitted. Wilson further testified that it was the bank's policy to loan approximately 70 percent of the value of that type of property.

## FINDING OF TRIAL COURT

The trial court found that the Radtkes held Iske Place in a constructive trust for the corporation.

## DE NOVO REVIEW OF FACTS

[1] In the instant case, it is undisputed that the Iskes provided the homeowners with the opportunity to purchase Iske Place, as evidenced by the proposed offer of sale, before selling it to the NRD. The homeowners met and decided to form a corporation, I. P. Homeowners, Inc., to attempt to purchase Iske Place. I. P. Homeowners, Inc., filed its articles of incorporation with the Secretary of State on January 31, 1994, and 11 of the homeowners paid $100 each for 1 share of stock in the corporation. Pursuant to Harold Radtke's instructions, Eby contributed $100 for Radtke to become a stockholder in the corporation. Lustgarten, who admitted that he was representing Eby, Curtis Morrow, Samuel Caniglia, and Radtke, wrote on Radtke's subscription receipt, "Esther Eby, on behalf of Harold Radtke." Despite the subscription receipt and his February 1 letter to Radtke detailing Radtke's status as a stockholder in the corporation, Lustgarten could not recall whether he ever discussed the corporation or the corporation's efforts to purchase Iske Place with Radtke. The general rule is that notice to, or knowledge of facts by, an attorney is notice to, or knowledge of, his client. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995) (discussions between officer and defendant's attorney were sufficient to give defendant notice of charges against him); *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc.*, 212 Neb. 137, 322 N.W.2d 369 (1982) (knowledge of city's interest in property imputed to client).

Harold Radtke essentially testified that in all his discussions with Eby, Walker, Gail Iske, and Lustgarten, he never became aware of the corporation until it filed suit against him on November 10, 1994. We note that Radtke admitted that Iske had told him, prior to the Radtkes' purchase of Iske Place, that a group of homeowners had made offers to purchase the property. Harold Radtke attempted to deny his knowledge of the corporation by referring to the members of the group as "they," without defining the word. While we find inconsistencies in the stockholders' testimony, we are convinced that prior to his purchase of Iske Place on February 3, Radtke knew that he was a stockholder of the corporation. In fact, Lustgarten's knowledge is imputed to him. See *City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc., supra.*

## ANALYSIS

We need not address the corporation's first two causes of action because we find in favor of the corporation under its third cause of action, breach of fiduciary duty.

*Fiduciary Duty.*

[2-4] Shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership. *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), *disapproved on other grounds, Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). See, also, *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983).

> Shareholders in a close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another, to act among themselves in the utmost good faith and loyalty. This reliance on partnership principles is appropriate since many close corporations are in substance partnerships by another name. Unlike the holders of public stock, who can sell their stock when disagreements over management arise, shareholders in a small corporation do not usually have an available market to sell their shares. The mere fact that a business is run as a corporation rather than a part-

> nership does not shield the business venture from a fiduciary duty similar to that of true partners.

12B William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5713 at 2 (Cum. Supp. 1996).

In *Anderson v. Clemens Mobile Homes*, 214 Neb. at 288, 333 N.W.2d at 904, the Nebraska Supreme Court, in imposing a fiduciary relationship between the two shareholders of a corporation, stated:

> It has been held that although an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this burden of proof, there has been a breach of that fiduciary trust or relationship. [Citations omitted.] The general rule is stated to be that a director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons.

However, generally, no corporate opportunity exists if the corporation is by itself financially unable to undertake the opportunity, and a corporate officer has no specific duty to use or pledge his personal funds to enable the corporation to take advantage of a business opportunity. To be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy. *Id.* (finding it was not clear that corporation would have been unable to take advantage of usurped opportunities).

In *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N.W. 839 (1913), a corporation brought suit against Koenig, a former engineer and director of the corporation, over an application to divert water from the Loup River. As part of his employment, Koenig had access to the corporation's records and engineering data. Koenig made an application to divert in his own name,

resigned his directorate, and in a legal contest, prayed for the cancellation of all of the corporation's prior applications. The corporation then sought to enjoin Koenig from attempting to cancel its applications. The trial court found that Koenig made his application as a fiduciary and therefore held the application in trust for the corporation. On appeal, the issue was whether Koenig's application was held in trust for the corporation.

The court found that Koenig's directorate was a confidential relation that made him the corporation's fiduciary. The court stated that directors are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business. The court went on to find that Koenig's fiduciary relation prevented him from acquiring adverse rights to waters of the same stream. The court held that equity would operate upon the conscience of Koenig and restore to the corporation the benefits of Koenig's hostile acts, without regard to the nature of the adverse interests he attempted to acquire. Thus, the court upheld the imposition of the trust.

[5] Both *Anderson* and *Koenig* deal with the usurpation of corporate opportunities by officers or directors. The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the impression of a constructive trust in favor of the corporation upon the property. 3 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 861.50 (rev. perm. ed. 1994). However, in the instant case, the corporate opportunity was taken by a shareholder. As stated above, shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership. *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), *disapproved on other grounds, Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985). Nebraska's Uniform Partnership Act provides at Neb. Rev. Stat. § 67-321(1) (Reissue 1990) that every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

[6] The Nebraska Supreme Court in *Bode v. Prettyman*, 149 Neb. 179, 188-89, 30 N.W.2d 627, 631-32 (1948), further detailed the duty between partners:

> The law requires the utmost frankness and absolute honesty in the dealings of one partner with another. As trustees, they cannot derive a secret profit from partnership transactions unknown to the other. [Citations omitted.]
>
> " '[A] partner . . . has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.' " [Citation omitted.]
>
> Partners must exercise the utmost good faith in all their dealings with the members of the firm. A partner must at all times act for the common benefit of all. He must not take advantage of a partner by the slightest concealment or misrepresentation of any kind. [Citation omitted.]
>
> "Law will not permit those associated in relationships in which mutual confidence and trust are ingredients to put themselves in position where their individual interests may have tendency to cause them to relax in their vigilance for the common good, or to make secret individual profits out of common activities."

Regarding a partner's duty to the other partners, the taking of a partnership opportunity has been compared with the taking of a corporate opportunity. Alan R. Bromberg and Larry E. Ribstein, in their treatise on partnership, stated:

> The partners have a duty not only regarding property currently owned and transactions engaged in by the partnership but also regarding their outside business activities that involve opportunities—or potential property or transactions—of the partnership. Although the partnership does not have a conventional property right in such "opportunities" in the sense of being able to exclude third parties from possession, it does have such a right as against the partners individually. One reason for giving the partnership this property right is that exploitation of a partnership opportunity may involve use of partnership assets and

> information . . . . A second reason is that, like self-dealing liability, preventing partners from exploiting partnership opportunities helps ensure that the partners will exercise their energies for the benefit of the partnership rather than for their personal gain.
>
> . . . .
>
> If an opportunity is deemed to belong to the partnership, the courts will usually hold the usurping partner accountable (unless the other partners were aware of the opportunity and turned it down), even if the defendant claims that the partnership would have been unable or unwilling to take advantage of the opportunity if it had been offered. . . . It would be anomalous to permit the usurping partner to hide behind protestations of financial inability in light of the fact that the partner often has substantial control over such circumstances. Moreover, if the partner could finance the deal, the partnership could probably also have done so.

II Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership § 6.07(d) at 6:77-6:83 (1996).

In the instant case, the Radtkes were informed of the potential purchase of Iske Place because of their status as homeowners. We do not decide whether the Radtkes initially owed a duty to the other homeowners. However, once the Radtkes became stockholders of the close corporation, they owed the other stockholders the same fiduciary duty that partners owe to one another in a partnership. See *Russell v. First York Sav. Co.*, *supra*. As stated above, partners must exercise the utmost good faith in all their dealings with the members of the partnership and further must at all times act for the common benefit of all. See *Bode v. Prettyman, supra*. The partnership creates a confidential relation. See *Koefoed v. Thompson*, 73 Neb. 128, 102 N.W. 268 (1905) (where party obtained legal title to property by virtue of confidential relation as partner, court imposed constructive trust). See, also, *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978) (noting some circumstances that create confidential relations).

*Imposition of Constructive Trust.*

We conclude that the Radtkes breached their fiduciary duty to the other stockholders. Corporate representatives and the Iskes' attorney, Jungers, had scheduled a meeting on February 4, 1994, to discuss the corporation's possible purchase of Iske Place. While it was uncertain whether an agreement would be reached, it is clear that the corporation still had the opportunity to purchase the property. Thus, the Radtkes' purchase of the property on February 3 denied the corporation any opportunity that it might have had of acquiring the property. Any argument by the Radtkes that the corporation consented to their purchase of Iske Place is unpersuasive. The Radtkes may have had permission to purchase the property if the corporation was unable to do so on February 4, but they did not have the corporation's consent to enter into the agreement with the Iskes on February 3. At most, the Radtkes had the consent of Eby, whose acquiescence as only one of three elected corporate representatives was insufficient to be deemed a consensual act on behalf of the corporation, especially considering that Eby was lulled into inaction by Harold Radtke's representations concerning leases, rent, and the option to purchase. The Radtkes also maintain that the corporation was unable to finance the purchase. It is not at all clear that the corporation would have been unable to take advantage of the opportunity to purchase Iske Place. See *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983). We conclude that the Radtkes breached their fiduciary duty to the other stockholders by usurping the corporate opportunity to purchase Iske Place.

[7,8] Generally, a court sitting in equity will not impose a constructive trust and constitute an individual as a trustee of the legal title for property unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relation and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994); *Wells v. Wells*, 3 Neb. App. 117, 523 N.W.2d 711 (1994). A constructive trust is a relationship, with

respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the grounds that his or her acquisition or retention of the property would constitute unjust enrichment. *Brtek v. Cihal, supra*; *Wells v. Wells, supra*.

[9] It has long been held that constructive trusts are excepted from the operation of the statute of frauds. See, Neb. Rev. Stat. § 36-103 (Reissue 1993) ("[n]o estate or interest in land . . . nor any trust . . . shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same"); Neb. Rev. Stat. § 36-104 (Reissue 1993) (§ 36-103 "shall not be construed . . . to prevent any trust from arising or being extinguished by implication or operation of law"). See, also, *Light v. Ash*, 174 Neb. 44, 115 N.W.2d 903 (1962); *Wiskocil v. Kliment*, 155 Neb. 103, 50 N.W.2d 786 (1952).

The corporation proved by clear and convincing evidence that the Radtkes obtained title to Iske Place by abusing their confidential relation as shareholders of the corporation. The Radtkes breached their fiduciary duty by usurping the corporate opportunity. Thus, the imposition of a constructive trust is the appropriate remedy.

*Accounting for Constructive Trusts.*

[10] We conclude that the Radtkes hold the 39,400 dollars' worth of rents accumulated in trust for the corporation. After a court imposes a constructive trust, it may determine the matter of the accounting of rents and profits. See, e.g., *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978). A constructive trustee is accountable to the beneficiary for the rents received on property held in trust. See, e.g., *Bowen v. Watz*, 5 Ariz. App. 519, 428 P.2d 694 (1967) (constructive trustees of land must hold proceeds from use thereof, such as rent, which have been received in meantime, for benefit of original beneficiaries); *Bank of America v. Ryan*, 207 Cal. App. 2d 698, 24 Cal. Rptr. 739 (1962) (if constructive trust is to be imposed on money and other property, beneficiary thereof is entitled to recover not only money and property so acquired but also

interest on such money at legal rate from time of its receipt and rents, income, and profits on such property together with interest thereon at legal rate from time of receipt); *Ryan v. Plath*, 18 Wash. 2d 839, 140 P.2d 968 (1943) (on theory of unjust enrichment, constructive trustee may be compelled to convey or assign corpus of trust property and to account for and pay over rents, profits, issues, and income which constructive trustee has actually received or, in general, which he might by exercise of reasonable care and diligence have received); 76 Am. Jur. 2d *Trusts* § 413 (1992) (one holding property under constructive trust is chargeable only with rents actually received); Annot., 36 A.L.R. 1331 (1925). See, also, § 67-321 (every partner must account to partnership for any benefit and hold as trustee for it any profits derived by him without consent of other partners from any transaction connected with formation, conduct, or liquidation of partnership or from any use by him of its property). The Radtkes must therefore account for the rents received as constructive trustees.

*Interest and Other Expenses.*

Generally, a trustee may be reimbursed or indemnified for expenses incurred or advances made in the execution of the trust, and a constructive trustee who has paid purchase money for the benefit of the trust should be allowed credit for such purchase money. 90 C.J.S. *Trusts* § 471 f. (1955). A constructive trustee may also be entitled to compensation for managing property, where he is chargeable with rents. See *Olson v. Lamb*, 56 Neb. 104, 76 N.W. 433 (1898). However, the Radtkes failed to produce evidence of any such expenses.

We observe that the Radtkes did not prove any interest costs or expenses of the trust. There is no evidence which would establish the interest as an expense of the trust, which might be deductible in an accounting trust deed. The trial court simply allowed $12,886 in interest, which was to be paid together with the principal within 60 days of the date of the order. We note, however, that the Radtkes did not comply with Neb. Rev. Stat. § 45-103.02 (Cum. Supp. 1996), the prejudgment interest statute. Additionally, interest on property held in a constructive trust is not provided for under Neb. Rev. Stat. § 45-104 (Reissue

1993), which allows for interest on certain contractual obligations. There is a split of authority on whether a constructive trustee may recover interest on the purchase price of the trust property. See, 90 C.J.S., *supra*; *White Gates Skeet Club, Inc. v. Lightfine*, 276 Ill. App. 3d 537, 658 N.E.2d 864 (1995) (constructive trustees who breached their fiduciary duty by usurping corporate opportunity were not permitted to recover interest on money used to purchase property); *Ryan v. Plath, supra* (constructive trustee was allowed interest on such purchase money). The Nebraska Supreme Court has held that in cases of actual fraud, a court of equity should deny any recovery for services rendered to the trust estate. *Tuttle v. Wyman*, 149 Neb. 769, 32 N.W.2d 742 (1948). The foregoing authorities persuade us to conclude, similar to the court in *White Gates Skeet Club, Inc. v. Lightfine, supra*, that it would be contrary to public policy to allow the Radtkes interest on the money they used to usurp a corporate opportunity. We further conclude that there is no evidence of any allowable trust expenses.

*Enforcement of Decree.*

The trial court ordered the corporation to pay $162,886 to the clerk of the court within 60 days of the order or forever be barred from any interest in Iske Place. After the corporation timely paid, it filed a motion to confirm title. The trial court dismissed the corporation's motion for lack of jurisdiction because the Radtkes had already perfected their appeal.

An appeal does not operate as a stay of proceedings unless an appellant supersedes the judgment or final order in the manner provided by law. *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 785, 448 N.W.2d 141 (1989). In the absence of a supersedeas, a judgment or final order retains its vitality and is capable of being executed during the pendency of the appeal. *Production Credit Assn. of the Midlands v. Schmer, supra*; *Travelers Ins. Co. v. Nelson*, 4 Neb. App. 551, 546 N.W.2d 333 (1996). In the instant case, the Radtkes failed to supersede the order by complying with the requirements of Neb. Rev. Stat. § 25-1916(3) (Reissue 1995). The motion to confirm the sale was merely a means of asking the court to enforce its

unsuperseded decree. Consequently, the trial court erred in failing to confirm title to the property in the corporation.

## CONCLUSION

We affirm the trial court's imposition of a constructive trust in favor of the corporation and modify the decree to require the corporation to pay to the Radtkes $110,600, which is the purchase price of $150,000 less the $39,400 in rents collected by the Radtkes. The record indicates the corporation has paid $162,886 to the district court. The court should distribute the money and any earnings thereon in accordance with this modification.

AFFIRMED AS MODIFIED.

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STATE OF NEBRASKA, APPELLEE, V.
TYRONE NEWMAN, APPELLANT.
559 N.W.2d 764

Filed January 7, 1997. No. A-96-137.

1. **Appeal and Error: Words and Phrases.** Plain error is that error which was not complained of at trial 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 system.
2. **Appeal and Error.** An appellate court always reserves the right to note plain error.
3. **Criminal Law: Indictments and Informations.** To charge the defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute or in language equivalent to the statutory terms defining the crime charged.
4. **Indictments and Informations.** The purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also so that he may be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense.
5. **Indictments and Informations: Lesser-Included Offenses.** Where an information charges one crime, a defendant may be convicted of a lesser-included offense.
6. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
7. **Appeal and Error.** Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.

8. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
9. **Rules of Evidence: Appeal and Error.** Ordinarily, for error to be predicated on the admission of evidence, there must be a timely objection made at trial.
10. **Trial: Evidence: Effectiveness of Counsel.** A failure to object could be explained by trial strategy rather than by lack of effectiveness.
11. **Trial: Evidence: Effectiveness of Counsel: Appeal and Error.** The decision to object or not to object is part of the trial strategy, and an appellate court gives due deference to counsel's discretion in formulating trial tactics.
12. **Criminal Law: Trial: Evidence: Appeal and Error.** The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt.
13. **Trial: Juries: Evidence: Appeal and Error.** In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.
14. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and if other relevant evidence, properly admitted, supports the finding by the trier of fact.
15. **Constitutional Law: Effectiveness of Counsel: Proof.** To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
16. **Effectiveness of Counsel: Appeal and Error.** An appellate court will not address the matter of effectiveness of counsel on direct appeal when the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing.
17. **Records: Appeal and Error.** It is incumbent on an appellant to present to the appellate court a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
18. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
19. **Sentences.** In imposing sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his criminal record or past law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Dakota County: MAURICE REDMOND, Judge. Judgment on count I reversed, and sentence vacated. Judgment on count II affirmed.

William L. Binkard for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Tyrone Newman appeals his jury convictions for first degree sexual assault and first degree false imprisonment and the sentences imposed by the district court for Dakota County. For the reasons set forth below, we affirm Newman's conviction for first degree sexual assault and the sentence imposed upon Newman on that conviction. Newman's conviction for first degree false imprisonment is reversed, and his sentence on that conviction is vacated.

## FACTS

Following an incident which took place on February 19, 1995, Newman was charged by information with kidnapping, sexual assault in the first degree, and robbery. The victim was Newman's estranged wife. At trial, the victim testified that earlier in the day she and Newman had been discussing their impending divorce. Newman telephoned her at her home around 5:30 p.m., asking for a ride to work. Although she initially refused, the victim eventually took Newman to the IBP plant. Newman asked that the victim wait for him for a few minutes. He returned to the car, stating that he did not have to work and that he wanted to return home with the victim.

The victim testified that Newman stated that he "want[ed] to spend time with [the victim]," a phrase interpreted by the victim as Newman's indication that he wanted to have sex. The victim testified that she did not want Newman to come home with her and that she instead drove around for a while so that they could talk. She testified that as she drove, Newman grabbed the steering wheel in an attempt to pull the car over. After the victim stopped the car, Newman snatched the keys and hit the victim. Following a struggle, the victim drove Newman to her home.

After the two were inside the victim's home, Newman made sure all the doors were closed and refused to allow the victim to

turn the lights on in the house. The victim testified that she attempted to go to the home of neighbors, but that Newman grabbed her arm several times and refused to let her leave. She stated that the two began arguing and that the argument escalated into a physical confrontation in which Newman pulled the victim's hair, slapped and punched her in the face, and kicked her. The victim stated that the confrontation occurred throughout several rooms in the house, that Newman continued to hit and kick her, and that he pushed her to the kitchen floor, eventually holding her down by her neck.

The victim testified that after Newman had knocked her to the floor, he ripped her bra, pushed aside her shorts, and engaged in intercourse with her. The victim stated that she was crying and repeatedly told Newman "no" and that she did not want to have sex with him, but that he responded by telling her that he would kill her if she did not keep quiet.

The victim stated that she drove Newman back to work, and she then drove to the home of her neighbor, Marjorie Peterson.

Peterson testified that the victim came in the door and was screaming, crying, and hysterical. Over defense counsel's hearsay objection, Peterson was allowed to testify that the victim stated, "I don't know why he had to rape me. Marge, he hurt me bad. I don't know why he had to do it to me." Peterson also testified that the victim's cheek was red, she had marks on her neck and arm, her bra was ripped, and there were scratches on her breast.

The jury was allowed, without objection, to view a videotape of the victim's police station interview in which she recounted the incident to police officers. There is an indication in the record that portions of the videotape were not shown to the jury. At the close of the State's case, Newman moved for a directed verdict on all three counts. The motion was granted with respect to the robbery charge.

In his defense, Newman testified that the victim had instructed him to call her so that she could give him a ride to work. He stated that she asked him if he could get time off to spend with her. Newman testified that they returned to the victim's home after he checked in at work and that they "wound up

making love." Newman denied striking the victim or forcing her to "make love."

The jury was charged on the elements of kidnapping and further instructed that if it found Newman not guilty of kidnapping, it should consider whether Newman committed first degree false imprisonment. The jury received an instruction on first degree sexual assault.

The jury convicted Newman of false imprisonment and of first degree sexual assault. He was given sentences of 2 to 5 years' imprisonment on the conviction of false imprisonment and of 5 to 10 years' imprisonment on the conviction of sexual assault, to be served concurrently, with credit given for time served of 339 days. Newman appeals.

## ASSIGNMENTS OF ERROR

Summarized and restated, Newman claims the following errors in his brief: (1) The State failed to prove each of the elements of the charges alleged against Newman, and the evidence does not support Newman's convictions; (2) Newman was not provided with effective assistance of counsel at trial; (3) the admission of the videotape of the victim's police station interview was plain error because the videotape is hearsay; (4) Peterson's testimony as to the victim's statements was inadmissible hearsay; (5) the jury instruction relating to false imprisonment should have provided that it was a lesser-included offense of first degree sexual assault; and (6) the sentences imposed were excessive.

## ANALYSIS

*Sufficiency of Evidence.*

Newman claims that each element of false imprisonment and sexual assault was not proved beyond a reasonable doubt. For his argument, Newman states that "the appellate court should review the entire Bill of Exceptions and conclude that not all of the requisite elements of the crimes [charged] have been proven beyond a reasonable doubt." Brief for appellant at 7. Newman does not direct our attention to a specific element lacking proof.

Newman was charged by information with kidnapping, first degree sexual assault, and robbery. The robbery charge was dismissed during the course of the trial.

*First Degree Sexual Assault: Adequacy of Evidence.*

Neb. Rev. Stat. § 28-319(1) (Cum. Supp. 1994), in effect at the relevant time, provided that a person is guilty of first degree sexual assault if he subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception; (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct; or (c) the actor is 19 years of age or older and the victim is less than 16 years of age. The record shows that the victim in this case testified that she was forced to have intercourse with Newman despite her continued objections. She stated that she was hit, punched, and kicked, and that when she cried, Newman threatened to kill her if she did not keep quiet. There is clearly sufficient evidence of the elements of sexual penetration, force, and threat of force to support the conviction of first degree sexual assault.

*First Degree False Imprisonment: Plain Error.*

Newman claims that the evidence was insufficient to support his conviction for first degree false imprisonment. We need not address the issue as posed, since we find plain error in connection with the conviction for first degree false imprisonment due to an improper variation between the crime charged in the information and the crime of which Newman was convicted.

[1] Plain error is that error which was not complained of at trial 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 system. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

[2] An appellate court always reserves the right to note plain error. *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996). Newman's conviction for first degree false imprisonment, a crime with which he was not charged, and which is not a lesser-

included offense of the crime of kidnapping with which he was charged, was plain error.

Newman was charged by information with kidnapping, in violation of Neb. Rev. Stat. § 28-313 (Reissue 1995). According to § 28-313, a person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to, inter alia, terrorize him or a third person or commit a felony.

Newman was not, however, charged in the information with first degree false imprisonment. The information was not amended to include a charge of first degree false imprisonment. Neb. Rev. Stat. § 28-314 (Reissue 1995) states that a person commits false imprisonment in the first degree if he knowingly restrains another person under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury. "Restrain" is defined as "to restrict a person's movement in such a manner as to interfere substantially with his liberty." Neb. Rev. Stat. § 28-312(1) (Reissue 1995).

[3,4] Generally, to charge the defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute or in language equivalent to the statutory terms defining the crime charged. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). The purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also so that he may be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. *Id.*

[5,6] The law is well settled that where an information charges one crime, a defendant may be convicted of a lesser-included offense. See, e.g., *State v. George*, 3 Neb. App. 354, 527 N.W.2d 638 (1995). Also, an information may be amended to include a lesser-included offense during trial and prior to submission to the jury. See *State v. Wiemer*, 3 Neb. App. 821, 533 N.W.2d 122 (1995). To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Long*, 4 Neb. App. 126, 539 N.W.2d 443

(1995). A review of the elements of first degree false imprisonment compared to the elements of kidnapping shows that first degree false imprisonment is not a lesser-included offense of kidnapping. The trial court's charge which permitted a finding of guilt of first degree false imprisonment if the jury found Newman not guilty of kidnapping and Newman's consequent conviction of first degree false imprisonment are plain error. The conviction on count I is reversed, and the sentence on count I is vacated.

*Lesser-Included Offense.*

Newman argues that false imprisonment is a lesser-included offense of first degree sexual assault because a forcible sexual assault cannot occur absent a restraining of the victim without legal authority. Because Newman's conviction for first degree false imprisonment is reversed, we need not address his argument.

*Testimony of Neighbor.*

[7] Newman assigns as error, but does not discuss in his brief, the admission of Peterson's testimony regarding the victim's statements after the incident. Ordinarily, to be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

Peterson's testimony, as set forth above, was objected to as hearsay at trial. The prosecutor responded to the objection by stating, "No, it's not, Your Honor. [The victim] has testified." The trial court then overruled Newman's hearsay objection.

[8] The State argues on appeal that the victim's statements were admissible as an excited utterance. "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. Neb. Rev. Stat. § 27-803(1) (Reissue 1995). For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant

while under the stress of the event. *State v. Anderson*, 245 Neb. 237, 512 N.W.2d 367 (1994).

Granting that the first two elements of the exception are met, i.e., there was a startling event and the victim's statements related to the event, the issue is whether the victim's statements were made while under the stress of the event.

> For hearsay to be admissible under the excited utterance exception, "[s]tatements need not be made contemporaneously with the exciting cause but 'may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.' " *State v. Jacob*, 242 Neb. at 188, 494 N.W.2d at 118 (quoting 6 John H. Wigmore, Evidence in Trials at Common Law § 1750 (James H. Chadbourn rev. 1976)). "[T]he key requirement is spontaneity, a showing that the statement was made without time for conscious reflection." *State v. Boppre*, 243 Neb. 908, 927, 503 N.W.2d 526, 538 (1993). Accord, *State v. Jacob, supra*; *In re Interest of D.P.Y. and J.L.Y.*, [239 Neb. 647, 477 N.W.2d 573 (1991)]; *State v. Plant*, [236 Neb. 317, 461 N.W.2d 253 (1990)]. However, the time interval between the startling event and the statements in question is not "of itself dispositive of the spontaneity issue." *State v. Boppre*, 243 Neb. at 927, 503 N.W.2d at 538. Accord, *In re Interest of D.P.Y. and J.L.Y., supra*; *State v. Roy*, 214 Neb. 204, 333 N.W.2d 398 (1983). The permissible length of time between the statement and the startling event is determined on the unique facts of each case. *State v. Boppre, supra*; *State v. Jacob, supra.*

*State v. Tlamka*, 244 Neb. 670, 676-77, 508 N.W.2d 846, 850-51 (1993), *questioned on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

The victim testified that she drove Newman back to his workplace, and then, upon her return home, she went to her neighbor's home. The record does not reflect the distance between the victim's home and Newman's workplace or the passage of time between the assault and the challenged statement. Peterson testified that the victim "come [sic] in the door screaming and crying and — and she was just all hysterical." At that point, the

victim made the statements to Peterson that are at issue on this appeal.

In *State v. Tlamka*, 244 Neb. at 677, 508 N.W.2d at 851, the Nebraska Supreme Court indicated:

> As stated in *State v. Plant*, 236 Neb. 317, 329, 461 N.W.2d 253, 264 (1990): "While it is not necessary to show that the declarant was visibly excited in order to qualify under the excited utterance exception, [citations omitted], a declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event." "'"[T]he true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue . . . ."'" *State v. Jacob*, 242 Neb. 176, 188, 494 N.W.2d 109, 118 (1993) (quoting 6 Wigmore, *supra*, § 1745).

The victim arrived at Peterson's home directly after driving Newman back to his workplace. Peterson testified that the victim was crying, screaming, and hysterical. Under the unique facts of this case, we think that the victim was speaking under the stress of nervous excitement and shock produced by the incident with Newman. The victim's statements to Peterson come within the "excited utterance" exception to the hearsay rule, and their admission was not plain error.

*Admission of Videotape and Ineffectiveness of Trial Counsel.*

Newman points to the admission into evidence, without objection, of the videotaped police station interview of the victim. Newman asserts that admission of the videotape was in violation of the hearsay rule. Newman argues that admission of the videotape was plain error and that his trial counsel's representation was ineffective. The State does not argue that the videotaped interview was properly admitted into evidence; rather, the State argues that Newman suffered no prejudice because the information contained in the videotape was cumulative to the victim's trial testimony.

[9-11] Ordinarily, for error to be predicated on the admission of evidence, there must be a timely objection made at trial. Neb. Rev. Stat. § 27-103 (Reissue 1995); *State v. Martinez*, 4 Neb. App. 192, 541 N.W.2d 406 (1995), *aff'd* 250 Neb. 597, 550 N.W.2d 655 (1996). It is undisputed that no objection was made to the admission of the videotape by trial counsel. However, the failure to object could be explained by trial strategy rather than by lack of effectiveness. The decision to object or not to object is part of the trial strategy, and an appellate court gives due deference to counsel's discretion in formulating trial tactics. *State v. Lieberman*, 222 Neb. 95, 382 N.W.2d 330 (1986). Defense counsel could have concluded that the videotape would be admitted as cumulative to the victim's account or otherwise and, therefore, rather than prolonging or accentuating the obvious, chosen not to object. See *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992). Under the facts of this case, we, therefore, proceed to consider the errors regarding the videotape to the extent permitted by the record.

[12-14] The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *Id.* The erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and if other relevant evidence, properly admitted, supports the finding by the trier of fact. *Id.*

The videotaped interview with the victim took place around 9 p.m. on the evening of the incident. In the videotape, the victim describes the incident and, to some extent, matters surrounding the couple's stormy relationship and Newman's personal history not directly pertaining to the incident. Thus, it appears that the tape contains statements not otherwise in evidence, some of which could be prejudicial to Newman. Specifically, the victim mentions that her separation from Newman initially resulted from Newman's imprisonment, that Newman is afraid of going back to prison, that Newman now

resides at the "Release Center," that the victim had told Newman's parole officer that the victim did not want Newman to return home because the victim feared that Newman would be back on drugs, that Newman had at one time been on probation in California, and that he came to the area "thinking he could run some drugs."

Newman claims that the admission of the videotape was plain error or that because his trial counsel did not object to its admission, its admission demonstrates ineffectiveness of trial counsel. As noted below, we cannot tell on the record presented to us which portions of the videotape were shown to the jury, and we, therefore, cannot assess Newman's appellate claims pertaining to the videotape.

[15] The Nebraska Supreme Court has stated:

> To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

*State v. Dawn*, 246 Neb. 384, 392-93, 519 N.W.2d 249, 255-56 (1994).

[16] Claims of ineffective assistance of counsel raised for the first time on appeal, as is the case here, do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. See *id.* An appellate court will not address the matter on direct appeal when the issue has not been raised or ruled on at the trial court level "*and the matter necessitates an evidentiary hearing.*" (Emphasis in original.) *Id.* at 393, 519 N.W.2d at 256.

The record before this court is insufficient to adequately review the question of effectiveness of counsel. The record at trial reflects the following statements by the trial judge to the jury before the tape was viewed:

> At this time we are going to view a videotape approximately 18 minutes long. The attorneys will be operating

> the controls of the videotape — of the VCR. There are certain portions that the parties have stipulated that should be muted out, that are not relevant to the issues in this case. And so when we've reached those points the attorneys will be muting the VCR and you will not be able to hear whatever is going on on the tape. They're not trying to hide anything from you. It's just that it's not relevant to this case and it could be confusing and could cause problems with the case. So they have agreed to eliminate those portions. Okay.

The court's comments quoted above do not state which portions of the videotape were eliminated, nor do the attorneys state on the record which portions are in evidence and which portions are excluded or why. For the sake of completeness, we note that there is a handwritten piece of paper, located at the back of volume IV of the bill of exceptions, which may correspond to the excluded material. This paper is not described in the record, much less identified as an exhibit. Its significance is ambiguous. Thus, the record fails to conclusively establish which portions of the videotape were muted out, and we are unable to ascertain whether the victim's statements referring to Newman's possible drug use and to his prior incarcerations and involvements with the penal system which may be problematic were heard by the jury.

[17] Keeping in mind that we are being asked to review the claim for plain error or the ineffectiveness of counsel on direct appeal, we are unable to evaluate Newman's claim that the videotape was so prejudicial as to require reversal or that his trial counsel's performance was ineffective by allowing the jury to view the tape. It is incumbent on an appellant to present to the appellate court a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed. *Sabrina W. v. Willman*, 4 Neb. App. 149, 540 N.W.2d 364 (1995). Newman has not supplied us with a record which supports his claim. Because the issue of ineffective assistance of counsel at the trial level was not raised or ruled on by the trial court and the matter necessitates an evidentiary hearing, the matter will not be further addressed on appeal. See

*State v. Dawn, supra.* In the absence of an adequate record, we cannot say that the admission of the videotape was error.

Newman also argues that his trial counsel was ineffective for failing to point out to the trial court at sentencing that Newman's conviction was actually for second degree false imprisonment and that his trial counsel was ineffective for failing to ask that the jury be instructed that second degree false imprisonment is a lesser-included offense of first degree sexual assault. Based on our reversal of the first degree false imprisonment conviction, there is no merit to these arguments.

*Excessive Sentences.*

Newman was sentenced to 2 to 5 years' imprisonment on the conviction of false imprisonment, a Class IV felony, and to 5 to 10 years' imprisonment on the conviction of first degree sexual assault, a Class II felony. The sentences were ordered to be served concurrently. Newman argues that the sentences are excessive given his employment, educational, and family background.

[18,19] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995). In imposing sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his criminal record or past law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995).

Newman's presentence investigation report indicates that he has prior convictions for burglary, robbery, and theft. The robbery and theft convictions stemmed from an incident in Iowa in which Newman robbed a postal employee after indicating that he had a gun. Given his criminal record and the fact that his current conviction involved extreme violence in which the victim was beaten, threatened with death, and sexually assaulted, his sentence for first degree sexual assault, which is within the statutory limits, is not excessive.

Because Newman's conviction on the false imprisonment charge is reversed, his sentence on that charge is vacated.

JUDGMENT ON COUNT I REVERSED, AND SENTENCE VACATED.
JUDGMENT ON COUNT II AFFIRMED.

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# MARY H. SHERIDAN, APPELLEE, V. CATERING MANAGEMENT, INC., DOING BUSINESS AS 1ST AVENUE BAR & GRILL, AND MILWAUKEE INSURANCE COMPANY, APPELLANTS.

558 N.W.2d 319

Filed January 7, 1997. No. A-96-399.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
3. **Workers' Compensation: Judgments: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Proof.** To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the employment and the alleged injury or disability.
5. **Workers' Compensation: Expert Witnesses.** Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
6. **Trial: Evidence.** The *Frye* test, as established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is the appropriate test to use in determining the admissibility of novel scientific evidence.
7. ____: ____. The *Frye* standard of general acceptance within a particular scientific field, as established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), has been employed as a special foundational requirement for novel or new scientific devices or processes involving the evaluation of physical evidence, such as lie detectors, experimental systems of blood typing, voiceprints, identification of human bite marks, microscopic analysis of gun residue, and human leukocyte antigen testing.
8. **Trial: Evidence: Physicians and Surgeons.** The *Frye* test, as established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is inapplicable where there is no claim

that a novel or newly developed scientific device or process is utilized by a physician in the test under consideration.

9. **Workers' Compensation: Evidence: Physicians and Surgeons: Proof.** In a workers' compensation case involving occupational disease, a claimant is not required to prove that the treating physician's opinions, diagnosis, or treatment satisfies either the *Daubert* test, as established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), or the *Frye* test in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
10. **Workers' Compensation: Evidence: Physicians and Surgeons: Expert Witnesses: Testimony.** A licensed physician who has examined and treated a claimant in a workers' compensation case and who has past experience with patients suffering from the same types of symptoms is qualified to give an expert opinion about the claimant's symptoms, and such testimony does not have to meet the requirements of the *Frye* test, as established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
11. **Workers' Compensation: Rules of Evidence: Appeal and Error.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence, and admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
12. **Evidence: Expert Witnesses: Testimony.** Regarding the use of evidence based on the opinion of a medical expert, the witness must qualify as an expert, the witness' testimony must assist the trier of fact to understand the evidence or determine a fact in issue, the witness must have a factual basis for the opinion, and the testimony must be relevant.
13. **Workers' Compensation: Proof.** A claimant is not required to prove that a diagnosis is universally recognized by and agreed upon in the medical community.
14. **Workers' Compensation: Expert Witnesses.** Triers of fact, including the Workers' Compensation Court, are not required to take the opinions of expert witnesses as binding.
15. ____: ____. It is for the Workers' Compensation Court to determine which, if any, of the expert witnesses to believe.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Darrell K. Stock, of Snyder & Stock, for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

HANNON, Judge.

Catering Management, Inc., doing business as 1st Avenue Bar & Grill, and Milwaukee Insurance Company, appeal from

the judgment of the Workers' Compensation Court review panel, which affirmed the trial judge's finding that Mary H. Sheridan suffered brain damage as a result of exposure to pesticides arising out of and in the course of her employment with Catering Management. For the reasons set forth below, we affirm.

## FACTUAL BACKGROUND

Sheridan, age 33 at trial, worked as a bartender at the 1st Avenue Bar & Grill beginning in June 1993. As part of her duties, she normally staffed the bar by herself and ran the cash register. She also served as a cocktail waitress one night a week.

Sheridan worked the night of Saturday, September 18, 1993, and closed the bar at approximately 1 a.m. on Sunday, September 19. After the bar was closed, Larry Rezac, an exterminator, came to spray the premises for cockroaches, which he did on a monthly basis. There is evidence that Rezac had been coming more frequently in the months prior to September 19. Rezac applied his normal base spray application of a chemical called Conquer in the cracks and crevices while Sheridan and other employees remained in the bar. After everyone left, Rezac power-fogged the bar with a chemical called Prentox, a mixture of pyronyl oil and Conquer. Rezac also applied a powder chemical called Drione behind the walls. The chemicals consisted of esfenvalerate, pyrethrins, and synergists. Rezac finished at 4:30 a.m. and instructed all humans to remain away for 4 hours.

Dianna Kindler, who worked in the kitchen of the bar, arrived at 8:20 a.m. on September 19 and worked until 10:30 a.m., preparing food. Kindler testified that she did not notice any fog, did not have difficulty breathing, did not notice any unusual sensations, and did not experience any physical problems afterward.

Sheridan returned at noon to clean the bar before opening it to the public. She testified that the bar was "really foggy" and "smelled awful." Using towels and a bucket of water, she washed everything in the bar that had been exposed to the chemicals. Sheridan, whose hands and arms were uncovered, continually dunked the towels into the water and wrung them out. She cleaned for approximately 2½ hours, opened the bar,

and then worked until midnight. She testified that while working, she experienced headaches, burning in her eyes and throat, ringing in her ears, body aches, and a feeling of nauseousness. According to her testimony, the following day, her muscles felt paralyzed and extremely sore, she could hardly talk, she was experiencing seizures, and she was having problems with blurry vision. Her husband, Steven, took her to Lincoln General Hospital.

Since September 19, Sheridan has experienced problems with her memory, vision, patience, and temper, which problems have prevented her from working and have made it difficult for her to help around the house and with her children. She testified that she experiences hundreds of "shocks through [her] body" per day and that she itches herself until she bleeds. Her husband testified that she has temper "explosions." She brought suit against Catering Management on July 15, 1994, seeking workers' compensation benefits. Trial was held in March 1995, at which time a considerable amount of expert testimony was presented, the significant portion of which we summarize below.

Dr. Carol Angle, a physician, saw Sheridan first on September 29, 1993, and then again on April 6, 1994. Dr. Angle testified that Sheridan suffered from persistent cognitive and emotional dysfunction, which Dr. Angle described as organic brain damage. Dr. Angle opined, with a reasonable degree of medical certainty, that Sheridan's organic brain damage was due to toxic encephalopathy (organic brain disease) from acute poisoning by esfenvalerate (a synthetic pyrethroid and isomer of fenvalerate), other pyrethrins (natural products used as insecticides), their synergists, and petroleum distillates on September 19, 1993. According to Dr. Angle's calculations, Sheridan could have absorbed as much as 1 percent of the total amount of the chemicals applied to the bar. Dr. Angle also testified that absorption of as little as .1 percent would have been sufficient to produce symptomatic poisoning in Sheridan.

Dr. Angle also testified concerning the nature of the chemicals to which Sheridan was exposed. Dr. Angle admitted that while there were limited clinical reports of fenvalerate poisoning, where brain damage symptoms lasted up to 1 year, there were no human reports of esfenvalerate poisoning. However,

Dr. Angle testified that esfenvalerate had produced neurologic symptoms of staggering gait, tremors, and altered response to stimuli in rats and is three times as toxic as fenvalerate. Dr. Angle also testified that despite the fact that the pertinent literature suggested that those exposed to fenvalerate would be completely free of symptoms within 1 to 2 months, and certainly by 1 year, it was Dr. Angle's opinion that Sheridan had persistent symptoms and deficits and persistent evidence of organic brain damage. Dr. Angle added that it was certainly possible that pyrethrins and pyrethroids could cause neurologic injury.

Thomas Korn, Ph.D., a neuropsychologist and rehabilitation consultant with specialized training in the assessment and intervention of people with various kinds of brain injuries, examined Sheridan on October 5 and November 4, 1993, and January 13 and June 2, 1994. Korn opined, with a reasonable degree of medical certainty, that she sustained an encephalopathy as a consequence of her exposure to chemical pesticides, which resulted in deficits in her brain functioning. Korn testified that her emotional situation, depression, anxiety, and "catastrophic responding" were consequential to her encephalopathy. Korn further testified that the deficits were chronic, or permanent, in nature and that resultingly, she was not a candidate for continuous, competitive, or even part-time employment.

Dr. Richard Andrews, a neurologist who had treated other individuals with a history of toxic exposure, examined Sheridan on December 20, 1993. Dr. Andrews testified that based on "the best of my ability to tell and to the best degree of medical certainty that I can come to," she suffered a brain injury which was directly related to a toxic exposure that she suffered when she was exposed to pesticides and rodenticides in the course of her job. Dr. Andrews concluded that her injury was permanent and that she would be unable to sustain competitive employment.

Dr. Sharon Hammer, a psychiatrist, began seeing Sheridan on January 25, 1994. Dr. Hammer also opined, based on a reasonable degree of medical certainty, that Sheridan had an organic brain disorder, or an organic mood disorder, and would continue exhibiting problems with memory dysfunction, psychiatric sequela (modulation of emotional responses), depression, and

anxiety. Dr. Hammer testified that Sheridan's symptoms would be permanent.

Bart Hultine, a vocational specialist and rehabilitation economist, concluded in his report that Sheridan's loss of earning capacity due to her exposure to pesticides was 100 percent.

Dr. Eli Chesen, a psychiatrist, examined and tested Sheridan on January 25, 1995. Dr. Chesen opined, with a reasonable degree of medical certainty, that she showed no evidence of intellectual or memory dysfunction, no evidence of psychiatric or neurological injury, no evidence of organic brain damage or encephalopathy, and no evidence of any vocational limitations or restrictions. Dr. Chesen further concluded that she dramatically exaggerated her memory difficulties and vision problems and was "actively manipulating her answers to questions so as to show that her memory was malfunctioning . . . ." Dr. Chesen testified: "It's my belief that for reasons of both primary and secondary gain that she was attempting to look damaged to me as an examiner."

Dr. Joel Cotton, a neurologist, examined Sheridan on February 2, 1995, and concluded that she had not suffered any physical injury to her nervous system or to her brain caused by a toxic exposure. Dr. Cotton further concluded that she was capable of performing all usual, customary activity without restrictions.

Dr. Ronald Gots of the National Medical Advisory Service, Inc., in an August 30, 1994, report based on a review of Sheridan's medical records, concluded:

> It is toxicologically incorrect to assert that Ms. Sheridan's problems are related to pesticide toxicity. First of all, the agents used have very minimal toxicity. The primary agent, Prentox, consists primarily of a pyrethrin, a class of pesticides derived from chrysanthemums. The only reported cases of poisoning by this (other than children drinking it) occurred in Chinese workers who were directly and heavily sprayed. All recovered. Millions of workers and homeowners are exposed directly to applications of these pesticides with no adverse effects. Furthermore, there is no way, given the alleged exposure, for Ms. Sheridan to have had any systemic exposure. For

toxicity to occur, a dose must enter the body. This can theoretically occur by drinking the chemical or inhaling a concentrated airborne mixture. Dried residue at the bar could not have entered her body.

Next, Ms. Sheridan had signs of anxiety but no other physical findings or laboratory findings in the days after the alleged event. She clearly was not poisoned.

Lastly, the recent diagnosis of toxic encephalopathy is readily explained by her alcoholism, the most common cause of toxic encephalopathy.

Joel Coats, Ph.D., a professor of entomology and toxicology at Iowa State University, reported that Sheridan tested negative for the presence of esfenvalerate. Coats, who had no opinion as to her susceptibility to chemicals, additionally reported that he calculated her exposure to the chemicals to be 10 times less than Dr. Angle's calculation.

Coats explained that while fenvalerate has been used for approximately 15 years as a pesticide, esfenvalerate is a relatively new chemical. Esfenvalerate and natural pyrethrins are known to affect sodium channels in the nerve, thus creating ionic imbalance. Coats testified that the relevant literature shows that the most common symptoms in humans from exposure to pyrethrins and pyrethroids are itching, burning, and tingling sensations in exposed features of the body and that the normal length of symptoms could last up to a few days. Coats further testified that based primarily upon medical literature, there was no evidence that esfenvalerate or natural pyrethrins or other synthetic pyrethroids caused permanent brain damage or permanent ill effects in humans. Coats, however, admitted that he did not distinguish between esfenvalerate and fenvalerate in forming his opinions, despite the fact that esfenvalerate was three times more toxic. Coats also admitted that it was possible that there was no literature concerning esfenvalerate and its effect on humans, that all the effects of esfenvalerate on humans were not known to science, that science could not completely predict its effects, and that he could not guarantee that there were no permanent effects from such an exposure. Coats testified that a large enough dose of esfenvalerate could be lethal.

The trial judge found that on September 19, 1993, Sheridan suffered brain damage as a result of exposure to pesticides arising out of and in the course of her employment. The trial judge further found that she was temporarily totally disabled from September 20, 1993, to and including June 2, 1994, and thereafter became permanently totally disabled. The review panel affirmed the judgment.

## ASSIGNMENTS OF ERROR

Catering Management and Milwaukee Insurance assign five errors; however, not all of them were discussed in their brief. We do not address those errors assigned, but not discussed. *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). Catering Management and Milwaukee Insurance's entire argument is that the trial judge erred in admitting expert testimony, specifically, the deposition testimony and opinions of Dr. Angle on the issue of causation without a showing that the testimony was generally accepted within the relevant scientific community.

## STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996); *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996). In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Haney v. Aaron Ferer & Sons*, 3 Neb. App. 14, 521 N.W.2d 77 (1994).

[2] Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Kerkman*

*v. Weidner Williams Roofing Co., supra*; *Cords v. City of Lincoln, supra*. In testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Kerkman v. Weidner Williams Roofing Co., supra*; *Cords v. City of Lincoln, supra*. As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Kerkman v. Weidner Williams Roofing Co., supra*.

[3] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996).

## ANALYSIS

[4,5] To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection "between the alleged injury, the employment, and the disability." *Schlup v. Auburn Needleworks*, 239 Neb. 854, 863, 479 N.W.2d 440, 447 (1992). The injured worker must show by a preponderance of the evidence that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Id.* Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. *Bernhardt v. County of Scotts Bluff*, 240 Neb. 423, 482 N.W.2d 262 (1992).

Catering Management and Milwaukee Insurance claim that only two witnesses, Coats and Dr. Angle, possessed sufficient knowledge of toxicology to render an opinion on causation. Catering Management and Milwaukee Insurance argue that because Dr. Angle failed to demonstrate that the chemicals could have caused Sheridan's injury (and Coats dismissed the possibility of causation), Dr. Angle's opinions establishing causation should not have been admitted. As the main thrust of its argument, Catering Management and Milwaukee Insurance ask this court to apply the "general acceptance" test for the admissibility of novel scientific evidence as set forth in *Frye v. United*

*States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (lie detector test ruled inadmissible).

Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[6] Nebraska has adopted the *Frye* test and not the arguably more flexible standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). See, *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *cert. denied* 515 U.S. 1123, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995). Under the test or standard enunciated in *Frye*, reliability for admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or is based on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., supra*; *State v. Dean, supra*; *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Tlamka*, 1 Neb. App. 612, 511 N.W.2d 135 (1993), *affirmed* 244 Neb. 670, 508 N.W.2d 846. *Frye* is the appropriate test to use in determining the admissibility of novel scientific evidence. *State v. Carter, supra*. One benefit of *Frye* is that it protects courts from unproven and potentially erroneous scientific theories until those theories have been appropriately subjected to scrutiny by experts from the relevant scientific community. *State v. Carter, supra*.

> "In effect, *Frye* envisions an evolutionary process leading to the admissibility of scientific evidence. A novel technique must pass through an 'experimental' stage in which it is scrutinized by the scientific community. Only after the technique has been tested successfully in this

> stage and has passed into the 'demonstrable' stage will it receive judicial recognition."

*State v. Carter*, 246 Neb. at 973-74, 524 N.W.2d at 778 (quoting Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197 (1980)).

The *Frye* test has been applied in Nebraska to lost enjoyment of life calculations, DNA statistical probability calculations, laser bullet-trajectory analysis, and psychological testing methodology. See, *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., supra*; *State v. Carter, supra*; *State v. Dean, supra*; *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992); *State v. Tlamka, supra* (methodology used by doctor to arrive at his opinion did not have evidential underpinning of acceptance in relevant scientific community as to who has and has not previously engaged in prior acts of sexual abuse upon child). See, also, *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983) (quoting Arizona court's use of *Frye* test with regard to hypnosis); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949) (where court cited *Frye* in holding that use of polygraph had not yet received general scientific acceptance).

> [7,8] When applied to the admission of particular expert testimony, the *Frye* standard of "general acceptance within a particular scientific field" has been employed as a special foundational requirement for *novel* or new scientific devices or processes involving the evaluation of physical evidence, such as lie detectors, experimental systems of blood typing, voiceprints, identification of human bite marks, microscopic analysis of gun residue and human leukocyte antigen testing.

*City of Aurora v. Vaughn*, 824 P.2d 825, 826 (Colo. App. 1991). The *Vaughn* court held that the *Frye* test is inapplicable where there is no claim that a novel or newly developed scientific device or process is utilized by a physician in the test under consideration.

While the *Frye* test has never specifically been applied in a workers' compensation case in Nebraska, it has been addressed by workers' compensation courts in other states, including recently in *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750,

907 P.2d 923 (1995). In *Armstrong*, the claimant-employee was similarly exposed to toxic chemicals, and one of the claimant's physicians diagnosed the claimant with multiple chemical sensitivities. The administrative law judge found the requisite causation and allowed the claimant to recover. The employer argued that the physician's opinion, treatment, and diagnosis did not pass the *Daubert* test and was therefore inadmissible.

[9] The *Armstrong* court held that in a workers' compensation case involving occupational disease, a claimant is not required to prove that the treating physician's opinions, diagnosis, or treatment satisfies either the *Daubert* or the *Frye* test. The court reasoned:

> A claimant's burden of proof in a workers compensation case is to prove that it is more probably true than not true that he or she suffers from a disabling physical condition which is the result of his or her work. To require a claimant to also prove that a diagnosis is one universally recognized by and agreed upon in the medical community is above and beyond the scope and nature of the Workers Compensation Act. To apply the *Daubert* or the *Frye* standard to a workers compensation case would be to apply technical rules of procedure to which neither the ALJ nor the Board are subject. It also would require us to apply our rules of evidence to those proceedings, and those rules of evidence have been held specifically not applicable.

*Armstrong v. City of Wichita*, 21 Kan. App. 2d at 758, 907 P.2d at 929. We agree. We do, however, note that in Kansas, medical testimony is not essential to the establishment of the existence, nature, and extent of the disability of an injured worker.

[10] In *Fuyat v. Los Alamos Nat. Laboratory*, 112 N.M. 102, 811 P.2d 1313 (N.M. App. 1991), the claimant-employee was exposed to aqua regia fumes. At trial, experts were split as to whether the claimant's symptoms were triggered by exposure to chemicals at work. The employer argued that expert opinions establishing causation were inadmissible because they were based upon novel scientific techniques that had not gained general acceptance. The *Fuyat* court held that a licensed physician who had examined and treated the claimant and who had past experience with patients suffering from the same types of symp-

toms was qualified to give an expert opinion about the claimant's symptoms and that such testimony did not have to meet the requirements of *Frye*.

We recognize that the *Frye* test has been applied to workers' compensation cases dealing with serum blood alcohol tests, see *Domino's Pizza v. Gibson*, 668 So. 2d 593 (Fla. 1996), and infrared thermography, see *K-Mart Corp. v. Morrison*, 609 N.E.2d 17 (Ind. App. 1993). See, also, *Garcia v. Borden, Inc.*, 115 N.M. 486, 853 P.2d 737 (N.M. App. 1993) (dissent not advocating *Frye* test or suggesting that court should be bound by majority view of medical profession or of any other scientific group on issue of causation).

[11,12] In Nebraska, the Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence, and admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). Regarding the use of evidence based on the opinion of a medical expert, the witness must qualify as an expert, the witness' testimony must assist the trier of fact to understand the evidence or determine a fact in issue, the witness must have a factual basis for the opinion, and the testimony must be relevant. *Id.*

[13] Dr. Angle, a licensed physician, had not only examined and treated Sheridan, but was familiar with the symptoms of and literature on such chemical exposures. Dr. Angle testified, based on her knowledge of the relevant scientific literature, that (1) symptoms from fenvalerate poisoning could potentially last up to 1 year; (2) esfenvalerate has produced neurologic symptoms in rats of staggering gait, tremors, and altered response to stimuli; and (3) esfenvalerate is three times as toxic as fenvalerate. Based on these factors, Dr. Angle opined with a reasonable degree of medical certainty that Sheridan's exposure to the toxic chemicals caused her organic brain injury. We find nothing novel in such a diagnosis. Furthermore, we agree with the court in *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995), that a claimant is not required to prove that a diagnosis is universally recognized by and agreed upon in the medical community. Such a requirement would impose an oner-

ous burden upon the claimant in the context of workers' compensation litigation. We cannot say that the trial court abused its discretion in admitting the testimony and opinions of Dr. Angle. Dr. Angle was qualified to give an opinion as to the causation of Sheridan's symptoms.

[14,15] Even without Dr. Angle's testimony, there is sufficient unchallenged evidence, viewed in the light most favorable to Sheridan, to support the trial judge's finding that she proved by a preponderance of the evidence causation between her employment and her injury or disability. Dr. Andrews, Dr. Hammer, and Korn all testified with a reasonable degree of medical certainty that Sheridan sustained a brain injury as a consequence of her exposure to the chemicals on September 19, 1993. We acknowledge the conflicting expert testimony to the effect that Sheridan did not suffer any physical injury and was fabricating her symptoms. However, under *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996), the compensation court is free to believe whichever experts it chooses. Triers of fact, including the Workers' Compensation Court, are not required to take the opinions of expert witnesses as binding, *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994), and may, as may any other trier of fact, either accept or reject such opinions, *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992). It is for the Workers' Compensation Court to determine which, if any, of the expert witnesses to believe. *Berggren v. Grand Island Accessories, supra.* Having viewed the evidence in the light most favorable to Sheridan, we cannot say that the trial judge was clearly wrong in finding that she met her burden of proof on the issue of causation.

## CONCLUSION

The judgment of the Workers' Compensation Court trial judge, as affirmed by the Workers' Compensation Court review panel, is affirmed. We award Sheridan $1,750 in attorney fees.

AFFIRMED.

# JULIE A. ELSE, APPELLEE, V. TIMOTHY L. ELSE, APPELLANT.

558 N.W.2d 594

Filed January 14, 1997. No. A-95-488.

1. **Divorce: Appeal and Error.** In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. In such de novo review, 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.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right in matters submitted for disposition in a judicial system.
3. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
4. **Property Division.** An appropriate division of marital property turns on reasonableness as determined by the circumstances of each particular case.
5. **Corporations: Valuation.** To determine the value of a closely held corporation, the trial court may consider the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, marketability of the shares, past earnings or losses, and future earning capacity.
6. ____: ____. The method of valuation used for a closely held corporation must have an acceptable basis in fact and principle.
7. **Child Support: Insurance.** A trial court may make appropriate orders as to the manner in which future medical and dental expenses of the children, after the insurance payments, are to be shared.
8. ____: ____. A parent who does not wish to provide health insurance must be ready to pay for health care for the children.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Barbara B. McCall for appellant.

Howard F. Ach, of Ach Law Office, and Kathy Pate Knickrehm for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

MILLER-LERMAN, Chief Judge.

Timothy L. Else appeals a divorce decree entered by the district court for Thayer County dissolving his marriage to Julie A.

Else. Generally, he challenges the district court's division of property and order that he pay all reasonable and necessary medical and dental expenses incurred by or on behalf of their daughter Emily. For the reasons stated below, we affirm.

## FACTUAL BACKGROUND

Timothy and Julie were married March 16, 1980. Three children were born of the marriage: Emily, born January 27, 1982; Natalie, born December 26, 1984; and Andrew, born November 20, 1985. Emily has had severe health problems since birth. When Emily was born, she had a medical condition requiring surgery and a long hospitalization. When Emily came home after the long hospitalization, Timothy changed the family's insurance carrier because he was dissatisfied with the coverage provided by their previous carrier for Emily's medical expenses. The new insurance carrier refused to extend coverage for Emily. Since that time, Emily has been uninsured. Emily currently suffers "lung problems" and asthma. Her medical expenses are paid, in part, by medicaid and, in part, by a grant for which Julie applied. The remainder of Emily's medical expenses must be paid by the parties.

Timothy has a degree from the University of Nebraska in agricultural economics. During the early years of the marriage, he was employed in several agricultural enterprises and farmed part time. In 1986, he began farming full time. In 1991, Timothy, his father, and his brother formed 3-E Farms, a subchapter S corporation. Timothy executed a bill of exchange, which transferred Timothy and Julie's homestead, farm equipment, livestock, growing crops, grain, and debt to the corporation. Timothy is a minority shareholder in the corporation with a net interest of 40.8 percent. Timothy's adjusted gross income for 1993 was $37,195.

At the time of the parties' marriage, Julie was a beautician. After Emily's birth, Julie remained in the home to care for Emily for a period of time. In 1983, Julie opened a beauty shop, which she later sold for $7,500. Julie then worked part time in her father's pharmacy for a couple of years. In 1988, Julie opened a day-care business, which she sold in April 1991 for roughly her related debt. Although at the time of trial Julie was

on a leave of absence until January 1, 1995, she was employed part time at Blue River Agency on Aging as a senior center director and generally worked 25 hours per week at $5 per hour. Julie was also working approximately 8 hours per week at a movie theater. In addition to the above businesses and periods of employment, Julie was primarily responsible for the care of the parties' three children and also helped with Timothy's farming activities on occasion.

The parties separated in February 1993. Julie filed for divorce on April 27, 1993. Trial was held November 4 and 11, 1994. It is clear from the evidence that the parties are quite hostile toward one another.

The bulk of the evidence related to the division of the marital estate. The parties' largest assets are Timothy's interest in 3-E Farms and 160 acres of farmland. The parties stipulated to the receipt of evidence showing that the value of the 160 acres of farmland was $176,000.

The value of Timothy's interest in 3-E Farms was disputed. The record includes financial statements for Timothy and for the corporation dating from March 1993 to April 1994, and corporate and individual tax returns. Timothy offered appraisals of certain assets of 3-E Farms prepared October 31 and November 3, 1994, and a current financial statement of 3-E Farms dated November 4, 1994. These exhibits, numbered 35, 37, and 40, valued 3-E Farms' net worth as $451,997, placing Timothy's 40.8 percent interest at approximately $184,415. The district court refused to consider Timothy's appraisal and current financial statement of 3-E Farms except for the limited purpose of showing Timothy's ability to finance an award to Julie.

The evidence which was received at trial values Timothy's interest in 3-E Farms from $268,687 to $353,936. The evidence is composed of individual and corporate financial statements offered by Timothy and dated from March 1991 to April 1994.

In refusing to consider the more recent valuation offered by Timothy for the purposes of property division and valuation, the district court concluded that the value of the marital estate should be determined on the date of separation. The court stated:

> But, nobody is required as far as I know to work for someone else or to take risks for someone else or to make investments for someone else after the divorce has been filed and summons served, and it doesn't make any sense.
>
> . . . .
>
> . . . But when I was practicing and the older cases suggested that the best way of doing it was to determine what the people owed and owned at the time of the separation . . . .

On March 1, 1995, the district court prepared a docket entry of its findings, and a decree was prepared and filed on May 10. The district court found the marriage to be irretrievably broken. Custody of the three children was awarded to Julie with reasonable visitation by Timothy. Timothy was ordered to pay child support in the amount of $765 per month beginning March 1, 1995, retain his current medical insurance coverage for Natalie and Andrew, and pay the reasonable and necessary medical and dental bills of Emily. Timothy and Julie were ordered to share the reasonable and necessary medical and dental costs for Natalie and Andrew not covered by insurance.

Regarding the division of property, the district court awarded Julie her premarital property, the personal property in her possession, her IRA, and a 1988 Lincoln Town Car. She was also ordered to be responsible for the payment of the AT&T credit card debt and the Dillard's credit card debt. Timothy was awarded the balance of the marital property and made responsible for the remainder of the parties' debt. In addition, in lieu of an award of property, Timothy was to pay Julie $14,000 on March 1, 1995, and thereafter, $133,000, payable in monthly payments of $1,112.47 for 240 months at 8-percent per annum interest. This appeal followed.

## ASSIGNMENTS OF ERROR

For his assignments of error, Timothy contends that the district court erred in (1) admitting exhibits 19, 23, 35, 37, and 40 for a limited purpose only, (2) refusing to consider the value of the parties' interest in 3-E Farms as of the date of trial, (3) failing to determine the value of the marital estate, (4) awarding Julie $157,900 of assets from a marital estate of undetermined

value, (5) incorrectly computing the amount of the parties' debt, and (6) requiring him to be solely responsible for the medical and dental costs for Emily.

## STANDARD OF REVIEW

[1] In an appeal involving an action for dissolution of marriage, an appellate court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. In such de novo review, 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. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Policky v. Policky*, 239 Neb. 1032, 479 N.W.2d 795 (1992).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right in matters submitted for disposition in a judicial system. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

## ANALYSIS

We first address Timothy's assigned errors regarding the admission of exhibits 19, 23, 35, 37, and 40 for a limited purpose and the district court's refusal to consider the value of 3-E Farms at the time of trial. Based upon our review of the record, exhibit 19, which is an April 13, 1994, financial statement for Timothy, and exhibit 23, which is a December 14, 1993, financial statement for 3-E Farms, were admitted without limitation. However, the record shows that the district court received exhibits 35, 37, and 40 for a limited purpose because the court used the date of separation as the valuation date for the marital estate.

[3] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or

excluded. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995).

[4-6] Under Nebraska jurisprudence, an appropriate division of marital property turns on reasonableness as determined by the circumstances of each particular case. *Thiltges, supra*; *Jirkovsky, supra*. See Neb. Rev. Stat. § 42-365 (Reissue 1993). To determine the value of a closely held corporation, the trial court may consider the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, marketability of the shares, past earnings or losses, and future earning capacity. *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986). The method of valuation used for a closely held corporation must have an acceptable basis in fact and principle. *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988); *Bryan, supra*. Based on the case law and the facts of this case, the valuations of 3-E Farms and its assets set out in exhibits 35, 37, and 40, which were determined 1 week before trial, bear a rational relationship to the property to be divided upon dissolution. See *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982) (using values at time of trial when modifying district court's disposition of property). See, also, *Keim, supra*; *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Hoffmann v. Hoffmann*, 188 Neb. 408, 197 N.W.2d 373 (1972). We conclude the district court erred in failing to receive exhibits 35, 37, and 40 without limitation. These exhibits included valuations of marital assets as appraised the week prior to trial. Such valuations were clearly relevant to the court's reasonable and equitable division of property upon dissolution.

For the sake of completeness, we note that the majority of other jurisdictions permit the date of trial or date of dissolution as the valuation date for marital property. See, e.g., *Brown v. Brown*, 914 P.2d 206 (Alaska 1996); *In re Marriage of Finer*, 920 P.2d 325 (Colo. App. 1996); *Moriarty v. Stone*, 41 Mass. App. 151, 668 N.E.2d 1338 (1996); *Romkema v. Romkema*, 918 S.W.2d 294 (Mo. App. 1996); *In re Marriage of Meeks*, 276 Mont. 237, 915 P.2d 831 (1996); *Peterson and Peterson*, 141 Or. App. 446, 918 P.2d 858 (1996). See, also, *Doser v. Doser*, 106

Md. App. 329, 664 A.2d 453 (1995); *In re Marriage of McLaughlin*, 526 N.W.2d 342 (Iowa App. 1994) (using date of dissolution). Compare, *In re Marriage of Long v. Long*, 196 Wis. 2d 691, 539 N.W.2d 462 (Wis. App. 1995) (using date of agreement or date of filing unless another date is more equitable); *Stanley v. Stanley*, 118 N.C. App. 311, 454 S.E.2d 701 (1995) (using date of separation); *In re Marriage of Cray*, 254 Kan. 376, 867 P.2d 291 (1994) (finding date of filing to be most logical).

In order for the improper exclusion of evidence to be reversible error, the exclusion of evidence must unfairly prejudice a substantial right of Timothy's. See *McIntosh, supra.* Although we cannot determine from the docket entry or the divorce decree what value the district court placed on Timothy's interest in 3-E Farms, we have reviewed the range of 3-E Farms' valuation evidence as though exhibits 35, 37, and 40 had been admitted. Based on our de novo review and given the property award as reflected in the findings and decree, we conclude that Timothy was not prejudiced by the district court's refusal to receive the valuations contained in exhibits 35, 37, and 40 without limitation. We have also reviewed the division of property in light of Timothy's other assignments of error and do not find an abuse of discretion in the division of marital property and, therefore, conclude that Timothy's assignments of error pertaining to calculation and division of property are without merit.

We address Timothy's final assignment of error that the district court erred in ordering him to pay all reasonable and necessary medical and dental costs for Emily. We review the district court's determination de novo for an abuse of discretion. See, *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995); *Druba v. Druba*, 238 Neb. 279, 470 N.W.2d 176 (1991).

[7,8] In *Druba*, the Nebraska Supreme Court held that a trial court may make appropriate orders as to the manner in which future medical and dental expenses of the children, after the insurance payments, are to be shared. In *Druba*, the husband had never provided health insurance for the wife or the children, and his *cavalier attitude* was never explained. The Supreme Court observed that a parent who does not wish to provide such

insurance must be "ready to pay for health care for the children." *Id.* at 284, 470 N.W.2d at 180.

We also note that the November 8, 1995, revisions to the child support guidelines, effective January 1, 1996, contain the following new provision:

> O. **Health Care.** Children's health care needs are to be met by requiring either parent to provide health insurance as required by state law, and the court may apportion all nonreimbursed children's health care costs between the parents according to the same formula used to determine each parent's share of support.

Although not in effect at the time of trial, this new guideline provides, at a minimum, conceptual direction to a court in circumstances such as presented by the instant case.

In the case before us, it is clear from the record that Timothy chose to change insurance carriers after he was dissatisfied with the coverage provided by their insurance carrier for Emily's surgery and long hospitalization. When Timothy changed insurance carriers, the new insurance carrier refused to cover Emily. There is evidence that Timothy was warned of this possibility prior to canceling the insurance policy which was then in force. Although we cannot determine from the record the amount of each parent's respective share of support for their children, the record shows that the disparity in income and earning capacity between Timothy and Julie is obvious and great.

Timothy argues that Julie is "likely to make financially irresponsible decisions, possibl[y] to hurt Tim. It is unconscionable for the Court to put Julie i[n] a position where she is allowed to incur unlimited medical expenses which Tim is obligated to pay in full." Brief for appellant at 49. This argument is without merit because Timothy is only required under the court's order to pay "reasonable and necessary" medical expenses incurred for Emily.

For the reasons stated above, we conclude that the district court did not abuse its discretion in ordering Timothy to be solely responsible for all reasonable and necessary medical expenses incurred for Emily.

## CONCLUSION

The district court committed error in failing to receive without limitation exhibits relating to the valuation of marital assets which were prepared near the date of trial. However, Timothy was not prejudiced thereby. Timothy's remaining assigned errors regarding the division of property are without merit. Finally, we conclude that the district court did not abuse its discretion in ordering Timothy to pay all reasonable and necessary medical and dental costs incurred for Emily.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
KAMIL H. AL-ZUBAIDY, APPELLANT.
559 N.W.2d 774

Filed January 14, 1997. No. A-96-012.

1. **Judges: Jury Instructions: Appeal and Error.** A trial judge has a duty to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue in the case are prejudicially erroneous.
2. **Lesser-Included Offenses: Jury Instructions: Evidence.** Courts must engage in a two-step test for determining whether or not a lesser-included offense instruction should be given: First, the court must determine whether the lesser crime is actually a lesser-included offense of the greater crime; second, if the court determines the lesser crime is actually a lesser-included offense, then the court must determine whether the evidence presented at trial justifies an instruction on the lesser-included offense.
3. **Homicide: Criminal Attempt: Lesser-Included Offenses.** Attempted second degree murder is a lesser-included offense of attempted first degree murder.
4. **Homicide: Criminal Attempt.** There is no such crime as attempted manslaughter.

5. **Rules of Evidence: Witnesses: Impeachment: Prior Statements.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require.
6. ____: ____: ____: ____. The requirement that a witness be afforded an opportunity to explain or deny an alleged prior inconsistent statement may be met either before or after the introduction of the extrinsic impeaching evidence.

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

Alan G. Stoler for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Kamil H. Al-Zubaidy appeals from his convictions of attempted first degree murder, second degree assault, and two counts of use of a weapon in the commission of a felony. Appellant challenges the district court's refusal to instruct the jury on attempted second degree murder and attempted manslaughter as lesser-included offenses of attempted first degree murder and the district court's refusal to allow appellant to present extrinsic evidence to impeach one of the State's witnesses. Because we find that the evidence presented did not warrant a lesser-included offense instruction and because appellant failed to provide the witness to be impeached an opportunity to deny or explain the alleged impeachment, we affirm.

## II. BACKGROUND

On December 9, 1994, appellant's wife, Anita Al-Zubaidy, told him she was leaving him and took the couple's infant son to the home of one of Anita's friends, Ann Brown. On the evening of December 9, appellant returned home from work, found Anita had left, and telephoned Brown's home looking for Anita. Appellant eventually went to Brown's home to speak to Anita, and Anita refused to allow appellant into the home. At

some point the police were called, and appellant left the residence before the police arrived.

James Fritts testified that appellant came to Fritts' apartment on December 10, 1994, looking for Anita. Fritts informed appellant that he had not seen Anita. Appellant asked Fritts to call a phone number looking for Anita, which Fritts agreed to do. According to Fritts, Brown answered the phone and then gave the phone to Anita. Fritts testified that appellant wanted to speak to Anita, but that Anita told Fritts she did not wish to speak to appellant. Fritts then hung up the phone.

Fritts testified that appellant dialed a number on Fritts' telephone, did not seem to get any answer, and then hung up the phone and began crying. Fritts testified that appellant told him that the problems between appellant and Anita were being caused by Brown. Fritts testified that appellant then said that "he knew where [Brown] worked and that Monday [December 12, 1994] he was going to kill her." Fritts told appellant that he needed to be patient, but appellant "just insisted that he was going to kill Ann Brown."

After appellant left Fritts' apartment, Fritts called Brown's home again and spoke to Brown. Fritts informed Brown that appellant had left Fritts' apartment and was acting very threatening toward Brown and was threatening to kill her. Anita testified that she and Brown then began calling friends, trying to find somewhere to go, although they were unable to find anyone at home. Anita testified that her brother then called, saying that appellant was at her parents' home and that appellant wanted to speak to her. According to Anita, appellant was on the phone and sounded "very angry," so she hung up on him.

Anita testified that appellant and one of appellant's friends arrived at Brown's home at approximately 10:30 p.m. on December 10, 1994. Anita spoke to appellant's friend through the front window while Brown called the 911 emergency service from the kitchen. Anita testified that Brown's son, Tierney, and several of his friends were also at the home, in the basement. According to Anita, she heard Brown "screaming into the phone, oh my God, he's coming through the back door and he's got a knife."

Anita testified that she then observed appellant stabbing Brown in the chest, arm, and wrist with a knife. Brown's daughter Seana tried to pull appellant off Brown, and appellant stabbed Seana in the shoulder. Anita testified that she next observed Tierney and one of his friends grabbing appellant and attempting to get appellant out of the home. Brown ran through the home to her bedroom. Anita testified that she checked on Brown, then went across the street to use a neighbor's phone, because Brown's phone had been pulled off of the wall.

According to Anita,

> [t]here was blood splattered everywhere. The kitchen was just all covered with blood. And there was blood in the living room all over the walls from when Seana ran through. And there was blood back in Ann's bedroom. There was blood all over the living room carpet from when the paramedics were working on Ann.

Both Brown and Seana testified substantially in accordance with Anita concerning the events of December 9 and 10, 1994. Additionally, Tierney and one of his friends, Daniel Watson, testified on behalf of the State. Tierney and Daniel testified that Tierney pulled appellant off of Seana, that Tierney and Daniel chased him outside, and that Tierney and his friends began hitting the car appellant was in with a baseball bat and other objects. Daniel testified that he used a towel to grab hold of the knife and take it from appellant during the struggle. Finally, two police officers who had responded to a call to the scene testified for the State.

Appellant testified that the events of December 10, 1994, were far different from those testified to by the State's witnesses. According to appellant, Fritts told appellant that Brown was the cause of the problems between appellant and Anita. Appellant denied intending to kill Brown and denied telling Fritts that he was going to kill Brown. Appellant testified that he went to Brown's on December 10 to take some of their child's belongings to Anita.

Appellant testified that he had always before entered Brown's home through the back door, so he went immediately to the back door on December 10, 1994. Appellant testified that the door was locked when he first arrived, but that "[a] guy

came from the basement," opened the door, and began yelling, "[H]ere he is, here he is." Appellant testified that he then entered the kitchen and that Brown began yelling, "[C]ome here and kill him, come here and kill him." According to appellant, Brown hit him in the forehead with the telephone. Appellant testified that a group came from the basement and began to "strike" and attack him. Appellant also testified that one of the males in the group stabbed him in the shoulder.

Appellant then testified that he saw a knife on a table in the kitchen and grabbed it to defend himself. Appellant testified that he attempted to flee, but was grabbed by Brown and Seana, and that he had to stab them in order to get away from the home. Finally, appellant testified that he suffered no cuts or bruises from being hit in the head with the phone and that he did not need stitches for the "stab" wound in his shoulder.

Appellant offered the testimony of another witness, John Ways, whom appellant had met while in custody awaiting trial. Appellant proposed to question Ways concerning a conversation Ways allegedly had with Seana wherein Seana told Ways that "people in the house," including her brother's friends, had jumped appellant and that appellant had grabbed a knife from a table while they were beating him. Appellant offered this testimony as extrinsic evidence of a prior inconsistent statement to impeach Seana's testimony at trial. The State argued that Seana was out of the jurisdiction, in Michigan, and that she would therefore have no opportunity to explain or deny the alleged prior inconsistent statement. The court refused to allow Ways to testify.

After the conclusion of the evidence, a jury instruction conference was held. Appellant's attorney requested an instruction on self-defense, but stated that no lesser-included offense instruction was requested regarding the attempted first degree murder charge, because "the Supreme Court's made it clear that there are no lesser included offenses whenever the charge is criminal attempt."

The jury returned verdicts of guilty on all four counts, attempted first degree murder, second degree assault, and two counts of use of a weapon to commit a felony. The court sentenced appellant to 30 to 40 years' imprisonment on the

attempted first degree murder conviction, 4 to 5 years' imprisonment on the second degree assault conviction, and 10 to 20 years' imprisonment on each of the use of a weapon to commit a felony convictions. The court further ordered that the sentences were to be served consecutively to each other. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On appeal, appellant assigns two errors: First, appellant asserts that the district court erred in failing to instruct the jury on attempted second degree murder and attempted manslaughter as lesser-included offenses of attempted first degree murder, regardless of whether the court was requested to so instruct the jury or not. Second, appellant asserts that the district court erred in refusing to allow extrinsic evidence to impeach Seana.

## IV. ANALYSIS

### 1. Lesser-Included Offense Instruction

[1] A party who does not request a desired jury instruction cannot usually complain on appeal about incomplete instructions. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). However, a trial judge has a duty to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue in the case are prejudicially erroneous. *State v. Willams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Myers, supra.*

#### (a) Generally

##### *(i) Lesser-Included Offenses Generally*

The law in Nebraska concerning when a jury must be instructed on lesser-included offenses has undergone several significant changes. In *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), the Nebraska Supreme Court purported to adopt the "elements test" for determining whether one offense is a lesser-included offense of another. The Supreme Court held that a lesser-included offense is one which is necessarily established by proof of the greater offense because all of the ele-

ments of the lesser-included offense are necessarily included in the elements of the greater offense. *Id.*

In *State v. Garza*, 236 Neb. 202, 205, 459 N.W.2d 739, 741 (1990), the Nebraska Supreme Court recognized that *State v. Lovelace, supra*, had expressed the "common-law or strict statutory approach" to lesser-included offenses. The Supreme Court, however, went on to recognize that other decisions of the Supreme Court since *State v. Lovelace* had not strictly followed the "statutory-elements approach." *State v. Garza, supra.* The Supreme Court concluded that the pre-*Lovelace* rule, the "cognate-evidence approach" to lesser-included offenses, was the better rule and overruled *State v. Lovelace* to the extent it conflicted with that approach. *State v. Garza, supra.* The cognate-evidence approach determined whether a lesser-included offense existed based upon the elements of the crime as charged in the information and the evidence adduced to support the charge, rather than focusing solely on the strict statutory elements of the two crimes. *Id.*

The law of lesser-included offenses changed again, however, when the Supreme Court decided *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). In *State v. Williams*, the Supreme Court noted the difficulties associated with attempting to apply the cognate-evidence approach and returned to the strict statutory-elements approach espoused in *State v. Lovelace, supra.* The Supreme Court specifically overruled several decisions, including *State v. Garza, supra*, to the extent they rely upon and apply the cognate-evidence approach. *State v. Williams, supra.*

[2] As a result of the Supreme Court's opinion in *State v. Williams*, courts must engage in a two-step test for determining whether or not a lesser-included offense instruction should be given: First, the court must determine whether the lesser crime is actually a lesser-included offense of the greater crime; second, if the court determines the lesser crime is actually a lesser-included offense, then the court must determine whether the evidence presented at trial justifies an instruction on the lesser-included offense. *State v. Williams, supra.* In resolving the first step, the applicable test is that to be a lesser-included offense, the statutory elements of the lesser offense must be such that it is impossible to commit the greater offense without at the same

time having committed the lesser offense. *Id.* In resolving the second step, the applicable test is that a lesser-included offense instruction is justified if the evidence adduced at trial provides a rational basis for the jury to return a verdict acquitting the defendant of the greater offense, but convicting him of the lesser offense. *Id.*

*(ii) Lesser-Included Offenses of Attempted Crimes*

In parallel with the progression of the law in Nebraska concerning lesser-included offenses generally has been a progression of the law concerning lesser-included offenses of criminal attempt. In *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986), the Supreme Court cited *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), for the general rule concerning lesser-included offenses. To the specific question whether third degree sexual assault could be considered a lesser-included offense of attempted first degree sexual assault, the Supreme Court, based on the rule from *State v. Lovelace*, answered in the negative. *State v. Swoopes, supra.* The Supreme Court held that "[b]ecause an attempted crime as defined by [Neb. Rev. Stat.] § 28-201 [(Reissue 1995)] may be committed without the crime itself being committed, no offense can be a lesser-included offense of an attempted crime prosecuted under § 28-201." (Emphasis omitted.) *State v. Swoopes*, 223 Neb. at 922, 395 N.W.2d at 506.

In *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987), the Nebraska Supreme Court revisited the issue of lesser-included offenses of criminal attempt. To the specific question whether attempted second degree sexual assault could be considered a lesser-included offense of attempted first degree sexual assault, the Supreme Court answered in the affirmative. *Id.* The Supreme Court held that "a substantial step in a course of conduct intended to culminate in a sexual assault in the first degree . . . may include a substantial step in a course of conduct intended to culminate in . . . commission of a sexual assault in the second degree." *Id.* at 856, 408 N.W.2d at 729. In reference to the topic of lesser-included offenses of criminal attempt, the Supreme Court overruled *State v. Swoopes, supra*, to the extent *Swoopes* held that there can be no lesser-included offenses of an attempted crime. *State v. Jackson, supra.*

In *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990), the Nebraska Supreme Court also revisited the law of lesser-included offenses in the context of criminal attempt. The Supreme Court, after overruling *State v. Lovelace, supra*, held that overruling *State v. Swoopes, supra*, was improvident. *State v. Garza, supra*. The Supreme Court held that under the cognate-evidence approach, "[a]s an attempted crime may be committed in an infinite variety of ways by acts which without the requisite intent are entirely innocent, the doctrine, under the cognate theory readopted earlier, simply becomes unworkable in the context of attempted crimes." *Id.* at 208, 459 N.W.2d at 743. As a result, the Supreme Court overruled that portion of *State v. Jackson, supra*, which overruled *State v. Swoopes, supra*. *State v. Garza, supra*.

The Nebraska Supreme Court has not discussed lesser-included offenses in the context of attempted crimes since *State v. Garza, supra*. However, in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), the Supreme Court expressly overruled *State v. Garza* to the extent *State v. Garza* relied upon and applied the cognate-evidence approach. The portion of *State v. Garza* which overruled *State v. Jackson*'s holding that there could be lesser-included offenses of criminal attempt was explicitly based upon the cognate-evidence approach and, therefore, was overruled in *State v. Williams, supra*. As a result, it appears that the general two-step approach of *State v. Williams, supra*, for determining whether a lesser-included offense instruction is warranted should apply to attempted crimes as well.

(b) Attempted Second Degree Murder

[3] The first step in determining whether a lesser-included offense instruction on attempted second degree murder was warranted in the present case is to determine if attempted second degree murder is actually a lesser-included offense of attempted first degree murder. See *State v. Williams, supra*. As charged in the present case, the statutory elements of attempted first degree murder are these: a substantial step in a course of conduct intended to culminate in the commission of a purposeful, malicious, premeditated killing of another person. § 28-201

and Neb. Rev. Stat. § 28-303 (Reissue 1995). The statutory elements of attempted second degree murder are these: a substantial step in a course of conduct intended to culminate in the commission of an intentional killing of another person. § 28-201 and Neb. Rev. Stat. § 28-304 (Reissue 1995). Additionally, the Nebraska Supreme Court has held that malice is a necessary element of second degree murder and, by implication, attempted second degree murder. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). When comparing the strict elements of the two crimes, it is apparent that attempted second degree murder is actually a lesser-included offense of attempted first degree murder.

The second step in determining whether a lesser-included offense instruction on attempted second degree murder was warranted in the present case is to determine if the evidence adduced at trial produced a rational basis for the jury to return a verdict acquitting appellant of attempted first degree murder, but convicting him of attempted second degree murder. See *State v. Williams, supra.* The testimony at trial on appellant's behalf was based upon a theory of self-defense. Appellant testified that he was jumped by a group at Brown's home, that Brown screamed at the group to kill appellant, that the group began beating him, and that he grabbed the knife and stabbed Brown in an effort to defend himself and flee from her home. The evidence produced by appellant reasonably provided the jury with a rational basis to acquit him of attempted first degree murder, but the self-defense theory would also have been applicable to any instructed charge of attempted second degree murder. In other words, appellant did not present any evidence which would reasonably provide the jury with a rational basis to find that appellant intentionally and maliciously attempted to kill Brown, but did so without premeditation. As such, the instruction was not warranted by the evidence presented in this case.

(c) Attempted Manslaughter

This court has twice discussed the topic of "attempted manslaughter." See, *State v. Smith*, 3 Neb. App. 564, 529 N.W.2d 116 (1995); *State v. George*, 3 Neb. App. 354, 527 N.W.2d 638 (1995). Criminal attempt requires a person to

*intentionally* engage in conduct which constitutes a substantial step in a course of conduct intended to culminate in the commission of a crime. § 28-201. See, also, *State v. Smith, supra*; *State v. George, supra*. By contrast, manslaughter is an *unintentional* killing, without malice, either upon a sudden quarrel or while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1995). See, also, *State v. Smith, supra*; *State v. George, supra*.

[4] "A person cannot perform the same act intentionally and unintentionally at the same time." *State v. George*, 3 Neb. App. at 358, 527 N.W.2d at 642. In *State v. George*, this court held that the crime of attempted involuntary manslaughter (while in the commission of an unlawful act) does not exist in Nebraska. In *State v. Smith*, this court held that the crime of attempted voluntary manslaughter (upon a sudden quarrel) does not exist in Nebraska. Because it is fundamental that a person cannot intentionally take a substantial step toward the commission of a crime which is, by its terms, involuntary, there is no such crime as attempted manslaughter.

(d) Resolution

Because the evidence did not warrant the giving of an instruction on attempted second degree murder, the district court did not err in failing to give such an instruction. Because there is no such crime in Nebraska as attempted manslaughter, the district court did not err in failing to give an instruction on the crime of attempted manslaughter as a lesser-included offense of attempted first degree murder. This assigned error is without merit.

2. Extrinsic Evidence for Impeachment Purposes

Appellant offered to present testimony from a witness concerning an alleged prior inconsistent statement made by one of the State's witnesses, Seana, who was also the victim of the second degree assault charged in this case, concerning the events at Brown's home on the evening of December 10, 1994. Seana testified substantially in accordance with Anita and Brown that appellant came to the home, broke through the back door with a knife in his hand, began stabbing Brown, and stabbed Seana

when she attempted to assist Brown. The witness appellant wished to call would have testified that he had a conversation with Seana in which Seana told the witness that a group including her brother's friends jumped appellant when he arrived at Brown's home, that they began beating appellant, and that appellant grabbed a knife from a table when they were beating him.

Seana testified during the State's case in chief. She testified that she had moved to Michigan, and she then provided her testimony as described above. During cross-examination, appellant did not confront Seana with the alleged prior inconsistent statement. At the conclusion of Seana's testimony, appellant did not request that Seana remain subject to recall, nor did he in any way suggest to the State that there was a need for Seana to remain in Nebraska to possibly explain or deny a prior inconsistent statement. The court dismissed Seana. It is apparent from the dialog between the attorneys at the time of the proffered extrinsic testimony concerning the alleged prior inconsistent statement that Seana returned to Michigan after testifying.

[5] Neb. R. Evid. 613(2), Neb. Rev. Stat. § 27-613(2) (Reissue 1995), governs the use of extrinsic evidence to impeach a witness through demonstrating a prior inconsistent statement. Rule 613(2) provides in part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require."

[6] The Nebraska Supreme Court has discussed the foundational requirement of rule 613(2), that the witness be afforded an opportunity to explain or deny the alleged prior inconsistent statement, on two occasions. In *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979), the Supreme Court held that the foundational requirement may be met either before or after the introduction of the extrinsic impeaching evidence. In *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985), the Supreme Court again held that the extrinsic impeaching evidence may be introduced before the witness is given an opportunity to explain or deny the alleged prior inconsistent statement, depending upon the defendant's strategy.

In the present case, the State argues that Seana became unavailable after testifying and, therefore, would not have had an opportunity to explain or deny the alleged prior inconsistent statement. Appellant argues that the decision not to confront Seana with the statement during her testimony was a tactical decision and that he was never notified that she would become unavailable.

In the present case, Seana's testimony established that she lived in Michigan. It is apparent that appellant had knowledge of the alleged prior inconsistent statement at the time of Seana's testimony, as appellant argues that the decision not to confront her was a "tactical" decision, and appellant does not argue that this is a case where the alleged prior inconsistent statement was discovered after Seana became unavailable. Additionally, appellant did nothing to place anyone on notice that Seana would need to remain in Nebraska for purposes of having an opportunity to explain or deny the alleged prior inconsistent statement.

Under similar circumstances, the 11th Circuit Court of Appeals in *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1524 (11th Cir. 1986), held that where

> counsel had sufficient knowledge such that action of some kind was required, whether it be to generally inquire of the witness as to [the prior statement] or to alert the court to the fact that counsel sought to pursue the matter later after further preparation [but counsel] failed to do either, counsel ran the risk that the witness would become unavailable . . . .

Speaking in reference to Fed. R. Evid. 613(b), which is almost identical to Nebraska's rule 613(2), Weinstein has suggested that the impeaching party would seem sufficiently to comply with the rule if he informs both the court and opposing counsel at the time the witness to be impeached testifies that he intends to introduce an allegedly inconsistent prior statement and that his opponent may, therefore, wish to keep the witness available to be called to explain or deny the alleged inconsistency. 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 613[04] (1996).

On the facts of the present case, it is apparent that Seana would not have had an opportunity to explain or deny the

alleged inconsistent prior statement had Ways been allowed to testify. Appellant was aware that Seana was living in Michigan when she testified, and he did nothing to suggest to anyone that there was reason for her to remain in Nebraska after her testimony was finished. Because rule 613(2) requires that the party to be impeached be given an opportunity to explain or deny the inconsistent statement, and because such an opportunity would have been denied Seana in the present case, the district court did not err in refusing to allow the extrinsic evidence. Additionally, appellant has not demonstrated that the interests of justice require dispensing with the foundational requirement of rule 613(2) in the present case. This assigned error is without merit.

## V. CONCLUSION

Finding no error by the district court, we affirm the judgment.

AFFIRMED.

HANNON, Judge, concurring in part, and in part dissenting.

I concur in the majority's opinion in all respects except its conclusion that the trial court did not err when it failed to instruct the jury on attempted second degree murder. When the evidence can support different and reasonable inferences, the jury must draw the inference determining the degree of criminal homicide. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Under Neb. Rev. Stat. § 29-2027 (Reissue 1995), the court is required to instruct the jury on lesser-included offenses when there is evidence tending to show those crimes were committed. *State v. Archbold, supra.* I can see no reason why this same rule does not apply when the crime is attempted murder rather than the completed crime.

As defined in the majority's opinion, first degree murder is the purposeful, malicious, and premeditated killing of another person, whereas second degree murder is the malicious, intentional killing of another person. The elements of "purposeful," "malicious," "premeditation," and alternatively, "malicious intention" are necessarily proved by circumstantial evidence. By the nature of things, when a jury considers whether a defendant is guilty of first degree murder or the lesser-included offense of second degree murder, it is deciding whether the evidence established an inference of premeditation beyond a rea-

sonable doubt, as well as perhaps deciding the credibility of the evidence which might support either inference. The second step mentioned in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), that is, the court's determination whether the evidence presented at trial justifies an instruction on the lesser-included offense, has a different application when the element which distinguishes the greater crime from the lesser crime is one of intent, which is necessarily proved by inferences from the evidence.

I regard this situation as distinct from that in *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978), where the defendant wanted an instruction on the lesser-included offense of second degree sexual assault rather than first degree sexual assault on the basis that there was no penetration. In *Tamburano*, the State introduced evidence establishing penetration, and the defendant did not dispute this evidence. In that case, the Supreme Court held that the lesser-included offense instruction was not proper because the prosecution had offered uncontroverted evidence of that element and the defendant had offered no evidence to dispute that fact. In *Tamburano*, the factor which distinguished the greater crime from the lesser crime was a physical fact, whereas in this case, the distinction between the crimes is necessarily in the mind of the defendant. I am therefore convinced that there is a rational basis to find that appellant intentionally and maliciously attempted to kill Brown, but did not do so with premeditation.

The difference in the nature of the elements requires a different treatment. Therefore, I believe the trial court was required to instruct the jury on attempted second degree murder, and I would reverse the conviction because it failed to do so.

DELANTE PITTMAN, BY AND THROUGH HIS NEXT FRIEND AND LEGAL GUARDIAN, VANESSA FINNEY, APPELLANT, V. STATE OF NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE.

558 N.W.2d 600

Filed January 21, 1997. No. A-95-931.

1. **Tort Claims Act.** Neb. Rev. Stat. § 81-8,209 (Reissue 1994) provides that the State of Nebraska shall not be liable for the torts of its officers, agents, or employees and that no suit shall be maintained against the State on any tort claim except to the extent, and only to the extent, provided by the State Tort Claims Act.
2. **Tort Claims Act: Licenses and Permits.** Neb. Rev. Stat. § 81-8,219(8) (Reissue 1994) provides that the State Tort Claims Act shall not apply to any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Michael B. Kratville, of Terry & Kratville Law Offices, and Bruce Brodkey, of Brodkey & Cuddigan, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Delante Pittman, by and through his next friend and legal guardian, Vanessa Finney, appeals from a district court order granting the State of Nebraska's motion for summary judgment. Because we find that Pittman's negligence action against the State is not authorized by the State Tort Claims Act, we affirm.

## II. BACKGROUND

Pittman was injured on January 14, 1993, while in the care of the Kiddie Care Daycare Center (KCDC). KCDC was licensed as a day-care center by the State through the Nebraska Department of Social Services (DSS) on July 2, 1991.

On or about December 4, 1991, a staff member of KCDC was arrested for involvement with cocaine. When the director of

KCDC learned of the staff member's arrest, the staff member's employment was terminated. The State investigated the matter and found KCDC to be in compliance with DSS regulations on or about January 4, 1992.

Pittman brought suit against the State, alleging that the State was obligated to revoke KCDC's license to operate as a day-care center because of the drug-related arrest of a staff member. Pittman's petition was filed on June 3, 1994. It appears that Pittman based his claim on a DSS regulation which provides that no license shall remain in effect if there is an admission of, or substantial evidence of, crimes involving the illegal use of a controlled substance by a care provider.

On May 26, 1995, Pittman filed a motion for partial summary judgment, seeking judgment on the issue of liability. On July 25, the State filed a motion for summary judgment. The motions were heard on August 3. On August 3, the district court entered an order overruling Pittman's motion and granting the State's motion for summary judgment. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On appeal, Pittman assigns two errors: First, Pittman asserts that the district court erred in overruling his motion for partial summary judgment. Second, Pittman asserts that the district court erred in granting the State's motion for summary judgment.

## IV. ANALYSIS

On appeal, the parties present argument concerning the basic elements of negligence, namely, whether the State owed Pittman a duty, whether the State breached any such duty, and whether the State's alleged breach proximately resulted in injury to Pittman. We need not address the merits of such arguments, however, because we conclude that this suit is not authorized by the State Tort Claims Act. See Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994).

[1,2] Section 81-8,209 provides that "[t]he State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state . . . on any tort claim except to the extent, and only to the extent, provided by the State Tort Claims Act." Section 81-8,219(8) provides that

the State Tort Claims Act shall not apply to "[a]ny claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order." Subsection (8) was added to § 81-8,219 by 1992 Neb. Laws, L.B. 262, § 11, passed by the Nebraska Legislature during February 1992.

In the present case, Pittman's cause of action for negligence is based entirely upon the State's failure to revoke KCDC's day-care license. Because the State Tort Claims Act specifically does not authorize such an action, the State was entitled to judgment as a matter of law and the district court did not err in granting the State's motion for summary judgment.

AFFIRMED.

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LEROY C. KRAFT AND RITA M. KRAFT, APPELLEES, V. ROBERT L. METTENBRINK AND MAY METTENBRINK, HUSBAND AND WIFE, ET AL., APPELLANTS, AND DAVID W. BOCKMANN AND KIM A. BOCKMANN, HUSBAND AND WIFE, APPELLEES.

559 N.W.2d 503

Filed January 21, 1997. No. A-95-1235.

1. **Boundaries: Equity: Appeal and Error.** An action to settle disputed corners is an equity action, and appeals are taken in conformity with equity rules.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Adverse Possession: Proof: Time.** The party who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for 10 years.
4. **Adverse Possession: Real Estate.** An adverse possessor can succeed in his claim even if he does not know he is occupying land not included in his deed or chain of title.
5. **Adverse Possession: Title.** Possession by permission of the owner can never ripen into title by adverse possession unless change of possession has been brought home to the true owner.

6. **Real Estate: Presumptions.** As to parties sharing a parental or filial relationship, possession of land of one by the other is presumed to be permissive.
7. **Boundaries: Adverse Possession.** The rule of recognition and acquiescence embodied in Neb. Rev. Stat. § 34-301 (Reissue 1993) is separate and distinct from the theory of adverse possession.
8. **Boundaries: Notice.** In order to claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary.
9. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
10. **Attorney Fees: Words and Phrases.** "Frivolous," as used in Neb. Rev. Stat. § 25-824(2) (Reissue 1995), refers to a legal position wholly without merit.

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

David A. Domina and, on brief, Robert L. Mettenbrink and May Mettenbrink for appellants.

William G. Blackburn, of Cunningham, Blackburn, Francis, Brock & Cunningham, Attorneys, for appellees Kraft.

SIEVERS, MUES, and INBODY, Judges.

MUES, Judge.

## INTRODUCTION

LeRoy C. Kraft and Rita M. Kraft own property adjacent to property owned by the Mayrob Company, of which Robert L. Mettenbrink and May Mettenbrink are trustees. The Mettenbrinks et al. (Mettenbrinks) appeal from a decision establishing the boundary line between these two properties and quieting title to disputed property in the Krafts.

## STATEMENT OF CASE

In 1954, Robert Mettenbrink became owner by warranty deed of real property legally described as the north half of Fractional Section 19, Township 12 North, Range 9 West of the 6th P.M., in Hall County, Nebraska (hereinafter referred to as Fractional Section 19). Adjacent to Fractional Section 19 to the east is the northwest quarter of Section 20. In 1989, the Krafts became owners by warranty deed of part of the northwest quarter of Section 20. The Krafts' interest, described by metes and bounds, began and ended on the west line of the northwest quarter and contained 69.332 acres, more or less. This dispute arose

over the correct location of that west boundary line which divides these two properties.

An original government survey conducted in 1866 established the location of the true corner between Fractional Section 19 and the northwest quarter of Section 20. However, a subsequent survey conducted in 1895 marked the location of this corner by placing a stake 205 feet east of the previously marked corner. This error was discovered in or about 1992 by the Hall County surveyor. That portion of land lying between the original corner and the subsequent corner consists of approximately 12.214 acres. Whether the Krafts or the Mettenbrinks own this portion of land is the subject of this litigation. Pursuant to the original government survey, this disputed property lies in the northwest quarter of Section 20; however, the corner, as it was marked in 1895, places this disputed property within Fractional Section 19.

The evidence establishes that neither the Krafts nor the Mettenbrinks have paid property taxes on this disputed area. While county records indicate the Mettenbrinks' interest as 2.38 acres, the Krafts are shown to own 69.33 acres.

On August 27, 1993, the Krafts filed a petition asking the court to decree the boundary between Fractional Section 19 and the northwest quarter of Section 20 in accordance with the original government survey. The Krafts further alleged ownership of the adjacent disputed property and sought damages in the amount of $2,500. The Krafts also sought two easements for ingress and egress across the Mettenbrinks' land to permit access to the county road lying on the west side of Fractional Section 19.

By answer and cross-petition, the Mettenbrinks claimed the correct corner was pursuant to that set by the 1895 survey. They also, by cross-petition, asserted ownership of the disputed 12.214 acres under color of title and adverse possession.

Prior to trial, the parties stipulated that the true corner of the properties was in accordance with the original government survey, or 205 feet west of the corner as it was marked in 1895. The court's order dated October 13, 1995, established the boundary line between the two properties in accordance with this true corner. The court further found that neither the Krafts nor the

Mettenbrinks had established ownership by adverse possession and thereafter quieted title to the disputed property in the Krafts. The Krafts' metes and bounds description was changed accordingly, and while their legal description continues to begin and end at a point on the west line of the northwest quarter of Section 20, they now own 80.163 acres, more or less.

The court further granted an easement to the Krafts for ingress and egress along and upon a tract of land generally described as 24 feet in width adjacent to a natural creek located near the northerly end of Fractional Section 19 as well as a 24-foot easement adjacent to and along the southerly side of a creek which traverses Fractional Section 19 near the south end of the north half of the north half of Fractional Section 19.

Finally, the court found it was without jurisdiction to award damages and denied the Mettenbrinks' cross-petition. The Mettenbrinks' motion for a new trial was subsequently overruled, and this appeal followed.

## ASSIGNMENTS OF ERROR

Summarized, the Mettenbrinks assert that the trial court erred in (1) quieting title to the disputed property in the Krafts, (2) granting the Krafts easements when there was already an existing easement to One-R School, and (3) dismissing the Mettenbrinks' cross-petition.

## STANDARD OF REVIEW

[1,2] An action to settle disputed corners is an equity action, and appeals are taken in conformity with equity rules. Neb. Rev. Stat. § 34-301 (Reissue 1993). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Gustin v. Scheele,* 250 Neb. 269, 549 N.W.2d 135 (1996); *Whitten v. Malcolm,* 249 Neb. 48, 541 N.W.2d 45 (1995).

## ANALYSIS

The Krafts brought this action pursuant to § 34-301 for the purpose of establishing the west boundary line to real property belonging to them and the east boundary line to real property belonging to the Mettenbrinks. Section 34-301 provides in relevant part:

> When one or more owners of land, the corners and boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, destroyed or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. . . . Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years . . . .

Thus, while a boundary may be fixed in accordance with a survey, see *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981), when a different boundary is shown to have existed between the parties for the 10-year statutory period, it is that boundary line which is to be determined between the parties and not that of the original survey. See *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965). See, also, *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987).

In the present action, the trial court determined the true corner in accordance with the original government survey and quieted title to the disputed property in the Krafts. In their first assigned error, the Mettenbrinks argue that the trial court erred in quieting title to this property in the Krafts. The Mettenbrinks argue that they are the true owners of the disputed property by virtue of adverse possession and mutual acquiescence. The Mettenbrinks further assert that the Krafts failed to establish an ownership interest in said property. We address each argument separately.

*Adverse Possession.*

[3] The party who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for 10 years. *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996); *Dugan v. Jensen*, 244 Neb. 937, 510 N.W.2d 313 (1994). Intent to assert ownership is another requirement of adverse possession, although in most cases, it is inferred from the circumstances. *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983).

Robert Mettenbrink testified that when he purchased Fractional Section 19 in 1954, he thought he was purchasing approximately 12 acres. At the time of purchase, there was a fence on the east side of what he believed to be Fractional Section 19, which he subsequently removed. Robert's father owned the adjacent property to the east (the northwest quarter of Section 20) until 1987, when Elmer Mettenbrink purchased the property from Robert's father's estate. In 1989, Elmer sold his interest to the Krafts.

Rita Kraft testified that at the time of purchase, she inspected the property, and the disputed area had weeds and milo. In 1990, the Krafts began to farm the disputed area. According to Rita, they had to hire Joe Dibbern to come in and plow the area because the Krafts' equipment was not big enough to plow the weeds under. Dibbern testified that he could not say if a crop had been raised on the disputed property the preceding year or not.

After the Krafts' crop was planted, Robert Mettenbrink approached the Krafts, asserting his ownership of the disputed property and offering to rent it to the Krafts. This offer was refused because, according to Rita, she did not believe the Mettenbrinks owned this land, as records indicated that they owned only approximately 2 acres to the west of the northwest quarter of Section 20. The Mettenbrinks subsequently erected a fence, claiming ownership of the disputed property, and further erected a gate preventing the Krafts access to the county road located on the west side of Fractional Section 19.

[4] The Mettenbrinks correctly cite the rule that an adverse possessor can succeed in his claim even if he does not know he

is occupying land not included in his deed or chain of title. See *Gustin, supra*. Stated another way, although a party does not intend to claim more land than that described by deed, even mistaken intent is sufficient where a party occupies to the wrong line believing it to be the true line. *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). Intent, however, is not the only element which needs to be established in a claim for adverse possession. The court stated in *Petsch*:

> Intent satisfies the "hostile" or "adverse" requirement of adverse possession. An equally important element to be proved before title is gained through adverse possession is that the claimant must also show notice to the true owner. The notice requirement and intent requirement are independent; it is the nature of the hostile possession that constitutes the warning, i.e., notice, not the intent of the claimant when he takes possession. [Citations omitted.] More specifically, the acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice that his lands are in the adverse possession of another.

214 Neb. at 400-01, 335 N.W.2d at 260.

Certainly, the Mettenbrinks' actions toward the Krafts provided sufficient notice of adverse possession. However, since the Krafts had not been in possession of this land for 10 years prior to the filing of their action in 1993, the Mettenbrinks must have also provided sufficient notice to the Krafts' predecessors.

As previously stated, Robert Mettenbrink removed the fence purportedly dividing Fractional Section 19 and the northwest quarter of Section 20 after he purchased his property in 1954. Robert testified that from 1954 until 1990, the property owned by him and that property to the east, first owned by Robert's father and then by Elmer Mettenbrink, were farmed together.

[5,6] It is well established that possession by permission of the owner can never ripen into title by adverse possession unless change of possession has been brought home to the true owner. *Petsch, supra*. This rule applies even where an original owner who permitted a particular use devised the land to another who simply continued to permit said use. *Id.* Further, permission may be presumed under some circumstances. For

example, as to parties sharing a parental or filial relationship, possession of land of one by the other is presumed to be permissive. *Chase v. Lavelle*, 105 Neb. 796, 181 N.W. 936 (1921). This rule was extended in *Petsch, supra*, to apply to more distant relationships such as between grandson and stepgrandmother and between cousins.

Absent any evidence to the contrary, we likewise presume that the Mettenbrinks' use of the disputed property was permissive. Thus, while the Mettenbrinks may have satisfied the intent element of adverse possession, they have failed to evidence any acts of dominion over the land sufficient to put the Krafts' predecessors on notice. Further, the evidence fails to establish that the Mettenbrinks have been in exclusive possession of this property. To the contrary, Robert's testimony indicates they did not exercise exclusive possession over the property at issue. We also point out that the abstract of title to the northwest quarter of Section 20 indicates that Robert and May had an interest in the north half of Section 20 as late as 1986. Obviously, one cannot adversely possess against oneself.

Thus, the Mettenbrinks have failed to establish by a preponderance of the evidence that they are the owners of the disputed property by virtue of adverse possession. The Mettenbrinks also argue in their brief, however, that they own the property at issue by virtue of mutual recognition and acquiescence.

*Mutual Recognition and Acquiescence.*

[7] When properly pleaded, the theory of adverse possession as well as the theory of mutual recognition and acquiescence may be raised under § 34-301. *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981). The rule of recognition and acquiescence embodied in § 34-301 is separate and distinct from the theory of adverse possession. *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983). The Mettenbrinks did not raise the theory of mutual recognition and acquiescence in their answer and cross-petition. For that reason, we could choose not to address it here. See *McDermott v. Boman*, 165 Neb. 429, 86 N.W.2d 62 (1957).

[8] Even if the theory were properly pleaded, however, a claim based on this theory must fail. As with adverse posses-

sion, the statutory period required for acquiescence is 10 years. § 34-301; *Swanson v. Dalton*, 178 Neb. 55, 131 N.W.2d 704 (1964). In order to claim a boundary line by acquiescence, both parties must have knowledge of the existence of a line as the boundary. *Spilinek, supra*. Therefore, the mere establishing of a line by one party and the taking by him of possession up to that line is insufficient. *Bender v. James*, 212 Neb. 77, 321 N.W.2d 436 (1982). Thus, in *Bender*, the Supreme Court found that changing the direction of crop rows where there had never been a boundary dispute and where the parties' predecessors in title had always gotten along with each other did not constitute notice of the establishment of a boundary line sufficient to support a claim of acquiescence.

Again, there is no evidence from which we could conclude that previous landowners had knowledge or notice of the purported boundary line which the Mettenbrinks now assert. Thus, even had the theory been properly pleaded, the Mettenbrinks have failed to adduce evidence sufficient to support a claim of mutual recognition and acquiescence.

*Boundary Line and Title to Krafts.*

The parties stipulated that the true corner was that set by the original government survey and that this corner is located 205 feet west of the stake erroneously placed in 1895. Absent a showing of adverse possession or acquiescence, the boundary line was correctly established in accordance with this original government survey. See § 34-301. The Mettenbrinks, however, argue that the Krafts are not entitled to the disputed property because the Krafts did not establish title by adverse possession. This argument is not well taken. The boundary line was properly set according to the survey. The Mettenbrinks needed to prove adverse possession or acquiescence to establish a boundary different from that evidenced by the survey. However, the same cannot be said of the Krafts.

The effect of placing the boundary line in accordance with the true corner was to move the west line of the northwest quarter of Section 20 to the west 205 feet. The metes and bounds deed granting the Krafts ownership of a part of the northwest quarter of Section 20 begins and ends at the *west* boundary of

the northwest quarter of Section 20. Once the west boundary line was changed, it logically follows that the Krafts' ownership interest would likewise change. The effect of the court's order was to increase the Krafts' property interest from 69.332 acres, as originally deeded to them, to 80.163 acres. If anyone could challenge the trial court's order granting the Krafts the additional acres, it would be those property owners located to the *east* of the Krafts. In their petition, the Krafts specifically named all persons having an interest or claim in the 80.163 acres awarded to them by the court. As no such persons have objected, the trial court's quieting of title in the Krafts was correct.

*Easements.*

As previously set forth, the court further granted an easement to the Krafts for ingress and egress along and upon a tract of land generally described as 24 feet in width adjacent to a natural creek located near the northerly end of Fractional Section 19 as well as a 24-foot easement adjacent to and along the southerly side of a creek which traverses Fractional Section 19 near the south end of the north half of the north half of Fractional Section 19. In their second assigned error, the Mettenbrinks assert that this was error, as there was already an existing easement to One-R School. In support of this assigned error, the Mettenbrinks argue that the Krafts have other means for ingress and egress, that the easements are inconsistent with a purchase agreement executed in July 1989, and that One-R School already has an easement on the Mettenbrink property.

Although the record is sketchy at best regarding the location of the easements and the fencing involved, Rita Kraft testified that since the Mettenbrinks installed the fence and gate, the Krafts have been denied access to a field located at the north end of their property. The Krafts previously accessed this field from the county road on the west side of their property. Since the fence was installed, the Krafts have been forced to build a bridge across a creek in order to access their field. According to Rita, it is dangerous to cross this creek with their equipment. In support of their argument that the Krafts have other means of ingress and egress, the Mettenbrinks argue that the Krafts never

approached the county to ask it to put in a culvert. This argument is without merit. The evidence is that without the easements, the Krafts have no means of ingress and egress, other than constructing a bridge which is dangerous to cross.

[9] As to the Mettenbrinks' argument pertaining to the 1989 purchase agreement, their argument is without merit, and at any rate, this agreement was not entered into evidence. We, therefore, do not consider it. A party's brief may not expand the evidentiary record. *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995).

Finally, the record reflects that One-R School was granted an easement on Fractional Section 19 for use of leach lines for sewage disposal purposes. The Mettenbrinks contend that this somehow precludes an award of easements to the Krafts. The Mettenbrinks cite no authority for this proposition, nor does the evidence establish how the Krafts' and the school's easements would in any way be mutually exclusive. This assigned error is without merit.

*Cross-Petition.*

[10] In their third assigned error, the Mettenbrinks assert that the trial court erred in not permitting their cross-petition. We have previously discussed that portion of their cross-petition asserting adverse possession. In their cross-petition, the Mettenbrinks also sought costs and attorney fees for the filing of a frivolous action, in accordance, we presume, with Neb. Rev. Stat. § 25-824 (Reissue 1995). The Mettenbrinks similarly seek attorney fees on appeal resulting from this "frivolous complaint." Brief for appellants at 27. "Frivolous" as used in § 25-824(2) refers to a legal position wholly without merit. *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994). Obviously, the Krafts' claim is not such an action, and the Mettenbrinks were not entitled to an award of costs or attorney fees by the trial court pursuant to § 25-824. They are likewise not entitled to such on appeal, and this assigned error is without merit.

## CONCLUSION

The trial court properly established the boundary line in accordance with the original government survey and properly

quieted title to the disputed property in the Krafts. The trial court also properly granted easements to the Krafts and denied the Mettenbrinks' cross-petition.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE,
v. RICKY R. DAVENPORT, APPELLANT.
559 N.W.2d 783

Filed January 21, 1997. Nos. A-95-1311, A-95-1312.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court must reach a conclusion independent of that of the lower court.
2. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver.** In a first-tier challenge to the validity of prior convictions used for enhancement, a defendant may challenge a prior conviction during the enhancement proceeding itself if the record does not show whether the defendant was represented by counsel or properly waived counsel.
3. **Constitutional Law: Sentences: Prior Convictions: Appeal and Error.** In a second-tier challenge to the validity of prior convictions used for enhancement, a defendant may attack the validity of a prior conviction on other constitutional grounds in a direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.
4. **Prior Convictions: Collateral Attack: Misdemeanors.** A defendant cannot collaterally attack a prior uncounseled misdemeanor conviction for which he or she was not sentenced to imprisonment.
5. **Sentences: Prior Convictions: Collateral Attack: Habitual Criminals.** A defendant cannot commence a separate proceeding which raises a second-tier collateral attack after he or she is found to be a habitual criminal based on prior convictions and after his or her enhanced sentence has already been imposed.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Ricky R. Davenport, pro se.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

IRWIN, SIEVERS, and INBODY, Judges.

IRWIN, Judge.

## I. INTRODUCTION

In 1993, Ricky R. Davenport was convicted of manslaughter, use of a firearm to commit a felony, and possession of a firearm

by a felon. He was found to be a habitual criminal because of prior felony convictions in 1986 and 1988. After this determination, he received enhanced sentences of imprisonment of 25 years for manslaughter, 20 years for use of a firearm to commit a felony, and 20 years for possession of a firearm by a felon, sentences to be served consecutively.

In 1995, Davenport filed two "Petition[s] for Relief in a Separate Proceeding" in the district court for Douglas County. These petitions are the subject of the instant appeal. Davenport's petitions challenged the validity of the two prior felony convictions in 1986 and 1988 and their use to enhance his sentences relating to his 1993 convictions. His petitions allege that these prior felony convictions are constitutionally invalid for reasons other than the denial of his Sixth Amendment right to counsel and, thus, are characterized as second-tier attacks for challenging the validity of prior convictions used for enhancement of sentences. See *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995). The two cases arising from these petitions were consolidated in the district court as well as for the present appeal. For the reasons stated below, we conclude that Davenport cannot commence these separate proceedings regarding his 1986 and 1988 felony convictions after they have already been used as a basis to find him to be a habitual criminal and after an enhanced sentence has been imposed.

## II. FACTUAL BACKGROUND

On June 10, 1993, Davenport was charged in the district court for Douglas County in an amended information with second degree murder, Neb. Rev. Stat. § 28-304 (Reissue 1995); use of a firearm to commit a felony, Neb. Rev. Stat. § 28-1205 (Reissue 1989); possession of a firearm by a felon, Neb. Rev. Stat. § 28-1206 (Reissue 1989); and being a habitual criminal, Neb. Rev. Stat. § 29-2221 (Reissue 1989). On August 20, a jury found Davenport guilty of manslaughter, Neb. Rev. Stat. § 28-305 (Reissue 1995); use of a firearm to commit a felony, § 28-1205; and possession of a firearm by a felon, § 28-1206.

An enhancement hearing was held on October 8, 1993, prior to Davenport's sentencing. The State offered two prior convictions in Douglas County. The first was a June 20, 1986, convic-

tion following a guilty plea to unlawful possession of a firearm by a felon, for which Davenport was sentenced to 1½ years' imprisonment. The second was a November 18, 1988, conviction following a guilty plea to two counts of unlawful possession of a controlled substance, for which Davenport was sentenced to concurrent sentences of 20 to 40 months' imprisonment. The sentences for these prior convictions had been served prior to the filing of the petitions for separate proceedings on appeal before us. Based on these prior convictions, the district court found Davenport to be a habitual criminal.

On December 3, 1993, the district court sentenced Davenport to terms of imprisonment of 25 years for manslaughter, 20 years for use of a firearm in the commission of a felony, and 20 years for possession of a firearm by a felon. These sentences were to be served consecutively. The convictions and sentences were affirmed by a panel of this court in an unpublished opinion filed November 15, 1994. *State v. Davenport*, 94 NCA No. 45, case No. A-94-009 (not designated for permanent publication).

On August 30, 1995, Davenport filed the two "Petition[s] for Relief in a Separate Proceeding" (hereinafter petitions) in the district court for Douglas County. One petition challenged the 1988 conviction. Davenport generally alleged that the conviction was constitutionally invalid and void because his counsel failed to object to improper information contained in the presentence report; because the improper information contained in the presentence report violated due process, equal protection, and his right to freedom of association; and because he was not properly advised of his constitutional rights and did not intelligently, voluntarily, and knowingly waive his rights at the time of his guilty plea. In Davenport's other petition, challenging the 1986 conviction, he made the same general allegations as set forth above.

In a "Memorandum & Order" filed November 21, 1995, the district court characterized Davenport's petitions as "applications for post-conviction relief." After examining the substantive allegations contained in the petitions, the district court denied the petitions without an evidentiary hearing, instead, relying on the files and records of the case. Thereafter, Davenport timely appealed each case. A petition for bypass

filed with the Nebraska Supreme Court was denied on October 2, 1996.

## III. ASSIGNMENTS OF ERROR

The only assigned error necessary to dispose of this case is that the district court erred in not finding Davenport's prior felony convictions were constitutionally invalid on second-tier grounds for challenging the validity of prior convictions used for enhancement of his sentences.

## IV. STANDARD OF REVIEW

[1] Regarding matters of law, an appellate court must reach a conclusion independent of that of the lower court. *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996); *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996).

## V. ANALYSIS

### 1. Characterization of Petitions

Initially, we address the district court's characterization of Davenport's petitions as "applications for post-conviction relief" pursuant to Nebraska's postconviction statutes, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). It is clear from a reading of Davenport's petitions that he is not seeking postconviction relief as contemplated under the statutes, but, rather, is initiating separate proceedings to challenge prior convictions as contemplated in *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992); and other related cases. As a result, the district court's characterization and subsequent treatment of the petitions were incorrect.

### 2. Separate Proceedings

We turn to Davenport's assigned error. Davenport contends that his prior convictions from 1986 and 1988 are constitutionally invalid and should not have been used to enhance his 1993 convictions. The State argues that Davenport's present actions are untimely, since Davenport did not file his separate proceeding until after he was determined to be a habitual criminal and after his enhanced sentences were imposed. We note that the sit-

uation before us is different from those presented in *State v. LeGrand, supra*, and *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994), which will be discussed below. In those cases, the objection to the prior conviction or the separate proceedings challenging the prior conviction were made or filed before the enhancement hearing and before the enhanced sentence was imposed.

(a) Review of Relevant Case Law

We briefly review Nebraska jurisprudence regarding challenges to the validity of prior convictions used for enhancement.

[2,3] The Nebraska Supreme Court has established what is referred to as a two-tiered system for challenging the validity of prior convictions used for enhancement. See *State v. Wiltshire, supra*. In a first-tier challenge, a defendant may challenge a prior conviction during the enhancement proceeding itself if the record does not show whether the defendant was represented by counsel or properly waived counsel. *State v. Wiltshire, supra*; *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). See, also, *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996); *State v. LeGrand, supra*. In a second-tier challenge, a defendant may attack the validity of a prior conviction on other constitutional grounds in a direct appeal or "in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid." *State v. Oliver*, 230 Neb. 864, 870, 434 N.W.2d 293, 298 (1989). See, also, *State v. LeGrand, supra*; *State v. Wiltshire, supra*.

The necessity for the two-tiered system was uncertain following the U.S. Supreme Court's decision in *Custis v. United States, supra*. In *Custis*, the Court addressed whether the federal Constitution requires any procedure through which second-tier constitutional rights are protected in enhancement proceedings. After Custis was convicted for federal drug and firearm offenses, the federal prosecutor sought to enhance his sentence under 18 U.S.C. § 924(e)(1) (1994) by using three prior state felony convictions. Custis challenged the use of two of these convictions in the enhancement proceedings.

The *Custis* Court affirmed the rulings of the lower courts denying relief. It held that the statute on which Custis based his

challenge did not authorize collateral attacks on prior convictions and that the federal Constitution requires only a procedure through which a defendant can challenge prior convictions used for enhancement purposes if the defendant was denied his or her Sixth Amendment right to counsel. In *Custis*, the Court distinguished the right to counsel from other constitutional guarantees of an accused.

In reaching its decision, the Court made the following policy statement:

> Ease of administration also supports the distinction. As revealed in a number of the cases cited in this opinion, failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States.
>
> The interest in promoting the finality of judgments provides additional support for our constitutional conclusion. As we have explained, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. . . . [P]rinciples of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing. By challenging the previous conviction, the defendant is asking a district court "to deprive [the] [state-court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t]." . . . These principles bear extra weight in cases in which the prior convictions, such as one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, "the concern with finality served by the limitation on collateral attack has special force."

*Custis v. United States*, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

Subsequently, in *LeGrand v. State*, 3 Neb. App. 300, 527 N.W.2d 203 (1995), a defendant commenced a separate proceeding to challenge two prior driving while intoxicated convictions which a prosecutor wanted to use to enhance a driving while intoxicated conviction to third offense. Based upon the *Custis* holding, a panel of this court held it impermissible to attack the validity of a prior conviction sought to be used for enhancement on any grounds except "the transcript's failure to disclose whether the defendant had or waived counsel at the time the pleas were entered, when the defendant was sentenced to imprisonment . . . ." 3 Neb. App. at 318-19, 527 N.W.2d at 213.

On further review, the Nebraska Supreme Court reversed the judgment of the Court of Appeals. *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995). The court held:

> Without separate proceedings, a defendant in a state case, who is not in custody, has no other forum to challenge a constitutionally infirm judgment *sought to be used* for sentence enhancement. With this in mind, we reaffirm our holdings . . . that separate proceedings are a valid means to collaterally attack allegedly constitutionally invalid prior convictions used for sentence enhancement.

(Emphasis supplied.) *Id.* at 9, 541 N.W.2d at 386. In so holding, the court afforded more protection under our state Constitution to defendants such as LeGrand than is required under the federal Constitution. See *id.* (recognizing that states may afford greater due process protection under their state constitutions than is granted by federal Constitution).

(b) Timeliness Issue

Davenport's challenges to his 1986 and 1988 prior convictions as set forth in his petitions attack the information upon which his sentences were based and the validity of his guilty pleas. His petitions make no reference to a failure to provide counsel. If determined to be timely, Davenport's challenges were properly brought as separate proceedings, since they constitute a second-tier attack. See, *State v. LeGrand, supra*; *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992); *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). The question

before us is whether Davenport may initiate a separate proceeding raising second-tier challenges to prior convictions that were used to determine that he is a habitual criminal after the habitual determination has been made and after his enhanced sentences have been imposed.

We find no Nebraska case law discussing when a separate proceeding may be initiated in a situation such as this before us. In our review of reported cases in Nebraska, the separate proceedings challenging prior convictions were initiated before the defendant was found to be a habitual criminal and before the enhanced sentence was imposed. See, e.g., *State v. LeGrand, supra*; *State v. Wiltshire, supra*. The Nebraska Supreme Court's holding in *LeGrand* that our state Constitution requires a defendant be provided a procedure to bring a second-tier attack on a prior conviction arises from a factual situation in which the second-tier attack was brought before the prior conviction was used to enhance his offense to third-offense driving while intoxicated and before the enhanced sentence was imposed. The Nebraska Supreme Court has not been presented with the factual scenario now before us.

[4] We recognize that in *LeGrand*, the Nebraska Supreme Court stated that a "void judgment may be set aside at any time and in any proceeding." 249 Neb. at 7, 541 N.W.2d at 385. However, Nebraska case law reveals that there are exceptions to this general proposition. For instance, a defendant cannot collaterally attack a prior uncounseled misdemeanor conviction for which he or she was not sentenced to imprisonment. *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); *State v. Jackson*, 4 Neb. App. 413, 544 N.W.2d 379 (1996). See *State v. Austin*, 219 Neb. 420, 363 N.W.2d 397 (1985) (holding on direct appeal of misdemeanor conviction for which no imprisonment was imposed that defendant was not entitled to appointed counsel under the 6th and 14th Amendments). In addition, a defendant cannot challenge a prior conviction on second-tier grounds at an enhancement hearing. *State v. LeGrand, supra*; *State v. Wiltshire, supra*; *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992).

Furthermore, although the Nebraska Supreme Court was not presented in *State v. LeGrand*, 249 Neb. 1, 9, 541 N.W.2d 380,

386 (1995), with the timing question now before us, it did state that separate proceedings are the only forum for a defendant to challenge a prior conviction "sought to be used" for sentence enhancement. This language suggests that the time to commence a separate proceeding is before, not after, an enhanced sentence is imposed.

In our research, we discovered a line of cases in the Kentucky appellate courts that squarely addresses the timing issue before us. The Kentucky Supreme Court has repeatedly held that if a defendant fails to raise issues regarding the validity of a prior conviction at the time he or she is tried as a "persistent felon," he or she is "precluded from contesting the validity of the earlier convictions in subsequent post-conviction proceedings." *Alvey v. Com.*, 648 S.W.2d 858, 859 (Ky. 1983). See, also, *Com. v. Gadd*, 665 S.W.2d 915 (Ky. 1984); *Copeland v. Com.*, 415 S.W.2d 842 (Ky. 1967); *Ray v. Com.*, 633 S.W.2d 71 (Ky. App. 1982). *Alvey* and the other Kentucky cases cited above predate the *Custis* decision and obviously do not rely on it.

In *Alvey*, the Kentucky Supreme Court reasoned:

> There is a substantial difference between a situation in which the record in a guilty plea proceeding does not pass constitutional muster, and one in which post-conviction proceedings are filed after a defendant has already had an opportunity to raise issues about the validity of earlier guilty pleas but has failed to do so. In the latter instance we should not afford the defendant a second bite at the apple.

648 S.W.2d at 860. Likewise, Davenport had the opportunity to file a separate proceeding raising his second-tier attacks of his 1986 and 1988 convictions prior to, or at the time of, his enhancement proceedings following his 1993 convictions.

In deciding the issue before us, we recall the principles of finality and judicial economy relied upon by the U.S. Supreme Court in deciding *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). These principles apply with particular force to the situation before us wherein Davenport challenged the validity of his prior convictions after the district court found him to be a habitual criminal based on those prior convictions and after it imposed the enhanced sentences. To

allow Davenport to file separate proceedings at this point would create a legal maelstrom in our criminal justice system. The concept of finality requires a defendant to decide whether to raise a second-tier challenge to a prior conviction well before Davenport filed his petitions in the instant case.

## VI. CONCLUSION

[5] Based on the facts before us, we conclude that Davenport cannot commence separate proceedings which raise his second-tier collateral attacks after he was found to be a habitual criminal based on prior convictions and after his enhanced sentences were imposed. We affirm the judgment of the district court.

AFFIRMED.

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LORRAINE M. PORTLAND, APPELLEE,
V. BRYAN PORTLAND, APPELLANT.
558 N.W.2d 605

Filed January 28, 1997. No. A-95-788.

1. **Modification of Decree: Alimony: Appeal and Error.** The modification of an alimony award is entrusted to the discretion of the trial court and will be reviewed de novo on the record for abuse of discretion.
2. **Trial: Words and Phrases.** Abuse of judicial discretion exists when the reasons or rulings of a trial judge are clearly untenable such as to unfairly deprive a litigant of a substantial right and a just result.
3. **Modification of Decree.** One may in good faith make an occupational change even though the change may reduce one's ability to meet financial obligations.
4. **Modification of Decree: Alimony: Good Cause: Words and Phrases.** An award of alimony may be modified or revoked only for good cause shown. Good cause means a material and substantial change of circumstances and depends upon the facts of each case.
5. **Modification of Decree.** Any change in circumstances within the contemplation of the parties at the time of the decree does not justify a change or modification of the original order.
6. **Modification of Decree: Alimony.** An increase in a party's income is a circumstance that may be considered in determining whether an alimony award should be modified.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed.

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

Gary B. Randall, P.C., and Mary Rauth Winner, P.C., of Marks Clare & Richards, for appellee.

HANNON and MUES, Judges, and NORTON, District Judge, Retired.

NORTON, District Judge, Retired.

Bryan Portland appeals from an order of the district court denying Bryan's application for modification of his divorce decree and granting the motion by Bryan's ex-wife, Lorraine M. Portland, for substitution of collateral. In his application for modification, Bryan requested that the court reduce the alimony Bryan is currently paying to Lorraine. During the pendency of Bryan's application for modification, Lorraine filed a motion for substitution of collateral. The court heard Lorraine's motion to substitute collateral and Bryan's application for modification at the same time; the court denied Bryan's application for modification, while granting Lorraine's motion for substitution of collateral. For reasons set forth fully below, we affirm the district court's decision denying Bryan's request for modification of alimony, but reverse the court's decision granting Lorraine's motion for substitution of collateral.

## STATEMENT OF FACTS

Lorraine M. and Bryan Portland were divorced by decree on March 29, 1993. During their marriage, Lorraine and Bryan had three children. When the original decree was entered, one child, Melissa, born August 1, 1977, remained a minor, and by stipulation, Bryan received custody of Melissa. In the original decree, Lorraine was ordered to pay child support to Bryan of $150 per month and Bryan was ordered to pay Lorraine alimony for a period of 120 months as follows: $1,000 per month for the first 3 months, $750 per month for the next 57 months, and $500 per month for the remaining 60 months. The court ordered that the alimony payments cease upon the death of either party or the remarriage of Lorraine.

In determining the amount of alimony, the court considered the net income of both parties. The court considered evidence

Bryan presented regarding the economic downturn affecting Bryan's company, a downturn likely to adversely affect Bryan's income. Taking the economic downturn into account, the court found that Bryan would reasonably be able to make $5,000 per month beginning May 1, 1993.

In the decree, the court split Lorraine and Bryan's marital assets. One of the assets the court divided was Bryan's performance unit share plan at Information Products, Inc. (IP). The share plan is essentially a deferred compensation plan, which was valued at $86,000 at the time of the decree. The decree awarded 65 percent of the share plan to Bryan and 35 percent to Lorraine. Lorraine's 35-percent share was worth approximately $30,000 when the district court entered the decree.

In August 1993, Melissa began living with Lorraine, and Lorraine filed an application to modify the divorce decree on September 15, 1993. Upon hearing the application, the court granted Lorraine custody of Melissa, terminated Lorraine's child support obligation effective August 1, 1993, and ordered Bryan to pay Lorraine child support in the amount of $500 per month beginning October 1, 1993. The court allowed Bryan to pay his October and November payments in $250 increments beginning in January 1994. Bryan paid Lorraine child support and alimony for the month of December 1993 at the time of the decree's modification.

On October 31, 1994, Bryan filed an application to modify the decree, alleging that a substantial change in circumstances had occurred and that he was now unable to meet his child support and alimony obligations. Bryan requested a temporary reduction of alimony.

On March 17, 1995, Lorraine filed a motion for substitution of collateral and notice of hearing, alleging that Bryan had put at risk her 35-percent share of Bryan's share plan awarded to her in the decree. IP is withholding the money in Bryan's share plan because Bryan left IP and joined a competitor, Network Concepts Inc. (NC), in direct violation of Bryan's employment agreement with IP.

On May 23, 1995, the district court for Douglas County heard both Bryan's application to modify the decree and

Lorraine's motion for substitution of collateral. The court found that Bryan failed to show good cause for a modification and denied Bryan a reduction in alimony. Further, the court granted Lorraine's motion for substitution of collateral because Bryan had placed at risk Lorraine's 35-percent share of his share plan. The court ordered Bryan to substitute collateral in the amount of $30,000 on or before August 1, 1995.

## ASSIGNMENTS OF ERROR

Bryan argues that the district court erred in (1) finding that Bryan failed to show good cause for modification of the decree, specifically, that Bryan failed to show a material change in his income and his ability to earn a similar income within the current year, and (2) sustaining Lorraine's motion for substitution of collateral, which punishes Bryan for switching employment in good faith, a change which he felt was necessary to preserve his vocational and economic well-being.

## STANDARD OF REVIEW

[1,2] The modification of an alimony award is entrusted to the discretion of the trial court and will be reviewed de novo on the record for abuse of discretion. *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994); *Rood v. Rood*, 4 Neb. App. 455, 545 N.W.2d 138 (1996). Abuse of judicial discretion exists when the reasons or rulings of a trial judge are clearly untenable such as to unfairly deprive a litigant of a substantial right and a just result. *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996); *Mathis v. Mathis*, 4 Neb. App. 307, 542 N.W.2d 711 (1996).

## ANALYSIS

After reviewing the evidence, we conclude that regardless of whether the decrease in Bryan's income was a material and substantial change, Bryan's current decrease in income was clearly within the contemplation of the parties at the time of the original decree. Neither the decrease in Bryan's income nor the increase in Lorraine's income justifies a decrease in alimony. Additionally, we find that the district court improperly ordered Bryan to substitute collateral in the amount of $30,000.

*Material and Substantial Change.*

[3] One may in good faith make an occupational change even though the change may reduce one's ability to meet financial obligations. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). Bryan cites this proposition and argues that his decision to leave IP and take a job at NC was in good faith and that thus, the district court should have reduced the alimony he pays to Lorraine, because he is no longer financially able to meet his obligations. We disagree.

[4,5] We do not dispute Bryan's contention that he made the move to NC in good faith, but, rather, we point out that an award of alimony may be modified or revoked only for good cause shown. Good cause means a material and substantial change of circumstances and depends upon the facts of each case. Neb. Rev. Stat. § 42-365 (Reissue 1993); *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985). Any change in circumstances within the contemplation of the parties at the time of the decree does not justify a change or modification of the original order. *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991); *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985).

Bryan argues that he is not making the $5,000 per month the court reasonably assumed and that the decrease in his income constitutes a material and substantial change justifying a decrease in alimony. The record shows that Bryan's income was as follows: In 1992, Bryan made $89,492; in 1993, $111,934.36; and in 1994, Bryan's total income was $56,858.82—$19,976.82 from IP and $36,882 from NC. Thus, for 1994, the year in which Bryan filed to modify the decree, Bryan grossed approximately $4,700 per month. We do not consider this a material and substantial change.

Determining whether the decrease in Bryan's 1995 income was a material and substantial change is more difficult. For the first 3½ months of 1995, Bryan testified that he made approximately $14,500. For the next few months, Bryan testified that he would receive a gross salary of approximately $3,000 per month. Thomas Smith, chief operating officer of NC, testified by a telephonic deposition that after August 1995, Bryan would no longer receive $3,000 per month, but, rather, Bryan's only

income from NC would come entirely from commissions. Smith testified that Bryan would not realize any income until Bryan paid NC back the $27,531.91 he owes them. Bryan owes NC this money because Bryan's commissions failed to exceed the salary NC previously paid him. Smith also testified that Bryan could make from $2,500 to $17,000 in commissions on a single sale. Bryan testified that he was looking for another job to supplement his income.

Bryan argues that because his income is now at least 10 percent lower than the $5,000 per month anticipated by the district court, there is a rebuttable presumption of a material change in circumstances. The case Bryan cites, *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995), is a child support case, and the 10-percent guideline Bryan advocates has been incorporated into the child support guidelines. The 10-percent guideline is not applicable in alimony cases, and we decline to extend the 10-percent rule to the instant case.

Regardless of whether the decrease in Bryan's 1995 income was a material and substantial change, a downturn in Bryan's industry and a resulting decrease in Bryan's income were clearly within the contemplation of the parties at the time of the original decree. In its order, the trial court stated that

> the evidence further shows that within his industry there is a downward trend in sales which will affect Respondent's income adversely. The Respondent has enjoyed a base salary of $55,000.00 per year which will be eliminated in April of 1993. The Respondent testified that it is his belief that he will only be able to generate a salary of $35,000.00 to $40,000.00 per year thereafter. While it appears to the Court that Respondent's salary will be reduced, it is also clear from Respondent's past history that he has always been sufficiently enterprising to provide himself and his family with a substantially higher standard of living.

Thus, based merely on Bryan's reduced income, we find that the trial court did not abuse its discretion in failing to reduce Bryan's alimony payments.

*Increase in Lorraine's Income.*

[6] Alternatively, Bryan argues that his alimony payments should be temporarily reduced because Lorraine's income has

increased since the original decree. An increase in a party's income is a circumstance that may be considered in determining whether an alimony award should be modified. *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992).

Based on the record, we find that although Lorraine's income has increased, her expenses have increased as well. Even with her rising income, she is unable to meet the expenses she and her daughter incur.

Lorraine's salary history is as follows. In 1992, Lorraine made $14,577; in 1993, her income rose to $21,100; and in 1994, to $26,555. In 1995, Lorraine's income through May 31 was $8,815. Lorraine testified that although her income has risen, her expenses have also increased since the original decree. See *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985) (court must take into consideration not only increase or decrease in person's income, but also increase or decrease in person's expenses).

In the instant case, including the alimony and child support Bryan provides, Lorraine's expenses exceed her monthly income. Lorraine should not be penalized for supplementing Bryan's alimony award to meet her expenses. Given that Lorraine is unable to pay her bills with the child support and alimony that Bryan is required to pay, we do not find that the increase in Lorraine's income justifies a reduction in alimony.

*Motion for Substitution of Collateral.*

Bryan also appeals the district court's ruling granting Lorraine's motion to substitute collateral. The district court ordered Bryan to substitute collateral worth $30,000 to replace the 35 percent of Bryan's share plan awarded to Lorraine in the decree. Because Bryan violated the noncompetition provisions of his employment agreement with IP, IP is currently withholding the money in Bryan's share plan.

We find that the district court abused its discretion in granting Lorraine's motion to substitute collateral. Essentially, Lorraine asked the district court to modify the original divorce decree, substituting one asset for another. Under Nebraska law, the district court did not have authority to do so.

Lorraine and Bryan were divorced on March 29, 1993, and Lorraine did not file her motion for substitution of collateral until March 17, 1995. Because Lorraine and Bryan were divorced before September 9, 1995, Neb. Rev. Stat. § 42-372 (Reissue 1993) applies to this case. A court may modify a decree within 6 months of the entry of the decree, or if 6 months have passed since the decree's entry as in this case, a district court may modify or vacate a divorce decree under either Neb. Rev. Stat. § 25-2001 (Reissue 1995) or the court's independent equity jurisdiction. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

Under § 25-2001, a district court has the power to vacate or modify its own judgment after the 6-month time period for any of the nine reasons set out in the statute. After reviewing the record, we conclude that none of the nine reasons apply in the instant case.

Before concluding that the court abused its discretion in substituting collateral, we must determine whether the district court properly granted Lorraine's motion under its independent equity jurisdiction.

A court's authority to modify or vacate a decree under its independent equity jurisdiction is rarely authorized. See *DeVaux, supra*. In an older case, *Shinn v. Shinn*, 148 Neb. 832, 29 N.W.2d 629 (1947), the Nebraska Supreme Court exercised its independent equity jurisdiction to set aside a divorce decree because the husband perpetrated fraud upon his wife and the court when he promised not to divorce his wife if she moved back in with him. The parties had been living apart for some time, but upon her husband's request, the wife moved back in with her husband. Nevertheless, the husband went ahead with the divorce.

The Supreme Court held that under § 25-2001, the husband had practiced fraud in obtaining the divorce, and thus, the wife was entitled to file a fraud action against her husband within 2 years. The court noted that the wife failed to file such an action within the 2-year time period, but emphasized that it had the authority to set aside the divorce decree under its independent equity jurisdiction. In exercising its independent equity juris-

diction and vacating the divorce decree, the court emphasized the sacred bond between husband and wife and the court's policy of encouraging couples to reconcile within the 6-month waiting period.

We find that the district court did not have a similar reason to invoke its independent equity jurisdiction in the instant case. Lorraine does not argue, and we do not find, any underlying public policies sufficient to allow the district court to invoke its independent equity jurisdiction. At the time of the original decree, the district court generally granted Lorraine a 35-percent interest in Bryan's share plan, regardless of whatever form the 35 percent would end up being. Because Bryan violated his noncompetition agreement with IP, Lorraine's 35-percent interest may no longer be worth what it was at the time the decree was originally entered. Even though this is true, the district court was without authority to modify the divorce decree to remedy this fact under § 25-2001 or by exercise of its independent equity jurisdiction. We do not wish this case to be interpreted as a holding that there are no other means by which Lorraine could seek recourse if Bryan has endangered the portion of his share plan which Lorraine was awarded in the decree.

Accordingly, we affirm the district court's decision denying Bryan's request for modification of alimony, but reverse the court's decision granting Lorraine's motion for substitution of collateral. Bryan is ordered to pay Lorraine $1,500 in attorney fees for this appeal.

AFFIRMED IN PART, AND IN PART REVERSED.

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ALLEN D. FALES, NATURAL FATHER AND LEGAL GUARDIAN AND NEXT FRIEND OF COLTON W. FALES, APPELLANT, V. N. LEON BOOKS, M.D., APPELLEE.

558 N.W.2d 831

Filed January 28, 1997. No. A-95-934.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.

2. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
3. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, the party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, the appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
7. **Jury Instructions.** A trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend.
8. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.
9. **Jury Instructions.** It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for a new trial.

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

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee.

SIEVERS, MUES, and INBODY, Judges.

INBODY, Judge.

Allen D. Fales appeals the judgment of the district court for Custer County following a jury trial. This case involves a malpractice claim made by Fales on behalf of his infant son, Colton

W. Fales, alleging that N. Leon Books, M.D. (Dr. Books), was negligent in his use of forceps to assist during the delivery of Colton. Following a trial, the jury returned a verdict in favor of Dr. Books, and Fales appealed. For the reasons cited below, we reverse.

## STATEMENT OF FACTS

On April 26, 1992, at approximately 2:40 a.m., Dr. Books was informed that his patient, Vedah Fales, had gone into labor. Dr. Books, a family practitioner in Broken Bow, Nebraska, had provided prenatal care for Vedah and was the attending physician during the birth of Vedah's son, Colton. Colton was born on April 27 at approximately 9:29 p.m.

Vedah experienced a long and difficult delivery. During her labor, Dr. Books administered Pitocin to increase the force of Vedah's contractions and eventually also administered an epidural anesthetic. When Vedah appeared no longer able to adequately push to deliver Colton, Dr. Books applied forceps to the head of Colton. Dr. Books applied the forceps three times in an attempt to assist the delivery of Colton. Approximately 30 minutes after the final forceps' application, Vedah delivered Colton without assistance. Upon delivery, Colton required resuscitation. As a result of the use of the forceps, Colton suffered a skull fracture.

On November 12, 1993, Fales, Colton's father, filed a petition in the district court for Custer County on behalf of Colton, alleging that Dr. Books' negligence was the direct and proximate cause of injuries suffered by Colton during his delivery. Fales alleged, among other things, that Dr. Books was negligent in his use of the forceps and in his failure to perform a cesarean section.

A trial on the matter commenced on May 22, 1995, before a jury. At trial, Dr. John Schulte, an obstetrician/gynecologist from Kearney, Nebraska, testified as an expert for Fales. Dr. Books testified on his own behalf, and Dr. Stuart Embury, a family practitioner from Holdrege, Nebraska, also testified for Dr. Books. Prior to Dr. Embury's testifying, Fales made a motion in limine regarding the testimony of Dr. Embury and another expert, Dr. Gilbert Rude, who it appears was not called

to testify. With respect to Dr. Embury, Fales requested that the court not permit Dr. Embury to testify regarding the use of forceps and, further, that the court limit Dr. Embury's opinion testimony to whether or not a cesarean section was an appropriate alternative in this case. In support of the motion, Fales argued that Dr. Books failed to disclose in interrogatories that Dr. Embury would testify regarding his opinion of Dr. Books' use of forceps. The court overruled Fales' motion.

During the testimony, Dr. Embury testified that he had an opinion concerning whether Dr. Books met the appropriate standard of care for a family practitioner in his care and treatment of Vedah and Colton, including the delivery of Colton. When asked to state that opinion, Fales' attorney objected on the basis of foundation and because "the opinions that [Dr. Embury] is going give to [sic] go beyond those disclosed by virtue of discovery and I would ask the Court to ask the Reporter to note my former objection that was made outside the presence of the Jury for the purpose of the record." The court overruled the objection, and Dr. Embury testified that in his opinion, Dr. Books met and exceeded the standard of care in this case. Fales' attorney did not request a continuing objection, nor did he object to other more specific questions asked of Dr. Embury regarding Dr. Books' use of forceps.

At the conclusion of the testimony, the court held a jury instructions conference with the parties. At that time, Fales' attorney proffered a proposed instruction regarding the applicable standard of care. The court, however, refused to give this proposed instruction because it did not include the language "a similar practice in a same or similar locality," and the court, instead, gave a similar instruction which included the locality language.

Following the jury deliberations, on May 25, 1995, the jury returned a verdict in favor of Dr. Books. Fales filed a motion for new trial and a motion for a judgment notwithstanding the verdict on June 2, and an amended motion for a new trial on August 17. The amended motion for new trial alleged, among other things, that the jury arrived at the verdict as a result of jury misconduct, that the court erred in failing to further instruct the jury when requested to do so, and that the court erred in telling the

jury that it would not accept anything less than a 10-to-2 decision and the jury had to deliberate until such a verdict was reached. A hearing on the motion for new trial was held on August 17. At the hearing on the motion, Fales offered into evidence affidavits from two jurors, Shirley Hoskins and Joan Case. Dr. Books objected to the admission of the affidavits, and the court sustained the objection. On August 17, the court overruled the motion for a new trial and the motion for a judgment notwithstanding the verdict. The court also ordered that costs for the discovery deposition taken by Dr. Books of Dr. Schulte be taxed to Fales. Fales appeals from the judgment and the subsequent orders.

## ASSIGNMENTS OF ERROR

On appeal, Fales argues that the court erred by (1) allowing Dr. Embury's testimony regarding forceps, (2) failing to give Fales' proposed instruction regarding standard of care of a health care provider, (3) giving instruction No. 7 regarding the standard of care, (4) failing to fully and accurately answer questions from the jury, (5) overruling Fales' motion for new trial, (6) overruling Fales' motion for a judgment notwithstanding the verdict, (7) failing to receive into evidence certain exhibits during the hearing on the motion for new trial, and (8) taxing the costs of Dr. Schulte's deposition to Fales.

## ANALYSIS

[1] Fales first argues that the trial court erred by allowing Dr. Embury to testify, over objection, to his opinion regarding Dr. Books' use of forceps. A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996).

Fales asserts that the trial court abused its discretion in allowing Dr. Embury's testimony, over objection, because Dr. Books failed to adequately answer an interrogatory regarding the substance of Dr. Embury's expert testimony. Books' response to the interrogatory regarding the substance of Dr. Embury's expert testimony was as follows:

> Dr. Embury will testify that in his opinion, after a review of the medical records, it is his opinion that Dr. Books met the standard of care in his medical treatment of Vedah Fales and Colton W. Fales. His prenatal care was appropriate, as was his perinatal care. Mrs. Fales was appropriately monitored and appropriately managed during her labor. It was indeed a hard delivery, but the patient was showing progress and it is Dr. Embury's opinion that he did not feel a cesarean section was indicated as long as the patient was progressing, even slowly. Dr. Books did a pelvimetry and it appeared that the patient would deliver vaginally.

Prior to the testimony, Fales sought a motion in limine to restrict Dr. Embury's testimony to whether a cesarean section was an appropriate alternative. The court overruled this motion and instructed Fales' attorney that "you will need to make your objections for the basis of the record." The record indicates, however, that Fales' attorney objected to only one question posed to Dr. Embury. The question which was objected to asked Dr. Embury what his opinion was concerning whether Dr. Books met the appropriate standard of care for a family practitioner in his care and treatment of Vedah and Colton, including the delivery of Colton. Fales' attorney objected to this question on the basis of foundation and because "the opinions that [Dr. Embury] is going give to [sic] go beyond those disclosed by virtue of discovery and I would ask the Court to ask the Reporter to note my former objection that was made outside the presence of the Jury for the purpose of the record." The court overruled the objection, and Dr. Embury testified that in his opinion, Dr. Books met and exceeded the standard of care in this case. Fales' attorney failed to request a continuing objection and then failed to object to later, more specific questions regarding Dr. Books' use of forceps, such as, "Do you feel that the use of forceps in this particular deliver[y] was appropriate?"

[2,3] A motion in limine is not enough to preserve a problem for appeal. As the district court noted, it was necessary for Fales to also make a timely objection. Failure to make a timely objection waives the right to assert prejudicial error on appeal. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). If,

when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, the party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995). Because Fales' attorney failed to request a continuing objection or to object to specific questions regarding Dr. Books' use of forceps, we find no abuse of discretion in admitting the testimony into evidence.

[4-6] Fales next argues that the court erred by refusing to give his proposed jury instruction regarding the standard of care of a health care provider and by, instead, giving jury instruction No. 7. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Id.* To establish reversible error from a court's failure to give a requested jury instruction, the appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

Fales' proposed instruction stated: "A physician such as the defendant has the duty to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other physicians engaged in the delivery of infants." The court refused to give this instruction "because it [did] not include the language required by the Statute, include [sic] a similar practice in a same or similar locality, at the end of the Instruction." Instead, the court gave instruction No. 7, which

read as follows: "DUTY OF HEALTH CARE PROVIDER[.] A physician has the duty to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other physicians engaged in a similar practice in the same or similar localities." Fales argues that the court erred by giving instruction No. 7 in place of his proposed instruction, because the locality standard which was included in instruction No. 7 was not applicable in this case.

Neb. Rev. Stat. § 44-2810 (Reissue 1993), a portion of the Nebraska Hospital-Medical Liability Act (the Act) upon which the court apparently relied, provides in part:

> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice *in his or in similar localities.*

(Emphasis supplied.)

Despite the language in § 44-2810, Dr. Books conceded in his answer that he did not qualify as a health care provider under the Act. Neb. Rev. Stat. § 44-2821 (Reissue 1988) states that if a health care provider fails to qualify under the Act, he or she will be subject to liability under the common law.

Fales argues that the common law does not require that a physician be judged only by the standard of physicians in his or her locality or in similar localities. In so arguing, Fales cites to *Burns v. Metz*, 245 Neb. 428, 433, 513 N.W.2d 505, 508 (1994), which states:

> "[P]roof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. . . ."

(Quoting *Kortus v. Jensen*, 195 Neb. 261, 237 N.W.2d 845 (1976).) However, in *Kortus v. Jensen*, the court, although recognizing that "medical standards of care and skill are becoming

national, rather than local or regional," *id.* at 269, 237 N.W.2d at 850, stated:

> In performing professional services a doctor who is a specialist must use the skill and knowledge ordinarily possessed and used under like circumstances by members of his specialty in good standing in his or similar localities. . . .
>
> In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients.

*Id.* at 268, 237 N.W.2d at 850.

Nevertheless, Fales cites to the more recent case of *Wentling v. Jenny*, 206 Neb. 335, 293 N.W.2d 76 (1980), a medical malpractice case which occurred before the passage of the Act and which involved a doctor's alleged failure to timely diagnose cancer. In *Wentling v. Jenny*, the court held that it was error to exclude an expert's testimony solely because he or she did not actually practice or reside in the same community. In so deciding, the court stated that "[c]ancer is a commonly prevailing disease with common characteristics. If practices within a certain specialty do not vary significantly throughout the country, there is no policy justification for the locality rule." *Id.* at 338, 293 N.W.2d at 78-79.

Dr. Books argues that the locality rule is still applicable as it is included in the Nebraska Jury Instructions. Specifically, NJI2d Civ. 12.01 states that "A [physician] has the duty to possess and use the care, skill, and knowledge ordinarily possessed and used under like circumstances by other [physicians] engaged in a similar practice *in the same or similar localities*." (Emphasis supplied.) However, the comment at 689 to NJI2d Civ. 12.01 notes that "[a]s communication among doctors improves, as continuing medical education improves and medical education becomes more standardized, as areas of medicine become fewer in which practices vary significantly from locality to locality, more and more of the locality rule may give way

to the national rule." Furthermore, the comment at 690 states that

> where there is no testimony about a particular local standard, where all of the evidence supports the conclusion that the local standard is the same as the national standard, where it is undisputed that practices do not vary throughout the country—in other words, where this is not an issue of fact—it is appropriate to drop the following words from the instruction:
>
> "in the same or similar localities."

In this case, there was no evidence that a particular local standard of care existed with regard to either the delivery of infants or the use of forceps. In fact, Dr. Books himself testified that there was no difference between the local standard of care for the delivery of fetuses and the national standard of care. In short, no issue of fact existed as to whether the local standard differed from the national standard. Both parties agree that the two standards of care are the same.

[7-9] In instruction No. 7, the court included language which instructed the jury to judge Dr. Books' actions against the standards of other physicians "in the same or similar localities." By including this language, the court in effect asked the jury to determine a factual issue which did not exist: that is, what the local standard was. A trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Id.* It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial. *Id.* See, also, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

The instruction in this instance asked the jury to determine whether Dr. Books acted in accordance with a standard which the evidence indicated did not exist. There is prejudice because, under the instruction given, the jury could have reasonably been encouraged to discount the testimony of Fales' expert, Dr.

Schulte from Kearney, since he was not practicing in the same or similar locality as Dr. Books. And, conversely, to place greater credence in the testimony of Dr. Embury whose locality of practice, Holdrege, was more similar to that of Dr. Books. Because of the absence of evidence of a local standard, the jury should have been allowed to consider Dr. Books' action in light of the opinions of both Drs. Schulte and Embury without an instruction which implicitly instructed the jury to favor or discount an opinion because of the geographical locality of the medical practice of the expert expressing it. Thus, the erroneous instruction was misleading and prejudicial.

Fales assigns five additional assignments of error. Because our decision regarding the jury instructions is dispositive, we will not address the remaining assigned errors. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

## CONCLUSION

Although Dr. Books failed to specifically enumerate the substance of Dr. Embury's testimony in his answer to an interrogatory, Fales failed to properly object to the testimony, and it was therefore not an abuse of discretion to admit Dr. Embury's testimony. However, because the jury instruction on the standard of care included the "locality rule" where no evidence was adduced or argument made that the standard of care was unique to the locality, the court erred in admitting such an instruction. We therefore reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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STATE OF NEBRASKA, APPELLEE, V.
ROBERT LYLE ROBBINS, APPELLANT.
559 N.W.2d 789

Filed January 28, 1997. No. A-96-251.

1. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard of appellate review is the same.
2. ___: ___. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evi-

dence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

3. **Kidnapping: Intent: Proof.** Kidnapping requires proof of a specific intention.
4. **Kidnapping: Intent: Words and Phrases.** "Intent to terrorize" means more than an intent to put another in fear. It means an intent to put that person in some high degree of fear, a state of intense fright or apprehension.
5. **Kidnapping: Words and Phrases.** "Terrorize" means to cause extreme fear by use of violence or threats.
6. **Intent: Words and Phrases.** "Intent" is the state of the actor's mind when the actor's conduct occurs.
7. **Criminal Law: Intent.** The intent operative at the time of an action may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct.
8. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Thomas J. Garvey, Sarpy County Public Defender, and Gregory A. Pivovar for appellant.

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

HANNON, MUES, and INBODY, Judges.

HANNON, Judge.

Robert Lyle Robbins appeals from his convictions of two counts of attempted kidnapping, alleging that the evidence is insufficient to support the convictions. We conclude that the State failed to prove that Robbins intended to terrorize his victims, as the State charged in the information, and thus, we reverse the convictions and sentences.

## FACTUAL BACKGROUND

Robbins' only assignment of error is that the evidence is insufficient to support his convictions. As such, the facts as adduced at trial will be related below in the light most favorable to the State.

### *Incident with Chasity C.*

In the late afternoon on June 15, 1995, Robbins approached Chasity C., an 11-year-old girl, who was walking the 8 or 10

blocks from her grandmother's house to the school where her brother was at baseball practice. Chasity's mother and younger sister were planning on driving to the practice field and were about 5 minutes behind Chasity. Chasity testified that a man in an older car pulled alongside of her and that the man asked her if she had seen his lost dog. He then drove away. The man returned a "couple of minutes or seconds later" and approached her a second time, driving again in the same direction as Chasity was walking. The man stated: " 'Can you please help me? I really need this dog. My daughter is really sad.' " He offered her $100 to get into his car and help him find his dog. She repeatedly said no. Robbins then positioned his car in such a way that Chasity could not cross the street without going around his car. Robbins asked again for her to assist him in finding his dog. At trial, Chasity described his tone of voice as a "little bit under yelling." Robbins abruptly sped off. Chasity then ran to the practice field and related the story to her mother when she arrived. Chasity's mother contacted the police.

Chasity testified that she felt scared, that she had never seen the man before, and that she did not make eye contact with him during this incident because the "DARE" program in which she participated at school taught her to avoid eye contact and not go with strangers.

Brian Richards, an off-duty investigator for the Sarpy County sheriff's office, happened to be driving home from the grocery store with his wife when he noticed Robbins' car blocking Chasity's path across the street. Richards thought this was odd, and he noticed that Chasity, whom he did not know, looked frightened. He waited at an intersection for approximately 40 seconds, and he wrote down the license plate number of the car and noted Robbins' features. Robbins was leaning over the seat and talking to Chasity through the open passenger window. Robbins apparently noticed that Richards was watching him, and he sped off. Chasity immediately ran off.

*Incident with Taylor S.*

On the same day, at approximately 9 p.m., Taylor S., a 5-year-old girl, obtained her parents' permission to go to a school playground, which was next door to their home, to play.

Taylor's parents were in their yard working on their automobile, and it was still light. Taylor was approached by Robbins, who said, " '[C]ome in my car,' " and he would give her "five bucks." She testified that she responded no. She knew that she should not talk to strangers because she had watched a video entitled "Don't Talk to Strangers" featuring the "Berenstain Bears." Taylor then went to "the little house" and "the swings." Robbins jumped the fence, got in his car, and drove off, only to approach her again a short time later. She repeatedly refused to go with him, got on her bike, and went home and told her parents. Taylor testified on cross-examination that Robbins never touched her, never yelled at her, and never stated that he was going to hurt her.

Lisa Sales, a neighbor, happened to be sitting outside on her porch and witnessed the incident between Robbins and Taylor. She testified that she watched Robbins jump the fence, approach Taylor, and walk back to his car. Sales testified that Robbins motioned with his head as if to say " '[C]ome on.' " She saw him drive past the playground a second time and then approach Taylor again. Finding Robbins' behavior peculiar, Sales approached the playground, and he fled. Sales alerted Taylor's parents, and Sales and Taylor's mother got into a car and chased Robbins in his car, but did not catch him.

The quick actions of Richards, Sales, and the children's parents enabled the police to identify Robbins as the man who attempted to have Chasity and Taylor get into his car. This evidence is clearly sufficient to support a finding that Robbins was the actor in this case, and we are therefore not going to detail the investigation which enabled the police to locate Robbins or the evidence of the several witnesses which caused Robbins to be identified as the person who attempted to get these children into his automobile.

Robbins was arrested, and an information was filed, charging him with two counts of attempted kidnapping, each attempt a Class III felony. In each charge, the State alleged Robbins attempted to commit the crime of kidnapping "with the intent to terrorize." A bench trial was had, and Robbins was found guilty on both counts. The court sentenced him to a term of 2 to 5 years' imprisonment on each count, with the sentences to run

consecutively. Robbins timely appeals from his convictions and sentences.

## ASSIGNMENT OF ERROR

Robbins' only allegation on appeal is that the trial court erred in finding the evidence sufficient to sustain convictions of attempted kidnapping.

## STANDARD OF REVIEW

[1,2] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Beethe*, 249 Neb. 743, 545 N.W.2d 108 (1996); *State v. Brozovsky*, 249 Neb. 723, 545 N.W.2d 98 (1996).

## DISCUSSION

The information charged Robbins with two counts of attempted kidnapping with the intent to terrorize. "A person shall be guilty of an attempt to commit a crime if he . . . (6) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime." Neb. Rev. Stat. § 28-201(1) (Reissue 1995). Neb. Rev. Stat. § 28-313(1) (Reissue 1995) provides:

> A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> (a) Hold him for ransom or reward; or
>
> (b) Use him as a shield or hostage; or
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony; or
>
> (e) Interfere with the performance of any government or political function.

In each of the counts contained in the information, the State alleges that Robbins attempted the kidnapping "with the intent to terrorize, in violation of section 28-201, R.R.S. Nebraska." Only Robbins' alleged intent to terrorize the children or some third person is available to support the convictions. Evidence solely tending to show Robbins attempted to abduct the children to hold them for ransom or as a shield, or to commit a felony, or to interfere with the performance of the government is immaterial. The principal question in this appeal is whether the evidence supports a finding that Robbins attempted to abduct the children "with the intent to terrorize" them or a third person.

As the above statute shows, one of the elements of attempted kidnapping is an attempt to abduct the children. Neb. Rev. Stat. § 28-312(2) (Reissue 1995) defines "abduct" as "to restrain a person with intent to prevent his liberation by: (a) Secreting or holding him in a place where he is not likely to be found; or (b) Endangering or threatening to endanger the safety of any human being." Robbins does not argue that the evidence is insufficient to show that he intended to abduct the children, and therefore, we will not consider whether the evidence supports the conclusion that he attempted to abduct them.

[3] In *State v. Miller*, 216 Neb. 72, 74, 341 N.W.2d 915, 917 (1983), the Supreme Court stated: "Kidnapping requires proof of a specific intention which is not an element of false imprisonment. An abduction might occur under terrorizing circumstances even though there was no intention on the part of the abductor to terrorize the victim." It is this specific intent to terrorize which Robbins argues is not supported by the evidence.

[4,5] While Nebraska case law has yet to articulate a specific meaning for the phrase "intent to terrorize," many jurisdictions have. The North Carolina Court of Appeals has held that the "[i]ntent to terrorize means more than an intent to put another in fear. It means an intent to '[put] that person in some high degree of fear, a state of intense fright or apprehension.' " *State v. Claypoole*, 118 N.C. App. 714, 717, 457 S.E.2d 322, 324 (1995). Minnesota courts have held that "[t]errorize means to cause extreme fear by use of violence or threats." *State v. Schweppe*, 306 Minn. 395, 400, 237 N.W.2d 609, 614 (1975). In

Pennsylvania, at least one court has held that "terrorizing" means to reduce to terror by violence or threats and that "terror" means an extreme fear or fear that agitates body and mind. *Com. v. Green*, 287 Pa. Super. 220, 429 A.2d 1180 (1981). Other courts have looked to dictionary definitions to determine the phrase's common meaning. See, *State v. Dyson*, 238 Conn. 784, 680 A.2d 1306 (1996) (defining "terrorize" as to fill with terror or anxiety and defining "terror" as state of intense fright or apprehension; stark fear); *Teer v. State*, 895 S.W.2d 845 (Tex. Crim. App. 1995) (holding that "terror" is defined as to fill with intense fear or to coerce by threat or force and that fear of anticipated infliction of imminent bodily injury or death is sufficient to indicate intent to terrorize); *State v. Bodenschatz*, 62 Or. App. 606, 662 P.2d 1 (1983) (holding that Webster's defines "terror" as meaning intense fear; quality of causing dread; terribleness).

We conclude that while there are no Nebraska cases defining "intent to terrorize," the definitions set forth above are consistent with Nebraska cases which examined whether specific acts by defendants were intended to terrorize the victims.

For example, in *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988), the Supreme Court concluded that the fact that the defendant terrorized the victim by pointing a gun at her and threatening to kill her was sufficient evidence to support the claim that the defendant abducted the victim with the intent to terrorize her. In *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994), the court concluded the evidence was sufficient to establish that the defendant abducted and restrained the victim with the intent to terrorize him. In support of this conclusion, the court related that the defendant "kept his weapon pointed at [the victim] for much of the time, showed [the victim] that the weapon was loaded, struck [the victim] in the face, [and] threatened '"to blow [the victim's] guts all over the back seat"' unless [the victim] talked." *Id.* at 1024, 524 N.W.2d at 347. In *Masters*, there was direct positive evidence of terroristic threats by the defendant, but there is no similar evidence in the instant case.

Additionally, Neb. Rev. Stat. § 28-311.01(1) (Reissue 1995) defines "terroristic threats" as follows:

> A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.

As applied to the situation in this case, terroristic threats could be only threats to commit a crime of violence with the intent to terrorize another.

[6,7] As stated previously, kidnapping is a specific intent crime. *State v. Masters, supra.* "Intent" is the state of the actor's mind when the actor's conduct occurs. *Id.* The intent operative at the time of an action may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct. *Id.*; *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990). We are unable to find any circumstantial evidence which would justify a finding that Robbins intended to abduct the children to terrorize them.

In the instant case, there is no evidence of what Robbins intended to do with the children. The State argues that Robbins' approaching children and attempting to induce them to leave with him in and of itself showed an intent to terrorize, which is evidenced by the children's testimony that they were both scared. Even the trial judge did not seem to recognize such an intent when he stated at the sentencing hearing that "[a]ll I could surmise, because of your financial situation you were looking for a way to kidnap somebody to gain some money." Certainly this does not reflect an intent to terrorize, as contemplated by the charges against Robbins.

[8] We are troubled by Robbins' actions, as we, like most members of our society, recognize that children who are picked up in automobiles by strangers are frequently very seriously injured or killed. However, "in Nebraska all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so." *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 148, 313 N.W.2d 438, 441 (1981).

We find no statute in Nebraska that appears to allow prosecution of Robbins for a crime carrying a penalty that is likely to deter activity such as Robbins committed in this case. Such a law seems desirable. Several states have laws against strangers enticing children into automobiles and the like, but they generally prohibit the act only if the defendant intends some sort of criminal activity. See, generally, Ala. Code § 13A-6-69 (Michie 1994); Colo. Rev. Stat. Ann. § 18-3-305 (West 1990 & Supp. 1996); N.J. Stat. Ann. § 2C:13-6 (West 1995); N.M. Stat. Ann. § 30-9-1 (Michie 1994); Va. Code Ann. § 18.2-370 (Michie 1996); Wis. Stat. Ann. § 948.07 (West 1996).

Only the State of Ohio seems to have a law which would clearly cover Robbins' conduct. See Ohio Rev. Code. Ann. § 2905.05 (Anderson 1996). The Ohio law provides that no person shall entice a child under the age of 14 years into a vehicle unless that person knows the child or is in some manner privileged to entice the child, and the statute specifies who holds that privilege. Offenders have been prosecuted under this law in Ohio, and it has been held to be constitutional. See, *Reynoldsburg v. Johnson*, 78 Ohio App. 3d 641, 605 N.E.2d 996 (1992) (upholding conviction under similar municipal ordinance); *State v. Hurd*, 74 Ohio App. 3d 94, 598 N.E.2d 72 (1991); *State v. Long*, 49 Ohio App. 3d 1, 550 N.E.2d 522 (1989); *State v. Kroner*, 49 Ohio App. 3d 133, 551 N.E.2d 212 (1988).

We sincerely hope that the Legislature considers making it a crime for an individual who is a stranger to a child to attempt to entice that child into an automobile. However, we conclude that the evidence does not support the conviction of Robbins for attempted kidnapping in either of the instances upon which the State relies. We therefore reverse, and remand with directions to vacate the convictions and sentences.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD CUMMINGS, APPELLANT, V. OMAHA PUBLIC SCHOOLS AND ITT HARTFORD INSURANCE CO., ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

558 N.W.2d 601

Filed January 28, 1997. No. A-96-493.

1. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate tribunal on questions presented for review become the law of the case, and the holdings of the appellate tribunal conclusively settle, for purposes of that litigation, all matters which are ruled upon, either expressly or by necessary implication.
2. ____. Matters previously addressed in an appellate court are not reconsidered after a remand unless the facts presented on remand are materially and substantially different from the facts presented during the first trial.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded.

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

Joseph W. Grant and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellees.

MILLER-LERMAN, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

## I. INTRODUCTION

Edward Cummings appeals from an order of the Workers' Compensation Court review panel (panel) which affirmed an order of a trial judge of the Workers' Compensation Court (court). The court awarded Cummings compensation for a 5-percent disability resulting from a series of work-related accidents in 1992 and 1993 which exacerbated Cummings' back injury from a prior, compensated, work-related accident in 1984. The court further denied Cummings' claim for psychological injuries resulting from the 1992 and 1993 accidents. Cummings appealed to the panel, alleging that the court was clearly wrong in relying on particular medical evidence in assessing his disability; that his disability should not have been apportioned between the prior, compensated injury and the new

injuries; and that the court was clearly wrong in denying compensation for the alleged psychological injuries. The panel affirmed the judgment. For the reasons stated herein, we reverse, and remand.

## II. BACKGROUND

Cummings is, and was at all times relevant to these proceedings, employed by Omaha Public Schools. In August 1984, Cummings injured his back in a work-related accident. As a result of that accident, Cummings received a lump-sum settlement award based upon a 25-percent disability to his body as a whole. Subsequent to the settlement, Cummings returned to work at a salary equal to or greater than his salary prior to the accident.

On June 1, 1992, Cummings was injured at work when ceiling tiles fell onto him, causing injury to his back and exacerbating his prior back condition. On November 10, Cummings suffered another injury at work when a chair rolled out from under him, causing additional injury to his back and additional exacerbation of his back condition. On March 1, 1993, Cummings fell on ice in the parking lot at work, causing additional injury to his back and additional exacerbation of his back condition. On April 30, Cummings was involved in an altercation at work between a student and a security guard, causing additional injury to his back and additional exacerbation of his back condition. Finally, on November 23, Cummings suffered a back spasm at work which caused him to fall to his knees, additionally exacerbating his back condition.

On June 13, 1994, Cummings filed a petition in the Workers' Compensation Court, seeking compensation for the series of accidents. Cummings alleged temporary total disability, emotional and psychological injuries, and loss of earning capacity. On June 27, Omaha Public Schools and its workers' compensation insurance carrier filed an answer.

On October 17, 1994, a hearing was held before the court. At trial, the parties stipulated that Cummings was injured in a series of work-related accidents, that there was no controversy regarding payment of temporary total disability benefits, and that the only issues remaining at trial concerned Cummings'

loss of earning capacity. At trial, Cummings offered evidence, including a medical report and a vocational rehabilitation report concerning his injuries and loss of earning capacity. Omaha Public Schools and its insurer objected to the admissibility of the two reports, arguing that they had not been timely disclosed and that the medical report was not properly characterized as a rebuttal report. The court sustained the objections to the two exhibits.

The court received other evidence and heard testimony from Cummings and two employees of Omaha Public Schools. Included in the admitted evidence was a medical report from Dr. Lonnie Mercier, who examined Cummings in August 1993. Mercier's examination occurred prior to the back spasm incident in November 1993. The evidence also indicated that an MRI was performed on Cummings sometime after the November 1993 incident, and the MRI was not considered in Mercier's report or conclusions.

On November 8, 1994, the court entered an award in favor of Cummings. The court found that the series of injuries occurred in the course and during the scope of Cummings' employment with Omaha Public Schools and that Cummings was entitled to workers' compensation benefits. The court awarded 10 weeks of temporary total disability benefits. The court further determined that Cummings had suffered a 5-percent loss of earning capacity from the series of injuries and the exacerbation of his prior back condition. The court specifically noted that the determination concerning Cummings' loss of earning capacity was based heavily on Mercier's report. Additionally, the court found that Cummings failed to satisfy his burden of proof regarding the alleged psychological injuries and denied compensation for them. Finally, the court declined to award vocational rehabilitation benefits.

On November 14, 1994, Cummings filed an application for review of the court's award by the panel. Cummings assigned as error the court's reliance on Mercier's report rather than the objective MRI results; the court's acceptance of particular vocational rehabilitation opinions; the court's refusal to accept the two proffered reports into evidence; the court's apportionment of Cummings' disability between his prior, compensated injury

and the new series of injuries; the court's denial of any compensation for alleged psychological injuries; and the court's specific finding that Cummings could obtain the same or a similar salary from a different employer if his employment with Omaha Public Schools was for some reason ended.

On March 21, 1995, the panel affirmed the court's award in all respects except concerning the court's ruling on the admissibility of the two reports offered by Cummings. The panel ruled that the exhibits should not have been excluded on the basis upon which the court excluded them, and the panel remanded the case on the limited issue of loss of earning capacity.

On May 5, 1995, the court entered an order on remand. The court noted that the exhibits had been received and that all of the evidence had been reconsidered. The court once again concluded that Cummings' loss of earning capacity from the series of accidents was 5 percent.

On May 19, 1995, Cummings filed another application for review of the court's opinion. Cummings assigned the same six errors as in his first application for review, except with regard to the previous assignment concerning the admissibility of the exhibits. In the place of that assigned error, Cummings assigned that the court's ruling was contrary to the evidence.

On April 24, 1996, the panel entered an order. The panel held that the assignments of error which had been previously rejected on the first review were not reviewable a second time, because of the law-of-the-case doctrine. With regard to the new assignment of error, the panel affirmed the court's findings. This appeal timely followed.

## III. ASSIGNMENTS OF ERROR

On appeal, Cummings has assigned six errors. As one of his assignments of error, Cummings asserts that the panel erred in failing to reconsider all of his assigned errors during the panel's review of the case after remand. Because our discussion of this assignment of error disposes of the case, we need not address Cummings' other assignments. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

## IV. ANALYSIS

In Cummings' first application for review to the panel, he assigned as error (1) the court's reliance on Mercier's report rather than the objective MRI results; (2) the court's acceptance of and reliance on a particular vocational rehabilitation report; (3) the court's refusal to accept the two proffered reports into evidence; (4) the court's apportionment of Cummings' disability between his prior, compensated injury and the new series of injuries; (5) the court's denial of any compensation for alleged psychological injures; and (6) the court's specific ruling regarding Cummings' ability to obtain the same or a similar salary from a different employer. With regard to assignments Nos. 1, 4, 5, and 6, the panel affirmed the court's order. The panel considered assignments Nos. 2 and 3 together and held that the court erred in excluding the proffered reports. The panel remanded the case for a determination whether the reports could be proper rebuttal evidence to rebut the "accepted" vocational rehabilitation report and the weight to be given to the proffered reports. The panel's order specifically held that the court's order was "affirmed except with respect to [the] findings concerning the extent of [Cummings'] permanent loss of earning power, for which this matter is remanded for further consideration."

On remand, the court received the proffered reports into evidence. Upon consideration of all of the evidence concerning Cummings' loss of earning capacity, the court reached the same conclusion as in the original award, that Cummings suffered from a 5-percent loss of earning capacity. From this order on remand, Cummings again applied for review by the panel.

In Cummings' second application for review, he assigned the same six errors as in his first application, except with regard to the previous assignment concerning the admissibility of the two exhibits. In the place of that assigned error, Cummings asserted that the court's ruling was contrary to the evidence. The panel refused to consider any of the five assigned errors which had been raised in Cummings' first application for review, holding that those assignments were not reviewable a second time because of the law-of-the-case doctrine.

[1,2] Under the law-of-the-case doctrine, the holdings of an appellate tribunal on questions presented for review become the law of the case, and the holdings of the appellate tribunal conclusively settle, for purposes of that litigation, all matters which are ruled upon, either expressly or by necessary implication. *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994); *McKinstry v. County of Cass*, 241 Neb. 444, 488 N.W.2d 552 (1992); *Tank v. Peterson*, 228 Neb. 491, 423 N.W.2d 752 (1988); *Waite v. Carpenter*, 3 Neb. App. 879, 533 N.W.2d 917 (1995). As a result, matters previously addressed in an appellate court are not reconsidered after a remand unless the facts presented on remand are materially and substantially different from the facts presented during the first trial. *Pendleton v. Pendleton, supra*; *McKinstry v. County of Cass, supra*; *Tank v. Peterson, supra*.

In the present case, the panel remanded the case to the court for further consideration of the extent of Cummings' permanent loss of earning capacity. On remand, the court received two exhibits previously excluded, reviewed the other exhibits, and held that "considering the evidence as a whole" Cummings suffered a 5-percent loss of earning capacity. The panel's order of remand that the court reconsider the loss of earning capacity issue necessarily required the court to reconsider the weight to be given to Mercier's report, the "accepted" vocational rehabilitation report, and the newly received evidence. Additionally, any reconsideration of loss of earning capacity required the court to reconsider what portion of Cummings' disability was attributable to the present series of accidents, rather than the prior, compensated injury. The court's order after remand makes it apparent that the court did reconsider all of these matters.

Because the panel's order of remand resulted in the court's reconsideration of Mercier's report, the "accepted" vocational rehabilitation report, and the apportionment issue in light of the newly admitted reports, it is apparent that the facts on remand were materially and substantially different from the facts presented during the first trial with respect to those three issues. As a result, the law-of-the-case doctrine does not apply to prevent reconsideration of those three issues on the panel's second

review. See, *Pendleton v. Pendleton, supra*; *McKinstry v. County of Cass, supra*; *Tank v. Peterson, supra*. The admission of the new evidence concerning Cummings' loss of earning capacity could have impacted the conclusions to be drawn from Mercier's report and the "accepted" vocational rehabilitation report and could have impacted the result of the court's apportionment. As such, the panel erred in failing to reconsider those three issues in light of the new evidence after remand. The case is therefore remanded for further proceedings.

## V. CONCLUSION

Because we conclude that the panel erred in refusing to reconsider Cummings' assigned errors concerning Mercier's report, the "accepted" vocational rehabilitation report, and apportionment after remand, we reverse the judgment and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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KERRIGAN & LINE, A PARTNERSHIP, APPELLANT, V. CLARINDA FOOTE AND CLARA MAE LANGE, COPERSONAL REPRESENTATIVES OF THE ESTATE OF DELPHINE C. WAGNER, DECEASED, APPELLEES.

558 N.W.2d 837

Filed February 4, 1997. No. A-95-1023.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. ____: ____: ____. In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law in connection with which an appellate court has an obligation to reach an independent conclusion.

5. **Statutes: Legislature: Intent: Appeal and Error.** When settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
6. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are perceived as consistent, harmonious, and sensible.
7. **Decedents' Estates: Claims: Words and Phrases.** Under the Nebraska Probate Code, "claim" is defined to include, inter alia, expenses of administration.
8. **Decedents' Estates: Attorney Fees.** In probate proceedings, attorney fees are administration expenses.
9. **Decedents' Estates: Claims.** Based on the plain and ordinary meaning of the language of Neb. Rev. Stat. § 30-2485(b) (Reissue 1995), administration expenses are only excepted from the time-bar provisions for bringing claims; § 30-2485(b) cannot be read to except administration expenses from the probate claims procedure itself.
10. **Decedents' Estates: Claims: Attorney Fees.** A claim for attorney fees may be brought pursuant to the probate claims procedure.
11. **Decedents' Estates: Claims.** The county court is not the only avenue available to a party with a claim against an estate in some circumstances.
12. ____: ____. An allowance of a claim in probate is generally not equivalent to an ordinary judgment.
13. ____: ____. The proper manner to obtain payment of a claim in probate that has been allowed, but not paid, is to file a petition in the county court requesting an order that the personal representative pay the claim.
14. **Decedents' Estates: Claims: Jurisdiction.** Because there is no statute allowing an action for payment of an allowed claim in probate not yet reduced to an order in a court other than the county court, the county court has exclusive original jurisdiction over such an action.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

William G. Line, of Kerrigan & Line, for appellant.

Kelle J. Westland, of Raynor, Rensch & Pfeiffer, and Darrell K. Stock, of Snyder & Stock, for appellees.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

MILLER-LERMAN, Chief Judge.

Kerrigan & Line, a partnership, appeals the judgment of the district court for Dodge County sustaining the demurrers of Clarinda Foote and Clara Mae Lange, copersonal representa-

tives of the estate of Delphine C. Wagner, deceased (defendants), and dismissing its action. For the reasons stated below, we affirm.

## ASSIGNMENTS OF ERROR

Kerrigan & Line assigns as error that the district court erred (1) in finding that the statutory claims procedure does not apply to a claim for administrative expenses, including attorney fees, and (2) in sustaining the demurrers and dismissing the action.

## STANDARD OF REVIEW

[1-3] When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995); *Proctor v. Minnesota Mut. Fire & Cas.* 248 Neb. 289, 534 N.W.2d 326 (1995). In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Id.* An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Vowers & Sons, Inc., supra*; *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993).

## FACTUAL BACKGROUND

For the purpose of reviewing the sustaining of the demurrers, we take as true the following facts set forth by Kerrigan & Line in its petition and attached exhibit, which were filed April 27, 1995, in the district court:

Kerrigan & Line is a partnership engaged in the general practice of law. The partnership furnished legal services to Clara Mae Lange, special administratrix of the estate of Delphine C. Wagner, deceased. Kerrigan & Line filed its claim for legal services in the county court for Dodge County in the manner prescribed in Neb. Rev. Stat. § 30-2486 (Reissue 1995) within the time limit prescribed in Neb. Rev. Stat. § 30-2485 (Reissue 1995). Neither copersonal representative mailed a notice of disallowance of the claim within 60 days as required by Neb. Rev.

Stat. § 30-2488 (Reissue 1995), and therefore, the claim has been allowed.

Attached to the petition and incorporated therewith is a pleading captioned for filing in the county court for Dodge County entitled "Amended Statement of Administrative Claim," dated February 13, 1995, in which Kerrigan & Line makes claim against the estate in the amount of $74,804.38 for legal services rendered.

In its petition filed in district court, the dismissal of which is the subject of this appeal, Kerrigan & Line sought judgment against the defendants for $74,804.38 with interest and costs.

On May 26, 1995, the defendants each demurred to the petition, alleging lack of personal jurisdiction, lack of subject matter jurisdiction, that another action was pending between the same parties for the same cause in the county court for Dodge County, and that the petition does not state facts constituting a cause of action. The defendants attached to their demurrers a May 17, 1995, order of the county court for Dodge County finding that Kerrigan & Line had been fully compensated for services rendered on behalf of the estate in the amount of $24,750 and that the estate was not further obligated to Kerrigan & Line.

The district court sustained the defendants' demurrers and dismissed the action. It found that the claims procedure set forth in § 30-2485 does not apply to a claim for administrative expenses, including attorney fees, and that the county court has jurisdiction to review the payment of attorney fees in a probate proceeding. This appeal followed.

## ANALYSIS

[4] We first address whether an action for attorney fees may be brought under the probate claims procedure provided in the Nebraska Probate Code, Neb. Rev. Stat. § 30-2201 et seq. (Reissue 1995), and more particularly §§ 30-2483 through 30-2498. Statutory interpretation presents a question of law in connection with which an appellate court has an obligation to reach an independent conclusion. *Payne v. Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996).

[5,6] When settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and

intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996); *McCook Nat. Bank v. Bennett*, 248 Neb. 567, 537 N.W.2d 353 (1995). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are perceived as consistent, harmonious, and sensible. *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

[7,8] The probate claims procedure set forth in §§ 30-2483 through 30-2498 addresses the presentation, allowance, and payment of creditors' claims. The code defines "claim" to include "liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and *expenses of administration*." (Emphasis supplied.) § 30-2209(4). The Nebraska Supreme Court has held that in probate proceedings, attorney fees are administration expenses. See *In re Estate of Reimer*, 229 Neb. 406, 427 N.W.2d 293 (1988). Therefore, based on a plain reading of the code, it appears that attorney fees are claims which may be brought under the probate claims procedure.

[9] The defendants seem to argue that demands for attorney fees may be brought only under § 30-2482 and that certain language in § 30-2485(b) excepts administration expenses from the probate claims procedure. Section 30-2482 provides that after appropriate notice, the reasonableness of the compensation of any person employed by a personal representative, including an attorney, may be reviewed by the county court. Section 30-2485 is entitled "Limitations on presentation of claims," and subsection (b) reads, in relevant part: "All claims, *other than for administration expenses*, against a decedent's estate which arise at or after the death of the decedent . . . are barred against the

estate, the personal representative, and the heirs and devisees of the decedent, unless presented [within certain time periods]." (Emphasis supplied.) Based on the plain and ordinary meaning of the language of § 30-2485(b), administration expenses are only excepted from the time-bar provisions for bringing claims; § 30-2485(b) cannot be read to except administration expenses from the probate claims procedure itself.

[10] Based upon the foregoing, Kerrigan & Line's claim for attorney fees may be brought pursuant to the probate claims procedure. This result is consistent with the Nebraska Supreme Court's decision in *In re Estate of Reimer, supra*, which suggests that administration expenses may be paid under either § 30-2481 or the probate claims procedure set forth in §§ 30-2483 through 30-2498. See, also, *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989) (holding that reasonableness of attorney fee may be reviewed under § 30-2482).

We next address whether Kerrigan & Line may bring its action in district court. The defendants generally contend that the county court has exclusive original jurisdiction of probate matters pursuant to Neb. Rev. Stat. §§ 24-517 and 30-2211 (Reissue 1995).

[11] We are aware that the county court is not the only avenue available to a party with a claim against an estate in some circumstances. In *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990), the Nebraska Supreme Court held that certain statutes in the code act to limit the exclusive original jurisdiction of the county court in probate matters. In reversing the district court's judgment that sustained a demurrer based on lack of subject matter jurisdiction, the Nebraska Supreme Court found that pursuant to § 30-2488(a) (Reissue 1989), a dissatisfied claimant whose claim has been disallowed may commence a proceeding against the personal representative in the district court insofar as the claim relates to matters within the district court's chancery or common-law jurisdiction. *Holdrege Co-op Assn., supra.* Section 30-2488(a) (Reissue 1995) provides, in relevant part: "Every claim which is disallowed in whole or in part by the personal representative is barred . . . unless the claimant files a petition for allowance in the [county] court or commences a proceeding against the per-

sonal representative not later than sixty days after the mailing of the notice of disallowance . . . ." The holding in *Holdrege Co-op Assn., supra*, is not applicable to the situation before us, which, at the time of the filing of the petition whose adequacy was challenged by the demurrers, involved an action for payment of an allowed claim rather than a disallowed claim.

According to the language of the petition filed April 27, 1995, Kerrigan & Line presented its claim by filing a written statement of the claim with the clerk of the county court pursuant to § 30-2486(1). According to § 30-2486(2), Kerrigan & Line also had the option, which it did not exercise, to present its claim by "commenc[ing] a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate [within a certain time period]."

[12] The petition alleges that the personal representatives did not mail notice of disallowance of Kerrigan & Line's claim within 60 days of presentation of the claim as required by § 30-2488(a). "Failure of the personal representative to mail notice to a claimant of action on his or her claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance." § 30-2488(a). We note that an allowance of a claim is generally not equivalent to an ordinary judgment.

> It is a judgment only in a qualified sense, and does not attain the force and dignity of an absolute judgment until an order of court is made directing the executor or administrator to pay it. Until then it is simply an acknowledged debt of the estate, bearing interest at the contract rate.

31 Am. Jur. 2d *Executors and Administrators* § 646 at 326 (1989). See, also, § 30-2488(e) (stating allowed claims generally bear interest at legal rate for period commencing 60 days after time for original presentment has expired).

[13,14] In its petition, Kerrigan & Line sought a district court judgment against the defendants for the amount of its allowed claim. The code has a specific statute regarding such an action. Section 30-2489(a), in relevant part, provides: "By petition to the court in a proceeding for the purpose . . . a claimant whose

claim has been allowed but not paid as provided herein may secure an order directing the personal representative to pay the claim . . . ." The code defines "court" as "the court or branch having jurisdiction in matters relating to the affairs of decedents. This court in this state is known as county court." § 30-2209(5). To restate, the proper manner to obtain payment of a claim that has been allowed, but not paid, is to file a petition in the county court requesting an order that the personal representative pay the claim. The code does not provide an alternative manner in which a claimant may seek payment of an allowed claim not yet reduced to an order. Because there is no statute allowing an action for payment of an allowed claim not yet reduced to an order in a court other than the county court, the county court has exclusive original jurisdiction over such an action. See *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

Kerrigan & Line failed to follow the procedure specified in § 30-2489. The district court lacked subject matter jurisdiction to determine the action filed in district court and appealed to us. Therefore, the district court properly granted the defendants' demurrers on this basis. We affirm.

AFFIRMED.

HANNON, Judge, concurring.

I concur in the opinion of the majority, but I disagree with that portion of the opinion which either expressly or by implication holds that the attorney fees in this case, which are clearly administration costs, may be recovered under probate claim procedures provided in Neb. Rev. Stat. §§ 30-2483 through 30-2498 (Reissue 1995). In my opinion, in *In re Estate of Reimer*, 229 Neb. 406, 409, 427 N.W.2d 293, 295 (1988), the Supreme Court clearly held that administrative expenses are not paid pursuant to the probate claim statutes when it said: "We determine that fees allowed in probate proceedings under § 30-2481 to persons nominated as personal representatives under a will are administration expenses and need not be paid pursuant to the probate claim statutes." To my mind, it is obvious that except on appropriate appeal, the district court cannot determine the administrative expenses of a county court proceeding.