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REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 20, 2005 and SEPTEMBER 4, 2006

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XIV

PEGGY POLACEK

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

For the benefit of the State of Nebraska

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RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK ..... Reporter
LANET ASMUSSEN ..... Clerk
JANICE WALKER ..... State Court Administrator

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No. A-04-123: **Thompson v. Thompson**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-04-146: **State v. Charles**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-04-250: **In re Interest of Devin W. et al**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-04-441: **Veath v. Neth**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-04-476: **Miller v. Miller**. Affirmed in part, and reversed in part. Carlson, Sievers, and Cassel, Judges.

No. A-04-528: **Nagavalli v. Yathish**. Affirmed as modified. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-04-582: **National Programs v. Heritage Admin. Servs**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-604: **State on behalf of Williams v. Brase**. Affirmed as modified. Sievers, Carlson, and Cassel, Judges.

No. A-04-607: **State v. Moyer**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-633: **Brooks v. Orion Insurance**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-04-684: **Hute v. County of Lancaster**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-04-730: **Engert v. Levitt**. Reversed and remanded. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-744: **Kowskie v. Hamilton**. Affirmed. Sievers, Irwin, and Moore, Judges.

Nos. A-04-752, A-04-753: **State v. Soby**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-04-774: **Hughes v. Poyko-Post**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-04-799: **Darrow v. Darrow**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-804: **Ainsworth v. Hinrichs**. Affirmed as modified. Sievers, Irwin, and Moore, Judges.

No. A-04-844: **State v. Lykens**. Affirmed. Inbody, Chief Judge, and Irwin and Sievers, Judges.

No. A-04-855: **In re Estate of Whaley**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

Nos. A-04-876, A-04-877: **Campbell v. Carlson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-881: **Wright v. Wright**. Affirmed as modified. Moore, Sievers, and Carlson, Judges.

Nos. A-04-961, A-04-1376: **Gurnon v. Gurnon**. Judgment in No. A-04-961 affirmed as modified. Appeal in No. A-04-1376 dismissed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-983: **Talbott v. Talbott**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-984: **State v. Romero**. Affirmed. Cassel and Sievers, Judges. Moore, Judge, participating on briefs.

No. A-04-1027: **Otto-Briggs v. Lone Star Steakhouse**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-04-1028: **Robinson v. Robinson**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-1030: **State v. Henderson**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-04-1036: **Norman v. Norman**. Affirmed in part, and in part reversed and remanded with directions. Carlson, Sievers, and Moore, Judges.

No. A-04-1048: **Shrader v. Shrader Refuse & Recycling Serv. Co**. Affirmed. Sievers and Cassel, Judges. Moore, Judge, participating on briefs.

No. A-04-1053: **Garcia v. Garcia**. Affirmed as modified. Sievers, Irwin, and Moore, Judges.

No. A-04-1080: **State v. McSwine**. Affirmed. Sievers and Cassel, Judges. Moore, Judge, participating on briefs.

No. A-04-1095: **In re Estate of Mason**. Appeal dismissed. Sievers, Carlson, and Moore, Judges.

No. A-04-1102: **Timmermann v. McAvoy Living Trust**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-04-1103: **Goodwin v. Goodwin**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1133: **State v. Siegle**. Appeal dismissed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1171: **Norby v. Farnam Bank**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Moore, and Cassel, Judges.

No. A-04-1187: **State v. Coen**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-04-1190: **In re Estate of Crate**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-1203: **United Rentals v. Meier Masonry**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-04-1215: **Spence v. Bush**. Appeal dismissed. Sievers, Moore, and Cassel, Judges.

No. A-04-1219: **Lenhart v. Department of Motor Vehicles**. Reversed and remanded with directions. Sievers, Irwin, and Moore, Judges.

No. A-04-1227: **Kaufman v. Weaver**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-04-1229: **Rasmussen v. Rasmussen**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-04-1237: **Pesek v. Neth**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-04-1249: **In re Interest of Sadie W. & Noah W.** Affirmed in part, and in part reversed. Cassel, Sievers, and Carlson, Judges.

No. A-04-1254: **In re Interest of Olivia W. & Lucien W.** Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1260: **State v. Fountain**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-04-1318: **Henderson v. Henderson**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-04-1335: **In re Estate of Jelinek**. Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-04-1341: **Ross v. Board of Regents**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-04-1343: **State v. Alameen**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-04-1348: **Henk v. Ruger**. Affirmed. Cassel, Sievers, and Carlson, Judges.

Nos. A-04-1357, A-05-105, A-05-388: **Partch v. Partch**. Affirmed as modified. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1362: **State v. Jensen**. Reversed and remanded with directions. Cassel, Sievers, and Carlson, Judges.

No. A-04-1366: **State v. Abboud**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-04-1384: **Roepke v. Roepke**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-04-1421: **MacGregor v. Nebraska Dept. of Corr. Servs**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-04-1427: **Long v. Long**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-04-1435: **Stender v. State Patrol**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-04-1446: **Smith v. Smith**. Judgment vacated, and cause remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-04-1449: **Lauer v. Lauer**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-04-1454: **Meyer v. Farrall**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-04-1455: **Nolte v. Stonestreet**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-04-1463: **Burke v. Burke**. Affirmed. Sievers and Irwin, Judges. Inbody, Chief Judge, participating on briefs.

No. A-04-1471: **State v. Thies**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-04-1472: **State v. Robertson**. Sentence affirmed. Sievers, Irwin, and Cassel, Judges.

No. A-05-006: **Allis v. Allis**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge, and Carlson, Judge. Cassel, Judge, participating on briefs.

No. A-05-010: **In re Adoption of Cody H**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-028: **State v. Brown**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-036: **Nimmer v. Brewer**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-052: **State v. Jones**. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-055: **In re Interest of Cody S**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-095: **State v. Green**. Reversed and remanded for a new trial. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-05-099: **State v. Khuseinov**. Affirmed. Moore and Irwin, Judges. Carlson, Judge, participating on briefs.

No. A-05-110: **Matthews v. Drivers Mgmt., Inc**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-112: **State v. Sargent**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-113: **State v. Schram**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-131: **State v. Gade**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-167: **Kathol v. Kathol**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-168: **Harm v. Harm**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-181: **State v. Carstensen**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-214: **State v. Richards**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-05-223: **State v. Burks**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-05-224: **State v. Parnell**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-255: **Moosman v. Cherry Cty. Bd. of Adjustment**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-258: **In re Interest of Tyreek T. & Asia R.** Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-275: **In re Interest of Kaleb H**. Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-05-286: **State v. La**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-296: **State v. Haynes**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-312: **Fischer v. Neth**. Reversed and remanded with directions. Moore, Sievers, and Cassel, Judges.

No. A-05-322: **Stone v. Wroblewski**. Affirmed. Irwin and Moore, Judges. Cassel, Judge, participating on briefs.

No. A-05-339: **Smith v. City of Lincoln**. Affirmed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-05-340: **In re Interest of Devin P. et al**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-343: **In re Application of Regnier**. Reversed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-350: **State v. Charko**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-354: **In re Interest of John S**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-355: **Crosby v. Crosby**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-05-357: **State v. Parrott**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-360: **Mendez v. Mendez**. Affirmed as modified. Sievers, Moore, and Cassel, Judges.

No. A-05-361: **In re Interest of Aniyah L**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-364: **Perez v. Double Dutch Dairy**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-370: **State v. Bernhardt**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-05-382: **In re Interest of Emma B**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-390: **State v. Smith**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-397: **State v. Starks**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-401: **Palm v. Lovelace**. Affirmed as modified. Cassel, Sievers, and Moore, Judges.

No. A-05-427: **State v. Beat**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-451: **Hamre v. Everman Plumbing**. Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-459: **Machacek v. Long John Silvers**. Reversed and remanded with directions. Sievers, Moore, and Cassel, Judges.

No. A-05-479: **Taylor v. Bussell**. Affirmed as modified. Sievers, Irwin, and Moore, Judges.

Nos. A-05-481, A-05-482: **In re Interest of Zakary B. & Natasha B**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-483: **State v. Howard**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-485: **Lewis v. Lewis**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-493: **State v. Grosvenor**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-496: **State v. Gray**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-514: **State v. Brunson**. Affirmed. Moore, Irwin, and Sievers, Judges.

Nos. A-05-551 through A-05-553: **In re Interest of Sierra H. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-563: **In re Interest of Beau F. & Shawn F**. Affirmed. Carlson, Sievers, and Cassel, Judges.

No. A-05-570: **Byam v. Modern Equip. Co**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-590: **Ruzicka v. Dalton's Auto Center**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-595: **State v. O'Hara**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-05-596: **State v. James**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-05-599: **del Carmen Rubio v. Chavez**. Affirmed. Sievers, Carlson, and Cassel, Judges.

No. A-05-625: **State v. Ornelas-Perez**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-627: **State v. Webb**. Affirmed. Per Curiam.

No. A-05-644: **Heppler v. Omaha Cable**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-655: **Morris v. Frank**. Affirmed. Cassel, Sievers, and Irwin, Judges.

No. A-05-657: **State v. Groene**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-660: **State v. Beckman**. Reversed and remanded for further proceedings. Moore, Judge (1-judge).

No. A-05-663: **In re Estate of Kleinholz**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-668: **In re Interest of Sabrina M.** Affirmed. Cassel, Sievers, and Carlson, Judges.

No. A-05-669: **In re Estate of Anderson**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-673: **In re Guardianship of Chrystian S.** Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-675: **State v. Turner**. Affirmed. Inbody, Chief Judge, and Carlson and Cassel, Judges.

No. A-05-685: **State v. Bragg**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-05-687: **Korus v. Korus**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-689: **Joshi v. VanNoordwyk**. Affirmed in part, and in part reversed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-694: **In re Interest of Vincent P.** Affirmed. Irwin, Sievers, and Moore, Judges.

No. A-05-765: **Smith v. Smith**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-781: **Halbmaier v. Halbmaier**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-790: **State v. Adamson**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-795: **Churchill v. Churchill**. Affirmed. Cassel and Sievers, Judges. Moore, Judge, participating on briefs.

No. A-05-828: **State v. Dunovsky**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-834: **State v. Payne**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-835: **In re Interest of Bailey S. & Brady S**. Reversed and remanded for further proceedings. Sievers, Carlson, and Moore, Judges.

No. A-05-837: **In re Interest of Ashley M**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-05-859: **In re Guardianship of Matthew N**. Reversed and vacated. Inbody, Chief Judge, and Irwin and Cassel, Judges.

Nos. A-05-866, A-05-867: **In re Interest of Frederick A. & Elliott A**. Affirmed. Sievers, Irwin, and Moore, Judges.

No. A-05-868: **State v. Jensen**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-893: **State v. Schriner**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-916: **McDowell v. Leprino Foods Co**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-962: **State v. Benish**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-971: **In re Interest of Mario G**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-972: **In re Interest of Peyton H**. Affirmed in part, and in part reversed. Sievers, Irwin, and Moore, Judges.

No. A-05-974: **State v. McClinton**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-05-977: **In re Interest of Jose M**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-987: **State v. Glenn**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-999: **Schrier v. Schrier**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1011: **In re Interest of Ashley K. et al**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1015: **State v. Arthur**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-1017: **In re Interest of Amanda J**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1018: **State v. Stewart**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-1026: **State v. Dunovsky**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1029: **State v. Phu**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1031: **Laska v. Laska**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1032: **In re Interest of Septembur L. & Jaden L**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-05-1050: **Wurdeman v. Wurdeman**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-05-1068: **In re Interest of Dwight R**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-05-1079: **In re Interest of Michael B. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1086: **State v. Beck**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1088: **State v. Hansen**. Sentence vacated and cause remanded with directions. Cassel, Sievers, and Moore, Judges.

No. A-05-1094: **State v. Shelton**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1096: **Pflepsen v. KC Concrete Placement**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1098: **State v. Scott**. Affirmed in part, and in part reversed. Sievers, Carlson, and Moore, Judges.

No. A-05-1106: **State v. Beck**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1121: **In re Interest of William S., Jr**. Appeal dismissed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1123: **In re Interest of Cameron B. et al**. Affirmed. Carlson, Sievers, and Moore, Judges

No. A-05-1140: **State v. Miner**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-1157: **State v. Miner**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-05-1162: **Buckendahl v. Buckendahl**. Affirmed as modified. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1177: **In re Interest of Casey S. et al**. Affirmed. Moore, Sievers, and Carlson, Judges.

Nos. A-05-1182 through A-05-1185: **In re Interest of Alica A. et al**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1206: **State v. Aldaba-Martinez**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1220: **State v. Devitt**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-05-1240: **State v. O'Dey**. Affirmed. Sievers, Judge (1-judge).

No. A-05-1258: **Scheurich v. Drivers Mgmt., Inc**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1281: **State v. Worley**. Affirmed in part, vacated in part, and in part reversed and remanded. Cassel, Irwin, and Moore, Judges.

No. A-05-1288: **In re Interest of Melanie S. et al**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1295: **State v. Smith**. Affirmed. Irwin, Moore, and Cassel, Judges.

No. A-05-1308: **State v. Mueller**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-05-1315: **In re Interest of Patrick S. et al**. Affirmed. Moore, Sievers, and Cassel, Judges.

Nos. A-05-1324, A-05-1325: **In re Interest of Chynne P. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-05-1331: **State v. Cole**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-05-1349: **In re Interest of Grace J**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1350: **In re Interest of Maliyah W**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-05-1366: **In re Interest of Jazmin B**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1388: **Backhaus v. Calvert**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-05-1405: **In re Interest of Andreana D**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1416: **State v. Neeman**. Affirmed. Sievers, Judge (1-judge).

No. A-05-1454: **Kuhn v. H&H Chevrolet Co**. Affirmed. Irwin, Moore, and Cassel, Judges.

No. A-05-1508: **Ahlberg v. Ahlberg**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

No. A-05-1559: **In re Adoption of Jessica D**. Reversed and vacated. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-05-1568: **State ex rel. Tyler v. Houston**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-05-1573: **State v. Bering**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-05-1575: **State v. Strickland**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-06-020: **State v. Doria**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-06-032: **In re Interest of Christian P**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-06-055: **State v. Ford**. Affirmed as modified. Sievers, Moore, and Cassel, Judges.

No. A-06-131: **Nocita v. Nocita**. Affirmed in part, affirmed in part as modified, and in part vacated. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

Nos. A-06-135, A-06-136: **In re Interest of Wade W**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-06-199: **In re Interest of Teylor K**. Affirmed. Inbody, Chief Judge, and Sievers and Carlson, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-04-099: **In re Application of Thornton**. Appeal dismissed. See, rule 7A(2); *Thornton v. Thornton*, 13 Neb. App. 912, 704 N.W.2d 243 (2005).

No. A-04-452: **Fowler v. Palmer Brothers Granite Co.** Motion of appellant to dismiss appeal sustained; each party to pay own costs.

No. A-04-477: **Lewis v. Lewis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-689: **Salazar v. Diamond Hill Farms**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-731: **Krohn v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-800: **Murphy v. Brown**. Matter dismissed. See Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-04-1016: **Wilmot v. Snelling**. Appeal dismissed. See, rule 7A(2): *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-04-1109: **In re Estate of Putnam**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-1222: **Stamm v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-1285: **Skradski v. Cook**. Appeal dismissed. See rule 7A(2).

No. A-04-1333: **Cash v. Clarke**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004).

No. A-04-1350: **Neville v. Homeworx Custom Remodeling**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-04-1383: **Brown v. Brown**. Appeal dismissed. See, rule 7A(2); *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999).

No. A-04-1387: **State on behalf of Wieser v. Wieser**. Summarily affirmed. See rule 7A(1).

No. A-04-1391: **Tyler v. Physicians Mut. Ins. Co**. Affirmed. See rule 7A(1).

No. A-04-1403: **State v. Hyde**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Adams*, 7 Neb. App. 571, 585 N.W.2d 96 (1998).

No. A-04-1445: **Aslan Companies v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-04-1456: **Sehnert v. Sehnert**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-039: **State v. Hughan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-051: **Benson Park Plaza v. City of Omaha**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-102: **Wright v. Hart**. Judgment order of December 28, 2004, is summarily reversed and remanded for further proceedings. See, rule 7A(3); Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2004); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983); *Curley v. Curley*, 214 Neb. 780, 336 N.W.2d 103 (1983).

No. A-05-129: **Cave v. Clarke**. Affirmed. See, rule 7A(1); *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

No. A-05-147: **State v. McDougald**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

No. A-05-186: **Deterding v. Neth**. Motion of appellant to reconsider our dismissal considered and sustained.

No. A-05-186: **Deterding v. Neth**. Reversed and remanded with directions.

No. A-05-197: **Evans on behalf of Trofholz v. Trofholz**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-211: **State v. Chavez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-252, A-05-253: **Silverman v. Collison**. Appeals dismissed. See rule 7A(2).

No. A-05-267: **State v. Griffin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-279: **Schreiner v. Schreiner**. Stipulation allowed; appeal dismissed.

No. A-05-318: **State v. Benish**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005); *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

No. A-05-331: **Gallardo v. Gallardo**. Affirmed. See, rule 7A(1); *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

No. A-05-345: **Tyler v. Auman**. Matter dismissed. See rule 7A(2).

No. A-05-351: **State v. Turley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-353: **Conn v. Conn**. Motion of appellee State for summary disposition sustained; order of district court entered February 18, 2005, vacated and cause remanded for further proceedings. See rule 7C.

No. A-05-362: **In re Interest of Patrick L.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-363: **In re Guardianship & Conservatorship of Wisniewski**. Summarily affirmed. See rule 7A(1).

No. A-05-365: **In re Estate of Schindler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-373: **Walton v. Department of Corrections**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-377: **State v. Bartunek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-381: **Timm on behalf of Tweedy v. Crook**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-05-391: **State v. Gray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-395: **Shepard v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-396: **Shepard v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-399: **Walker v. Malone**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

No. A-05-405: **State v. Anngello**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-412: **State v. Watkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-420: **Semin Construction v. Waldron**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-435: **National Loan Investors v. W.F.M., Inc**. Appeal dismissed. See rule 7A(2).

No. A-05-440: **Guerrero v. Guerrero**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-448: **State v. Mattson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-455: **State v. Villanueva**. Affirmed. See, rule 7A(1); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

No. A-05-470: **State v. Harwell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-472: **In re Estate of DeCamp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-473: **State v. Hayes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-478: **In re Estate of Malloy**. Summarily reversed and remanded. See, rule 7A(3); *In re Guardianship & Conservatorship of Bowman*, 12 Neb. App. 891, 686 N.W.2d 642 (2004).

No. A-05-484: **State v. Eissler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-487: **Hilgers v. Blue Cross and Blue Shield**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-490: **State v. Freeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-05-494, A-05-495: **State v. Roberson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-502: **State v. Kirkendall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-517: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-521: **State v. Hall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-530: **State v. Montgomery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-543: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-549: **State v. Werner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

No. A-05-550: **Samuel v. Nebraska State Penitentiary**. Motion of appellee for summary affirmance sustained. See, Neb. Rev. Stat. § 29-2801 (Reissue 1995); *Gallion v. Zinn*, 236 Neb. 98, 459 N.W.2d 214 (1990); *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977).

No. A-05-555: **State v. Burr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-568: **State v. Ajamu**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

No. A-05-569: **State v. Mendez-Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-571: **State v. Clark**. Appeal dismissed. See rule 7A(2).

Nos. A-05-573, A-05-574: **State v. McGregor**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

Nos. A-05-575, A-05-576: **State v. Blair**. Appellee's suggestion of remand sustained. Sentences vacated and cause remanded for further proceedings. See, Neb. Rev. Stat. § 29-2261(1) (Cum. Sup. 2004); *State v. Kellogg*, 10 Neb. App. 557, 633 N.W.2d 916 (2001).

No. A-05-581: **State v. Johnson**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998).

No. A-05-583: **Kaup v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-588: **Tran-Villarreal v. Villarreal**. Affirmed. See rule 7A(1).

No. A-05-594: **State v. Kelley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-598: **Kmiecik v. Erickson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-610: **Porter v. Neth**. Affirmed. See, rules 7A(1) and 9E; *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997); *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005).

No. A-05-611: **Chase v. Chase**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-05-615: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-618: **Clark v. Jansen**. Motions of appellees for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

No. A-05-620: **Von Seggern v. Von Seggern**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-624: **State v. Hunter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-632: **State v. Goynes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-633: **State v. Wilksen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-05-637: **Weiss v. Twin Cities Dermatopathology Corp**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-641: **State v. Jeppson**. Stipulation of parties for summary reversal granted. See, rule 7C; *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001). Cause remanded for a new trial.

No. A-05-646: **State v. Schoenrock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-647, A-05-648: **State v. Chapman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-649: **Buggs v. Britten**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. King*, 214 Neb. 855, 336 N.W.2d 576 (1983).

No. A-05-662: **State v. Estell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-664: **Lamprecht v. Lamprecht**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-666: **Grafton v. Columbia Ins. Group**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-667: **State v. Bretthauer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-671: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-676: **State v. Washington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-05-677: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-678: **State v. Prior**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001); *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990).

No. A-05-682: **State v. Stekr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-684: **State v. Robinson**. Affirmed. See rule 7A(1).

No. A-05-697: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-708: **State v. Woodruff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-715: **State ex rel. Wagner v. Global Bus. Servs**. Stipulation allowed; appeal dismissed.

No. A-05-716: **State v. Hallman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-717: **State v. Fiala**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-719: **State v. Longo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-731: **Country Cars v. Price**. Appeal dismissed. See rule 7A(2).

No. A-05-733: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-734: **State v. Mohorcic**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-735: **State v. Deng**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-736: **State v. Heckenliable**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-737 through A-05-740: **State v. Greathouse**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-741: **State v. Cutshall**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2004); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-05-742: **State v. Flood**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-754: **State v. Echols**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-755: **State v. Rocha**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998).

No. A-05-756: **State v. Landrum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-761: **State v. Riley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-762: **State v. Friend**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-767: **State v. Dohmen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-770: **State v. Smart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-773: **State v. Harrahill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-774: **State v. Harrahill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-775: **Tyler v. Kyler**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969).

No. A-05-776: **State v. Rickard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-783: **Tyler v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-791: **State v. Fry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-793: **Papio-Missouri River NRD v. Wright Investments**. Matter dismissed. See, rule 7A(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-05-796: **State v. Lange**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-798: **Arias v. Board of Parole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Moore v. Nebraska Bd. of Parole*, 12 Neb. App. 525, 679 N.W.2d 427 (2004).

No. A-05-799: **Friedman v. Friedman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-803: **Bush v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-805: **Randles v. Kirby**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-806: **In re Interest of Caleb H. & Savannah H**. Matter dismissed. See rule 7A(2).

No. A-05-809: **Soto v. Nau**. Stipulation allowed; appeal dismissed.

No. A-05-810: **State v. Hynes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-811: **State v. Marion**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-813: **State v. Amador-Rosario**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-814: **Tyler v. Stahlecker**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-816: **State v. Shufeldt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-819: **Maloley v. Maloley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-820: **Kumar v. Thelappurath**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-821: **Dunn v. City of Bellevue**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-824: **State v. Millan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-825: **Gartin v. Brill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-826: **State v. Allen**. Affirmed. See, rule 7A(1); Neb. Rev. Stat. § 25-2301.02(1)(b) (Cum. Supp. 2004); *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); *Moore v. Nebraska Bd. of Parole*, 12 Neb. App. 525, 679 N.W.2d 427 (2004).

No. A-05-830: **Barker v. Given**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-831: **State v. Sanchez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-833: **Tyler v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-840: **Idealhire, Inc. v. Digital Partners**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-841: **State v. Young**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

Nos. A-05-842 through A-05-844: **State v. Young**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-845: **Nielsen v. Nielsen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-850: **State v. White**. Motion of appellee for summary affirmance sustained. Sentence orally pronounced by county court affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988); *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999); *State v. Erb*, 6 Neb. App. 672, 576 N.W.2d 839 (1998).

No. A-05-855: **Akins v. Froisland**. Motion for summary affirmance sustained. See, rule 7B(2); *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Revels v. Vincenz*, 382 F.3d 870 (8th Cir. 2004), *cert. denied, Revels v. Wimp*, 546 U.S. 860, 126 S. Ct. 371, 163 L. Ed. 2d 140 (2005); *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993); *Wishon v. Gammon*, 978 F.2d 446 (8th Cir. 1992); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004); *Newton v. Huffman*, 10 Neb. App. 390, 632 N.W.2d 344 (2001).

No. A-05-856: **Akins v. Leduc**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-858: **State v. Chavez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-862: **State v. Gonzalez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-863: **Friedman v. Friedman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1901 (Reissue 1995).

No. A-05-869: **Smith v. Brokam, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-874: **Dike v. Nichols**. Stipulation considered; appeal dismissed.

No. A-05-878: **Johnson v. Burrell**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-885: **Finnegan v. Leslie**. Appeal dismissed as moot. See, rule 7A(2); *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

No. A-05-886: **State v. Stinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-891: **Bush v. Cheuvront**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-05-899, A-05-900: **In re Interest of Alijah L. & Andre L**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-05-901: **In re Interest of Nalf A. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-902: **In re Interest of Russell K. et al**. Appeal dismissed. See, rule 7A(2); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998).

No. A-05-907: **State ex rel. Bruning v. California Alternative High Sch**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1144.01 and 25-1329 (Cum. Supp. 2004).

No. A-05-908: **State v. Vanhunnik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 29-4005(3)(a) and (4)(c) (Cum. Supp. 2004); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-05-909, A-05-910: **State v. Foster**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-913: **State v. Veath**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-914: **State v. Rodriguez**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-05-917, A-05-918: **State v. Vandorien**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-919: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-923: **State v. Byers**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-924: **Smith v. City of Omaha**. Affirmed. See rule 7A(1).

No. A-05-926: **In re Guardianship & Conservatorship of Dunn**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-05-927: **State v. Haith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-931: **AFSCME Local 251 v. City of South Sioux City**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-933: **State ex rel. Tyler v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-940: **State v. Jacobs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-941: **State v. Tyndall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-942: **State v. Marrero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005); *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

No. A-05-943: **McGhee v. Security National Bank**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004). See, also, *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-05-944: **Brook View, LLC v. Brook Valley Ltd. Part**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-946: **State v. Knutson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-949, A-05-950: **State v. Huss**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-951: **State on behalf of Claypool v. Bush**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-952: **Okwumuo v. Cornhusker Bank**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). See, also, Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-953: **Kerr v. Board of Regents**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-953: **Kerr v. Board of Regents**. Motion of appellant for rehearing sustained. Order dismissing appeal vacated and appeal reinstated. See, Neb. Rev. Stat. § 85-901 (Reissue 1999); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-957: **State v. Evans**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-961: **State v. Gonzales**. Affirmed. See rule 7A(1).

No. A-05-968: **State v. Brooks**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 29-824(2) (Cum. Supp. 2004); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-05-969: **State v. Baeza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-970: **State v. Parker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-975: **Gardner v. Tuesday**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-983: **Randles v. Nichols**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-986: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-988: **Rab v. Muhammad**. Motion for summary dismissal sustained; appeal dismissed. See *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

No. A-05-989: **Rab v. Muhammad**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998); *Ponseigo v. Mary W.*, 267 Neb. 72, 672 N.W.2d 36 (2003); *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003); *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

No. A-05-990: **Aguon v. Mathis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-994: **Concerned Citizens v. Boone Cty. Bd. of Comrs**. Motions of appellees for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005); *Hawkins Constr. Co. v. Director*, 240 Neb. 1, 480 N.W.2d 183 (1992).

No. A-05-996: **State v. Smick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-997: **State v. Smick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1001: **State v. Beckner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1002: **State v. Pavon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1009: **Billups v. Clarke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1010: **State ex rel. Tyler v. Houston**. Affirmed. See rule 7A(1).

No. A-05-1013: **Foreman v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1014: **State v. Sundermeier**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1016: **State v. Roberson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1023: **State v. Conn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001).

No. A-05-1025: **In re Interest of David Q**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 71-930 (Cum. Supp. 2004).

No. A-05-1030: **State v. Schmader**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1040: **Detamore v. Beck**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1041: **State v. Johnson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1042: **State v. Velazquez**. Affirmed. See rule 7A(1).

No. A-05-1044: **State v. Montin**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1045: **State v. Kintzle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1048: **Kostos v. Kostos**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-05-1053: **Tyler v. Rife Construction**. Appeal dismissed. See rule 7A(2).

No. A-05-1054: **Kelly v. Botos**. Stipulation allowed; appeal dismissed.

No. A-05-1055: **Gartin v. Brill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1057: **State v. Hartung**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1058: **State v. Hays**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003); *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1060: **Willmore v. Department of Corr. Servs. Appeals Bd**. Affirmed. See rule 7A(1).

No. A-05-1061: **Renter v. Seidenburg**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1062: **Zechmann v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1063: **State on behalf of Meyers v. Meyers**. Appeal dismissed. See rule 7A(2).

No. A-05-1065: **Reynolds v. Thomas**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1068: **In re Interest of Dwight R**. Appeal dismissed. See rule 7A(2).

No. A-05-1068: **In re Interest of Dwight R**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-05-1069: **State v. O'Neal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1070: **State v. Pecka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1071: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1074: **Japp v. Papio-Missouri River NRD**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-05-1078: **In re Adoption of Khalid E**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 43-113 (Reissue 2004); *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

No. A-05-1080: **State v. Tylka**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004); *State v. Martinez*, 250 Neb. 597, 550 N.W.2d 655 (1996); *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *Jeppesen v. State*, 154 Neb. 765, 49 N.W.2d 611 (1951).

No. A-05-1081: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1083: **Thelen v. State**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1085: **In re Interest of Desiree G**. Appeal dismissed. See Neb. Rev. Stat. § 43-287.01 (Reissue 2004).

Nos. A-05-1089, A-05-1090: **State v. Hansen**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-1093: **Tyler v. University of Nebraska**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1095: **Brody v. Nebraska Dept. of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1097: **State v. Miller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1101: **In re Estate of Rollman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1102: **Villarreal v. Villarreal**. Order of August 31, 2005 (filed October 26, 2005), affirmed. See, rule 7B(2); *Locke v. Volkmer*, 8 Neb. App. 797, 601 N.W.2d 807 (1999).

No. A-05-1103: **Johnson v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1104: **Swetson v. Bender**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1105: **State v. Vannortwick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1107: **State v. Todd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1109: **In re Interest of Falcon H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1110: **Jacobson v. State Board of Education**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1905 (Reissue 1995) and 25-1931 (Cum. Supp. 2004); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-1111: **State v. Martin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1112: **State v. Manning**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1113: **County of Adams v. Arthur**. Appeal dismissed. See, rule 7A(2); *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

No. A-05-1114: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,197(5) (Reissue 2004); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005); *State v. Turner*, 263 Neb. 896, 644 N.W.2d 147 (2002).

No. A-05-1117: **State v. Portillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

No. A-05-1118: **State v. Goertz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1119: **State v. Goertz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1122: **Jensen v. Jensen**. Appeal dismissed. See rule 7A(2).

No. A-05-1124: **State v. Kleve**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1127: **Citizens of Decatur v. Lyons-Decatur Sch. Dist**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-05-1128: **Holzapfel v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1129: **Classe v. Fitzgerald, Schorr**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1301 and 25-1912(3) (Cum. Supp. 2004).

No. A-05-1133: **Schmidt v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1134: **Kramer v. Charter Oak Fire Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1135: **Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

No. A-05-1136: **State v. Concannon**. Order of district court summarily reversed, and cause remanded. See, rule 7A(3); *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990); *State v. Olson*, 5 Neb. App. 951, 568 N.W.2d 273 (1997).

No. A-05-1137: **In re Interest of Larry D**. Affirmed. See rule 7A(1).

No. A-05-1139: **State v. Philby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1143: **State v. Nguyen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *State v. Cardona*, 10 Neb. App. 815, 639 N.W.2d 653 (2002).

No. A-05-1144: **State v. Gonzales**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1146: **Kenley v. Nebraska Liquor Control Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1150: **Bush v. County of Lancaster**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1151: **State v. Hodges**. Appeal dismissed. See rule 7A(2).

No. A-05-1152: **State v. Hodges**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1158: **State v. Fountain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1159: **State v. Zuniga**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1161: **Brodax v. Lincoln Mgmt. Assocs**. Stipulation allowed; appeal dismissed.

No. A-05-1167: **State on behalf of Fosdick v. Edwards**. Motion of appellee Bosak for summary dismissal for mootness sustained; appeal dismissed as moot.

No. A-05-1169: **Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

Nos. A-05-1170, A-05-1171: **State v. Kaiser**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-1173: **State v. Yeager**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1174: **Archibald v. Allen**. Appeal dismissed. See rule 7A(2).

No. A-05-1175: **Jones v. Jones**. Appeal dismissed. See rule 7A(2).

No. A-05-1178: **In re Interest of Jamie H. et al**. Appeal dismissed. See rule 7A(2). Juvenile court's order of September 12, 2005, vacated.

No. A-05-1179: **State v. Sommer**. Appellee's suggestion of remand, to which appellant has filed no response, is granted. Final order denying appellant's motion for absolute discharge is reversed and cause is remanded with directions. See, Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995); *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998); *State v. Droz*, 14 Neb. App. 32, 703 N.W.2d 637 (2005).

No. A-05-1180: **State v. Fox**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1181: **In re Interest of Aaron K**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1186: **State v. Weiler**. Affirmed. See, rule 7A(1); *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004).

No. A-05-1187: **State v. Ladd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1188: **State v. York**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-1191, A-05-1192: **State v. Baxter**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1193: **Conley v. Hogan**. Stipulation allowed; appeal dismissed.

No. A-05-1194: **M & K Constr. & Eng. v. Franklin Pub. Sch**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); *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-05-1195: **Hansen v. Vampola**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1196: **State v. Sandman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1199: **State on behalf of Kopystynsky v. Kopystynsky**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1202: **In re Interest of Faith M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1203: **In re Interest of Dante M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1205: **Inspro, Inc. v. WBE Company**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1209: **Capital One Bank v. Vigil**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-05-1210: **State v. Murphy**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1210: **State v. Murphy**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-05-1216: **Droud v. Droud**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1218: **State v. Basden**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-05-1219: **State v. Basden**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-05-1222: **State v. Jenkins**. Appellee's suggestion of remand for a new trial granted. See *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

No. A-05-1225: **SLF Series A v. TC Properties**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1228: **Tyler v. Clarke**. Motions of appellees for summary affirmance granted. See, *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

No. A-05-1229: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

No. A-05-1231: **In re Name Change of Henry**. Appeal dismissed. See, rule 7A(2); *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

No. A-05-1232: **Metzger v. Village of Cedar Creek**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1233: **Arias v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1235: **Becker v. PBX, Inc**. Appeal dismissed. See, rule 7A(2): *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005).

No. A-05-1236: **Ray v. Ray**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1237: **Koch v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1238: **In re Guardianship & Conservatorship of Dunn**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1239: **State v. Culp**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1241: **State v. Lickliter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1243: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1244: **State v. Minard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); *State v. Brown*, 14 Neb. App. 508, 710 N.W.2d 337 (2006).

Nos. A-05-1245, A-05-1246: **State v. Griffin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1248: **Tyler v. City of Omaha**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1254: **State v. Lee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1259: **State v. Sensenbach**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1260: **State v. Smith**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1275: **State v. Ebeling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1276: **Diamond Custom Tile v. Khan**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1277: **Caston v. TMW Enters**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1278: **Grove v. Neth**. Affirmed. See, rule 7A(1); *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

No. A-05-1279: **State v. Rivero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1280: **HGR Acquisitions v. DeWall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1282: **State v. Larsen**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-1283: **Howard v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1284: **Howard v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1285: **Howard v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1286: **Howard v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1287: **Tucker v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1289: **In re Estate of Handley**. Stipulation allowed; appeal dismissed.

No. A-05-1290: **In re Estate of Handley**. Stipulation allowed; appeal dismissed.

No. A-05-1293: **Champion Window Co. of Omaha v. Andersen**. Appeal dismissed. See rule 7A(2).

No. A-05-1294: **State v. Matteo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1296: **State v. Zmievski**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1298: **State v. Rhodes**. Appeal dismissed. See, rule 7A(2); *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000); *State v. Steinbach*, 11 Neb. App. 468, 652 N.W.2d 632 (2002).

No. A-05-1302: **State v. Henning**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1303: **Schirmer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1307: **State v. Schmutte**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1309: **Babbitt v. Hahn**. Appeal dismissed. See, rule 7B(1); *I.P. Homeowners v. Morrow*, 12 Neb. App. 119, 668 N.W.2d 515 (2003); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001). See, also, *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-05-1310: **Ryan v. Galbraith**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-05-1312: **State v. Cline**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1313: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1314: **State v. Mann**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1318: **State v. Simons**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-1319: **State v. Bride**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1320: **State v. Brown**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1321: **Roberts v. Steppat**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 25-1315 (Cum. Supp. 2004) and 25-1902 (Reissue 1995).

No. A-05-1322: **Lynch v. Sparks**. Affirmed. See, rule 7A(1); *Knerr v. Swigard*, 243 Neb. 591, 500 N.W.2d 839 (1993).

No. A-05-1323: **Lockman v. Diekmann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1326: **In re Interest of Richard C**. Appeal dismissed. See, rule 7A(1); Neb. Rev. Stat. § 43-2,106.01 (Reissue 2004).

No. A-05-1327: **Petersen v. Petersen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1329: **Ruegge v. State**. Appeal dismissed as filed out of time.

No. A-05-1334: **Tyler v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1336: **State v. Belek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1338: **Tyler v. Heineman**. Appeal dismissed. See rule 7A(2).

No. A-05-1339: **Harris v. Rummel**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1340: **Discover Bank v. Bradley**. Affirmed. See, rule 7A(1); *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997).

No. A-05-1341: **Brown v. Beltramea**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-05-1342, A-05-1343: **State v. Fisher**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-05-1344: **State v. Haley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1345: **State v. Murphy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1346: **State v. Burton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1347: **Risney v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

No. A-05-1348: **Swift Bird v. Swift Bird**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1352: **State v. Fernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 558 N.W.2d 556 (1999).

No. A-05-1353: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002); *Newton v. Huffman*, 10 Neb. App. 390, 632 N.W.2d 344 (2001); *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000).

No. A-05-1354: **Manning v. Manning**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-05-1355: **Beckner v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-1356: **Beckenhauer v. Beckenhauer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1360: **Russell v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1362: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1363: **State v. McCoy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1364: **State v. Hawkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1367: **State v. McKinney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1368: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1370: **In re Interest of Cyrus P.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 43-2,106.01 (Reissue 2004) and 25-1912 (Cum. Supp. 2004).

No. A-05-1371: **Spivey v. Werner Enters.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-05-1373: **State on behalf of Stevens v. Stevens.** Appeal dismissed. See, rule 7A(2); *Jacobson v. Jacobson*, 10 Neb. App. 622, 635 N.W.2d 272 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-05-1375: **State v. Pfeifer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1379: **Trout v. Neth.** Summarily affirmed. See rule 7A(1).

No. A-05-1380: **State on behalf of Strange v. Armendariz.** Appeal dismissed. See, rules 7A(2) and 1B(4); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-05-1386: **Keitges v. Keitges.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1389: **Braimah v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1390: **State v. Giesmann.** Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); Neb. Rev. Stat. § 60-6,197(2) and (9) (Supp. 2003); *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992); *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989).

No. A-05-1391: **State v. Ellis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). See, also, *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

No. A-05-1392: **State v. Reid.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1398: **Day v. Day.** By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1400: **Jones v. Platteview Apartments**. Motion of appellees Platteview Apartments, Midstates Development, Terry Burns, and Jeanne Hinrich for summary dismissal sustained; appeal dismissed. See, rule 7B(1); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-05-1401: **Drucker v. Bejeris**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-05-1402: **Merklin v. Curtis-Merklin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1403: **State v. Nattress**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1410: **Wilson v. Greater Omaha Packing**. Appeal dismissed. See rule 7A(2).

No. A-05-1411: **Villarreal v. Anderson**. Appeal dismissed. See rule 7A(2).

No. A-05-1413: **State v. Biloff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1414: **State v. Bussart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995).

No. A-05-1419: **State v. Barnes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1420: **State v. Reyes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1424: **Myers v. Myers**. Appeal dismissed. See, *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-05-1425: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1426: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1427: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1428: **State v. Janes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1439: **State v. O'Neal**. Appeal dismissed. See, rule 7A(2); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-05-1440: **State v. Latzel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1441: **Wyatt v. Wyatt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1442: **Piernicky v. Union Pacific RR. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 466 N.W.2d 73 (1991).

No. A-05-1444: **Tyler v. Lustgarten**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1447: **State v. Cook**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1449: **First Nat. Bank of Omaha v. Moore**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1450: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1451: **State v. Liechti**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1452: **State v. Gerren**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1453: **State v. Lentz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1455: **State v. McClure**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1456: **State v. Grantham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1458: **State v. Aldaba**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1459: **State v. Schommer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1460: **State v. Schneider**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-05-1462: **State v. Webster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1468: **Buggs v. Department of Corr. Servs.** Affirmed. See rule 7A(1).

No. A-05-1469: **State v. Roblero-Ramirez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1470: **Martin v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301(1) (Cum. Supp. 2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-05-1471: **Martin v. Board of Parole**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301(1) (Cum. Supp. 2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-05-1472: **In re Interest of Gabriela H. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1474: **State v. Rolo**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1479: **State v. Brewer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1480: **State v. Fernau**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1481: **State v. Barney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

Nos. A-05-1482 through A-05-1485: **State v. Grandel**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

Nos. A-05-1491 through A-05-1494: **State v. Clifford**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-05-1495, A-05-1496: **State v. Grant**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1497: **State v. Dunkinsel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1499: **State v. Mettin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1501: **Carpenter v. Parrella Motors**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1501: **Carpenter v. Parrella Motors**. Motion of appellant to reinstate appeal sustained. Appeal reinstated.

No. A-05-1502: **G. Auten Farms v. Adams Cty. Bd. of Adjustment**. Appeal dismissed. See, rule 7A(2); *Morello v. City of Omaha*, 5 Neb. App. 785, 565 N.W.2d 41 (1997).

No. A-05-1512: **State v. Varland**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

No. A-05-1514: **State v. Gormley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-05-1515 through A-05-1517: **State v. Walker**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-05-1519: **Tyler v. Auman**. Appeal dismissed. See, rule 7A(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-05-1521: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1524: **McCroy v. McCroy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1528: **Saylor v. Department of Corr. Servs.** Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-05-1530: **State v. Luea**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-05-1531: **State v. Leija**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1533: **In re Guardianship & Conservatorship of Dunn**. Appeal dismissed. See rule 7A(2).

No. A-05-1534: **State v. Spears**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1536: **State v. Hines**. Stipulation allowed; appeal dismissed.

No. A-05-1537: **State v. Downing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-05-1539: **Vasquez v. Wright**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-05-1541: **State v. Soash**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1542: **State v. Soash**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1545: **State v. Hansen**. Appeal dismissed. See, rule 7A(2); *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998).

No. A-05-1547: **Ridder v. Javed**. Stipulation allowed; appeal dismissed.

No. A-05-1551: **Discover Bank v. Runyan**. Affirmed. See rule 7A(1).

No. A-05-1552: **Morrison v. Mercer**. Appeal dismissed. See, rule 7A(2); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

No. A-05-1554: **In re Interest of Amanda M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1557: **Villarreal v. Villarreal**. Appeal dismissed. See rule 7A(2).

No. A-05-1558: **Berlin v. Murray**. Appeal dismissed. See, rule 7A(2); *Peterson v. Damoude*, 95 Neb. 469, 145 N.W. 847 (1914); *Vrana v. Vrana*, 85 Neb. 128, 122 N.W. 678 (1909).

No. A-05-1562: **Taylor v. Department of Motor Vehicles**. Affirmed. See, rule 7A(1); *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

No. A-05-1563: **State v. Schooler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1564: **State v. Mesadieu**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-05-1565: **In re Interest of Jamia F**. Motion of appellee for summary dismissal sustained; appeal dismissed as moot. See rule 7B(1).

No. A-05-1569: **State ex rel. Tyler v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-05-1571: **Kessler v. Kessler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-05-1572: **State v. Korth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1574: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

No. A-05-1576: **State v. Lynam**. Motion of appellee for summary dismissal sustained.

No. A-05-1578: **State v. Sauvage**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-05-1579: **State v. Lewis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-003: **Akins v. Clarke**. Appeal dismissed. See, rule 7A(2); *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

No. A-06-004: **Akins v. Quinn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003); *State v. Smith*, 13 Neb. App. 477, 695 N.W.2d 440 (2005).

No. A-06-005: **Akins v. Leduc**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Abdullah v. Nebraska Dept. of Corr. Servs.*, 246 Neb. 109, 517 N.W.2d 108 (1994); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991).

No. A-06-007: **State v. Grant**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-009: **In re Guardianship & Conservatorship of Masek**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-013: **Sannicks v. Lanik**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-014: **State v. Ashcraft**. Matter dismissed.

No. A-06-015: **Liming v. Liming**. Appeal dismissed. See *Giese v. Giese*, 243 Neb. 60, 497 N.W.2d 369 (1993).

Nos. A-06-017, A-06-018: **State v. Dixon**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-019: **State v. Stubblefield**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-021: **State v. Borseth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-022: **State v. Lyons**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-023: **Atelier Partners v. Data Duplicating**. District court's order of December 8, 2005, affirmed. See rule 7A(1).

No. A-06-024: **Hamilton v. Hamilton**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-026: **State ex rel. Tyler v. Houston**. Summarily affirmed. See rule 7A(1).

No. A-06-028: **Olson v. Olson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-031: **In re Interest of Karen R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-039: **Rodwell v. State**. Appeal dismissed. See rule 7A(2).

No. A-06-040: **In re Revocable Trust of Blauhorn**. Appeal dismissed. See, rule 7A(2); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

No. A-06-043: **Trupp v. Host Marriott Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-048: **Zitek v. State ex rel. State Real Estate Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-06-051: **Arias v. Department of Corr. Servs**. Appeal dismissed as premature. See, rule 7A(2); *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002).

No. A-06-052: **Tyler v. Department of Corr. Servs**. Affirmed. See rule 7A(1).

No. A-06-053: **Tyler v. Houston**. Affirmed. See, rule 7A(1); *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998).

No. A-06-054: **State v. Jorgensen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-056: **State v. Toles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-057: **State v. Werner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-058: **State v. Bradley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-059: **State v. Wehr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-061: **Shaddy v. Department of Corr. Servs. Appeals Bd**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-065: **IBEW v. City of Gering**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-071: **Cole v. Clarke**. Appeal dismissed. See, rule 7A(2); *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

No. A-06-076: **State ex rel. Tyler v. Houston**. Affirmed. See, rule 7A(1); *State ex rel. Tyler v. Douglas Cty. Dist. Ct.*, 254 Neb. 852, 580 N.W.2d 95 (1998).

No. A-06-080: **State v. Mendoza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-082: **Sand Livestock Systems v. Svoboda**. Motion of appellee Area Citizens for Res. and Envtl. Support for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004).

No. A-06-083: **State v. Billington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-084: **State v. Stanko**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-087: **Bradley v. Whelan**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-088: **State v. Drahota**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-089: **State v. Wicjiek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-099: **Ellis v. Ellis**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, rule 7B(1); *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006).

No. A-06-101: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000); *State v. Guzman-Gomez*, 13 Neb. App. 235, 690 N.W.2d 804 (2005).

No. A-06-104: **Eastern Neb. Against Chem. Trespass v. Environ. Qual**. Appeal dismissed. See, rule 7A(2); *State v. Plymate*, 8 Neb. App. 513, 598 N.W.2d 65 (1999).

No. A-06-106: **State v. O'Doniel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-107: **State v. Dotson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-108: **State v. Hays**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-109: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-110: **State v. Lambert**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004).

No. A-06-112: **State v. Anaya**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006); *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

No. A-06-113: **Marshall v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-115: **State v. Kirkendall**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-116: **Watkins v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-122: **State v. Hassan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

No. A-06-124: **State v. Lohman**. Appeal dismissed. See, rule 7A(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-06-128: **State v. Basden**. Appeal dismissed. See rule 7A(2).

No. A-06-129: **State v. Basden**. Appeal dismissed. See rule 7A(2).

No. A-06-132: **Fitzgibbon v. Carf Realty 98**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-133: **In re Guardianship of Misle**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-134: **State v. Purvis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-138: **State v. Hymond**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-139: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-141: **Hall v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-143: **MBNA America Bank v. Olmer**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-147: **State v. Vera**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-150: **Polk Cty. Rec. Assn. v. Susquehanna Patriot Commercial Leasing**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-151: **State v. Lunsford**. Appeal dismissed.

No. A-06-152: **State v. Lunsford**. Appeal dismissed.

No. A-06-155: **State v. Tyler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-156: **Martin v. Goynes**. Motion of appellant to dismiss appeal granted; appeal dismissed at cost of appellant.

No. A-06-157: **State on behalf of Goynes v. Martin**. Motion of appellant to dismiss appeal granted; appeal dismissed at cost of appellant.

No. A-06-161: **Rech v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-06-163, A-06-164: **State v. Fisher**. Motions of appellee for summary affirmance sustained; judgments affirmed.

No. A-06-165: **State v. Banks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-167: **Marriott v. SID No. 230**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995); *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960).

No. A-06-168: **State v. Beversdorf**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-174: **State v. Snyder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-175: **State v. Aldez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-183: **Tyler v. Houston**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-184: **Arias v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); *Portley-El v. Brill*, 288 F.3d 1063 (8th Cir. 2002); *Martin v. Curry*, 13 Neb. App. 171, 690 N.W.2d 186 (2004).

No. A-06-185: **Dush v. Vishay Dale Electronics**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-186: **State v. Steinman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-188: **State v. Woita**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-189: **State ex rel. Tyler v. Houston**. Summarily affirmed. See, rule 7A(1); *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

No. A-06-197: **Faxon v. Faxon**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-205: **In re Interest of Nicole P. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-210: **State v. Knight**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-218: **State v. Luff**. By order of the court, appeal dismissed for failure to file briefs.

No. A-06-225: **State v. Redding**. Appeal dismissed; that part of the district court's order affirming the sentence is vacated. See, rule 7A(2); Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2004); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-06-231: **In re Estate of Chrisp**. Appeal dismissed. See, rule 7A(2); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 382 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-234: **State v. Lassen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-06-235: **In re Interest of Fedalina G**. Matter dismissed. See *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-238: **Bakewell v. Department of Motor Vehicles**. Affirmed. See rule 7A(1).

No. A-06-240: **Ryan v. Galbraith**. Matter dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-244: **Villarreal v. Villarreal**. Appeal dismissed. See, rule 7A(2); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

No. A-06-245: **Bradley v. Kahn**. Appeal dismissed. See, rule 7A(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-246: **In re Interest of Stevi W**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-06-248: **Jacobson v. Board of Education**. Affirmed. See rule 7A(1).

No. A-06-257: **Lee v. Lee**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-258: **Foster v. BryanLGH Med. Ctr. East**. Appeal dismissed. See, rule 7A(2); *Wells v. Goodyear Tire & Rubber Co.*, 14 Neb. App. 384, 707 N.W.2d 438 (2005).

No. A-06-260: **State v. Sheldon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-06-261: **State v. Caskey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-262: **State v. Daye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-265: **Muller v. Muller**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-266: **Waste Connections of Neb. v. Sarpy Cty. Bd. of Adjustment**. Stipulation allowed; appeal dismissed.

No. A-06-267: **Golliday v. Golliday**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-270: **Looby v. Toman**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2004).

No. A-06-271: **Peterson v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-277: **State v. Perez**. Affirmed. See, rule 7A(1); *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998); *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992).

No. A-06-280: **State v. Wright**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-286: **Clark v. Clark**. Appeal dismissed; district court's order of affirmance vacated. See, rule 7A(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-06-288: **In re Trust of Taylor**. Appeal dismissed. See rule 7A(2).

No. A-06-290: **Dunham v. State Patrol**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

Nos. A-06-295, A-06-296: **State v. Kenney**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. A-06-297: **Moore v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-298: **Hagedorn v. Lierman**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-06-299: **Hagedorn v. Lierman**. Appeal dismissed. See, rule 7A(2); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

No. A-06-309: **State v. Valdez**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-06-311: **Clark v. Clark**. Appeal dismissed. See, rule 7A(2); *Harvey v. Harvey*, 14 Neb. App. 380, 707 N.W.2d 444 (2005).

No. A-06-312: **In re Estate of Swisher**. Motion of appellee for summary dismissal and stipulations sustained. See rule 7B(1).

No. A-06-313: **In re Trust Agreement (1997) of Swisher**. Motion of appellee for summary dismissal and stipulations sustained. See rule 7B(1).

No. A-06-314: **In re Trust Agreement (1994) of Swisher**. Motion of appellee for summary dismissal and stipulations sustained. See rule 7B(1).

No. A-06-325: **State v. Ryan**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-328: **Kulhanek v. Department of Motor Vehicles**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-328: **Kulhanek v. Department of Motor Vehicles**. Motion of appellant for rehearing sustained. Dismissal vacated and appeal reinstated.

No. A-06-329: **Hofferber v. City of Hastings**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-335: **In re Interest of Lauren T**. Appeal dismissed. See, rule 7A(2); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-06-349: **In re Interest of Brittany H**. Appeal dismissed. See rule 7A(2).

No. A-06-350: **State v. Foster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

No. A-06-355: **In re Interest of Ruben M. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-357: **Kanyer v. Union Pacific RR. Co**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-06-362: **Shafer v. Shafer**. Appeal dismissed. See, rule 7A(2); *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994).

No. A-06-362: **Shafer v. Shafer**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-06-366: **Keup v. Department of Corr. Servs**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1999); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-06-368: **Garden Chateau v. Sarpy Cty. Bd. of Equal**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 77-5019 (Supp. 2005); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-06-369: **State v. Leishman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-378: **Lamar Co. v. Omaha Zoning Bd. of Appeals**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-06-380: **Tyler v. Heineman**. Appeal dismissed. See rule 7A(2).

No. A-06-387: **Schlichtman v. Jacob**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1902 (Reissue 1995).

No. A-06-396: **State v. Krejci**. Stipulation allowed; appeal dismissed.

No. A-06-397: **Herrera v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-06-402: **In re Interest of Emma B**. Appeal dismissed. See, rule 7A(2); *County of Sarpy v. City of Garden*, 267 Neb. 943, 678 N.W.2d 740 (2004); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004).

No. A-06-414: **In re Guardianship of Stein**. Appeal dismissed. See, rule 7A(2); *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992); *J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-06-415: **State v. Anderson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-419: **In re Interest of Amanda M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-422: **Dreyovich v. Dreyovich**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-429: **Baack v. Baack**. Stipulation allowed; appeal dismissed.

No. A-06-439: **In re Interest of Krista K**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. §§ 43-2,106.01(1) (Reissue 2004) and 25-1912 (Cum. Supp. 2004).

No. A-06-443: **Lovejoy v. Department of Corr. Servs**. Appeal dismissed. See rule 7A(2).

No. A-06-444: **State v. Zerley**. Appeal dismissed. See rule 7A(2).

No. A-06-448: **In re Interest of Dawnvara W**. Appeal dismissed. See, rule 7A(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-06-452: **In re Interest of Thomas Z**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-06-455: **Jay v. Lembke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-456: **Neidhardt v. Welling**. Appeal dismissed. See, rule 7A(2); *State v. Plymate*, 8 Neb. App. 513, 598 N.W.2d 65 (1999); *Morello v. City of Omaha*, 5 Neb. App. 785, 565 N.W.2d 41 (1997).

No. A-06-467: **Farrell v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-470: **Stroh v. Stroh**. Appeal dismissed. See rule 7A(2).

No. A-06-480: **State v. Jackson**. Appeal dismissed. See rule 7A(2).

No. A-06-481: **State v. Gregory**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-482: **Leverone v. Harris**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-06-488: **In re Interest of Litzy M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-504: **State v. Craig**. Appeal dismissed. See, rule 7A(2); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-06-510: **State v. Fitzgerald**. Appeal dismissed. See, rule 7A(2); *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988).

No. A-06-543: **State v. Jenkins**. Affirmed. See rule 7A(1).

No. A-06-547: **State ex rel. Linder v. Strong**. Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. A-06-560: **State v. Sharp**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-564: **Velehradsky v. Velehradsky**. Appeal dismissed. See, rule 7A(2); *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999).

No. A-06-565: **Preister v. Roberts Pool & Spa**. Appeal dismissed; district court's order vacated. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004); *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

No. A-06-570: **In re Interest of Angelus M.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-571: **Caton v. Clarke**. Appeal dismissed. See, rule 7A(2); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

No. A-06-576: **Szawicki v. Szawicki**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-577: **Mitchell v. Williams**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-579: **State v. Thomas**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-584: **State v. Weiler**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-585: **Petrie v. Petrie**. Appeal dismissed. See, rule 7A(2); *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006); *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-586: **State on behalf of Evans v. Buckhalter**. Appeal dismissed. See rule 7A(2).

No. A-06-593: **State v. Larsen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-597: **Brody v. Clarke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-598: **Eurek v. Robbins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-605: **State v. Beck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-609: **State on behalf of Luna v. Luna**. Appeal dismissed. See, rule 7A(2); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-06-627: **Villarreal v. Douglas Cty. Mediation & Conciliation Ct**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2004); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-06-633: **In re Estate of Breinig**. Appeal dismissed. See, rule 7A(2); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-06-634: **Realty Trust Group v. General Growth Properties**. Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004).

No. A-06-652: **Harris v. Rummel**. Appeal dismissed. See, rule 7A(2); *State v. Blair*, 14 Neb. App. 190, 707 N.W.2d 8 (2005).

No. A-06-670: **Travelers Indemnity Co. v. Heim**. Appeal dismissed. See rule 7A(2).

No. A-06-671: **State v. Larsen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-672: **State v. Larsen**. Appeal dismissed. See, rule 7A(2); Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004).

No. A-06-686: **State v. Putz**. Appeal dismissed as moot. See rule 7D.

No. A-06-696: **Tyler v. Houston**. Appeal dismissed. See rule 7A(2).

No. A-06-705: **Chapman v. Schroeder**. Appeal dismissed. See, rule 7A(2); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

No. A-06-716: **In re Interest of Melissa A. & Kenna S.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-781: **State v. Nichols**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-822: **State v. Schonlau**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-06-860: **Coffey v. County of Otoe**. Appeal dismissed. See Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-03-560: **Keller v. State**. Petition of appellant for further review overruled on October 13, 2005.

No. A-03-630: **C & L Industries v. Kiviranta**, 13 Neb. App. 604 (2005). Petition of appellee for further review overruled on September 21, 2005.

No. A-03-721: **McDermott v. Keenan**, 13 Neb. App. 710 (2005). Petition of appellant for further review overruled on September 14, 2005.

No. S-03-924: **Didier v. Ash Grove Cement Co**. Petition of appellee for further review sustained on February 23, 2006.

No. A-03-1136: **Meredith v. Schwarck Quarries**, 13 Neb. App. 765 (2005). Petition of appellant for further review overruled on October 13, 2005.

No. A-03-1167: **Hornbarger v. TMS Design Servs**. Petition of appellant for further review overruled on September 28, 2005.

No. A-03-1209: **Westergaard v. Westergaard**. Petition of appellant for further review overruled on September 14, 2005.

No. A-03-1217: **Kramper Family Farm v. Beef Products**. Petition of appellant for further review overruled on October 26, 2005.

No. A-03-1318: **Lynn v. Jelinek**. Petition of appellant for further review overruled on October 26, 2005.

No. A-03-1331: **Salber v. Salber**. Petition of appellee for further review overruled on April 12, 2006.

No. A-03-1345: **Vande Guchte v. Hoffman**. Petition of appellant for further review overruled on December 14, 2005.

No. A-03-1361: **McCombs v. Haley**, 13 Neb. App. 729 (2005). Petition of appellant for further review overruled on September 28, 2005.

No. A-03-1425: **Edlund v. 4-S, LLC**, 13 Neb. App. 800 (2005). Petition of appellee for further review overruled on November 23, 2005.

No. A-04-034: **Thille & Son Constr. v. Thille**. Petition of appellee for further review overruled on September 28, 2005.

No. A-04-066: **Johnson v. B & K Enters**. Petition of appellant for further review overruled on November 23, 2005.

No. A-04-077: **Vital Learning Corp. v. Talent Plus**. Petition of appellant for further review overruled on October 13, 2005.

No. A-04-146: **State v. Charles**. Petition of appellant for further review overruled on May 18, 2006.

Nos. A-04-153, A-04-437: **Ord v. AmFirst Invest. Servs.**, 14 Neb. App. 97 (2005). Petitions of appellee AmFirst Bank for further review overruled on December 14, 2005.

No. A-04-184: **In re Estate of Peters**. Petition of appellee Dennis Egge for further review overruled on April 26, 2006.

No. A-04-184: **In re Estate of Peters**. Petition of appellee Kevin Peters for further review overruled on April 26, 2006.

No. S-04-237: **Bronsen v. Dawes County**, 14 Neb. App. 82 (2005). Petition of appellant for further review sustained on November 16, 2005.

No. A-04-266: **Helvering v. Union Pacific RR. Co.**, 13 Neb. App. 818 (2005). Petition of appellant for further review dismissed on October 11, 2005, for failure to timely file the fee. See, rule 2F(1); *Robertson v. Rose*, 270 Neb. 466, 704 N.W.2d 227 (2005).

No. A-04-282: **Vater v. County of Lancaster**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. Petition of appellant for further review overruled on February 15, 2006.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. Petition of appellee for further review overruled on February 15, 2006.

No. A-04-502: **C. Goodrich, Inc. v. Thies**, 14 Neb. App. 170 (2005). Petition of appellee for further review overruled on February 23, 2006.

No. A-04-521: **State v. Schmidt**. Petition of appellant for further review overruled on November 30, 2005.

Nos. A-04-565, A-04-566: **State v. Policky**. Petitions of appellant for further review overruled on September 28, 2005.

No. A-04-582: **National Programs v. Heritage Admin. Servs**. Petition of appellant for further review overruled on March 15, 2006.

No. A-04-596: **State v. Holzer**. Petition of appellant for further review overruled on April 19, 2006.

No. A-04-607: **State v. Moyer**. Petition of appellant for further review overruled on January 5, 2006.

No. A-04-617: **In re Guardianship of Brenda B. et al.**, 13 Neb. App. 618 (2005). Petition of appellee for further review overruled on September 21, 2005.

No. S-04-627: **Roseland v. Strategic Staff Mgmt.**, 14 Neb. App. 434 (2006). Petition of appellee for further review sustained on April 12, 2006.

No. A-04-683: **Howe v. Hinzman**, 14 Neb. App. 544 (2006). Petition of appellant for further review overruled on May 18, 2006.

No. A-04-684: **Hute v. County of Lancaster**. Petition of appellant for further review overruled on January 5, 2006.

No. A-04-725: **State v. Feldhacker**. Petition of appellant pro se for further review overruled on October 26, 2005.

No. A-04-735: **Marti v. Marti**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-756: **Precision Enters. v. Duffack Enters.**, 14 Neb. App. 512 (2006). Petition of appellant for further review overruled on April 12, 2006.

No. A-04-770: **Anderson v. Anderson**. Petition of appellant for further review overruled on October 26, 2005.

No. A-04-770: **Anderson v. Anderson**. Petition of appellant pro se for further review overruled on October 26, 2005.

No. A-04-774: **Hughes v. Poyko-Post**. Petition of appellant for further review overruled on March 15, 2006.

No. A-04-777: **Vande Guchte v. Kort**, 13 Neb. App. 875 (2005). Petition of appellant for further review overruled on November 16, 2005.

No. A-04-829: **Messinger v. Forsman**. Petition of appellee for further review overruled on June 20, 2006, as filed out of time.

No. S-04-844: **State v. Lykens**, 13 Neb. App. 849 (2005). Petition of appellee for further review sustained on October 19, 2005.

Nos. A-04-848, A-04-849: **State v. Hernandez-Martinez**. Petitions of appellant for further review overruled on March 29, 2006.

No. A-04-893: **Peterson v. Peterson**, 14 Neb. App. 778 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-04-894: **Nielsen v. Nielsen**. Petition of appellee for further review overruled on October 19, 2005.

No. A-04-919: **State v. Rye**, 14 Neb. App. 133 (2005). Petition of appellant for further review overruled on March 1, 2006.

No. A-04-984: **State v. Romero**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1011: **State v. Groves**. Petition of appellant for further review overruled on October 26, 2005.

No. A-04-1037: **State v. Nguth**, 13 Neb. App. 783 (2005). Petition of appellee for further review overruled on October 13, 2005.

No. A-04-1041: **State v. Nunez**. Petition of appellant for further review overruled on February 1, 2006.

No. A-04-1080: **State v. McSwine**. Petition of appellant for further review overruled on June 7, 2006.

No. A-04-1096: **Bob Bennie Properties v. Design Data**. Petition of appellee for further review overruled on June 7, 2006.

No. A-04-1123: **Michael L. v. Angelita S**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1141: **State v. Belk**, 14 Neb. App. 53 (2005). Petition of appellee for further review overruled on February 15, 2006.

No. S-04-1158: **State v. Furrey**. Petition of appellant for further review sustained on September 21, 2005.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Farnam Bank for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellee Rupp for further review overruled on July 6, 2006.

No. A-04-1171: **Norby v. Farnam Bank**. Petition of appellees Franzen and Widick for further review overruled on July 6, 2006.

No. A-04-1205: **Mickelsen v. Newton**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1213: **Hibbs v. Nebraska State Patrol**. Petition of appellant for further review overruled on May 18, 2006.

No. A-04-1232: **Anderson v. Anderson**. Petition of appellant for further review overruled on March 1, 2006.

No. A-04-1249: **In re Interest of Sadie W. & Noah W.** Petition of appellant for further review overruled on November 30, 2005.

No. A-04-1251: **Campagna v. Higday**, 14 Neb. App. 749 (2006). Petition of appellant for further review overruled on July 12, 2006.

No. A-04-1254: **In re Interest of Olivia W. & Lucien W.** Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1257: **State v. McCardle**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1259: **State v. Dunn**, 14 Neb. App. 144 (2005). Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1259: **State v. Dunn**, 14 Neb. App. 144 (2005). Petition of appellee for further review overruled on December 14, 2005.

No. A-04-1260: **State v. Fountain**. Petition of appellant for further review overruled on May 24, 2006.

No. A-04-1272: **State v. Wells**. Petition of appellant for further review overruled on September 21, 2005.

No. A-04-1274: **State v. Ramsay**. Petition of appellant for further review overruled on December 21, 2005.

No. A-04-1298: **State v. Anderson**, 14 Neb. App. 253 (2005). Petition of appellant for further review overruled on April 12, 2006.

No. A-04-1318: **Henderson v. Henderson**. Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1333: **Cash v. Clarke**. Petition of appellant for further review overruled on January 25, 2006.

No. A-04-1337: **Dworak v. Dworak**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1343: **State v. Alameen**. Petition of appellant for further review overruled on February 15, 2006.

No. A-04-1351: **State v. Smith**. Petition of appellee for further review overruled on September 28, 2005.

No. A-04-1352: **State v. Wayt**, 13 Neb. App. 759 (2005). Petition of appellant for further review overruled on January 5, 2006.

Nos. A-04-1357, A-05-105, A-05-388: **Partch v. Partch**. Petitions of appellant for further review overruled on June 21, 2006.

No. A-04-1361: **In re Guardianship of Breeahana C.**, 14 Neb. App. 182 (2005). Petition of appellant for further review overruled on January 5, 2006.

No. A-04-1366: **State v. Abboud**. Petition of appellant for further review overruled on December 14, 2005.

No. A-04-1384: **Roepke v. Roepke**. Petition of appellant for further review overruled on April 12, 2006.

No. A-04-1403: **State v. Hyde**. Petition of appellant for further review overruled on January 19, 2006.

No. A-04-1415: **Arias v. Board of Parole**. Petition of appellant for further review overruled on September 14, 2005.

No. A-04-1419: **In re Interest of Travis B**. Petition of appellant for further review overruled on February 15, 2006.

No. A-04-1432: **Stauffer v. Stauffer**. Petition of appellant for further review overruled on November 23, 2005.

No. A-04-1434: **State v. Rodriguez**. Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1487: **Spence v. Bush**, 13 Neb. App. 890 (2005). Petition of appellant for further review overruled on November 16, 2005.

No. A-04-1488: **State on behalf of Ephraim H. v. Jon P**. Petition of appellee Phillip R. for further review overruled on November 16, 2005.

No. A-05-011: **Scott v. Drivers Mgmt., Inc.**, 14 Neb. App. 630 (2006). Petition of appellant for further review overruled on June 21, 2006.

No. A-05-011: **Scott v. Drivers Mgmt., Inc.**, 14 Neb. App. 630 (2006). Petition of appellee for further review overruled on June 21, 2006.

No. A-05-026: **State v. Gilbert**. Petition of appellant for further review overruled on October 26, 2005.

No. A-05-028: **State v. Brown**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-050: **State v. Rodriguez**. Petition of appellant for further review overruled on October 19, 2005.

No. A-05-055: **In re Interest of Cody S**. Petition of appellant for further review overruled on November 30, 2005.

No. S-05-069: **State v. Caniglia**, 14 Neb. App. 714 (2006). Petition of appellee for further review sustained on June 28, 2006.

No. A-05-110: **Matthews v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-112: **State v. Sargent**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-114: **Grandt v. Douglas County**, 14 Neb. App. 219 (2005). Petition of appellant for further review overruled on February 1, 2006.

No. A-05-131: **State v. Gade**. Petition of appellant for further review overruled on December 21, 2005.

No. A-05-134: **In re Conservatorship of Anderson**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-146: **State ex rel. Bonner v. McSwine**, 14 Neb. App. 486 (2006). Petition of appellant for further review overruled on March 29, 2006.

No. A-05-202: **Wells v. Goodyear Tire & Rubber Co.**, 14 Neb. App. 384 (2005). Petition of appellant for further review overruled on March 29, 2006.

No. S-05-212: **State v. Tompkins**, 14 Neb. App. 526 (2006). Petition of appellant for further review granted on May 18, 2006.

No. A-05-214: **State v. Richards**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-218: **State v. Davey**. Petition of appellant for further review overruled on September 21, 2005.

No. A-05-223: **State v. Burks**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-224: **State v. Parnell**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-249: **State v. Romero**. Petition of appellant for further review overruled on September 26, 2005, as untimely filed.

No. A-05-250: **State v. George**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-258: **In re Interest of Tyreek T. & Asia R.** Petition of appellant for further review overruled on November 16, 2005.

No. A-05-274: **State v. Alm**. Petition of appellant for further review overruled on October 13, 2005.

No. A-05-286: **State v. La**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-300: **Hendrix v. Sivick**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-308: **State v. Roman**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-318: **State v. Benish**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-340: **In re Interest of Devin P. et al**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-347: **Gardner v. Negley**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-357: **State v. Parrott**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-370: **State v. Bernhardt**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-377: **State v. Bartunek**. Petition of appellant for further review overruled on February 1, 2006.

No. A-05-382: **In re Interest of Emma B**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-395: **Shepard v. Hill**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-397: **State v. Starks**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-419: **State v. Shelby**. Petition of appellant for further review overruled on October 13, 2005.

No. S-05-425: **In re Interest of Veronica H.**, 14 Neb. App. 316 (2005). Petition of appellant for further review sustained on March 1, 2006.

No. A-05-428: **State v. Arevalo-Martinez**. Petition of appellant for further review overruled on June 5, 2006, as filed out of time.

No. A-05-432: **State v. Wells**. Petition of appellant for further review overruled on November 30, 2005.

No. S-05-449: **Zach v. Nebraska State Patrol**, 14 Neb. App. 579 (2006). Petition of appellant for further review sustained on June 14, 2006.

No. A-05-456: **State v. Munoz**. Petition of appellant for further review overruled on October 13, 2005.

No. A-05-470: **State v. Harwell**. Petition of appellant for further review overruled on October 19, 2005.

No. A-05-471: **State v. Lopez**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-473: **State v. Hayes**. Petition of appellant for further review overruled on December 14, 2005.

Nos. A-05-481, A-05-482: **In re Interest of Zakary B. & Natasha B**. Petitions of appellee Pamela S. for further review overruled on February 15, 2006.

No. A-05-483: **State v. Howard**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-493: **State v. Grosvenor**. Petition of appellee for further review overruled on January 17, 2006, as filed out of time. See rule 2F(1).

No. A-05-503: **State v. Carter**. Petition of appellant for further review overruled on September 28, 2005.

No. A-05-512: **State v. Renteria**. Petition of appellant for further review overruled on October 3, 2005, as filed out of time.

No. S-05-529: **State v. Bruna**, 14 Neb. App. 408 (2006). Petition of appellant for further review sustained on April 12, 2006.

No. A-05-535: **State v. Schleiger**. Petition of appellant for further review overruled on December 21, 2005.

No. A-05-543: **State v. Brown**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-569: **State v. Mendez-Lopez**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-581: **State v. Johnson**. Petition of appellant for further review overruled on December 14, 2005.

No. A-05-588: **Tran-Villarreal v. Villarreal**. Petition of appellant for further review dismissed on June 22, 2006. See rule 2F(1).

No. A-05-590: **Ruzicka v. Dalton's Auto Center**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-595: **State v. O'Hara**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-596: **State v. James**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-610: **Porter v. Neth**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-625: **State v. Ornelas-Perez**. Petition of appellant for further review overruled on June 21, 2006.

Nos. A-05-647, A-05-648: **State v. Chapman**. Petitions of appellant for further review overruled on December 21, 2005.

No. A-05-649: **Buggs v. Britten**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-653: **State v. Rouse**. Petition of appellant for further review overruled on May 19, 2006, as untimely filed.

No. A-05-671: **State v. Hansen**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-682: **State v. Stekr**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-685: **State v. Bragg**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-692: **State v. Koch**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-736: **State v. Heckenliable**. Petition of appellant for further review overruled on November 30, 2005.

Nos. A-05-737 through A-05-740: **State v. Greathouse**. Petitions of appellant for further review overruled on February 23, 2006.

No. A-05-741: **State v. Cutshall**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-745: **State v. Head**, 14 Neb. App. 684 (2006). Petition of appellee for further review overruled on June 28, 2006.

No. A-05-790: **State v. Adamson**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-791: **State v. Fry**. Petition of appellant for further review overruled on January 19, 2006.

No. A-05-795: **Churchill v. Churchill**. Petition of appellant for further review overruled on June 28, 2006.

No. A-05-798: **Arias v. Board of Parole**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-800: **State v. Sextro**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-804: **State v. Haas**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-815: **Burnham v. Pacesetter Corp**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-815: **Burnham v. Pacesetter Corp**. Petition of appellees for further review overruled on May 18, 2006.

No. A-05-824: **State v. Millan**. Petition of appellant for further review overruled on February 1, 2006.

No. A-05-826: **State v. Allen**. Petition of appellant for further review overruled on February 1, 2006.

No. S-05-838: **Rasch v. Remedy Intelligent Staffing**. Petition of appellant for further review sustained on May 24, 2006.

No. A-05-841: **State v. Young**. Petition of appellant for further review overruled on March 1, 2006.

Nos. A-05-842 through A-05-844: **State v. Young**. Petitions of appellant for further review overruled on January 19, 2006.

Nos. A-05-866, A-05-867: **In re Interest of Frederick A. & Elliott A**. Petitions of appellant for further review overruled on January 19, 2006.

No. A-05-868: **State v. Jensen**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-872: **Homemakers v. Douglas Cty. Bd. of Equal**. Petition of appellee for further review overruled on June 14, 2006.

No. A-05-881: **State v. Murphy**, 14 Neb. App. 804 (2006). Petition of appellant for further review overruled on July 19, 2006.

No. A-05-907: **State ex rel. Bruning v. California Alternative High Sch**. Petition of appellant for further review overruled on November 23, 2005.

No. A-05-957: **State v. Evans**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-959: **Salazar v. Baily's Tire & Serv**. Petition of appellee for further review overruled on July 6, 2006.

No. A-05-969: **State v. Baeza**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-972: **In re Interest of Peyton H**. Petition of appellee for further review overruled on March 22, 2006.

No. A-05-988: **Rab v. Muhammad**. Petition of appellant for further review overruled on November 16, 2005.

No. A-05-995: **Griffin v. Drivers Mgmt., Inc.**, 14 Neb. App. 722 (2006). Petition of appellee for further review overruled on June 21, 2006.

No. A-05-1009: **Billups v. Clarke**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1015: **State v. Arthur**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1017: **In re Interest of Amanda J**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1018: **State v. Stewart**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1023: **State v. Conn**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1030: **State v. Schmader**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1032: **In re Interest of Septembur L. & Jaden L**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1042: **State v. Velazquez**. Petition of appellant for further review overruled on March 15, 2006.

No. A-05-1058: **State v. Hays**. Petition of appellant for further review overruled on February 23, 2006.

No. A-05-1068: **In re Interest of Dwight R**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1071: **State v. Rodriguez**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1072: **In re Interest of Chloe L. & Ethan L.**, 14 Neb. App. 663 (2006). Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1072: **In re Interest of Chloe L. & Ethan L.**, 14 Neb. App. 663 (2006). Petition of appellee Daniel L. for further review overruled on June 14, 2006.

No. A-05-1079: **In re Interest of Michael B. et al**. Petition of appellant for further review overruled on May 24, 2006.

No. A-05-1081: **State v. Fletcher**. Petition of appellant for further review overruled on March 29, 2006.

No. A-05-1086: **State v. Beck**. Petition of appellant for further review overruled on May 18, 2006.

Nos. A-05-1089, A-05-1090: **State v. Hansen**. Petitions of appellant for further review overruled on June 7, 2006.

No. A-05-1135: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on November 30, 2005.

No. A-05-1140: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1157: **State v. Miner**. Petition of appellant for further review overruled on July 6, 2006.

No. A-05-1177: **In re Interest of Casey S. et al**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-1186: **State v. Weiler**. Petition of appellant for further review overruled on April 26, 2006.

No. A-05-1195: **Hansen v. Vampola**. Petition of appellant for further review overruled on July 14, 2006, as untimely filed. See rule 2F(1).

No. A-05-1209: **Capital One Bank v. Vigil**. Petition of appellee for further review overruled on April 26, 2006.

No. A-05-1210: **State v. Murphy**. Petition of appellant for further review overruled on February 27, 2006, as prematurely filed.

No. A-05-1233: **Arias v. Department of Corr. Servs**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1235: **Becker v. PBX, Inc**. Petition of appellant for further review overruled on April 19, 2006.

No. A-05-1241: **State v. Lickliter**. Petition of appellant for further review overruled on June 14, 2006.

No. A-05-1244: **State v. Minard**. Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1294: **State v. Matteo**. Petition of appellant for further review overruled on June 13, 2006, as untimely filed. See rule 2F(1).

No. A-05-1296: **State v. Zmievski**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1302: **State v. Henning**. Petition of appellant for further review overruled on May 5, 2006, as untimely filed.

No. A-05-1307: **State v. Schmutte**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1312: **State v. Cline**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1323: **Lockman v. Diekmann**. Petition of appellant for further review overruled on May 18, 2006.

Nos. A-05-1324, A-05-1325: **In re Interest of Chynne P. et al**. Petitions of appellant for further review overruled on August 8, 2006.

No. A-05-1329: **Ruegge v. State**. Petition of appellant for further review overruled on February 15, 2006.

No. A-05-1335: **In re Interest of Andrew S.**, 14 Neb. App. 739 (2006). Petition of appellant for further review overruled on June 21, 2006.

No. A-05-1392: **State v. Reid**. Petition of appellant for further review overruled on June 7, 2006.

No. A-05-1400: **Jones v. Platteview Apartments**. Petition of appellant for further review overruled on January 25, 2006.

No. A-05-1407: **In re Interest of Brandon G**. Petition of appellant for further review overruled on July 19, 2006.

No. A-05-1413: **State v. Biloff**. Petition of appellant for further review overruled on April 12, 2006.

No. A-05-1414: **State v. Bussart**. Petition of appellant for further review overruled on May 18, 2006.

No. A-05-1440: **State v. Latzel**. Petition of appellant for further review overruled on June 28, 2006.

No. A-05-1447: **State v. Cook**. Petition of appellant for further review overruled on May 24, 2006.

No. A-05-1455: **State v. McClure**. Petition of appellant for further review overruled on July 12, 2006.

No. A-05-1470: **Martin v. Department of Corr. Servs.** Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1471: **Martin v. Board of Parole**. Petition of appellant for further review overruled on March 1, 2006.

No. A-05-1528: **Saylor v. Department of Corr. Servs.** Petition of appellant for further review overruled on March 15, 2006. See *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-05-1568: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 19, 2006. See rule 2F(3).

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on February 13, 2006.

No. A-06-010: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on March 7, 2006, as premature.

No. S-06-015: **Liming v. Liming**. Petition of appellant for further review sustained on May 18, 2006.

No. A-06-059: **State v. Wehr**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-071: **Cole v. Clarke**. Petition of appellant for further review overruled on June 7, 2006.

No. A-06-080: **State v. Mendoza**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant for further review overruled on June 28, 2006.

No. A-06-138: **State v. Hymond**. Petition of appellant pro se for further review overruled on June 28, 2006.

No. A-06-167: **Marriott v. SID No. 230**. Petition of appellant for further review overruled on July 6, 2006.

No. S-06-235: **In re Interest of Fedalina G**. Petition of appellant for further review sustained on July 19, 2006.

No. S-06-258: **Foster v. BryanLGH Med. Ctr. East**. Petition of appellant for further review sustained on July 6, 2006.

No. A-06-290: **Dunham v. State Patrol**. Petition of appellant for further review overruled on July 6, 2006.

No. A-06-365: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on June 20, 2006, as premature.

No. A-06-366: **Keup v. Department of Corr. Servs**. Petition of appellant for further review overruled on July 19, 2006.

No. A-06-402: **In re Interest of Emma B**. Petition of appellant for further review overruled on July 12, 2006.

No. A-06-602: **State ex rel. Tyler v. Department of Corrections**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-603: **State ex rel. Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-604: **Tyler v. Houston**. Petition of appellant for further review overruled on July 28, 2006, as prematurely filed. See rule 2F(1).

No. A-06-698: **State v. Tyler**. Petition of appellant for further review overruled on August 14, 2006, as premature. See rule 2F(1).

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-03-924: **Didier v. Ash Grove Cement Co**. 05 NCA No. 38. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-03-1059: **Morrissey v. Knippelmeyer**. 06 NCA No. 9. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-03-1331: **Salber v. Salber**. 06 NCA No. 7. Former opinion modified. Motions for rehearing overruled. Cassel, Judge.

No. A-04-147: **Acton v. Acton**. 06 NCA No. 15. Affirmed. Moore, Judge.

No. A-04-184: **In re Estate of Peters**. 05 NCA No. 41. Affirmed in part, and in part reversed. Inbody, Chief Judge.

No. A-04-257: **Hooper v. Hooper**. 05 NCA No. 40. Affirmed. Moore, Judge.

No. A-04-282: **Vater v. County of Lancaster**. 05 NCA No. 40. Affirmed. Cassel, Judge.

No. A-04-303: **InfoUSA.com, Inc. v. Berj, Inc**. 05 NCA No. 42. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-04-306: **State v. Weiler**. 05 NCA No. 47. Affirmed in part, and in part reversed and remanded for further proceedings. Irwin, Judge.

No. A-04-348: **Springer v. Springer**. 05 NCA No. 45. Affirmed. Inbody, Chief Judge.

No. A-04-513: **Burrell v. Kwik Shop**. 05 NCA No. 42. Reversed and remanded for a new trial. Sievers, Judge.

No. A-04-514: **Wiseman v. Wiseman**. 05 NCA No. 39. Affirmed in part, and in part reversed. Carlson, Judge.

No. A-04-596: **State v. Holzer**. 06 NCA No. 10. Affirmed. Inbody, Chief Judge.

No. A-04-666: **Lascsak v. Hollingsworth**. 06 NCA No. 13. Affirmed. Moore, Judge.

No. A-04-673: **Erikson v. Abels**. 06 NCA No. 10. Affirmed. Sievers, Judge.

No. A-04-675: **Darling v. Midwest Partitions**. 05 NCA No. 47. Affirmed. Irwin, Judge.

No. A-04-709: **Royer v. Royer**. 06 NCA No. 13. Affirmed. Irwin, Judge.

No. A-04-732: **State v. Norris**. 06 NCA No. 2. Affirmed. Carlson, Judge.

No. A-04-735: **Marti v. Marti**. 06 NCA No. 5. Affirmed as modified. Carlson, Judge.

No. A-04-746: **State v. Horst**. 05 NCA No. 39. Affirmed. Irwin, Judge.

No. A-04-761: **Farmers Co-op Elev. Co. v. Jelinek**. 06 NCA No. 5. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge.

No. A-04-801: **Thomas v. First Nat. Life Ins**. 06 NCA No. 5. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-04-829: **Messinger v. Forsman**. 06 NCA No. 18. Reversed and remanded with directions. Carlson, Judge.

Nos. A-04-848, A-04-849: **State v. Hernandez-Martinez**. 06 NCA No. 3. Affirmed. Inbody, Chief Judge.

No. A-04-858: **Controlled Rain v. Sanders**. 06 NCA No. 20. Affirmed. Cassel, Judge.

No. A-04-865: **Monroe v. Monroe**. 06 NCA No. 20. Appeal dismissed. Moore, Judge.

No. A-04-867: **Perry v. Krone Digital Comm**. 05 NCA No. 40. Affirmed. Inbody, Chief Judge.

No. A-04-873: **Anderson v. Anderson**. 06 NCA No. 6. Affirmed. Moore, Judge.

No. A-04-884: **Nichols v. Nichols**. 06 NCA No. 18. Affirmed in part, and in part appeal dismissed. Irwin, Judge.

No. A-04-921: **Blair v. Nebraska Dept. of Corr. Servs**. 06 NCA No. 6. Affirmed. Cassel, Judge.

No. A-04-1041: **State v. Nunez**. 05 NCA No. 44. Affirmed. Moore, Judge.

No. A-04-1046: **Brokaw v. Spence**. 06 NCA No. 20. Affirmed. Inbody, Chief Judge.

No. A-04-1077: **Anderson v. Christensen**. 06 NCA No. 26. Affirmed in part, and in part reversed. Sievers, Judge.

No. A-04-1088: **Forgey v. Nebraska Dept. of Motor Vehicles**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-04-1096: **Bob Bennie Properties v. Design Data**. 06 NCA No. 15. Affirmed in part as modified, and in part reversed. Carlson, Judge.

No. A-04-1114: **Mruk v. Mruk**. 06 NCA No. 10. Affirmed. Cassel, Judge.

No. A-04-1135: **Higgins v. Higgins**. 05 NCA No. 51. Affirmed. Carlson, Judge.

No. A-04-1168: **U.S. Bank Nat. Assn. v. Empire Park Joint Venture**. 06 NCA No. 21. Affirmed. Inbody, Chief Judge.

No. A-04-1193: **Eran Indus. v. City of La Vista**. 06 NCA No. 26. Affirmed in part, and in part reversed. Irwin, Judge.

No. A-04-1205: **Mickelsen v. Newton**. 06 NCA No. 13. Affirmed. Sievers, Judge.

No. A-04-1213: **Hibbs v. Nebraska State Patrol**. 06 NCA No. 11. Affirmed. Inbody, Chief Judge.

No. A-04-1214: **Lenzen v. JG Shopping Ctr. Mgmt**. 06 NCA No. 33. Affirmed. Cassel, Judge.

No. A-04-1236: **Berens v. McNeil Company**. 06 NCA No. 22. Reversed and remanded for further proceedings. Irwin, Judge.

No. A-04-1238: **Thomas v. Hollinger**. 06 NCA No. 23. Affirmed. Carlson, Judge.

No. A-04-1314: **Caudill v. Roberts**. 06 NCA No. 26. Affirmed. Sievers, Judge.

No. A-04-1349: **Schlondorf v. Breunig**. 06 NCA No. 33. Affirmed. Cassel, Judge.

No. A-04-1381: **State v. Robinson**. 05 NCA No. 45. Affirmed. Inbody, Chief Judge.

No. A-04-1386: **Porter v. Neth**. 06 NCA No. 20. Reversed and remanded with directions. Irwin, Judge.

No. A-04-1419: **In re Interest of Travis B**. 05 NCA No. 45. Affirmed. Inbody, Chief Judge.

No. A-04-1432: **Stauffer v. Stauffer**. 05 NCA No. 41. Affirmed. Inbody, Chief Judge.

No. A-04-1459: **Richmond v. Peterson**. 06 NCA No. 30. Affirmed. Moore, Judge.

No. A-04-1488: **State on behalf of Ephraim H. v. Jon P**. 05 NCA No. 39. Reversed. Irwin, Judge.

No. A-05-014: **State v. Schoen**. 06 NCA No. 4. Affirmed. Sievers, Judge.

No. A-05-024: **Reed v. Drivers Mgmt., Inc**. 05 NCA No. 40. Affirmed. Moore, Judge.

No. A-05-034: **Lundy v. Shelter Mut. Ins. Co**. 06 NCA No. 35. Affirmed in part, and in part reversed. Irwin, Judge.

No. A-05-042: **Wineteer v. Wineteer**. 06 NCA No. 35. Affirmed as modified. Sievers, Judge.

No. A-05-043: **Sanderson v. Department of Motor Vehicles**. 06 NCA No. 26. Reversed and remanded with directions. Sievers, Judge.

No. A-05-048: **Stednitz v. Associated Press**. 06 NCA No. 26. Affirmed. Inbody, Chief Judge.

No. A-05-106: **Jepsen v. Greenfield Sales**. 06 NCA No. 26. Affirmed. Irwin, Judge.

No. A-05-134: **In re Conservatorship of Anderson**. 06 NCA No. 7. Affirmed. Sievers, Judge.

No. A-05-250: **State v. George**. 06 NCA No. 13. Affirmed. Irwin, Judge.

No. A-05-259: **In re Interest of Dayzanequie B. & Dayjeonna B**. 05 NCA No. 47. Affirmed. Carlson, Judge.

No. A-05-277: **In re Interest of Chelsea B. & Gage K**. 05 NCA No. 39. Affirmed. Carlson, Judge.

No. A-05-300: **Hendrix v. Sivick**. 06 NCA No. 11. Affirmed as modified. Cassel, Judge.

No. A-05-335: **State v. Burkhardt**. 05 NCA No. 51. Reversed and remanded for a new trial. Carlson, Judge.

No. A-05-347: **Gardner v. Negley**. 05 NCA No. 52. Affirmed. Carlson, Judge.

No. A-05-371: **Polanowski v. Neth**. 06 NCA No. 26. Affirmed. Cassel, Judge.

No. A-05-374: **Conroy v. Columbia Ins. Co**. 06 NCA No. 26. Affirmed. Cassel, Judge.

No. A-05-386: **State on behalf of Janda v. Janda**. 05 NCA No. 52. Affirmed. Carlson, Judge.

No. A-05-387: **Valasek v. Neth**. 06 NCA No. 28. Affirmed. Moore, Judge.

No. A-05-406: **Cox v. Brady Basements**. 06 NCA No. 10. Affirmed. Moore, Judge.

No. A-05-413: **State v. Rohde**. 06 NCA No. 9. Affirmed. Moore, Judge.

No. A-05-416: **State v. Wichser**. 05 NCA No. 44. Affirmed in part, and in part reversed and remanded for further proceedings. Carlson, Judge.

No. A-05-424: **In re Interest of Latifah N**. 05 NCA No. 44. Affirmed. Irwin, Judge.

No. A-05-428: **State v. Arevalo-Martinez**. 06 NCA No. 18. Affirmed. Sievers, Judge.

No. A-05-442: **In re Interest of Kayla F. et al**. 05 NCA No. 44. Affirmed. Cassel, Judge.

No. A-05-454: **Weiler v. Union Ins. Co**. 06 NCA No. 34. Affirmed. Cassel, Judge.

No. A-05-463: **B & B Sales v. Union Ins. Co**. 06 NCA No. 27. Affirmed. Moore, Judge.

No. A-05-466: **SFI Ltd. Part. II v. Sarpy Cty. Bd. of Equal**. 06 NCA No. 15. Affirmed. Irwin, Judge.

No. A-05-497: **In re Interest of Sharae H**. 05 NCA No. 42. Affirmed. Irwin, Judge.

No. A-05-519: **Zink v. Neth**. 06 NCA No. 27. Affirmed. Sievers, Judge.

No. A-05-558: **State v. McKay**. 06 NCA No. 13. Affirmed. Irwin, Judge.

No. A-05-567: **State v. Tomek**. 06 NCA No. 22. Affirmed. Sievers, Judge.

No. A-05-653: **State v. Rouse**. 06 NCA No. 15. Affirmed. Cassel, Judge.

No. A-05-692: **State v. Koch**. 06 NCA No. 23. Affirmed. Carlson, Judge.

No. A-05-722: **State v. Graves**. 06 NCA No. 33. Affirmed. Irwin, Judge.

No. A-05-723: **State v. Alford**. 06 NCA No. 22. Affirmed. Irwin, Judge.

Nos. A-05-725, A-05-726: **Sterling v. Sterling**. 06 NCA No. 14. Judgment in No. A-05-725 affirmed in part, and in part reversed and remanded with directions. Judgment in No. A-05-726 reversed and remanded with directions. Irwin, Judge.

Nos. A-05-728, A-05-729: **In re Interest of Jay M. & Johanna M.** 05 NCA No. 47. Affirmed. Irwin, Judge.

No. A-05-800: **State v. Sextro**. 06 NCA No. 15. Affirmed. Irwin, Judge.

No. A-05-804: **State v. Haas**. 06 NCA No. 16. Affirmed. Carlson, Judge.

No. A-05-807: **Bielenberg v. Brodkeys Carpet One Omaha**. 06 NCA No. 10. Affirmed. Irwin, Judge.

No. A-05-815: **Burnham v. Pacesetter Corp**. 06 NCA No. 5. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge.

No. A-05-838: **Rasch v. Remedy Intelligent Staffing**. 06 NCA No. 15. Affirmed. Moore, Judge. Carlson, Judge, dissenting.

No. A-05-848: **State v. Chancellor**. 06 NCA No. 23. Affirmed in part, sentences vacated in part, and in part reversed and remanded. Sievers, Judge.

No. A-05-865: **In re Interest of Miguel G**. 06 NCA No. 7. Affirmed. Inbody, Chief Judge.

No. A-05-872: **Homemakers v. Douglas Cty. Bd. of Equal**. 06 NCA No. 18. Reversed and remanded with directions. Sievers, Judge.

No. A-05-915: **Deitloff Transfer v. Omaha Truck Ctr**. 06 NCA No. 30. Reversed and remanded with directions. Cassel, Judge.

No. A-05-932: **In re Interest of Sierra E**. 06 NCA No. 8. Affirmed. Irwin, Judge.

No. A-05-981: **Deann E. v. Jeffery E**. 06 NCA No. 10. Affirmed. Moore, Judge.

No. A-05-985: **Thomas v. Dugan Funeral Servs**. 06 NCA No. 22. Affirmed. Carlson, Judge.

No. A-05-1003: **State v. VanDorien**. 06 NCA No. 30. Affirmed in part, and in part vacated and remanded for resentencing. Irwin, Judge.

No. A-05-1004: **State v. White**. 06 NCA No. 31. Affirmed. Moore, Judge.

No. A-05-1043: **State v. Hysell**. 06 NCA No. 30. Affirmed. Moore, Judge.

No. A-05-1049: **Margo M. v. Martin S**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-05-1108: **Jackson v. Precision Builders**. 06 NCA No. 28. Affirmed. Carlson, Judge.

No. A-05-1130: **Velehradsky v. Velehradsky**. 06 NCA No. 30. Affirmed as modified. Carlson, Judge.

No. A-05-1131: **State v. Stetz**. 06 NCA No. 26. Affirmed in part, and in part reversed and remanded with directions. Carlson, Judge.

Nos. A-05-1141, A-05-1142: **State v. Schmutz**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-05-1153: **State v. Agee**. 06 NCA No. 31. Affirmed in part, and in part vacated and remanded with directions. Moore, Judge.

No. A-05-1197: **Putzier v. Aurstaff**. 06 NCA No. 33. Affirmed. Irwin, Judge.

No. A-05-1217: **Poskochil v. Poskochil**. 06 NCA No. 30. Affirmed as modified. Cassel, Judge.

No. A-05-1234: **McPherson v. VFW of Geneva**. 06 NCA No. 34. Affirmed. Irwin, Judge.

No. A-05-1266: **Maag v. Maag**. 06 NCA No. 28. Reversed and remanded with directions. Irwin, Judge.

No. A-05-1300: **Bing v. Drivers Mgmt**. 06 NCA No. 30. Affirmed. Irwin, Judge.

No. A-05-1365: **In re Interest of Sarah T**. 06 NCA No. 26. Affirmed. Irwin, Judge.

Nos. A-05-1381 through A-05-1384: **In re Interest of Vanessa R. & Mario R**. 06 NCA No. 22. Judgments in Nos. A-05-1381 and A-05-1382 affirmed. Judgments in Nos. A-05-1383 and A-05-1384 reversed, and causes remanded for further proceedings. Irwin, Judge.

No. A-05-1407: **In re Interest of Brandon G**. 06 NCA No. 22. Affirmed. Carlson, Judge.

No. A-05-1409: **In re Interest of Lawrence H**. 06 NCA No. 26. Appeal dismissed. Carlson, Judge.

No. A-05-1418: **State v. Portsche**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-05-1510: **In re Interest of Navaeh C**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-05-1535: **State v. Rose**. 06 NCA No. 30. Affirmed. Cassel, Judge.

No. A-05-1544: **State v. Prater**. 06 NCA No. 28. Affirmed in part, and in part reversed and sentence modified. Sievers, Judge.

No. A-05-1555: **Olson v. Capital Electric**. 06 NCA No. 33. Affirmed. Cassel, Judge.

No. A-05-1566: **In re Interest of Raymond G. et al**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-06-047: **State v. Howard**. 06 NCA No. 30. Exception sustained, and cause remanded with directions. Inbody, Chief Judge.

No. A-06-074: **Banks v. Midwest Padding**. 06 NCA No. 35. Affirmed. Carlson, Judge.

No. A-06-077: **In re Interest of Malik B**. 06 NCA No. 26. Affirmed. Carlson, Judge.

No. A-06-127: **In re Interest of Jesse B. & Gracie B**. 06 NCA No. 34. Affirmed. Carlson, Judge.

No. A-06-194: **In re Interest of Stephanie G**. 06 NCA No. 35. Affirmed. Moore, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

RICHARD R. NYGREN, APPELLANT, V.
CHERYL A. NYGREN, APPELLEE.

704 N.W.2d 257

Filed September 20, 2005. No. A-03-1042.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Evidence: Appeal and Error.** When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another.
4. **Property Division.** Property owned by a party at the time of marriage is not marital property.
5. **Divorce: Courts: Property Division.** The manner in which property is titled or transferred by the parties during a marriage does not restrict the trial court's determination of how the property will be divided in an action for dissolution of marriage.
6. **Divorce: Property Division.** The equitable property division in an action for the dissolution of marriage involves three steps: (1) to classify the parties' property as marital or nonmarital, (2) to value the marital assets and marital liabilities of the parties, and (3) to calculate and divide the net marital estate between the parties.
7. **Property Division.** The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
8. ____. Property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception applies when both spouses have contributed to the improvement or operation of the property that one of them received by gift or inheritance.
9. **Wills: Time.** Provisions of a will take effect and become operative at the time of the testator's death.
10. **Witnesses: Real Estate: Valuation.** It is the general rule that a witness need not be an expert to testify to the value of land.

11. **Evidence: Appeal and Error.** When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another.
12. **Property Division: Proof.** The burden of proof to show that property is a nonmarital asset remains with the person making the claim.
13. **Evidence: Proof.** Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, the party having the burden of proof may not sustain that burden by a reliance alone on the inference supporting that party's position.
14. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
15. **Appeal and Error.** Alleged errors must be specifically assigned and specifically argued in order to be considered by an appellate court.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed as modified.

Benjamin M. Belmont and Anthony W. Liakos, Senior Certified Law Student, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellant.

Frank X. Haverkamp, of Penke & Haverkamp, for appellee.

CARLSON, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Richard R. Nygren appeals the decree of the Douglas County District Court dissolving his marriage to Cheryl A. Nygren and dividing the parties' property. On appeal, he essentially argues that the trial court erred in classifying certain items and assets as marital property and in dividing the marital estate. We hold that the trial court incorrectly applied the rule from *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), that was specifically disapproved in *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), prior to the trial court's decision. We also hold that the trial court abused its discretion in characterizing some of Richard's nonmarital property as marital property, and we affirm as modified.

BACKGROUND

On November 22, 1991, Richard and Cheryl entered into an antenuptial agreement. It provided that the farm owned by

Richard and the insurance agency owned by Cheryl, along with all other assets owned by the parties at that time, would remain their separate property. Additionally, any income derived from any businesses or assets held by the parties at that time would remain their separate property. Richard and Cheryl provided disclosures of their assets and liabilities as of the date of the antenuptial agreement and attached them to the agreement.

The parties married on November 23, 1991. No children were born to the marriage. Richard had farmed since 1960 on a farm that, as of the time of trial, had been in his family for over 100 years. In 1964, Richard had acquired 40 acres, and then had inherited an additional 40 acres in 1991 (we will refer to these parcels below as the 80-acre property). Richard denied ever gifting or transferring the farm to Cheryl. From the time of their marriage until December 1995, the parties lived on the family farm. At the time of trial, Richard had been employed full time as a truckdriver since 1997 or 1998 and farmed part time. Cheryl had been an agent with an insurance company since 1985. She also possessed a real estate license. During the marriage, Richard and Cheryl maintained separate bank accounts, although Cheryl testified that they had one joint account to which they both contributed for living expenses, such as groceries and entertainment.

On March 12, 1992, Richard obtained a loan from Wahoo State Bank, secured by a deed of trust on the 80-acre property, for approximately $120,000. Cheryl signed the deed of trust, but did not sign the note. Richard used the loan to pay his first wife the final payment pursuant to their divorce decree and to reduce his operating debts at Bank of Mead.

On July 19, 1994, Cheryl made Richard's annual loan payment at Wahoo State Bank in the amount of $14,459.29, from funds generated by her insurance agency. Cheryl presented evidence that $13,629.62 of her contribution went toward interest on the loan, while the remainder went toward debt reduction. Cheryl testified that Richard had asked her to lend him the money, having tried but failed to obtain it elsewhere. She stated that Richard was worried because the loan was in default and that he told her that he feared he would lose the family farm without her help. Cheryl testified that the loan was in danger of foreclosure and that she knew this because the payment was over 3 months overdue and

the bank had called. Based on information from the bank showing that only a slight portion of the principal had been paid, it was Cheryl's understanding that the secured debt on Richard's land still totaled all or nearly all of the value of the land, as it had when they married.

Cheryl suspected that Richard was unable to obtain money elsewhere because of his bad credit. Cheryl testified that many creditors called repeatedly and often. Richard testified that he had been involved in a co-op since 1960, but according to Cheryl, the co-op had refused to bring propane in 1994 "because there was no money." Credit card companies called, "[t]he phone was shutting off," and the local electric utility "was threatening to shut down the power." As of July 1994, Richard still had an outstanding loan at Bank of Mead. Cheryl testified that the loan was always in default. Richard denied ever receiving a notice of default regarding nonpayment at Wahoo State Bank or Bank of Mead.

In July or August 1994, the antenuptial agreement was destroyed by mutual agreement of the parties. The trial court received into evidence a letter, dated August 18, 1994, from the attorney who prepared the antenuptial agreement confirming their intent to destroy it. According to Cheryl, when Richard asked her to help him pay his debt at Wahoo State Bank, she told him that she would not loan him money because of his history with loans. Instead, she offered to "invest in our future together." Cheryl offered to give Richard the money if they destroyed the antenuptial agreement, and they agreed that it was the best thing to do. Richard testified that he considered Cheryl's payments toward his debt to be loans. Cheryl testified that when she and Richard decided to destroy the antenuptial agreement, it was her intention to commingle all of the property that each of them had brought into the marriage and make it marital property, and Cheryl stated that Richard told her that he had the same intention. Richard denied indicating to Cheryl before or after the antenuptial agreement was destroyed that she would have an interest in his farm while he was alive, and he did not recall agreeing to give Cheryl an interest in the farm in return for the payments she made.

On September 26, 1994, Richard executed a new will. According to Cheryl, Richard executed the will to protect her.

Richard's original will had stated that upon his death, Cheryl would have the opportunity to stay in their house and use the income from the farm as long as she did not remarry. Cheryl testified that when they destroyed the antenuptial agreement, however, the provisions of the original will still gave Richard's children standing to inherit the farm completely. Cheryl testified that Richard therefore executed the new will, which provided, in part:

> **DISTRIBUTION OF FARM:** My beloved wife, Cheryl . . . has contributed to reducing the debt on my farm, and has otherwise contributed to my farm. In consideration of this, as well as my love and devotion to her, if she shall survive me, I give, devise and bequeath to her a one-half interest in my farm, to include the land and all appurtenances thereon, subject to the right and obligation of my children to purchase her interest within eighteen months of the date of my death. Should Cheryl and I die simultaneously under the terms of this will, my personal representative, if sufficient assets are available, or the distributees of my farm shall pay Cheryl's children all sums which she contributed to the farm, plus interest at the rate of seven percent thereon from the date of advancement until paid.

Richard explained that the reference to "my farm" meant the 80-acre property. Cheryl stated that in June 1999, Richard reviewed the will and approved it. According to Richard, the will was no longer in existence at the time of trial.

On March 1, 1995, Cheryl paid $7,500 from her business account to Wahoo State Bank toward Richard's annual loan payment, and Richard paid the remaining sum to complete that payment. Cheryl testified that Richard had told her that his crops and the price of hogs "were not good" and that he needed more help. According to Cheryl, Richard again expressed fear that he would lose the family farm without her help.

Cheryl admitted that part of the approximately $22,000 that she put toward the loan payments at Wahoo State Bank came from funds that she had prior to the marriage, though not more than $5,200, which was an estimate of the total amount in Cheryl's checking and savings accounts when she signed the antenuptial agreement. The remainder came from funds she had earned between 1991 and 1995. Cheryl did not recall how much

money was in her savings account when she made the 1995 payment.

Cheryl testified that when she first moved to the parties' farmhouse, the "interior was in bad shape." Cheryl, her brothers, her parents, and her sons made substantial repairs and modifications, including gutting and modernizing an existing bathroom, adding a new bathroom, joining two rooms to make a large bedroom, installing closets, replacing floor coverings, replacing ceilings, and painting inside and outside. Richard admitted that Cheryl did some "decorating" and that her father and brothers "took a wall out" and helped install a new bathroom. According to Richard, it was "debatable" whether such improvements added to the value of the house. Richard denied that Cheryl ever worked on the farm or made any improvements to it during the 4 years they lived there.

On December 26, 1995, Richard sold the house and the 3 acres upon which it stood—part of the aforementioned 80-acre property—to his daughter and son-in-law for approximately $85,000. Richard testified that the 3 acres did not include farmland or buildings other than the house. Cheryl opined, as a real estate agent, that when she and Richard married, the house and the surrounding 3 acres were worth approximately $55,000. Cheryl testified that she could not accurately estimate how much the house increased in value from the time the parties married until the house was sold, but she stated, "I'm sure we had to improve the value with that complete renovation . . . ." On cross-examination, Cheryl admitted that she was not an appraiser and that any values she mentioned in the context of improvements constituted speculation. At the time of sale, the farmhouse and 3 acres were appraised at $106,000.

Richard used $23,949.54 from the sale of the farmhouse and the 3 acres for a downpayment on a house in a southwest subdivision of Omaha, in which house Richard and Cheryl took title as joint tenants. Richard testified that he made the downpayment on that house essentially to repay Cheryl for making the loan payments to Wahoo State Bank in 1994 and 1995. On August 15, 1996, the parties sold that house and purchased another house in southwest Omaha. Cheryl alone was listed on the title for the latter house. On August 31, 1999, the parties sold the latter house,

and they purchased a duplex in northeast Omaha which was likewise titled in Cheryl's name alone and where she lived at the time of trial.

On March 14, 2002, Richard informed Cheryl that he had agreed to sell 37 of the originally 80-acre property's remaining 77 acres to his four children for $80,000, or $2,162.16 per acre. Cheryl testified on direct examination that she was concerned, in part about the parties' retirement prospects, because she believed the 37 acres to be worth more than $80,000. She then testified about her opinion concerning the per-acre value of the land:

> [Cheryl's counsel:] Do you have an opinion as to the value of farmland of that type in that area?
>
> [Cheryl:] I can only state what I know the bank has told me, and —
>
> [Richard's counsel]: Judge, I'm going to object on foundation and hearsay.
>
> THE COURT: Overruled. Go ahead.
>
> [Cheryl:] Yes, sir, I do. I know what I've been told [t]hat it's worth.
>
> [Richard's counsel]: Judge, objection, hearsay and foundation.
>
> THE COURT: Overruled. Go ahead, ma'am.
>
> [Cheryl:] One banker told me $3,200 and one said [$3,400]. And then I had an appraiser that I've talked to that said it could run anywhere from [$2,900] to — some of the land in that area sold for $3,800. So I would say mid 30s, upper 30s.

Based on these values, Cheryl believed that Richard had sold the property for at least $1,000 per acre less than what he could have obtained in an arm's-length sale. Richard testified that at the time of trial, he still had 40 acres of what had been the 80-acre property. He estimated that that land was worth $2,600 per acre.

The parties testified and exhibits were received regarding the valuation of additional assets. At the time of trial, the value of Richard's interest in the co-op he had been gaining equity in was approximately $11,467.98. Richard estimated that $2,500, or approximately 25 percent, of that amount had been accumulated during the marriage. Richard admitted that he had no documentary support for this estimate. Richard admitted spending money

at the co-op during the marriage to raise approximately 500 to 600 hogs per year and to farm approximately 500 acres. In Cheryl's valuation of the marital estate, she included the entire value of Richard's interest in the co-op, or $11,467.98.

The trial court received Cheryl's valuations of the farm equipment, which she presented as "Option A = purchased during marriage" and "Option B - All." Option A stated the following values:

Skid loader	$ 1,000
Combine	12,000
Corn head	3,000
Bean head	3,000
Grain bin, 3,500-bushel	3,500
Irrigation equipment	37,500
	$60,000

Option B totaled $169,230 and included equipment acquired both before and after the parties married, except for the skid loader, which was inexplicably omitted from option B. Cheryl testified that she based her valuations of the farm equipment on the amount of insurance carried on it. Cheryl testified that the farm equipment was insured for actual cash value and that the insurance on the farm equipment lapsed on April 11, 2002. She had written the insurance policies for the farm equipment and received commissions for them based on the premiums. She did not have the equipment appraised, "[o]ther than underwriting," but she testified that she relied on Richard's word as to the equipment's value.

Richard testified that he possessed certain items of farm equipment before the marriage and purchased more items during the marriage. Of the items purchased during the marriage, a skid loader, a combine, and two six-row combine heads were still operational at the time of trial, and Richard valued them as follows:

Skid loader	$ 200
Combine	3,000
Combine heads	2,000
	$5,200

Richard paid $335 for the skid loader, $21,800 for the combine, and $2,100 for the combine heads. Richard testified that the skid loader was approximately 10 years old and was in average to below-average condition. As indicated above, Richard valued the skid loader at $200, but he admitted at trial that he probably could not replace it for that amount. The combine and one of the heads were made in 1981, and the other head was made in 1976. Richard did not dispute that he had insured the equipment for the values set forth by Cheryl.

Richard testified that he also purchased an irrigation center pivot during the marriage, which pivot, at the time of trial, had been dismantled as scrap. As noted above, Cheryl valued Richard's irrigation equipment at $37,500 based on an insurance policy, but Richard testified that the parties' $37,500 insurance policy for irrigation equipment was for such equipment that he had purchased prior to the marriage. Also, Richard did not recall purchasing a 3,500-bushel grain bin during the marriage, which bin Cheryl asserted he had bought.

Cheryl valued her 1996 Oldsmobile at $3,292, while Richard valued it at $7,315. Cheryl testified that she based her estimation of its value on the "Blue Book" and subtracted a portion of that value for the car that she brought into the marriage, which was traded eventually to obtain the 1996 Oldsmobile. According to the antenuptial agreement, Cheryl brought a 1990 Chrysler worth $20,000 into the marriage. Another exhibit recounted the subsequent vehicle trades:

Purchase	Vehicle	Value	Trade
September 1990	1990 Chrysler	(illegible)	
April 1995	1992 Oldsmobile	$20,184	$7,435
December 1998	1996 Oldsmobile	$22,194	$7,995

Cheryl requested that the court credit her with one-half of the trade value of her premarital 1990 Chrysler as against the 1996 Oldsmobile, or approximately $3,700, and deduct it from the 1996 Oldsmobile's "Blue Book" value of $6,585.

Cheryl admitted that during the marriage, she contributed to retirement accounts. Among those accounts were four "Equitrust" accounts, totaling $32,870.98. She testified that her two "Farm

Bureau variable annuities" were created during the marriage, and she assigned them a "marital value" of $20,179.16.

Cheryl testified that she contributed to a "career incentive plan" both before and during the marriage. Statements for the career incentive plan were received into evidence. A handwritten notation, signed by Cheryl, on one statement indicates that she began her career incentive plan in 1987 and had not contributed to it since 1994. Cheryl calculated that the vested value of the plan as of April 10, 2002, was $20,306.12. She testified that she considered 35.31 percent of that value, or $7,170.09, to be a "premarital asset," while the remaining portion, or $13,136.03, was a "marital asset." Cheryl offered the following figures, which reflect how she arrived at 35.31 percent as a premarital asset:

Date	Plan Total	Percent of 12/31/95 Value
11/30/91	$ 6,138.56	35.31
8/31/94	16,204.19	93.20
12/30/95	17,385.86	100.00

Thus, when Cheryl married in November 1991, she had already made 35.31 percent of the contributions she would make to the career incentive plan.

Cheryl submitted the following information regarding debts:

Miscellaneous Debt	
Overdraft protection	$1,000.00
Accountant	4,378.71
2001 taxes	3,800.00

Cheryl testified that the accountant debt of $4,378.71 represented charges for preparation of tax returns for both her insurance agency and the farm. She requested that the trial court assess $1,500 of that debt to her and the remainder to Richard. Cheryl requested that the other miscellaneous debts be divided equally between the parties.

Cheryl testified that at the time of the parties' separation, the farm debt totaled approximately $58,000 at Wahoo State Bank and $42,000 at Bank of Mead. Thus, it was Cheryl's understanding that a total of approximately $100,000 was owed

against the land. Richard denied that Bank of Mead had a lien against his land; he stated that the Bank of Mead loans were "[u]nsecured, with the exception of the farming business, grains, [and] livestock."

The trial court found:

> [A]lthough the parties brought [premarital] assets into the marriage, which they itemized in their [antenuptial] agreement, the parties gifted those [premarital] assets to the marriage, making them marital assets to be divided by the Court. This was the testimony of [Cheryl], which the Court, having observed the testimony of both parties, finds to be more credible than [Richard's] testimony, and supported by the evidence.
>
> [Cheryl's] testimony that the parties intended to co[m]mingle their separate [premarital] assets was corroborated by the fact that both agreed to rescind their [antenuptial] agreement as confirmed by [their attorney] in his letter to the parties . . . ; [Richard's] change in his will . . . ; and [Cheryl's] being listed as a seller of 37 acres of the [80-acre property] in March, 2002 . . . .

The trial court valued the 80-acre property's remaining 40 acres at $3,000 per acre and, subtracting the debt owed on the farm at the time of the parties' separation, determined the farm's equity to be $20,000 at the time of their separation. For the remaining marital assets, the trial court relied on Cheryl's valuations as set forth in her exhibit dividing the property:

	Richard	Cheryl
Cash	$ 500.00	$ 2,415.71
Furniture	1,865.00	2,770.00
Automobiles		
1996 Oldsmobile		3,292.00
1991 Dodge	2,185.00	
1996 Dodge	0.00	
1987 Ford	1,925.00	
Retirement account	896.00	
Equitrust accounts		32,870.98
Farm Bureau annuities		20,179.16
Career incentive plan		13,136.03

Life insurance policies		6,604.00
Duplex		16,872.00
Co-op	11,467.98	
Farm equipment, buildings	169,230.00	
Farm (40 acres at $3,000/acre)	120,000.00	
Farm debt (rounded from $99,972.27, total owed to Wahoo and Mead banks)	(100,000.00)	
TOTAL	$208,068.98	$98,139.88

The trial court found that Richard should be responsible for the marital debts, and it credited Cheryl for $1,500 that she contributed toward the accountant debt. To equalize the division of the marital assets, the trial court ordered Richard to pay Cheryl $53,420.

ASSIGNMENTS OF ERROR

Richard alleges that the trial court erred in (1) including his premarital farm and premarital farm equipment in the marital estate, (2) including in the marital estate the entire value of his interest in the co-op, (3) finding that he gifted his premarital assets to the marriage, (4) dividing the marital estate as it did, (5) overruling Richard's objections to Cheryl's valuation of Richard's farm and farm equipment, (6) not including in the marital estate the entire value of Cheryl's retirement accounts and automobile, (7) ordering Richard to pay Cheryl the sum of $53,420 to equalize the division of the marital estate, and (8) requiring Richard to pay all the parties' marital debts.

STANDARD OF REVIEW

[1-3] In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000).

ANALYSIS

Gift of Premarital Assets.

[4] Richard contends that the evidence does not support a finding that he gifted his premarital assets, including the farmland and farm equipment, to the marital estate. We begin by recalling a basic principle: Property owned by a party at the time of marriage is not marital property. *Smith v. Smith*, 9 Neb. App. 975, 623 N.W.2d 705 (2001). Thus, unless some exception applies to change the basic rule, the farmland and farm equipment owned by Richard prior to the marriage are not marital property. Cheryl contends that by an oral agreement, at the time of the destruction of the antenuptial agreement, "both parties agreed that from that time forward, they would co[m]mingle all assets and anything owned by one, would be considered the joint property of the other." Brief for appellee at 18.

[5] At the time the parties made their antenuptial agreement, public policy in Nebraska prohibited enforcement of a provision in such an agreement purporting to forfeit property rights in the event of a divorce. See *Mulford v. Mulford*, 211 Neb. 747, 320 N.W.2d 470 (1982) (generally, antenuptial agreements providing that in event of divorce or separation, each spouse should forfeit his or her rights in property of other, are contrary to public policy and void as tending to promote divorce). Thus, such agreements were enforceable only in accordance with testamentary dispositions or other transfers taking effect at death. In finding that the parties had gifted their premarital assets to the marriage, the trial court was apparently relying upon *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), in which this court 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. However, approximately 4 months before the trial court filed its decree in this case, the Nebraska Supreme Court expressly disapproved *Gerard-Ley* in *Schuman v. Schuman, supra*,

which held that the manner in which property is titled or transferred by the parties during a marriage does not restrict the trial court's determination of how the property will be divided in an action for dissolution of marriage. Therefore, we conclude that the trial court applied the wrong rule in determining that the parties had gifted their premarital assets to the marriage.

Although we agree with the trial court's determination that the parties agreed to revoke their antenuptial agreement, it does not follow that they also agreed to convert their sole property to jointly owned property. Had they intended to do so, the portion of Richard's will providing that Cheryl would receive a one-half interest in the farm upon Richard's death would have been superfluous, because Cheryl would have already owned a one-half interest in the farm. Thus, the will does not support the notion that the parties intended to gift their premarital interests to each other; instead, it lends support to the opposite conclusion.

Farmland.

[6,7] Richard argues that the trial court erred in including Richard's 40 acres, remaining from the 80-acre property, in the marital estate. The equitable property division in an action for the dissolution of marriage involves three steps: "The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties . . . ." *Tyma v. Tyma*, 263 Neb. 873, 877, 644 N.W.2d 139, 144 (2002). The "marital estate" includes property accumulated and acquired during the marriage through the joint efforts of the parties. *Id.*

[8] In dividing property inherited by or gifted to one of the parties, we look to the rule in *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982):

> [P]roperty acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. . . . An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or

> the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.

Thus, the marital estate generally does not include property acquired by one of the parties through gift or inheritance. See *id.* However, an exception applies when both spouses have contributed to the improvement or operation of the property that one of them received by gift or inheritance. *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). In *Tyler*, the wife brought a home from a prior marriage into the marriage at issue. The husband and the wife lived in the wife's house, sold it, and purchased another, which became the focus of the appeal. This court modified the divorce decree to require the wife to pay the husband half of the equity in the latter home owned by the parties, but the Nebraska Supreme Court reversed, stating that each time the *Van Newkirk* exception had been applied, the Nebraska Supreme Court had "required evidence of the value of the contributions and evidence that the contributions were significant." *Tyler v. Tyler*, 253 Neb. at 213, 570 N.W.2d at 320. The court in *Tyler* then recounted evidence that the husband had improved the home by performing such tasks as building a deck, carpeting and painting the family room, replacing kitchen countertops, and installing four ceiling fans. The husband had also contributed to the mortgage, paid a special assessment lien, and submitted expenses for certain improvements to the house. The *Tyler* court observed that the husband failed to produce any evidence indicating the value of these contributions and that he failed to demonstrate "the significance of the aforementioned contributions." 253 Neb. at 214, 570 N.W.2d at 320. However, the court found that the husband was entitled to be compensated for his contributions, the special assessment lien, and half the mortgage reduction.

Because it is undisputed that Richard owned the 40 acres in question prior to the marriage, the initial issue is whether the *Van Newkirk* exception applies so that the property should be included in the marital estate. Cheryl resided on the farm for 4 years of the parties' marriage. There is no evidence that she worked in the farming operation. While Cheryl presented evidence that she and her immediate family made improvements to

the farmhouse, Richard sold that portion of the farm in 1995, and there is no evidence that any improvements Cheryl made to that portion contributed to the value of the 40 acres remaining at the time of trial. Cheryl did, however, make farm payments in 1994 and 1995 totaling $21,959.29. Cheryl testified that Richard feared he would lose the family farm without her aid. Cheryl admitted that an estimated $5,200 or less of the $21,959.29 came from her premarital funds. The remainder came from funds Cheryl had earned during the marriage. The antenuptial agreement, assuming it was ever effective, had been revoked by the parties, and any funds Cheryl earned before the marriage were her separate property, while any funds she earned during the marriage were marital property. See *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). Therefore, pursuant to *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), and *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997), we conclude that Cheryl's contributions of not more than $5,200 from her separate property were not so significant as to garner Cheryl an interest in Richard's farm.

Although we conclude that Cheryl never acquired an interest in the farm, the revocation of the antenuptial agreement did operate to allow Cheryl to acquire an interest in the contributions she made to the Wahoo State Bank loan—whether from premarital or marital funds. Therefore, Cheryl is entitled to be compensated in full for her contributions from premarital funds and to receive one-half of the remainder, which came from marital funds. However, Cheryl did not present evidence of the value of her premarital contribution. She testified that she contributed not more than $5,200 in premarital funds, that amount being an estimate of her assets at the time she signed the prenuptial agreement. We consider this estimate upon an estimate to be insufficient evidence of the value of Cheryl's contribution from premarital funds, and we therefore consider her entire contribution of $21,959.29 to be from marital funds and conclude that she is entitled to compensation for half of that sum, or $10,979.65.

[9] Cheryl contends that if she is to receive credit for her contribution to the farm payments, that credit should include interest at the rate of 7 percent. Cheryl bases this rate of interest on

Richard's will, which provided: "[T]he distributees of my farm shall pay Cheryl's children all sums which she contributed to the farm, plus interest at the rate of seven percent thereon from the date of advancement until paid." We decline to allow Cheryl such interest. The will was not in effect at the time of trial, see *Tucker v. Heirs of Myers*, 151 Neb. 359, 37 N.W.2d 585 (1949) (provisions of will take effect and become operative at time of testator's death), and this provision was intended to operate upon the simultaneous death of both Richard and Cheryl. That event has not occurred, and the will cannot serve as justification for the award of interest that Cheryl seeks.

Richard also contends that the trial court erred in overruling his objections to Cheryl's valuations of his remaining 40 acres. When asked whether she had an opinion as to the value of the land, Cheryl testified that bankers had told her $3,200 per acre and $3,400 per acre. Based on this input and a discussion with an appraiser, Cheryl opined, "mid-30s, upper 30s." Richard objected based on hearsay and foundational grounds, and he restates those grounds on appeal, arguing that Cheryl had never been the owner of the land.

[10] *First Baptist Church v. State*, 178 Neb. 831, 834-35, 135 N.W.2d 756, 758-59 (1965), sets forth the general rule for lay witnesses without ownership testifying about the value of land:

> "It is the general rule that a witness need not be an expert to testify to the value of land. Market value is not a question of science or skill upon which experts alone may give an opinion. . . . It is necessary only to show that he has the means of forming an intelligent opinion derived from an adequate knowledge of the nature and kind of property in controversy, and of its value. . . . It is not essential that every witness expressing an opinion shall have all-inclusive information of every detail of the elements entering into the value. . . . It is most difficult to state an all-inclusive rule fixing the qualification of witnesses to give their opinions as to the market value of land. Their testimony is ordinarily received if they show an acquaintance with the property and are informed as to the state of the market, the weight and credibility of their evidence being for the jury. . . ."

(Citations omitted.) (Emphasis omitted.) Quoting *Evans v. State*, 176 Neb. 156, 125 N.W.2d 541 (1963).

Although Cheryl did not possess an ownership interest in the family farm, she lived on it for 4 years, and she had worked as a licensed real estate agent. She testified that she had spoken to bankers and appraisers regarding the value of the land. Their statements were not offered for the truth of the matter asserted, but, rather, to show that Cheryl had researched the value of the land. It was upon this research that Cheryl based her opinion of the value of the land. Thus, we conclude that Cheryl demonstrated an acquaintance with the land and the state of the market and that the trial court did not err in allowing her opinion as to the value of the land, over Richard's objections.

Farm Equipment.

[11] Richard contends that the trial court erred in overruling his objections to Cheryl's valuations of the farm equipment despite insufficient foundation and in relying on those valuations. Cheryl testified that Richard's farm equipment was insured for cash value and that she relied on the figures in the insurance policies in determining the value of the equipment. She admitted that she wrote the policies, but she also testified that she relied on Richard's word in assigning values to the equipment and that the values were approved by underwriters. Richard's values for the farm equipment conflicted with Cheryl's. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000). We conclude that Cheryl established sufficient foundation for her valuations of the farm equipment and that the trial court did not abuse its discretion in using those valuations in its calculations of the marital estate.

Richard asserts that the trial court erred in relying on Cheryl's exhibit which included in the marital estate farm equipment acquired both before and during the marriage. We agree. The trial court included $169,230 for farm equipment in the marital estate, despite the fact that Cheryl clearly admitted that the figure included equipment that Richard had acquired prior to the marriage. See *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002)

(marital estate includes property accumulated and acquired during marriage through joint efforts of parties).

It is undisputed that Richard obtained the skid loader, the combine, and the combine heads during the marriage. However, Richard argues that the trial court erred in including irrigation equipment and a grain bin in the marital estate. Cheryl presented evidence that Richard acquired irrigation equipment and a 3,500-bushel grain bin during the marriage, which she valued at $37,500 and $3,500, respectively. Richard testified that the irrigation equipment to which Cheryl referred had been acquired prior to the marriage, while the irrigation equipment he had acquired during the marriage had been dismantled and had only scrap value. He also testified that he acquired the grain bin prior to the marriage. We again note that when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another, and on our de novo review, we conclude that the trial court did not abuse its discretion in including the irrigation equipment and the grain bin in the marital estate. See *Mace v. Mace, supra.*

On our de novo review, we determine that the skid loader, the combine, the combine heads, the grain bin, and the irrigation equipment were properly valued and included in the marital estate, but that the trial court abused its discretion in including any farm equipment obtained prior to the marriage. We set forth our changes to the overall division of property below.

Richard's Interest in Co-op.

Richard argues that the trial court erred in including his entire interest in the co-op in the marital estate. He points out that he had been involved in the co-op for 40 years, during only 10 of which he was married to Cheryl. Of Richard's $11,467.98 interest in the co-op at the time of trial, Richard estimated that he had accumulated $2,500, or approximately 25 percent, during the marriage. Richard did not support this testimony with co-op statements or other documentation, and considering the size of his farming operation during the marriage, it is certainly possible that he contributed more than $2,500 during that period. Moreover, Richard's calculation assumes that he acquired the

interest at a constant rate for 40 years. In Cheryl's calculations, she included the entire value of Richard's interest in the co-op in the marital estate; however, taking into account that Cheryl considered even premarital assets to be part of the marital estate after the revocation of the antenuptial agreement, she may have included Richard's premarital interest in the co-op in her division of the marital estate or she may have assumed that Richard acquired his entire interest in the co-op during the marriage.

[12,13] The burden of proof to show that property is a nonmarital asset remains with the person making the claim. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Where several inferences may be drawn from the facts proved, which inferences are opposed to each other but are equally consistent with the facts proved, the party having the burden of proof may not sustain that burden by a reliance alone on the inference supporting that party's position. See *Fritz v. Marten*, 193 Neb. 83, 225 N.W.2d 418 (1975). The inference that the equity in the co-op accrued at a constant rate over the 40-year period is no stronger than an inference that a greater portion accrued during the marital period. We conclude that Richard did not meet his burden and that the trial court did not abuse its discretion in including in the marital estate the entire value of Richard's interest in the co-op.

Cheryl's Retirement Accounts.

[14] Richard asserts that the trial court allowed Cheryl to arbitrarily reduce the value of one of her Farm Bureau annuities. He contests Cheryl's reduction of the value of that account, a reduction representing significant contributions she made after the parties' separation. Although Neb. Rev. Stat. § 42-366(8) (Reissue 2004) requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of the statute does not require that such assets be valued at the time of dissolution; the expression "at the time of dissolution" in § 42-366(8) qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. *Hosack v. Hosack*, 267 Neb. 934, 678

N.W.2d 746 (2004). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). Based on this authority, we conclude that the trial court was reasonable and did not abuse its discretion in allowing Cheryl to subtract her postseparation contributions from the value of her annuity. She and Richard were no longer supporting each other at that time, and Cheryl logically accounted for the amount of those contributions.

Richard also argues that the trial court allowed Cheryl to arbitrarily reduce the value of her career incentive plan to offset her premarital contributions to it. We disagree. Cheryl's calculations, set forth above, support her deduction of 35.31 percent to arrive at the value of the marital portion of the plan.

Cheryl's 1996 Oldsmobile.

Richard asserts that Cheryl arbitrarily reduced the value of her 1996 Oldsmobile, which was purchased during the marriage. Despite the convoluted arithmetic presented by Cheryl in her testimony, it is apparent that she requested and received approximately one-half the "Blue Book" value of her 1996 Oldsmobile because that vehicle had been obtained, in part, through trade-in value traceable to her nonmarital vehicle. On our de novo review, we conclude that the value of the 1996 Oldsmobile was not arbitrarily reduced and that the trial court did not abuse its discretion in assigning a marital value to that vehicle.

Omaha Residences.

[15] We note that Cheryl argues that the parties' first house in Omaha constitutes a marital asset because it was titled in joint tenancy. As Richard correctly points out in his reply brief, in *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), the Nebraska Supreme Court expressly disapproved an interpretation of *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), which would preclude nonmarital property titled in joint tenancy during the marriage from being considered as a nonmarital asset in an action for dissolution of marriage simply because the property was so titled. However, at no time does Richard argue or assign that the trial court erred in including the net value

of the duplex, which was eventually purchased from the proceeds of the sale of the first Omaha house, in the marital estate. Therefore, we need not consider the classification of these houses further. See *Schnell v. Schnell*, 12 Neb. App. 321, 673 N.W.2d 578 (2003) (alleged errors must be specifically assigned and specifically argued in order to be considered by appellate court).

Marital Debts.

Richard assigns that the trial court erred in requiring him to pay all the parties' marital debts. However, he did not argue that error in his brief, and we will not consider it. See *id.*

Division of Property and Credits.

Based on the foregoing analysis, we divide the parties' marital estate as follows:

	Richard	**Cheryl**
Cash	$ 500.00	$ 2,415.71
Furniture	1,865.00	2,770.00
Automobiles		
1996 Oldsmobile		3,292.00
1991 Dodge	2,185.00	
1996 Dodge	0.00	
1987 Ford	1,925.00	
Retirement account	896.00	
Equitrust accounts		32,870.98
Farm Bureau annuities		20,179.16
Career incentive plan		13,136.03
Life insurance policies		6,604.00
Duplex		16,872.00
Co-op	11,467.98	
Farm equipment		
Skid loader	1,000.00	
Combine	12,000.00	
Corn head	3,000.00	
Bean head	3,000.00	
Grain bin	3,500.00	
Irrigation equipment	37,500.00	
TOTAL	$78,838.98	$98,139.88

To equalize the marital estate, we conclude that Cheryl owes Richard $9,650.45, or one-half the difference between $78,838.98 and $98,139.88. However, as discussed above, Richard must compensate Cheryl, in the amount of $10,979.65, for her contributions to the farm loan. On appeal, Richard did not contest the $1,500 credit Cheryl received for payments she made for tax preparation; therefore, she is entitled to that credit as well. Considering together the $9,650.45 owed to Richard for equalization of the marital estate and the $12,479.65 in credits owed to Cheryl, we conclude that Richard shall pay Cheryl the difference between those two figures: $2,829.20.

CONCLUSION

On our de novo review, we hold that the trial court applied an incorrect standard in determining the marital estate, that the trial court abused its discretion in including some of Richard's farm equipment in the marital estate, and that Cheryl should receive compensation for contributions she made to the farm debt. Therefore, we affirm the trial court's decree, as modified.

AFFIRMED AS MODIFIED.

LYNN HOFF, APPELLEE, V.
VICTOR AJLOUNY, APPELLANT.

703 N.W.2d 645

Filed September 20, 2005. No. A-04-204.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Injunction: Equity.** An action for injunction sounds in equity.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.

5. **Affidavits.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein; sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.
6. **Rules of Evidence: Records: Proof.** The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Neb. Rev. Stat. § 27-902 (Reissue 1995) or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.
7. **Restrictive Covenants: Waiver.** The six criteria for judging whether there has been a waiver of a restrictive covenant are set out in *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976), and are as follows: (1) whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken, (2) the extent and kind of violation, (3) the proximity of the violations to those who complain of them, (4) any affirmative approval of the same, (5) whether such violations are temporary or permanent in nature, and (6) the amount of investment involved.
8. ____: ____. Evidence of a prior restrictive covenant violation is a predicate to the use of the six-criteria test for waiver under *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976).
9. ____: ____. Of necessity, without a prior violation of a covenant, which has been tolerated by those with standing to enforce the covenant, there is no basis upon which to find a waiver.
10. **Deeds: Records: Time: Notice.** All deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Scott A. Lautenbaugh, of Nolan, Olson, Hansen & Lautenbaugh, L.L.P., for appellant.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

This appeal presents the question of whether a homeowner must remove the new asphalt shingle roof on his home and

replace it with a wood shake shingle roof, which is the required roofing under the subdivision's covenants. The district court found that he must—and we agree.

I. FACTUAL BACKGROUND

After our review of the record, we find that the following recitation of pertinent facts from the Douglas County District Court's order dated January 13, 2004, is concise and accurate, and therefore we quote it at length for the sake of judicial economy:

> Plaintiff Lynn Hoff ("Hoff") is the owner of Windridge Estates Lot 134, 1412 North 158th Avenue, Omaha, Nebraska. . . . Defendant Victor Ajlouny ("Ajlouny") owns Windridge Estates Lot 42, 1553 North 158th Avenue, Omaha, Nebraska. . . . All lots in Windridge Estates are subject to certain Protective Covenants recorded in the office of the Register of Deeds of Douglas County on September 12, 1984. . . . Paragraph Seven of these Protective Covenants provides as follows: "Roofs. All houses shall have wood shake shingle roofs." . . .
>
> On or about January 2002, Ajlouny replaced the wood shake shingle roof on his residence with an asphalt roof. . . . Hoff became aware of the installation of the asphalt roof approximately two to three days after the roof was completed. . . . Hoff sent letters to Ajlouny regarding the covenant violation dated January 11, 2002, February 11, 2002, and March 18, 2002. . . . Hoff also spoke with Ajlouny between January and March regarding the roof. . . . Ajlouny refused to bring his residence into compliance with the Covenants.

II. PROCEDURAL BACKGROUND

Lynn Hoff filed her petition on October 9, 2002, and her amended petition on October 15. In her amended petition, Hoff alleges that Victor Ajlouny's residence is subject to certain protective covenants (Protective Covenants) recorded in the office of the register of deeds of Douglas County, that such covenants provide " '[a]ll houses shall have wood shake shingle roofs,' " and that the asphalt roof installed at Ajlouny's residence violates the covenants. Hoff further alleges that Ajlouny refuses to bring his

residence into compliance with the covenants, despite demand from the homeowners' association, and that such refusal to comply has caused damage to the owners of homes in the Windridge Estates subdivision. Hoff requested an order of mandatory injunction directing Ajlouny to replace the roof with a wood shake shingle roof.

Ajlouny filed his answer on February 6, 2003. Ajlouny admitted that the current roof on his residence is not a wood shake shingle roof. Ajlouny set forth three affirmative defenses: (1) The alleged covenants are void as against public policy, (2) Hoff waived the covenant by failing to enforce it in a timely manner, and (3) the burden sought to be imposed by Hoff upon Ajlouny is much greater than any alleged damages flowing from the alleged violation of the covenant in question. Ajlouny requested that the court dismiss Hoff's amended petition with prejudice. We note that Ajlouny's first and third affirmative defenses are not before us on this appeal; he assigns error only with respect to the district court's failure to adopt his defense of waiver.

On June 2, 2003, Hoff filed a motion for summary judgment alleging that there was no genuine issue of material fact with respect to her claim. In support of her motion, Hoff submitted the affidavit of Kristopher Covi, Hoff's attorney.

A hearing on Hoff's motion for summary judgment was held on October 20, 2003. The court filed its order on January 13, 2004. The order granted summary judgment in favor of Hoff. The order also enjoined Ajlouny from violating paragraph 7 of Windridge Estates' Protective Covenants recorded in the office of the register of deeds of Douglas County on September 12, 1984, and directed Ajlouny to replace his asphalt roof with a wood shake shingle roof. Ajlouny now appeals.

III. ASSIGNMENTS OF ERROR

Ajlouny alleges that the district court erred in (1) admitting the affidavit of Covi into evidence with the Protective Covenants attached, when proper foundation had not been laid and the copy did not meet the requirements of the public record hearsay exception, and (2) failing to utilize the appropriate criteria and standard for waiver of the right to seek an injunction regarding restrictive covenants.

IV. STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003). Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

[3,4] An action for injunction sounds in equity. *Whipps Land & Cattle Co. v. Level 3 Communications, supra.* On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995). (*Poppleton* was a summary judgment case regarding an equity matter. The plaintiffs had summary judgment ruled against them when the district court refused to grant them quiet title of real estate. The Nebraska Supreme Court began its factual analysis by stating: "Viewing the evidence in a light most favorable to the [plaintiffs] and giving them the benefit of all reasonable inferences deducible from the evidence, the facts of this case are as follows[.]" *Id.* at 356, 535 N.W.2d at 402.) Therefore, we will use the same standards in the instant case, and we, too, will view the evidence in a light most favorable to Ajlouny and give him the benefit of all reasonable inferences deducible from the evidence.

V. ANALYSIS

1. Affidavit of Covi

Ajlouny argues that the district court erred in admitting Covi's affidavit into evidence with the attachment of the Protective Covenants, when proper foundation had not been laid and the copy of the covenant did not meet the requirements of the public

record hearsay exception. Ajlouny's argument relies on Neb. Rev. Stat. § 76-235 (Reissue 2003), which states:

> *Every deed acknowledged or proved, and certified by any of the officers* named in sections 76-217, 76-219, 76-220, 76-226 and 76-227, *and authorized to take acknowledgments*, including the certificate specified in section 76-242, whenever such certificate is required by law, *may be read in evidence without further proof*, and shall be entitled to be recorded. The record of a deed duly recorded, or a transcript thereof duly certified, may also be read in evidence with the like force and effect as the original deed, whenever by the party's oath or otherwise the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control. Neither the certificate of the acknowledgment or the proof of any deed, nor the record or transcript of the record of such deed, shall be conclusive, but may be rebutted, and the force and effect thereof may be contested by any party affected thereby. *If the party contesting the proof of a deed shall make it appear that such proof was taken upon the oath of an interested or incompetent witness, neither such deed nor the record thereof shall be received in evidence until established by other competent proof.*

(Emphasis supplied.)

Ajlouny argues that in Covi's affidavit, Covi "makes no mention of how or why he knows [the Protective Covenants] are correct, nor that he is employed or has capacity as an officer pursuant to . . . § 76-235 to testify to the fact that the Protective Covenants attached are the same as held by the Register of Deeds Office." Brief for appellant at 7. Ajlouny also argues that "[i]n Covi's affidavit, he attests to the fact that he is the attorney for [Hoff], making him an interested person," and "[t]hus, a third party was required to lay foundation for the admission of the Protective Covenants, and to swear and certify to their accuracy when compared with the Original Protective Covenants." *Id.* However, Ajlouny's reliance on § 76-235 is misplaced because the statute deals with real property conveyances, and the covenant at issue clearly does not convey real property.

[5,6] The correct statutes for analysis are Neb. Rev. Stat. §§ 25-1334 and 27-1005 (Reissue 1995). Section 25-1334 states in part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

And, § 27-1005, regarding the Nebraska rules of evidence, states:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with section 27-902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

In his affidavit, Covi stated that he had personal knowledge of the facts set forth in his affidavit and stated that exhibit B attached to his affidavit was "a true and correct copy of the 'Protective Covenants' recorded at Book 718 Page 382 of the Miscellaneous Records of Douglas County on September 12, 1984 as compared to the original." Thus, the requirements of §§ 25-1334 and 27-1005 have been satisfied, and the affidavit and its attachment were properly admitted.

2. Prima Facie Case and Defense of Waiver

(a) Prima Facie Case

Paragraph 7 of the Protective Covenants for Lots 1 through 154 of the Windridge Estates subdivision states: "Roofs. All houses shall have wood shake shingle roofs." In his answer, Ajlouny admitted the allegations in paragraph 6 of Hoff's amended petition, which said, "On or about January, 2002 [Ajlouny] replaced the wood shake shingle roof on the Residence with an asphalt roof." Thus, the violation of the subdivision's covenants is established as a matter of law. Therefore, Hoff has

established a prima facie case and is entitled to summary judgment, unless Ajlouny establishes a genuine issue of material fact as to the defense of waiver—the only defense at issue on appeal.

(b) Waiver

[7] Ajlouny argues that the district court erred by not using the appropriate criteria and standard for determining whether there has been a waiver of the right to obtain an injunction regarding restrictive covenants. In support of his argument, Ajlouny cites *Pool v. Denbeck*, 196 Neb. 27, 33-34, 241 N.W.2d 503, 507 (1976), which sets out six criteria for judging whether there has been a waiver of a restrictive covenant:

> Whether there has been such a waiver or acquiescence depends upon the circumstances of each case. The criteria for determining this include[:] whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations are temporary or permanent in nature; and the amount of investment involved.

[8,9] However, the foregoing from *Pool v. Denbeck, supra*, must be read in light of the facts of that case which make it readily distinguishable from the instant case. In *Pool*, there were already other covenant violations in the subdivision, and the question was whether, because of the acquiescence of the subdivision's residents to those violations, the residents had waived their right to enforce the restrictive covenants against the new violation at issue in the lawsuit. However, in the case before us, Ajlouny introduced no evidence of any other covenant violation in the Windridge Estates subdivision, which evidence in our view is a predicate to the use of the six-criteria test for waiver under *Pool*. Of necessity, without a prior violation of a covenant, which has been tolerated by those with standing to enforce the covenant, there is no basis upon which to find a waiver.

In so concluding, we are not unmindful of the consideration set forth in the criteria from *Pool v. Denbeck, supra*: "the period of time in which no action was taken." However, even without

proof of a prior violation, we believe that the "passage of time" could be a possible defense, for example, if Ajlouny alleged that Hoff waited 3 years after he installed his asphalt shingle roof to complain or seek relief. However, that situation would fall under the rubric of laches or equitable estoppel. See *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 481, 513 N.W.2d 534, 543 (1994) ("the defense of laches is not favored in Nebraska. It will be sustained only if a litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary"). Equitable estoppel is said to occur "[w]hen a person, knowing her rights, takes no steps to enforce those rights until the adverse party has, in good faith, changed his position such that he could not be restored to his former state if the rights are enforced, [and] the delay becomes inequitable . . . ." *Welch v. Welch*, 246 Neb. 435, 449, 519 N.W.2d 262, 272 (1994). Neither laches nor equitable estoppel was raised as a defense, and thus no issue of delay by Hoff is before us. In conclusion, as a matter of law, the enforceability of the covenant at issue has not been waived.

(c) Ajlouny's Knowledge of Covenant

[10] While Ajlouny does not specifically assign such as error on appeal, his brief argues that he was unaware that a restrictive covenant was placed on the property, because the prior owners of his residence did not disclose the existence of a homeowners' association or covenants. While we are not required to address such argument, because it was not specifically assigned, we do so only for the sake of completeness.

Neb. Rev. Stat. § 76-238 (Reissue 2003) states in part:

> All deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering [such instruments] to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice.

Thus, Ajlouny had record notice of such covenant, and such covenant was binding. The asphalt roof clearly violates the subdivision restrictions, and an injunction is the proper remedy.

VI. CONCLUSION

Therefore, we find that the district court properly awarded summary judgment in favor of Hoff because there was no genuine issue of material fact. We further find that the district court properly enjoined Ajlouny from violating paragraph 7 of Windridge Estates' Protective Covenants recorded in the office of the register of deeds of Douglas County on September 12, 1984, and properly directed Ajlouny to replace his asphalt roof with a wood shake shingle roof.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DOROTHY A. DROZ, APPELLANT.

703 N.W.2d 637

Filed September 20, 2005. No. A-04-446.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. **Speedy Trial: Proof.** The burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) is applicable when the defendant is not tried within 6 months.
5. ____: ____. 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.
6. **Speedy Trial: Time.** To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add in any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.
7. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
8. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
9. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the

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

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Thomas J. Garvey, Sarpy County Public Defender, Gregory A. Pivovar, and Tom Strigenz for appellant.

Jon Bruning, Attorney General, and Michael B. Guinan for appellee.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Dorothy A. Droz appeals from an order denying her motion to discharge, wherein she alleged that her statutory and constitutional rights to a speedy trial were violated.

BACKGROUND

The record before us consists of the transcript and a copy of the trial judge's "journal entries," but no bill of exceptions, and reflects the following: On February 27, 2003, Droz was charged by information with two counts of forgery. Droz entered a plea of not guilty to both charges on March 14, and the trial was set for July 7. On July 7, Droz pled guilty to count I and count II was dismissed. Sentencing was deferred to August 29 pending completion of a presentence investigation. On August 28, sentencing was continued to September 5 " '[b]y agreement of Counsel.' "

At the September 5, 2003, hearing, the State orally moved to set aside the plea, which motion, along with sentencing, was taken under advisement until October 31. On October 31, with counsel and Droz present, the matter was continued to November 14. On November 14, the hearing on the State's motion to set aside the plea was held and the motion was sustained " 'by agreement of [Droz].' " On the same date, the matter was set for jury trial on December 10. On December 11, Droz' attorney's motion

to withdraw was sustained, a public defender was appointed, the trial scheduled for December 10 was canceled, and the matter was fixed for further proceedings on December 19. A pretrial hearing was held December 19, and a jury trial was scheduled for February 4, 2004.

On January 29, 2004, Droz filed her motion to discharge, which was heard on February 4 and taken under advisement. The district court entered its written order on March 8, overruling the motion. In this order, the district court recited that the plea agreement entered into on July 7, 2003, required Droz to make restitution prior to sentencing. The State filed the motion to set aside the plea on September 5 due to the fact that Droz had failed to comply with the plea agreement. The matter was continued to October 31 to allow the court to review the record and to give Droz the opportunity to comply with the plea agreement.

The district court noted that there were no pretrial motions filed between February 27, 2003, and the date of Droz' plea on July 7, so this period of 4 months 10 days is not excluded from the speedy trial calculation. In support of its March 8, 2004, denial of the motion for discharge, the court stated:

> The Court is of the opinion however that the period of time from July 7[, 2003,] until [March 8, 2004,] the date of this Order[,] is excludible, for the reasons of [Droz'] plea agreement and request for continuance of Sentencing to comply with the plea agreement, then consenting to set aside the plea and change of Counsel were all actions of [Droz] and are excludible (see [*State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983))].

Droz filed this timely appeal.

ASSIGNMENTS OF ERROR

Droz assigns that the trial court erred in (1) ruling that she was not denied her statutory right to speedy trial, (2) ruling that she was not denied her constitutional right to speedy trial, and (3) not allowing her to proceed on her motion to suppress.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual

question which will be affirmed on appeal unless clearly erroneous. *State v. Petty*, 269 Neb. 205, 691 N.W.2d 101 (2005); *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

ANALYSIS

Statutory Speedy Trial.

[3-5] Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that every person indicted or informed against for any offense shall be brought to trial within 6 months, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005). Section 29-1207(4) provides that the following periods shall be excluded:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent;
>
> (c) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:
>
> (i) The continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(ii) The continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case;

(d) The period of delay resulting from the absence or unavailability of the defendant;

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him; and

(f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

The burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) is applicable when the defendant is not tried within 6 months. *State v. Schmader, supra*; *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002). 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. Schmader, supra*; *State v. Dailey, supra.*

[6] The rule in Nebraska is clear that to calculate the time for speedy trial purposes, we must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add in any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. See, *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002); *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999). In this case, Droz was charged by information on February 27, 2003. Thus, the original speedy trial deadline was August 27, and all applicable exclusions are added onto that date to determine the new trial deadline. See *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990).

The parties agree that there was no excludable time between the filing of the information on February 27, 2003, and Droz' plea on July 7. We examine the time between that July 7 and the filing

of Droz' motion to discharge on January 29, 2004, to determine what, if any, periods were excludable.

[7] The State asserts that the time between the entry of Droz' guilty plea on July 7, 2003, and the date the plea was set aside, November 14, should be excluded. We agree. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996). The Nebraska Supreme Court has held that this waiver includes a defendant's right to a speedy trial. See *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984). See, also, Annot., 57 A.L.R.2d 302 (1958), and Annot., 56-58 A.L.R.2d Later Case Service 302-344 (2003) (defendant's plea of guilty made without raising question of denial of speedy trial constitutes valid and binding waiver of right thereto).

In this case, the record reflects that the trial judge properly advised Droz of her rights and made a finding that she understood her rights prior to accepting her plea. Specifically, the trial court's journal entry for July 7, 2003, provides in relevant part:

> "[Droz] re-arraigned on the charge contained in the Information and enters a plea of guilty to Count I. The Court finds beyond a reasonable doubt that such plea is entered with an understanding of the charges, penalties, constitutional rights, [and] consequences of pleading guilty, and is entered freely, voluntarily, intelligently and knowingly made, with advi[c]e of counsel, and with a factual basis. . . ."

Accordingly, Droz' right to a speedy trial ceased to exist on July 7, when she pled guilty to forgery.

The State's motion to set aside the plea was sustained "'by agreement of [Droz]'" on November 14, 2003. In determining the effect of this action, we find the case *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), to be instructive. *Andersen* is distinguishable in that the defendant in that case did not plead guilty; rather, he waived his right to a speedy trial and then later revoked that waiver. The Nebraska Supreme Court held that upon termination of a defendant's waiver of speedy trial rights, "the 6-month period for the State to bring a defendant to trial

provided in § 29-1207 shall begin anew." *Id.* at 195, 440 N.W.2d at 211. We believe the holding in *Andersen* to be applicable in the present case since the setting aside of Droz' guilty plea effectively terminated the waiver of her speedy trial rights occasioned by her earlier plea. Applying *Andersen* to the case at bar, Droz' rights to speedy trial began anew on November 14. Pursuant to *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002), we exclude November 14, count forward 6 months, back up 1 day, and then add in any time excluded under § 29-1207(4) to determine the last day Droz can be or could have been tried. Without counting any other excludable periods, the State had until May 14, 2004, to bring Droz to trial.

The district court concluded that the entire period between Droz' plea on July 7, 2003, and its order filed on March 8, 2004, was excludable. For the following reasons, we disagree. In reviewing the record, we find no basis for excluding the period between November 14 and December 11, 2003. On December 11, Droz' counsel was allowed to withdraw and, on Droz' motion, the district court appointed a public defender to represent her. On that same date, the trial scheduled for December 10 was canceled and the matter was fixed for a pretrial hearing on December 19. It is the State's contention that the time between December 11 and the filing of Droz' motion to discharge on January 29, 2004, is properly excluded under § 29-1207(4)(a) or (b) as either " 'time from filing until final disposition of pretrial motions of [Droz],' " or a " 'period of delay resulting from a continuance granted at the request or with the consent of [Droz] or [her] counsel.' " See brief for appellee at 23. Section 29-1207(4)(a) provides for exclusion of the period of time from the filing to the final disposition of a defendant's pretrial motions. In this case, however, the record indicates that Droz' motion for court-appointed counsel and the district court's final disposition sustaining that motion were almost simultaneous. This subsection therefore does not apply. In addition, the record does not contain any evidence of an oral or written motion for continuance made by either Droz or her counsel which would bring this delay under § 29-1207(4)(b). The State argues that Droz' consent to a continuance under these circumstances is "self-evident" because "no one would expect a newly appointed attorney to be prepared for a felony trial on such

short notice." Brief for appellee at 23. We agree with the State that some delay before trial would be expected in this situation. However, absent evidence that a continuance was sought by either Droz or her counsel, this period of time is not properly excludable under § 29-1207(4)(b).

Although it could be argued that there was "good cause" for delay following the appointment of new counsel, the district court did not make a specific finding to that effect as required by § 29-1207(4)(f). See *State v. Feldhacker*, 11 Neb. App. 872, 663 N.W.2d 143 (2003) (supplemental opinion) (when relying on § 29-1207(4)(f), general finding of good cause will not suffice and trial court must make specific findings as to good cause or causes which resulted in extension of time). Absent statutory authority to exclude the period between November 14, 2003, and January 29, 2004, we include the period in our speedy trial calculations. We find that at the time Droz filed her motion to discharge on January 29, the State had 106 days within which to bring Droz to trial.

[8] Based on the foregoing analysis, it is clear that Droz' statutory right to speedy trial had not been violated when she filed her motion to discharge on January 29, 2004. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002). Albeit for different reasons, we find no error in the district court's ruling that Droz' statutory speedy trial right was not violated.

Constitutional Speedy Trial.

Droz also argues that her state and federal constitutional rights to a speedy trial were violated. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Our case law is clear, however, that the voluntary entry of a guilty plea waives every defense to a charge, including constitutional defenses. See, *State v. Burkhardt*, 258 Neb. 1050,

607 N.W.2d 512 (2000); *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996). In *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984), the Nebraska Supreme Court reasoned that whether it considered the defendant's voluntary and knowing waiver under § 29-1207, the Constitution of the United States, or the Constitution of the State of Nebraska, the conclusion it would reach would be the same: The defendant waived any rights to a speedy trial. Applying the reasoning of *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), as we did above, we find that Droz' constitutional as well as statutory rights to a speedy trial began anew on November 14, 2003, when her plea was set aside.

[9] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *State v. Loyd, supra*; *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). " 'The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.' " *State v. Robinson*, 12 Neb. App. 897, 904, 687 N.W.2d 15, 21 (2004), quoting *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). This court noted in *Robinson* that

> [o]nly in *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998), and *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), has the Nebraska Supreme Court found the length of the delay to be so short as to make it unnecessary to inquire into the other three factors of the *Barker* balancing test. In *Kula, supra*, the length of the delay at issue was only 49 days, and in *Palmer, supra*, it was 17 weeks.

12 Neb. App. at 904, 687 N.W.2d at 21.

In this case, the applicable time period we examine in determining whether Droz' constitutional rights were violated is

November 15, 2003, the day after Droz' plea was set aside, to January 29, 2004, the day Droz filed her motion to discharge. See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002) (exclude day information was filed in speedy trial calculations). This period totals 76 calendar days, or just under 11 weeks. Because the total period at issue in this case falls between the lengths of delay in *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998), and *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), we conclude without further analysis that it is unnecessary to inquire into the other three factors of the *Barker* balancing test. Droz' constitutional rights to a speedy trial were not violated. This assignment too is without merit.

Motion to Suppress.

In her brief, Droz fails to raise or argue her third assignment of error. Errors that are assigned but not argued will not be addressed by an appellate court. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005); *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

CONCLUSION

Because Droz' statutory and constitutional rights to a speedy trial were not violated, the district court's denial of Droz' motion for discharge was not clearly erroneous and is hereby affirmed. Upon entry of the mandate in the district court, there remain 106 days in which to bring Droz to trial in order to comply with § 29-1207.

AFFIRMED.

ANONYMOUS, APPELLANT AND CROSS-APPELLEE, V. ST. JOHN LUTHERAN CHURCH OF SEWARD, NEBRASKA, A NEBRASKA CORPORATION, ET AL., APPELLEES, AND THE ESTATE OF DAVID MANNIGEL, DECEASED, APPELLEE AND CROSS-APPELLANT.

703 N.W.2d 918

Filed September 27, 2005. No. A-04-275.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Limitations of Actions.** A purpose of a statute of limitations is to prevent recovery on stale claims.
4. ____. The mischief which a statute of limitations is intended to remedy is general inconvenience resulting from delay in assertion of a legal right which it is practicable to assert.
5. ____. The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim.
6. **Limitations of Actions: Negligence.** In the context of a professional relationship, a continuous relationship may toll the statute of limitations but requires that there be a continuity of the relationship and services for the same or a related subject matter after the alleged professional negligence.
7. **Mental Competency: Words and Phrases.** A person with a mental disorder is one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action.
8. **Limitations of Actions: Mental Competency: Words and Phrases.** A mental disorder within the meaning of Neb. Rev. Stat. § 25-213 (Reissue 1995) is an incapacity which disqualifies one from acting for the protection of one's rights.
9. **Expert Witnesses: Proof.** Injuries subjective in nature and effect must be established by expert medical testimony.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Seward County: MARY C. GILBRIDE, Judge. Affirmed.

Daniel H. Friedman and Herbert J. Friedman, of Friedman Law Offices, for appellant.

David A. Domina and Claudia Stringfield, of Domina Law, P.C., for appellees St. John Lutheran Church et al.

Randy L. Goyette and Christopher J. Walker, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Estate of David Mannigel.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Anonymous filed suit against St. John Lutheran Church of Seward, Nebraska, a Nebraska corporation, and Gary Lewien and John Doe 1 through 2,300 (real names unknown), doing business as St. John Lutheran Congregation, an unincorporated religious association (collectively St. John); the Nebraska District of the Lutheran Church-Missouri Synod, a Nebraska corporation, and the Lutheran Church-Missouri Synod, a Missouri corporation (subsequently dismissed as parties); and the estate of David Mannigel, deceased (Estate of Mannigel), based upon allegations of sexual abuse perpetrated by Mannigel in the early 1970's when Anonymous was between the ages of 10 and 12. Finding that Anonymous' claims were barred by the statute of limitations, the district court granted summary judgment and dismissed the petition. We affirm.

BACKGROUND

Anonymous filed a petition for damages on November 1, 2002, alleging that she had been a member of St. John and had attended St. John Lutheran School. The petition alleged that in 1971 and 1972, Mannigel sexually abused her on numerous occasions while in the course of his position as teacher and minister, that the abuse took place on school property, that the abuse continued until 2001, that the abuse was ongoing in nature and designed to intimidate and control, and that Mannigel began inquiring about Anonymous' children in 2001. Anonymous further alleged that St. John was or should have been placed on notice "at least ten years ago" that Mannigel was "sexually abusing [Anonymous] and other children on a routine and regular basis and refused to take steps to remove him from a position of power and refused to discharge him and report him to criminal

authorities." She set forth causes of action for intentional infliction of emotional distress, negligence, breach of fiduciary duty, breach of implied warranty, and misrepresentation, and she prayed for $750,000 and general damages, interest, and costs against each party on each cause of action.

The answer of the Estate of Mannigel and that of St. John alleged the petition was barred by the statute of limitations. On May 12, 2003, St. John filed a motion for summary judgment, claiming that because Anonymous' claims were barred by the statute of limitations, the movants were entitled to judgment as a matter of law. The Estate of Mannigel filed a similar motion for summary judgment on May 16.

The court held an evidentiary hearing on the motions and received various items of evidence. According to that evidence, Anonymous was born in 1961, graduated from high school at the top of her class, attended a year of college, married in 1984, and had given birth to a number of children.

Anonymous attended St. John Lutheran School from kindergarten through the ninth grade. Mannigel was a teacher at the school and a friend of Anonymous' family. In the classroom, Mannigel would put money in Anonymous' socks and "fly" her around the room by picking her up in her chair, raising her as high as he could, and carrying her about the room. Mannigel took Anonymous on two summer vacations and on numerous trips to the movies. Anonymous' first recollection of Mannigel's molesting her was in the summer before Anonymous entered the fifth grade. Anonymous stated that Mannigel abused her by having her sit on his lap, kissing her on the mouth, rubbing her vagina through her clothes, and having her rub his penis through his clothes. Although the molesting ceased after Anonymous completed the sixth grade, Mannigel continued to have contact with Anonymous until 2001. This contact included giving Anonymous money, sending her greeting cards, and visiting the house of Anonymous' parents at times when Anonymous was present. In the mid- to late 1980's, Anonymous worked at St. John Lutheran School for approximately 3 to 4 years, where Mannigel was her "boss."

When Anonymous was approximately 14 or 15 years old, she told her mother that she had been sexually abused by Mannigel.

In approximately 1983, Anonymous told a psychiatrist about the abuse, and she also told her husband-to-be before they married. Anonymous testified that in 1990, she told Paul Vasconcellos, a mental health practitioner and also a visiting pastor at St. John, of the abuse by Mannigel. At that time, Vasconcellos provided professional mental health care to Anonymous. Anonymous stated that Vasconcellos was silent when Anonymous revealed that Mannigel had abused her. She thought Vasconcellos had an obligation to report the abuse to the police, but Anonymous did not know if he did report the abuse.

Anonymous stated that she "frequently talked about [the abuse] to people that [she] trusted, such as friends, but [she] c[ould]n't give . . . exact dates and times." She stated that during her teenage years and throughout her entire life, she told people of the abuse. Anonymous sent a letter regarding the abuse to Mannigel in approximately 1998, and around that same time, she read the letter to her mother and to a friend. Anonymous stated that she "never forgot" the abuse, that the abuse had been alive and active in her mind all her life since the time it occurred, and that she "knew what [Mannigel] had done, but it wasn't until [she] saw [a psychiatrist] that he confirmed for [Anonymous] that everything that [Anonymous] had gone through in [her] life was because of that sexual abuse."

Anonymous stated that when Mannigel telephoned or sent her letters, "[i]t always sent [her] right back to [her] childhood." Dr. Mario Scalora, who conducted forensic interviews with Anonymous and performed psychological testing, stated in his evaluation that Anonymous "described a variety of factors that would explain a significant delay in reporting the alleged abuse": Mannigel maintained a significant relationship with Anonymous and Anonymous' family and maintained substantial influence over Anonymous, Anonymous experienced a longstanding pattern of traumatic symptoms since the 2-year period the sexualized contact took place, and Anonymous suffered estrangement from her mother as a result of the lack of maternal support when reporting the abuse to her mother. Scalora stated, "To summarize, the continued contact between [Anonymous] and the alleged abuser appeared to have had the effect of continuing old emotional wounds and preventing them from healing." In personality

testing, Scalora found "no evidence of thought disorder or difficulties of reality testing," but observed indications of "significant emotional problems." Scalora opined that Anonymous' "extensive continued contact with the abuser, her struggle with post-traumatic symptoms as well as limited familial and community support appeared to have made her immediately publicly re-disclosing the abuse and publicly confronting her abuser a formidable task." Scalora's evaluation concluded with the observation that "[t]he psychological effects of sexual abuse, particularly in cases of extended exploitation at the hands of an authority figure, may impair the victim's ability to immediately confront the abuser in a public manner (such as a legal proceeding)."

Paul Flack, a provisionally licensed mental health practitioner who had counseled with Anonymous over 20 times, opined that every contact Mannigel had with Anonymous "had the effect of essentially 'tearing the scab off of a wound' and lighting up and reaggravating the incidents when he actually sexually assaulted her." Flack further opined that Mannigel's contacts with Anonymous "aggravated the original abuse and amounted to a continuation of the trauma and control issues of the original abuse."

In her answers to St. John's requests for admissions, Anonymous admitted that for more than 10 years immediately before she filed the action, she had handled her own business affairs, provided maternal custodial care to her children, "[p]rovided decision-making and control with her husband over her health and the health of her children," sought and obtained medical and other professional services for herself and her children, voted when she chose to do so, and held appointed or volunteer positions in the church or community. Anonymous admitted that she had been mentally competent for more than 10 consecutive years before she filed the lawsuit. Although she had seen various psychiatrists and psychologists, Anonymous never had any restrictions placed on her activities for any medical or mental health reason, and she had never been an inpatient at a mental health facility. In an affidavit, however, Anonymous stated that she believed she was "mentally incapacitated and ill to a degree that [she] was unable to understand [her] legal rights, retain legal counsel, and institute legal action until at least after April, 2001."

In its February 12, 2004, journal entry, the district court found that Anonymous attained the age of majority in 1981, that she had 4 years from that time to bring suit upon those causes of action which accrued prior to the time she attained majority, that Anonymous was aware of the sexual abuse from the date she achieved her majority and at all times since that date, that Anonymous was aware Mannigel's conduct was wrong prior to and after 1981, that the statute of limitations had not been tolled as the result of any disability or mental disorder, that Nebraska had not adopted the " 'continuing wrong theory' " in emotional distress cases, and that the running of the statute of limitations could not be tolled by the allegations of a " 'continuing wrong.' " The court stated that even assuming the continuing wrong theory applied, the evidence did not present any question of fact. With regard to the claim of infliction of emotional distress based upon events occurring after November 1, 1998, the court stated that the evidence did not show that the conduct of Mannigel from that time was so " 'outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and [wa]s to be regarded as atrocious and utterly intolerable in a civilized community.' " The court stated that there was no genuine issue of fact with respect to Anonymous' claims of emotional abuse occurring after 1998. Therefore, the district court sustained the motions for summary judgment and dismissed the petition. Anonymous timely appeals.

ASSIGNMENTS OF ERROR

Anonymous alleges that the trial court erred in granting the motions for summary judgment.

Upon cross-appeal, the Estate of Mannigel alleges that the district court erred in making a final determination of fact as to whether Mannigel committed the alleged acts of sexual abuse when such a determination of fact was unnecessary and improper in order to address the motions for summary judgment.

STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

Sodoro, Daly v. Kramer, 267 Neb. 970, 679 N.W.2d 213 (2004). Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

ANALYSIS

Statute of Limitations.

Neb. Rev. Stat. § 25-207(3) (Reissue 1995) sets forth a 4-year statute of limitations for "an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated." Neb. Rev. Stat. § 25-213 (Reissue 1995) provides that

> if a person entitled to bring any action mentioned in this chapter . . . is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed.

[3-5] The alleged abuse occurred in 1971 and 1972, when Anonymous was between the ages of 10 and 12. Because the alleged abuse occurred when Anonymous was "within the age of 20 years," see § 25-213, Anonymous had 4 years from the time she became 21 years of age to file suit. See *Brown v. Kindred*, 259 Neb. 95, 100, 608 N.W.2d 577, 580 (2000) (" 'within the age of 20 years' " means until one becomes 21 years old). Contrary to the district court's finding that Anonymous attained the age of majority in 1981, we observe that Anonymous turned 21 in 1982. However, this makes no difference in our analysis. The petition was not filed until November 1, 2002. A purpose of a statute of limitations is to prevent recovery on stale claims. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), *overruled on other grounds, Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002). The mischief which a statute of limitations is intended to remedy is general inconvenience resulting from delay in assertion of a legal right which it is practicable to assert. *Id.* The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not

prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim. *Id.* In this case, Anonymous did not file the petition until after the death of Mannigel.

Anonymous was aware of the abuse, and such awareness is evidenced by her numerous reports of the abuse to others. Anonymous told her mother of the alleged abuse when Anonymous was 14 or 15 years old. She told her husband about it prior to marriage and told a psychiatrist in approximately 1983. According to Anonymous, in 1990, she told Vasconcellos about the alleged abuse. In 1998, she wrote Mannigel concerning the alleged abuse and read the letter to her mother and a friend. Anonymous admitted that she had never been diagnosed with or treated for a mental illness that required inpatient hospitalization or for a repressed memory. She has been able to handle her own affairs and admitted to being mentally competent for more than 10 consecutive years before she filed the lawsuit. Although Anonymous argues that she suffered from a mental disorder that prevented her from instituting legal action, such assertion is unsupported by the evidence, even when viewed in the light most favorable to Anonymous.

Continuing Tort Doctrine.

Anonymous must show some reason why the action is not barred by the statute of limitations. She has not established that her discovery of the claim was delayed. Anonymous knew Mannigel's alleged molestation of her was wrong since at least the mid-1970's when she first told her mother that Mannigel had sexually abused her. Instead, Anonymous first argues that her claims are not barred by § 25-207, because Mannigel's conduct constituted a continuing tort that persisted through 2001.

[6] Anonymous acknowledges that no Nebraska case law directly supports her attempt to apply the continuing tort doctrine in the case before us. She analogizes the instant case with those applying the concept in cases of medical negligence. In the context of a professional relationship, Nebraska law does recognize that a continuous relationship may toll the statute of limitations but requires that there be a continuity of the relationship and services for the same or a related subject matter after the alleged

professional negligence. See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). No Nebraska appellate court has applied this rule in a context similar to that in the case before us, and there was no evidence of a similar professional relationship as in *Reinke Mfg. Co.* between Anonymous and Mannigel during the years after Anonymous reached the age of majority.

Anonymous cites to the Idaho case of *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749 (1993), in support of her argument. We first observe that the issue in *Curtis* involved a very different factual context, concerning alleged physical and mental abuse in the relationship between an unmarried, adult couple over a 10-year period during which they resided together.

The *Curtis* court stated that by its nature, the tort of intentional infliction of emotional distress will often involve a series of acts over a period of time, rather than one single act causing severe emotional distress. According to *Curtis*, "continuing tort" has been defined as

> "one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation."

123 Idaho at 603, 850 P.2d at 754, quoting 54 C.J.S. *Limitations of Actions* § 177 (1987).

A "continuing tort doctrine" is inapplicable in the case before us. The alleged sexual abuse ceased in 1972. Although a counselor explained that each time Mannigel corresponded with Anonymous it was like "tearing the scab off of a wound," Mannigel's contact with Anonymous after that point—such as sending Anonymous cards and money and seeing her at her parent's house—was not wrongful conduct in the legal sense and does not rise to the level needed to be actionable as an intentional infliction of emotional distress.

The *Curtis* court recognized that

> embracing th[e] concept [of continuing tort] in the area of intentional or negligent infliction of emotional distress does not throw open the doors to permit filing these actions at any time. The courts which have adopted this continuing tort theory have generally stated that the statute

> of limitations is only held in abeyance until the tortious acts cease. . . . At that point the statute begins to run. If at some point after the statute has run the tortious acts begin again, a new cause of action may arise, but only as to those damages which have accrued since the new tortious conduct began.

(Citations omitted.) 123 Idaho at 604, 850 P.2d at 755. Anonymous attempts to define the continual ill effects of the original violations as continuing unlawful acts. Construing Mannigel's subsequent contacts as unlawful—and thus equating them with the earlier acts of sexual abuse—would throw open the doors to permit filing of such actions at any time. A chance encounter on a city street would be given the same legal effect as the despicable acts of sexual abuse which were alleged to have occurred during the 1970's. We decline to apply the continuing tort doctrine in such fashion.

Mental Disorder.

Anonymous also argues that § 25-213—which tolls the time for bringing an action if the claimant "is, at the time the cause of action accrued . . . a person with a mental disorder"—applies in the case before us.

[7,8] In *Vergara v. Lopez-Vasquez*, 1 Neb. App. 1141, 510 N.W.2d 550 (1993), this court determined that the substitution of the phrase "a person with a mental disorder" for the word "insane" in § 25-213 did not change the legal standard involved. We found that a person with a mental disorder is one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action. *Vergara, supra.* A mental disorder within the meaning of § 25-213 is an incapacity which disqualifies one from acting for the protection of one's rights. *Vergara, supra.*

[9] We recognize that, because we are reviewing a summary judgment granted against Anonymous, we must view the evidence in the light most favorable to her. Obviously, Anonymous' own statements cannot serve to establish that she suffers from a mental disorder; expert testimony is required. See, e.g., *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999) (mental suffering

and sense of helplessness are injuries subjective in nature and effect and must be established by expert medical testimony). Flack's affidavit opines that Anonymous "has been plagued by a variety of medical and physical ailments including post-traumatic stress disorder," but the affidavit fails to express any opinion concerning her ability to institute a legal action. Scalora's affidavit provides lengthy discussion of Anonymous' symptoms and complaints, but also fails to opine that Anonymous suffered from a mental disorder which actually prevented her from understanding her legal rights or from instituting legal action. At most, Scalora opines that "immediately publicly re-disclosing the abuse and publicly confronting her abuser [would be] a formidable task" and that the psychological effects of sexual abuse "may" impair the victim's ability to "immediately" confront the abuser in a public manner. Viewed in the light most favorable to Anonymous, this evidence does not establish an issue of fact concerning the existence of a mental disorder within the meaning of § 25-213.

[10] Having rejected both of Anonymous' arguments, we find nothing that would toll the statute of limitations and no disputed issue of material fact regarding whether the claims are barred by the statute of limitations. Because we affirm the order of the district court, we need not consider the cross-appeal by the Estate of Mannigel. See *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

CONCLUSION

We conclude that Anonymous' causes of action are barred by the statute of limitations and that any conduct within 4 years prior to the time Anonymous filed her petition did not rise to the level of being actionable as an intentional infliction of emotional distress. We therefore affirm the order of the district court granting summary judgment and dismissing the petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSHUA BELK, APPELLANT.

703 N.W.2d 652

Filed September 27, 2005. No. A-04-1141.

1. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
2. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial.
3. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.
4. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
5. **Postconviction.** Postconviction proceedings are special proceedings.
6. **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.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** In addition to the district court's express statutory power to void the entire criminal proceedings, a district court has implicit authority to grant a new direct appeal where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings.
8. **Postconviction: Appeal and Error.** In a postconviction action, the district court does not possess the power to limit the issues when it grants a new direct appeal.
9. **Judgments: Collateral Attack.** If a judgment is entered without jurisdiction of the person or the subject matter or in excess of the court's power, it is void and may be collaterally impeached.
10. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
11. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

12. ____. In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.
13. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

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

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

The district court for Lancaster County, Nebraska, granted Joshua Belk's motion for postconviction relief, granting Belk the right to a new direct appeal. Belk has now appealed his convictions and sentences stemming from his pleas of no contest to two counts of sexual assault of a child. For the reasons set forth herein, we affirm Belk's convictions and sentences.

STATEMENT OF FACTS

On January 29, 2003, Belk was charged by information with one count of first degree sexual assault on a child, which is a Class II felony. The matter was to come on for trial on July 21 but was subsequently rescheduled for July 29. On July 22, the State and Belk notified the court that the parties had arrived at a plea agreement. Pursuant to the agreement, on that same date, Belk was charged by amended information with two counts of sexual assault of a child, which is a Class IIIA felony. Belk pled no contest to the two counts of sexual assault of a child, and the court accepted the pleas and found Belk guilty of two counts of sexual assault of a child. The amended information was filed with the district court clerk the next day. On September 10, the district court sentenced Belk to terms of 3 to 5 years' imprisonment on each count of sexual assault of a child. The sentences were ordered to run consecutively to each other. Belk was given credit for 244 days already served. No direct appeal was filed.

On November 18, 2003, Belk filed a motion for postconviction relief. In his motion, Belk sought to have his convictions and sentences vacated on the following grounds:

> a. That [Belk's] rights under Article I, Section 3 of the Nebraska Constitution, and the Fifth and Fourteenth Amendment[s] under the United States Constitution were violated when [Belk's] attorney refused to prosecute a direct appeal at the request of [Belk] within the allotted time limit.
>
> b. That [Belk's] rights under Article I, Section 11 of the Nebraska Constitution, and the Sixth Amendment rights under the Constitution of the United States were violated when [Belk's] attorney refused to prosecute a direct appeal at the request of [Belk] within the allotted time limit.
>
> c. [Belk's] rights under Article I, Section 23 of the Nebraska Constitution were violated when [Belk's] attorney refused to prosecute a direct appeal at the request of [Belk] within the allotted time limit.
>
> d. Had the [aforementioned] error not occurred, [Belk] would have been able to appeal his prosecution to the [N]ebraska Supreme Court.

A hearing was held on Belk's motion on May 4, 2004, and at the conclusion of the hearing, the district court took the matter under advisement. On September 10, the district court entered its order. The court found that Belk and his attorney "did not discuss [Belk's] right to appeal on September 10, 2003." The court next found that "[o]n September 16, 2003, [Belk's attorney] sent a letter to [Belk] setting forth his requirements of [Belk] before [the attorney] would file an appeal." The court further found, "[Belk's wife] took a check to [the attorney's] office on October 6, 2003, along with a letter giving [the attorney] permission to file [an] appeal, but [the attorney's] assistant would not accept either and said that [the attorney] would call. He did not call."

The court concluded that Belk's trial attorney "failed to act reasonably regarding [Belk's] right to file an appeal because he did not file the requested appeal re excessive sentence and he did not provide information to [Belk] regarding [Belk's] right to request in forma pauperis status regarding an appeal." Therefore, the court held that Belk's "motion for postconviction relief is

sustained for the reasons set forth above" and ordered that "[Belk] is hereby granted a new direct appeal re the issue of excessive sentence." The district court appointed the Lancaster County public defender's office to represent Belk in his direct appeal, and Belk has timely appealed to this court.

ASSIGNMENTS OF ERROR

Belk contends, restated, that he received ineffective assistance from his trial counsel for numerous reasons and that the district court abused its discretion when it imposed excessive sentences upon him.

STANDARD OF REVIEW

[1] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

[2] An appellate court always reserves the right to note plain error which was not complained of at trial. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[3] An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Mulinix*, 12 Neb. App. 836, 687 N.W.2d 1 (2004).

[4] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

ANALYSIS

Ineffective Assistance of Counsel.

[5] Belk's first five assignments of error, restated as a single assignment above, all claim that he received ineffective assistance from his trial counsel. However, the district court's order granting Belk's motion for postconviction relief limited the direct appeal to "the issue of excessive sentence." Belk has not appealed from the district court's order granting his motion for

postconviction relief. We note that since postconviction proceedings are special proceedings, and because the district court's decision affected a substantial right of Belk's, the district court's order was a final and therefore appealable order. See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[6] Despite the fact that Belk failed to appeal from the district court's order limiting the issues of his direct appeal to the matter of excessive sentences, we note that an appellate court always reserves the right to note plain error which was not complained of at trial. *State v. Davlin, supra.* 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. *Id.*

[7] The Nebraska Supreme Court has previously noted the following regarding the district court's power to grant postconviction relief:

> In [*State v.*] *McCracken*, [260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002),] we specifically rejected the State's contention that the power conferred by the [Nebraska Postconviction Act] is limited to either setting aside a criminal judgment because of a violation of the defendant's constitutional rights or denying postconviction relief entirely. We held that in addition to the district court's express statutory power to void the entire criminal proceedings, a district court had implicit authority to grant a new direct appeal "where the evidence establishes a denial or infringement of the right to effective assistance of counsel at the direct appeal stage of the criminal proceedings."

State v. Meers, 267 Neb. 27, 29-30, 671 N.W.2d 234, 236-37 (2003).

[8,9] Although the district court has the implicit authority to grant a new direct appeal in a postconviction action, we are unable to find any authority that grants a district court the power to limit the issues of that direct appeal, and we determine that in a postconviction action, the district court does not possess the

power to limit the issues when it grants a new direct appeal. Therefore, we find that it was plain error for the district court to limit the direct appeal granted to Belk to the issue of excessive sentences. If a judgment is entered without jurisdiction of the person or the subject matter or in excess of the court's power, it is void and may be collaterally impeached. *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999). Because that portion of the district court's order limiting Belk's direct appeal was in excess of the court's power, it is void. As a result, Belk is entitled to a full direct appeal.

[10] After examining the record and each of Belk's allegations of ineffective assistance of counsel, it is clear to us that the record before us is not sufficient to properly address his allegations. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003). The determining factor is whether the record is sufficient to adequately review the question. *Id.* If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.* We conclude in the instant case that the record on direct appeal is not sufficient to adequately review Belk's arguments regarding ineffective assistance of counsel, and because these matters have not been raised or ruled on at the trial level and may require an evidentiary hearing, we will not address these matters on direct appeal.

Excessive Sentences.

Belk alleges that the district court abused its discretion when it imposed excessive sentences upon him. As mentioned earlier, Belk was convicted of two counts of sexual assault of a child. He was sentenced to 3 to 5 years' imprisonment on each count, was given credit for 244 days already served, and was ordered to pay the costs of prosecution. Belk's sentences were ordered to run consecutively to each other. Sexual assault of a child is a Class IIIA felony, and the sentencing range for Class IIIA felonies is up to 5 years' imprisonment or a $10,000 fine.

An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Mulinix*, 12 Neb. App. 836,

687 N.W.2d 1 (2004). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005).

Belk alleges that his sentences were excessive because, "[d]espite the existence of numerous mitigating circumstances and the lack of any significant criminal history . . . Belk was sentenced to substantial minimum sentences and maximum, maximum sentences for the two class IIIA felonies for which he was convicted." Brief for appellant at 22. Belk points out that he was the only child of a single parent, that he never met his natural father, that his homelife was inadequate, that he suffered physical abuse at the hands of his stepfather, that he was exposed to domestic violence and drug use as a child, that his mother gave him marijuana, and that he was removed from his mother's care and placed in foster care when he was 15 years old. He also notes that his sentences created substantial hardship for his family and children. Belk suggests that "[h]ad [he] not been incarcerated, he would have been able to work, pay taxes, and provide financial support for his wife and their mutual child" and would have been able to pay child support for his other children. *Id.* at 23.

Belk's brief notes that "[i]n spite of [his] disadvantaged background, [Belk] reached the age of 30 . . . with a relatively minimal criminal record." *Id.* at 22. Belk claims that prior to the crimes in the instant case, he "had no prior history of violent or aggressive behavior, no prior felony convictions, and no arrests or convictions for sex offenses." *Id.* at 23. Belk contends that "[g]iven this fact and the fact that his prior convictions were almost exclusively related to the operation of motor vehicles, the court's combined sentences of not less than six nor more than 10 years imposed a punishment against [Belk] which was much greater than his criminal history would warrant." *Id.* Belk further notes that he pled no contest to the instant charges, saving the State money and saving the victims from having to testify.

[11-13] In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past

criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Kula*, 262 Neb. 787, 635 N.W.2d 252 (2001).

An examination of the factors to be considered in imposing a sentence reveals that the district court clearly did not abuse its discretion when it imposed its sentences upon Belk. The presentence report reveals that Belk was 29 years old at the time he committed the crimes in the instant case, while one of his victims was 6 years old and the other victim was 8 years old. The presentence report also reflects that the 6-year-old victim alleged that Belk digitally penetrated her, while the 8-year-old victim alleged that Belk touched her "private parts" with his hand and that he " 'tried to put his private in [hers].' " He was an experienced adult, while the children were susceptible and vulnerable. His crimes were undoubtedly traumatic for his victims. The record indicates that the trial court examined the presentence report prior to sentencing Belk, and the court, when it imposed its sentences, noted that "if the Court were to impose sentences less than the ones about to be imposed, it would . . . depreciate the seriousness of these crimes and promote disrespect for the law."

Belk's sentences are clearly within the statutory range for the crimes he committed. The reasons and rulings of the trial judge in sentencing Belk were not clearly untenable and did not unfairly deprive Belk of a substantial right or deny him a just result in the instant case. The district court did not abuse its discretion when it imposed its sentences upon Belk, and this assignment of error is entirely without merit.

CONCLUSION

The record in the instant case is not sufficient to properly address Belk's allegations of ineffective assistance of counsel. Further, we find that the trial court did not abuse its discretion

when it imposed its sentences upon Belk. Accordingly, Belk's convictions and sentences are affirmed.

AFFIRMED.

IN RE INTEREST OF KYLE O., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KYLE O., APPELLANT.

703 N.W.2d 909

Filed September 27, 2005. No. A-04-1477.

1. **Juvenile Courts: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings.
2. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
3. **Witnesses.** Credibility of a witness is always relevant.
4. ____. Normally, it is improper for one witness to testify as to the credibility of another witness.
5. **Trial: Evidence.** If an exhibit is admissible only in part, it is incumbent on the offeror to select and offer only the admissible part; if one offers both the admissible and inadmissible parts, the trial court may reject the entire offer.
6. **Juvenile Courts: Proof.** When an adjudication is based upon Neb. Rev. Stat. § 43-247(1) (Reissue 2004), the allegations must be proved beyond a reasonable doubt.
7. **Sexual Assault: Words and Phrases.** Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.
8. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.
9. **Sexual Assault: Proof.** In proving sexual contact, as defined in Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2004), the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such purpose.
10. **Sexual Assault: Minors: Intent: Evidence.** The issue of intent of sexual gratification in minors must be determined on a case-by-case basis. There can be no bright-line test. The fact finder must consider all of the evidence, including the offender's age and maturity, before deciding whether intent can be inferred.
11. ____: ____: ____: ____. Without some evidence of the child's maturity, intent, experience, or other factor indicating his or her purpose in acting, sexual ambitions must not be assigned to a child's actions.

12. **Criminal Law: Sexual Assault.** Nebraska does not criminalize sexual contact for the purpose of humiliating or degrading a person.

Appeal from the County Court for Burt County: C. MATTHEW SAMUELSON, Judge. Reversed and remanded with direction to dismiss.

Bryan C. Meismer for appellant.

Daniel A. Smith, Burt County Attorney, for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The county court for Burt County, sitting as a juvenile court, adjudicated Kyle O. under Neb. Rev. Stat. § 43-247(1) (Reissue 2004) for sexual contact with another child, in violation of Neb. Rev. Stat. § 28-320 (Reissue 1995). Kyle appeals. Because we conclude that (1) the trial court did not abuse its discretion in excluding an exhibit that was only partially admissible and (2) the State presented insufficient evidence to establish that "sexual contact" occurred, we reverse, and remand with direction to dismiss.

BACKGROUND

The State filed an amended petition alleging that Kyle committed two instances of third degree sexual assault in violation of § 28-320 and seeking adjudication of Kyle under § 43-247(1). Kyle denied the allegations, and the court subsequently conducted a trial.

At trial, the State presented one witness, an adult apparently related to Kyle. The State's witness testified that his children, who were ages 10, 9, and 7, were Kyle's cousins and that the witness' family lived "[r]ight across the alley" from Kyle. Kyle and the witness' children often played together and had been doing so over a period of years. The witness stated that in May 2004, he was in a detached garage near his house, working on a car, and he was observing the children playing in the yard while his wife was away from home. He testified that because of some prior incidents of an inappropriate nature, he was particularly attentive. He claimed that prior to the incident in question, he had caught Kyle

and his children underneath the bed in the basement of the witness' house, "disclothing [sic] Barbie dolls, showing the kids what to do with Barbie dolls."

The State's witness testified that on the date in question, Kyle was 14 years of age. On that occasion, the witness saw Kyle pull down the pants of another child, S.S., who was 5 years old, and observed Kyle "grab [S.S.'] penis and hold it and showed [sic] my kids how small it was." Upon observing Kyle's actions, the witness came out of the door of the garage, "hollered" at Kyle, and saw Kyle turn away and fold his arms as if to appear that he had done nothing. S.S. resided in the same neighborhood and occasionally came over to play with the witness' children. The witness then told all the children to go home, and S.S. pulled up his own pants.

On cross-examination, the witness testified that he initially told no one other than his wife about the incident. The witness' testimony conflicted as to when he reported the event to police. On one hand, he testified that it "[c]ouldn't have been too many days afterwards" and that he did not "think it was even a week"; but shortly thereafter, he also testified that a meeting on July 22, 2004, was the first time he talked to the police. He attempted to explain, "We talked to the police first, but we went to the police, because they was [sic] family, we tried to do this without going through all this."

The witness claimed that he observed the event, which took about 2 seconds, through an open window in the garage and that he heard Kyle speak, telling the witness' children how small S.S.' penis was. When the witness was asked whether "it look[ed] like [the contact] was for sexual gratification," he responded that he did not know.

After the State rested, Kyle offered no evidence other than a letter from Kyle's counselor, which stated in pertinent part:

> I have discussed with Kyle the allegations of inappropriate touching during several sessions. Kyle has always denied sexually or non-sexually touching anyone. I believe that Kyle is telling the truth. Kyle appears to be immature for his age in some ways. Kyle has expressed disgust and repulsion while discussing sexual material in my office. Which indicates to me that he is . . . still in a pre- or early

> adolescent [sic]. During this stage adolescents express little interest in sexual matters. This stage is where children express an interest in becoming more independent from their parents. Kyle chooses to express his independence with minimal rebellion in his home. Kyle expresses a great deal of maturity and independence in fixing things for his mom and working with his grandfather. In my office Kyle prefers to play and show me how he can build things, mostly things with wheels, using connecting blocks. Kyle shows a great deal of interest in anything with an engine or on wheels.

In response to the offer of the exhibit, the State's attorney expressly disclaimed any objection on the basis of foundation or hearsay, but did object on the basis of relevance. The trial court deferred ruling on the objection until after the trial. In a written judgment entered November 30, 2004, the trial court excluded the exhibit and found beyond a reasonable doubt that Kyle had subjected S.S. to sexual contact in violation of § 28-320. Accordingly, Kyle was adjudicated pursuant to § 43-247(1). Kyle timely appeals.

ASSIGNMENTS OF ERROR

Kyle asserts, consolidated and restated, that (1) the trial court erred in excluding the exhibit that Kyle offered and (2) there was insufficient evidence to support the adjudication under § 43-247(1) or to establish that Kyle subjected S.S. to sexual contact in violation of § 28-320.

STANDARDS OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach conclusions independent of the trial court's findings. *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002).

[2] Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).

ANALYSIS

Exclusion of Exhibit.

Kyle argues that the trial court erred in excluding the letter from Kyle's counselor. He relies upon the part of the letter which opines that Kyle is emotionally immature for his age. Kyle suggests that this opinion may indicate that adult assumptions about Kyle may be false. We assume that this portion of the exhibit was relevant and would have been admissible.

[3-5] However, the content of the exhibit was not restricted to such arguably relevant material. The letter also contained expressions concerning Kyle's statements to his counselor about the allegations and an opinion that Kyle was telling the truth. Credibility of a witness is always relevant. *State v. Eldred*, 5 Neb. App. 424, 559 N.W.2d 519 (1997). However, Kyle did not testify at the trial. Even if Kyle had testified at the trial, another principle would have precluded admission of the counselor's opinion that Kyle was telling the truth. Normally, it is improper for one witness to testify as to the credibility of another witness. See *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). We believe the rule has equal application in the situation here, where Kyle did not testify. In the instant case, the counselor's expressions describing Kyle's statements and opining that Kyle was telling the truth were irrelevant. That portion of the exhibit was not admissible. If an exhibit is admissible only in part, it is incumbent on the offeror to select and offer only the admissible part; if one offers both the admissible and inadmissible parts, the trial court may reject the entire offer. *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994). We find no abuse of discretion in the exclusion of the counselor's letter.

Sufficiency of Evidence.

[6] Pursuant to Neb. Rev. Stat. § 43-279(2) (Reissue 2004), when an adjudication is based upon § 43-247(1), the allegations must be proved beyond a reasonable doubt. *In re Interest of Cory P.*, 7 Neb. App. 397, 584 N.W.2d 820 (1998).

The State sought adjudication on the basis that Kyle committed a sexual assault. Section 28-320(1) states that

> [a]ny person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or

> should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

Because the State does not assert that Kyle caused serious personal injury to S.S., the alleged sexual assault in the instant case would "be in the third degree and [be] a Class I misdemeanor." Section 28-320(3).

[7] Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2004) defines "sexual contact." Because Kyle's argument does not address or contest the physical touching portion of the definition, we confine our attention to that portion of the definition which states "[s]exual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party." *Id.*

We reject Kyle's argument that the decision in *State v. Hulshizer*, 245 Neb. 244, 512 N.W.2d 372 (1994), "requires that we give all reasonable explanations equal weight and proof beyond a reasonable doubt cannot be found just because one explanation points towards guilt." Brief for appellant at 8.

Hulshizer concerned an alleged abuse of a vulnerable adult. There, a female certified nurse's aide in a nursing home facility walked into a bathroom and found the defendant, a male certified nurse's aide, seated on the toilet with a female resident of the care facility sitting on the defendant's lap. The elderly resident suffered from senile dementia and Parkinson's disease. She was wearing her briefs in place, but had her dress pulled up around her buttocks. Neither the defendant nor the resident had his or her genitalia exposed; however, the witness testified that she saw the defendant trying to zip up his pants. The Nebraska Supreme Court stated that under those circumstances, any evidence of sexual arousal or gratification was entirely circumstantial. The Supreme Court recited the principle that a reasonable inference from circumstantial evidence is to be taken most favorably to the accused when the circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. In reversing the jury's conviction

of the defendant, the Supreme Court explained that the inference that the defendant sexually abused the resident was not stronger than the inference that the defendant fell backward onto the toilet and pulled her onto his lap to prevent her from falling onto the floor.

[8] In *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995), though not discussing *Hulshizer*, the Nebraska Supreme Court rejected the "accused's rule," which is the principle from *Hulshizer* upon which Kyle relies. In *Pierce*, the Supreme Court "again overrule[d] those cases espousing the accused's rule as an appropriate standard of review." 248 Neb. at 548, 537 N.W.2d at 330. The Supreme Court adhered to the better rule that " 'one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.' " *Id.* at 546, 537 N.W.2d at 329-30, quoting *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). In our view, the decision in *Pierce* rejects the principle from *Hulshizer* that Kyle seeks to invoke.

[9] However, Kyle also contends that "[t]here was no evidence offered to show whether either party to this alleged incident was sexually gratified or aroused by what happened." Brief for appellant at 4. Citing *State v. Berkman*, 230 Neb. 163, 430 N.W.2d 310 (1988), the State correctly responds that in proving "sexual contact," as defined in § 28-318(5), the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such purpose.

Kyle also argues that "[t]he record does not indicate that [the State's witness] caught the children performing any sex acts of any sort or that the children made any attempt to conceal what was happening." Brief for appellant at 4. The evidence is undisputed that Kyle intentionally touched S.S.' penis. The only question is whether that conduct "can be reasonably construed as being for the purpose of sexual arousal or gratification of either party."

We agree that the conduct cannot be reasonably construed as being for the purpose of sexual arousal or gratification of S.S., who was only 5 years of age. Whether Kyle's action can be reasonably construed as being for the purpose of his own sexual arousal or gratification is a more difficult question. In *McGalliard*

v. State, 306 Ark. 181, 813 S.W.2d 768 (1991), the Supreme Court of Arkansas defined "sexual gratification" as, paraphrased, something that pleases the sexual organs or gratifies the libido. The court construed the words in accordance with their reasonable and commonly accepted meanings. Later, in *Farmer v. State*, 341 Ark. 220, 223, 15 S.W.3d 674, 676 (2000), the court noted its previous holdings that "it is not necessary for the State to provide direct proof that an act is done for sexual gratification if it can be assumed that the desire for sexual gratification is a plausible reason for the act." The court also observed that "it is difficult to know for certain in this day and age what is sexually gratifying to another person. Indeed, short of a confession or physical evidence, sexual gratification, like intent, is rarely capable of proof by direct evidence and must usually be inferred from the circumstances." *Id.* at 224, 15 S.W.3d at 677. Accord *State v. Berkman, supra* (intent is mental process and may be inferred from words and acts of defendant and from circumstances surrounding incident).

In several cases considering factual situations similar to the case before us, an Illinois appellate court refused to automatically make the same inference of sexual gratification where the actor was a child rather than an adult. Three cases illustrate the reasoning, which depends heavily upon the particular circumstances of each case.

The Illinois court first considered the situation in *In re A.J.H.*, 210 Ill. App. 3d 65, 568 N.E.2d 964, 154 Ill. Dec. 743 (1991). In that case, the trial court adjudicated a 13-year-old girl, A.J.H., based upon a finding that she committed an act of aggravated criminal sexual abuse against a 5-year-old boy she babysat. At the hearing, the prosecutor asked the boy to demonstrate on a doll what A.J.H. had done to him, and in response, the boy put his thumb and middle finger in the penis area of the doll and moved them back and forth. The prosecutor asked the boy to demonstrate how long A.J.H. had her hand on the boy's penis, and the court noted for the record a time of about 4 to 5 seconds. The boy testified that after the touching, A.J.H. told him not to tell anyone. A.J.H. denied touching the boy's private parts. The appellate court noted that the applicable statute defined "sexual conduct" as

> "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, for the purpose of sexual gratification or arousal of the victim or the accused." Ill.Rev.Stat.1989, ch. 38, par. 12-12(e).

In re A.J.H., 210 Ill. App. 3d at 71, 568 N.E.2d at 968, 154 Ill. Dec. at 747. In reversing the conviction, the appellate court stated:

> [I]t is not justified to impute the same intent into a child's action that one could reasonably impute into the actions of an adult. Here, [A.J.H.] was 13 years old, and the alleged victim was five. Even accepting [the alleged victim's] allegations as true, we cannot reasonably infer from [A.J.H.'s] actions that she intended sexually to gratify or arouse [the alleged victim] or herself. Without such evidence, an essential element of the crime is missing.

In re A.J.H., 210 Ill. App. 3d at 72, 568 N.E.2d at 968, 154 Ill. Dec. at 747.

The Illinois appellate court recently considered the same issue in *In re Matthew K.*, 355 Ill. App. 3d 652, 823 N.E.2d 252, 291 Ill. Dec. 242 (2005). At the time of the alleged offense in that case, Matthew K. was 12 and the alleged victim, A.L., was 8 years old. A.L. testified that she and Matthew played a game called " 'survival' " in Matthew's bedroom, for which game Matthew set the rules, *id.* at 653, 823 N.E.2d at 253, 291 Ill. Dec. at 243; that Matthew told the other children present to leave and then return in 5 minutes; and that Matthew touched A.L.'s private parts when her pants were down. When A.L. told Matthew that his sliding his finger tickled, Matthew told her to cover her mouth. Matthew then gave A.L. a " 'tongue massage,' " wherein he put his mouth to her mouth and wiggled his tongue. *Id.* at 654, 823 N.E.2d at 253, 291 Ill. Dec. at 243. According to A.L., Matthew did not remove his clothing, make any special noises, or threaten A.L., although he did tell her to keep the incident a secret. A child psychiatrist testified that Matthew was socially immature and that Matthew's actions could be better understood as those of a 10-year-old. The doctor opined that Matthew had no interest in becoming sexually aroused and that Matthew told

the doctor that Matthew "wanted to see what it felt like." 355 Ill. App. 3d at 654, 823 N.E.2d at 254, 291 Ill. Dec. at 244. After the trial court found Matthew guilty of aggravated criminal sexual abuse, Matthew appealed, alleging that the State failed to prove beyond a reasonable doubt that Matthew acted with the intent to sexually gratify or arouse.

[10] In reaching its conclusion that the State failed to prove that Matthew acted with the purpose of sexual gratification or arousal, the *In re Matthew K.* court discussed several prior cases on the issue, including *In re A.J.H.*, 210 Ill. App. 3d 65, 568 N.E.2d 964, 154 Ill. Dec. 743 (1991). In *In re E.R.E.*, 245 Ill. App. 3d 669, 614 N.E.2d 1367, 185 Ill. Dec. 682 (1993), a 12-year-old boy was adjudicated for touching the vagina of a 6-year-old over her clothes and telling the victim not to tell anyone. The boy testified and denied touching the victim. The appellate court held that the State failed to prove the sexual gratification element and reversed the adjudication. In *In re Donald R.*, 343 Ill. App. 3d 237, 796 N.E.2d 670, 277 Ill. Dec. 584 (2003), a 16-year-old boy was adjudicated for exposing his penis to a 6-year-old girl and having her touch his penis. The boy admitted exposing his penis to the girl, but he denied that the girl touched his penis, voluntarily or otherwise. On appeal, the *In re Donald R.* court concluded that a fact finder reasonably could have inferred from the circumstantial evidence that the minor boy had the required state of mind. The *In re Matthew K.* court stated that *In re A.J.H.* and *In re E.R.E.* had greater applicability because the 16-year-old minor in *In re Donald R.* was significantly closer to adulthood than the offenders in *In re A.J.H.* and *In re E.R.E.* The *In re Matthew K.* court further stated:

> [A]n inference of sexual gratification was reasonable in *Donald R.*, while the same inference, without any evidence of intent, is unreasonable here. As our analysis of these cases implies, the issue of intent of sexual gratification in minors must be determined on a case-by-case basis. There can be no bright-line test. The fact finder must consider all of the evidence, including the offender's age and maturity, before deciding whether intent can be inferred.

In re Matthew K., 355 Ill. App. 3d 652, 656-57, 823 N.E.2d 252, 256, 291 Ill. Dec. 242, 246 (2005).

[11] Similarly, the Court of Appeals of North Carolina has stated:

> [W]e hold that without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting, sexual ambitions must not be assigned to a child's actions. Adults can and should be presumed to know the nature and consequences of their acts; this is not always the case with children. . . .
>
> We are not asked to and do not hold that a nine year old is incapable of acting for the purpose of arousing or gratifying his sexual desires. We have no evidence on this question. We do not believe, however, that the State may rest on an allegation of the act alone between, for example, a four year old and a one year old, to infer sexual purpose. We hold that the element "for the purpose of arousing or gratifying sexual desire" may not be inferred solely from the act itself under [the "Indecent liberties between children" statute].

In re T.S., 133 N.C. App. 272, 277, 515 S.E.2d 230, 233 (1999).

With regard to the age factor, a California appellate court reasoned in *In re Jerry M.*, 59 Cal. App. 4th 289, 69 Cal. Rptr. 2d 148 (1997), that the closer a minor approaches the age of 14, the more likely the minor understands the wrongfulness of his or her acts. In addition to the factor of the defendant's age, that court stated:

> Circumstances which have been considered relevant to proving intent to satisfy sexual desires include: the charged act, extrajudicial statements, the relationship of the parties, other acts of lewd conduct, coercion or deceit used to obtain the victim's cooperation, attempts to avoid detection, offering of a reward for cooperation, a stealthy approach to the victim, admonishment of the victim not to disclose the occurrence, physical evidence of sexual arousal and clandestine meetings.

Id. at 299, 69 Cal. Rptr. 2d at 153.

In concluding that the prosecution failed to sustain its burden of proof, the *In re Jerry M.* court was persuaded by many factors, including: The defendant was 11 years old, there was no evidence that the defendant had reached puberty, there was no evidence that the defendant was sexually aroused, each of the minor

victims knew the defendant, the conduct occurred in public during the daytime and in the presence of others, there was no attempt to prolong the touching beyond the initial momentary contact, and there was no admonishment to the victims to not disclose the incident. The *In re Jerry M.* court stated:

> The record shows Jerry was a brazen 11-year-old whose conduct was more consistent with an intent to annoy and obtain attention than with sexual arousal. Under these circumstances Jerry was perhaps guilty of battery . . . but the record does not support a true finding beyond a reasonable doubt of conduct intended sexually to exploit a child—the "gist" of [the statute pertaining to felony lewd touching of a victim under 14 years of age].

59 Cal. App. 4th at 300, 69 Cal. Rptr. 2d at 154.

We agree with the Illinois appellate court that no bright-line rule applies regarding the age of the child actor. In the instant case, Kyle pulled down S.S.' pants, grabbed S.S.' penis, and made a remark to the other children about the small size of the penis. There may have been another charge that would not have required that the conduct be for the purpose of sexual arousal or gratification; however, as charged in this case, the State had the burden to prove beyond a reasonable doubt that Kyle's actions could be reasonably construed as being for such purpose.

The State's only witness testified that he did not know whether it appeared that Kyle was seeking sexual gratification. There is no evidence that Kyle was sexually aroused, and we are left looking to the circumstantial evidence in an attempt to glean Kyle's intent. Significantly, the act occurred outside during the daytime, in the presence of others, and lasted approximately 2 seconds. While Kyle's subsequent nonverbal response manifested an attempt to convey the impression that he had been doing nothing wrong, given that Kyle's actions were wrong on a more basic level, as an offensive touching contrary to the common law, Kyle's response does not provide sufficient proof that Kyle's conduct was for the purpose of his sexual gratification.

[12] It would be very easy to construe Kyle's conduct as being for the purpose of humiliating, bullying, or annoying S.S. Although some jurisdictions criminalize sexual contact for the purpose of humiliating or degrading a person, Nebraska does

not. See, Conn. Gen. Stat. Ann. § 53a-65(3) (West 2001); D.C. Code Ann. § 22-3001(9) (2001); Mich. Comp. Laws Ann. § 750.520a(n)(ii) (West 2004); Mont. Code Ann. § 45-2-101(67)(a) (2005); N.J. Stat. Ann. § 2C:14-1(d) (West 1995); Wis. Stat. Ann. § 940.225(5)(b)(1) (West 2005). See, also, Colo. Rev. Stat. Ann. § 18-3-401(4) (West 2004) ("for the purposes of sexual arousal, gratification, or abuse"); Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(D) (West Cum. Supp. 2004) ("or for the purpose of causing bodily injury or offensive physical contact"); Md. Code Ann., Crim. Law § 3-301(f) (2002) ("or for the abuse of either party"); R.I. Gen. Laws § 11-37-1(7) (2002) ("for the purpose of sexual arousal, gratification, or assault"); Wyo. Stat. Ann. § 6-2-301(a)(vi) (Michie 2005) ("touching, with the intention of sexual arousal, gratification or abuse"). It is a function of the Legislature and not of this court to include within the definition of "sexual contact" conduct which can reasonably be construed as being for the purpose of humiliation or abuse. Because the Nebraska definition does not include such conduct and because, upon our de novo review, we cannot find that Kyle's conduct can reasonably be construed for the purpose of sexual arousal or gratification, we find that the State failed to satisfy its burden of proving the elements of the offense beyond a reasonable doubt.

CONCLUSION

Although we find that the trial court did not abuse its discretion in excluding an exhibit which was only partially admissible, we conclude that there was insufficient evidence to support the adjudication. Accordingly, we must reverse the adjudication and remand the cause with direction to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

IN RE INTEREST OF SKYE W. AND MCKENZIE W., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JENNIFER W., APPELLANT.

704 N.W.2d 1

Filed September 27, 2005. No. A-05-285.

1. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
2. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven.
3. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights.** A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
5. ____. Termination of parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 2004) requires a finding that the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.
6. ____. Neb. Rev. Stat. § 43-292(7) (Reissue 2004) operates mechanically and, unlike the other subsections of the statute, does not require the State, in termination of parental rights proceedings, to adduce evidence of any specific fault on the part of a parent.
7. ____. It is in the context of analyzing the best interests of the juvenile that courts must respect a parent's commanding interest in the accuracy and justice of the decision to terminate parental rights.
8. ____. The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan.
9. **Juvenile Courts: Parental Rights.** Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.

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

Jason E. Troia, of Gallup & Schaefer, for appellant.

Stuart J. Dornan, Douglas County Attorney, and Karen Kassebaum Nelson for appellee.

Lynnette Z. Boyle, guardian ad litem.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jennifer W. appeals the decision of the separate juvenile court of Douglas County terminating her parental rights as to two of her children, Skye W. and McKenzie W., pursuant to Neb. Rev. Stat. § 43-292(7) (Reissue 2004), and finding that such termination is in the best interests of the children. Jennifer alleges that the juvenile court erred in finding that termination of her parental rights is in the best interests of the children. We find that the State failed to adduce sufficient evidence to clearly and convincingly demonstrate that termination of Jennifer's parental rights is in the best interests of the children, and accordingly, we reverse the juvenile court's order.

II. BACKGROUND

The two minor children involved in this case are Skye, born on August 11, 1997, and McKenzie, born on May 8, 2000. On January 16, 2003, a petition was filed alleging that Skye and McKenzie were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) through the fault or habits of Jennifer. The petition alleged inappropriate discipline and emotional abuse. On February 11, an amended petition was filed. On July 2, Skye and McKenzie were adjudicated on the allegations of the amended petition.

On October 12, 2004, a motion for termination of Jennifer's parental rights was filed. The motion sought such termination solely on the basis of alleging both the statutory provision of § 43-292(7) and the best interests of the children. On January 27, 2005, a termination of parental rights hearing was held. The State called only one witness, the caseworker assigned to the case, to testify in support of the termination of Jennifer's parental rights. The substance of this witness' testimony will be discussed below in the "Analysis" section of this opinion. On January 31, the juvenile court entered an order terminating Jennifer's parental rights. This appeal followed.

III. ASSIGNMENT OF ERROR

Jennifer's sole assignment of error on appeal is that the juvenile court erred in finding that termination of Jennifer's parental rights is in the best interests of the children.

IV. ANALYSIS

Jennifer asserts that the State failed to adduce clear and convincing evidence to demonstrate termination of Jennifer's parental rights is in the best interests of the children and that the juvenile court erred in finding otherwise. We find that the record in this case bears striking similarities to the record described by the Nebraska Supreme Court in *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In that case, the court found that "the evidence in this record is, simply stated, neither clear nor convincing." *Id.* at 263, 691 N.W.2d at 175. We find the same to be true in this case. Accordingly, we reverse the judgment of the juvenile court.

[1,2] Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *Id.*; *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003). The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. *In re Interest of Aaron D., supra*; *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). See *In re Interest of Heather G. et al.*, 12 Neb. App. 13, 664 N.W.2d 488 (2003).

[3,4] It is well established that a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of Aaron D., supra*; *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004). However, it is also well established that a parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *In re Interest of Aaron D., supra*; *In re Interest of Kassara M.*, 258

Neb. 90, 601 N.W.2d 917 (1999); *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999); *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

[5-7] As noted, the State in this case sought to terminate Jennifer's parental rights solely on the basis of § 43-292(7), which provides that the court may terminate parental rights if "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Section 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Aaron D., supra.* In such cases, the Nebraska Supreme Court has indicated that appellate courts must be particularly diligent in the de novo review of whether termination of parental rights is, in fact, in the juvenile's best interests. *Id.* It is in the context of analyzing the best interests of the juvenile that courts must respect a parent's "commanding" interest in the accuracy and justice of the decision to terminate parental rights. *Id.* As the Nebraska Supreme Court stated in *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 257, 674 N.W.2d 442, 463 (2004):

> The 15-month condition set forth in § 43-292(7) serves the purpose of providing a reasonable timetable for parents to rehabilitate themselves. . . . But termination based on the ground that a child has been in out-of-home placement for 15 of the preceding 22 months is not in a child's best interests when the record demonstrates that a parent is making efforts toward reunification and has not been given a sufficient opportunity for compliance with a reunification plan.

(Citation omitted.)

Although termination of parental rights solely on the basis of § 43-292(7) can be appropriate in cases in which clear and convincing evidence is presented, it may prove difficult in cases where the record is insufficient to prove any of the other statutory grounds for termination of parental rights—i.e., where the parent did not abandon the child, did not neglect to protect or provide for the child, did not fail to participate in necessary rehabilitation, and was not abusive. See *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In such cases, where termination of parental rights is sought solely pursuant to

§ 43-292(7), proof that termination is nonetheless in a juvenile's best interests will, necessarily, require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292. *In re Interest of Aaron D., supra.*

As noted, we find the record in the present case to bear striking similarities to the record described by the Nebraska Supreme Court in *In re Interest of Aaron D., supra.* In that case, the court found that the record lacked clear and convincing evidence of circumstances as compelling and pertinent to the child's best interests as those enumerated in the other subsections of § 43-292. The court noted "the failure of the State to produce the clear and convincing evidence required to show that termination [of parental rights] would be in [the juvenile's] best interests." *In re Interest of Aaron D.*, 269 Neb. at 261, 691 N.W.2d at 174.

In *In re Interest of Aaron D., supra*, the sole witness presented by the State was the caseworker assigned to the case. The court noted that the State used the caseworker "as a proxy for all of the other witnesses whose expertise and testimony would have been helpful, and perhaps essential, in determining what was in [the juvenile's] best interests." *Id.* at 261, 691 N.W.2d at 174. In addition, the caseworker's testimony was based in large measure on her review of records and reports generated by others who directly observed the parties. The court specifically noted, for example, that one of the primary reasons the State proffered for seeking to change the juvenile's permanency objective to adoption involved problems during visitation. However, the caseworker never actually observed any visitation, and her opinion was based only on someone else's report about such problems.

The court in *In re Interest of Aaron D., supra*, further specifically noted that the juvenile's therapists did not testify, that family support workers did not testify, and that foster parents and teachers did not testify. The court opined that "[t]he State seems to have forgotten that the focus of this proceeding is not [the parent], but [the juvenile], and the State thus did not present evidence directly adduced from many of the people most able to testify as to [the juvenile's] condition, circumstances, and best interests." *Id.* at 263, 691 N.W.2d at 175.

The record in the present case is very similar to the record described in *In re Interest of Aaron D., supra.* In the present case, the sole witness called by the State to prove the need for termination of parental rights was the assigned caseworker. The sum total of the State's evidence for terminating Jennifer's rights to parent these children consisted of approximately 43 pages of testimony and one exhibit. The caseworker, as a proxy for expert medical testimony, attempted to present testimony about Jennifer's mental health issues and opined that Jennifer needed individual therapy, proof that she was taking medications, and regular psychiatric checkups to deal with a diagnosis of suffering from bipolar disorder. The caseworker, however, acknowledged that she did not recall what medications Jennifer was supposed to be taking and did not know if Jennifer still needed to be on medication.

In addition, the caseworker's testimony was based in large measure on information reported to her, rather than on her own personal observations. For example, the caseworker opined that the children would not be safe in Jennifer's care, based on Jennifer's diagnosis of bipolar disorder and on a review of visitation reports. The caseworker acknowledged, however, that there had never been any concerns about the children's safety during any visitation but that Jennifer had not made progress toward unsupervised visitation. The caseworker never made it clear why a lack of progress toward unsupervised visitation amounted to a concern for the safety of the children such that the children's best interests would be served by terminating Jennifer's parental rights.

Finally, the caseworker attempted to support her opinion concerning the best interests of the children by testifying about Jennifer's recent marriage. The record indicates that "shortly surrounding the time" that Jennifer married her new husband, he was "in the McCook Work Camp in McCook, Nebraska." The caseworker opined that "it's not in [the children's] best interests to have visitation with an individual who's not known to the children and that may have a background record with some incarceration at the time." The record does not indicate that Jennifer ever sought to have the children attend any "visitation" with her new husband. Additionally, the caseworker acknowledged that

she had no information concerning Jennifer's new husband or for what he was incarcerated. The caseworker opined, however, that "it takes a considerable action of an individual to be incarcerated in a penal institution and those are usually pretty serious actions of some sort that would violate the law."

The State presented no evidence from a medical expert or therapist in this case—either for the children or for Jennifer—concerning Jennifer's diagnosis, medicinal needs, or ability to successfully parent the children. The State presented no evidence from any foster parent or education provider. The State essentially presented no evidence whatsoever concerning the children at issue in this case—their needs or their best interests. Tellingly, the caseworker, who presented the entirety of the State's case for termination of Jennifer's parental rights and who had been assigned to these children's case since its inception in the juvenile court system, testified that she did not know any of the surrounding circumstances about the very incident that initially led to adjudication.

Furthermore, like the record in *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005), the record in the present case does not contain any dispositional orders setting forth court-ordered rehabilitation plans, and we cannot review the reasonableness of case plans that are not contained in the record. In this case, the court purported to take "judicial notice of previous findings and orders as requested [by the State] and, as a matter of fact, on [the court's] own motion . . . take judicial notice of all previous findings and orders under this docket." However, none of these previous orders, plans, or findings were marked as an exhibit and made a part of the record or otherwise presented in the record on appeal so that we might be able to review them. See *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005) (noting papers requested to be judicially noticed must be marked, identified, and made part of record). Thus, although the caseworker testified that Jennifer has failed to rehabilitate herself, the State failed to introduce evidence in support of its contention that she failed to meet the requirements of her rehabilitative plans; nonetheless, the State is relying on Jennifer's alleged failure to comply with requirements that are not fully evidenced by the record. The only court-ordered plan apparent in the

record is part of a dispositional order entered on October 15, 2004, which was 3 days after the State filed its motion for termination of parental rights.

[8] The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan. *In re Interest of Aaron D., supra.* Because the relevant court-ordered plans are not part of our record, the reasonableness of the requirements imposed on Jennifer is uncertain. Under those circumstances, we cannot find Jennifer's alleged noncompliance with the requirements of her rehabilitative plans to be clear and convincing evidence that termination of her parental rights is in the children's best interests.

Jennifer herself testified that she had seen two different doctors and that one had diagnosed her with bipolar disorder while the other one had said she did not have bipolar disorder. She testified that her doctor had taken her off all medications and that she was participating in individual therapy until the State indicated that her therapist was "not approved." She testified that she left numerous messages on the caseworker's telephone, seeking an approved therapist, but that she received no response until the week before the termination hearing. Jennifer immediately scheduled an appointment with the approved therapist. She testified that she had maintained employment as well as safe and adequate housing.

[9] Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). See *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999). After our de novo review of the record, we do not find clear and convincing evidence that termination was in the children's best interests. " '[T]he law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.' " *In re Interest of Aaron D.*, 269 Neb. at 265, 691 N.W.2d at 176 (quoting *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004)). We conclude that the juvenile court erred in finding that the State established, by clear and convincing evidence,

that termination of Jennifer's parental rights is in the children's best interests.

V. CONCLUSION

The State did not present clear and convincing evidence that termination of Jennifer's parental rights is in the children's best interests. The evidence presented to the juvenile court indicated that the caseworker was of the opinion that Jennifer was not adequately addressing mental health issues, although the caseworker acknowledged having no personal knowledge about Jennifer's needs or medical requirements in that area. There was no expert testimony presented pertinent to how termination of parental rights would affect the children. The State almost completely failed to provide the juvenile court, and by extension this court, with testimony from many of the people whose opinions and observations would have been most pertinent to the principal issue—the children's best interests. The evidence the State did present was minimal and was simply not clear and convincing. The judgment of the juvenile court is reversed.

REVERSED.

CAROLYN BRONSEN, APPELLANT, V. DAWES COUNTY, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, AND FUR TRADE DAYS, INC., A NEBRASKA CORPORATION, APPELLEES.

704 N.W.2d 273

Filed October 4, 2005. No. A-04-237.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes.** Statutory interpretation presents a question of law.

4. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Liability: Words and Phrases.** The term "owner," as used in the Nebraska Recreational Liability Act, includes a political subdivision as well as a private person.
6. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
7. **Words and Phrases.** Under the ejusdem generis rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence.
8. ____. Under the ejusdem generis canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.
9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
10. **Negligence: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result.
11. ____: ____: ____. The term "willful or wanton" imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences.
12. ____: ____: ____. To constitute willful misconduct, there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury.
13. ____: ____: ____. To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith.
14. ____: ____: ____. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury.

Appeal from the District Court for Dawes County: BRIAN SILVERMAN, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellee Dawes County.

Neleigh N. Korth and Tim W. Thompson, of Kelley, Scritsmier & Byrne, P.C., for appellee Fur Trade Days, Inc.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Carolyn Bronsen filed a claim in the district court for Dawes County, Nebraska, against Dawes County (the County) and Fur Trade Days, Inc. (FTD), seeking damages for injuries she sustained after tripping and falling in a depression or hole in the lawn of the Dawes County courthouse while attending the Fur Trade Days celebration in Chadron, Nebraska. The district court granted motions for summary judgment filed by the County and FTD, finding that both the County and FTD were immune from liability pursuant to the Nebraska Recreational Liability Act (RLA), Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004). For the reasons stated herein, we affirm.

BACKGROUND

Bronsen's injuries occurred during the Fur Trade Days celebration in Chadron in July 2002. The celebration is arranged by FTD, a not-for-profit corporation organized under the laws of the State of Nebraska. The celebration takes place in Chadron each year on the second weekend of July. Fur Trade Days is a historical celebration of traders, "buckskinners," and Native Americans. The weekend is filled with a variety of different activities, including those at the "buckskinners' camp," where the public can view tepees, oldtime shelters, and furs being sold by traders. Events and activities are held on the Dawes County courthouse lawn, including a "buffalo burger" barbecue, a historical fur trade flag ceremony involving a dramatic presentation of the flags of the various entities involved in this country's fur trade, a flea market, and performances by bluegrass bands, Native American dancers, and other entertainers. Fur Trade Days also includes a parade, softball games throughout the weekend, and many other activities.

The summary judgment record shows that at the time of Fur Trade Days in 2002, Bronsen, a resident of Utah, was visiting her parents in Chadron. Bronsen had not attended Fur Trade Days or visited the courthouse lawn prior to the July 2002 celebration. On July 13, Bronsen and her family watched the parade, walked through the flea market, and purchased buffalo burgers

and beverages for lunch. Bronsen and her family sat at a picnic table on the courthouse lawn to eat their lunch, after which they planned to view the "[Native American] powwow." After lunch, Bronsen and her father went across the street to get bowls of homemade ice cream for the family to eat. Bronsen and her family visited while they ate the ice cream. As she walked across the courthouse lawn prior to her accident, Bronsen was able to feel that the lawn was uneven. Bronsen was also aware that her father had stepped in a hole in the courthouse lawn before the family first arrived at the picnic table. When Bronsen and her family were done eating, Bronsen picked up some paper plates and bowls that had blown off the picnic table, intending to throw them away in a nearby trash can. On her way to the trash can, Bronsen stepped into a hole or uneven area and fell, breaking her ankle. Since the accident, Bronsen has had several surgeries to repair the break. At the time of her deposition in November 2003, Bronsen still had pain in her ankle. Bronsen also continued to receive medical treatment in connection with the accident.

We note that although filed after the date when new rules of pleading took effect in Nebraska, Bronsen's pleadings use captions and terms from the old rules of pleading. Bronsen captioned her complaint and subsequent amended complaint with the terms "petition" and "amended petition" and used the term "cause of action" rather than the term "claim." Throughout this opinion, we will refer to Bronsen's operative "petition" (her amended petition) as the "complaint" and will refer to what Bronsen has titled her "cause of action" as her "claim."

Bronsen filed her operative complaint on May 12, 2003, setting forth a negligence claim against both the County and FTD. Specifically, Bronsen alleged that on July 13, 2002, she suffered personal injuries when she fell after stepping in a hole in the courthouse lawn while attending Fur Trade Days. Bronsen alleged that her fall was proximately caused by the negligence of the County in that it failed to (1) inspect the courthouse lawn for dangerous conditions, (2) maintain the lawn in a manner suitable for pedestrian traffic, (3) repair holes as they appeared in the lawn, (4) warn pedestrians of the existence of the hole, or (5) restrict traffic in the area of the hole so as to prevent pedestrians from falling there. Bronsen alleged that her fall was also

proximately caused by the negligence of FTD as the occupier of the courthouse lawn on July 13. Bronsen alleged that FTD was negligent in the same respects as was the County. Bronsen further alleged that her injuries required treatment from health care providers, that she incurred medical expenses exceeding $1,000, and that she would continue to incur future medical expenses. Bronsen also sought recovery for disability, pain and suffering, and lost income, both past and future. Finally, Bronsen alleged that she had filed a tort claim on October 21 with the Dawes County clerk pursuant to Nebraska's Political Subdivisions Tort Claims Act, that more than 6 months had passed without response, and that she had withdrawn her claim on April 23, 2003. Bronsen sought judgment for her special damages in an amount to be proved at trial and for such general damages as were allowable by law.

In its answer, the County denied that any defect existed in the lawn at the county courthouse other than the inherent uneven condition of the lawn itself due to the natural settling and rising of the soil. The County admitted that Bronsen fell on the lawn of the courthouse but alleged that Bronsen's fall was proximately caused by her own negligence. The County also contended that Bronsen's injuries "may not have been as she has alleged" and that Bronsen may have failed to mitigate her damages. The County alleged that it may be immune from liability because the premises were being used for recreational purposes as defined by § 37-729. The County also asserted that it did not have sufficient funds to "allocate as [Bronsen] has suggested." FTD filed an answer and subsequently an amended answer, making similar allegations and denials to those made by the County.

The County and FTD filed motions for summary judgment, which were heard by the district court on December 22, 2003. In addition to the evidence set forth above, the record at the summary judgment hearing included deposition testimony from Carol Connell, a part-time custodian and groundskeeper for the County. Connell's duties at the courthouse include minor interior maintenance, painting, daily cleaning, snow removal in the winter, and lawn maintenance in the summer. Connell mows, waters, and trims shrubs. Connell sows grass seed in areas where trees have been removed and fills holes in the courthouse lawn in the

spring and summer. Connell testified that she had filled the hole where Bronsen fell with dirt sometime prior to the 2002 Fur Trade Days celebration but that the dirt used to fill the hole had apparently settled. Connell testified that she probably did not put enough dirt in the hole and testified that the dirt "washes with the hoses." Connell testified that she thought her maintenance of the lawn and procedure for repairing uneven spots were reasonable. Connell had never heard of any other individual complaining of holes or dents in the courthouse lawn.

George Klein, one of the cochairs for the 2002 Fur Trade Days celebration, also testified by deposition. Klein was asked how FTD ensured that the land it used for Fur Trade Days activities was safe. Klein responded that FTD relied on the County's maintenance of the courthouse grounds. Klein did not direct a specific inquiry to the County about its maintenance activities prior to the 2002 celebration, and he testified that no one from FTD inspected the courthouse lawn. Klein testified that in terms of making sure the courthouse lawn was safe for Fur Trade Days activities, FTD expected the County to perform its "normal maintenance" and expected that the County would take measures to fill any holes "big enough to put a foot in" if the County were aware of such holes.

The record also includes an affidavit in which Klein provided information about FTD and his knowledge of the 2002 celebration. In his affidavit, Klein stated that he was unaware of FTD's ever paying a fee to the County for the use of the courthouse lawn and that at no time was FTD requested to perform any work or repairs on the lawn. Klein stated that at no point before or during the 2002 celebration (prior to Bronsen's accident) did he see or otherwise become aware of the hole that allegedly caused Bronsen's fall. Based on Klein's experience with and observations of the courthouse lawn, he did not believe it to be a dangerous place for hosting a public event. Klein stated that FTD does not charge the celebration attendees any sort of admission fee to enter the courthouse lawn. According to Klein, the only money paid by attendees is to purchase food or goods sold by various vendors for the event, and attendees are in no way required to purchase any of these items. Klein stated that attendees could simply sit at any of the various picnic tables on the

lawn and enjoy the free entertainment and could even bring their own food and seating. Klein was unaware of any previous injuries sustained on the courthouse lawn during the "10 years or so" that FTD had held its Fur Trade Days activities at that location. Klein stated that as cochair for the 2002 celebration, he received no reports of holes located on the lawn and was unaware of any other individual associated with FTD's being aware of any holes on the courthouse lawn.

The district court entered an order on February 4, 2004, granting both motions for summary judgment. The court found that it was clear Bronsen "was using [the courthouse lawn] for picnicking, viewing historical events or recreations (pow wow) or otherwise using the land for purposes of the user" and that those uses would qualify as recreational purposes under § 37-729(3). The court found that the facts adduced showed that FTD qualified as an owner as defined by § 37-729(2), in that it was an occupant or person in control of the premises. The court found that the evidence showed that Bronsen was allowed to use the courthouse lawn without charge. The court stated that FTD was thus immune from liability unless there was a willful or malicious failure on its part. The court found that FTD had no knowledge of the hole and did not create the hole and that thus, there was no willful or malicious action on the part of FTD.

The district court concluded that the County's actions would also place it within the protection of the RLA. The court stated that in order to establish liability on the part of the County, Bronsen was likewise required to show that its actions would amount to a willful or malicious failure. The court noted evidence showing that Connell, a county employee, had previously filled the hole but that the fill material had apparently settled. It further noted that there was no evidence that Connell knew this "condition" (the settling of the fill material) existed at the time of the 2002 Fur Trade Days. The court also noted deposition testimony from Bronsen that she knew a hole or dip existed at the location where she fell prior to her accident. The court concluded that there was no willful or malicious action on the part of the County.

The district court found no genuine issue as to any material fact and concluded that the County and FTD were entitled to

judgment as a matter of law. Accordingly, the court granted the motions for summary judgment. Bronsen subsequently perfected her appeal to this court.

ASSIGNMENT OF ERROR

Bronsen asserts that the district court erred in sustaining the County's and FTD's motions for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005); *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Range v. Abbott Sports Complex, supra.*

[3,4] Statutory interpretation presents a question of law. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Id.*

ANALYSIS

Bronsen asserts that the district court erred in sustaining the County's and FTD's motions for summary judgment. In sustaining the motions and dismissing Bronsen's complaint, the district court determined that both the County and FTD qualified as "owners" under the RLA and that Bronsen's activities at the time of her accident constituted "recreational purposes" under the RLA. The court also found that Bronsen was not charged a fee for her use of the courthouse lawn and that there was no willful or malicious action on the part of the County or FTD. Bronsen does not dispute the court's finding that both the County and FTD qualified as owners or its finding that she was not charged

a fee for her use of the property. Bronsen does dispute the premise that the courthouse lawn is the type of property that ought to be protected under the RLA, as well as the court's finding that her activities at the time of her accident amounted to "recreational purposes" under the act. Bronsen also argues that the County's conduct was willful or malicious. We address each of these arguments separately below.

Relevant Provisions of RLA.

As a background for our discussion of Bronsen's arguments, we first set forth the relevant provisions of the RLA. Pursuant to § 37-731, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Exceptions are provided for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity and for injury suffered when the landowner charges the person or persons who enter or go on the land. § 37-734. The purpose of the act "is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-730. Pursuant to § 37-729(2), an "[o]wner" includes a "tenant, lessee, occupant, or person in control of the premises." "Recreational purposes" are defined as including, but not being limited to, "any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, waterskiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user." § 37-729(3). Finally, "[c]harge" is defined as meaning "the amount of money asked in return for an invitation to enter or go upon the land." § 37-729(4).

Application of RLA.

Bronsen argues that the RLA should not apply to public landowners whose land was not opened in reliance on the RLA.

Bronsen further argues that because in the present case there is no evidence indicating whether the courthouse lawn was opened to the public in response to the RLA, the district court's order granting the summary judgment motions should be reversed and this matter should be remanded for a finding of whether the County should enjoy the benefit of the RLA when it apparently offers no "*quid pro quo*" to the public in exchange for immunity from liability. Brief for appellant at 14. Bronsen's arguments are based in part on the purpose of the RLA as stated in § 37-730, which is set forth above.

Among comparable jurisdictions, there is a division of authority as to whether recreational use statutes are available to immunize public bodies. The following remarks are useful in understanding the controversy and the arguments presented by Bronsen:

> In a number of cases, the statutes have been applicable in cases where governmental entities or other public bodies owned the property, but other holdings are to the contrary, sometimes on the basis that a governmental entity is not a "person" within the meaning of a state recreational use statute which applies to "persons."

62 Am. Jur. 2d *Premises Liability* § 131 at 507-08 (2005).

> It has been reasoned that since the sole purpose of a recreational use statute is to induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come upon their property to pursue the activities specified in the statute, such a statute does not provide immunity to a governmental agency already operating and maintaining a supervised facility for use by the public. Furthermore, since public parks are used not only for the "recreational" purposes listed in the statute, application of such a statute to require a county to observe different standards of care with respect to various park visitors, depending upon the nature of the activity for which they entered the premises, would foster an unreasonable result. Hence, the statute did not provide immunity to a county in the maintenance of a public park that was routinely patrolled, maintained, and supervised by the county and that was held open to the public for pursuit of some

> activities other than those specified in the statute. Other courts, however, have rejected the argument that the application of the statute to public parks defeated a public policy in favor of providing the public with safe facilities, and that the statutory purpose of encouraging the opening of land to public recreational use did not apply to the state. Nor has the argument that immunizing governmental bodies is not justified because it does not result in an increase in the amount of land available for recreational activities been accepted by federal courts construing the Federal Tort Claims Act, partly on the ground that federal regulations allow certain officials to close or restrict the use of forest or park areas and roads.

Id., § 132 at 508-09.

While Bronsen cites case law from another jurisdiction in support of her argument in favor of a quid pro quo requirement, the case law relied on by Bronsen is distinguishable from the present case, and after reviewing the relevant Nebraska case law, we decline Bronsen's invitation to impose such a requirement. While the Nebraska Legislature has not explicitly stated whether an owner of land includes governmental entities as well as private parties, the Nebraska Supreme Court has expressly held on four occasions that the RLA applies to governmental and private landowners alike. See, *Thies v. City of Omaha*, 225 Neb. 817, 408 N.W.2d 306 (1987); *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981). On other occasions, the Nebraska Supreme Court, while deciding whether governmental entities were entitled to immunity on some other ground, has tacitly accepted that they could be owners under the above line of cases. See, *Veskerna v. City of West Point*, 254 Neb. 540, 578 N.W.2d 25 (1998) (concluding city street could not be temporarily converted to recreational area for purpose of limiting city's liability under RLA for plaintiff's injury sustained at automobile show); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996) (concluding school district was not immune under RLA from liability for football player's injury because football clinic was not open to public without charge),

abrogated on other grounds, Heins v. Webster County, 250 Neb. 750, 552 N.W.2d 51; *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984) (concluding city was protected under RLA when plaintiffs did not pay charge to enter park and city was not guilty of willful or wanton negligence). See, also, *Teters v. Scottsbluff Public Schools*, 5 Neb. App. 867, 884, 567 N.W.2d 314, 327 (1997) (holding that school district was "owner" of land under RLA as "an occupant or a person in control of" recreational camp for weekend but was not immune from liability because it did not hold land open to public), *affirmed in part and in part reversed on other grounds* 256 Neb. 645, 592 N.W.2d 155 (1999) (reversing on separate issue but affirming Nebraska Court of Appeals' holding as to school district without discussion). Compare *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000) (concluding viewing of livestock exhibits at county fair was not recreational purpose, but neither being asked nor reaching issue whether agricultural society was governmental entity).

[5] The Nebraska Supreme Court first considered whether the RLA applied to governmental entities in *Watson v. City of Omaha, supra*. In *Watson*, the court held that the term "owner," as used in the RLA, includes a political subdivision as well as a private person. In so holding, the *Watson* court "concede[d] for the sake of argument that the original purpose of the [RLA] was to encourage private landowners to offer their lands for use by the public." 209 Neb. at 840, 312 N.W.2d at 258. The court also considered the language of the Political Subdivisions Tort Claims Act, which subjects a political subdivision to liability for the negligent acts or omissions of its employees "in the same manner and to the same extent as a private individual under like circumstances." See Neb. Rev. Stat. § 81-8,215 (Reissue 2003). The *Watson* court concluded that whatever the Legislature's intent at the time of the enactment of the RLA, the definition of "owner" in the act was sufficiently broad to cover a public entity. The court observed that the Legislature in enacting the Political Subdivisions Tort Claims Act was presumed to have knowledge of previous legislation, including the RLA. The court concluded that the intent of the Legislature, as reflected by the clear language of both the Political Subdivisions Tort Claims Act and the

RLA, was to grant the same rights and privileges to both governmental and private landowners. The court, in considering the facts of *Watson*, which involved "[s]lippery slide activities," held that while such activities were not specifically included within the definition of "recreational purposes" found in the RLA, the definition was broad enough to include the "normal activities afforded by public parks." *Watson v. City of Omaha*, 209 Neb. 835, 841-42, 312 N.W.2d 256, 259 (1981). In addition to the reasoning employed by the *Watson* court, we also note that the Nebraska Supreme Court has held that the provisions of the RLA apply to urban as well as rural areas. See, *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987); *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Garreans v. City of Omaha, supra*; *Watson v. City of Omaha, supra*.

[6] We are mindful of the reservations about the continued application of *Watson* expressed by the concurring opinion in the recent case *Iodence v. City of Alliance*, 270 Neb. 59, 700 N.W.2d 562 (2005), but as noted by the dissenting opinion in *Iodence*, the ruling in *Watson* is still the law. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *Holm v. Holm*, 267 Neb. 867, 678 N.W.2d 499 (2004). Bronsen has asked this court to answer the question "left unanswered" by *Watson*, that being whether the RLA applies if the urban park in question was open to the public before the RLA was enacted. Brief for appellant at 14. However, Bronsen is essentially asking for a judicial reconsideration of the holding in *Watson* that the term "owner," as used in the RLA, includes a political subdivision as well as a private person. Even if this court were inclined to agree with the arguments raised by Bronsen, we are bound by the Nebraska Supreme Court's ruling in *Watson*, which has not been overturned.

Given the reasoning employed by the Nebraska Supreme Court in *Watson* and the previous application of the RLA to city parks and other urban areas, we conclude that the district court

did not err in finding that the RLA was applicable in the present case. Bronsen's arguments to the contrary are without merit.

Picnicking.

[7,8] Bronsen disputes the district court's finding that her activities at the time of her accident constituted "recreational purposes" within the meaning of the RLA. Bronsen argues that buying lunch and visiting a flea market are not among the outdoor physical activities contemplated in the definition of "recreational purposes." In support of her argument, Bronsen cites case law examining activities not specifically listed within the definition and employing the rule of ejusdem generis. Under the ejusdem generis rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence. *Iodence v. City of Alliance, supra*; *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004). Under the ejusdem generis canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000).

[9] Bronsen's arguments ignore the fact that the district court found that she was using the courthouse lawn for "picnicking," an activity specifically listed in the RLA's definition of "[r]ecreational purposes." See § 37-729(3). The word "picnic" is defined as "an outing or excursion, typically one in which those taking part carry food with them and share a meal in the open air." Webster's Encyclopedic Unabridged Dictionary of the English Language 1089 (1989). The record shows that Bronsen traveled from Utah to Nebraska to visit her family and partook in various outdoor activities associated with the 2002 Fur Trade Days celebration on the day of her accident. Just prior to Bronsen's accident, she and her family obtained buffalo burgers, beverages, and ice cream from stands located on or near the courthouse lawn; took those food items to an outdoor picnic table located on the courthouse lawn; and sat and visited while consuming their food. Bronsen was in the process of disposing of trash associated with the outdoor meal when her accident occurred. Given these undisputed facts in the record, we cannot say the district court

erred in concluding that Bronsen was using the courthouse lawn for picnicking at the time of her accident and that her activities thus constituted "recreational purposes" within the meaning of the RLA. We need not consider whether other activities engaged in by Bronsen on July 13, 2002, qualified as "recreational purposes," as such analysis is not necessary to our resolution of this appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

Willful or Malicious Failure.

[10-14] Finally, Bronsen argues that the exception for willful failure to guard against a dangerous condition applies to the County's conduct in this case. In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result. *Gallagher v. Omaha Public Power Dist.*, 225 Neb. 354, 405 N.W.2d 571 (1987). The term "willful or wanton" imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences. *Id.* To constitute willful misconduct, there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. *Id.* To constitute willful negligence, the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. *Id.* Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury. *Id.*

The record shows that Connell had previously filled the hole which Bronsen stepped in during the accident which led to her injury. Connell testified that the fill material had apparently settled. There was no evidence that Connell knew this settling of the dirt had occurred in the hole at the time of the 2002 celebration. Viewing the evidence in a light most favorable to Bronsen and giving her the benefit of all reasonable inferences deducible

from the evidence, we cannot say that the district court erred in finding no willful or malicious action on the part of the County.

Summary Judgment.

In sum, the pleadings and evidence admitted at the hearing on the County's and FTD's motions for summary judgment disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the County and FTD were entitled to judgment as a matter of law. Viewing the evidence in a light most favorable to Bronsen and giving her the benefit of all reasonable inferences deducible from the evidence, we find no error in the district court's grant of the motions for summary judgment.

CONCLUSION

The district court did not err in granting the County's and FTD's motions for summary judgment.

AFFIRMED.

KEVIN ORD ET AL., APPELLANTS, V.
AMFIRST INVESTMENT SERVICES ET AL., APPELLEES.

704 N.W.2d 796

Filed October 11, 2005. Nos. A-04-153, A-04-437.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Summary Judgment: Proof.** Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted.
4. ____: ____. Once the party moving for summary judgment produces enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted, the burden of producing contrary evidence shifts to the party opposing the motion.

5. **Fraud.** Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive.
6. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
7. **Fraud.** Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation.
8. ____. In nondisclosure cases, the law does not attempt to define occasions when the duty to speak arises, but, instead, has adopted the proposition that whether a duty to speak exists is determined by all the circumstances of the case.
9. **Fraud: Juries.** In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact for the jury.
10. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
11. **Pleadings.** The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made.
12. ____. Although the decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made, Neb. Rev. Stat. § 25-852 (Reissue 1995) is to be liberally construed and amendments are permitted where they are proposed at an opportune time and will be in the furtherance of justice.

Appeals from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Ronald D. Mousel, of Mousel & Garner, and Mark J. Appleton, of Robinson, Waters & O'Dorisio, P.C., for appellants.

G. Peter Burger, of Burger & Bennett, P.C., and James M. Bausch, Shawn D. Renner, and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees AmFirst Bank and Van Korell.

J. Bryant Brooks, of Brooks Law Offices, P.C., and Richard M. Grant for appellees DynaCorp Financial Strategies, Inc., DFS Credit Corporation, and Robert Vener.

INBODY, Chief Judge, and CARLSON and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Kevin Ord; Ord, Inc.; D&J Trust; and Dan Liebig, as trustee of D&J Trust (collectively the plaintiffs), appeal from orders of the district court for Red Willow County dismissing certain of the plaintiffs' claims against AmFirst Bank; AmFirst Investment Services; Kent Carter; Van Korell; Aragon Financial Services, Inc. (Aragon); DynaCorp Financial Strategies, Inc. (DynaCorp); DFS Credit Corporation (DFS); DFS Secured Healthcare Receivables Trusts II and IV; Robert Vener; Bank of New York Western Trust Company; Chiao, Smith & Associates; and Buchanan, Anderson and Pratt. This case involves the plaintiffs' purchase of notes issued by DFS trusts through Carter, a registered representative of Aragon, from June 11, 1997, through January 25, 2000, and DFS' subsequent default on these obligations. For the reasons set forth below, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

Beginning in 1993, Korell, president of AmFirst Bank, began discussions with Carter and Aragon's predecessor concerning the possibility of generating income for the bank through the sale of securities. Shortly thereafter, an agreement was reached in which Carter agreed to lease space from the bank and sell investments through his company, which Carter called AmFirst Investment Services.

The record shows that upon that agreement, AmFirst Bank advertised that it had a "[n]ew [d]ivision at AmFirst Bank, AmFirst Investment Services. . . . Please make an appointment to visit with Kent Carter or any of our officers concerning this new service. AmFirst . . . second to none."

Under that agreement, AmFirst Bank received 40 to 42½ percent of each dollar of fees and compensation earned by AmFirst Investment Services, with Aragon receiving 15 to 20 percent and Carter receiving the remaining 40 to 42½ percent.

The lease agreement between Carter and AmFirst Bank specifically stated that Carter was to remain an independent contractor, but other evidence on this record suggests that Carter was an employee of AmFirst Bank. Specifically, there is evidence

that Carter's office was inside AmFirst Bank and that AmFirst Investment Services had no separate signage. Additionally, the record shows that a vice president of AmFirst Bank was supervising Carter and that AmFirst Bank had the power to approve or disapprove any investment product sold by Carter.

Furthermore, the record shows that Carter was allowed to participate in AmFirst Bank's group health insurance plan for its employees, that AmFirst Bank paid for half of Carter's health insurance costs, and that AmFirst Bank provided Carter with part-time clerical help from one of its own employees.

In 1995 or 1996, DFS notes issued by DFS trusts appeared on Aragon's approved products list. The trusts were purportedly established by and affiliated with DFS, DynaCorp, and Vener. On July 9, 1997, Ord, acting as president and on behalf of Ord, Inc., purchased two DFS notes through Carter—one for $120,000 and another for $40,000. Liebig, acting as trustee for D&J Trust, also purchased DFS notes in the following amounts on the following dates: $62,000 on June 11, 1997; $75,000 on January 16, 1998; $50,000 on May 4, 1998; $25,000 on May 15, 1998; and $38,000 on January 25, 2000, for a total of $250,000.

On November 15, 2000, after DFS had defaulted on its obligations regarding the DFS trusts, both Ord and Liebig met separately with representatives of Aragon, including Carter, in the basement of AmFirst Bank. During those meetings, Ord and Liebig each signed a copy of a document entitled "Assignment and Hold Harmless Agreement." With regard to the assignment, each agreement stated: "Investor hereby assigns and conveys to Aragon all of its rights and interests in and to any and all claims or causes of action or other rights of recovery associated with its investment in the Securities ('Claims')." In exchange, Aragon agreed that at its expense, it would "use commercially reasonable efforts to pursue the Claims of Investor . . . against DFS and/or DFS-Related Parties."

With respect to the hold harmless portion, each agreement states:

> Investor hereby agrees, on behalf of itself and all who may claim through it, to release and hold the Released Parties (as hereinafter defined) harmless from and against all claims, causes of action, debts, liabilities, obligations or expenses,

> of any nature, that arise out of or in any way relate to the offer and/or sale of the Securities, whether asserted in a court of law, arbitration or mediation and regardless of whether known by Investor or otherwise.

Each agreement further provides that for purposes of the agreement,

> "Released Parties" means and includes Aragon and each and every past and present director, officer, shareholder, employee, representative, broker, dealer, agent, affiliate, subsidiary, parent company and insurer of Aragon, including without limitation each and every bank or other financial institution with which Aragon contracted, or which participated or acted together with Aragon, in any capacity, in connection with the offer and/or sale of the Securities.

On June 8, 2001, the plaintiffs filed suit against the various defendants. In the petition, the plaintiffs asserted 15 "Claims for Relief" against AmFirst Bank, Carter, and Aragon as follows: (1) violation of the Securities Act of Nebraska, Neb. Rev. Stat. § 8-1101 et seq. (Reissue 1997, Cum. Supp. 2000 & Supp. 2001), specifically § 8-1102(b), by misrepresentation; (2) violation of the Securities Act of Nebraska, specifically § 8-1102(b), by omission; (3) common-law negligence, by misrepresentation; (4) common-law negligence, by omission; (5) common-law breach of fiduciary duty; (6) investment advisers as fiduciaries; (7) common-law fraud, by misrepresentation; (8) common-law fraud, by omission; (9) breach of contract; (10) violation of broker-dealer registration provisions under § 8-1103 and 15 U.S.C. § 78*o* (2000); (11) violation of investment adviser registration provisions under § 8-1103 and 15 U.S.C. § 80b-3 (2000); (12) violation of securities registration provisions under § 8-1104 and 15 U.S.C. § 77e (2000); (13) violation of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq. (Reissue 1999); (14) common-law agency; and (15) control person liability. The plaintiffs also asserted the allegation of control person liability against Korell.

The plaintiffs asserted claims of accounting and common-law fraud against DynaCorp, DFS, the DFS trusts, and Vener. Additionally, the plaintiffs asserted claims of accounting and common-law negligence, aiding and abetting, breach of fiduciary

duty, and common-law fraud against Bank of New York Western Trust Company; Chiao, Smith & Associates; and Buchanan, Anderson and Pratt. Although the plaintiffs originally sought punitive and exemplary damages, they later dropped that claim. The plaintiffs requested costs, expenses, "pre- and post-judgment interest," reasonable attorney fees, and "such other and further relief as to this Court seems just and proper."

On April 22, 2002, the plaintiffs filed with the district court a motion to compel production of documents and answer interrogatories. The issue presented by the motion to compel was whether Carter, AmFirst Bank, Korell, and Aragon should be required to provide the plaintiffs with the names of other persons to whom Carter had sold investments in the DFS trusts.

On May 10, 2002, AmFirst Bank, Carter, and Korell filed a written objection to the plaintiffs' request, contending that providing the plaintiffs such information would not lead to the discovery of admissible evidence and that the disclosure of such information would violate the confidentiality provisions of Neb. Rev. Stat. § 8-1401 (Cum. Supp. 2000). On July 10, the district court entered an order nunc pro tunc denying the plaintiffs' motion to compel.

On September 19, 2002, the plaintiffs filed a motion for summary judgment on their 12th claim for relief against Carter and Aragon for the sale of unregistered securities. Carter and Aragon raised the issue of the assignment and hold harmless agreement. The district court denied the plaintiffs' motion, stating that the assignment and hold harmless agreement signed by the plaintiffs generated genuine issues of material fact.

On June 5, 2003, AmFirst Bank, Carter, and Korell filed for leave to amend their answer, stating that amending their answer would allow them to assert three additional affirmative defenses: statutes of limitations, contributory negligence or assumption of risk, and estoppel. On July 1, the trial court granted this motion.

On July 24, 2003, AmFirst Bank, Carter, and Korell filed a motion for summary judgment. On September 22, the plaintiffs filed a motion for reconsideration of their previously denied motion for summary judgment. On September 23, the plaintiffs filed a motion for summary judgment on their 12th claim for relief against AmFirst Bank for the sale of unregistered securities.

In an order filed January 5, 2004, the trial court granted AmFirst Bank, Carter, and Korell's motion for summary judgment and denied the plaintiffs' motion for reconsideration of their summary judgment motion and their summary judgment motion against AmFirst Bank on the plaintiffs' 12th claim. In overruling the plaintiffs' motion for summary judgment, the trial court stated that "there are still issues of material fact with regard to the effect of the Assignment and Hold Harmless Agreement entered into by the Plaintiffs and the Defendants."

In granting AmFirst Bank, Carter, and Korell's motion for summary judgment, the court stated that the assignment and hold harmless agreement is a valid contract and that such agreement clearly shows that the plaintiffs are no longer the real parties in interest, having assigned their interests to Aragon. The trial court also found that by signing the agreement, the plaintiffs released AmFirst Bank and Korell from any liability.

The court further stated that the facts clearly show that the plaintiffs' federal claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Adviser's Act of 1940 were all filed after the 1-year statute of limitations and the 3-year statute of repose. The court further found that under the federal law, there is no tolling of the 3-year statute of repose, either legal or equitable, except for Liebig's January 25, 2000, purchase.

Subsequently, the trial court dismissed Carter from the action, given that the U.S. Bankruptcy Court for the District of Nebraska had entered a discharge against him, and the court then scheduled a new trial date for the remaining defendants. The record also shows that Bank of New York Western Trust Company was dismissed, given that it had reached a settlement with the plaintiffs. The plaintiffs then moved for a default judgment against DynaCorp, DFS, DFS Secured Healthcare Receivables Trusts II and IV, and Vener (hereinafter collectively DFS defendants), and Aragon for failure to respond to discovery. DFS defendants filed a motion for summary judgment.

On March 5, 2004, the trial court denied the plaintiffs' motion to enter default judgment except as against Aragon. The trial court entered a default judgment against Aragon and in favor of both Ord for $160,413.86 plus interest at 3.016 percent per

annum and Liebig for $280,213.04 plus interest at the same rate. The trial court granted DFS defendants' motion for summary judgment, stating that the assignment and hold harmless agreement signed by the plaintiffs dictated the dismissal of the plaintiffs' claims against these defendants.

The plaintiffs appeal.

ASSIGNMENTS OF ERROR

On appeal, the plaintiffs contend that the district court erred in (1) granting the defendants' motions for summary judgment and holding that there are no genuine issues of fact regarding the assignment and hold harmless agreement, the application of the various statutes of limitation, and the apparent authority of Carter as an agent for AmFirst Bank; (2) failing to grant the plaintiffs' motion for summary judgment against certain defendants on the plaintiffs' 12th claim for relief for the sale of unregistered securities; (3) failing to allow the plaintiffs to question other AmFirst Bank customers as to falsification of their DFS subscription documents, their nonaccredited investor status, and other misrepresentations by the defendants; and (4) allowing AmFirst Bank to amend its answer and raise, for the first time, statutes of limitation as an affirmative defense.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005); *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

ANALYSIS

Motions for Summary Judgment.

On appeal, the plaintiffs contend that the district court erred in granting the defendants' motions for summary judgment and

holding that there are no genuine issues of fact regarding the assignment and hold harmless agreement, the application of the various statutes of limitation, and the apparent authority of Carter as an agent for AmFirst Bank. The plaintiffs also contend that the trial court erred in failing to grant the plaintiffs' motion for summary judgment against certain defendants on the plaintiffs' 12th claim for relief for the sale of unregistered securities.

Initially, we note that in our reading of the court's order, the court did not make specific findings in regard to Carter's authority as an agent for AmFirst Bank, and therefore, we will not address this assignment in determining whether the court erred in granting certain defendants' motions for summary judgment. Rather, we focus on the trial court's two bases for the entry of summary judgment—the assignment and hold harmless agreement and the applicable statute of limitations.

[3,4] Because the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted. *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004). Once the party moving for summary judgment produces enough evidence to demonstrate his or her entitlement to judgment if the evidence remains uncontroverted, the burden of producing contrary evidence shifts to the party opposing the motion. *Id.*

In regard to the assignment and hold harmless agreement, the trial court made conflicting findings. In overruling the plaintiffs' motion for summary judgment, the court found that genuine issues of material fact existed regarding the agreement, while in granting certain defendants' motions for summary judgment, the trial court clearly found that no genuine issues of material fact existed. We find that genuine issues of material fact do exist regarding the assignment and hold harmless agreement. Therefore, on that basis, the trial court was correct in denying the plaintiffs' motion for summary judgment but erred in granting certain defendants' motions for summary judgment.

On appeal, the plaintiffs contend that they were fraudulently induced to sign the assignment and hold harmless agreement, given that Aragon representatives and Carter concealed the fact

that Carter himself, on behalf of Aragon and AmFirst Bank, may have been guilty of wrongdoing.

Specifically, Ord stated in his deposition that he invested in "DFS Receivables" through Carter all $160,000 of Ord's retirement funds because Carter stated that these investments were safe and secure and would preserve Ord's principal. Liebig also testified that he told Carter that his objective was a safe, secure, low-risk investment and that Carter assured him that the DFS investments met those objectives and were guaranteed by the federal government.

Both Ord and Liebig stated that Carter never gave them a prospectus for the DFS investments. Additionally, Ord testified that it was not until after the plaintiffs filed their lawsuit that he found out that the DFS investments involved a high degree of risk, according to the private placement memorandum for each DFS trust.

Additionally, both Ord and Liebig testified that at the time the assignment and hold harmless agreements were signed, neither of them was aware that the DFS investments were unregistered securities which could be sold only to "accredited investors," including individuals or entities with high income and high net worth. Both Ord and Liebig stated that they did not meet the requirements to be considered accredited investors and when shown the subscription documents stating that they met these requirements, both Ord and Liebig stated that they had never provided Carter with such information. In Carter's deposition, he denied that he had falsified any of the information regarding the plaintiffs' incomes and net worth and stated that the information he put down for the plaintiffs was information the plaintiffs gave him.

In addition to the plaintiffs' testimony regarding their own investments, they produced affidavits from two other individuals who also invested in DFS notes through Carter. In these affidavits, both individuals stated that they did not meet the specific income and net worth requirements to invest in DFS notes.

Both Ord and Liebig stated that at their individual meetings with Aragon and Carter after DFS' default on its obligations, Aragon indicated that there had been wrongdoing on the part of

entities other than Aragon but made no mention of any wrongdoing by Carter.

[5] Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[6] To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment. *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000).

Clearly, the record before us shows that genuine issues of material fact exist as to the following: whether Aragon and Carter concealed material facts with the intent that the plaintiffs acted in response to this concealment; whether the plaintiffs relied on the facts as the plaintiffs believed the facts to be as the result of the concealment; and whether the plaintiffs were damaged as the result of their reliance. AmFirst Bank argues, though, that no genuine issue of material fact exists as to whether Aragon and Carter had a duty to disclose those material facts. Specifically, AmFirst contends that "Neither Aragon nor Carter owed [the plaintiffs] a fiduciary duty to disclose information after the specific transactions [purchase of notes] were complete." Brief for appellees AmFirst Bank and Korell at 20.

[7,8] Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation. *Streeks, supra.* In nondisclosure cases, the law does not attempt to define occasions when the duty to speak arises, but, instead, has adopted the proposition that whether a duty to speak exists is determined by all the circumstances of the case. *Id.*

Under the circumstances of the instant case, we cannot adopt AmFirst Bank's conclusion that Aragon and Carter had no duty to disclose material facts to the plaintiffs. Clearly, even though

the sale of the notes was complete, Aragon and Carter had an ongoing duty to the plaintiffs, given that Aragon and Carter promised to undertake the responsibility of assisting the plaintiffs with recovering their money and impressed upon the plaintiffs that their signing of the release and the hold harmless agreement was imperative to the success of such recovery. Based on these circumstances, Aragon and Carter clearly had a continuing duty to the plaintiffs which included the duty not to conceal material facts.

[9] In fraudulent concealment cases, existence of a duty to disclose is a question of law, but the breach of that duty is a question of fact for the jury. *Id.* Given our finding above that genuine issues of material fact exist, including whether Aragon and Carter breached their duty, we conclude that these issues of material fact precluded the entry of summary judgment in favor of the defendants. Given that genuine issues of material fact exist regarding whether the plaintiffs were fraudulently induced to sign the hold harmless agreement, the trial court did not err in denying the plaintiffs' motion for summary judgment on this ground. We note that AmFirst Bank remains a defendant in this action, given that genuine issues of material fact exist as to whether Carter was AmFirst Bank's employee.

In regard to the relevant statute of limitations, the trial court found that the plaintiffs' federal claims under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Adviser's Act of 1940 were all filed after the 1-year statute of limitations and the 3-year statute of repose.

The record shows that the plaintiffs' 10th claim for relief, under the Securities Exchange Act of 1934, alleges a violation of 15 U.S.C. § 78*o*; that the plaintiffs' 11th claim for relief alleges violations of 15 U.S.C § 80b-3; and that the plaintiffs' 12th claim for relief, under the Securities Act of 1933, alleges a violation of 15 U.S.C. § 77e. The defendants argued, and the court found, that § 13 of the Securities Act, 15 U.S.C. § 77m, applies to all three of the above claims. Section 77m provides as follows:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should

> have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(a)(2) of this title more than three years after the sale.

The 1-year statute of limitations in § 77m runs from the date each "violation" occurred. See *Caviness v. Derand Resources Corp.*, 983 F.2d 1295 (4th Cir. 1993). A violation of § 77e occurs when a person sells an unregistered, nonexempt security. See 15 U.S.C § 77*l*(a)(1). A violation of § 78*o* occurs when an unregistered broker sells a security. A violation of § 80b-3 occurs when an unregistered investment adviser first enters into an agreement to provide investment adviser services. See *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030 (2d Cir. 1992). The record shows that Carter sold DFS notes to the plaintiffs more than 1 year prior to the filing of the plaintiffs' complaints.

The plaintiffs contend that the district court should have tolled the statute of limitations to take into consideration that the plaintiffs did not learn of Carter's alleged misconduct and DFS' default until on or about June 15, 2000.

Under § 77m, there is no equitable tolling for failure to register claims, given that registration is a matter of public record and therefore claims alleging the sale of unregistered securities cannot be concealed. See *Perry H. Bacon Trust v. Transition Partners, Ltd.*, 298 F. Supp. 2d 1182 (D. Kan. 2004).

The trial court found that the statute of repose could not be tolled under federal law, except for Liebig's January 25, 2000, purchase, which was the only purchase by Ord or Liebig occurring within 3 years of the filing of the plaintiffs' petition on June 8, 2001. On this record, we cannot find that the trial court erred in its determination.

Opportunity to Question Other AmFirst Bank Customers.

The plaintiffs also argue that the trial court erred in failing to allow them to question other individuals who had purchased DFS

notes through Carter as to falsification of their DFS subscription documents, their nonaccredited investor status, and other misrepresentations by Carter evidencing motive, intent, plan, identity or scheme, or absence of mistake or accident, pursuant Neb. Rev. Stat. § 27-404(2) (Reissue 1995).

[10] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

Specifically, in the plaintiffs' motions to compel, they requested that the court require Carter, AmFirst Bank, Korell, and Aragon to identify all other individuals or entities who invested in DFS notes through Carter. The plaintiffs stated that at a hearing, all of the individuals could then be questioned about whether the information on their investment applications was accurate, whether they were in fact " 'accredited investors,' " whether they were provided with DFS offering or risk disclosure documents by Carter, and what Carter verbally told them as to the safety and conservative nature of such investments.

AmFirst Bank, Korell, and Carter objected to the plaintiffs' request for discovery, citing § 8-1401, which allows a bank to withhold customer information it deems confidential without

> a court order of a court of competent jurisdiction setting forth the exact nature and limits of such required disclosure and a showing that all persons or organizations to be affected by such order have had reasonable notice and an opportunity to be heard upon the merits of such order.

AmFirst Bank, Korell, and Carter also stated that the plaintiffs' requests were beyond the scope of Neb. Ct. R. of Discovery 26 (rev. 2001) and that the plaintiffs were requesting dissemination of privileged, nonpublic, confidential customer information unrelated to the plaintiffs' litigation.

Under rule 26(b)(1),

> [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and

> location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The trial court denied the plaintiffs' motions to compel, stating that the information requested by the plaintiffs relates only to third parties not involved in this lawsuit and that the requested information would not lead to admissible evidence. On this record, we cannot say that the trial court abused its discretion in denying the plaintiffs' motions to compel.

AmFirst Bank's Amendment to Its Answer.

The plaintiffs also argue that the trial court erred in allowing AmFirst Bank to amend its answer and raise statutes of limitation as a defense. Specifically, the plaintiffs contend that AmFirst Bank's amendment of its answer occurred many years after the original answer was filed, years after the last discovery was taken on the issue, well after the pleadings had been ordered closed, and without good cause shown.

[11,12] The decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005); *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997). See, also, Neb. Rev. Stat. § 25-852 (Reissue 1995) (statute applicable to this action because action was filed prior to statute's repeal by 2002 Neb. Laws, L.B. 876, operative January 1, 2003; amended pleadings are now governed by Neb. Ct. R. of Pldg. in Civ. Actions 15 (rev. 2003)). Although the decision whether to allow or deny an amendment to any pleading lies within the discretion of the court to which application is made, the statute is to be liberally construed and amendments are permitted where they are proposed at an opportune time and will be in the furtherance of justice. *Genthon, supra*; *New Light Co., supra.*

AmFirst Bank contends that their amendment comported with Nebraska law, given that they proposed their amended answer nearly 3 months before the trial was originally scheduled to take place and nearly 6 months before the summary judgment hearing

actually occurred. The trial court agreed with AmFirst Bank, stating that AmFirst Bank's amendment of its answer was in furtherance of justice and did not prejudice the plaintiffs, given that there were more than 90 days before the commencement of trial. On this record, we cannot say that the trial court abused its discretion.

CONCLUSION

After reviewing the record, we conclude that the trial court erred in granting the defendants' motions for summary judgment, because there are genuine issues of fact regarding the assignment and hold harmless agreement. The trial court did not err in failing to grant the plaintiffs' motion for summary judgment or in finding that the plaintiffs' 10th, 11th, and 12th claims under federal law are barred by the relevant statute of limitations, except for Liebig's January 25, 2000, purchase of DFS notes. Additionally, the trial court did not err in failing to allow the plaintiffs to question other AmFirst Bank customers or in allowing AmFirst Bank to amend its answer and raise, for the first time, statutes of limitation as an affirmative defense. For these reasons, we reverse in part, and remand with directions for the trial court to dismiss its entry of summary judgment and for further proceedings consistent with this opinion. All other orders of the trial court are affirmed.

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

STATE OF NEBRASKA, APPELLEE, V. SERAFIN CISNEROS, APPELLANT.

704 N.W.2d 550

Filed October 11, 2005. No. A-05-597.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken.

4. **Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides that three types of final order may be reviewed on appeal: (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Judgments: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Appeal dismissed.

Thomas C. Riley, Douglas County Public Defender, and Peder Bartling for appellant.

Serafin Cisneros, pro se.

No appearance for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Serafin Cisneros appeals the order of the district court for Douglas County which denied his motion to withdraw his no contest pleas to criminal charges. Because we determine that the order denying the motion to withdraw the pleas was not a final, appealable order, we dismiss the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001).

BACKGROUND

On June 11, 2004, the State charged Cisneros with second degree murder and use of a deadly weapon to commit a felony. On January 24, 2005, Cisneros pled no contest to the charges and the district court adjudged him guilty as charged. The docket entries show that on April 7, the district court overruled Cisneros' motion to withdraw his pleas; that on June 2, Cisneros stated he wished to appeal; and that sentencing was postponed due to the appeal. Cisneros' notice of appeal, signed on May 1, stated that he was appealing from a May 1 judgment or order of

the district court. No such order is in the record. Even though Cisneros references a nonexistent order in his notice of appeal, we can infer that he is attempting to appeal from the order denying his motion to withdraw his pleas. We therefore address that order in this appeal.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken. *Id.* Therefore, we must consider whether an order denying a motion to withdraw a plea constitutes a final, appealable order. While no Nebraska appellate court has expressly stated that such an order is not final or appealable, we conclude that existing Nebraska jurisprudence compels that result.

[4] Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides that three types of final order may be reviewed on appeal: (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. See *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

The order overruling Cisneros' motion to withdraw his pleas did not prevent a judgment, and it was not made by summary application after the judgment was rendered. Instead, we are confronted with the question of whether an order overruling a motion to withdraw a plea affects a substantial right in a special proceeding.

In *State v. Silvers*, 255 Neb. 702, 708-09, 587 N.W.2d 325, 331 (1998), the Nebraska Supreme Court identified postconviction proceedings as "special proceedings," stating that "[s]pecial

proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes" and that "[s]pecial proceedings have also been described as 'every special statutory remedy which is not in itself an action.' " Except for legislation addressing the circumstances surrounding a trial court's failure to advise of the potential consequences to a noncitizen of removal from the United States or denial of naturalization, we find no statute specifically conferring a right to withdraw a plea of guilty or no contest. See Neb. Rev. Stat. § 29-1819.02 (Cum. Supp. 2004). The right conferred by § 29-1819.02 does not apply in the instant case. Thus, under the foregoing definition of a special proceeding, we conclude that Cisneros' motion to withdraw his pleas of no contest is not a "special proceeding" within the meaning of § 25-1902.

[5,6] Additionally, we conclude that the denial of a motion to withdraw a plea, at least where § 29-1819.02 does not apply, does not involve a substantial right. Because the circumstances contemplated by § 29-1819.02 are not present in the case before us, we express no opinion concerning whether an order denying a motion to withdraw a plea of guilty or no contest, made under that section, is a final, appealable order.

> A substantial right is an essential legal right, not a mere technical right. . . . A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

(Citation omitted.) *State v. Lauck*, 261 Neb. 145, 148, 621 N.W.2d 515, 517 (2001).

In *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997), the Nebraska Supreme Court held that the denial of a motion to discharge based on speedy trial grounds affected a substantial right and was an appealable order. But see *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005) (order denying motion for absolute discharge was not final, appealable order where probation statute did not expressly allow for absolute discharge upon violation of right contained therein). Similarly, in *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990), the Supreme Court held that the denial of a plea in bar raising a nonfrivolous double jeopardy claim was a final, appealable order because it affected

a substantial right in a special proceeding. In both cases, the Supreme Court noted that the rights of the accused would be significantly undermined if appellate review were postponed. In *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003), the Supreme Court applied *Gibbs* and *Milenkovich* and held that although the defendant had the option to move for a new trial based on DNA evidence under Neb. Rev. Stat. § 29-4123(3) (Cum. Supp. 2004), the denial of his motion to vacate and set aside the judgment under § 29-4123(2), following a hearing on DNA test results, affected a substantial right in a special proceeding because he had lost the right to be immediately released from custody without being exposed to further delay, expense, and the risk inherent in a new trial.

Unlike the rights of the defendants in *Gibbs*, *Milenkovich*, and *Bronson*, Cisneros' rights would not be significantly undermined by postponing review. The Nebraska Supreme Court has heard appeals from denials of motions to withdraw pleas *after* the appellants were sentenced. See, *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000); *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979). Thus, in the case before us, appellate review is not foreclosed and any prejudice arising from the order denying Cisneros' motion to withdraw his pleas can be mitigated by a timely appeal after sentencing. Moreover, a withdrawal of Cisneros' pleas would not have resulted in his immediate release from custody. Our conclusion is further strengthened by the fact that in both *Carlson* and *Hill*, the defendant's motion to withdraw his prior plea was initially denied more than 30 days prior to sentencing. Nonetheless, in both cases, on appeal after sentencing, the Supreme Court addressed the issue of the trial court's denial of the defendant's request to withdraw the plea. Presumably, had the Supreme Court considered an order denying a motion to withdraw a plea to be final and appealable, it would have dismissed that portion of the appeals in *Carlson* and *Hill* as untimely. See, e.g., *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996) (dismissal of appeal after sentencing and more than 30 days after denial of defendant's plea in bar). We conclude that the order denying Cisneros' motion to withdraw his pleas did not affect a substantial right.

CONCLUSION

Because the order denying Cisneros' motion to withdraw his no contest pleas was not a final, appealable order, we dismiss Cisneros' appeal pursuant to rule 7A(2).

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. CHERYL ZIEMANN, APPELLANT

705 N.W.2d 59

Filed October 18, 2005. No. A-04-1483.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **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.
3. **Sentences.** An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
4. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Constitutional Law: Warrantless Searches: Search and Seizure.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
6. **Constitutional Law: Search and Seizure.** Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
7. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.
8. **Constitutional Law: Search and Seizure.** The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a "legitimate expectation of privacy in the premises."
9. ____: ____. Under the open fields doctrine, open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.

10. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
11. **Sentences: Restitution.** In addition to any other sentence given for a violation of Neb. Rev. Stat. §§ 28-1009 (Cum. Supp. 2004) or 28-1010 (Reissue 1995), the sentencing court may order the defendant to reimburse a public or private agency for expenses incurred in conjunction with the care, impoundment, or disposal of an animal involved in the violation of such section.
12. **Judgments.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders.
13. **Statutes: Courts.** The provisions of chapter 25 of the Nebraska Revised Statutes apply to the Nebraska Supreme Court and county court, so far as the same may be applicable to the judgments or final orders of such courts.
14. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.

Appeal from the District Court for Thurston County, DARVID D. QUIST, Judge, on appeal thereto from the County Court for Thurston County, DOUGLAS LUEBE, Judge. Judgment of District Court affirmed in part, and in part remanded for further proceedings.

Jeffrey H. Bush for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Cheryl Ziemann (Cheryl) appeals the decision of the district court for Thurston County affirming the decision of the county court. The county court convicted Cheryl of one count of cruelty to animals, a Class I misdemeanor, and two counts of animal neglect, each a Class II misdemeanor.

FACTUAL AND PROCEDURAL BACKGROUND

On July 8, 2003, Thurston County Sheriff Charles Obermeyer received information from an electrician who had been working at a farmstead located between Walthill and Pender regarding

two horses which appeared to be without food or water. Sheriff Obermeyer and two deputies went to the farmstead. Upon arrival, Sheriff Obermeyer found that the farmstead appeared to be abandoned and that two horses were located in a grove of trees behind the house. One of the horses was tethered, and it appeared the other horse had broken free. (The two horses were later identified by Cheryl as "Ace," a male horse, and "Moon," a female horse, and we will use their names hereinafter.) Sheriff Obermeyer observed that the horses were without water, that there was no grass within reach of the horses, and that Ace's leg had a cut that was bleeding and oozing pus. The horses appeared very thin, with their ribs visible. Sheriff Obermeyer and the deputies got water for the horses, and Sheriff Obermeyer contacted the jailer for Thurston County, Larry Lown, who had experience caring for horses. Because of the condition of the horses, they were impounded and taken to Lown's farm so that they could receive proper care. Lown provided food and water for the horses and followed veterinary instructions concerning the care of the infected cut on Ace's leg. Cheryl eventually telephoned Sheriff Obermeyer and identified herself as the owner of Ace and Moon.

On July 9, 2003, Sheriff Obermeyer went to David Hunter's residence and observed "the balance of" the horses that were said to be the property of Cheryl and Sheriff Obermeyer took possession of four more horses, as well as a fifth horse on the following day.

The State filed a complaint against Cheryl on August 1, 2003, charging her with one count of cruelty to animals and six counts of animal neglect. At Cheryl's arraignment on August 25, she pled not guilty to all seven counts.

On January 5, 2004, Cheryl filed a "Motion to Suppress Physical Evidence." In Cheryl's motion, she alleged that all "items of evidence were taken from [her] or other area in which she had an expectation of privacy without any valid or legal consent to search" and that "[t]here existed no probable cause for the search or seizure of any of said evidence." Cheryl also filed a motion to quash, alleging that the complaint was defective on its face because it designated all seven counts as Class I misdemeanors, when, by statute, they were Class II misdemeanors.

At Cheryl's January 15, 2004, arraignment on the amended complaint, which complaint cured the defects named in the motion to quash, Cheryl pled not guilty to all seven counts. Also on January 15, a hearing was held on Cheryl's motion to suppress. At that hearing, Sheriff Obermeyer testified that on July 8, 2003, an electrician advised him that two horses were on an abandoned farmstead and that they were in "bad . . . shape." When Sheriff Obermeyer arrived, he found the horses were tied up behind the house, by a grain bin in a small grove of trees. Sheriff Obermeyer observed that there was no grass within the reach of the horses, that they had eaten all the grass they could reach, and that there was no water. Sheriff Obermeyer testified that Ace was bleeding from the leg and that the leg looked infected.

Sheriff Obermeyer testified that after making several telephone calls, he found out that the horses might belong to Cheryl, but that his attempts to contact her were unsuccessful. However, Cheryl ultimately called him back and wanted to know what right he had to take her horses.

Sheriff Obermeyer related that he talked to Cindy Rarrat, the owner and operator of Sioux City Animal Control, who advised him that she was already working with a situation involving a horse belonging to Cheryl. Sheriff Obermeyer recounted that during his investigation, he discovered that Cheryl had other horses at Hunter's place, and that on July 9, 2003, Sheriff Obermeyer seized from there four horses that appeared neglected and underfed. He also seized a fifth horse on July 10. Sheriff Obermeyer testified that he did not think he needed to obtain a warrant to seize the horses because he had permission from Hunter and because it was an emergency situation.

Rarrat testified that on June 23, 2003, she received a call from Hunter, who said he could not care for a horse in dire shape he had obtained from Cheryl. Rarrat testified that Hunter brought the horse, named "Dee," to her. Rarrat testified that Dee had lice, maggots, and an infection and was given food, water, and antibiotics. Rarrat testified that the veterinarians graded Dee a "one" and that they would have graded Dee a "zero," but there was not such an option on their chart. The evidence was that the American Humane Association rates the condition of horses on a scale from one to nine, with one being the worst possible condition and nine

being a horse that is extremely overweight, and that a rating of five or six would indicate a healthy horse. Rarrat said that Hunter allowed Rarrat and Sheriff Obermeyer onto the property and that Hunter signed a release form regarding every animal that was removed from the property.

The county court's order overruling Cheryl's motion was filed on February 20, 2004. The court found that Cheryl failed to establish that she had standing to challenge the search, that Cheryl had no reasonable expectation of privacy that attached to any of the locations of any of the horses, that a search warrant was not required by statute in this case, and that the warrantless search and subsequent seizure of horses found on Hunter's premises were justified by Hunter's consent to such search. Moreover, the court found that at both Hunter's place and the abandoned homestead, the officer had the right to be in the position where he had plain view.

A jury trial was held on May 6 and 7, 2004. At the time of trial, counts IV through VII had been dropped. The only charges remaining were count I (Dee) and counts II and III (Ace and Moon).

Sheriff Obermeyer's trial testimony was not materially different than his testimony at the suppression hearing, and therefore, we do not repeat it except as to new matter. Sheriff Obermeyer testified that Cheryl called him and claimed the horses. He testified that he told Cheryl the horses were in bad shape and that he thought about shooting them but he "didn't have the heart to shoot horses." Sheriff Obermeyer testified that Cheryl responded that if she had known he would have shot the horses, she would have let him shoot the horses for her. Sheriff Obermeyer testified that at that point, he advised Cheryl that he could not talk to her any more without advising her of her *Miranda* rights.

Lown, the county jailer, testified that he was called to the farmstead on July 8, 2003, to help with Ace and Moon. Lown testified that when he arrived, the two horses did not look good, and that when given water, the horses consumed 15 to 20 gallons in 5 to 10 minutes. Lown testified that Ace had an injured leg that probably had occurred within the prior 2 days. Lown testified that he took Ace and Moon to his place and started administering veterinary care. Lown testified that on July 8, he thought

the horses, especially Ace, would die. Lown testified that Ace and Moon have remained at his place since July 8.

Hunter testified that he agreed to watch one horse, Dee, for Cheryl for a weekend for approximately $90 and that he was to provide food and medication for the horse. Hunter said that Dee had a swollen leg and a hole in its stomach and that he had to pick the horse up so that it could digest food, because the horse would not get up on its own. Hunter was worried about Dee's life and called a veterinarian, who told him the horse should be "put to sleep." Hunter testified that he did not do that because Dee was not his horse. Hunter said that he called Rarrat and took Dee to her at the Siouxland Animal Rescue League (Siouxland Rescue). Hunter testified that he was keeping seven horses for Cheryl's daughter and that the people from Siouxland Rescue took those horses as well.

Rarrat testified that in addition to owning and operating the Sioux City Animal Control Center, she is also a volunteer and board member for Siouxland Rescue. Rarrat confirmed that Hunter had contacted her and later brought the horse to her in "horrific" condition, and she stated that "[i]t was the most unbelievable case I've ever seen." Rarrat testified that Dee's hair was falling out and that Dee was skin over bones, was very weak, had sores all over her body, had a swollen leg, had maggots around infected areas, and had lice. Although Rarrat treated Dee with antibiotics, cold packs, and Epsom salts, Dee was eventually euthanized. Rarrat said that she saw Ace and Moon on July 9, 2003, and that they were also in bad shape.

Cheryl's motion to dismiss at the conclusion of the State's case was denied, and she does not assign error to such ruling; nor does she contend that the evidence was insufficient to sustain the conviction. Thus, while Cheryl introduced evidence purporting to show that the horses were not neglected or abused by her, we need not recount that evidence because under our standard of review of a jury verdict, we view the evidence in the light most favorable to the State, see *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995), and in such light, the evidence is obviously sufficient to sustain the convictions for one count of cruelty to animals and two counts of animal neglect. The court's journal entry reflecting such conviction was filed on May 12, 2004.

A sentencing hearing was held on July 8, 2004, at which Cheryl testified that she was 55 years old and had received $599 per month in disability since February 2004. Cheryl said that she also filed for chapter 13 bankruptcy in February 2004, resulting in a 5-year plan under which she pays $300 per month. Cheryl testified that she is purchasing an acreage at a cost of $1,015 per month, which payment she makes with her mother's help. Cheryl said that the Siouxland Rescue bill for $1,681 included services for horses she did not own because the other horses were owned by her daughter. The presentence investigation report also includes a bill from Lown for $1,003.47. Neither Lown nor anyone from Siouxland Rescue testified about their expenditures which resulted in those bills.

The trial judge noted that in determining Cheryl's sentence, he considered that he had sat through the trial, observed the witnesses, and reviewed the presentence investigation report. The judge also noted that in 1991, Cheryl was convicted of 11 counts of similar types of crimes involving puppies and kittens. (The presentence investigation report reflects that Cheryl was convicted of 11 counts of cruelty to animals, was placed on probation for 2 years, and was ordered not to have more than one dog and one cat on her property during the probation period.) The judge thought it appeared likely that Cheryl would commit a similar crime in the future. The judge noted that he had considered Cheryl's family situation—Cheryl has a daughter who was 12 years old and still lived at home, but the child had her father to care for her. The judge found that probation was not an appropriate sentence and that a lesser sentence than incarceration would depreciate the seriousness of the crime and would promote disrespect for the law. The county court sentenced Cheryl to 240 days in jail for the cruelty conviction and 90 days in jail for each of the two neglect convictions, with the sentences to be served consecutively. The court ordered her to pay court costs of $131.47 and to cooperate as needed to execute all documents necessary to transfer ownership of the two horses which were the subjects of the neglect convictions, since they were to be placed for adoption. The court also ordered Cheryl to pay restitution to Siouxland Rescue and to Lown in the total amount of $2,112.27, although the judge also stated in reference to the

amount, "it may be inaccurate, I'm doing it rather quickly here, to be paid within three years after the release from incarceration." The court's journal entry dated July 8, 2004, reflected the jail sentences imposed at the hearing, but showed that Cheryl was to pay a different amount—$1,202.27—for the benefit of Siouxland Rescue and Lown.

On July 8, 2004, Cheryl filed her "Notice of Intention to Prosecute Appeal" to the district court for Thurston County. On July 15, the county court entered a nunc pro tunc order which stated that "due to [a] scrivener's error while calculating the expenses incurred in th[is] matter during the sentencing hearing of July 8, 2004, the correct total amount of restitution to be paid by [Cheryl] is $1,889.27; $885.80 to Siouxland . . . Rescue . . . and $1,003.47 to . . . Lown." Why or how the court ordered Siouxland Rescue to be paid $885.80 when the bill was $1,681 is not explained, nor is it apparent from the record.

An appeal hearing was held before the district court on September 14, 2004, and in an order filed November 30, 2004, the district court affirmed the county court's denial of Cheryl's motion to suppress and affirmed Cheryl's jail sentences. The district court did, however, vacate the county court's nunc pro tunc order dated July 15, 2004, finding that at the time such order was entered, jurisdiction of the case was vested in the district court because Cheryl had already filed a notice of appeal. Cheryl now appeals to this court.

ASSIGNMENTS OF ERROR

Cheryl alleges that the county court erred in (1) overruling her motion to suppress, (2) admitting at the jury trial evidence which should have been excluded, (3) changing the amount of restitution by written order nunc pro tunc after the judge had announced it in open court, (4) imposing jail sentences which were excessive, (5) ordering restitution which was erroneous and excessive, and (6) imposing restitution on her when it was clear she lacked the means to pay restitution.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to

perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

[2,3] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

[4] Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

Motion to Suppress.

Cheryl argues that the county court erred in overruling her motion to suppress. We will address the motion to suppress only as it relates to Dee, Ace, and Moon, the horses involved in counts I, II, and III, upon which Cheryl was convicted. The seizure of the other horses is moot because Cheryl was not convicted of any crimes relating to those four horses and because no evidence concerning those horses was presented at trial.

Cheryl's motion to suppress related to the seizure of horses on July 8, 9, and 10, 2003, from the farmstead and Hunter's property. Dee was surrendered to Siouxland Rescue by Hunter on June 23; thus, Dee was not seized by the State, nor was the State involved in Hunter's transfer of the horse to Siouxland Rescue. Therefore, Cheryl's argument for suppression in regard to Dee is without merit.

[5-8] We turn to the suppression motion as it relates to Ace and Moon, the two horses seized from the farmstead on July 8, 2003. The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

However, in *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), the U.S. Supreme Court stated:

> "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." [Citations omitted.] A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. [Citation omitted.] And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, [citation omitted], it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

In *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996), the Nebraska Supreme Court stated:

> A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). See, also, Neb. Rev. Stat. § 29-822 (Reissue 1995). The test used to determine if a defendant has an interest protected by the Fourth Amendment is whether the defendant has a "legitimate expectation of privacy in the premises."

[9] Cheryl does not own or reside at the farmstead where her two horses were seized. Cheryl bases her claim of a "legitimate expectation of privacy in the premises" on the fact that she leased the grass area on the farmstead for a dollar—although she did not establish whether this was per day, week, month, or year. And, the only evidence that any such lease existed is Cheryl's testimony. But, assuming there was such a lease, Cheryl was leasing only open land, which is subject to the open fields exception to the warrant requirement. Under the open fields doctrine, " '[o]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance.' " *State v. Cody*, 248 Neb. 683, 695, 539 N.W.2d 18, 26 (1995), quoting *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214

(1984). The boarding of two horses at an abandoned farmstead for a dollar clearly is not the sort of intimate activity sheltered by the Fourth Amendment. To put it another way, the search is not unreasonable and does not require a warrant. Therefore, Cheryl did not have standing to challenge the search of the farmstead.

Cheryl argues that the warrantless seizure of Ace and Moon was illegal, in violation of Neb. Rev. Stat. § 28-1012(1) (Cum. Supp. 2004), which states: "Any law enforcement officer who has reason to believe that an animal has been abandoned or is being cruelly neglected or cruelly mistreated may seek a warrant authorizing entry upon private property to inspect, care for, or impound the animal." However, the statute only says "may" seek a warrant, and Cheryl cites no authority that this statute either imposes a higher standard on law enforcement officers than is otherwise established by longstanding principles of search and seizure or makes it mandatory that a warrant be secured. And, we can think of no reason why the statute would do so. Thus, we read "may seek" as purely discretionary and as not effecting other doctrines of search and seizure, such as the plain view doctrine.

[10] A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). In the instant case, the record shows that all three criteria of the plain view doctrine are undisputedly established. Cheryl did not have standing to challenge law enforcement's presence at the farmstead, for the reasons previously stated in this opinion. And, once the officers were at the farmstead, Ace and Moon were in plain view and the "incriminating nature" was immediately apparent, given the poor condition of the horses at the time; plus, the horses appeared to be abandoned. Finally, the officers had a "lawful right of access" to Ace and Moon, since the horses were essentially in an open field. Therefore, the search and seizure was not unreasonable and Cheryl's Fourth Amendment rights were not violated. Thus, the trial court properly denied her motion to suppress evidence relating to the search and seizure of Ace and Moon.

Restitution.

Cheryl argues that the trial court failed to consider her ability to pay when ordering her to make monetary payments to Siouxland Rescue and to Lown. However, Cheryl's argument rests upon Neb. Rev. Stat. §§ 29-2280 and 29-2281 (Reissue 1995), which deal with restitution. Section 29-2281 provides that restitution is "based on the actual damages sustained by the victim." Here, the horses were the victims, but they were not damaged—at least in the sense that they incurred monetary damages for which restitution can be made to them. Thus, the authority cited by Cheryl concerning a defendant's ability to pay restitution, e.g., *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999), is not on point, since such authority rests on the explicit language of § 29-2281 requiring the court to "consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and [to] balance such considerations against the obligation to the victim." From this statutory language, the rule has evolved that the sentencing court must give "meaningful consideration" to the defendant's ability to pay restitution. See *State v. Wells*, 257 Neb. at 343, 598 N.W.2d at 38.

The State's argument that the county court's order of "restitution" is really "reimbursement," citing Neb. Rev. Stat. § 28-1006 (Cum. Supp. 2004), is partially correct. Section 28-1006 does allow for "reimbursement" for care associated with seized animals involved in any violation of Neb. Rev. Stat. § 28-1005 (Cum. Supp. 2004), a statute prohibiting dogfighting, cockfighting, bearbaiting, or pitting an animal against another. However, none of that is involved here. The applicable statute dealing with "reimbursement" in this case is Neb. Rev. Stat. § 28-1011 (Cum. Supp. 2004), which deals with violations of Neb. Rev. Stat. § 28-1009 (Cum. Supp. 2004), animal cruelty and neglect—the statute under which Cheryl was convicted.

[11] Section 28-1011(1) states:

> In addition to any other sentence given for a violation of section 28-1009 or 28-1010, the sentencing court may order the defendant to reimburse a public or private agency for expenses incurred in conjunction with the care, impoundment, or disposal of an animal involved in the violation of

> such section. Whenever the court believes that such reimbursement may be a proper sentence or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the expenses incurred. The court may order that reimbursement be made immediately, in specified installments, or within a specified period of time, not to exceed five years after the date of judgment.

Furthermore, unlike the restitution statute, this statute does not provide that before making reimbursement part of a sentence, the trial court must consider the defendant's ability to pay. Therefore, we reject this argument as a basis for reversing the reimbursement order. However, we now turn to the matter of the amount Cheryl is required to reimburse Siouxland Rescue and Lown.

Order Nunc Pro Tunc.

Cheryl argues that the county court erred in changing the reimbursement order in its order nunc pro tunc after the judge had announced sentence in open court. At the sentencing hearing, the judge ordered Cheryl to pay restitution to Siouxland Rescue and to Lown in the total amount of $2,112.27, although the judge also stated in reference to the amount that it could be inaccurate and that if so, he would correct it by an order nunc pro tunc. The court's journal entry dated July 8, 2004, also required reimbursement, except that it showed Cheryl was to pay $1,202.27 for the benefit of Siouxland Rescue and Lown, without specifying any amount per payee. On July 15, the court entered a nunc pro tunc order which stated that "due to [a] scrivener's error while calculating the expenses incurred in th[is] matter during the sentencing hearing of July 8, 2004, the correct total amount of restitution to be paid by [Cheryl] is $1,889.27; $885.80 to Siouxland . . . Rescue . . . and $1,003.47 to . . . Lown."

[12,13] Before the entry of the nunc pro tunc order, on July 8, 2004, Cheryl filed her "Notice of Intention to Prosecute Appeal" to the district court for Thurston County. Neb. Rev. Stat. § 25-2001(3) (Cum. Supp. 2004) states:

> Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission

> may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders. *During the pendency of an appeal, such mistakes may be so corrected before the case is submitted for decision in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.*

(Emphasis supplied.) This statute also applies to the county court. See Neb. Rev. Stat. § 25-2009 (Reissue 1995) (provisions of chapter 25 of Nebraska Revised Statutes shall apply to Supreme Court and county court, so far as same may be applicable to judgments or final orders of such courts).

While Cheryl filed her notice of appeal to the district court on July 8, 2004, the matter was not submitted to the district court for decision until after the hearing on September 14. Thus, under § 25-2001, the county court had jurisdiction to enter the order nunc pro tunc. Therefore, the district court improperly vacated the county court's order nunc pro tunc dated July 15, 2004, and although Cheryl's assignments of error do not attack the district court's action in this regard, we deal with it under the plain error doctrine. See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003) (plain error will be noted only where error is evident from record, prejudicially affects substantial right of litigant, and is of such nature that to leave it uncorrected would cause miscarriage of justice or result in damage to integrity, reputation, and fairness of judicial process).

Thus, we reject's Cheryl's core argument to this court that the county court improperly changed the sentence pronounced in open court. It is clear that a criminal sentence can be corrected by an order nunc pro tunc, see *State v. Kortum*, 176 Neb. 108, 125 N.W.2d 196 (1963), thus disposing of Cheryl's assignment of error that the county court erred in changing the sentence it had announced in open court. Cheryl cites *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995), for the proposition that when the sentencing court delays deciding the amount of restitution and an appeal is filed, the sentencing court is without jurisdiction to later order restitution. However, the *Campbell* court's finding of a lack of jurisdiction was in a case where the trial court did not pronounce one amount and then change it to

another, as here, but completely delayed the hearing on the amount of restitution until after the defendant was released from incarceration. *Campbell* does not mention § 25-2001, and in any event, *Campbell* is obviously factually distinguishable from the present situation. Because the district court committed plain error in vacating the county court's nunc pro tunc order, the nunc pro tunc order of July 15, 2004, is the operative order on the matter of reimbursement by Cheryl. However, we still have before us Cheryl's assignment of error that the amount ordered to be paid was "erroneous and excessive."

The record made at the sentencing hearing coupled with the two bills included in the presentence investigation report leave the correct amount of the reimbursement hopelessly muddled. Clearly, the purpose of § 28-1011 is to ensure the reimbursement for *all* expenses incurred by parties such as Siouxland Rescue and Lown, whether as part of the sentence or by civil liability. See § 28-1011(2) ("[e]ven if reimbursement for expenses is not ordered under subsection (1) of this section, the defendant shall be liable for all expenses incurred by a public or private agency in conjunction with the care, impoundment, or disposal of an animal. The expenses shall be a lien upon the animal"). The order nunc pro tunc does not match the bills included in the presentence investigation report, neither Lown nor anyone from Siouxland Rescue testified at sentencing, and the record shows that horses other than Dee, Ace, and Moon were cared for—but the record did not contain evidence that the bills included in the presentence investigation report were solely related to the three horses involved in the convictions, and the care of only these three animals could be involved in the reimbursement portion of the sentence under § 28-1011(1). Therefore, we remand this cause to the district court with direction that it remand the matter to the county court for a determination of the amount of reimbursement owed by Cheryl to Siouxland Rescue and to Lown.

Excessive Sentence.

[14] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). The possible penalty for cruelty to animals

is imprisonment for up to 1 year, a $1,000 fine, or both; the possible penalty for each count of animal neglect is imprisonment for a period of up to 6 months, a $1,000 fine, or both. The trial judge sentenced Cheryl to 240 days in jail for the cruelty conviction and 90 days in jail for each of the two neglect convictions, with the sentences to be served consecutively.

In determining Cheryl's sentence, the trial judge considered the presentence investigation and Cheryl's family situation. The trial judge also noted that in 1991, Cheryl was convicted of 11 counts of similar types of crimes involving puppies and kittens. (The presentence investigation report reflects that Cheryl was convicted of 11 counts of cruelty to animals, was placed on probation for 2 years, and was ordered not to have more than one dog and one cat on her property during the probation period.) And, the judge thought it appeared likely that Cheryl would commit a similar crime in the future. The judge found that probation was not appropriate in this case and that a lesser sentence than incarceration would depreciate the seriousness of the crime and would promote disrespect for the law. The judge also noted that he was not in agreement with the sentencing recommendations of the county attorney, because the recommendations were far too minimal for what had occurred in the instant case, although such recommendations are not in our record. It is well known that reduction of statutorily authorized sentences by the Nebraska appellate courts is an infrequent occurrence. The sentence is within the statutory limits, and therefore, the trial court did not abuse its discretion.

CONCLUSION

For the reasons stated above, we find that the county court properly denied Cheryl's motion to suppress evidence. We find that Cheryl's jail sentences were not excessive, and we affirm such sentences. We also affirm the decision of the county court ordering Cheryl to reimburse Siouxland Rescue and Lown for expenses incurred in conjunction with the care, impoundment, or disposal of the horses at issue in the instant case—Dee, Moon, and Ace. We find that the district court committed plain error when it vacated the county court's order nunc pro tunc dated July 15, 2004, since the county court did have jurisdiction

to enter such order. However, remembering that the county court has ordered three different amounts of reimbursement and that the presentence investigation report and sentencing hearing are insufficient to establish what the reimbursement by Cheryl really should be, we remand the cause to the district court with directions for it to remand the matter to the county court to hold such proceedings as are necessary as to make an accurate determination of the amount of reimbursement owed by Cheryl to Siouxland Rescue and Lown and to enter the corresponding order.

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

STATE OF NEBRASKA, APPELLEE, V.
RICHARD R. RYE, APPELLANT.

705 N.W.2d 236

Filed November 1, 2005. No. A-04-919.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
3. ____: ____: ____. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Jury Instructions: Appeal and Error.** If the jury instructions, read together and taken as a whole, 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.
5. **Criminal Law: Words and Phrases.** A person commits terroristic threats if he or she threatens to commit any crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror.
6. ____: ____. A crime of violence is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
7. **Criminal Law.** Robbery, murder, sexual assault, and assault with intent to inflict great bodily injury are crimes of violence.

8. **Convictions: Weapons: Intent.** Under Neb. Rev. Stat. § 28-1205 (Reissue 1995), when the underlying felony for the use of a weapon charge is an unintentional crime, the defendant cannot be convicted of use of a weapon to commit a felony.
9. **Criminal Law: Weapons: Intent.** Because a reckless terroristic threat is an unintentional crime, it cannot be the underlying felony for the use of a weapon charge.
10. **Jury Instructions.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence, and because of this duty, the trial court, on its own motion, must correctly instruct on the law.
11. **Jury Instructions: New Trial.** In order to find that a trial court's error in instructing the jury warrants a new trial, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.
12. **Criminal Law: Trial: Juries: Appeal and Error.** In a criminal case tried to a jury, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
13. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
14. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
15. **Criminal Law: Juries: Verdicts.** Where a single offense may be committed in several ways and there is evidence to support each of the ways, the jury need only be unanimous that the defendant violated the law and need not be unanimous as to which of several consistent ways resulted in the violation.
16. **Jury Instructions: Evidence: New Trial.** If the trial court fails to adequately instruct the jury but the reviewing court finds sufficient evidence to convict, the cause may be remanded to the trial court for a new trial.
17. **Sentences: Appeal and Error.** A sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
18. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

Following a jury trial, Richard R. Rye was convicted in the Lancaster County District Court of terroristic threats and use of a weapon to commit a felony. Richard appeals the convictions and the sentences. Because the trial court's instructions to the jury did not require a finding that the underlying felony for the use of a weapon charge be an intentional crime, we reverse the conviction on the use of a weapon charge and remand the cause for a new trial on such charge. The conviction for terroristic threats is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2003, when Allison Rye, Richard's wife, arrived home from work, Richard and their oldest son, who is an adult, were making dinner. Soon thereafter, Richard, Allison, and their son went upstairs to the attic where the computer was located, because Richard wanted to show them a scooter advertisement on the Internet. After viewing the scooter and laughing, Richard decided to write a comment about the advertisement and post it on the Web site. In typing his comment, he made a typographical error, and Allison corrected him. Allison testified that when she corrected him, Richard got angry and told her to stop attacking him. By this time, their son had returned to the kitchen to continue making dinner.

Richard and Allison continued arguing. Allison testified that Richard grabbed her arm and said that "he was sick and tired of [her] attacking him." She testified that once he let go of her arm, she went downstairs and out of the house because she was going to leave and "get a better perspective." However, she decided to go back into the house and upstairs to talk to Richard. When she got upstairs, Richard was angry and yelled at her to "get out." The couple continued to argue; Richard then "shoved" Allison, and she fell down. He continued to yell at her, and she got up and started toward the stairs. She reached the second step from the top, when she heard him open the drawer to the computer desk. She saw Richard take out a gun and point it in her direction. Then she saw a green flash from the muzzle and heard a shot.

Richard, still carrying the gun, then walked over to Allison and began yelling at her to call the police. He testified that he thought he had shot Allison. According to Richard, he then unloaded the gun, went downstairs and put it on a table, and called the 911 emergency dispatch service. Allison was not injured, but the bullet lodged in the wall about 4 feet from where she was standing. Allison testified that during the argument, Richard never verbally threatened her, but that she felt threatened when he fired the gun.

Richard testified that he normally kept his collection of guns in a locked cabinet but that on the morning of the incident, he had intended to commit suicide, so he put two guns in the desk drawer. Richard testified that the gun he fired was a .45-caliber revolver and that it was already loaded when he removed it from the drawer. Richard testified that he did not know why he fired the gun but that he did not want to hurt Allison. In his voluntary statement to police after the incident, Richard stated that he was "very careful so [the gun] was not pointed at [Allison]" and that he pointed it "up and to [his] left."

Richard was charged by information with terroristic threats, a Class IV felony, and use of a weapon to commit a felony, a Class II felony. Following a jury trial, Richard was convicted of both charges and sentenced to 12 to 36 months' imprisonment for the terroristic threats conviction and 18 to 36 months' imprisonment for the use of a weapon conviction, with the sentences to run consecutively. Following the denial of his motion for new trial, Richard appeals.

ASSIGNMENTS OF ERROR

Richard asserts, reassigned and restated, that the trial court erred in (1) refusing his proposed jury instructions Nos. 1 and 3 through 5, (2) overruling his objections to jury instructions Nos. IV, V, and VII, (3) denying his request for a bill of particulars, (4) overruling his motion to dismiss at the close of the State's case, (5) overruling his motion for directed verdict at the close of the evidence, (6) finding the evidence was sufficient to support the convictions, (7) sentencing him to excessive sentences, and (8) overruling the motion for new trial.

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). See *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

ANALYSIS

[2-4] In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Wisinski, supra.* To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Id.* If the jury instructions, read together and taken as a whole, 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. *State v. Fitzgerald*, 1 Neb. App. 315, 493 N.W.2d 357 (1992).

Richard assigns several errors to the trial court's jury instructions. Richard objected to jury instruction No. IV because it did not provide the underlying elements for the "crime of violence" which Richard would have had to commit to be guilty of terroristic threats. His proposed instruction No. 1, rejected by the trial court, provided that the "material elements" the State had to prove for terroristic threats include the specific elements of the "crime of violence" which Richard was alleged to have threatened, although the proposal did not specify a particular crime.

[5] Neb. Rev. Stat. § 28-311.01 (Reissue 1995) provides, in relevant part, that a person commits terroristic threats if he or she threatens to commit any crime of violence with the intent to terrorize another or in reckless disregard of the risk of causing such terror. In addition to stating these elements in the jury instruction, the trial court also provided a definition for "crime of violence," to which Richard also objected and assigns as error here.

Richard's argument that the trial court should have instructed the jury as to the specific elements of the crime of violence that was allegedly committed is fundamentally flawed. If the State had to prove every element of the crime of violence, the defendant would be guilty of that crime of violence rather than having "threatened" the victim with a crime of violence, and it is of course the threat of violence which is at the heart of the crime of terroristic threats. For example, if someone threatens to commit murder but does not actually kill another, he or she may be prosecuted for terroristic threats but not for murder. On the other hand, if the threat becomes a reality and the victim is killed, then the threat is merely a step on the path to the crime which is ultimately committed—murder—and there is no terroristic threats charge. In short, if each element of murder was proved, then there would be a murder, not a terroristic threat. Thus, the trial court did not err in giving instruction No. IV, which did not include the requirement that the State prove the specific elements of the alleged crime of violence, and in rejecting Richard's proposed instruction No. 1.

Richard also objected to the trial court's instruction which defined "crime of violence" as "an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority. Murder, assault, and robbery are crimes of violence." To determine whether jury instructions create prejudicial error, they 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 reversal. *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997).

[6,7] The Nebraska Supreme Court has defined "crime of violence" as "an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority." *State v. Palmer*, 224 Neb. 282, 294, 399 N.W.2d 706, 717 (1986). The Supreme Court has also said that robbery, murder, sexual assault, and assault with intent to inflict great bodily injury are crimes of violence. See, *State v. Nelson*, 235 Neb. 15, 453 N.W.2d 454 (1990); *State v. Palmer, supra*; *State v. Foutch*, 196 Neb. 644, 244 N.W.2d 291 (1976). The trial court's instruction correctly states the law, because it used the definition of

"crime of violence" provided by the Supreme Court. Moreover, the instruction was not misleading and adequately covered the issues raised by the evidence. Thus, there is no prejudicial error necessitating reversal based on the instruction that defined "crime of violence."

Richard argues that "[b]ecause the crime of terroristic threats can be committed either intentionally or recklessly, it is critical that the jury be instructed that they can only convict the defendant of use of a deadly weapon to commit the felony offense of terroristic threats if they find that he acted intentionally." Brief for appellant at 29-30.

In *State v. Ring*, 233 Neb. 720, 723, 447 N.W.2d 908, 910 (1989), the Nebraska Supreme Court found that the word "to" as used in the use of a weapon statute, Neb. Rev. Stat. § 28-1205 (Reissue 1995), could be interpreted within the context of the statute to mean " 'for the purpose of' " or " 'with the result of.' " The *Ring* court found that the language in § 28-1205 of " 'to commit any felony' " was synonymous with " 'for the purpose of committing any felony.' " 233 Neb. at 724, 447 N.W.2d at 911. The Supreme Court found that in order to convict the defendant in *Ring* of the use of a deadly weapon charge, the State had to prove he used his vehicle "*for the purpose of* committing a felony," and the State failed to meet such burden of proof because the underlying felony—felony motor vehicle homicide—was, by definition, "a felony which is committed unintentionally." *Id.* at 725, 447 N.W.2d at 911. Therefore, because nothing in the record indicated that the defendant "sought or intended to commit the felony motor vehicle homicide," the Supreme Court vacated the defendant's conviction for the use of a weapon charge. *Id.*

[8] In *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), the Nebraska Supreme Court, relying on its decision in *Ring*, explicitly stated that under § 28-1205, when the underlying felony for the use of a weapon charge is an unintentional crime, the defendant cannot be convicted of use of a weapon to commit a felony. The *Pruett* court vacated the defendant's sentence for use of a weapon to commit a felony, because the underlying felony—manslaughter for unintentionally causing death while in the commission of reckless assault—was an unintentional crime

and the defendant could not be convicted of using a weapon to commit such felony when the felony was an unintentional crime.

Here, Richard was convicted of making terroristic threats—the underlying felony on the weapons charge—and use of a weapon to commit a felony. The terroristic threats statute, § 28-311.01, provides:

> (1) 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.
>
> (2) Terroristic threats is a Class IV felony.

[9] The information alleged that Richard threatened to commit a crime of violence under § 28-311.01(1)(a), with the intent to terrorize Allison, or under § 28-311.01(1)(c), in reckless disregard of such terror, and that he used a firearm to commit the terroristic threats. The trial court instructed the jury that Richard could be guilty of terroristic threats if he threatened to commit any crime of violence either with the intent to terrorize Allison or in reckless disregard of the risk of terrorizing Allison. And, the jury was instructed that if it found him guilty of terroristic threats, but without any differentiation between intentional and reckless threats, then he could be found guilty of use of a weapon to commit a felony if he used a firearm to commit the terroristic threat. The trial court did not require the jury to make a separate finding on the terroristic threats charge as to whether Richard's threat was intentional under subsection (a) or reckless—unintentional—under subsection (c). See *State v. Pruett, supra* (state of mind to convict for reckless assault does not rise to level of intentional or knowing). As discussed earlier under *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), and *State v. Pruett, supra*, the underlying felony must be intentional before the defendant can be found guilty of use of a weapon to commit a felony. Thus, because a reckless terroristic threat is an unintentional crime, it cannot be the underlying felony for the use of a weapon charge.

[10] "Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence." *State v. Contreras*, 268 Neb. 797, 804, 688 N.W.2d 580, 585 (2004). "Because of this duty, the trial court, on its own motion, must correctly instruct on the law." *State v. Weaver*, 267 Neb. 826, 832, 677 N.W.2d 502, 508 (2004). The trial court erred in not requiring the jury to make a specific finding that the threat was intentional under § 28-311.01(1)(a) in order to then find Richard guilty of use of a weapon. In short, the trial court erred in giving an instruction that allowed the jury to convict Richard of the charge of use of a weapon to commit a felony without finding that he threatened to commit a crime of violence with the intent to terrorize Allison.

[11,12] However, in order to find that the trial court's error in the jury instruction warrants a new trial, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby. See *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991). In a criminal case tried to a jury, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

Here, during an argument between Richard and Allison, Richard yelled at her to "get out" and he took a loaded gun and fired a shot into the wall about 4 feet from where Allison was standing. A jury could find that this was an act intended to terrorize Allison. However, Richard testified that he did not know why he fired the gun but that he did not want to hurt Allison. In his voluntary statement to police after the incident, Richard stated that he was "very careful so [the gun] was not pointed at [Allison]" and that he pointed it "up and to [his] left." This evidence would permit a fact finder to conclude that Richard threatened to commit a crime of violence in reckless disregard of the risk of terrorizing Allison. Because the evidence was sufficient to convict Richard of either reckless or intentional terroristic threats, which differentiation does not impact the statutorily permissible penalty, the jury instruction did not prejudice Richard

and such was harmless error as to the terroristic threats charge. Therefore, such conviction is affirmed.

[13,14] Although the failure to find whether Richard acted intentionally or recklessly did not affect the terroristic threats charge, it was not harmless error as to the use of a weapon charge. Because the underlying crime for the use of a weapon conviction must be intentional, and no such finding was made, it was error not to instruct the jury that in order to find Richard guilty of the use of a weapon charge, the jury must first find him guilty of intentional terroristic threats. Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002).

[15,16] Here, while there is evidence to sustain a conviction on either reckless or intentional terroristic threats, the use of a weapon conviction must be reversed because only a conviction of intentional terroristic threats will serve as the predicate for such conviction. While we will not attempt to draft jury instructions in this opinion, the foregoing principles must be incorporated in the instructions upon retrial. We recognize that considered separately, the terroristic threats instruction was correct, because there is no requirement that all 12 jurors agree that such crime was intentional or reckless, except in a case such as this where there is an additional charge requiring a predicate offense which is an intentional crime. See *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986) (where single offense may be committed in several ways and there is evidence to support each of the ways, the jury need only be unanimous that the defendant violated the law and need not be unanimous as to which of several consistent ways resulted in violation). Therefore, we reverse Richard's conviction on the use of a weapon charge and remand for a new trial. See *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999) (if trial court fails to adequately instruct the jury but

reviewing court finds sufficient evidence to convict, cause may be remanded to trial court for new trial).

[17,18] We must address Richard's assignment that the sentences imposed were excessive, but only as to the terroristic threats conviction, given that we are reversing the use of a weapon conviction. Under the pertinent statute, § 28-311.01, terroristic threats is a Class IV felony, regardless of whether committed intentionally or recklessly, and the district court's sentence of 12 to 36 months' incarceration is on the low end of the statutory range. A sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). While this is a first criminal conviction, the discharge of a weapon in the direction of another is obviously a serious matter. The trial court found that a lesser sentence would depreciate the seriousness of the offense, and we cannot say that such conclusion is an abuse of discretion. Therefore, we affirm the sentence imposed by the district court for the conviction on the terroristic threats charge. Obviously, we vacate the sentence for the use of a weapon conviction. The remaining assignments of error are unnecessary to the disposition of this case, and we need not address them here. See *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

CONCLUSION

The trial court failed to instruct the jury that in order to find Richard guilty of the crime of use of a weapon, the underlying felony—terroristic threats—had to be an intentional crime, meaning that he had to threaten to commit a crime of violence with the intent to terrorize Allison and not just in reckless disregard of the risk of causing such terror. We affirm the terroristic threats conviction and sentence, and we reverse the use of a

weapon conviction, vacate the sentence, and remand the cause for a new trial on the use of a weapon charge.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
TROY DUNN, APPELLANT.
705 N.W.2d 246

Filed November 1, 2005. No. A-04-1259.

1. **Trial: Evidence: Photographs.** A photograph is admissible in evidence if the subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence.
2. **Rules of Evidence: Proof.** Pursuant to Neb. Evid. R. 901(1), the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
3. **Trial: Evidence: Photographs: Appeal and Error.** Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion.
4. **Evidence: Words and Phrases.** One of the components to relevant evidence is probative value, which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case.
5. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.
6. **Criminal Law: Trial: Appeal and Error.** Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the court in a judgment adverse to a substantial right of the defendant.
7. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, 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.
8. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the

light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

9. **Records: Ordinances: Appeal and Error.** The responsibility of the appellant to include a relevant municipal ordinance in the record can be met by a praecipe requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court when a notice of appeal is filed.
10. **Ordinances: Appeal and Error.** An appellate court assumes that the material allegations in a long-form complaint reflect the substantive content of the ordinance which the defendant was charged with violating.
11. **Criminal Law: Sentences.** Before a sentence is pronounced, the defendant must be informed by the court of the verdict and asked whether he has anything to say why judgment should not be passed against him.
12. **Sentences.** The most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence.
13. **Sentences: Due Process: Evidence.** A convicted defendant must be afforded more than a mere opportunity to express an attitude, disposition, or view toward a prospective sentence and must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information relied on by the sentencing judge.

Appeal from the District Court for Douglas County, ROBERT V. BURKHARD, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed in part, and in part reversed and remanded with directions.

Jason E. Troia and Jill A. Daley, Senior Certified Law Student, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Troy Dunn was convicted and sentenced in the county court for Douglas County on charges of assault and battery and disorderly conduct. Dunn's convictions and sentences were affirmed by the district court for Douglas County. On appeal, Dunn alleges that the county court erred in admitting a photograph as evidence, that the evidence adduced at trial was insufficient to support the convictions, that he was denied his statutory right of allocution

prior to being sentenced, and that the sentences imposed were excessive. We find that the county court erred in admitting the photograph as evidence, because there was no testimony presented to authenticate the photograph or to indicate the photograph was an accurate representation of what it was intended to depict. We find the erroneous admission of the photograph to be harmless, because sufficient other evidence was adduced to support Dunn's convictions, including the victim's prior statements to law enforcement. Finally, although the sentences imposed cannot be reviewed for alleged excessiveness because the relevant municipal ordinance governing the sentences is not in the record, we find that the county court effectively denied Dunn his statutory right of allocution when the court denied Dunn the opportunity to contest any incorrect factual grounds for the sentences imposed. Accordingly, we affirm in part the district court's order of affirmance, and in part reverse and remand the matter to the district court with directions to remand to the county court for a new sentencing hearing.

II. BACKGROUND

On the night of March 26, 2004, an altercation occurred at Dunn's residence between Dunn's wife, Christine Dunn (Christine), and Dunn's ex-wife. As a result, Christine called law enforcement and left the residence. Christine returned to the residence at approximately 4:30 a.m. on March 27, at which time an altercation occurred between Dunn and Christine. Dunn called law enforcement as a result of that altercation. Law enforcement advised Dunn to leave the residence. Dunn later returned to collect some personal belongings, and another altercation occurred between Dunn and Christine, during which altercation Christine's mother called law enforcement.

When law enforcement responded to Dunn's residence for the third time, Christine was in a "hysterical state." Christine reported to law enforcement that Dunn had slammed her head against a wall, kneed her in the chest, and pulled out her hair. Law enforcement observed some bruising to Christine's arm, a "slight knot" on the back of her head, and a patch of hair on the floor. Dunn had already left the residence before law enforcement responded.

On April 19, 2004, Dunn was charged by criminal complaint with assault and battery and disorderly conduct under Omaha municipal ordinances. A bench trial was conducted on June 2. During the bench trial, Christine recanted her reports to law enforcement, alleging that any injuries she sustained on March 26 and 27 occurred as a result of her altercation with Dunn's ex-wife. Christine testified that Dunn only pushed her enough to get past her to leave the residence and that her reports to law enforcement had been false. After the bench trial, the county court found Dunn guilty of both charges. The county court sentenced Dunn to 100 days in jail for each conviction, with the sentences to be served concurrently. Dunn appealed to the district court, which affirmed the convictions and sentences on October 21. This appeal followed.

III. ASSIGNMENTS OF ERROR

Dunn has assigned four errors on appeal. First, Dunn asserts that the county court erred in receiving into evidence a photograph of Christine's arm. Second, Dunn asserts that the county court erred in finding sufficient evidence to support convictions on the charges. Third, Dunn asserts that the county court denied Dunn his statutory right of allocution prior to the pronouncement of his sentences. Fourth, Dunn asserts that the county court imposed excessive sentences.

IV. ANALYSIS

1. Receipt of Photograph

Dunn first asserts that the county court erred in receiving into evidence a photograph of Christine's arm. Dunn asserts that there was insufficient foundation for admission of the photograph, because the testimony at the bench trial indicated the photograph was not an accurate representation of what it was intended to depict. We conclude that the testimony adduced by the State concerning the photograph demonstrates both that the photograph was not authenticated and that it was not an accurate representation of what it was intended to depict. As such, we agree that the county court erred in receiving the photograph into evidence.

[1-3] The general rule in Nebraska concerning the admissibility of photographs as evidence is that a photograph is admissible in evidence if the subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997); *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992); *State v. Butler*, 10 Neb. App. 537, 634 N.W.2d 46 (2001). " 'The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' " *State v. Garza*, 241 Neb. at 261, 487 N.W.2d at 555-56, quoting Neb. Evid. R. 901(1). Admission or exclusion of photographs as evidence is within the discretion of a trial court, whose evidential ruling on the photographs will be upheld on appeal unless the trial court abused its discretion. *Id.*

In this case, the initial requirement of authentication was not clearly satisfied. The State introduced the photograph through the testimony of one of the law enforcement officers who responded to the third call to Dunn's residence. The officer was asked if he took the picture and responded, "No, I didn't." The officer was further asked if the picture "accurately reflect[s] again how [Christine's] arm looked on the day in question." The officer responded, "No, it doesn't. It's kind of blurry." The officer acknowledged that the photograph was a picture of Christine's arm on the day in question. The State's questioning of the officer indicated that the photograph was "an attempt on [law enforcement's] part to photograph the injuries" Christine had sustained. The officer's testimony, however, indicates that he did not take the photograph and that it did not accurately reflect how Christine's arm actually looked.

[4] In addition, the photograph lacked relevance. One of the components to relevant evidence is probative value, which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. See *State v. Merrill, supra*. In this case, the photograph lacked relevance because it has no probative value. A review of the photograph reveals a blurry photograph of what appears to be a

woman's arm. However, it is not apparent from the photograph whose arm is depicted, and the photograph is so blurry that no alleged bruising is even visible on the arm. In addition, in light of the law enforcement officer's testimony concerning the photograph, it is not an accurate depiction of what Christine's arm looked like. As such, the photograph is not persuasive that Christine suffered bruising as a result of Dunn's conduct. As a result, we conclude that the county court abused its discretion in receiving the photograph into evidence.

[5,6] Although we conclude that the photograph was erroneously admitted, we find the error to be harmless. Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact. *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). Harmless error exists in a bench trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the court in a judgment adverse to a substantial right of the defendant. *Id.* A review of the photograph makes it apparent that the photograph could not have materially influenced the court to conclude that Dunn had assaulted or battered Christine, inasmuch as the photograph does not actually demonstrate any injury to Christine. In light of our discussion below concerning the other evidence which supports the county court's finding that Dunn was guilty of the charges, the erroneous admission of the photograph was harmless error.

2. Sufficiency of Evidence

Dunn next asserts that the evidence adduced at trial was insufficient to sustain his convictions on the charges. The State argues that Dunn failed to include in the appellate record the municipal ordinances under which he was convicted and that we are therefore precluded from reviewing the sufficiency of the evidence. Because we find that Dunn was charged in a long-form complaint containing substantive allegations, we review the sufficiency of the evidence to support the allegations of the complaint. In so doing, we conclude that there was sufficient

evidence, including Christine's statements to law enforcement, to sustain Dunn's convictions.

[7,8] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, 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. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). See, also, *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

[9] The first issue that must be addressed concerning our review of the sufficiency of the evidence to sustain Dunn's convictions is Dunn's failure to include in the appellate record the applicable municipal ordinances. In *State v. Bush*, 254 Neb. 260, 576 N.W.2d 177 (1998), the Nebraska Supreme Court clarified the "ordinance rule" originally articulated in *Steiner v. State*, 78 Neb. 147, 150, 110 N.W. 723, 724 (1907), where the court had stated:

> [An appellate] court cannot undertake to notice the ordinances of all the municipalities within its jurisdiction, nor to search the records for evidence of their passage, amendment or repeal. A party relying upon such matters must make them a part of the bill of exceptions, or in some manner present them as a part of the record.

The ordinance rule places responsibility upon an appellant to include the ordinance in the record which is transmitted to the appellate court. *State v. Bush, supra.* In *State v. Bush*, the court clarified that this responsibility can be met by a praecipe requesting that a copy of the ordinance be included in the transcript prepared by the clerk of the county court when a notice of appeal is filed.

In the present case, Dunn was convicted under Omaha municipal ordinances. Dunn has not presented the ordinances either in the bill of exceptions or in the transcript. Despite a motion for summary affirmance previously filed by the State specifically alleging Dunn's failure to satisfy the ordinance rule, Dunn took no steps to file a supplemental bill of exceptions or supplemental transcript to include the ordinances. As such, Dunn has failed to satisfy the ordinance rule.

[10] Although Dunn failed to satisfy the ordinance rule, we note that the transcript in this case includes a long-form criminal complaint containing substantive allegations against Dunn. In *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998), the Nebraska Supreme Court held that in such circumstances, an appellate court assumes that the material allegations in the complaint reflect the substantive content of the ordinance which the defendant was charged with violating and reviews the evidence to determine its sufficiency to prove the matters alleged beyond a reasonable doubt. Because the transcript includes such a long-form complaint, we review the evidence to determine its sufficiency to prove Dunn's violation of the allegations of the complaint.

The evidence adduced at trial indicated that when responding to Dunn's residence for the third time on March 26 and 27, 2004, law enforcement observed Christine with noticeable injuries. Christine told law enforcement that Dunn had slammed her head against a wall, kneed her in the chest, and pulled her hair out. Law enforcement observed a bump on Christine's head, some bruising on her arms, and a clump of hair on the floor. The evidence adduced at trial further indicates that on March 29, Christine signed an affidavit seeking a protection order in which she alleged that Dunn had assaulted her "by kicking, hitting and pulling [her] hair." Although Christine recanted these allegations at trial and testified that she had lied both to law enforcement and in the affidavit, the question of her credibility is not to be reassessed on appeal. As such, we find that the evidence adduced at trial was sufficient for the court to find Dunn guilty of assault and battery and disorderly conduct under the allegations in the complaint. This assigned error is without merit.

3. Denial of Allocution

Dunn next asserts that he was denied his statutory right of allocution. Dunn asserts that although the county court asked him if he had any reason why sentences should not be imposed, the court did not give him an opportunity to say anything concerning sentencing. The State asserts that Dunn was afforded a sufficient opportunity to offer comments. Based on our review of the record, we conclude that Dunn was effectively denied the opportunity for meaningful allocution prior to the county court's imposition of sentences.

[11-13] Neb. Rev. Stat. § 29-2201 (Reissue 1995) provides that "[b]efore the sentence is pronounced, the defendant must be informed by the court of the verdict . . . and asked whether he has anything to say why judgment should not be passed against him." The Nebraska Supreme Court discussed this provision, in dicta, in *State v. Barker*, 231 Neb. 430, 436 N.W.2d 520 (1989). The court noted that " 'the most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence . . . .' " *Id.* at 436, 436 N.W.2d at 524, quoting Arthur W. Campbell, Law of Sentencing § 72 (1978). Accord *State v. Dethlefs*, 239 Neb. 943, 479 N.W.2d 780 (1992). The court suggested that "[a] convicted defendant must be afforded more than a mere opportunity to express an attitude, disposition, or view toward a prospective sentence" and "must be afforded a forum and the right to question the constitutional propriety of the information utilized by the sentencing judge, to present countervailing information, and to test, question, or refute the relevance of information" relied on by the sentencing judge. *State v. Barker*, 231 Neb. at 436, 436 N.W.2d at 524.

Neb. Rev. Stat. § 29-2260 (Reissue 1995) provides a number of factors to be considered whenever a court "considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required." Section 29-2260 specifies a number of factors which, "while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment." Those factors include the offender's lack of criminal history, the offender's unlikelihood to commit another

crime, the offender's likelihood of responding affirmatively to probationary treatment, and the possible excessive hardship to the offender or his dependents entailed by imprisonment.

In the present case, the following colloquy is the entirety of the trial court's conversation with Dunn prior to imposing sentences:

> THE COURT: Mr. Dunn, I'm finding you guilty as charged on both counts. Any reason I shouldn't pass sentence today or is there anything that you or your attorney would like to say with regard to sentencing?
>
> [Defense counsel]: We'll ask that you do a presentence investigation on us.
>
> THE COURT: Well let me just tell you something, [counsel], I take this job pretty seriously and when people come in here and tell me stories, I don't really care for it. When I have people raise their hands and swear to tell the truth I expect them to tell the truth. [Christine] came in here and told me a story today. Everything was pretty consistent except for the fact of what [Dunn] did in this particular case. She tells me, as [counsel for the State] just spoken [sic] at closing remarks, that this altercation occurred on March 27th and on March 28th they are back together again and everything was h[u]nky-dory. Unfortunately, on March 29th she went into the district court, filed a petition, which is sworn to under oath. Let me just tell you what she said. She said, "I tossed a candy dish at the T.V. and knocked the stereo off the table. That's when he assaulted me by kicking, hitting and pulling my hair. I was yelling you going to kill me." "He continued to beat me. I pretended to pass out hoping that he would stop, but he continued to kick and hit me as his 9-year-old son watched." Now, when do you want me to believe that this particular witness that was called today was telling the truth?
>
> [Defense counsel]: That's —
>
> THE COURT: She told the police that statement on the 27th and she told the district court that on the 29th and today she comes in and tells me a totally different story.
>
> [Defense counsel]: Her story —
>
> THE COURT: I don't buy it.

> [Defense counsel]: — Her story she told the police was entirely different than the one you just read out loud.
>
> THE COURT: The sentence will be 100 days in the Douglas County Correctional Center on each count. Time will run concurrent.

The court was certainly entitled to decline Dunn's request for a presentence investigation report because this case involves a misdemeanor. See, Neb. Rev. Stat. § 29-2261 (Cum. Supp. 2004); *State v. Turco*, 6 Neb. App. 725, 576 N.W.2d 847 (1998) (no presentence investigation report required in cases involving misdemeanor). However, the lack of such a report makes allocution all the more important as the defendant's only opportunity to present information to the court concerning the sentencing factors set forth above, which factors the court is obligated to consider. In the present case, the county court did not afford Dunn any opportunity either to challenge the factual basis of the sentences, which basis appeared to be the court's conclusion that Christine's statement was consistent at all times prior to trial even though the record suggests that Christine's statement contained some inconsistencies at each stage of the proceedings, or to present further information about Dunn's criminal history or lack thereof and his amenability to probation.

Our review of the record leads us to conclude that although the trial court literally complied with the requirement of § 29-2201 that the court ask Dunn if he had anything to say why judgment should not be passed against him, the court did not offer Dunn any meaningful opportunity to respond. The record reveals, in fact, that attempts to interject disagreement with the court about the consistency of Christine's prior statements were precluded by the court. As such, we conclude that Dunn was effectively denied his statutory right of allocution. Accordingly, we reverse the district court's affirmance of the sentences and remand the matter to the district court with directions to remand to the county court for a new sentencing hearing to be conducted by a different county court judge. See, *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005); *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004); *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

4. Excessive Sentences

Dunn's final assertion is that the sentences imposed by the county court are excessive. We need not discuss this assignment of error in light of our resolution above of Dunn's assertion concerning the trial court's denial of his right of allocution. We note, however, that the record presented on appeal does not contain any municipal ordinance governing the sentences for these convictions and that we would be unable to address the error on the present record. See *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

V. CONCLUSION

Although we find that the county court erred in admitting a photograph as evidence, we find such error harmless and conclude that there was sufficient evidence to support Dunn's convictions for assault and battery and disorderly conduct. We find that the county court effectively denied Dunn his statutory right of allocution, and we therefore reverse the district court's affirmance of the sentences and remand the matter with directions to remand to the county court for a new sentencing hearing before a different county court judge.

Affirmed in part, and in part reversed and remanded with directions.

Greenhall Investments, L.L.C., appellant, v. Wiese Development Corporation, appellee and cross-appellant, and Charles R. Clatterbuck, intervenor-appellee and cross-appellee.

706 N.W.2d 552

Filed November 8, 2005. No. A-04-279.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
2. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
3. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any

material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Complaints.** Allegations of a complaint not denied are admitted without any predicate ruling from the trial court.
6. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Jeffrey T. Wegner, Rebecca L. Fox, and Richard Jeffries, of Kutak Rock, L.L.P., for appellant.

James D. Sherrets, of Sherrets & Boecker, L.L.C., for appellee.

Terry J. Grennan and Michael F. Scahill, of Cassem, Tierney, Adams, Gotch & Douglas, for intervenor-appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Greenhall Investments, L.L.C. (Greenhall), and Wiese Development Corporation (Wiese) entered into a purchase agreement whereby Greenhall sought to purchase real property from Wiese. Wiese's ability to sell the property was subject to a right of first refusal requiring Wiese to give Charles R. Clatterbuck the opportunity to match any offer to purchase the property. Clatterbuck purported to exercise the right of first refusal and entered into a purchase agreement with Wiese. Litigation ensued in which Greenhall sought an order compelling Wiese to specifically perform under the purchase agreement between Greenhall and Wiese. Clatterbuck intervened and sought an order compelling Wiese to specifically perform under the purchase agreement between Wiese and Clatterbuck. The district court for Douglas County granted partial summary judgment in favor of Wiese and dismissed Greenhall's claim for specific performance. Additionally, the district court granted partial

summary judgment in favor of Clatterbuck and ordered Wiese to specifically perform under the purchase agreement between Wiese and Clatterbuck.

Greenhall appeals and alleges the district court erred in finding that the right of first refusal did not violate any rule against perpetuities and in finding that Clatterbuck had timely exercised the right of first refusal. Wiese cross-appeals and alleges the district court erred in failing to find that Clatterbuck did not provide a "mirror image acceptance" when exercising the right of first refusal and in failing to find that Clatterbuck's subsequent failure to close was unreasonable.

We find that the right of first refusal was limited in duration by the contract in which it was contained and that accordingly, it did not violate any rule against perpetuities which might apply to it. We also find that Clatterbuck timely exercised the right of first refusal. As such, we affirm the district court's summary judgment in favor of Wiese and against Greenhall. Further, we find that inasmuch as Wiese had urged the district court to find a sufficient exercise of Clatterbuck's right of first refusal, Wiese is precluded from challenging the adequacy of that exercise on appeal. As such, we affirm the district court's summary judgment in favor of Clatterbuck and against Wiese.

II. BACKGROUND

On or about December 12, 2000, Wiese purchased the property in issue from Clatterbuck, executing a promissory note and deed of trust. On or about May 5, 2003, to extend the maturity date of the promissory note, Wiese and Clatterbuck entered into a forbearance agreement. The forbearance agreement specified that the period of forbearance was "through November 15, 2003." The forbearance agreement granted Clatterbuck a right of first refusal giving Clatterbuck the right to match any offer for the purchase of the property.

On or about September 9, 2003, Greenhall and Wiese entered into a purchase agreement whereby Greenhall sought to purchase the property from Wiese. On October 20, Wiese delivered a letter to Clatterbuck together with a copy of the purchase agreement between Greenhall and Wiese. On October 24, Clatterbuck and Wiese entered into a purchase agreement whereby Clatterbuck

sought to purchase the property from Wiese. On October 27, Clatterbuck executed a notarized document indicating a desire to exercise the right of first refusal.

Also on or about October 27, 2003, Wiese informed Greenhall of Clatterbuck's exercise of a right of first refusal and canceled the purchase agreement between Greenhall and Wiese. On October 28, Greenhall filed a complaint against Wiese. Greenhall sought specific performance of the purchase agreement between Greenhall and Wiese and sought damages for breach of contract. On November 21, Clatterbuck filed a complaint in intervention. Clatterbuck sought specific performance of the purchase agreement between Wiese and Clatterbuck or, in the alternative, damages for breach of contract. On November 25, Greenhall filed an amended complaint against Wiese in which Greenhall added a claim for misrepresentation. On November 26, Wiese filed an answer to Greenhall's amended complaint. The record presented on appeal does not indicate that any answer was ever filed to Clatterbuck's complaint in intervention.

Also on November 26, 2003, Wiese filed a motion for partial summary judgment against Greenhall. Wiese sought summary judgment on Greenhall's claim for specific performance. On January 22, 2004, the district court entered an order granting Wiese partial summary judgment and dismissing Greenhall's claim for specific performance. The district court specifically found that the right of first refusal did not violate any rule against perpetuities and that Clatterbuck had exercised the right of first refusal.

On January 27, 2004, Clatterbuck filed a motion for partial summary judgment against Wiese. Clatterbuck sought summary judgment on Clatterbuck's claim for specific performance. On February 11, the district court entered an order granting Clatterbuck partial summary judgment and ordering Wiese to specifically perform.

On February 17, 2004, the district court entered an order and final judgment. The district court effectively found that the partial summary judgment orders should be considered final orders pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004) and that there was no just reason for delaying the right to appeal the

partial summary judgment orders. This appeal and cross-appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Greenhall assigns as error the district court's findings that the right of first refusal did not violate any rule against perpetuities and that the right of first refusal was timely exercised by Clatterbuck. On cross-appeal, Wiese assigns as error the district court's failure to find that Clatterbuck's exercise of the right of first refusal was not a mirror-image acceptance of Greenhall's offer and that Clatterbuck's subsequent refusal to close was unreasonable.

IV. ANALYSIS

1. Greenhall's Appeal

Greenhall asserts that the district court erred in granting Wiese summary judgment on Greenhall's claim for specific performance. Specifically, Greenhall asserts that the district court erred in finding that the right of first refusal did not violate any rule against perpetuities and in finding that the right of first refusal was timely exercised by Clatterbuck. Wiese initially challenges Greenhall's standing to assert both the alleged violation of any rule against perpetuities and the alleged untimeliness of Clatterbuck's exercise of the right of first refusal.

(a) Standing

The first issue which must be addressed is Wiese's assertion that Greenhall lacks standing to assert that the right of first refusal violated a rule against perpetuities and that the right of first refusal was not timely exercised. Wiese asserts that Greenhall's appeal should be dismissed because Greenhall lacks standing. Wiese asserts that Greenhall lacks standing primarily because Greenhall was not privy or a party to the forbearance agreement between Wiese and Clatterbuck in which the right of first refusal is contained. We disagree and conclude that because Clatterbuck's exercise of the right of first refusal and the right's validity directly impact Greenhall's legal rights, Greenhall does have standing to bring the issues on appeal.

[1,2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of the court. *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005). In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.* Wiese correctly notes that the general rule is that only a party (actual or alleged) to a contract can challenge its validity. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). The fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract. *Id.*

In this case, however, while Greenhall is not a party to the forbearance agreement between Wiese and Clatterbuck, Greenhall has standing to challenge the validity of the right of first refusal under any applicable rule against perpetuities and to challenge the timeliness of Clatterbuck's exercise of the right. The facts of the present case are significantly comparable to the facts of *Spanish Oaks v. Hy-Vee, supra*, in which the Nebraska Supreme Court found that a third party had standing to challenge a provision in a contract.

In *Spanish Oaks*, the plaintiffs and one of the defendants had entered into a lease. The defendant then entered into a sublease with another party, which sublease included use restrictions. The plaintiffs tried to challenge the validity of the use restrictions in the sublease, even though the plaintiffs were not privy to the sublease. The plaintiffs alleged that the use restrictions had resulted in a breach of the lease contract between the plaintiffs and the defendant. The Nebraska Supreme Court found that the plaintiffs had standing to challenge the use restrictions because the plaintiffs were "alleging a breach of the [initial] lease, to which [they were] part[ies]." *Id.* at 138, 655 N.W.2d at 397.

Similarly, in the present case, Greenhall and Wiese entered into a purchase agreement. Wiese also entered into a forbearance agreement with Clatterbuck, which forbearance agreement included a restriction, namely a right of first refusal. Greenhall is challenging the validity of the restriction and its exercise, even though Greenhall is not a party to the forbearance agreement. Greenhall is alleging that the right of first refusal has resulted

in a breach of the purchase agreement between Greenhall and Wiese. Greenhall has standing to challenge the right of first refusal because Greenhall is alleging a breach of the purchase agreement, to which Greenhall is a party.

We also find Wiese's reliance on the Rhode Island Supreme Court's decision in *Brough v. Foley*, 525 A.2d 919 (R.I. 1987), to be misplaced because that decision is significantly distinguishable from the decision in the present case. In *Brough*, the plaintiffs and one of the defendants entered into a purchase agreement which *specifically mentioned* that the plaintiffs' rights were subject to a right of first refusal in a separate contract between the defendant and another party. When the plaintiffs tried to challenge the right of first refusal under a rule against perpetuities and under a theory that the right was not properly exercised, the Rhode Island Supreme Court found that the plaintiffs lacked standing. The significant difference in the present case is that the purchase agreement between Greenhall and Wiese made no mention of a right of first refusal. Rather, that purchase agreement provided only that Greenhall's rights were subject to liens "of record"; but there is no evidence in the record to indicate that Clatterbuck's right of first refusal was "of record." The Rhode Island Supreme Court's conclusion that the *Brough* plaintiffs' rights were subject to the right of first refusal, regardless of the right's validity, was premised on the fact that the purchase agreement specifically so provided. Such is not the case here.

We conclude that Greenhall has standing to raise the claims on appeal. Greenhall's legal rights under the purchase agreement between Greenhall and Wiese are directly affected by Clatterbuck's right of first refusal, and Greenhall has standing to challenge the district court's grant of partial summary judgment against Greenhall on the basis of the right of first refusal.

(b) Partial Summary Judgment Against Greenhall

Greenhall challenges the district court's grant of summary judgment in favor of Wiese on Greenhall's claim for specific performance. Greenhall asserts that the district court erred in finding that Clatterbuck's right of first refusal was not violative of the common-law rule against perpetuities and in finding that the right of first refusal was timely exercised by Clatterbuck.

Although it is not apparent that the common-law rule against perpetuities remains viable in Nebraska, we conclude, as we will explain below, that the limited duration of the forbearance agreement would prevent the rule against perpetuities from being violated, even assuming that it is applicable. Additionally, we conclude that there is no genuine issue of material fact concerning Clatterbuck's exercise of the right of first refusal and that the exercise was clearly within the time period required in the forbearance agreement. As such, we affirm the district court's summary judgment in favor of Wiese on Greenhall's claim for specific performance.

[3,4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

(i) Rule Against Perpetuities

Greenhall asserts that the right of first refusal in the forbearance agreement between Wiese and Clatterbuck violates the common-law rule against perpetuities. Although Greenhall acknowledges that Nebraska has adopted a statutory rule against perpetuities and that the statutory rule expressly excludes from its operation nonvested property interests arising out of nondonative transfers, such as the right of first refusal at issue in this case, Greenhall argues that the common-law rule against perpetuities remains viable and that the statutory rule supersedes the common-law rule only with respect to those interests actually covered by the statutory rule. Wiese argues that the statutory rule supersedes the common-law rule in all instances and, in effect, abolishes the common-law rule. We decline to determine whether the common-law rule remains at all viable, because we conclude that the common-law rule, even if applicable, would not be violated in this case because of the limited duration of the forbearance agreement itself.

Neb. Rev. Stat. §§ 76-2001 through 76-2008 (Reissue 1996 & Cum. Supp. 2002) are the Uniform Statutory Rule Against Perpetuities Act. Section 76-2002(a) provides that a nonvested property interest is invalid unless when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive or within 90 years after its creation. Section 76-2005 specifically provides that the statutory rule does not apply to a nonvested property interest arising out of a nondonative transfer, with some exceptions not applicable to this case. Greenhall acknowledges that the right of first refusal at issue in this case is, pursuant to § 76-2005, specifically excluded from the operation of the statutory rule against perpetuities.

Section 76-2008 provides, "The Uniform Statutory Rule Against Perpetuities Act supersedes the rule of common law known as the rule against perpetuities." Greenhall argues that this provision means the statutory rule supersedes the common-law rule only with respect to those interests actually covered by the statutory rule and that because the right of first refusal at issue in this case is excluded from the coverage of the statutory rule, the common-law rule's application to the right is not superseded. Wiese argues that this provision means that the statutory rule supersedes the common-law rule entirely and that the common-law rule was, in effect, abolished.

We decline to address the question of whether the common-law rule against perpetuities is superseded only with respect to interests actually covered by the statutory rule against perpetuities or with respect to all interests. As noted above, we conclude that the right of first refusal in this case, as a matter of law, would not be violative of the common-law rule against perpetuities, even assuming that the common-law rule is applicable. The common-law rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth. See *In re Trust Estate of Darling*, 219 Neb. 705, 365 N.W.2d 821 (1985). The right of first refusal in the present case was limited in duration to a period of time well within this perpetuities period.

The right of first refusal in the present case was one provision within a larger forbearance agreement between Wiese and Clatterbuck executed on or about May 5, 2003. The purpose of the entire forbearance agreement was for Clatterbuck to "temporarily forbear from enforcing [his] legal rights and remedies" for a possible default by Wiese on a previous real estate contract. The forbearance agreement specifically provided that the period of forbearance would be "from [approximately May 5, 2003,] through November 15, 2003." The right of first refusal was only one of a number of conditions upon which the temporary forbearance by Clatterbuck would be agreed to. As such, the right of first refusal, like the larger forbearance agreement itself, was limited to a period of fewer than 7 months, well within the common-law perpetuities period.

The record reveals no genuine issues of material fact concerning the limited duration of the forbearance agreement or the right of first refusal. As a matter of law, the right of first refusal was limited in duration to a period of time that would not violate the common-law rule against perpetuities, even assuming that such rule remains viable and applicable to the right of first refusal at issue in this case. As such, the district court did not err in finding that the right did not violate any rule against perpetuities. This assigned error is without merit.

(ii) Timely Exercise of Right of First Refusal

Greenhall also asserts that there are genuine issues of material fact concerning whether Clatterbuck timely exercised the right of first refusal. Greenhall asserts that there are factual disputes concerning both when the time period for exercise of the right was triggered and when the right was actually exercised. We conclude that any factual disputes are not material, because under any calculation of time supported by the record, the right of first refusal was timely exercised.

With regard to the right of first refusal, the forbearance agreement between Wiese and Clatterbuck provides as follows:

> [Wiese] hereby grants [Clatterbuck] the right of first refusal on the land . . . . In the event [Wiese] receives a bona fide, written offer to purchase any or all of such land, [Wiese] shall present such bona fide, written offer to [Clatterbuck]

> and [Clatterbuck] shall have five (5) working days to match the bona fide written offer . . . .

The first issue that must be resolved is when the period of 5 working days began to run in this case. Greenhall presented evidence that as early as October 14, 2003, an attorney who represented Clatterbuck in executing the forbearance agreement "expressed his prior knowledge of the Purchase Agreement [between Greenhall and Wiese] by congratulating" Greenhall on the impending purchase of the property. Greenhall argues that this knowledge by Clatterbuck's attorney should be sufficient to have triggered the period of 5 working days. Wiese, however, asserts that the period was not triggered until Wiese provided written notice of Greenhall's offer, which the record indicates occurred on October 20. Alternatively, Greenhall urges this court to find that the language specifying the triggering event was "ambiguous" and that a genuine issue of material fact existed as to when the triggering event occurred. See brief for appellant at 17.

We find it immaterial whether the right of first refusal requires written notice by Wiese to Clatterbuck or merely notice by Wiese to Clatterbuck of a written offer. Any ambiguity in this regard is immaterial because, either way, the right of first refusal clearly and unambiguously requires Wiese to present the offer to Clatterbuck to trigger the running of the period of 5 working days. The record contains no evidence to suggest that Wiese presented the offer to Clatterbuck, orally or in writing, at any time prior to October 20, 2003. Although Greenhall presented evidence suggesting that Clatterbuck's counsel (and perhaps, by implication, Clatterbuck himself) had some knowledge of Greenhall's offer earlier than October 20, Greenhall presented no evidence to indicate or suggest that Wiese had ever presented the offer in any fashion to Clatterbuck prior to October 20. As such, no matter when the period of 5 working days was to be triggered, the earliest date upon which the period could have been triggered, judging from the evidence in this case, is October 20.

The next issue, then, is whether Clatterbuck timely exercised the right of first refusal "within 'five (5) working days'" of October 20, 2003. See *id.* at 20. Greenhall argues that there is a

genuine issue of material fact concerning when Clatterbuck exercised the right because the record indicates that Wiese and Clatterbuck entered into a purchase agreement on October 24 but that the document captioned as Clatterbuck's exercise of the right of first refusal was not notarized until October 27. We find any factual dispute in this regard likewise to be immaterial. As noted, the forbearance agreement specifically provided that Clatterbuck had 5 *working* days to exercise the right of first refusal. In 2003, October 20 was a Monday. As such, October 27 was the fifth *working* day after October 20. Regardless of whether Clatterbuck should be said to have exercised the right on October 24, when Wiese and he entered into a purchase agreement, or on October 27, when his notice of exercising the right was notarized, he exercised the right within 5 working days.

We find no genuine issue of material fact concerning the timeliness of Clatterbuck's exercise of the right of first refusal. Any factual dispute concerning when the appropriate time period for exercising the right was triggered and any factual dispute concerning when the right was actually exercised are immaterial. As a matter of law, Clatterbuck's exercise of the right of first refusal was within the appropriate time period set forth in the forbearance agreement, and the district court did not err in so finding. This assignment of error is without merit.

(iii) Conclusion on Greenhall's Appeal

Although we find that Greenhall has standing to raise the issues on appeal challenging the validity of the right of first refusal and the timeliness of Clatterbuck's exercise of the right, we find that the district court did not err in granting Wiese partial summary judgment and dismissing Greenhall's claim for specific performance. Even assuming that the common-law rule against perpetuities remains viable and is applicable to the right of first refusal at issue in this case, that right did not violate the common-law rule. As a matter of law, the right of first refusal in the present case was limited in duration to a period of time well within the perpetuities period. Additionally, there is no genuine issue of material fact concerning the timeliness of Clatterbuck's exercise of the right of first refusal. The record indicates that as a matter of law, the right was exercised within the appropriate

time period set forth in the forbearance agreement. As such, we affirm the district court's grant of partial summary judgment in favor of Wiese and dismissal of Greenhall's claim for specific performance.

2. Wiese's Cross-Appeal

Wiese's position on cross-appeal is that the district court erred in granting Clatterbuck summary judgment on Clatterbuck's claim for specific performance. Wiese asserts that the district court erred in failing to find that Clatterbuck's exercise of the right of first refusal did not constitute a mirror-image acceptance sufficient to match Greenhill's offer, as required by the forbearance agreement. Additionally, Wiese asserts that the district court erred in failing to find that Clatterbuck's refusal to close after the court granted Wiese partial summary judgment against Greenhall and dismissed Greenhall's claim for specific performance was unreasonable.

(a) Clatterbuck's Match of Offer

Wiese first challenges the district court's grant of summary judgment in favor of Clatterbuck by asserting that Clatterbuck's exercise of the right of first refusal did not constitute a mirror-image acceptance sufficient to match Greenhall's offer, as required by the forbearance agreement. Wiese argues that Clatterbuck's exercise of the right of first refusal contained deviations from Greenhall's offer concerning terms of the sale such as the closing date and to whom the brokerage fee should be paid.

We initially note the incongruity in Wiese's positions in response to Greenhall's appeal and in furtherance of Wiese's cross-appeal. In seeking summary judgment against Greenhall in the district court, and in urging this court on appeal to affirm the grant of summary judgment against Greenhall, Wiese asserted as the primary basis for denying Greenhall's asserted right to specific performance that Clatterbuck had properly exercised the right of first refusal, thereby usurping Greenhall's legal interest in the property. Now, in furtherance of the cross-appeal, Wiese attempts to assert that the district court was in error to find that Clatterbuck's exercise of the right of first refusal was proper. If

such were found to be the case, then the district court's error would logically also mean that Greenhall's legal right to enforcement of the purchase agreement between Greenhall and Wiese was never usurped; this, of course, is a position completely at odds with Wiese's stance both at trial and in response to Greenhall's appeal.

Wiese filed an answer to Greenhall's amended complaint. In that answer, Wiese specifically and affirmatively alleged that Clatterbuck had exercised the right of first refusal. Wiese also submitted an affidavit in support of summary judgment against Greenhall in which Wiese affirmatively alleged that Clatterbuck had exercised the right of first refusal. The record does not contain any responsive pleading filed by Wiese in reply to Clatterbuck's complaint in intervention (which alleged proper exercise of the right of first refusal) or in response to Clatterbuck's motion for summary judgment against Wiese on the issue of specific performance.

[5,6] It is fundamental in Nebraska that allegations of a complaint not denied are admitted without any predicate ruling from the trial court. See *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004). Further, an admission made in a pleading on which the trial is had is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and therefore is a limitation of the issues. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003). One who has invited error cannot be heard to complain of it. See, *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987). See, also, *Gillespie v. Hynes*, 168 Neb. 49, 106-07, 95 N.W.2d 457, 486 (1959) (" 'party may not be heard to complain of error which he has invited. . . . Error may not be assigned upon a ruling or action of the district court made or taken with the consent of the complaining party' "), quoting *Tucker v. Paxton & Gallagher Co.*, 152 Neb. 622, 41 N.W.2d 911 (1950).

In this case, we find that Wiese is precluded from asserting on appeal that the district court should have found that Clatterbuck's exercise of the right of first refusal was somehow ineffective or improper. The very essence of Wiese's position

before the district court was that Clatterbuck had properly and effectively exercised the right of first refusal, thereby usurping any legal right that Greenhall might have had in enforcing the purchase agreement between Greenhall and Wiese. The district court having so found, Wiese cannot now assert that the district court erred in making the very finding Wiese sought. This assignment of error is without merit.

(b) Clatterbuck's Refusal to Close

Wiese next asserts that the district court erred in not finding unreasonable Clatterbuck's refusal to close after Wiese successfully received summary judgment against Greenhall and dismissal of Greenhall's claim for specific performance. Wiese asserts that Clatterbuck's refusal to close should be considered unreasonable, or a waiver of Clatterbuck's right to specific performance, or a waiver of Clatterbuck's right to any claim for monetary damages.

We disagree because the plain language of the purchase agreement between Wiese and Clatterbuck required Wiese to deliver clear title before Clatterbuck was obligated to close and specifically provided both that Wiese was required to "furnish a current title insurance commitment to [Clatterbuck]" and that Wiese was obligated to cure within a reasonable time any title defects found. Wiese has presented no evidence indicating that Wiese was able to procure such title or title insurance commitment while Greenhall's claim remained ripe for appeal. In fact, the record indicates that Clatterbuck was ready and willing to close, had placed funds equal to the purchase price into an escrow account, and was waiting only for Wiese to present a clear title before closing. On the record presented, we do not find the district court's failure to find such action by Clatterbuck unreasonable to be erroneous. This assigned error is without merit.

(c) Conclusion on Wiese's Cross-Appeal

We find Wiese's cross-appeal to be without merit. There are no genuine issues of material fact which Wiese can properly assert on appeal concerning Clatterbuck's exercise of the right of first refusal, inasmuch as Wiese urged the district court to find such exercise proper and effective at trial. We affirm the district

court's grant of summary judgment in favor of Clatterbuck on Clatterbuck's claim for specific performance.

V. CONCLUSION

We find no reversible error in the district court's grant of summary judgment in favor of Wiese and against Greenhall on Greenhall's claim for specific performance. Although Greenhall has standing to challenge the validity of the right of first refusal and the timeliness of Clatterbuck's exercise of the right, there is no genuine issue of material fact concerning the right of first refusal. The right is not violative of any rule against perpetuities and was timely exercised by Clatterbuck. As such, the district court's grant of summary judgment in favor of Wiese on Greenhall's claim for specific performance is affirmed.

We find no reversible error in the district court's grant of summary judgment in favor of Clatterbuck and against Wiese on Clatterbuck's claim for specific performance. Wiese is precluded from asserting on appeal that Clatterbuck's exercise of the right of first refusal was improper or ineffective, and Clatterbuck's refusal to close prior to Wiese's being able to deliver clear title is not unreasonable. As such, the district court's grant of summary judgment in favor of Clatterbuck on Clatterbuck's claim for specific performance is affirmed.

AFFIRMED.

C. GOODRICH, INC., APPELLEE, V. JOHN F. "JACK" THIES, APPELLEE, AND TAS TRUCK LINES, INC., APPELLANT.

705 N.W.2d 451

Filed November 8, 2005. No. A-04-502.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. ____: ____. In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

4. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
5. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
7. **Motions for New Trial: Judgments.** Unsolicited, specific findings recited by the trial court during the hearing on a motion for new trial, and written by the court in the order denying that motion, may supplant the general finding made in the initial judgment.
8. **Attorney and Client.** An attorney has power to bind his or her client by the attorney's agreement in respect to any proceeding within the scope of the attorney's proper duties and powers.
9. **Trial: Judgments: Evidence: Appeal and Error.** Where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong.
10. **Trial: Verdicts.** A general verdict cannot rectify improper or erroneous special findings.
11. **Trial: Judgments: Evidence.** It is proper to set aside a trial court's general finding if the court's articulated reasons for entering the finding are not supported by the evidence.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed in part, and in part reversed.

Robert J. Becker, of Stalnaker, Becker & Buresh, P.C., for appellant.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, L.L.P., and Craig D. Wittstruck and Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellee C. Goodrich, Inc.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

TAS Truck Lines, Inc. (TAS), appeals from a judgment, entered following a retrial to the bench, which awarded

$225,000 to C. Goodrich, Inc. (CGI), as damages resulting from a breach of contract. The primary question on appeal is whether specific findings made by the trial court in connection with TAS' motion for new trial supplant the trial court's initial general finding. Because we conclude that they do and that the monetary judgment for CGI was based solely upon a clearly erroneous factual finding, we reverse the monetary judgment for CGI but otherwise affirm the judgment rejecting the parties' other contentions.

PROCEDURAL BACKGROUND

CGI's operative petition against TAS alleged two causes of action, the first of which was subsequently dismissed. The second cause of action alleged that TAS breached the contract between the parties by failing to make payments due on CGI's trucks and trailers and by failing to pay compensation to CGI's employees. TAS denied the allegations and filed a counterclaim alleging that CGI breached the contract by failing to turn over accounts receivable payments to TAS, by refusing to sell CGI's trucks and trailers for payoffs, and by failing to remain with TAS for 5 years.

Following a jury trial, the jury returned a verdict finding in favor of CGI and awarding CGI damages of $225,000. The jury also returned a verdict in favor of TAS on its counterclaim and awarded damages of $13,600 to TAS. TAS appealed, and CGI filed a cross-appeal. After determining that a supplemental jury instruction given by the trial court was erroneous, this court set aside the jury's verdicts and remanded the cause for a new trial. See *C. Goodrich, Inc. v. Thies*, No. A-01-765, 2003 WL 105215 (Neb. App. Jan. 14, 2003) (not designated for permanent publication).

Further proceedings commenced at the trial court level on November 24, 2003. The parties stipulated that retrial would be to the bench, and the trial court received into evidence the bill of exceptions and exhibits from the first trial, along with the deposition of an agent for West Bay Leasing Services, L.L.C. (West Bay Leasing), and CGI's answers to TAS' first set of interrogatories.

FACTUAL BACKGROUND

CGI, owned by Clint Goodrich and Ruth Goodrich, is a trucking company incorporated in Minnesota that hauls goods for customers. In 1997, CGI operated eight trucks and nine trailers. TAS, owned by John F. "Jack" Thies and his wife, is a trucking company incorporated in Nebraska that also hauls goods for customers. On October 28, 1997, CGI and TAS entered into a written agreement to combine the companies and form a new corporation to conduct trucking business. The consolidation was to occur on January 1, 1998. However, problems arose before that time.

To pay for fuel, CGI's drivers used fuel credit cards issued by a third party, and the third-party issuer would debit CGI's account at CGI's bank in Winnebago, Minnesota. On November 4 and 5, 1997, CGI's bank refused to honor the debits on CGI's account due to insufficient funds in the account. After being informed of the situation, TAS paid the third-party issuer $3,500 on November 6, representing CGI's fuel charges from October 30 to November 5. From that point on, CGI's drivers used fuel credit cards issued to TAS.

On November 7, 1997, Thies and Clint negotiated a new agreement due to an "emergency need" to get the trucks moving. That handwritten agreement, signed by Thies and Clint, states:

> TAS agrees to:
> • Take over CGI trucks & trailers for payoffs
> • Work on a bonus plan & allow Clint to earn or buy stock options in TAS as TAS performance improves.
> • Pay Clint & Ruth compensation of $90,000/year total cost to TAS. (including taxes, ins[urance] etc)
> • Buy/payoff the accounts Rec[eivable] from the bank
> Goodrich agrees to:
> • Sell trucks & trailers for payoffs
> • Forward acc[ounts] Rec[eivable] checks to TAS as they come in
> • Stick with TAS for a minimum of 5 years

At the time of the November 7, 1997, agreement, all of CGI's trucks and trailers were under lease agreements, with the exception of one tractor secured by a lien and one trailer secured by a

lien at CGI's bank. TAS paid off CGI's lien for that trailer on November 7. Also on November 7, TAS paid $75,017.49 to CGI's bank in payment of CGI's accounts receivable. There is no dispute that TAS bought or paid off the accounts receivable from CGI's bank.

With regard to the bonus plan component of the agreement, Clint testified that there was no work on a bonus plan to allow him to earn or buy stock options in TAS. Thies testified that implementation of the bonus plan was not expected to happen for a few months or until TAS and CGI got everything running together. Clint admitted that he would not expect a bonus plan to be implemented 2½ months after the agreement went into effect.

According to the evidence, CGI's obligation to forward accounts receivable checks to TAS became related to TAS' obligation to pay compensation to CGI. Under the contract, CGI was to forward the accounts receivable checks to TAS. In November, CGI remitted to TAS two checks totaling $29,569.17—one in the amount of $18,003.40 with "Factoring note" written on the memo line and the other in the amount of $11,565.77 with "Acc rec." written on the memo line. Although CGI received $59,370.10 in accounts receivable collections, no other accounts receivable payments were made to TAS. Clint testified that he forwarded the accounts receivable checks to TAS until Thies told Clint not to do so. At some point, Clint approached Thies about the compensation of $7,500 per month or $90,000 per year and the parties agreed to allow CGI to retain a portion of the accounts receivable in lieu of, or as payment of, the salary. Ruth testified that she and Clint retained $22,500 of the accounts receivable collections as salary for 2 weeks in October and all of November and December 1997 and for January 1998. As to the extent that the compensation was being offset by accounts receivable, Clint was asked if TAS performed the compensation component of the contract, and he answered, "Yes. I guess, technically, in a round about way, you could look at it that way." CGI retained an additional $7,393 in accounts receivable collections and used that money to make truck payments.

Clint testified that TAS failed to take over CGI trucks and trailers for payoffs. On December 8, 1997, Thies wrote a letter to West Bay Leasing requesting a list of payments left on CGI's

equipment and the payoff figures. West Bay Leasing provided the payoff figures on December 10. West Bay Leasing provided amortization schedules for certain leases in correspondence dated December 22, 1997, and it provided more lease payoff information on some of the equipment on January 5, 1998. Thies inquired what the interest rate would be if he turned the lease into a common loan, and West Bay Leasing responded on January 15 with a possible method of refinancing the debt on the equipment. Thies also obtained temporary licensing for the trucks and trailers to be effective January through March 2, 1998. Clint testified that he was not aware that Thies and West Bay Leasing were engaged in negotiations in January 1998 regarding payoffs.

With regard to lease payments, Clint testified that he received telephone calls from West Bay Leasing, Associates Commercial Corporation, and Farm Credit Leasing that the payments were not being made for the month of November 1997. Clint spoke with Thies about it, and payments were then made. In December, payments had again not been made and insurance was lapsing. Clint spoke with Thies, and TAS made the payments, although not timely. Clint again received telephone calls regarding payments in January 1998. When Clint spoke with Thies, Thies said the November 7, 1997, contract needed to be renegotiated. Clint admitted that the November 7 contract did not require TAS to make lease payments for CGI. Further, TAS paid some bills for repairs of CGI equipment in December 1997 and January 1998. On November 17, 1997, the insurance company asked for an insurance payment, which TAS made. Confronted with evidence of this payment, Clint admitted that he was wrong when he said that TAS had not paid anything. In January 1998, TAS paid for the insurance on CGI's trucks until February 1. TAS also had licenses for CGI equipment issued in the name of "TAS Truck Lines." Thies testified that TAS would not have insured and licensed CGI equipment if TAS was not going to pay "them" off.

No lease payments for January 1998 were made by TAS. Thies testified that TAS did not make the January lease payments because (1) TAS was working on getting specific payoff amounts for CGI's trucks and trailers, (2) Clint left the company in January 1998, and (3) Clint took control of the trucks. Thies testified that while he was waiting to get a third quote related to

the payoff amounts, Clint "took" the trucks and transferred calls so that when the drivers called, the call would ring at Clint's house. Thus, TAS did not have the ability to call the drivers of those trucks.

The parties attempted to negotiate a new agreement in January 1998. Clint testified Thies told him that CGI was not worth $90,000 because "there's only half of a company," that the trucks were not worth the amount owed against them, and that they needed to renegotiate. Thies denied having any conversations with Clint wherein Thies indicated that TAS was not going to pay the $90,000 or that $90,000 was too high. Thies also denied having a discussion with Clint wherein Thies indicated that TAS would not make any further lease payments or other payments in regard to CGI trucks unless the November 7, 1997, contract was renegotiated. A document on CGI's letterhead submitted to TAS on January 19, 1998, contains suggestions and negotiations by CGI to change the November 7, 1997, agreement.

Ultimately, the remaining trucks and trailers were either sold by Clint and Ruth for more than the payoff amounts, retained by them for their own use, or leased to other companies. Between February 24 and December 10, 1998, 9 of the 13 pieces of equipment leased from West Bay Leasing were sold, and CGI received $924 more than the payoff amounts. CGI kept the other four pieces of equipment.

CGI did not remain with TAS for a minimum of 5 years. Clint "walked out" on January 25, 1998. Ruth testified that while she remained in the Minnesota office, she prepared invoices on loads carried on CGI's trucks and billed by TAS. She spoke with Thies several times a day, and Thies requested that Ruth do various tasks on behalf of TAS. The Minnesota home of Clint and Ruth was sold in December 1998, and Ruth moved to Beatrice in mid-December. She began work as the office manager in Beatrice on or about December 26. After a couple of days, for reasons in dispute, Thies asked Clint to tell Ruth not to return to work. Thies testified that Ruth was not an important part of the November 7, 1997, contract. However, Clint was to replace Thies' former manager who earned $90,000 per year. Thies testified that TAS entered into the agreement with CGI because of Clint and the ability to get Clint to manage the TAS operations.

In addition to all the evidence from the original trial, the court also received into evidence CGI's answers to TAS' interrogatories. One of the interrogatories asked CGI to identify each item of damage claimed. CGI listed dollar amounts for (1) insurance, deposit and 3 months' premiums; (2) payoff of equipment for Yellow Medicine County Bank and Minnstar Bank; (3) payoff for Associates Commercial Corporation; (4) payoff for Farm Credit Leasing; (5) loss of profits for 1998; and (6) loss of value of the business.

The court made a general finding for CGI and entered a judgment in favor of CGI in the amount of $225,000 plus the costs of the action. That judgment also dismissed TAS' counterclaim. TAS timely moved for a new trial, and during the hearing on that motion, the court stated:

> There's one thing that I regret here on my part in reviewing this. I just want to say I did not make specific findings in my order, which I normally do. So I understand it's difficult to know the basis of the decision. I did not simply adopt the jury verdict although it's fairly close to that. But I do want to state for the record I felt there was substantial compliance by both [CGI] and [TAS] with respect to the lease issues on the contract between the parties. And my judgment was based on the compensation issue as it pertained to [Ruth]. That basically, she had been — had been let go, I think, in violation of the portion of the agreement to have her provide services, and that was a breach of contract on the part of [TAS]. So I awarded damages on that basis, basically, $45,000 for five years.

The court's order on the motion for new trial stated in part:

> Part of the agreement between the parties was that [TAS] would pay [CGI] $90,000 per year for five years for the services of Clint . . . and Ruth . . . . TAS terminated the services of Ruth . . . without good cause, in violation of the agreement. Clint . . . left TAS' employment, which excused TAS from performing the portion of the agreement related to his services. TAS authorized CGI to retain certain accounts receivable, and there was substantial performance by both parties with respect to the accounts receivable and the leases. However, TAS remained obligated to compensate

> CGI for [Ruth's] services, and TAS defaulted in that obligation resulting in damages of $45,000 per year for five years. Accordingly, the motion for new trial should be overruled.

TAS timely appeals.

ASSIGNMENTS OF ERROR

TAS alleges that the trial court erred in overruling its motion for new trial by finding (1) that TAS materially breached the contract as it pertained to the compensation component of the contract; (2) that CGI should be awarded $225,000 in damages when that award was not sustained by the evidence, was contrary to law, was beyond the claims of CGI, and was excessive; and (3) that CGI did not materially breach the contract.

STANDARD OF REVIEW

[1-4] A suit for damages arising from breach of a contract presents an action at law. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). 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 disturbed on appeal unless clearly wrong. *Id.* The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Id.*

[5,6] A motion for new trial is addressed to the discretion of the trial court, and the trial court's decision will be upheld unless it is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. See *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

ANALYSIS

[7] Because neither party requested that the district court submit written findings of fact or conclusions of law pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1995), this case presents an interesting question: Do the unsolicited, specific findings recited by the trial court during the hearing on TAS' motion for new trial, and written by the court in the order denying that motion, supplant the general finding made in the initial judgment? Under the circumstances presented here, we conclude that they do. After the retrial to the bench, the trial court initially entered a judgment for CGI based upon only a general finding. In the subsequent hearing and ruling on the motion, the court did not expressly state that it intended to modify its general verdict. The court did state, however, that it regretted not making specific findings in the initial judgment; that it understood the difficulty in knowing the basis of the court's decision; that it wanted "to state for the record" that CGI and TAS substantially complied, "with respect to the lease issues on the contract"; but that the court's judgment was "based on the compensation issue as it pertained to [Ruth]." The court stated that it "awarded damages on that basis, basically, $45,000 for five years." Under these circumstances, we conclude that the specific findings operated, in effect, to modify the initial judgment and to supplant the general finding. We make this determination only in the context of a bench trial and specific findings, made before the judgment became final, by the same trial judge who made the initial general finding.

The relevant provision of the contract states, "Pay Clint & Ruth compensation of $90,000/year." At trial, Thies explained that it had been negotiated that TAS would pay CGI rather than Clint and Ruth because CGI had a "normal operating loss . . . carried forward of $90,000 on their income taxes. So they could offset $90,000 worth of income without paying any taxes, income taxes." According to Thies, Ruth was not an important part of the agreement and Clint was replacing Thies' previous manager who earned $90,000 per year. Thies testified that the obligation to pay the $90,000 per year ran to CGI. Because we are required to view the evidence in the light most favorable to CGI, this testimony, standing alone, would be insufficient to

disturb the judgment. However, at trial, counsel for the parties agreed that the obligation was to CGI, not to Clint or Ruth individually, as evidenced in the following exchange which took place during Clint's testimony:

> [Counsel for CGI]: Okay. And let me back up to the list again. It says, "Pay Clint and Ruth compensation of $90,000 a year." When did you first receive or your wife first receive compensation from TAS?
>
> [Clint]: We didn't.
>
> [Counsel for TAS]: Objection, Your Honor. This is where we were before. I think the parties agree here that the agreement was that TAS would pay [CGI]; am I correct on that, [counsel for CGI]?
>
> [Counsel for CGI]: Yeah.
>
> [Counsel for TAS]: So it's not a matter of his wife's salary or his salary.
>
> [Counsel for CGI]: No.
>
> [Counsel for TAS]: That's where I'm getting confused.
>
> THE COURT: I see. I'll sustain it and ask counsel to restate the question.

[8] An attorney has power to bind his or her client by the attorney's agreement in respect to any proceeding within the scope of the attorney's proper duties and powers. Neb. Rev. Stat. § 7-107 (Reissue 1997). See, also, *In re Estate of Mithofer*, 243 Neb. 722, 502 N.W.2d 454 (1993) (stipulations voluntarily entered into between parties' attorneys during trial will be respected and enforced); *McCann v. McLennan*, 3 Neb. 25 (1873) (agreement by attorneys made in open court and entered on record binds parties). The stipulation made between the parties' attorneys during trial, that the parties' agreement was that TAS would pay CGI and that it was not a matter of Clint's salary or Ruth's salary, was binding upon the trial court.

The evidence also shows there had been an agreement between the parties for CGI to keep portions of the accounts receivable as payment of compensation rather than turning that money over to TAS as originally set forth under the contract. CGI had collected $59,370.10 in accounts receivable, but turned over only $29,569.17 to TAS. According to the testimony, CGI retained $22,500 as payment for compensation at $7,500 per

month, and also retained an additional $7,393 which was used to make truck payments. Because CGI had retained $22,500 of accounts receivable collections as its compensation for 3 months, there had been no breach of the compensation component of the contract at the time that Clint quit. We conclude that the trial court was clearly wrong in finding that TAS defaulted on its obligation and in awarding damages of $45,000 per year for 5 years as Ruth's compensation under the contract.

[9-11] We are mindful of the fact that the court initially made a general finding and of the proposition that where neither party requests that the trial court make specific findings of fact and conclusions of law, if there is a conflict in the evidence, the appellate court in reviewing the judgment rendered will presume that the controverted facts were decided in favor of the successful party, and the findings will not be disturbed unless clearly wrong. See *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998). In *Wagner v. State*, 176 Neb. 589, 595, 126 N.W.2d 853, 857 (1964), *overruled on other grounds, Bentz v. Nebraska P.P. Dist.*, 211 Neb. 844, 320 N.W.2d 763 (1982), a case wherein the jury returned a general verdict and also special findings pursuant to the court's instructions, the Nebraska Supreme Court stated: "[T]o argue that the general verdict is acceptable, therefore the special findings are proper or faultless, is neither legal nor logical. A general verdict cannot rectify improper or erroneous special findings." Just as it is not error to set aside the general verdict if the special findings of a jury are not supported by the evidence, we think it is proper to set aside the general finding if the court's articulated reasons for entering the finding are not supported by the evidence. To conclude that this court must turn a blind eye to the trial court's clearly erroneous finding upon which it admittedly based its decision, because the trial court was not required to make such finding or because such finding was made upon a motion for new trial, would be prejudicial to the rights of TAS and deprive TAS of a just result.

The trial court's specific findings make it clear that the judgment in favor of CGI for $225,000 was based solely upon the finding which we have determined was clearly erroneous. At trial, the parties presented numerous other contentions to the

trial court. In its specific findings, the trial court clearly rejected those other contentions. As to those other issues, we cannot find that the trial court was clearly wrong.

CONCLUSION

The portion of the judgment granting a monetary judgment to CGI, based upon a clearly erroneous finding, is reversed. The portion of the judgment rejecting the other contentions of the parties is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

IN RE GUARDIANSHIP OF BREEAHANA C.
DAVID S., APPELLEE, AND ALICIA C., INTERVENOR-APPELLEE, V. BOBBY C., APPELLANT.

706 N.W.2d 66

Filed November 8, 2005. No. A-04-1361.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Affidavits: Appeal and Error.** An appellate court obtains jurisdiction over an appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit, without literal payment of the fees, costs, or security mentioned in Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2004).
6. **Courts: Appeal and Error.** An appellant's designation of the wrong court in the notice of appeal is not necessarily fatal.
7. **Rules of the Supreme Court: Records: Waiver.** The official court reporter shall in all instances make a verbatim record of the evidence offered at a trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.

8. **Trial: Records.** It is the duty of the court reporter to make a verbatim record of judicial proceedings, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.
9. **Trial: Records: Appeal and Error.** A bill of exceptions duly allowed and certified by the trial judge imports absolute verity, and its truthfulness cannot be assailed collaterally.
10. **Guardians and Conservators: Divorce: Child Custody: Jurisdiction.** During the pendency of a dissolution action, a county court's exclusive original jurisdiction in guardianship matters touching upon the custody of a minor must yield to the jurisdiction of the district court in which the dissolution petition is filed.
11. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
12. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.

Appeal from the County Court for Sherman County: GARY G. WASHBURN, Judge. Remanded with directions.

Bobby C., pro se.

Alicia C., pro se.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Bobby C. appeals the order of the county court for Sherman County appointing Kayla N. and Tony N. as permanent co-guardians of Breeahana C., the daughter of Bobby and Alicia C. The record is insufficient for us to determine whether Bobby alleged in county court that the county court's exercise of jurisdiction was an abuse of discretion because Alicia's petition for dissolution of marriage was under the jurisdiction of the district court. Therefore, we remand this matter to the county court with directions to vacate the appointment of coguardians and to conduct a new hearing on the matter.

BACKGROUND

Breeahana is the minor child of Bobby and Alicia. On June 14, 2004, the district court for Sherman County entered a decree dissolving Bobby and Alicia's marriage. The decree ordered, inter alia, that Alicia would have custody of Breeahana and that

Bobby would pay child support. On June 24, Breeahana's maternal grandfather, David S., filed a petition in the county court seeking appointment of Kayla and Tony as coguardians for Breeahana. On July 22, the county court commenced a hearing on the petition for appointment of guardian, and upon granting Bobby's motion for continuance to present witnesses, the court concluded the hearing on October 14. On October 28, the county court appointed Kayla and Tony as Breeahana's permanent coguardians. Kayla and Tony subsequently accepted the appointment.

On November 29, 2004, Bobby filed a pro se notice of appeal together with an affidavit and motion for leave to proceed in forma pauperis. In Bobby's notice of appeal, he stated that he "intend[ed] to appeal the order . . . rendered on Oct[ober] 28, 2004, to the District Court of Sherman County, Nebraska." The county court ordered the clerk magistrate to send copies of the appeal documents to this court.

ASSIGNMENTS OF ERROR

Bobby alleges that the trial court erred in (1) failing to give his "testimonial appointment of guardianship proper judicial notice," (2) disregarding the testimony of Bobby's witnesses and favoring Alicia's appointment of guardians, and (3) failing to adhere to the Uniform Child Custody Jurisdiction Act.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

ANALYSIS

Designating Wrong Court in Notice of Appeal.

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005). Under Neb. Rev. Stat. § 30-1601 (Cum. Supp. 2004), appeals in guardianship matters lie directly to this court in the same manner as appeals from the district court. In Bobby's notice of appeal, Bobby designated the district court rather than this court as the court to which he intended to appeal. The county court forwarded the appeal documents to this court.

[5] An appellate court obtains jurisdiction over an appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit, without literal payment of the fees, costs, or security mentioned in Neb. Rev. Stat. § 25-2301.02(1) (Cum. Supp. 2004). *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004). Under Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2004), the notice of appeal must be filed "within thirty days after the entry" of the judgment or final order. The county court's order was entered on October 28, 2004. Bobby filed his notice of appeal on November 29. Ordinarily, the deadline for appeal would have been November 27, but taking into account 2 days for the Thanksgiving holiday and 2 days for the following weekend, Bobby's notice of appeal was timely. Concerning the requirements to proceed in forma pauperis, which act as a substitute for a docket fee, the county court's order to the clerk magistrate did not explicitly grant Bobby's motion to proceed in forma pauperis. However, by directing the clerk magistrate to forward the appeal documents to this court, the county court implicitly granted Bobby's motion. Thus, the only defect in Bobby's notice of appeal was his failure to designate the correct appellate court.

[6] Other jurisdictions have held that an appellant's designation of the wrong court in the notice of appeal is not necessarily fatal. See, 5 Am. Jur. 2d *Appellate Review* § 338 (1995); 4 C.J.S. *Appeal and Error* § 374 (1993). These jurisdictions seem to base their holdings in favor of the appellant upon the notion that the court officials can correct the error and the appellant is

usually not harmed. See, e.g., *United States v. Blue*, 384 U.S. 251, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966) (when party appealed to Court of Appeals rather than Supreme Court where jurisdiction lay, Court of Appeals certified appeal to Supreme Court, and Supreme Court noted procedural history of case and exercised jurisdiction over appeal); *Hess v. St. Francis Regional Med. Center*, 254 Kan. 715, 869 P.2d 598 (1994) (when appellee argued that notice of appeal precluded appellate court from considering certain issues because notice of appeal did not designate any trial court rulings as being challenged, appellate court exercised jurisdiction, noting that appellee did not claim that it was surprised or placed at disadvantage by issues briefed); *The People v. N. Y. C. R. R. Co.*, 391 Ill. 377, 63 N.E.2d 405 (1945) (lack of strict technical compliance with form of notice of appeal not fatal where notice gives necessary information and opposing party is not prejudiced).

In the case before us, Bobby's notice of appeal was timely forwarded to this court, and none of the opposing parties claim that they have been prejudiced. In light of the foregoing authority, we conclude that we have jurisdiction over this case, despite Bobby's failure to designate this court in his notice of appeal.

County Court Jurisdiction.

Bobby contends that the county court lacked subject matter jurisdiction over the guardianship proceedings because the district court "had original jurisdiction . . . when it entered the Divorce Decree on June 14, 2004." Reply brief for appellant at 3. Before addressing this issue, we must dispense with the preliminary issues presented by the record before us.

Bobby's jurisdictional argument requires us to consider the dissolution decree entered by the district court. The dissolution decree was included in the bill of exceptions for the guardianship proceedings as exhibit 1. The bill of exceptions contains only the following regarding the offer and reception of the decree during direct examination of David:

> [David's counsel:] We would have you look at exhibit marked number one.
>
> THE COURT: Okay. And [Bobby], do you have Exhibit 1?

> [Bobby]: Yes, I do, Your Honor.
> THE COURT: Okay.
> [David's counsel:] Can you identify —
> (At this point, the tape recorder switched sides and the remainder of the direct examination was not recorded. During this time [David] offered Exhibit No. 1. [Bobby] did not object to the offer and the Court received Exhibit No. 1 into evidence. Direct examination was completed and cross-examination began. A portion of the cross-examination was not recorded.)
> (Exhibit No. 1 is hereby made a part of this bill of exceptions and may be found at the end of this bill of exceptions.)
> (At this point, the clerk discovered that the recorder had not been working. The clerk inserted a new tape and the proceedings were as follows:)

The bill of exceptions then continues with the remainder of the cross-examination of David. None of the other witnesses testified regarding the decree or its contents, and none of the properly received exhibits referred to the decree.

The bill of exceptions includes a certification by the court stenographer that the bill of exceptions, including exhibit 1, "contains all of the proceedings had . . . or all of the evidence adduced in the foregoing cause . . . and the rulings of the Court thereon; that said bill of exceptions is a correct and complete transcription from the official tape recording made at the time of the proceedings." The bill of exceptions also contains verification by the trial court that the "following," which included exhibit 1, is "the bill of exceptions in this case" and that "the tape recording from which this bill of exceptions was prepared is the official record made at the time of the proceedings."

[7,8] Neb. Ct. R. of Prac. 5A (rev. 2005) provides in part:

> (1) The official court reporter shall in all instances make a verbatim record of the evidence offered at [a] trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived.
> (2) Upon the request of the court or of any party, either through counsel or pro se, the official court reporter shall

> make a verbatim record of anything and everything said or done by anyone in the course of trial or any other proceeding[.]

It is the duty of the court reporter to make a verbatim record of judicial proceedings, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty. *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995).

[9] Regardless of the court stenographer's efforts to "fill in the blanks" and the county court's approval of that approach, the record before us does not constitute a verbatim record of the evidence offered at trial. It is inevitable that technical difficulties will arise occasionally, but the better approach in this case would have been that upon discovery of the malfunction, the court reporter notify the trial judge of the difficulty with the tape recorder and the judge, with any necessary assistance of the reporter, determine the point at which the tape recorder malfunctioned and, after the proper function of the tape recorder was restored, direct the parties to continue their presentation of evidence from that point forward, repeating the omitted content. The bill of exceptions, while deficient in recording the full extent of the evidence, does memorialize that exhibit 1 was offered and received without objection, and none of the parties quarrel with that fact. Therefore, we will consider the divorce decree as an exhibit, recognizing that " '[a] bill of exceptions duly allowed and certified by the trial judge imports absolute verity and its truthfulness cannot be assailed collaterally.' " *Bors v. McGowan*, 159 Neb. 790, 795, 68 N.W.2d 596, 600 (1955), quoting *Gregory v. Kaar*, 36 Neb. 533, 54 N.W. 859 (1893).

With the dissolution decree before us, we address Bobby's argument that the county court lacked subject matter jurisdiction to entertain the guardianship proceedings because the district court had original jurisdiction over the matter of custody. Neb. Rev. Stat. § 42-351(1) (Reissue 2004) provides that the district court has jurisdiction in divorce actions to render judgments and make orders concerning, inter alia, "the custody and support of minor children." Section 42-351(2) provides that during the pendency of an appeal, the district court retains jurisdiction to "provide for such orders regarding custody, visitation, or support . . . or other appropriate orders in aid of the appeal process."

Neb. Rev. Stat. § 24-517(2) (Cum. Supp. 2004) gives the county court "[e]xclusive original jurisdiction in all matters relating to the guardianship of a person, except if a separate juvenile court already has jurisdiction over a child in need of a guardian, concurrent original jurisdiction with the separate juvenile court in such guardianship." Section 30-2602 further grants the county court "jurisdiction over . . . guardianship proceedings."

[10-12] In *In re Guardianship of Zyla*, 251 Neb. 163, 555 N.W.2d 768 (1996), the Nebraska Supreme Court discussed the interplay between county court and district court jurisdiction. In that case, the mother of a minor child filed in district court for dissolution of her marriage to the minor's father. The district court awarded temporary custody of the minor to the mother " 'until further order of this court.' " *Id.* at 165, 555 N.W.2d at 771. Shortly thereafter, the minor's grandfather and his wife petitioned the county court for appointment as the minor's coguardians. The county court appointed the grandfather and his wife as coguardians, and they accepted the appointment. On appeal to the Nebraska Supreme Court, the mother alleged that because she had been granted temporary custody of the minor by the district court, the county court lacked jurisdiction to appoint coguardians for the minor. The court reviewed the applicable statutes and relevant case law and held:

> [D]uring the pendency of a dissolution action, a county court's exclusive original jurisdiction in guardianship matters touching upon the custody of a minor must yield to the jurisdiction of the district court in which the dissolution petition is filed. It was accordingly an abuse of discretion as a matter of law for the county court to have exercised its jurisdiction over the within petition for the appointment of coguardians.

Id. at 168-69, 555 N.W.2d at 772-73. Thus, the court in *In re Interest of Zyla* implicitly held that the county court's subject matter jurisdiction over guardianship proceedings was not vitiated by the district court's divorce decree; rather, the county court should have declined to exercise such jurisdiction. That difference is important in the case before us, because lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *New Tek Mfg. v. Beehner*, 270

Neb. 264, 702 N.W.2d 336 (2005). Where the county court possessed subject matter jurisdiction, an assertion that the court abused its discretion in exercising such jurisdiction would require that the objecting party raise the issue before the trial court. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Parker v. Parker*, 268 Neb. 187, 681 N.W.2d 735 (2004).

In this court, Bobby further argues that the county court erred in not "yielding jurisdiction" to the district court. Brief for appellant at 16. However, at this point, the defect in the verbatim record becomes critical. While Bobby did not raise the issue before the county court in the proceedings that were preserved, because of the "lost" portion, we are unable to determine whether Bobby raised the issue in the county court. Such a flaw in the record can only be remedied by a new hearing, at which the issue suggested by *In re Guardianship of Zyla, supra*, might be raised and considered.

CONCLUSION

For the foregoing reasons, we remand the matter to the county court with directions to vacate its appointment of coguardians and to conduct a new hearing on the petition for appointment of coguardians.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. STEVEN R. BLAIR, APPELLEE AND CROSS-APPELLANT.

707 N.W.2d 8

Filed November 15, 2005. No. A-03-942.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.

3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Judgments: Time: Notice: Appeal and Error.** In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order.
5. **Pleadings: Parties: Time: Notice: Appeal and Error.** When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion.
6. **Pleadings: Judgments.** In order to qualify for treatment as a motion to alter or amend the judgment, the motion must seek substantive alteration of the judgment.
7. **Jurisdiction: Pleadings: Time: Notice: Appeal and Error.** When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Appeal dismissed.

Thomas J. Garvey and Michael F. Maloney for appellant.

Robert A. Wright, Jr., of Wright & Wright, and, on brief, Sherie E. Cotton for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The State of Nebraska appeals from an order of the district court for Douglas County granting postconviction relief, consisting of a new trial, to Steven R. Blair. The State filed a notice of appeal 2 days after the district court entered its order, and 5 days later, Blair filed a motion to alter or amend the judgment. Because under these circumstances, Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2004) declares that the State's notice of appeal "shall have no effect" and requires that a new notice of appeal be filed within the prescribed time after the entry of an order ruling on the motion, we lack jurisdiction over the purported appeal.

BACKGROUND

Trial and Direct Appeal

An amended information charged Blair with kidnapping, use of a deadly weapon to commit a felony, and terroristic threats arising out of events occurring on May 12, 1997. The information also charged Blair with failure to appear, but this charge was severed from the other counts at the outset of the trial. Represented by Marc Delman, Blair waived his right to a jury trial and a bench trial was held.

At trial, Patty Dory testified that on the evening of May 11, 1997, she and Blair argued, Blair telephoned and paged her repeatedly, Blair demanded that she come to his house, and Blair said Dory knew what Blair would do if she did not comply. Dory testified that she understood Blair's comment to mean Blair would shoot her and that she eventually agreed to go to Blair's house out of fear Blair would harm her or her family. Dory testified that Blair was waiting on the front steps to her house and that she drove her car to Blair's house, with him following in his van. Dory testified that once they arrived at Blair's house, Blair positioned himself in the doorway and held a shotgun. After Dory entered the house, Blair began beating her. She testified that Blair began slashing the couch upon which she had been sitting, and pictures of a "slashed" couch were received into evidence.

At some point, Dory called her sister, Lori Anzaldo. When the telephone call got disconnected, Anzaldo called back and Blair answered. Anzaldo threatened to call the police if Dory did not arrive at Anzaldo's house within 10 to 15 minutes. Blair allowed Dory to leave, and Dory went to Anzaldo's house. Anzaldo called the police, and the police went to Anzaldo's house in response to the call.

Officer Jason Christensen of the Omaha Police Department testified that while other Omaha police officers were arresting Blair, Christensen stepped into the front door of Blair's house, because Christensen had "heard there was a couple other people sitting in the house." Christensen observed a shotgun, which he discovered was loaded, leaning against the wall at the bottom of a staircase. Christensen also testified that a rifle was found in

Blair's house. There was considerable testimony about holes in the walls of Blair's house which may have been caused by a gunshot, but there was no evidence that Blair fired a gun inside his house on the dates at issue in this case. Christensen's testimony included some confusion over the time he went to Blair's home to assist with the arrest. He testified that it was around 5 p.m., but then stated that 8 p.m. would be correct if that is what his report indicated. Other officers testified that they responded to the situation between 5 and 6 p.m. Officer Jeffrey L. Morgan searched Blair's house pursuant to a search warrant and found a knife which matched Dory's description of the knife Blair threatened her with and then used to cut up his couch.

Blair denied holding Dory against her will, threatening her life, or beating her. He testified that the van Dory alleged he drove that night was not drivable at the time. According to Blair, he had been watching television in his bedroom in the early morning hours of May 12, 1997, when Dory came to his house, let herself in, and entered his bedroom. They allegedly got into an argument over a rental car which Dory had failed to return on time. Blair maintained Dory told him that her boyfriend had beaten her and taken the money Blair had given her for the car.

Blair testified that on May 12, 1997, he spent "practically all day" working at his family's business, a self-service laundry facility (laundromat) and adjoining pizza restaurant. A friend of Blair testified that he saw Blair at the laundromat between 9 and 10 a.m. on May 12. Blair's brother, Kenneth Wayne Blair (Kenneth), testified that he saw Blair at the laundromat between 10 and 10:30 a.m. on May 12 and that he and Blair then went to Blair's house, where Kenneth had recently been staying. Kenneth testified that when he finished moving, he dropped Blair off at the laundromat at 11 or 11:30 a.m.

Blair testified that he finished working at the laundromat at about 4 p.m. on May 12, 1997. At that time, he and "Deborah," whom Blair described as his "little helper," went to his house, and Dory was still there. Blair testified that Anzaldo telephoned for Dory and that Dory stated Anzaldo would be coming over to pick up Dory. Blair objected because he did not get along with Anzaldo. Blair testified that Anzaldo then told Dory that she would call the police on Blair. Blair testified that he, Dory, and

"Deborah" all left the house together and that there did not seem to be anything wrong with Dory at that time.

At the end of the trial, the district court made several comments, some of which follow:

> From the evidence, it appears to this Court that the credibility of [Dory] and [Dory's] witnesses is corroborated to some extent by the police officers who do not have any interest in the outcome of the litigation insofar as the Court considers. And contrary to that, [Blair's] credibility, I feel, is inadequate and that it is not corroborated fully.
>
> . . . And, of course, the witness, Deborah, who did not appear here, obviously, she could have had very material evidence, but was not called by the defense.
>
> So it's going to be the judgment of the Court and the finding of the Court by evidence beyond a reasonable doubt that [Blair] is guilty of the crime of kidnapping in the first count; guilty of the second count of using a weapon to commit a felony; and third count, the terroristic threats on the part of the defendant.

Blair filed a motion for new trial on April 27, 1998, through a new attorney who also represented Blair on direct appeal. The motion alleged that "an irregularity in the proceedings occurred as a result of the prosecutor's threat to have a witness for [Blair] arrested on an outstanding warrant if she took the stand." The affidavits of Delman and Deborah Wright were attached to the motion. Delman's affidavit stated that he "was informed by [the State's attorney] that if he called . . . Wright as a witness to testify on behalf of [Blair], that [the State's attorney] would have her arrested as there was a current outstanding warrant for her arrest." The court denied the motion.

A district court judge different from the judge who heard the evidence at trial sentenced Blair to 10 to 15 years' imprisonment for the kidnapping conviction and 3 to 5 years' imprisonment for the use of a deadly weapon to commit a felony conviction, to run consecutively, and 4 to 5 years' imprisonment for the terroristic threats conviction, to run concurrently with the other two sentences.

Blair timely appealed, alleging that the trial court erred (1) in finding him guilty of kidnapping upon insufficient evidence, (2)

in not granting a new trial on the basis of newly discovered evidence, and (3) in determining that Blair knowingly, voluntarily, and intelligently waived his right to a jury trial. In a memorandum opinion, this court affirmed the decision of the district court. See *State v. Blair*, 8 Neb. App. xvi (No. A-98-732, Mar. 31, 1999).

POSTCONVICTION

Blair filed an amended motion to set aside his convictions and sentences, alleging that both trial counsel and appellate counsel provided ineffective assistance in numerous respects.

The court held an evidentiary hearing on Blair's application for postconviction relief and received into evidence numerous exhibits.

Wright testified that on the date of Blair's trial, Delman "pushed me out of the courtroom and told me I couldn't testify because the prosecuting attorney was going to arrest me because I had a warrant." She obtained a printout showing that there were no warrants for her arrest and showed such printout to Delman, but Delman did not call her to testify. Wright testified that had she been called as a witness, she would have testified that she was with Dory and Blair from noon or 1 p.m. until 4 or 5 p.m. on May 12, 1997, and Wright would have verified that Dory was not being held against her will during those hours. Wright testified that Dory and Blair "were fine" and that they "had a good time." Wright could not recall any arguments between Dory and Blair about another male acquaintance of Dory. Wright testified that Blair left the laundromat sometime after 5 p.m. and that Dory had not gone back to the laundromat with Wright and Blair. Based upon Wright's conversation with Delman, it was her understanding that Delman did not call her to testify because of the prosecutor's threat to have her arrested. Wright testified that Delman had taken her deposition prior to trial and knew what Wright's testimony would have been. Wright remained in the courtroom until the trial was over and was not arrested. Blair's mother testified that she told Delman to call Wright as a witness and that if Wright was arrested, Blair's mother would "get her out and put her on the stand anyway."

The prosecutor testified she told Delman that she ran Wright's record, that Wright had a misdemeanor warrant, and that the

prosecutor would have to alert the sheriff's department. She testified that she provided such information to Delman as a matter of professional courtesy and that the warrant could have been taken care of prior to any testimony by Wright.

Delman testified that he informed Blair and his mother of the alleged warrant for Wright's arrest and that it was Blair and his mother's decision not to call Wright to testify. Delman testified that he used a computer to check for warrants for Wright and could not find any, but the prosecutor again said that there was an active warrant. Delman did not believe that in speaking with Wright, Delman discouraged Wright from testifying. Delman thought Wright's testimony would be helpful to Blair's case.

The court received into evidence Forest Roper's affidavit, signed on September 30, 1999. The affidavit states that Roper spoke with Delman in April 1998 regarding testifying on Blair's behalf; that Roper voluntarily appeared in court on April 14, 1998, to testify on Blair's behalf; that Roper was not called as a witness; that had Roper been called as a witness, he would have testified that he was present with both Dory and Blair on May 11, 1997, between approximately 7 and 9 p.m.; that between those hours, Blair was working at the laundromat; that between those hours, Dory, Blair, and another female were drinking beer in the office; that Roper and a friend of Blair were watching television in the laundromat while Roper washed and dried his comforter; that at approximately 9 p.m., Roper "as well as the others walked out of the laundr[o]mat, got in our vehicles and left"; and that Dory and Blair were in good spirits at the time Roper left. At the evidentiary hearing, Roper testified that he never observed Blair make any threatening telephone calls. Roper believed that at the time he left the laundromat, Dory, Blair, and Wright were still there. Delman testified that he decided not to call Roper to testify because all Roper could basically testify to was having seen Blair and Dory prior to the alleged incident and that "it wasn't germane to the case, nor would it have been that beneficial."

In an order filed August 11, 2003, the court stated:

> Of all the grounds for postconviction relief raised by [Blair] in his amended application, the Court finds that [Blair] has sustained his burden of proof as to his allegation that he was rendered ineffective assistance of counsel,

> prejudicial to his defense, in failing to produce . . . Wright or . . . Roper as defense witnesses at [Blair's] trial.

The court reasoned that Wright's testimony would have "substantially contradicted" Dory's testimony, would have "brought into issue Dory's credibility," and "might have" affected Dory's credibility to the extent that the court could "find reasonable doubt as to [Blair]'s guilt." It thus found that Blair's counsel was ineffective in failing to call Wright as a witness, in failing to properly preserve the record if Wright was not called due to prosecutorial misconduct, and in failing to properly present Wright's evidence on Blair's motion for new trial by offering an affidavit rather than live testimony subject to cross-examination.

The court stated that because the State depended on Dory's credibility, Roper would have been "a critical witness," since his testimony would have been in direct conflict with Dory's testimony. Because Delman testified that he determined Roper's testimony was not relevant, the court found that Blair was further denied effective assistance of counsel by Delman's failure to call Roper as a witness. The court set aside the judgment of conviction and Blair's sentencing, and the court ordered a new trial.

Notices of Appeal and Other Motions

The court's order granting Blair postconviction relief was file stamped on August 11, 2003. On August 13, the State filed a notice of appeal regarding that order. Such appeal was docketed in our court on August 18 as case No. A-03-942 and is the appeal now before us.

On August 18, 2003, Blair moved the district court to alter or amend its order. In an order file stamped on October 10, the trial court declined to consider Blair's motion to alter or amend, due to the court's belief that it lacked jurisdiction to rule on the motion. Blair filed a notice of appeal from that order on September 26, which appeal was docketed as case No. A-03-1137. This court dismissed that appeal, citing the rule that when a lower court lacks authority to exercise jurisdiction, the appellate court also lacks power to determine the merits of the case. However, on September 14, 2005, this court recalled the mandate in case No. A-03-1137, and on October 11, this court ordered that the appeal in that case proceed.

On November 7, 2003, the State deposited $75 and filed a notice of appeal "to fully preserve and perfect its appeal should the Court of Appeals determine that [Blair's] 'Motion to Alter and Amend' did change the time for filing a Notice of Appeal." That appeal was docketed as case No. A-03-1295. Such notice was filed within 30 days after the trial court's order ruling on the motion to alter or amend. This court dismissed the appeal in that case as well.

Blair filed a motion for summary dismissal of the instant appeal and asserted in his brief on appeal that this court lacked jurisdiction to hear the appeal. Although this court overruled Blair's motion for summary dismissal, we granted additional time for the State to file a reply brief responding to Blair's argument concerning jurisdiction.

ASSIGNMENTS OF ERROR

The State alleges that the trial court erred (1) in finding that Blair's trial attorney provided ineffective assistance of counsel and (2) in applying an incorrect standard in determining whether counsel's alleged errors prejudiced Blair.

On cross-appeal, Blair alleges that the trial court erred (1) in failing to include as a basis of ineffective assistance of counsel the failure of trial defense counsel to conduct discovery and to file a motion to suppress and (2) in failing to include as finding in support of a motion for new trial that prosecutorial misconduct occurred by the prosecutor's presentation of evidence which the prosecutor knew or should have known to be false.

In a supplemental brief on cross-appeal, filed well over a year after Blair's original brief on cross-appeal, Blair alleges (1) that the court erred by failing to rule on the issue of prosecutorial misconduct for failure to disclose under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the 911 emergency dispatch service data and the medical records of Dory's emergency hospital visits and (2) that postconviction counsel failed to provide effective assistance to Blair on issues raised in the motion to set aside convictions and sentences.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court

will not be disturbed unless they are clearly erroneous. *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004).

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

ANALYSIS

[3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.* Blair previously moved for summary dismissal of this appeal on the bases that the trial court's order granting a new trial was an interlocutory order and that the State's notice of appeal was ineffective because Blair timely filed a motion to alter or amend the judgment. We now conclude that the second allegation of Blair's motion, which has been fully briefed by the parties, requires that the appeal be dismissed for lack of jurisdiction.

[4,5] In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order. § 25-1912(1). Section 25-1912(3) states in part:

> The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01, *(b) by a timely motion to alter or amend a judgment under section 25-1329*, or (c) by a timely motion to set aside the verdict or judgment under section 25-1315.02, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection. When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion

> *shall have no effect, whether filed before or after the timely filing of the terminating motion.*

(Emphasis supplied.)

[6] Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002) provides: "A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment." Thereafter, the 30-day appeal period begins to run from the entry of an order ruling upon the motion to alter or amend a judgment. See, § 25-1912(3); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003). In order to qualify for treatment as a motion to alter or amend the judgment, the motion must seek substantive alteration of the judgment. *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

Pursuant to § 25-1912(3), when any terminating motion such as the motion to alter or amend is timely filed, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. That section further states that a new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion.

Blair's motion to alter or amend the judgment alleged that the trial court failed to make findings of fact and conclusions of law pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1995) regarding certain allegations of Blair's amended motion for postconviction relief. In Blair's operative motion to set aside the convictions and sentences, he specifically requested that pursuant to § 25-1127, the court set forth its conclusions of fact separately from its conclusions of law. While we acknowledge that Blair's citation to § 25-1127 was inapposite, the statute governing a motion for postconviction relief, Neb. Rev. Stat. § 29-3001 (Reissue 1995), explicitly requires the trial court, after an evidentiary hearing on such motion, to make findings of fact and conclusions of law.

The State argues that Blair's August 18, 2003, motion to alter or amend the judgment did not void the State's August 13 notice of appeal because Blair's motion did not seek a substantive change in the court's August 11 order. In *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), the appellant filed a motion seeking an order granting a new trial and any other relief deemed equitable and just. The Nebraska

Supreme Court determined it had jurisdiction, stating: "In effect, [the appellant] requested that the court reconsider its grant of summary judgment. A motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment." 270 Neb. at 6, 701 N.W.2d at 326, citing *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). In *Weeder v. Central Comm. College, supra*, the appellant asked the district court to " 'reexamine its decision to dismiss . . . and reinstate the action as previously filed.' " 269 Neb. at 120, 691 N.W.2d at 513. The Nebraska Supreme Court concluded that such language sought substantive alteration of the judgment of the trial court dismissing the appellant's action.

[7] In the instant case, the relief sought by Blair was that the court "alter and amend it's [sic] Order by making findings of facts and conclusions of law on trial counsel's ineffective assistance regarding [Blair's] illegal arrest and unlawful search and seizure, and for any other relief the Court deems just and proper." The court's order granting postconviction relief is silent on these issues, and thus, Blair's request seeks a substantive change to the court's order. See *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990). When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Because Blair's motion terminated the 30-day appeal period, the State's notice of appeal was ineffective. Accordingly, we lack jurisdiction over this purported appeal.

CONCLUSION

We conclude that Blair's motion to alter or amend the judgment terminated the appeal period and that the State's notice of appeal, filed before disposition of the terminating motion, became ineffective. This court therefore lacks jurisdiction over the State's purported appeal and Blair's purported cross-appeal.

APPEAL DISMISSED.

IN RE INTEREST OF KINDRA S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TAMMIE S., APPELLANT.

705 N.W.2d 792

Filed November 15, 2005. No. A-04-1443.

1. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence.
2. **Evidence: Words and Phrases.** Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven and, further, that it is more than a preponderance of evidence, but less than proof beyond a reasonable doubt.
3. **Parental Rights: Rules of Evidence.** In proceedings to terminate parental rights, the Nebraska Evidence Rules do not apply.
4. **Parental Rights: Rules of Evidence: Due Process.** The requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. The question becomes whether the evidence is relevant based upon the broad concerns of juvenile proceedings, with the Nebraska Evidence Rules serving as a guidepost.
5. **Parental Rights: Due Process.** In termination of parental rights cases, due process requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated.
6. **Juvenile Courts: Parental Rights: Evidence.** The Nebraska Juvenile Code specifically calls for the satisfaction of two requirements before termination of parental rights is proper. First, the code requires the existence of 1 or more of the 10 statutory grounds for termination of parental rights described in Neb. Rev. Stat. § 43-292 (Reissue 2004). Second, the code allows the court to terminate parental rights when the court finds such action to be in the best interests of the juvenile.
7. **Parental Rights.** Termination of parental rights is appropriate if the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months.
8. **Parental Rights: Time: Abandonment.** Neb. Rev. Stat. § 43-292(1) (Reissue 2004) provides that a court may terminate parental rights if the parents have abandoned the juvenile for 6 months or more immediately prior to the filing of the petition.
9. ____: ____: ____. Despite the fact that a parent has been incarcerated for all or part of the 6-month period used to prove abandonment, the period of time of the parent's incarceration may be considered in reference to abandonment as a basis for termination of parental rights if certain other matters are proven.
10. **Parental Rights: Abandonment: Intent: Words and Phrases.** Abandonment, for the purpose of Neb. Rev. Stat. § 43-292(1) (Reissue 2004), is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence,

care, love, protection, maintenance, and opportunity for the display of parental affection for the child.

11. ____: ____: ____: ____. For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2004), abandonment is an intentional act as defined by law in Nebraska and the parent's act of abandonment must be voluntary, i.e., intentional.
12. **Parental Rights: Time: Abandonment.** For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2004), if the actions that gave rise to abandonment were voluntary, the time spent while being incarcerated can be used in the determination of whether the 6-month period of abandonment has been satisfied.
13. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-292 (Reissue 2004) requires that in a proceeding for termination of parental rights, the court must find such termination to be in the child's best interests.
14. ____: ____. A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
15. **Trial: Evidence: Waiver.** If, when evidence is offered, the opposing party consents to its introduction or fails to object or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, the opposing party waives whatever objection may have existed, and the evidence is in the record for consideration the same as other evidence.
16. **Parental Rights: Rules of Evidence.** The standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), are not applicable in cases where the Nebraska Evidence Rules do not apply, such as in termination of parental rights cases.
17. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
18. **Trial: Courts: Expert Witnesses.** When an expert opinion involves scientific or specialized knowledge, the trial court applies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under *Daubert*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
19. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** The improper admission of evidence by a juvenile court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made.
20. **Parental Rights: Rules of Evidence: Due Process.** The Nebraska Evidence Rules provide a guidepost in determining whether admission or exclusion of particular evidence would violate fundamental due process in termination of parental rights cases.
21. **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 such evidence admitted or excluded.
22. **Rules of Evidence.** When the substance of the excluded evidence is made known to the court pursuant to Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1995), the court is within its discretion to determine relevancy and admissibility of the evidence.

23. ____. Neb. Rev. Stat. § 27-403 (Reissue 1995) provides that relevant evidence may be excluded if there is needless presentation of cumulative evidence.

Appeal from the County Court for Cheyenne County: EDWARD D. STEENBURG, Judge. Affirmed.

Donald J. Tedesco for appellant.

Paul B. Schaub, Cheyenne County Attorney, for appellee.

William C. Peters, guardian ad litem for appellant.

Richard H. Jensen, guardian ad litem for Kindra S.

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

IRWIN, Judge.

I. INTRODUCTION

Tammie S. appeals from the order of the Cheyenne County Court, sitting as a juvenile court, which terminated her parental rights with regard to her daughter, Kindra S. Tammie alleges that the court erred in finding that her parental rights should be terminated, in overruling a motion in limine, and in failing to admit into evidence a statement of a former caseworker. We find that the State proved by clear and convincing evidence the grounds for termination of Tammie's parental rights under Neb. Rev. Stat. § 43-292(7) (Reissue 2004). Given the facts of this case, Tammie's incarceration or hospitalization in a mental health facility should not be excluded from the court's calculation of Kindra's time in out-of-home placement under § 43-292(7). We find that termination of Tammie's parental rights is in Kindra's best interests. Additionally, we find that the court did not err in overruling the motion in limine or in failing to admit into evidence the former caseworker's statement, since the Nebraska Evidence Rules are not applicable in cases involving the termination of parental rights and the evidentiary rulings comported with due process. Accordingly, we affirm.

II. BACKGROUND

These proceedings involve the termination of Tammie's parental rights with regard to Kindra, who was born on February 7, 2000. Kindra spent her first 13 months with Tammie. In February

2001, Tammie threw a brick or stone through a window of her father's home. Due to this incident, Tammie was arrested and subsequently extradited to Texas pursuant to an outstanding Texas warrant. She was incarcerated and hospitalized for approximately 14 months in Texas due to mental illness.

As a result of Tammie's absence, the Nebraska Department of Health and Human Services (DHHS) took legal custody of Kindra on February 27, 2001. Kindra was placed in foster care and has remained in the same foster home since that time.

Soon after the Texas authorities released Tammie, she returned to Nebraska. Here, she began working with DHHS in an effort to begin visitation with, and ultimately regain custody of, Kindra. The goals of the case plan that Tammie was required to complete were to "participate in psychotherapy[,] remain stable on her medications[, and] continue to display no physical aggression." As of June 2002, in accordance with a visitation plan, Tammie was permitted supervised visitation with Kindra.

Subsequently, Tammie spent a period of time—described by various witnesses as between 6 and 9 months—in the Hastings Regional Center. While there, she was permitted biweekly telephone visitations with Kindra.

After Tammie left the Hastings Regional Center, DHHS provided Tammie in-person visitations with Kindra every other week for a period of time. These visitations were progressively increased to three times a week. In June 2004, visitations were suspended due to the DHHS caseworker's concerns about Tammie's erratic behavior and the resulting impact on Kindra's safety. Such concerns were based on Tammie's noncompliance with taking her medication and on her cessation of psychotherapy.

On April 1, 2004, the State filed a petition to terminate Tammie's parental rights, as well as the parental rights of Kindra's father, who is not involved in this appeal. The petition alleged that Tammie's parental rights should be terminated as a result of her inability to discharge parental responsibilities due to mental illness or mental deficiency which is likely to continue for a prolonged indeterminate period. The petition also alleged that Kindra had been in out-of-home placement for 15 or more months of the most recent 22 months and that termination of Tammie's parental rights was in the best interests of Kindra.

Guardians ad litem were appointed for Tammie and for Kindra pursuant to Neb. Rev. Stat. § 43-292.01 (Reissue 2004). A hearing was held on the State's petition to terminate parental rights on August 5, 2004. Due to the presiding judge's death on August 8, Tammie filed on August 16 a motion for new trial, which motion was granted.

On September 20, 2004, and before the new hearing on the termination of parental rights, the State filed a motion to take the trial deposition of an examining psychologist, Dr. Anne Talbot. On November 9, Tammie filed a motion in limine requesting that the court determine whether Dr. Talbot's deposition could be received into evidence at the ensuing termination of parental rights hearing. The court ultimately overruled the motion.

The new hearing on the termination of parental rights was held on November 17, 2004. On December 8, the court entered an order terminating Tammie's parental rights. In that order, the court determined that termination of Tammie's parental rights was proper according to § 43-292(5) and (7) and was in the best interests of Kindra. The court relied, inter alia, on testimony from two psychologists, Drs. Daniel Scharf and Talbot, as well as the then-current DHHS caseworker assigned to the case. Their testimony revealed that Tammie's behavior had continued to be adverse to the best interests of Kindra.

Testimony established that Tammie had received several forms of assistance from DHHS staff but had been unable to meet the goals of the rehabilitation plan over a span of nearly 3 years. Tammie had terminated her psychotherapy and was noncompliant with taking her medications. Additionally, testimony from Drs. Scharf and Talbot indicated that a high risk of harm to Kindra would be likely were she to be returned to Tammie's care. Dr. Scharf testified that such placement would insert Kindra into a chaotic environment where she would be exposed to violent behavior and a lack of parental care. Dr. Scharf expressed concern that Kindra might become the target of Tammie's mood volatility. Furthermore, the DHHS caseworker testified that Kindra had been in out-of-home placement for at least 15 of the most recent 22 months before the filing of the petition to terminate.

The court noted that while Tammie might be in a position to parent Kindra after another 2 to 3 years of diligent and consistent

treatment to improve her mental condition, Dr. Scharf had indicated it would be highly unlikely that Tammie would benefit from services that would help her achieve this end because of her past noncompliance with medications and her substance abuse. The court concluded that the evidence was clear and convincing that Tammie's conditions would continue for a prolonged and indeterminate period of time. As such, the court found that it was in the best interests of Kindra to terminate Tammie's parental rights. Tammie now appeals to this court.

III. ASSIGNMENTS OF ERROR

Tammie and her guardian ad litem have filed separate briefs, and each brief contains assignments of error. Tammie and her guardian ad litem assert, combined and restated, that the county court erred (1) in finding that the State proved by clear and convincing evidence that Tammie's parental rights should be terminated, (2) in overruling the motion in limine, and (3) in failing to admit into evidence the statement of a former caseworker. Tammie also assigned error regarding termination of her parental rights based on § 43-292(5). Given our disposition below, this assigned error need not be addressed.

IV. ANALYSIS

1. Standard of Review

[1] Cases arising under the Nebraska Juvenile Code, and specifically an appeal from an order terminating parental rights, shall be reviewed de novo on the record, and an appellate court must reach conclusions independent of the trial court's findings while disregarding impermissible or improper evidence. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

[2] Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven. Further, clear and convincing evidence is more than a preponderance of evidence, but less than proof beyond a reasonable doubt. *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002).

[3,4] In proceedings to terminate parental rights, the Nebraska Evidence Rules do not apply. See *In re Interest of Brettany M. et al., supra.* The requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. The question becomes whether the evidence is relevant based upon the broad concerns of juvenile proceedings, with the Nebraska Evidence Rules serving as a guidepost. *Id.*

[5] In termination of parental rights cases, due process requires that fundamentally fair procedures be used by the State in an attempt to prove that a parent's rights to his or her child should be terminated. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

2. Termination of Parental Rights

(a) Statutory Grounds

Tammie argues that the statutory grounds under § 43-292(7) for termination of parental rights were not proven by clear and convincing evidence. Specifically, she argues that periods of Kindra's out-of-home placement during the 22 months preceding the filing of the petition to terminate parental rights included periods of time Tammie was incarcerated or in mental health facilities and that such periods of time should be excluded when calculating whether Kindra was in out-of-home placement for 15 of those 22 months. Tammie cites to no case law in Nebraska which supports her argument that the time of incarceration or hospitalization should be excluded from calculating the time period of Kindra's out-of-home placement, and our research reveals none. We disagree with her argument given the facts of the case.

[6,7] The Nebraska Juvenile Code specifically calls for the satisfaction of two requirements before termination of parental rights is proper. First, the code requires the existence of 1 or more of the 10 statutory grounds for termination of parental rights described in § 43-292. Second, the code allows the court to terminate parental rights when the court finds such action to be in the best interests of the juvenile. § 43-292. Section 43-292(7) specifically provides that termination of parental rights is appropriate if "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months."

[8,9] That part of Tammie's argument regarding the exclusion of periods of incarceration is one previously made and addressed by Nebraska jurisprudence in the context of § 43-292(1). Section 43-292(1) provides that a court may terminate parental rights if "[t]he parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition." Nebraska jurisprudence concludes that despite the fact that a parent has been incarcerated for all or part of the 6-month period used to prove abandonment, the period of time of the parent's incarceration may be considered in reference to abandonment as a basis for termination of parental rights if certain other matters are proven. See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

[10] At this point in our analogy, § 43-292(1) and (7) diverge, because Nebraska appellate courts have concluded that " ' "[a]bandonment," for the purpose of § 43-292(1), is a parent's *intentionally* withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.' " (Emphasis supplied.) *In re Interest of L.V.*, 240 Neb. at 419, 482 N.W.2d 250 at 260 (quoting *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990)).

[11,12] Nebraska appellate courts have concluded that for purposes of § 43-292(1), abandonment is an intentional act as defined by law in Nebraska and the parent's act of abandonment must be voluntary, i.e., intentional. The impact of this intent requirement means that periods of time used to calculate the 6-month period of abandonment can be included only if the actions that gave rise to the abandonment were voluntary. If such is found to be the case, the time spent while being incarcerated can be used in the determination of whether the 6-month requirement has been satisfied.

However, § 43-292(7) does not require that the child's out-of-home placement be the result of any intentional act on the part of the parent. In fact, the Nebraska Supreme Court has held that § 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). In

a case of termination of parental rights based on § 43-292(7), the protection afforded the rights of the parent comes in the best interests step of the analysis. Yet, when termination of parental rights is based on the ground described in § 43-292(1), the protection of the parent's rights is analyzed not only in the best interests analysis, but is given additional scrutiny with the added requirement that the abandonment be intentional and not a mechanical operation of counting months. In both situations, however, the time that a parent spends incarcerated or hospitalized can be included in the required time calculations to determine whether the statutory ground has been proven.

Given the facts of this case, it is our conclusion that a finding of statutory grounds for termination of parental rights under § 43-292(7) is a mechanical arithmetic matter. The proper application of this subsection consists of counting the most recent 22 months preceding the filing of the petition to terminate parental rights, followed by counting how many of those 22 months the child was in out-of-home placement. If the child was in out-of-home placement for 15 of those 22 months, the statutory grounds for termination of parental rights are satisfied and termination of parental rights is appropriate, subject to a determination that such termination is in the child's best interests.

The record shows that Kindra was placed in the custody of DHHS when she was approximately 1 year old. At the time of the hearing on the termination of parental rights, Kindra was 4 years 9 months old and had continuously been in out-of-home placement since being placed in the custody of DHHS. During the time Kindra was in out-of-home placement, Tammie had been either incarcerated or in mental health treatment in Texas for approximately 14 months and had been in the Hastings Regional Center for approximately 6 to 9 months. However, Tammie was never incarcerated or hospitalized in Texas during the most recent 22 months of the date of filing of the petition to terminate parental rights.

Tammie's hospitalization in the Hastings Regional Center did occur during the most recent 22 months of the filing of the petition to terminate her parental rights. Given our conclusion above, the time Tammie was in the Hastings Regional Center need not be excluded from the court's determination of whether Kindra

was in out-of-home placement for 15 of the 22 months immediately preceding the petition to terminate parental rights.

We find that the statutory grounds for termination of Tammie's parental rights were proven by clear and convincing evidence. Under the facts of this case, there is no exception under § 43-292(7) for Tammie's incarceration or hospitalization in mental health facilities for the purpose of determining Kindra's time in out-of-home placement. Compare *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005) (finding that father's parental rights were wrongly terminated where fundamental fairness was lacking). This assigned error is without merit.

In light of these findings, no review of the county court's ruling with regard to § 43-292(5) is required. See *In re Interest of Brittany S.*, 12 Neb. App. 208, 670 N.W.2d 465 (2003). Because we conclude that the State sufficiently proved the existence of statutory grounds for termination of Tammie's parental rights, we find this assignment of error to be without merit.

(b) Best Interests

Tammie argues that the court erred in finding that terminating Tammie's parental rights is in Kindra's best interests. We find that the State proved by clear and convincing evidence that such termination was in Kindra's best interests because of Tammie's inadequate response to the treatment of her mental illness and because of her volatile behavior that could place Kindra at risk.

[13] Section 43-292 specifically requires that in a proceeding for termination of parental rights, the court must find such termination to be in the child's best interests. This requirement ensures that there are ample safeguards in place to ensure that termination of parental rights is not based solely on the duration of out-of-home placement. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

The testimony of the two evaluating psychologists demonstrates that Tammie suffers from mental illness. Dr. Scharf diagnosed Tammie with disorganized schizophrenia. Dr. Talbot diagnosed Tammie with "a significant major psychiatric disorder that incorporates schizophrenia and a personality disorder, as well as an additional diagnosis that impacts on her ability to deal with her

other psychiatric diagnoses; and that is the diagnosis of borderline intellectual functioning." By itself, this prognosis does not preclude a person from parenting a child. However, other factors must be considered in Tammie's case.

An underlying factor that weighs heavily in the best interests analysis is Tammie's unwillingness to fully acknowledge both the seriousness of her symptoms and the need for treatment. Based on Dr. Talbot's evaluations of Tammie and review of her history, she opined that Tammie has a limited awareness of the seriousness of her illness and that Tammie downplays her condition, which could place both Tammie and Kindra at risk.

Dr. Scharf testified that Tammie has expressed ambivalence about the need for her medications and about whether she was schizophrenic or not. He testified that in June 2004, Tammie admitted that "she was not taking her medications, that she said that she had flushed them down the toilet, [and] that she believed that she did not need them." In addition to not taking her medications, Tammie had been using marijuana and drinking alcohol, which, according to Dr. Scharf, "would be very detrimental to her mental health. It probably would exacerbate her psychotic symptoms and probably exacerbate her mood difficulties also."

Tammie testified that she would take her medication if she "felt like taking it." On one occasion, Tammie left the doctor's office, after waiting 15 minutes, without having received her dosage of medication because she saw "no need to sit around." Tammie missed another appointment with the doctor to receive medication because she was otherwise occupied.

These behaviors support Dr. Talbot's statement that Tammie does not acknowledge both the seriousness of her condition and the need for treatment of the condition. Dr. Talbot indicated that Tammie had "an unrealistic perception of the impact of her psychiatric history and the impact that had, not only on her, but on her daughter."

Tammie had also been inconsistent with psychotherapy treatment, which treatment was one of the goals set forth in her case plan. On July 6, 2004, Tammie indicated to the DHHS caseworker that Tammie refused to see her psychotherapist. On July 20, Tammie called her DHHS caseworker and said that she refused to see her counselor; subsequently, Tammie did not make

an effort to go to a different counselor. Tammie had repeatedly been reminded of the conditions of her psychological evaluation that called for her to be on medication and to be stabilized before visitation with Kindra would be possible.

Dr. Scharf testified that there are mothers with schizophrenia who are capable of parenting. He also maintained that Tammie's type of disorganized schizophrenia can be controlled by medication. However, Tammie's inadequate response to her need for treatment is not in the best interests of Kindra.

[14] Similarly, Dr. Talbot testified that aspects of Tammie's condition could be mediated by medication but that Tammie "ha[d] not demonstrated a pattern of maintaining stabilization or cooperation with treatment recommendations consistently." While Tammie should not be punished for her illness, it is the juvenile's best interests that are of primary consideration in determining whether parental rights should be terminated. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005); *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

Tammie's noncompliance with taking medication and her failure to regularly attend psychotherapy have resulted in very aggressive and threatening behavior at times. Tammie has made threats against others. She threatened Kindra's foster father that she would either get a gun or train her dog to kill him. On June 2, 2004, Tammie threatened DHHS staff that she would get a gun from her father and use it if anyone touched Kindra. On June 28, Tammie threatened DHHS staff that she was going to take a gun and attempt to take Kindra. On July 21, Tammie warned several DHHS staff and a sheriff that they should watch their own daughters. One caseworker indicated that she was afraid because Tammie knew where she lived, and that caseworker expressed concern for the safety of her daughter.

Dr. Scharf administered to Tammie several psychological tests, one of which revealed Tammie was "very active and probably would have difficulty inhibiting her behavior." Dr. Scharf testified that Tammie "scored similar to other individuals that were aggressive, that tended to show aggressive behavior." While this type of behavior may be a symptom of her condition, it is nonetheless not in the best interests of Kindra.

Tammie's behavior is inconsistent with the best interests of Kindra. Her behavior and mental condition have a detrimental effect on her ability to parent Kindra. Dr. Scharf testified that Tammie's mental illness had affected her ability to parent. He reported that Tammie had suffered from functional impairment regarding real life problems, such as making appointments, taking care of hygiene, and working. Her mental deficiency also was shown to affect her ability to parent. Dr. Scharf explained that the intellectual testing which measured Tammie's IQ also measured things such as reasoning, judgment, attention, and concentration—skills necessary to parenting.

Additionally, Dr. Talbot explained that Tammie "has a diagnosis that affects her judgment and reasoning, her ability to reality test, her ability to understand the developmental needs of a child. And she is prone to delusional states and psychotic states that affect her ability to provide a safe environment for a child." Dr. Talbot clarified that in addition to the mental illness diagnosis, Tammie's mental deficiency causes difficulties for her to respond appropriately to treatment, education, and other interventions that might help her overcome or mediate her impaired reality testing or delusions.

Tammie's observed and diagnosed mental health issues have an effect on her ability to parent and, therefore, a direct effect on Kindra's best interests. Dr. Talbot stated that Tammie's responses to a "Parenting Scale" test Dr. Talbot had administered were "overly simplistic, and sometimes inappropriate, in such a way that the situation might be escalated, or place a child in danger." Dr. Talbot relayed that Tammie made inappropriate statements in Kindra's presence which "reflect a real lack of concern for Kindra's psychological state." When asked what impact there would be on Kindra if she were returned to live with Tammie, Dr. Talbot replied, "It could be devastating." Dr. Talbot also explained that it would be nearly impossible for Kindra and Tammie to have a successful reunification. Dr. Talbot stated that Tammie has a serious psychiatric disorder which puts herself, and Kindra, in jeopardy.

Likewise, when Dr. Scharf was asked what impact there would be on Kindra if she were returned to live with Tammie, he replied,

> When I saw Tammie in June of 2004, I think the impact would be that Kindra would live in a pretty chaotic environment, where — I think Tammie would have difficulty providing structure and predictability for Kindra. I think there would be a decent chance that Kindra would be exposed to violence, or threatening behavior, which would be very detrimental to her.

Dr. Scharf also expressed concern that Tammie suffered from mood volatility, of which Kindra could eventually become a target.

Therefore, we find that the State proved by clear and convincing evidence that termination of Tammie's parental rights is in Kindra's best interests. This first assigned error is without merit.

3. Motion in Limine

Tammie filed a motion in limine requesting the county court to determine whether the deposition of Dr. Talbot could be received into evidence. The court overruled the motion. We find that the court did not err, and we analyze the motion in limine in four separate subsections below.

(a) Objections in Deposition

Tammie asserts that the county court erred in overruling her motion in limine to exclude Dr. Talbot's deposition. Tammie argues that the deposition contained many objections upon which the court was never given an opportunity to rule. Citing to Neb. Rev. Stat. § 27-804 (Reissue 1995) regarding hearsay exceptions, Tammie contends that "[a]n argument could be made that because such trial deposition was not taken and offered in compliance with the law, it is not admissible." Brief for appellant at 15. This argument is without merit because Tammie did not obtain a ruling on any of the objections contained in Dr. Talbot's deposition.

[15] It is a well-known rule that if, when evidence is offered, the opposing party consents to its introduction or fails to object or to insist upon a ruling on an objection to the introduction of such evidence, and otherwise fails to raise the question of its admissibility, the opposing party waives whatever objection may have existed, and the evidence is in the record for consideration the same as other evidence. *In re Interest of E.G.*, 240 Neb. 373,

482 N.W.2d 17 (1992); *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948).

Tammie's counsel made objections to the testimony during the deposition. In the hearing on the motion in limine, Tammie's counsel objected based on *Daubert* and, additionally, on inadequate foundation of the deponent, Dr. Talbot, to render an expert opinion. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The court noted at the hearing that objections were made during the deposition, but at no time was the court asked to rule on them. The court overruled the motion in limine. When the State offered into evidence at trial the exhibit containing Dr. Talbot's deposition, Tammie's counsel renewed the objection from the earlier motion in limine hearing. The court received the deposition nonetheless. As such, the objections contained in the deposition are not properly preserved for appeal.

(b) *Daubert* Challenge

[16] Tammie asserts that the county court erred in admitting the deposition of Dr. Talbot, because her expert testimony was improperly received by the court. Tammie asserts that Dr. Talbot did not "render her opinion in the appropriate form," essentially arguing that it was not made with a reasonable degree of medical certainty. Brief for appellant at 18. We find that Dr. Talbot's deposition was admissible expert testimony because the *Daubert* standards are not applicable in cases where the Nebraska Evidence Rules do not apply, such as in termination of parental rights cases. See *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

[17] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[18] Additionally, when the expert opinion involves scientific or specialized knowledge, the trial court applies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra. Robb v. Robb, supra.* Under *Daubert*, the trial court acts as a gatekeeper

to ensure the evidentiary relevance and reliability of an expert's opinion. *Robb v. Robb, supra.*

However, application of the *Daubert* standards for admission of expert testimony is limited to those cases in which the Nebraska Evidence Rules apply. Since this is a case involving the termination of parental rights, and the Nebraska Evidence Rules are not applied in such cases, the *Daubert* standards do not apply to this case. See *In re Interest of Rebecka P., supra.* Thus, this argument is without merit.

(c) Due Process

Tammie argues that the court erred in overruling the motion in limine to exclude Dr. Talbot's deposition, and Tammie implies that the requirements of due process were not met by the admission of such deposition. We find that due process requirements were fulfilled because fundamentally fair procedures were used.

We have previously recognized that Nebraska Evidence Rules do not apply in cases involving termination of parental rights. See *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). Tammie correctly maintains that the requirements of due process control in determining the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. See *id.* To this end, fundamentally fair procedures must be used by the State. See *In re Interest of Rebecka P., supra.*

The record shows that Tammie received notice of the deposition, she was represented by counsel, and Tammie's counsel cross-examined Dr. Talbot. Therefore, we find no basis on which to conclude that Dr. Talbot's deposition should not have been admitted into evidence. Due process requirements were met, and the admission of Dr. Talbot's expert testimony was proper. Therefore, this argument lacks merit.

(d) Existence of Reversible Error

[19] We additionally note, sua sponte, that even if Dr. Talbot's deposition was improperly received, such action would not by itself constitute reversible error; a showing of prejudice must be made. See, *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of L.H. et al.*, 241 Neb.

232, 487 N.W.2d 279 (1992). Tammie must show that the inclusion of the deposition in the evidence was prejudicial to her due process rights. See *id.*

In the instant case, Tammie does not argue that she was prejudiced; nor do we find any basis on which to conclude that Tammie was prejudiced. We find no reversible error with respect to the motion in limine.

4. Statement of Former Caseworker

Tammie asserts that the written statement of a former DHHS caseworker, Stacey Mitlehner, should have been accepted into evidence. However, on our de novo review of the record, we find that the statement was properly excluded and that no reversible error exists. The requirements of due process were comported with, and the judge was within his discretion to exclude the statement.

Tammie offered into evidence the statement of Mitlehner, who was unavailable to testify at the trial. The statement was a written memorandum containing her account of Tammie's history and progress. Both the State and Kindra's guardian ad litem objected to the admission of the statement, based on hearsay. The court sustained the objections.

Tammie correctly asserts that a due process analysis is required concerning the trial court's refusal to admit this evidence. She argues that fundamental fairness would dictate that since the State was allowed abundant hearsay in its case, she ought to be allowed hearsay evidence in her case. However, Tammie offered no explanation for Mitlehner's unavailability to appear, and the State was given no opportunity to cross-examine the witness. Tammie's attorney explained only that he "couldn't get [Mitlehner] to come in."

[20] Additionally, the Nebraska Evidence Rules provide a guidepost in determining whether admission or exclusion of particular evidence would violate fundamental due process in termination of parental rights cases. See, *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

[21] 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 such evidence admitted or excluded. *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005). See Neb. Rev. Stat. § 27-103(1) (Reissue 1995).

[22] In the instant case, the substance of the excluded evidence was made known to the trial court pursuant to § 27-103(1)(b), and the court was within its discretion to determine relevancy and admissibility of the evidence. As such, we find no substantial right was unfairly prejudiced by the exclusion of the statement.

[23] Additionally, Neb. Rev. Stat. § 27-403 (Reissue 1995) provides that relevant evidence may be excluded if there is "needless presentation of cumulative evidence." The statement of Mitlehner was cumulative in the sense that the court had already heard evidence on Tammie's history and progress. This assignment of error is without merit.

V. CONCLUSION

Upon a de novo review of the record, there is clear and convincing evidence that termination of Tammie's parental rights is proper pursuant to § 43-292(7) and is in the best interests of Kindra. No due process rights were violated in the overruling of Tammie's motion in limine or in the court's admission of Dr. Talbot's deposition. No due process rights were violated when the court excluded the statement of Mitlehner, the former caseworker, and no prejudicial error resulted from such exclusion. The county court's order terminating Tammie's parental rights with regard to Kindra is affirmed.

AFFIRMED.

BARBARA D. GRANDT, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

705 N.W.2d 600

Filed November 15, 2005. No. A-05-114.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. **Workers' Compensation.** Loss of earning power and employability are the bases for compensation for permanent partial disability to the body as a whole.
4. ____. The overall purpose of the Nebraska Workers' Compensation Act is to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act.
5. ____. One purpose of the Nebraska Workers' Compensation Act is to compensate an employee for the loss of his or her earning power.
6. ____. The right to and amount of recovery in workers' compensation proceedings are purely statutory.
7. **Workers' Compensation: Legislature.** The Nebraska Workers' Compensation Act creates rights which did not exist at common law, and the Legislature may place such restrictions thereon as it sees fit.
8. **Workers' Compensation.** The fact that vocational rehabilitation may reduce an employee's loss of earning power is not a valid reason for postponing a determination of such loss.
9. ____. Upon a determination that an injured worker has reached maximum medical improvement, a trial court is obligated to determine the injured worker's loss of earning power without speculating about the possible result of vocational rehabilitation.
10. ____. Where a trial court is not called upon to make a determination of loss of earning power until after completion of vocational rehabilitation, the court is not required to retroactively look to the extent of loss of earning power as of the date of maximum medical improvement and disregard the documented change in loss of earning power flowing from completion of vocational rehabilitation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James F. Fenlon, P.C., for appellant.

Stuart J. Dornan, Douglas County Attorney, and Bernard J. Monbouquette for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Barbara D. Grandt appeals from the order of the Nebraska Workers' Compensation Court review panel affirming the decision of the trial court. We are confronted with the question of whether a trial court, if it has not been called upon to determine loss of earning power until after completion of vocational rehabilitation, must disregard the reduction in loss of earning power

resulting from successful vocational rehabilitation and calculate continuing benefits upon the loss of earning power as it existed immediately upon attainment of maximum medical improvement (MMI). Because we conclude that the trial court may consider the full circumstances existing at trial, we affirm.

BACKGROUND

The relevant facts are not in dispute. On November 8, 1999, when Grandt was employed by Douglas County (Douglas) as a nurse, Grandt was attacked by a patient and suffered back injuries. Douglas recognized that Grandt had suffered a work-related injury and, without any proceedings before the Workers' Compensation Court, began making payments to Grandt in relation to her claim for workers' compensation benefits. While those payments were ongoing, Grandt's primary treating physician opined that Grandt had reached MMI as of July 24, 2000.

During periods between November 9, 1999, and November 23, 2002, Douglas paid Grandt permanent partial disability (PPD) benefits based on a 40-percent loss of earning power. On December 6, 2001, shortly after Grandt began a vocational rehabilitation program, Gail Leonhardt, the vocational rehabilitation counselor whom the parties had agreed to engage, rendered an opinion regarding loss of earning power. Leonhardt's report stated that a vocational rehabilitation plan had been submitted and that Grandt was participating in an associate degree program in substance abuse counseling, but that

> [a]s per the request, decided upon as per agreement of [counsel for both parties], an earning capacity assessment as per Gibson v. Kurt Mfg., [255 Neb. 255, 583 N.W.2d 767 (1998), was] being conducted, considering [Grandt's] loss of earning capacity as of the date she reached [MMI], prior to undergoing any vocational rehabilitation as a result of this injury.

Leonhardt found that Grandt had sustained a 35- to 45-percent loss of earning power as of the date of MMI.

On August 17, 2002, Grandt completed the vocational rehabilitation plan, through which she obtained an associate degree in substance abuse counseling. In an "update" of Grandt's loss of earning power requested by Douglas, Leonhardt noted that his

previous report had not considered "completed future vocational rehabilitation" and found that Grandt's loss of earning power was "reduced" to 25 to 35 percent upon completion of the vocational rehabilitation plan because Grandt was capable of performing work in the field of substance abuse counseling. Commencing November 24, Douglas unilaterally reduced Grandt's PPD benefits, basing subsequent payments on a 25-percent loss of earning power.

In a petition filed on March 13, 2003, after the vocational rehabilitation training had been completed and Douglas had reduced Grandt's PPD benefits, Grandt requested a hearing to address that reduction. At trial, the parties presented evidence, consisting primarily of a written stipulation and related exhibits. In its subsequent written decision, the trial court found that Grandt had sustained "a prevocational rehabilitation loss of earning capacity of 40 percent and a post vocational rehabilitation loss in earning capacity of 30 percent." The trial court then stated the respective rates of compensation to which each loss of earning power percentage "would entitle" Grandt. The trial court ordered:

> [Douglas] is entitled to "compute" [Grandt's] loss in earning capacity at the post vocational rehabilitation amount of 30 percent and that [Douglas] shall continue to pay a 30 percent loss in earning capacity . . . for the period of time set forth in [the parties' stipulation] and from and including November 24, 2002 to the date of hearing of November 20, 2003 and continuing for a period of time not to exceed 300 weeks.

While the order perhaps lacks some precision in that Douglas unilaterally reduced Grandt's PPD benefits based upon a 25-percent loss of earning power rather than 30 percent, we conclude that the order intended to approve the payments based upon a 40-percent loss prior to November 24, 2002, and upon a 30-percent loss from and after that date. Grandt appealed to the review panel, assigning the same errors she assigned in this court. The review panel summarily affirmed, with one judge dissenting and one judge in the majority responding to the dissent. Grandt now appeals to this court.

ASSIGNMENTS OF ERROR

Grandt alleges that the trial court erred in (1) finding that she had two different losses of earning power and (2) finding that her loss of earning power could be "re-determined" after she had completed vocational rehabilitation.

STANDARD OF REVIEW

[1,2] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005).

ANALYSIS

Loss of Earning Power After Vocational Rehabilitation.

We choose to first address Grandt's second assignment of error, asserting that loss of earning power cannot be "re-determined" after completion of vocational rehabilitation. The simple answer to this assertion is that there has been only one determination by the trial court, made in response to a petition filed after completion of vocational rehabilitation and long after Grandt attained MMI. However, Grandt's argument makes it clear that this assignment is intended to address the date for determination of loss of earning power.

[3] Grandt contends that her loss of earning power must be determined as of July 24, 2000, the date she reached MMI, and not as of her completion of vocational rehabilitation. Loss of earning power and employability are the bases for compensation for PPD to the body as a whole. See *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989). Neb. Rev. Stat. § 48-121(2) (Reissue 2004) provides for awards of PPD benefits, and states:

> For disability partial in character, except the particular cases [of loss or loss of use of specified members], the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . . This compensation shall be paid during the period of such partial disability but not beyond three hundred weeks. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability.

Grandt argues that § 48-121(2) does not provide for a reduction of PPD benefits following completion of vocational rehabilitation and that, therefore, the workers' compensation court, as a tribunal of limited and special jurisdiction, does not have authority to change the rate of benefits at such time. However, § 48-121(2) requires only that loss of earning power be calculated after the injury, and the period following vocational rehabilitation fits within that timeframe.

The Nebraska appellate courts have not confronted this precise situation, in which no determination of loss of earning power is sought before the Workers' Compensation Court until after completion of vocational rehabilitation. While it appears that in *Clemco Fabricators v. Becker*, 62 S.W.3d 396 (Ky. 2001), another state's high court has addressed the question, we conclude that Nebraska case law precludes us from using that court's rationale. The *Clemco* court relied on a statute which allowed for the reopening of an award on the motion of a party or on the administrative law judge's motion where objective medical evidence showed a worsening of impairment due to a condition caused by the compensable injury. In effect, the *Clemco* court treated the matter as both an initial claim and a reopening. We believe that the Nebraska Supreme Court, in *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998), definitively rejected the contention that the Nebraska statute concerning modification of workers' compensation awards can support a reduction of an award based on the ground that vocational rehabilitation was successful in decreasing a claimant's loss of earning power. In the case before us, however, we are confronted by an initial determination by the

lower court, and Douglas has not sought to invoke the Nebraska statute concerning modification of an award. Thus, the real question that we must answer is, What is the proper time for determination of loss of earning power?

Before we turn to a discussion of the Nebraska case law upon which the parties rely in disputing the answer to this question, we note some general principles. In an ordinary tort action, the principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as that person would have been had there been no injury, that is, to compensate the person for the injury actually sustained. See *Keitges v. VanDermeulen*, 240 Neb. 580, 483 N.W.2d 137 (1992). In that context, the time for assessing damages concerning an impairment, loss, or diminution of future earning power is at the time of trial. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988). The injured party is not required to postpone the right to recover damages for such injuries until there is either full recovery, surgery, exhaustion of possible therapy, or treatment, although the party may choose to do so. *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972).

[4-7] The overall purpose of the Nebraska Workers' Compensation Act (Act), on the other hand, is to provide benefits for employees who are injured on the job, and the terms of the Act are to be broadly construed to accomplish the beneficent purposes of the Act. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). Within that general goal, one purpose of the Act is to compensate an employee for the loss of his or her earning power. See *Warner v. State*, 190 Neb. 643, 211 N.W.2d 408 (1973). While this purpose is similar to the purpose of recompense for future loss of earning capacity in a tort action, the right to and amount of recovery in workers' compensation proceedings are purely statutory. *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986). The Act creates rights which did not exist at common law, and the Legislature may place such restrictions thereon as it sees fit. *University of Nebraska at Omaha v. Paustian*, 190 Neb. 840, 212 N.W.2d 704 (1973).

While § 48-121(2) does not explicitly answer the precise question before us, Grandt contends that Nebraska Supreme Court precedent compels a result contrary to that reached by the

trial court and the majority of the review panel. Grandt relies on *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998), and *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000).

In *Gibson*, the trial court awarded Michael Gibson vocational rehabilitation benefits but declined to determine loss of earning power until after Gibson had completed vocational rehabilitation. The trial court stated that if, after vocational rehabilitation, the parties could not agree on Gibson's loss of earning power, either party could apply for further hearing. The employer appealed, and Gibson cross-appealed. The review panel determined that because Gibson had attained MMI by the time of trial and had received an impairment rating with restrictions, the trial court was clearly wrong in declining to assess Gibson's loss of earning power. On appeal, this court reversed the review panel's order, in part, determining that Gibson was entitled to vocational rehabilitation and that where the claimant is awarded vocational rehabilitation, the trial court should postpone a determination of loss of earning power until after completion of that rehabilitation.

[8] On further appeal, the Nebraska Supreme Court in *Gibson* reversed this court's order, affirmed the review panel's order, and stated:

> [U]pon a determination that Gibson had reached [MMI], absent a valid reason for not making such a determination, the trial judge was obligated to make a determination as to Gibson's loss of earning power. The fact that vocational rehabilitation may reduce an employee's loss of earning power is not a valid reason for postponing a determination of such loss. To hold otherwise would impose an unfair hardship on employees with [PPD] to the body as a whole who have been granted vocational rehabilitation. . . .
>
> . . . It is the intent of the Act that the employer pay [PPD] benefits as determined, if any, as soon as possible after [MMI] has been reached and that the employer, regardless of the employee's ability to increase his or her earning power through vocational rehabilitation, must continue such payment during the limited period of time provided by the Act [in § 48-121(2)] unless the requirements of

> [Neb. Rev. Stat.] § 48-141 [(Reissue 1993)] or [Neb. Rev. Stat.] § 48-185 [(Reissue 1993) (providing for appeal after review)] have been met.

255 Neb. at 265-66, 583 N.W.2d at 773.

[9] In *Collins v. General Casualty, supra*, the trial court found that Scott Collins had sustained a compensable injury and awarded benefits, including vocational rehabilitation. The trial court estimated that Collins' loss of earning power would be 5 percent after successful completion of vocational rehabilitation. The review panel affirmed, but determined that the trial court had erred in estimating Collins' loss of earning power. The Nebraska Supreme Court affirmed the review panel's order, holding that because Collins had reached MMI, the trial court was obligated to determine his loss of earning power and had erred in speculating about the possible result of vocational rehabilitation when determining his loss of earning power.

Grandt contends that no language in *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998), or *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000), allows the trial court to find that completion of vocational rehabilitation has reduced the claimant's loss of earning power. However, both cases are distinguishable from the case at hand.

First, in *Gibson* and *Collins*, trial occurred before the claimant completed vocational rehabilitation; whereas, in the case before us, trial was held after Grandt completed vocational rehabilitation. Unlike the situations in *Gibson* and *Collins*, the trial court in the instant case did not postpone a determination of loss of earning power or speculate about it. Rather, the trial court in this case made a loss of earning power determination based on all of the evidence available to it at the time of trial.

Second, Grandt received compensation for loss of earning power during the period between the dates of MMI and completion of vocational rehabilitation. This alleviates the principal concern expressed by the Nebraska Supreme Court in *Gibson*—that despite the trial judge's finding that Gibson had suffered a substantial loss of earning power, by deferring determination of the extent of loss until completion of vocational rehabilitation, the judge effectively denied Gibson any compensation for loss of earning power until completion of all the appeals. In the

instant case, the compensation Grandt received for loss of earning power during the full period of time between MMI and completion of vocational rehabilitation was calculated without any regard to the potential effect of the pending or future vocational rehabilitation. Also of note is the fact that Grandt received temporary total disability benefits while completing her vocational rehabilitation—again alleviating the *Gibson* court's concern that the injured worker would be without benefits during vocational rehabilitation.

Grandt also argues that the language of the court's opinion in *Gibson*, which we quoted at length above, dictates that loss of earning power must be determined as of the date of MMI without regard to the time at which the compensation court is called upon to make that determination. Grandt asserts that because the Legislature has not amended § 48-121(2) or Neb. Rev. Stat. § 48-141 (Reissue 2004) to address the timing of the determination of loss of earning power, this court must presume that the Legislature has acquiesced in the interpretation of those statutes contained in *Gibson*. However, as discussed above, due to factual differences, the holding in *Gibson* does not apply to the case at hand. In the case before us, the compensation court made a determination of Grandt's loss of earning power as soon after Grandt attained MMI as the court was called upon to make that determination.

We also observe that in *Collins v. General Casualty*, 258 Neb. 852, 858, 606 N.W.2d 93, 98 (2000), the Nebraska Supreme Court stated that "since Collins had reached [MMI], the trial judge was obligated to determine his loss of earning power, and . . . the trial judge erred in speculating what would be the result of the vocational rehabilitation when determining loss of earning capacity." We find it significant that the Supreme Court addressed the issue merely as a problem of speculation. This implies that if the vocational rehabilitation had been completed, then the trial court properly could have considered the results. In the instant case, where the vocational rehabilitation was completed before the trial court was called upon to determine the loss of earning power, the implication from *Collins* supports the trial court's determination of loss of earning power as of the time that Douglas reduced Grandt's benefit.

This result provides Grandt with the prompt payment of benefits and fully recognizes her greater loss of earning power between MMI and completion of vocational rehabilitation—which seems to us to be fully consistent with the purposes of the Act set forth above.

Multiple Losses of Earning Power.

Grandt's other assignment of error alleges that the trial court erred in finding that she had sustained two different losses of earning power. This assignment of error does not accurately reflect the trial court's award.

[10] As we have discussed above at some length, the trial court merely determined, as soon after Grandt reached MMI as the court was called upon to make a determination, the extent of Grandt's loss of earning power. Grandt's assignment of error on this matter relies upon her earlier argument that the trial court was required to retroactively look to the extent of loss of earning power as of the date of MMI and disregard the documented change in loss of earning power flowing from completion of vocational rehabilitation. For the same reasons that we have already rejected that argument, we conclude that this assignment of error also lacks merit.

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not err in considering the beneficial effects of vocational rehabilitation on Grandt's loss of earning power, and we affirm.

AFFIRMED.

GARY DEAN HUGHES, APPELLEE, V.
MARY BETH HUGHES, APPELLANT.

706 N.W.2d 569

Filed November 22, 2005. No. A-04-939.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.

2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Judgments: Evidence: Appeal and Error.** Where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Divorce: Property Division.** In determining and dividing the marital estate, the proper methodology is a three-step sequential process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties.
6. ____: ____. The purpose of a property division is to distribute the marital assets equitably between the parties.
7. ____: ____. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
8. **Divorce: Property Division: Proof.** Property acquired by one spouse through gift or inheritance ordinarily is set aside to the individual receiving the inheritance or gift and is not considered a part of the marital estate, unless the other spouse has contributed to the improvement or operation of the property. Evidence is required to show the value of the contributions and that the contributions were significant.
9. ____: ____: ____. For inherited money expenditures to be set aside as nonmarital property, it is insufficient to simply show the amount of the expenditures.
10. ____: ____: ____. Where there is commingling of marital property and inherited funds, it is necessary that there be proof of the monetary effect of the inherited money expenditures on the value of the marital asset before it can be concluded that the party claiming the nonmarital property set aside has carried his or her burden of proof.
11. **Property Division.** A set-aside of inherited property requires identification of the inherited property.
12. **Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
13. **Divorce: Property: Interventions.** The right of third parties to intervene in divorce proceedings is very limited, but may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in the dissolution action.
14. **Child Support.** Earning capacity, which includes money available from all sources, may be used in lieu of a parent's actual income.
15. ____. Income averaging for the purpose of child support is to be used when there are yearly fluctuations in a parent's income, rather than when the supporting parent's income is consistently increasing or decreasing.

16. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
17. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
18. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
19. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed as modified.

Heather Swanson-Murray and Mandi J. Schweitzer, of Yeagley & Swanson-Murray, L.L.C., for appellant.

John O. Sennett and Julianna S. Jenkins, of Sennett, Duncan, Borders & Jenkins, for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

I. INTRODUCTION

Mary Beth Hughes appeals the order of the Garfield County District Court, which dissolved her marriage to Gary Dean Hughes. The case is complicated by the fact that assets from Gary's deceased mother's trust have been improperly transferred and are now part of property which must be dealt with in this dissolution action, and the evidence does not allow accurate tracing of such trust assets.

II. FACTUAL AND PROCEDURAL BACKGROUND

Gary and Mary were married on May 26, 1979. At the time of the June 15, 2004, trial, Gary was 51 years old and Mary was 46 years old. During the marriage, the parties had two children and adopted a third child. At the time of trial, the parties' son, Jason, was 24 years old, and their daughter Kaycee was 19. Allison, born April 6, 1994, was the only child at issue in the proceedings.

Gary is employed with the North Loup River Public Power and Irrigation District, earning a gross monthly salary of $1,875. Until 1993, Mary was employed outside the home. From 1993 until the parties' separation, Mary stayed home as the primary caregiver for the children and operated the parties' business on a property known as Trapper's Creek. At the time of trial, Mary worked as a seasonal employee, earning $5.50 per hour, for 40 hours per week from May to October. She testified that she would need to obtain other employment and that she had a "[s]ecretarial" associate degree. Mary said that there was employment available in the area, much of it secretarial work for $8 per hour.

On September 18, 1992, the parties purchased the real estate known as Trapper's Creek for $110,000, on which property they later operated the aforementioned business. Emma A. Hughes, Gary's mother, loaned the parties $40,000 for the purchase of Trapper's Creek, and the parties obtained a loan for the remaining $70,000 from another source. At the time of trial, there was still a debt of $24,296.86 associated with Trapper's Creek. The debt did not include the loan from Emma, which was forgiven when she died. Trapper's Creek includes a cabin and some land used for "recreation," such as hunting and fishing, as well as approximately 80 acres used for growing alfalfa. Trapper's Creek is located next to land owned by the " 'Emma A. Hughes Family Trust' " (Emma's trust). The land owned by the trust includes 80 acres, as well as two residences, one of which Gary and Mary lived in, rent free and tax free, during their entire marriage. Gary became the trustee of Emma's trust upon her death in October 1993.

Emma's trust provided, among other things, that $25,000 each in life insurance proceeds would be distributed to Gary, Mary, Jason, and Kaycee. Gary would receive the income from the trust's 80 acres and two residences until age 65. The trust provides that when Gary reaches 65, the real estate will pass to Jason and Kaycee, free of the trust. As for the residue of the trust, meaning all assets except the 80 acres and the two residences, half is to be "allocated" to Gary, from which half he is to receive the income until age 65, at which time the principal and any then accumulated income of his allocation will be distributed to him.

The other half of the residue is to be divided by allocating a quarter of the total to Jason and the remaining quarter to Kaycee. The interest or income on Jason's and Kaycee's allocations "shall be accumulated and become a part of the principal" until each attains the age of 21. From age 21 to 25, they each will receive the earnings on their allocations. Upon reaching age 25, they each are to receive half the principal remaining in their allocations of Emma's trust. At age 30, each will receive the balance of their allocations of Emma's trust, free of the trust. We note that the only separate trusts to be established via Emma's trust are two separate "educational" trusts for Jason and Kaycee to be funded by $25,000 per child from Emma's life insurance proceeds, which we have previously mentioned. Otherwise, Emma's trust is to remain intact, with a "residuary miscellaneous account" to be allocated as discussed above—Emma's trust does not provide for the establishment of separate trusts to handle the allocations. However, the record reveals that at some point, separate trusts, in addition to the educational trusts, were established by Gary for Jason and Kaycee using assets from Emma's trust; but the details about how this was done and the assets used to fund the trusts are extremely sketchy. We point out these facts at this time as a precursor to our later finding that transfers by Gary from Jason's, Kaycee's, and Emma's trusts to a trust which Mary established for herself were improper.

On March 30, 1994, Gary and Mary each executed separate living revocable trusts. On that same day, Gary and Mary conveyed a one-half interest in Trapper's Creek to each of their trusts. Mary testified that she received $25,000 in life insurance proceeds from Emma's trust, but that she could not definitely say that the entire amount went into the "Mary B. Hughes Living Revocable Trust" (Mary's trust). In October 2000, Gary signed letters authorizing the transfer to Mary's trust of 70 shares of "Microsoft" from Kaycee's trust, 145 shares of "Qwest Communications" from Emma's trust, and 256 shares of "Bank One" as well as 25 shares of "Sun Microsystems" from Jason's trust. The evidence at trial showed that the investment or brokerage account in Mary's trust was valued at $63,369.23 as of August 29, 2003.

Gary testified that Emma's trust paid for approximately $25,000 to $30,000 worth of "improvements" to Trapper's Creek which included putting in a well, a septic tank, and a deck; putting on siding; and redoing a roof and a chimney. Emma's trust sometimes paid the mortgage and real estate taxes on Trapper's Creek.

On July 13, 2004, the district court entered the decree dissolving the parties' marriage, awarding the care, custody, and control of Allison to Mary and ordering Gary to pay alimony of $100 per month for 10 years as well as child support of $387 per month to Mary. The district court also divided the parties' property, finding that Gary's "evidence was more credible than [Mary's] as to values and proposed disposition of the marital property." The court awarded Gary a credit for $38,369 "for funds inherited by him from [Emma's trust]" and found that there was evidence that funds from Emma's trust were used to improve Trapper's Creek, which improvements enhanced its value by "at least $20,000," resulting in a nonmarital credit in that amount to Gary. The district court also ordered Gary to pay Mary $68,324.67 in order to make the division of the property equal. Mary appeals.

III. ASSIGNMENTS OF ERROR

Mary asserts that the district court erred in (1) awarding Trapper's Creek to Gary, (2) giving Gary a credit for an increase in the value of Trapper's Creek due to improvements which were paid for with Gary's inherited funds, (3) giving Gary a credit for $38,369 in inherited funds, (4) failing to give Mary a credit for $25,000 in inherited funds, and (5) failing to consider Gary's income from all sources in determining his child support and alimony obligations.

IV. STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003).

[2-4] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002). However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.* A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Velehradsky v. Velehradsky*, 13 Neb. App. 27, 688 N.W.2d 626 (2004).

V. ANALYSIS

1. District Court's Division of Property

We set forth the district court's calculation of how the property was valued and divided:

Item	Gary	Mary	Total
Household Goods	$ 6,270.00	$ 10,325.00	$ 16,595.00
Checking and Savings	3,896.64	2,123.52	6,020.16
Vehicles	5,995.00	12,350.00	18,345.00
Farm and Business	13,910.00	13,071.00	26,981.00
Real Estate	207,284.00	0.00	207,284.00
Life Insurance	95,474.46	75,527.26	171,001.72
Miscellaneous	6,419.00	1,017.00	7,436.00
	$339,249.10	$114,413.78	$453,662.88
Mortgages	($ 24,296.86)	$ 0.00	($ 24,296.86)
Secured Creditors	(3,812.04)	0.00	(3,812.04)
Unsecured Creditors	(1,726.68)	(18.60)	(1,745.28)
	$309,413.52	$114,395.18	$423,808.70
Mary's Trust (funds from Emma's Trust)	(38,369.00)		(38,369.00)
Emma's Trust (funds from Trapper's Creek)	(20,000.00)		(20,000.00)
	$2[5]1,044.52	$114,395.18	$3[6]5,439.70

The court divided what it considered as the marital estate so as to give each party an equal share ($365,439.70 ÷ 2 = $182,719.85), which division resulted in an equalization payment of $68,324.67 ($182,719.85 – $114,395.18) from Gary to Mary that the court ordered to be paid within 90 days.

[5] Mary's assignments of error concerning the property division call into question the trial court's methodology in determining and dividing the marital estate. The proper methodology, a three-step sequential process, is now firmly established. See *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). The first step is to classify the parties' property as marital or nonmarital. *Id.* The second step is to value the marital assets and marital liabilities of the parties. *Id.* The third step is to calculate and divide the net marital estate between the parties. *Id.*

(a) Trapper's Creek

[6,7] Mary asserts that the trial court erred in awarding Gary Trapper's Creek. The purpose of a property division is to distribute the marital assets equitably between the parties. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Id.* Mary was awarded one-half of the marital estate by the trial court. Gary testified that Trapper's Creek did not generate enough income to pay for the improvements to that property or to pay the principal and interest payments, real estate taxes, and expenses associated with the property. Because Trapper's Creek did not generate enough income, Emma's trust was used to pay many of the financial obligations for Trapper's Creek. Therefore, as a practical matter, had Mary been awarded Trapper's Creek, at a value of $50,000 as she desired, she would have needed a source of income to help fund and operate the business, in addition to needing to pay Gary a judgment to equalize the property division; and we note that there is no credible evidence that Trapper's Creek is worth only $50,000. The evidence is that Trapper's Creek has never made a profit and that secretarial work, which comports with Mary's education,

skills, and experience, is readily available for her. Moreover, Trapper's Creek is directly adjacent to the real property owned by Emma's trust, including the residence in which Gary has a life estate, making an award of Trapper's Creek to Mary an awkward proposition. For all of these reasons, the trial court did not err in awarding Trapper's Creek to Gary.

(b) Improvements to Trapper's Creek

Mary asserts that the district court erred in giving Gary credit for "funds expended on Trapper's Creek from [Emma's trust] during the marriage." Brief for appellant at 18. The district court's decree states that the court found "credible evidence to warrant a credit to [Gary] for funds [that] were used from [Emma's trust] to improve the Trapper's Creek property and that such improvements enhanced the value of Trapper's Creek by at least $20,000." The appraisal of Trapper's Creek cited by the court for the latter finding is dated August 28, 2003, and states that at Trapper's Creek, the dryland is worth $15,080, the grassland and trees are worth $120,204, the cabin is worth $20,000, and the 80 acres being used for alfalfa are worth $52,000, for a total value of $207,284.

The September 1992 purchase agreement for Trapper's Creek allocates the purchase price among various aspects of the property, including $25,000 for the "house," now referred to as "the cabin"; $2,500 for a "domestic well"; and $75,000 for the land and fences. Although we recognize that such allocations can have secondary purposes somewhat affecting their reliability, in this instance, the allocations are worthy of note. The appraisal of Trapper's Creek in evidence at trial, mentioned above, shows that the land has increased in value by about $120,000, but that the cabin is now worth $5,000 less than was allocated to it in the purchase agreement. Moreover, the record does not tell us when the $25,000 to $30,000 from Emma's trust was spent on "improvements." The significance of this latter fact is that the appraisal used by the trial court is "as of" August 28, 2003, whereas the trial was over 10 months later on June 15, 2004. Thus, one predicate to any set-aside to Gary for the $25,000 to $30,000 spent on Trapper's Creek from Emma's trust, or for any portion thereof, is proof that these expenditures

are not already included in the August 28, 2003, appraisal, which values the entirety of Trapper's Creek at $207,284, including only $20,000 for the cabin. Gary's evidence does not fill this gap.

Additionally, no one testified that Trapper's Creek was "enhanced" by at least $20,000 as found by the trial court. In fact, Gary's testimony was that the cabin was in need of repairs and upkeep at the time of purchase. The increase in value of Trapper's Creek from 1992, when it was purchased, to 2003 is attributable to the land, not any enhancement of the cabin. These shortcomings in the evidence necessarily undercut the trial court's decision to set aside $20,000 to Gary for expenditures originating as inherited property from Emma's trust.

[8-10] Mary concedes in her brief that funds from Emma's trust were used to pay for expenses and upkeep of Trapper's Creek. However, she claims that there is no evidence in the record showing "the value of the contribution upon which the claim is made." (Emphasis omitted.) Brief for appellant at 20. In support of this argument, she refers us to *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). *Tyler* held that property acquired by one spouse through gift or inheritance ordinarily is set aside to the individual receiving the inheritance or gift and is not considered a part of the marital estate, unless the other spouse has contributed to the improvement or operation of the property. However, in *Tyler*, the court made it clear that if this exception applies, evidence that the contributions were significant is required, as is evidence of the value of the contributions. However, this case is somewhat different, because Trapper's Creek is clearly marital property and the improvements and maintenance were paid for by Emma's trust. (We must make it clear that we are not, in any way, suggesting or deciding that this was a proper use of funds and assets in Emma's trust.) Nonetheless, the basic notion of *Tyler* about proof of value is applicable in a case such as this, where there is intermingling of marital property and inherited property. For inherited money expenditures to be set aside as nonmarital property, it is insufficient to simply show the amount of the expenditures when property is divided in a divorce, because it is elementary that cost or expenditure does not equate with value. Generally, we

look to the fair market value of an asset. See *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). Where there is commingling of marital property and inherited funds, it is necessary that there be proof of the monetary effect of the inherited money expenditures on the value of the marital asset before it can be concluded that the party claiming the nonmarital property set aside has carried his or her burden of proof.

[11] Our holding above seems to logically flow from the well-established rule that a set-aside of inherited property requires identification of the inherited property. See *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003) (if inheritance can be identified, it is to be set aside to inheriting spouse and eliminated from marital estate). In considering the matter of identification, it necessarily involves more than simply showing that the source of the funds spent on the marital property was a gift or inheritance. What is missing in the identification process in this record is evidence that the inherited money expenditures can be traced to something which has ascertainable value. See, e.g., *Ross v. Ross*, 219 Neb. 528, 364 N.W.2d 508 (1985). In the case of purported enhancement of a marital asset, it must be proved that such expenditures increased the value of the marital asset. In this case, proof is required that the expenditures on Trapper's Creek increased the value of that property as a whole, or the cabin in particular, given that the "improvements" to the cabin form the rationale for the trial court's set-aside of $20,000 to Gary.

There are other problems with the $20,000 set-aside to Gary. Gary testified that one of the expenditures for "improvements" was for a well, but no evidence as to an amount was provided. Additionally, the purchase agreement recited that $2,500 of the purchase price was allocated to a "domestic well," which strongly suggests that the property already had a water source. Therefore, absent evidence to the contrary, there is clearly a permissible inference from the record that the expenditure for a new well was not an improvement enhancing value, but merely "maintenance" to retain value and function. Without overworking this topic, it can be said that many of the other expenditures recited in Gary's testimony would appear to be for simply maintenance rather than improvements.

In summary, proof merely that money was spent on real estate does not establish that the real estate's value has been enhanced. Gary did not prove his entitlement to a set-aside as nonmarital property for expenditures from Emma's trust on Trapper's Creek. Therefore, in our revised property division, Trapper's Creek is all marital property to be included in the marital estate at a value of $207,284.

(c) Treatment of Funds and Assets in Mary's Trust

(i) Mary's Life Insurance Proceeds From Emma

Mary also asserts that the district court erred in finding that there was "credible evidence to warrant a credit to [Gary] for funds inherited by him from [Emma's trust] in the amount of $38,369" and in not giving Mary a credit for the $25,000 she received from Emma's life insurance proceeds. An "SII Investments" (SII) account statement dated August 29, 2003, was used to prove the value of Mary's trust, which she established in March 1994. The statement shows the value of the SII account to be $63,369.23, comprising $562.56 in cash and the balance in stocks or mutual funds. Given stock market fluctuations, this account balance seems "stale" considering that the case was tried 10 months later. However, we can only use the evidence introduced by the parties. The district court awarded the full amount of the SII account to Mary, although incorrectly labeling it "Life Insurance." No nonmarital set-aside was made to Mary for any portion of the SII account. However, the trial court awarded Gary a nonmarital property credit of $38,369, which represents the balance of Mary's trust after $25,000 is subtracted from the rounded value of the SII account held by Mary's trust ($63,369 – $25,000 = $38,369).

As outlined earlier, Mary received $25,000 in life insurance proceeds upon Emma's death, pursuant to provisions of Emma's trust. This $25,000 would initially be Mary's separate property. See *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004) (property acquired through gift or inheritance ordinarily is set aside to individual receiving inheritance or gift and is not considered part of marital estate). See, also, *Ainslie v. Ainslie*, 4 Neb. App. 70, 538 N.W.2d 175 (1995). We dispense with further citation of authority, as the principles applied above to the issue of

the $20,000 set-aside to Gary are equally applicable in this discussion. The crucial issues are whether at the time of the divorce such funds still existed and, if not, whether they can be identified and traced to other existing assets. While Mary argues that the $25,000 from the life insurance is contained within her trust as the result of her investing and managing such money, her SII account contains only $562.56 in cash, and no evidence was introduced to establish that any of the stocks now found in Mary's SII account can be traced to the $25,000 she inherited from Emma.

On cross-examination, Mary first said that everything in her own trust but the $25,000 came from Emma's trust. She then said that it "was a little confusing with all of the money that came in after [Emma] died" and that she could not definitely say that "the $25,000.00 in cash" went into her own trust. Mary also admitted that she did not "know for sure" that such amount went into her trust. She ultimately admitted that transfers were made from Emma's trust, Gary's trust, or Jason's or Kaycee's trust to her trust. Mary had the burden of proof to show either that the SII account still contained the original $25,000 in cash—which it obviously did not—or that the stocks and mutual funds in such account could be traced to the $25,000, meaning that the original $25,000 has been "identified" by the evidence. A thorough examination of the record reveals that Mary failed to carry her burden of proof on this issue.

Searching the record for evidence of the source of the stocks and mutual funds in Mary's SII account is not fruitful other than revealing transfers of stock shown by four letters dated October 25, 2000, signed by Gary as trustee (for Emma's, Jason's, and Kaycee's trusts), directing a brokerage house to transfer to the SII account 70 shares of "Microsoft" from Kaycee's trust, 145 shares of "Qwest Communications" from Emma's trust, and 256 shares of "Bank One" as well as 25 shares of "Sun Microsystems" from Jason's trust. The evidence shows that as of August 29, 2003, there were 50 shares of "Sun Microsystems" and 140 shares of "Microsoft" in the SII account—twice the number of shares of these two stocks as were transferred pursuant to the letters. While a stock split might explain the increase in the number of shares, there is no evidence of such a split. In

any event, the stock in these four companies had a value of $14,658.27 in August 2003, and the evidence shows that such portion of the SII account cannot be traced to the $25,000. There is, of course, the unanswered question of how the other $48,710.96 in stock and mutual funds in the SII account was acquired—and it was Mary's burden to prove that such was acquired by use of the $25,000, as such fact cannot be assumed or presumed when the starting point in this analysis is her uncertain testimony about whether the $25,000 in life insurance proceeds from Emma was ever placed in her trust, as well as her statement in her testimony that "all the rest of the money" in her SII account "[p]robably" came from the other trusts, if she did not put the $25,000 in her trust. Therefore, on this record, the trial court did not err in failing to set aside $25,000 from the SII account to Mary as her separate inherited property.

(ii) Gary's "Inheritance" From Emma of $38,369

We now turn to the $38,369 that the trial court set aside as a "credit to [Gary] for funds inherited by him from [Emma's trust]." Mary assigns this set-aside as error, asserting that such funds are part of the marital estate. Although the trial court did not explain how it arrived at this amount, it is evident that such figure is the balance in the SII account remaining after Mary's claim of $25,000 is deducted from the account's value and the difference is rounded to the nearest dollar. The import of the trial court's calculation is acceptance of Mary's assertion that the SII account contains $25,000 of her separate money, but rejection of her claim that such amount should be set aside to her, while at the same time Gary is awarded a credit, as his inherited property, of an amount equal to the balance of the SII account after a $25,000 deduction. While this award to Gary and the method of setting the amount may not be completely logical, our study of this case makes it apparent that Gary and Mary's cavalier treatment of the restrictions in Emma's trust has created a financial and accounting morass. Therefore, the lack of comprehensive evidence documenting and tracing their handling of Emma's trust assets may account for the district court's result. To put it another way, a rough record in a complicated

divorce case sometimes means that "rough justice" is the best that can be done.

With that prelude, we return to the subject of how the stocks in the SII account were acquired, and we now consider the provisions of Emma's trust. When the document creating that trust is closely studied, it is clear that the four transfers of stock detailed in the above-mentioned letters were improper, to the extent that such stock was corpus or traceable to corpus of the trust which was to be held in the residuary miscellaneous account of the trust (there was no proof by anyone that such stock was not corpus). The transfers were clearly improper because until Gary reached age 65, he had no right to access the principal of Emma's trust. And, obviously, he could not properly transfer principal to Mary or transfer money or assets representing Jason's and Kaycee's allocations of Emma's trust to himself or to Mary before he reached age 65. Other than the trust's 80 acres and the two residences earlier discussed, all of Emma's residuary estate was to remain in the residuary miscellaneous account of Emma's trust—allocated 50 percent to Gary and 25 percent each to Jason and Kaycee, but with the corpus of such allocations remaining "off limits" to the three beneficiaries, Gary, Kaycee, and Jason, at all times during the marriage (as well as for a considerable time in the future, because Gary is not entitled to receive any of the corpus until he is age 65; he was 51 at the time of the trial).

Although the district court's decree is silent on the propriety of the transfers of stock, we review the record de novo, and the issue of the set-aside to Gary of $38,369 as property inherited from Emma necessarily requires us to examine the propriety of the transfers. In addition to our finding above, we note that during oral argument of this appeal, Gary's counsel candidly conceded that the transfers were improper. And Gary admitted much the same at trial, as well as the fact that there were no provisions in Emma's trust authorizing him to use Emma's trust funds to pay mortgage payments and real estate taxes on Trapper's Creek, as was apparently routinely done. Therefore, because the evidence fails to show that the noncash assets of Mary's trust, 99 percent of the SII account, were the result of proper transfers

from Emma's trust, the assets in the SII account cannot be considered marital property and Mary's claim to that effect is clearly without merit.

That said, we hasten to point out that our conclusion about the impropriety of the transfers is reached only in the context of determining whether the trial court erred by not including the $38,369 under discussion in the marital estate, as Mary wants. Rejecting her assignment of error is a far different conclusion from saying that Gary was lawfully entitled to access the corpus of Emma's trust assets, including any that may now be residing in the SII account. The record strongly suggests that Gary and Mary routinely ignored the restrictive terms of Emma's trust.

The inheritance tax worksheet for Emma's estate shows that her net estate was approximately $651,000, of which $207,000 was attributed to the trust's 80 acres and, though they are not explicitly mentioned, the two residences. Thus, the "residuary miscellaneous account" of Emma's trust would contain approximately $444,000 of corpus. When the statements for the accounts which would make up the residuary miscellaneous account as of May 30, 2003, are examined, there is approximately $172,142 left—in a situation where no corpus of the residuary miscellaneous account could have yet been properly used or spent.

Clearly, there are entities and individuals, not parties to this action, who likely have potential claims against Gary, Mary, or both concerning the SII account, the transfers, and the handling of Emma's trust. Obviously, we cannot resolve such claims in this action, as neither the claims nor the parties are before us.

While Gary is ultimately the 50-percent beneficiary of the corpus of the trust, he may have a financial day of reckoning with the other beneficiaries—his children. Therefore, while the district court's set-aside to Gary of $38,369 as an inheritance is really not supported by the evidence and he certainly did not carry his burden to prove that such sum was his inherited property, the trial court's division will not be set aside. Our reasoning is simply that the result strikes us as a fair and equitable result—considering all of the unique circumstances we have detailed in this opinion, as well as other considerations which are revealed to some degree by the evidence. In other words,

this seems the best result that can be accomplished, and such result has the advantage of putting more assets in Gary's hands should the other beneficiaries seek to hold him accountable for his handling of Emma's trust. And, in the final analysis, in approximately 13 years, Gary is entitled to 50 percent of the residuary corpus.

[12] This seems an appropriate point to recall that the division of property in a dissolution action is based on equitable principles and that the ultimate test for determining the appropriateness of a division of property is reasonableness as determined by the facts of each case. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). There is no mathematical formula by which such awards can be precisely determined, because each depends upon the facts of the particular case. *McCollister v. McCollister*, 219 Neb. 711, 365 N.W.2d 825 (1985). Finally, we note that the record is clear that Gary and Mary were both involved in the decisions about Emma's trust and that both participated in the transfers and usage of the trust's assets. Thus, while the result here may not be perfect and precise, we think it is as fair and equitable as we can make it, under these unusual circumstances, recalling what we said in *Griess v. Griess*, 9 Neb. App. 105, 116-17, 608 N.W.2d 217, 225 (2000):

> "[E]quitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973). In *Janke v. Chace*, 1 Neb. App. 114, 487 N.W.2d 301 (1992), we also said that where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.

[13] To conclude this issue, we note that attached to the court's decree are a property statement and the court's property award and division worksheet, the latter document containing an award of "Life Insurance" in the amount of $75,527.26 to Mary. But, it really is not life insurance. Rather, it is $4,354.46 of "School retirement," $7,803.57 from "AmerUS Life," and the $63,369.23 from the SII account which total $75,527.26. Thus, Mary was actually awarded possession of the SII account containing the $63,369.23, and Gary's set-aside was accounted for

as a credit against this equalizing judgment to Mary. So that there is no misunderstanding, we point out here that we affirm that result. However, we hasten to add that our decision resolves the matter of possession and use of Mary's trust's SII account only as between Mary and Gary in his capacity as an individual, not as to Gary in his capacity as trustee of Emma's trust. In other words, our affirmance of the district court's award is not a finding, binding on those who might later assert claims against such account or against Gary (individually or as trustee) or Mary, that Mary or Gary is the lawful owner of any portion of the assets in the SII account. We simply leave the account in Mary's possession as an equalizing judgment and give Gary a credit against that equalizing judgment for a portion of the SII account. While it was possible for other persons or entities to have sought intervention in this action to assert claims against assets in the hands of Gary and Mary, no such relief was sought. See *Yelkin v. Yelkin*, 193 Neb. 789, 229 N.W.2d 59 (1975) (right of third parties to intervene in divorce proceedings is very limited, but may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in dissolution action). No potential claims of the various trusts and no claims of Jason and Kaycee are before us, and in any event, the record is inadequate to resolve any such claim. Compare *Parker v. Parker*, 1 Neb. App. 187, 492 N.W.2d 50 (1992) (district court erred in divorce action in attempting to mandate disposition of account under Nebraska Uniform Gifts to Minors Act, where parties' son was no longer minor).

2. Calculating and Dividing Marital Estate

The second step in an equitable property division is to value the marital assets and marital liabilities of the parties. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in Neb. Rev. Stat. § 42-365 (Reissue 2004). *Medlock v. Medlock, supra*. No error is assigned to the district court's valuation of the property in the instant case; nor does either party claim that an equal division is not appropriate. Thus, we accept the district court's valuations as stated in the decree and accept its finding that the

marital estate should be equally divided. Our calculations using the three-step sequential methodology are as follows, after the modification previously outlined in this opinion:

Assets	**Gary**	**Mary**
Household Goods	$ 6,270	$10,325
Checking and Savings	3,897	2,124
Vehicles	5,995	12,350
Farm and Business	13,910	13,071
Trapper's Creek	207,284	0
Life Insurance/Retirement	95,474	12,158
Miscellaneous	6,419	1,017
SII Account		25,000
TOTAL	$339,249	$76,045
Liabilities		
Mortgages	$ 24,297	
Secured Creditors	3,812	
Unsecured Creditors	1,727	$ 19
TOTAL	$ 29,836	$ 19
Net Value of Property Received	$309,413	$76,026

Net Marital Estate:
$309,413 + $76,026 = $385,439 ÷ 2 = $192,719.50
Equalization Payment to Mary:
$192,719.50 – $76,026 = $116,693.50
Gary's Credit Against Judgment: $38,369
Mary's Equalizing Judgment From Gary: $78,324.50

Therefore, initially, Gary's equalization payment to Mary, rounded to the nearest dollar, was $116,693. However, because Mary retains all of the SII account in her possession and because Gary receives a credit for $38,369 of the SII account, requiring Gary to pay Mary a judgment which includes 50 percent of the $38,369 would constitute a substantial and undeserved "windfall," given our previous discussion about the propriety of the handling of Emma's trust. Therefore, the equalization payment is reduced by $38,369 as the most straightforward method of "balancing the ledger" between Gary and

Mary. The judgment to be paid by Gary to Mary is $78,324, and the district court's order is so modified. The district court's previous judgment of $68,324.67 was to be paid within 90 days of the entry of the decree. Therefore, Gary shall pay Mary the sum of $68,324 within 90 days after our mandate is issued, and the remaining balance of $10,000 shall be paid within 180 days of the issuance of the mandate. Interest shall not accrue on such amounts unless they are not timely paid, in which event the statutory interest rate on judgments in effect at the time when the delinquency occurs shall apply until such amounts are paid in full.

3. Gary's Income and Child Support

Mary argues that the trial court erred in failing to consider all of Gary's income in calculating child support and alimony. We agree as concerns child support. The trial court stated in its order that the child support calculation was based solely on Gary's "regular employment" because the "income from [Emma's trust] property appears sporadic and speculative." Paragraph D of the Nebraska Child Support Guidelines provides that in calculating child support, the total monthly income of both parties "from all sources" is to be used.

The record contains a "2003 Rental Agreement" for the "Hughes Family Trust Farm," which agreement provides that the tenants agreed to pay Emma's trust $135 per acre for 67.6 acres in 2003. Mary testified that this rent was paid; therefore, the trust received $9,126 in 2003 for farm rental, and Emma's trust directs that this income is to be paid to Gary, at least annually. Gary and Mary's 2002 joint income tax return shows that Emma's trust generated interest income of $1,468 and other income of $401. Gary and Mary's 2001 joint income tax return shows that Emma's trust produced interest income of $656, "ordinary dividends" of $6,723, and other income of $2,488. Their 2001 return also shows rent received of $3,600 for the "farm house," which we assume to be the rental house located on Emma's trust property because Gary testified that he intended to rent out that house and that he previously received about $300 per month in rent from it. The parties' 2000 joint income tax return provides that the trust generated interest and ordinary

dividends of $5,256 and other income of $3,076 and that the farmhouse generated rent received of $300. Thus, the evidence in the record provides that the income Gary received from the trust is hardly speculative or uncertain, particularly with respect to the land and residences, although the amounts Gary is entitled to receive might vary somewhat from year to year. But, variance from year to year in the amounts received does not justify the total exclusion of the substantial income that Gary receives from the nonresiduary portion of Emma's trust.

[14,15] From 2000 to 2003, Gary's average income from Emma's trust, calculated using the figures above, was $8,273.50. Using this 4-year average fairly and reasonably accounts for the variances in amounts from year to year. Including the trust income more accurately reflects Gary's earning capacity; earning capacity may be used in lieu of a parent's actual income, and it includes money available from all sources. See *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001). Moreover, The Nebraska Child Support Guidelines specifically allow for income averaging in certain circumstances. The fifth comment to worksheet 1 of the guidelines states, "In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent . . . ." Case law suggests that income averaging is to be used when there are yearly fluctuations, rather than when the supporting parent's income is consistently increasing or decreasing. See *Willcock v. Willcock*, 12 Neb. App. 422, 675 N.W.2d 721 (2004).

Thus, in addition to Gary's gross monthly employment income of $1,875, we find that his income from all sources includes at least an additional $8,273 per year. The trial court erred in not including Gary's income generated by Emma's trust when calculating child support. In our reworking of the child support worksheet, attached as appendix A, Gary's income, rounded to the nearest dollar, is $2,564 per month, resulting in a child support payment of $493 per month which shall be effective retroactively to July 1, 2004, the date provided in the trial court's decree. The trial court is directed to adopt our appendix A as its worksheet and to order child support as set forth above.

4. ALIMONY

[16,17] Mary asserts that the district court erred in "establishing the alimony award to Mary without taking into consideration Gary's considerable nonmarital assets as well as in not considering Gary's income from those nonmarital assets." Brief for appellant at 26. In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id.* One of the predicates of Mary's argument concerning Gary's nonmarital assets has been undercut by our modification of the property division, as well as by the fact that the residuary miscellaneous account of Emma's trust has been improperly used by Gary—with Mary's admitted involvement.

[18,19] The district court ordered Gary to pay $100 per month beginning July 1, 2004, for a period of 10 years. In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Id.* In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id.*

Gary and Mary were married for 25 years. Gary's gross income from all sources is about $30,773 per year. Mary's gross income at the time of trial was about $11,400 per year, but she testified that she was looking for different employment and that she could obtain a secretarial position making $8 per hour, which calculates into a gross income of about $15,400. At the time of trial, Gary was 51 years old and Mary was 46 years old, and no health problems were discussed in the record which would interfere with either party's ability to work. During the marriage, the parties lived in a home owned by Emma's trust

without payment of rent or taxes; thus, there is no marital home for Mary and the parties' daughter Allison. However, Mary will receive a substantial cash payment within 90 days of our mandate which should mitigate any difficulties regarding her housing situation. While Mary's earnings are modest in today's economy, Gary's earnings are likewise modest, particularly without the beneficence of Emma. Additionally, he will have a significant child support obligation. While additional alimony could have been awarded on this record, we are unable to say that the trial court's award of alimony is untenable, and we will not disturb its award.

VI. CONCLUSION

We affirm the court's order granting dissolution of the marriage and granting Mary custody of Allison. We modify the decree to order Gary to pay $68,324 of the property division judgment within 90 days of the entry of the district court's order and an additional $10,000 within 180 days of such time, with interest as provided above. We also modify the amount of child support so that it is $493 per month, effective July 1, 2004. In all other respects, the decree of dissolution is affirmed.

AFFIRMED AS MODIFIED.

(*See page 252 for appendix A.*)

APPENDIX A

WORKSHEET 1

BASIC NET INCOME AND SUPPORT CALCULATION

		MOTHER	COMBINED	FATHER
1.	Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)*	953.00		2,564.00
2.	Deductions**			
	a. Taxes***	0.00		333.62
	b. FICA	72.90		196.15
	c. Health insurance****	0.00		0.00
	d. Retirement	0.00		0.00
	e. Child support previously ordered for other children	0.00		0.00
	f. Regular support for other children	0.00		0.00
	g. Total deductions	72.90		529.77
3.	Monthly net income (line 1 minus line 2g)	880.10		2,034.23
4.	Combined monthly net income		2,194.33	
5.	Combined annual net income		34,971.93	
6.	Percent contribution of each parent (line 3, each parent, divided by line 4)*****	30.2%		69.8%
7.	Monthly support from table 1		706.15	
8.	Each parent's monthly share (line 7, times line 6, for each parent)	213.25		492.90

* Court will require copies of last 2 years' tax returns to verify "total income" figures and copies of present wage stubs to verify the pattern of present wage earnings, except where a party is claiming depreciation as a deduction from income, in which case a minimum of 5 years' tax returns shall be required. Income should be annualized and divided by 12 to arrive at monthly amounts.

** All claimed deductions should be annualized and divided by 12 to arrive at monthly amounts.

*** Deductions for taxes will be based on the annualized income and the number of exemptions provided by law.

**** The increased cost to the parent for health insurance for the child(ren) of the parent shall be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium.

***** In the event of substantial fluctuations of annual earnings of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent as shown in item 6. The calculation of the average income shall be attached to this worksheet.

STATE OF NEBRASKA, APPELLEE, V. LARRY ANDERSON, APPELLANT.

706 N.W.2d 564

Filed November 22, 2005. No. A-04-1298.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
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.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Courts: Appeal and Error.** Where a cause has been appealed to a higher appellate court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to the higher court. In the absence of plain error, where an issue is raised for the first time in the higher appellate court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.

Appeal from the District Court for Antelope County, PATRICK G. ROGERS, Judge, on appeal thereto from the County Court for Antelope County, PHILIP R. RILEY, Judge. Judgment of District Court affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Larry Anderson appeals from an order of the district court which affirmed his county court conviction on the charge of trespassing in what was formerly his marital home. Regardless of

whether Anderson had an ownership interest in the home, we conclude that the State adduced sufficient evidence to show that Anderson knowingly entered the home without license or privilege. We therefore affirm.

BACKGROUND

At all times relevant to this proceeding, Carol Anderson and Anderson were in the process of dissolving their marriage. Carol and Anderson separated in 2000, and she has occupied the marital home since that time. After Carol filed for divorce in 2000, Anderson lived with his aunt for a period of time and also lived in a rental house. Carol and Anderson had stipulated that with regard to temporary orders, Carol should be awarded the temporary use and possession of the marital home. A district court order dated January 9, 2001, awarded to Carol the temporary use and possession of the home. Carol testified that she was thus to have possession and use of the house during the pendency of the divorce.

In the decree of dissolution rendered May 21, 2002, the district court awarded to Carol the house and real estate upon which it was situated as her sole and separate property. This court subsequently reversed the order of the district court and remanded the cause for a new trial. See *Anderson v. Anderson*, No. A-02-809, 2003 WL 21398219 (Neb. App. June 17, 2003) (not designated for permanent publication).

Carol testified that she experienced some difficulties with Anderson after he moved out of the home. At some point, Anderson was arrested for a criminal act that allegedly occurred at the home in January 2001, and in the course of the court proceeding in regard to that allegation, a bond prohibited Anderson from being at the home. Carol testified that because of this earlier incident, she would not have given Anderson a license or privilege to enter the home for any reason.

On July 7, 2003, Carol was vacationing in Alaska with two children of the marriage, one of whom was Matt. Carol had arranged for her mother to take care of the house and water plants in Carol's absence. Carol had locked the doors and windows of the house and had given her mother a key. Carol testified that from 2001 up until this vacation, she had changed the locks on

the house two or three times. At the time of this vacation, only Carol and her mother had a key to the house and her mother was the only person who was supposed to be in the house while Carol was away. While on vacation, Carol was informed by her mother about a problem with the house, and Carol called the Antelope County sheriff's office.

Anderson testified that he went to the former marital home on two or three occasions while Carol was gone, and there is no dispute that Anderson was inside the former marital home on July 7, 2003. Anderson testified that he and one of Anderson and Carol's children, Aaron, went to the home on July 7 to pick up Matt. According to Aaron, the home was unlocked, so they decided to wait inside for Matt to return from vacation with Carol.

Aaron did not reside at the home. When asked if he had a key to the home, he answered, "Yeah, we might somewhere I suppose." Aaron did not know whether the key was an old key or a new one. Aaron testified that there was a protection order which prohibited Anderson from entering the house and that Aaron "suppose[d]" that Anderson knew of the protection order. Anderson admitted that Carol did not give him permission to be in the house after protection orders were filed in 2001.

Brad Higgins, a trooper with the Nebraska State Patrol, testified that in the late evening hours of July 7, 2003, he observed Anderson's pickup truck parked at the former marital home and Anderson answered the door when Higgins knocked. Higgins and Anderson discussed who actually lived at the residence, and Anderson handed Higgins a document. The document appeared to be an opinion of a court and stated that Anderson "owned the house because his divorce decree was overturned." Higgins testified that Anderson said he "owned some of the property" but did not have any clothes in the house. Higgins testified that he explained to Anderson that "it was just like a rental property. [Anderson] may own it but he didn't have a right to actually be in there. At that point in time, [Anderson] said — that was way different. And he asked [me] to leave." Higgins left, and after speaking with the county attorney, Higgins returned to the former marital home. At that time, Anderson's pickup was parked inside the garage and the garage door was down. Higgins told

Anderson that Anderson needed to leave or he would be arrested. Anderson left the house at approximately 11:45 p.m.

On October 3, 2003, the State filed a complaint in the county court charging Anderson with first degree trespassing. Following a bench trial, the county court found Anderson guilty of trespassing and imposed a sentence of 18 months' probation, a 90-day suspended jail sentence waivable upon successful completion of probation, and a $1,000 fine. Anderson appealed the conviction and sentence to the district court, and the district court affirmed. Anderson now appeals to this court.

ASSIGNMENTS OF ERROR

Anderson alleges (1) that the evidence was insufficient to support the conviction and (2) that the county court erred in determining the essential elements of the offense by using a negligence standard.

STANDARD OF REVIEW

[1] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005).

[2] Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Sparr*, 13 Neb. App. 144, 688 N.W.2d 913 (2004).

[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *State v. Dittoe, supra*.

ANALYSIS

Sufficiency of Evidence.

[4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt. *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005). Neb. Rev. Stat. § 28-520(1) (Reissue 1995) provides that "[a] person commits first degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or secretly remains in any building or occupied structure, or any separately secured or occupied portion thereof." Anderson argues that his ownership interest in the property was an affirmative defense to the charge of criminal trespass, even if his interest is disputed, and that "[t]he evidence was insufficient as a matter of law, to establish beyond a reasonable doubt that [Anderson] knew he was not permitted to be in the property." Brief for appellant at 6. Affirmative defenses to prosecution under § 28-520, set forth in Neb. Rev. Stat. § 28-522 (Reissue 1995), are as follows:

> (1) A building or occupied structure involved in an offense under section 28-520 was abandoned; or
>
> (2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
>
> (3) The actor reasonably believed that the owner of the premises or other person empowered to license access thereto would have licensed him to enter or remain; or
>
> (4) The actor was in the process of navigating or attempting to navigate with a nonpowered vessel any stream or river in this state and found it necessary to portage or otherwise transport the vessel around any fence or obstructions in such stream or river.

Notably, an ownership interest is not included as an affirmative defense, and under the facts of this case, subsection (3) is the only affirmative defense that could arguably apply.

Anderson has not resided in the home since 2000. Carol and Anderson stipulated, and the district court ordered, that Carol should be given temporary use and possession of the marital home during the pendency of the divorce proceedings. In dissolving the marriage, the court awarded the home to Carol as her sole and separate property, and this court's mandate reversing and remanding for a new trial was not issued until September 5, 2003—after the date of the incident at issue.

According to the evidence, at one point, a bond prohibited Anderson from being at the former marital home. Carol had the

locks changed several times, and Anderson did not have a key. Carol testified that she would not have given Anderson a license or privilege to enter the home for any reason, and Anderson admitted that Carol had not given him permission to be in the house. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Anderson entered the home knowing that he was not licensed or privileged to do so. This assignment of error lacks merit.

Use of Negligence Standard.

[5] Although the county court's order shows that it found Anderson guilty beyond a reasonable doubt, Anderson argues that the county court erred in using a negligence standard, based upon that court's oral statement, "But I think the bottom line is that on July 7th, 2003 you knew or should have known based on all of the circumstances that you weren't authorized to be in that property." In his untimely filed "Statement of Issues on Appeal" in the district court, Anderson stated that he intended to assign error to "[w]hether the evidence was sufficient to support the conviction" and "[w]hether the sentence imposed was excessive"—and the district court proceeded to consider those two issues. Clearly, the argument that the county court erroneously applied a negligence standard was not assigned to or considered by the district court.

> "Where a cause has been appealed to [a higher appellate court] from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to [the higher] court. In the absence of plain error, where an issue is raised for the first time in [the higher appellate court], it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition."

In re Estate of Trew, 244 Neb. 490, 498, 507 N.W.2d 478, 483 (1993) (quoting *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985)). We find no plain error in the matter before us and therefore disregard the assignment not presented to or passed upon by the district court.

CONCLUSION

We find that the evidence is sufficient to support the conviction. We disregard Anderson's second assignment of error—that the county court erroneously applied a negligence standard—because that issue was not presented to or passed upon by the district court. We therefore affirm the order of the district court affirming the judgment of the county court.

AFFIRMED.

IN RE GUARDIANSHIP OF ANGELA LILLIAN GAUBE, AN INCAPACITATED AND PROTECTED PERSON. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE, V. WILLIAM H. GAUBE AND SANDRA L. GAUBE, APPELLANTS.

707 N.W.2d 16

Filed November 22, 2005. No. A-04-1374.

1. **Guardians and Conservators: Claims: Notice.** A guardian who has individual claims of his or her own against the estate of the ward or protected person is barred from paying the claims which aggregate in excess of $250 without first specifically informing the court of his or her adverse interest and obtaining the approval of the court.
2. **Guardians and Conservators: Claims: Notice: Words and Phrases.** Language expressly limiting powers shall be included on all letters of guardianship or conservatorship in the following language: "You shall not pay yourself or your attorney compensation from the assets or income of your ward without first obtaining an order therefor, after an application, notice to the interested persons, and a hearing thereon."
3. **Guardians and Conservators: Claims: Words and Phrases.** There is no distinction between a guardianship and a conservatorship for the purpose of determining whether payments are "compensation" per the letters of guardianship or letters of conservatorship.
4. ____: ____: ____. Compensation is any form of payment or remuneration made to a conservator or guardian from assets of a protected person.
5. **Guardians and Conservators: Claims: Notice.** When no conservator for the estate of a ward has been appointed, the guardian may not use funds from his or her ward's estate for room and board which he or she, or his or her spouse, parent, or child, has furnished the ward unless a charge for the service is approved by order of the court.
6. **Judgments: Appeal and Error.** Remand is necessary where the trial court may have based its order on an incorrect rule of law.
7. **Public Assistance: Costs: Liability: Proof.** A Nebraska Department of Health and Human Services developmental disability service recipient's liability to service

providers is based on the costs for the services, and there is no further requirement that the department offer proof as to the costs' fairness and reasonableness.

Appeal from the County Court for Douglas County: THOMAS G. MCQUADE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas K. Harmon, of Respeliers & Harmon, P.C., for appellants.

Jon Bruning, Attorney General, and Ronald L. Sanchez, Special Assistant Attorney General, for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

William H. Gaube and Sandra L. Gaube, coguardians for their daughter, Angela Lillian Gaube, appeal from an order of the county court for Douglas County, Nebraska. They appeal the court's order that they repay $25,500 to Angela's account for amounts they paid to themselves for Angela's monthly living expenses and $3,484.74 they paid to third-party retailers, all without court approval. They also contest the court's order that they pay, from Angela's funds, the Nebraska Department of Health and Human Services (DHHS) the sum of $3,948.93 for the cost of services received by Angela.

William and Sandra assert that the county court erred in failing to "ratify" certain payments and in failing to establish that DHHS' claimed costs were fair and reasonable. They also collaterally attack the determination made by DHHS in an order from an administrative appeal that Angela is liable for the cost of services received through DHHS.

We find that the court did not err in ordering William and Sandra to repay Angela's account, because they did not receive prior approval for claims in the amount of $25,500. We find that the court erred in ordering William and Sandra to repay an additional $3,484.74 for other items. Additionally, we find that the court did not err in ordering William and Sandra to pay DHHS costs of services received by Angela, because William and Sandra's assertion that DHHS must prove that costs are fair

and reasonable is incorrect. There is no requirement that costs of services provided be proven to be fair and reasonable in this situation, because the governing statutes provide that Angela's liability for services, to the extent of her ability to pay, is DHHS' cost of providing the services. Accordingly, we affirm in part, and in part reverse and remand for further proceedings.

II. BACKGROUND

Angela was born on February 1, 1982. She "suffers from Down's Syndrome and has limited mental capacity making it difficult for her to protect herself." Brief for appellants at 7. As such, the court appointed William and Sandra as her coguardians.

The "Order Appointing Guardian" lists William and Sandra's powers and duties as coguardians. It expressly provides that William and Sandra "may not use funds from the ward's estate for room and board which the ward, the ward's spouse, parent or child has furnished the ward unless a charge for the service is approved by order of the Court." In addition, the county court issued "Letters of Co-Guardianship," which include a limitation that directs William and Sandra not to pay themselves or their attorney compensation from Angela's assets, "except as approved by an order of this Court."

Until September 2003, Angela's income consisted of wages from her part-time job, supplemental security income, and assistance from the State of Nebraska. In September 2003, Angela inherited $42,000 from her aunt, which inheritance resulted in her supplemental security income's being discontinued.

Angela had been receiving services from DHHS, such as day services and case management services, for which she was not liable for any costs. The day services for Angela consisted of "employment support services with a class component for various skills including life skills." Brief for appellee at 6. The case management services provided by DHHS "consist[ed] of planning, coordination, support and monitoring activities." *Id.* Beginning in July 2003, Angela was required to pay for these services.

Sandra appealed the determination of DHHS that "full payment would have to be made for the developmental disabilities supports and services received by Angela." DHHS held an

administrative hearing on August 13, 2004, to resolve whether full payment was due for the support and services received by Angela. The director of DHHS entered an order on August 23 requiring William and Sandra to pay the full amount for the services provided. The record indicates that DHHS gave Sandra notice of the right to appeal the administrative order, but that she did not appeal it.

William and Sandra had made payments from Angela's account to third parties, and to themselves, without prior court approval. William and Sandra assert that the payments they made to themselves were "reimbursement . . . of bills including the cost of room, board, transportation, clothing, telephone, [and] entertainment." Brief for appellants at 8.

On August 23, 2004, William and Sandra filed an "Application for Approval of Accounting and for Review of the Guardian's Expenditures." The application requests, in pertinent part, an order "[p]rescribing the nature and amounts of expenses that may be incurred by [William and Sandra as] Co-Guardians of Angela . . . without prior approval of the court of each such expense" and "approving and ratifying the payment of the expenses previously made by [William and Sandra as] Co-Guardians of Angela."

On September 17, 2004, DHHS filed a "Motion for Payment of Claim and Objection to Approval of Accounting" in the above proceeding. The motion asserts, inter alia, that DHHS has a claim against Angela and her estate for services and that Angela's "liability was affirmed by [the D]HHS Director [in] her Finding and Order dated August 23, 2004, in the administrative appeal proceeding under the Administrative Procedure Act." Additionally, regarding its objection to the approval of accounting, DHHS asserted that payments were made by William and Sandra to themselves without advance court approval, contrary to Neb. Rev. Stat. § 30-2628(a)(4)(ii) (Cum. Supp. 2002), Neb. Ct. R. of Cty. Cts. 37(II) (rev. 2000), and the letters of coguardianship.

On October 12, 2004, the hearing was held on William and Sandra's application and DHHS' motion. The court heard testimony from Sandra; Lori Ann Sperry, a service coordinator for DHHS; and Christine Ann Ford, an accountant for DHHS.

Sandra's testimony consisted of information pertaining to Angela's financial history and expenses. She explained her failure to seek prior approval from the court for payments made to William and herself and to third parties from Angela's account and requested the court's ratification of those payments. Sperry testified regarding the process used by DHHS in providing services, and specifically regarding the services Angela received. In addition, Sperry provided case management for Angela and was Angela's service coordinator. Ford, as an accountant in the financial responsibility office of DHHS, testified regarding costs and billing of services.

The court entered an order on November 24, 2004, finding that William and Sandra "received $25,500.00 without court approval and paid an additional $3,484.74 for other items without court approval" and that DHHS' claimed costs were shown to be "usual and customary." Therefore, the court ordered William and Sandra to repay $28,984.74 to Angela's account and to pay DHHS $3,948.93 from Angela's funds. This appeal followed.

III. ASSIGNMENTS OF ERROR

William and Sandra have assigned five errors on appeal, which we restate and combine generally into three. They assert that the county court erred (1) by failing to ratify payments made to William and Sandra for Angela's monthly living expenses, (2) by failing to ratify certain payments made from Angela's account to two retailers, and (3) by finding that DHHS' claim must be paid.

IV. ANALYSIS

1. Standard of Review

In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005); *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004); *In re Guardianship &*

Conservatorship of Trobough, 267 Neb. 661, 676 N.W.2d 364 (2004).

An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings. See, *McCray v. Nebraska State Patrol*, 270 Neb. 225, 701 N.W.2d 349 (2005); *Eledge v. Farmers Mut. Home Ins.*, 6 Neb. App. 140, 571 N.W.2d 105 (1997). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *In re Estate of Bauer*, 270 Neb. 91, 700 N.W.2d 572 (2005); *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *McCray v. Nebraska State Patrol, supra.*

2. Application for Approval of Accounting and for Review of Guardian's Expenditures

William and Sandra argue that it is their duty to furnish Angela with the necessaries of life suitable to her condition and that payments made for that purpose from Angela's estate may be ratified and approved by the court. "Ratification," as it is used here by William and Sandra, means that although prior approval of certain expenses is required but was not obtained, the court may nevertheless "adopt" William and Sandra's payments of such expenses at the time of the annual accounting. William and Sandra allege that the court erred in not ratifying payments made on Angela's behalf, including payments they made to themselves and to third parties. Put another way, William and Sandra recognize that they were required to seek prior approval for certain payments made from Angela's estate, but assert that such failure can be remedied by the court's ratification of payments at the time of annual accounting.

We find that the court did not err in ordering William and Sandra to reimburse Angela's estate for payments they made to themselves. Absent prior court approval, William and Sandra

were barred from making individual claims in excess of $250 against Angela's estate, from paying themselves " ' "compensation from the assets or income" ' " of Angela, and from using Angela's funds for room and board which they, as her parents, had furnished. See brief for appellants at 20. However, we find that the court erred in ordering remuneration for certain other unapproved payments made to third parties. The court's decision regarding these payments was not supported by the record, because while these payments were made to third-party retailers without prior approval, such approval was not necessary regarding these payments.

(a) Payments to Coguardians

William and Sandra assert that payments they made to themselves without the court's prior approval may nonetheless be ratified by the court. They allege three grounds upon which ratification should be granted, which we analyze below.

(i) Rule 37: Individual Claims of Coguardians

William and Sandra argue that their request for ratification of payments they made from Angela's account to themselves should be granted because the payments were for reimbursement of Angela's expenses. They assert that they were acting within their duty to supply Angela " 'with the necessaries of life suitable to [her] condition out of [funds from her] estate.' " (Emphasis omitted.) Brief for appellants at 22. However, we find that the court did not err in failing to ratify these payments, because William and Sandra neglected to obtain prior court approval.

[1] County court rule 37, promulgated by the Nebraska Supreme Court and binding upon the county court for Douglas County, forbids a guardian who "has individual claims of his or her own . . . against the estate of the ward or protected person [from paying] the claims which aggregate in excess of $250 without first specifically informing the court of his or her adverse interest and obtaining the approval of the court."

William and Sandra made payments to themselves from Angela's estate, and they assert that these payments "were for the reimbursement of monthly expenses." Brief for appellants at 20. The annual accounting of Angela's estate for the period of

August 31, 2003, to August 4, 2004, reveals 12 disbursements of money to Sandra, each described as "living expenses," in the collective amount of $25,500.

Sandra testified that these disbursements were associated with out-of-pocket expenses" related to Angela, and she further detailed Angela's continuing expenses. She offered estimates for such expenses, including rent, food, clothing, utilities, telephone, security system, transportation, entertainment, and medical. Sandra estimated that Angela's living expenses averaged $2,024 per month during this time period, and Sandra asked the court to approve the payments. However, William and Sandra did not seek the court's prior approval for these payments. They argue that they were unaware of the requirement that they seek court approval, and they acknowledge their mistake. Specifically, Sandra recounted at trial, "I did not think about that simply because under federal law I was required to take those [supplemental security] funds and report to Social Security then how those funds were expended, so I . . . didn't think to carry it over into county court once [Angela] received her inheritance."

Nevertheless, county court rule 37 is clear: No individual claims in excess of $250 were to be made by William and Sandra against Angela's estate without prior approval of the court. Under the facts of this case, we find no exception to this rule. Therefore, William and Sandra's argument that the court should ignore the requirement of prior approval by ratifying these payments because they were for Angela's support is without merit.

(ii) Rule 43 and Letters of Coguardianship

William and Sandra contend that the court should ratify the payments they made to themselves from Angela's assets because the payments were reimbursement for Angela's expenses and not compensation to themselves. We find this argument to be without merit, and under the facts of this case, we hold that such remuneration made to coguardians from the estate of a ward must receive court approval prior to disbursement.

[2] Neb. Ct. R. of Cty. Cts. 43 (rev. 2000), promulgated by the Nebraska Supreme Court and binding upon the county court for Douglas County, provides in pertinent part the following:

> Language expressly limiting powers shall be included on all letters of guardian/conservator in the following language: "You shall not pay yourself or your attorney *compensation* from the assets or income of your ward . . . without first obtaining an order therefor, after an application, notice to the interested persons, and hearing thereon."

(Emphasis supplied.)

[3,4] In addition, the Nebraska Supreme Court has addressed the issue of "compensation" in the context of letters of conservatorship in *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004). We find no distinction between a guardianship and a conservatorship for the purpose of determining whether we shall consider payments as "compensation" per the letters of guardianship or letters of conservatorship in a given case. In *In re Conservatorship of Hanson*, the court adopted a broad definition of "compensation" which includes "any form of payment or remuneration made to the conservator from assets of the protected person." 268 Neb. at 205, 682 N.W.2d at 211. The court noted that

> the appointment of a conservator is based upon a judicial determination that it is necessary to protect the property of one who is unable to manage his or her property and affairs effectively for various reasons, including "physical illness or disability," and that such person "has property which will be wasted or dissipated unless proper management is provided . . . ."

Id. at 204, 682 N.W.2d at 210. By adopting a broad definition of "compensation," the court underscored the concept embodied in rule 43 that "self-dealing by a conservator may be permissible, but only after a judicial finding that there is an adequate reason for the transaction." *In re Conservatorship of Hanson*, 268 Neb. at 206, 682 N.W.2d at 211.

In *In re Conservatorship of Hanson*, the conservator of the estate of an incapacitated ward had made payments to herself out of conservatorship funds without court approval. In addition, she argued that such payments should be ratified by the court. She asserted that the payments were made pursuant to an oral agreement with the ward "which antedated her appointment as conservator." *Id.* at 201, 682 N.W.2d at 208.

In the instant case, William and Sandra made payments to themselves from Angela's assets without court approval. They argue that the court should consider such payments as not compensation, but reimbursement for expenses they paid on Angela's behalf. In addition, the letters of coguardianship, filed in December 2000, expressly provide the limitation that William and Sandra are not to pay compensation to themselves or their attorney from Angela's assets unless they receive approval by order of the court.

We follow the Nebraska Supreme Court's determination in *In re Conservatorship of Hanson* that the concept embodied in rule 43 and the express limitation provided in the letters of conservatorship, or in this case coguardianship, are controlling. Payments made from Angela's assets may be legitimate and consistent with William and Sandra's obligations to Angela as her coguardians; "however, subjecting all such transactions to the filter of prior judicial approval affords a measure of protection against those which are not." *In re Conservatorship of Hanson*, 268 Neb. at 205-06, 682 N.W.2d at 211. We find William and Sandra's argument to be without merit.

(iii) Room and Board

William and Sandra assert that the court erred in not ratifying the payments they made to themselves from Angela's assets, including those made as reimbursement for room and board. They argue that it is their duty as coguardians to furnish Angela with the necessaries of life suitable to her condition out of her estate. They assert that "necessaries of life" include " 'food, drink . . . shelter . . . and a suitable place of residence.' " Brief for appellants at 22. However, we find their assertion to be without merit because they did not obtain an order of the court for the payments.

[5] Section 30-2628(a)(4)(ii), regarding the general powers, rights, and duties of guardians, instructs that when no conservator for the estate of a ward has been appointed, the guardian "may not *use* funds from his or her ward's estate for room and board which he or she, his or her spouse, parent, or child has furnished the ward unless a charge for the service is approved by order of the court." (Emphasis supplied.) In addition, the order

of appointment in this case, filed in December 2000, imposes the same restriction.

Evidence adduced at trial shows that payments William and Sandra made to themselves from Angela's account were, in part, for Angela's room and board. Sandra testified that in calculating the out-of-pocket expenses incurred by William and herself, she considered a mortgage, taxes, and insurance associated with the residence to determine an estimate of Angela's rent. In addition, Sandra testified that she included estimates of food expenses in the payments she and William made to themselves. She based these estimates on "the types of food that [Angela] eats per month plus her drinks and just her special needs [which include] softer foods [because] she has trouble with choking if she eats foods that are too thick or too crunchy."

William and Sandra, in having made unapproved payments to themselves from Angela's assets for her room and board expenses, violated § 30-2628(a)(4)(ii). As we did in our analysis of William and Sandra's expenditures vis-a-vis "compensation," we conclude regarding room and board costs that expenditures made from a ward's estate must be given the same filter of prior judicial approval that was emphasized by the Nebraska Supreme Court in *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004). Therefore, under the facts of this case, we determine that there is no exception to the rule requiring prior approval and that the use of Angela's funds for room and board furnished by William and Sandra was improper. William and Sandra's claim that the disbursements they made to themselves, and specifically those disbursements being used for Angela's room and board, should be ratified by the court is without merit.

(iv) Conclusion

Upon our examination of the record, we determine that the judgment of the county court regarding the order to pay $25,500 to Angela's estate conforms with the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See, *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005); *In re Conservatorship of Hanson, supra.* The record clearly establishes that William and Sandra made

payments to themselves from Angela's funds for Angela's expenses, including room and board, without prior approval of the court. By making these payments to themselves, William and Sandra violated the order of appointment and the letters of coguardianship. Additionally, they made such payments in violation of § 30-2628(a)(4)(ii) and county court rules 37 and 43. As such, this assignment of error is without merit.

(b) Unapproved Expenditures to Third Parties

The annual accounting of Angela's estate includes all receipts and disbursements made from Angela's account during the period of August 31, 2003, to August 4, 2004. Based on this accounting, the court ordered that William and Sandra repay a total of $3,484.74 that was paid from Angela's account to two retailers. This total is separate and distinct from the payments William and Sandra made to themselves. William and Sandra assert that the court erred in failing to ratify these payments made on Angela's behalf without court approval. In our review for errors appearing on the record, we determine that the court did err in failing to ratify these two payments, because it based its decision on William and Sandra's failure to obtain prior judicial approval.

The duty owed by guardians of an incapacitated ward is set forth in § 30-2628. Section 30-2628(a) provides in part that "a guardian of an incapacitated person has the same powers, rights, and duties respecting his or her ward that a parent has respecting his or her unemancipated minor child." Additionally, § 30-2628(a)(4)(ii) provides that guardians may "[r]eceive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward." These provisions do not mandate the prerequisite of judicial approval.

William and Sandra made a payment from Angela's account to a furniture retailer from which they purchased a couch selected by Angela. At trial, Sandra testified, "Angela uses it and that's what we purchased for her . . . we bought a good couch because it will last her 30-some years . . . it's not in her room, it's in the living room." This expenditure amounted to $2,307.99. Additionally, William and Sandra made a payment from Angela's account to a storage building and garage retailer

from which they purchased a shed to store some of Angela's belongings, such as "her bicycle, all of her equipment, bocci [sic] equipment, snow shoe equipment, and so forth." This expenditure amounted to $1,176.75.

The county court's order stated that William and Sandra "paid . . . $3,484.74 for [these] items without court approval." It is clear that the court relied upon county court rule 37 or 43, or upon *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004)—all of which require prior judicial approval for certain expenditures—and thereby held that William and Sandra had a duty to obtain prior judicial approval for expenditures made to the two retailers. This part of the county court's order is in error.

[6] When reviewing a judgment for errors appearing on the record, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*; *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004). Because the court based its decision on an incorrect rule of law, namely that prior court approval was necessary for such expenditures to third parties, we conclude that the decision must be reversed in part and the cause remanded. Remand is necessary where the trial court may have based its order on an incorrect rule of law. See *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992) (recognizing that remand for new trial was necessary where trial court may have based its decision, inter alia, on incorrect rule of law). On remand, the court shall make a determination, based on the record that presently exists, whether the payments made to the two retailers were for Angela's "support, care, and education." See § 30-2628(a)(4)(ii).

3. DHHS Claim Against Estate

(a) Determination of Costs

William and Sandra claim that the amount the court ordered them to pay for services provided through DHHS "cannot be supported on appeal because no sufficient or proper evidence was adduced to support the State's claim." Brief for appellants at 27. They assert that the State solely adduced evidence that the

costs of the services were "usual and customary" and thus failed to offer evidence that the costs were "fair, necessary and reasonable." *Id.* at 28. We find that the court did not err in ordering William and Sandra to pay the full amount for these services, because DHHS adduced evidence as to the cost of such services, which adduction satisfies Neb. Rev. Stat. §§ 83-364 through 83-366 and 83-1211 (Reissue 1999 & Cum. Supp. 2004).

Neb. Rev. Stat. § 83-1208 (Reissue 1999), of the Developmental Disabilities Services Act, governs developmental disability services provided by DHHS. This act is applicable to the specialized services received by Angela, which were, under § 83-1208, "service[s] provided specifically for persons with developmental disabilities." The evidence adduced is that Angela has a developmental disability as defined by Neb. Rev. Stat. § 83-1205 (Reissue 1999), which articulates that "[d]evelopmental disability shall mean: (1) Mental retardation." Further, § 83-1211 directs:

> A person receiving specialized services from a local specialized program which receives financial assistance through [DHHS] shall be responsible for the *cost of such services* in the same manner as are persons receiving care at the Beatrice State Developmental Center. Provisions of law in effect on September 6, 1991, or enacted after such date relating to the responsibility of such persons and their relatives for the cost of and determination of ability to pay for services at the center shall also apply to persons receiving services from specialized programs.

(Emphasis supplied.) Sections 83-364 and 83-366 provide instruction as to a person's liability for his or her "care, support, maintenance, and treatment," § 83-364, and afford a reduction of such liability based on that person's limited ability to pay.

The method used to determine such costs is also dictated by the Legislature in § 83-365, which pronounces:

> [DHHS] shall periodically determine the individual cost, exclusive of the cost of education, for the care, support, maintenance, and treatment of the patients in each state institution and for persons receiving treatment prescribed by an institution following release or without being admitted as a resident patient. In making such determinations,

> [DHHS] may use averaging methods for each institution if, in the judgment of the director, it is not practicable to compute the cost for each patient. The cost of capital expenditures and capital construction shall not be included in making such determinations.

DHHS asserts that the cost of services such as those provided to Angela is "[D]HHS' expense in providing care, support, maintenance and treatment which may be apportioned and assessed to each individual based on averaging methods authorized by section 83-365." Brief for appellee at 13. William and Sandra's contention that the costs to Angela should be proven fair and reasonable amounts to a collateral attack on this statutory procedure that governs how DHHS is to determine costs. DHHS argues that if it were required to prove that costs are fair and reasonable, then the consequences would be incongruent with § 83-365. Specifically, DHHS contends that it would

> require adoption of the propositions that (i) the cost for which a [developmental disability] service recipient is liable is not [D]HHS' cost, but rather an amount which may be a different amount based on other factors, such as rates in the open market for like services, and (ii) such different liability amount is to be determined by an individualized review of the individual's [developmental disability] services and their respective values.

Brief for appellee at 13-14.

Ford, whose job is to determine the financial responsibility of those receiving developmental disability services through DHHS, testified that DHHS' financial responsibility office assessed Angela's obligation to pay for services based on her income and assets. At trial, William and Sandra's counsel made objections to exhibits that demonstrated the charges for services rendered through DHHS. He argued that there had been "no proper and sufficient foundation that [Ford] can testify as to the fairness or the reasonableness of the value of these particular services." The court overruled the objections. Ford testified that Angela was charged for services from April through September 2004, in the total amount of $7,703.07, and that William and Sandra had made payments to DHHS reducing the amount due to $3,948.93.

Further, testimony by Ford revealed that the costs of services were based on expenses calculated by DHHS for services rendered. Specifically, the cost of case management services is a "flat monthly rate . . . that [is] reviewed annually by the director of [DHHS]." The costs of day services such as those provided to Angela are based on "the cost to the [S]tate." Ford testified that DHHS "only request[s] reimbursement from the client to the extent that [DHHS] pay[s] out to the [service] provider."

Additionally, Angela's ability to pay was determined based on her assets, in particular the fact that her estate had assets in excess of $4,000. Specifically, "if an individual has resources over $4,000, then [he or she] must pay the full amount for the services" he or she receives. The annual accounting illustrates that on August 4, 2004, Angela's assets totaled $6,401.94.

[7] We determine that the decision of the county court ordering William and Sandra to pay DHHS $3,948.93 conforms with the law and is supported by competent evidence, as detailed above. Angela received specialized services through DHHS and, under § 83-1211, is liable for the "cost of such services," with consideration taken as to her ability to pay. That cost is based on DHHS' determination of "individual cost[s]" made using averaging methods, see § 83-365, and on DHHS' liability to the various providers. Thus, the statutory language is clear that Angela's liability is based on the costs of the services, and there is no further requirement that DHHS offer proof as to the costs' fairness and reasonableness. Instituting such a requirement would be contrary to § 83-365, which, as noted, allows averaging methods to determine costs, rather than requiring an individualized determination. As such, we find William and Sandra's assignment of error to be without merit.

(b) Administrative Order and Claim Against Guardianship Estate

William and Sandra argue that the State must prove that "the claim filed was valid," and they contend that the State failed to do so. See brief for appellants at 28. As such, they maintain that the court erred in ordering payment of the costs claimed by DHHS. We disagree because the claim against Angela's estate by DHHS

was made based on an administrative order, which cannot be collaterally attacked in this proceeding.

The Administrative Procedure Act provides the procedure that William and Sandra must follow to contest an administrative order. Specifically, Neb. Rev. Stat. § 84-917 (Reissue 1999) provides:

> (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act. . . .
>
> (2)(a) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency.

As such, judgments rendered by administrative agencies acting in a quasi-judicial capacity, as was DHHS, are not subject to collateral attack if the agency had jurisdiction over the parties and the subject matter. *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

Sandra appealed, on behalf of Angela, DHHS' determination that Angela was liable for full payment of the developmental disability support and services she had received. This appeal was in the form of an administrative proceeding held on August 13, 2004. Ford testified at the hearing and indicated that Angela's ability to pay was determined on the basis of her assets of $28,680 and that as such, Angela was required to pay for the services in full. DHHS' director entered an order and final judgment on the appeal, finding that Angela was liable for full payment for the services she received from DHHS during the period at issue. No judicial appeal was taken from this proceeding.

At the hearing in the instant case, before the county court, William and Sandra's counsel attempted to obtain testimony as to whether the charges claimed by DHHS were fair and reasonable. In questioning Ford, William and Sandra's counsel asked whether she had "any ability to testify as to whether [the charges were] fair or reasonable [and whether she made] certain assumptions as to their validity." She answered that she did not personally "set the rates" and that her role was limited to "accounting." Specifically,

she stressed, "I would reinforce or apply the rules and regulations under [DHHS] based on the amount of [the] statement that goes out. And then that's the amount that's billed and that's hopefully the intent of what's collected."

In addition, Sandra testified that she sought explanations "as to what the bills were." Sandra said that some of the bills she received were incongruent with "what [she was] hearing from" the corresponding service provider. She requested that DHHS provide her with explanations as to the costs associated with the bills.

We find that William and Sandra were precluded from challenging the validity of DHHS' claim in the county court. Pursuant to the Administrative Procedure Act, the proper forum for such an attack was in the district court, within 30 days after the final order was entered on their administrative appeal. See § 84-917. As such, we find that this assignment of error is without merit.

V. CONCLUSION

The county court's order mandating that William and Sandra repay Angela's account $25,500 for payments they made to themselves is affirmed. The county court's order directing William and Sandra to pay DHHS, on Angela's behalf, costs of services received by Angela is also affirmed.

However, the court's order mandating that William and Sandra repay Angela's account $3,484.74 for payments made to the two retailers is reversed, and the case is remanded for further proceedings consistent with this opinion.

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

IN RE GUARDIANSHIP OF CAMERON D., A MINOR. HOLLY S., APPELLANT, V. ROGER S. AND NANCY S., APPELLEES.

706 N.W.2d 586

Filed December 6, 2005. No. A-05-189.

1. **Child Custody: Parental Rights.** The principle of parental preference provides that a court may not properly deprive a biological or adoptive parent of the custody of a

minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the parent-child relationship or has forfeited that right.

2. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
3. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship and the preferences of the child.
4. **Parental Rights: Guardians and Conservators: Proof.** An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
5. **Child Custody: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.

Appeal from the County Court for Holt County: PHILIP R. RILEY, Judge. Reversed and remanded with directions.

John C. Jorgensen, of Legal Aid of Nebraska, for appellant.

John P. Heitz for appellees.

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

IRWIN, Judge.

I. INTRODUCTION

Holly S. appeals an order of the county court for Holt County, Nebraska, denying her petition for removal of coguardians of her child, Cameron D. She asserts that the court erred in finding that the coguardians had met their burden of proving by clear and convincing evidence that she is unfit to discharge her parental duties and in finding that it is in Cameron's best interests to continue the guardianship. The court based its determination on, inter alia, evidence of Holly's marital, educational, employment, and medical histories. Such evidence was insufficient to support the court's findings. We reverse, and remand with directions.

II. BACKGROUND

Holly is the natural mother of Cameron, who was born December 30, 2000. Holly was a senior in high school at the

time of Cameron's birth. Holly and Cameron lived in the home of Holly's parents, Roger S. and Nancy S. Holly graduated from high school as salutatorian in May 2001. She attended college in Sioux City, Iowa, for one academic year while Cameron resided with Roger and Nancy.

Subsequently, Roger and Nancy filed a "Petition for Appointment of Guardian for a Minor" on June 19, 2002, requesting that the court name them as coguardians for Cameron. A corresponding affidavit was filed by Nancy. The petition asserted that an "emergency exist[ed]," that it was "not in the best interest of [Cameron] to be in the care and custody of [Holly]," and that "even temporary custody with [Holly] would be detrimental and not in the best interest of [Cameron]." According to the petition, the apparent "emergency" which necessitated the appointment of guardians for Cameron was that Holly "ha[d] indicated her intention to remove [him] from the state of Nebraska." Nancy testified that the "initial reason" for the guardianship was that Holly "wanted to take [Cameron] to Sioux City" while she attended college. The record indicates that the court appointed Roger and Nancy as coguardians on August 26. Holly did not appeal this order, and we assume for the purpose of deciding this appeal that the guardianship was properly ordered.

During this guardianship, Holly maintained a relationship with Cameron. She attended college in Iowa and later in Lincoln, Nebraska. Holly came to Roger and Nancy's home "virtually every weekend" while she was attending college. In May 2004, Holly began living with her boyfriend, who is not Cameron's father, in a "[s]ubstantially furnished" three-bedroom apartment. She frequently visited Cameron at Roger and Nancy's home and had "taken him to her place for supper [and] had him overnight a few times." If Holly left work early, she would pick Cameron up from daycare, and she spent more time with him during times when she was unemployed. In addition, Holly and her boyfriend completed a parenting class.

Nearly 2 years after the guardianship was ordered, on July 6, 2004, Holly filed a petition with the county court, pursuant to Neb. Rev. Stat. § 30-2616 (Reissue 1995), to remove Roger and Nancy as coguardians of Cameron and to terminate the

guardianship. In the petition, Holly alleged that she "is a fit and proper person to resume her role as natural guardian of Cameron." A hearing on the petition was held on November 17, at which time Holly was 21 years old. Testimony was received from Jackie Fahrenholz, Cameron's daycare provider; Nancy; Cameron's father; and Holly.

Fahrenholz testified that she is a licensed home daycare provider and has provided daycare for Cameron since he was 6 weeks old. She testified as to the arrangements regarding who deposited Cameron at her house in the mornings and who retrieved him in the afternoons. Her testimony indicated that despite the guardianship of Cameron, Holly frequently picked Cameron up from daycare. Fahrenholz testified that on one occasion, Holly dropped Cameron off at Fahrenholz' home for daycare and allowed him to walk into the house on his own while Holly watched him from the car, as Nancy frequently did. Cameron entered the house through the unlocked front door, but unknown to Holly, no one was at home. Cameron was alone in the house for no more than 20 minutes and was unharmed.

In correspondence to the attorneys of record which was filed on December 30, 2004, the court noted that it was obligated to determine whether Holly was "not fit to take over [Cameron's] physical custody." In making that determination, the court considered that Holly "had numerous issues in her life" and examined Holly's educational, employment, relationship, and medical histories. Additionally, the court opined that "Cameron is comfortable and feels at home in [Roger and Nancy's] house." In its order, filed on January 13, 2005, the court denied Holly's petition and found that Roger and Nancy proved "by clear and convincing evidence that Holly . . . is, at this time, unfit to discharge her parental duties" and that "[i]t is in the best interests of Cameron . . . that the guardianship continue." This appeal followed.

III. ASSIGNMENTS OF ERROR

Holly asserts that the county court erred in finding that (1) Roger and Nancy had proven by clear and convincing evidence that Holly is unfit to discharge her parental duties and (2) it is in Cameron's best interests that the guardianship continue.

IV. STANDARD OF REVIEW

Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the lower court where competent evidence supports those findings. See *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

V. ANALYSIS

Holly asserts that the court wrongly denied her petition based on her educational, employment, relationship, and medical histories. She argues that Roger and Nancy did not meet the burden of proving by clear and convincing evidence either that she is unfit or that she forfeited her right to custody. Additionally, she asserts that Roger and Nancy did not prove that it is in Cameron's best interests that the guardianship continue. We find merit in Holly's assignments of error and find that the court erred in denying Holly's petition. The record is insufficient to show that Holly is unfit to take physical custody of Cameron and that Cameron's best interests would be served by continuing the guardianship.

[1] Our analyses of Holly's parental fitness and the best interests of Cameron are inseparable. It is well established that there are two competing principles in the area of child custody jurisprudence: the parental preference principle and the best interests of the child principle. See *In re Guardianship of D.J., supra.* Courts have long considered the best interests of the child to be of paramount concern in child custody disputes. See *id.* Yet, "the principle of parental preference provides that a court 'may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the [parent-child] relationship or has forfeited that right.' " *Id.* at 244, 682 N.W.2d

at 243, quoting *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). See, also, § 30-2608(a) (expressing that parents are natural guardians of minor child when they are "competent to transact their own business and not otherwise unsuitable").

[2-4] In weighing these two principles, the Nebraska Supreme Court has held that in guardianship termination proceedings involving a biological or adoptive parent, "the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent." *In re Guardianship of D.J.*, 268 Neb. at 244, 682 N.W.2d at 243. Under this principle, a parent has a natural right to the custody of his or her child which "trumps the interest of strangers to the parent-child relationship and the preferences of the child." *Id.* at 244, 682 N.W.2d at 243-44. Therefore, for a court to deny a parent the custody of his or her minor child, it must be affirmatively shown that such parent is unfit to perform parental duties or that he or she has forfeited that right. See *id.* Thus,

> an individual who opposes the termination of a guardianship bears the burden of proving *by clear and convincing evidence* that the biological or adoptive parent [either is] unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.

(Emphasis supplied.) *In re Guardianship of D.J.*, 268 Neb. 239, 249, 682 N.W.2d 238, 246 (2004).

In termination of guardianship proceedings, courts must be mindful of the temporary nature of guardianships that are created to relieve parents of the burdens of raising a child. One purpose of creating guardianships is to enable parents to "take those steps necessary to better their situation so they can resume custody of their child in the future." *Id.* at 248, 682 N.W.2d at 246. The policy behind this rule would be frustrated if guardianships were permanent or created a de facto termination of parental rights. See *id.* Parents in need of guardians for their minor children would be less likely to petition the court for the appointment of a guardian if such an appointment resulted in a

guardianship of unlimited duration. We address Holly's arguments below and, as mentioned above, find that her assignments of error have merit. In this case, our review for error on the record reveals that the decision of the county court is not supported by competent evidence.

1. EDUCATIONAL HISTORY

Holly argues that her educational history is not relevant to the determination of whether she is fit to resume custody of Cameron. She asserts that if she "had been to twenty different colleges and had been through twenty different programs of study, these facts are not relevant to whether she . . . is capable of carrying out any of the various parental duties and/or responsibilities." Brief for appellant at 21. Roger and Nancy assert that Holly's explanation of her educational history "reveal[s] her character. She is willing to make any argument necessary to try to get her way." Brief for appellees at 8. However, we find that Holly's argument has merit and supports her assertion that Roger and Nancy failed to meet their burden of proving that Holly is unfit to resume custody of Cameron.

[5] As previously stated, Roger and Nancy must prove by clear and convincing evidence that Holly either is unfit or has forfeited her right to custody. See *In re Guardianship of D.J., supra*. Without such a showing, termination of the guardianship is proper and Cameron should be reunified with Holly. " 'Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.' " *Uhing v. Uhing*, 241 Neb. 368, 375, 488 N.W.2d 366, 372 (1992), quoting *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

Testimony adduced at trial shows that Holly has attended three institutions of higher education, where she has achieved an excellent academic record. Holly attended college in Iowa from August 2001 to May 2002 and from August 2002 to February 2003. She received a scholarship and was a "pre med" major. Holly attended college in Lincoln, Nebraska, from August 2003 to May 2004. She had accumulated student loan debt from

attending the Iowa college and sought to take advantage of in-state tuition rates in Nebraska. Holly changed her focus from "pre med" to "pre nursing" because she "didn't want to leave Cameron behind" for the period of time it would require for her to complete medical school. She attended a community college at the time of the hearing in fall 2004, taking online courses in "Health Information Management," so that she "could come home [and] be close to Cameron." Holly testified that her cumulative grade point average for her completed coursework was approximately 3.8.

The court noted Nancy's testimony that Holly "seems unable to settle on any particular course of study." However, this evidence does not support a finding that Holly is unfit. Holly's educational history does not represent any " 'personal deficiency or incapacity' " that would be detrimental to Cameron's well-being. See *Uhing v. Uhing*, 241 Neb. at 375, 488 N.W.2d at 372. The evidence adduced at trial regarding Holly's educational history does not clearly and convincingly establish that Holly is unfit to resume parental responsibility of Cameron; nor does it rebut the presumption that it is in Cameron's best interests to be reunited with Holly. As such, Holly's assertion has merit.

2. Employment History

Holly argues that the evidence received at trial was insufficient to support the finding that she is an unfit parent by reason of her employment history or status. We find that the evidence of Holly's employment history is inadequate either to support the court's finding that Holly is unfit to take custody of Cameron or to rebut the presumption that it is in Cameron's best interests to be reunited with Holly.

On our review for error on the record, we must determine whether there was clear and convincing evidence that Holly is unfit or has forfeited her right to custody. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). See, also, *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000) (comparing parental fitness standard applied in guardianship appointment under § 30-2608 with juvenile court's finding that it would be contrary to juvenile's health, safety, and welfare to return juvenile home).

Nancy testified as to Holly's employment history from the time of her high school graduation to the time of the hearing in the instant case. Holly's employment history consists of several part-time jobs at fast-food restaurants and clothing and grocery stores. In addition, she became a certified nurse's aide and has worked at several nursing homes. Holly testified that her part-time jobs were "temporary transitional positions" and not a part of her "life's work." She explained that she had a history of frequently changing jobs because she had often been in the position of having to choose between working at a "minimum wage job" and studying. At the time of the hearing, Holly was scheduled to begin working at a nursing home in Atkinson, Nebraska, as a certified nurse's aide at the rate of $8.52 an hour.

The evidence in the record regarding Holly's employment history does not support a finding that Holly is unfit to perform the duties imposed by her parental relationship. On the contrary, Holly is a licensed certified nurse's aide and has completed courses in the fields of sociology and psychology. Given these facts, the record does not justify the conclusion that Cameron's health, safety, or welfare would be compromised by returning him to Holly's home. Therefore, Holly's contention that her employment history does not support the court's finding that she is unfit has merit.

3. Marital Status

Holly asserts that "the evidence adduced at trial below lacks sufficient competency to support the finding of unfitness and is otherwise arbitrary, capricious and/or unreasonable." Brief for appellant at 13. She argues that a determination of parental fitness founded in part or whole upon her marital status is erroneous. Roger and Nancy argue that Holly's marital status creates uncertainty for Cameron and that they do not approve of Cameron's living with Holly while she cohabitates without the benefit of marriage. The court opined that "[t]here are indications that Holly's relationship with [her boyfriend] is not permanent. Holly contends that they are 'engaged' but I don't find that assertion compelling." We find that the evidence of Holly's relationship or marital status does not support a finding that Holly is unfit to perform the duties imposed by her parental relationship.

Of primary consideration in the instant case is whether there was clear and convincing evidence at trial that Holly is unfit. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). In looking at the issue of parental fitness, the court must consider whether Holly has a personal deficiency or incapacity that will be detrimental to Cameron, by preventing her from performing her parental obligations. See *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

While attending college in Iowa, Holly was in a relationship with a man which had terminated prior to the time of the hearing in the instant case. Nancy testified that during the course of the relationship, an abusive incident occurred against Holly that resulted in Holly's overdose on antidepressant pills. Holly remained hospitalized for 1½ days for psychiatric evaluation due to this incident. The evidence adduced at trial indicates that this was an isolated event and, furthermore as noted above, that the relationship has ceased. Given these facts, the abuse suffered by Holly and her subsequent overdose do not justify the conclusion that Cameron's well-being would be compromised by his returning to Holly's home.

After attending college for a year in Lincoln, Holly moved to O'Neill, Nebraska, in May 2004 and resided with her current boyfriend. There is no evidence on the record to show that he poses a threat to Cameron's safety. We understand that Roger and Nancy may have concerns about Holly's boyfriend, because Holly once had a volatile relationship with another man, but there is no evidence showing that Holly should be considered unfit to parent Cameron, given this relationship. Additionally, there is no evidence that the living arrangement would be detrimental to Cameron's best interests. In fact, Holly's boyfriend voluntarily took parenting classes with Holly. Therefore, we find merit to Holly's assertion that the court erred in determining that Holly is unfit by reason of her relationship or living arrangement.

4. Medical History

Holly asserts that the court erred in finding her unfit based, in part, on her medical history. She argues that "[t]he medical issues raised at trial are insufficient to demonstrate unfitness

and were merely utilized as a guise for bypassing the parental preference principle and instead applying a best interests of the child rationale." Brief for appellant at 19. Roger and Nancy maintain that Holly's medical condition essentially creates an unsafe and unstable environment for Cameron and that her condition will affect Cameron's well-being, as he depends on her for his care and safety. The court noted that "Holly takes medication for anxiety and depression" and that Holly "has seen several doctors . . . and has an appointment with a neurologist." We find that Holly's argument has merit. The evidence of Holly's medical history does not clearly and convincingly establish that she is unfit or that her condition will prevent her from performing her parental obligations, resulting in detriment to Cameron's well-being.

As previously stated, clear and convincing evidence is mandatory to establish that Holly is unfit to resume the obligations imposed by the parent-child relationship. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). Whether Holly is unfit is a determination made based on an examination of personal deficiency or incapacity that would result in detriment to Cameron's well-being. See *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

Nancy testified at trial that Holly received counseling services from the time she was 14 years old, both before and after being sexually assaulted by a 14-year-old boy. According to Nancy, the original cause for seeking these services was that Holly "was getting to be out of control [with t]emper tantrums." Nancy indicated that Holly had been in counseling and had been receiving psychiatric evaluations since that time, and that Holly had been referred to different counselors. Nancy testified that Holly "was having trouble with . . . depression type things" and had been prescribed antidepressants. Also, Nancy testified that Holly received counseling while attending college in Nebraska, because "she was having trouble with school and her finances and things like that." Based on the results of one psychological evaluation, Nancy testified that to her knowledge, Holly was diagnosed as "bipolar."

Testimony by Nancy and Holly describes one incident where it appears that Holly may have had some type of seizure while

driving with Cameron. Holly pulled over, stopped the car, and telephoned Roger and Nancy. She was able to describe her surroundings to them, and they located Holly and Cameron and returned them home. Additionally, Holly has had two other episodes where she had "what appeared to be like heat stroke," but may have been "some type of seizures." Based on these incidents, a neurologist performed an electroencephalogram test on Holly and further recommended that Holly not operate a motor vehicle pending the results of that test. Holly complied with this recommendation and made alternate arrangements for transportation.

We note that the record is lacking testimony from any expert witness able to provide a medical opinion regarding Holly's condition. However, based on the testimony adduced at trial, there is a lack of sufficient evidence to buttress the court's finding that Holly's condition makes her unfit, and the evidence adduced certainly does not rebut the presumption that reunification with Holly is in Cameron's best interests. Holly's condition does not rise to the level of parental unfitness where her incapacity would prevent " 'performance of a reasonable parental obligation in child rearing and . . . has caused, or probably will result in, detriment to [Cameron's] well-being.' " See *Uhing v. Uhing*, 241 Neb. at 375, 488 N.W.2d at 372. As such, we find merit to Holly's argument.

5. Resolution

From our review for error on the record, we conclude that the evidence, examined separately and cumulatively, is insufficient to establish Holly's unfitness to perform the duties imposed by the parent-child relationship and that therefore, the evidence fails to show that Holly is unfit to have custody of Cameron. Holly argued that her educational, employment, relationship, and medical histories were insufficient to support the court's finding that she is unfit. We find merit with each of her arguments and, as such, find merit with her assignments of error.

Although, as the court noted, "Cameron is comfortable and feels at home in [Roger and Nancy's] house," and although at the time of the trial proceedings, Cameron might have enjoyed some economic advantages from continued presence in Roger and

Nancy's residence, neither of those circumstances justifies a denial of Holly's application. The parental preference principle dictates that in order to deny Holly's petition, the court must find either that Holly is unfit or that she forfeited her right to perform the duties imposed by the parent-child relationship. The principle establishes a rebuttable presumption that Cameron's best interests are served by reuniting him with Holly. We find that there was insufficient evidence to support the court's finding that Holly is unfit or to rebut the presumption that Cameron's best interests would be served by his reunification with Holly.

VI. CONCLUSION

We reverse the order denying Holly's petition to terminate the guardianship and remand the case with directions to terminate the guardianship and to reinstate in Holly the care, custody, and control of Cameron.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD E. TOMLIN, APPELLEE, V. DENSBERGER DRYWALL INC. AND UNITED FIRE GROUP, APPELLANTS.

706 N.W.2d 595

Filed December 6, 2005. No. A-05-284.

1. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
2. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. 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.
4. **Workers' Compensation: Evidence: Appeal and Error.** An appellate court is precluded from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court.

5. ____: ____: ____. In analyzing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, who also receives the benefit of all inferences that may be drawn from the evidence.
6. **Workers' Compensation: Appeal and Error.** The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous.
7. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2004), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job.
8. **Workers' Compensation.** The "arising out of" employment requirement is primarily concerned with causation of an injury.
9. **Workers' Compensation: Expert Witnesses.** It is the role of the Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.
10. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
11. **Workers' Compensation: Expert Witnesses.** An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."
12. **Workers' Compensation.** Generally, compensation for repetitive trauma injuries is to be tested under the statutory definition of an accident.
13. **Workers' Compensation: Proof.** Three elements must be demonstrated in order to prove that a workers' compensation injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.
14. **Workers' Compensation: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.
15. **Workers' Compensation: Proof.** In workers' compensation cases, stopping work to seek medical attention, after which attention the employee returns to work, is sufficient to establish the identifiable point in time component of the suddenly and violently test.
16. **Workers' Compensation.** Finding an identifiable point in time satisfies the disjunctive test for whether an employee's accidental injury occurs suddenly and violently, making it unnecessary to determine whether the cause of injury is reasonably limited in time.
17. ____. Given the nature of the human body, not all injuries are caused instantaneously and with force, but may nevertheless be sudden and violent, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment.

18. **Workers' Compensation: Pleadings.** When an injured worker pleads a specific date of injury and fails to plead that the injury resulted from repetitive trauma, such failure is not dispositive on the issue of repetitive trauma.
19. ____: ____. When an employer will not be misled by a worker's pleading of a specific date of injury and the evidence is sufficient to support a claim of repetitive trauma, the compensation court must consider whether the injury is a result of repetitive trauma.
20. **Workers' Compensation: Judgments.** Under the provisions of Workers' Comp. Ct. R. of Proc. 11(A) (2002), all parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached.
21. **Workers' Compensation: Time.** The date of injury for repetitive trauma cases is generally the date in which the evidence shows that the employee discontinued employment and sought medical treatment.
22. **Workers' Compensation: Liability.** Under Neb. Rev. Stat. § 48-120 (Reissue 2004), the employer is liable for all reasonable medical, surgical, and hospital services, as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.
23. ____: ____. The only limitation on medical benefits set forth in Neb. Rev. Stat. § 48-120 (Reissue 2004) is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished.
24. **Workers' Compensation.** The Nebraska Workers' Compensation Act is to be broadly construed to accomplish the beneficent purpose of the act.
25. ____. Medical expenses incurred before the date of an employee's accident in a repetitive trauma case may be compensable if they are reasonably necessary and related to the compensable injury as required by Neb. Rev. Stat. § 48-120 (Reissue 2004).
26. **Workers' Compensation: Rules of Evidence.** The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.
27. **Testimony: Evidence: Appeal and Error.** Admitting testimony objected to which is substantially similar to evidence admitted without objection is not prejudicial error.
28. **Workers' Compensation.** In workers' compensation cases, travel expenses are compensable if they are shown to be reasonably necessary and related to the compensable injury.
29. **Workers' Compensation: Evidence: Proof.** In workers' compensation cases, when an employee presents evidence of medical expenses from a work-related injury, a prima facie case of fairness and reasonableness has been made, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John W. Iliff and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Jamie Gaylene Scholz, of Shasteen, Brock & Scholz, P.C., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

Densberger Drywall Inc. (Densberger) and United Fire Group (United) appeal the decision of the Nebraska Workers' Compensation Court review panel affirming the decision of the trial court, which found that Richard E. Tomlin suffered a compensable shoulder injury arising out of and in the course of his employment with Densberger.

FACTUAL BACKGROUND

Tomlin had been working in the drywall industry since 1972, with the exception of about 2 years. Tomlin began his employment as a "[r]ocker framer" with Densberger on July 23, 2001, and ended his employment in August 2003. Tomlin testified that his job duties as a "rocker framer" were metal framing and drywall hanging and that while performing such duties, he did "lots" of heavy lifting and "overhead work." Prior to working at Densberger, Tomlin was part owner in a company called Drywallers, Inc. At Drywallers, he had those same job duties but he also had supervisory duties, and therefore, he did not do as much physical labor as in his employment at Densberger.

On June 3, 2002, Tomlin went to see John Grandgenett, a nurse practitioner at the office of his family physician, for a "recheck [of] blood pressure medication." While seeing Grandgenett, Tomlin complained that he had been experiencing right shoulder pain for approximately 1 year but that he had no known trauma or injury. Grandgenett referred Tomlin to Dr. David J. Clare, an orthopedist.

On June 12, 2002, Tomlin saw Dr. Clare. Dr. Clare's notes state that Tomlin has had problems with his right shoulder for a couple of years but that Tomlin was unable to recall an injury. Dr. Clare diagnosed Tomlin with degenerative arthritis in his right shoulder. In a letter dated September 18, 2002, Dr. Clare opined:

> There has been some question as to whether this [severe degenerative arthritis of the right shoulder] defines a

> Workman Comp case. Although [Tomlin] did not sustain a single, isolated work-related injury, I feel he has experienced accumulative trauma that has resulted in the degenerative condition. I cannot say with 100% certainty that his work is the direct cause of his shoulder condition, but 30 years of laying dry wall undoubtedly contributed in some form or fashion to his degenerative right shoulder condition.

On that same day, Dr. Clare stated in his progress notes that "the long term heavy, repetitive work [Tomlin] performed for over 30 years has at least contributed to [his] level of degenerative arthritis."

In a letter dated December 16, 2002, Dr. Clare opined: "The etiology of [Tomlin's] arthritis is difficulty [sic] to definitively determine. He has been employed laying drywall for 30 years. I do believe that this occupation has contributed to the development of his arthritis."

On September 12, 2002, Tomlin presented to Dr. David A. Clough for a second opinion. Dr. Clough diagnosed Tomlin with degenerative arthritis and stated, "In the absence of a specific injury, I can not attribute this to Workers' Compensation." Dr. Clough clarified his opinion in a February 13, 2003, letter as follows:

> My statement, 'In the absence of a specific injury, I can not attribute this to Workers' Compensation', was intended to include both causation directly as well as aggravation of a pre-existing condition. It is my opinion, to a reasonable degree of medical certainty, that . . . Tomlin's degenerative arthritis of the right shoulder was not caused and not aggravated by his employment at Densberger . . . . It is my opinion that the degenerative arthritis is following it's [sic] natural progression with increasing symptoms and with decreasing levels of work activity and that his employment for the last year has not been a factor in any way.

On November 8, 2002, Dr. Clare performed a right shoulder hemiarthroplasty. Tomlin testified that he missed work for the surgery but that he did not remember missing work for any other doctors' appointments. On January 15, 2003, Tomlin returned to work at Densberger, doing "light duty."

On August 13, 2003, Dr. D.M. Gammel provided a medical evaluation of Tomlin based on a July 29 physical examination of Tomlin, a personal interview and history given by Tomlin, and a review of medical records and tests from June 3, 2002, to June 5, 2003. Dr. Gammel opined: "Tomlin's repetitive, heavy, overhead work duties as a drywall installer for thirty years resulted in and substantially contributed to the development of his right shoulder degenerative joint disease and need for subsequent medical intervention including right shoulder hemiarthroplasty." Dr. Gammel issued an impairment rating of 15 percent to the right upper extremity.

PROCEDURAL BACKGROUND

Tomlin filed a petition in the Nebraska Workers' Compensation Court on October 17, 2002, alleging that on June 12, he had sustained an injury in an accident arising out of and in the course of his employment with Densberger. Following a trial before a single judge on September 18, 2003, the trial court issued an award on March 23, 2004. The trial court found that Tomlin's shoulder injury was a result of the cumulative effects of a work-related trauma. The court stated that the parties' greatest contention regarding Tomlin's injury being an "accident" was whether the injury occurred "suddenly and violently." The trial court found that Tomlin's discontinuance of employment occurred within a reasonably limited period of time after the appearance of his symptoms and that when Tomlin "submitted himself to surgery" and missed work for such, he established an identifiable point in time when the injury occurred. Thus, the trial court found that the date he suffered his accident was November 8, 2002.

As to causation, the trial court stated that it had "carefully weighed and evaluated each of [the expert witnesses'] opinions" and that "a sufficient ca[us]al nexus has been proven so as to link [Tomlin's] shoulder injury to the subject accident." The trial court specifically stated that it "relied" on the opinion of Dr. Gammel and was "persuaded" by the opinions of Dr. Clare.

The trial court awarded Tomlin temporary total disability benefits for 9⅝ weeks, permanent disability benefits for 33¾ weeks based on an impairment rating of 15 percent to the right upper

extremity, and both medical and mileage expenses. The court denied an award for future medical benefits, finding the evidence insufficient to support such an award. The trial court found that there was a reasonable controversy which insulated Densberger and United from liability for the requested penalties, attorney fees, and interest.

Densberger and United appealed to the Workers' Compensation Court review panel the trial court's award. The review panel affirmed the trial court's award in all respects, stating that the trial court was not clearly wrong and that there was sufficient evidence in the record to support the award. Densberger and United timely appeal to this court.

ASSIGNMENTS OF ERROR

[1] Although Densberger and United assert 10 assignments of error in their brief, we restate and renumber the errors in accordance with those assignments that are actually argued in their brief. See *Shipferling v. Cook*, 266 Neb. 430, 665 N.W.2d 648 (2003) (errors assigned but not argued will not be addressed on appeal). Densberger and United assert that the trial court erred in (1) finding that Tomlin was injured in an accident arising out of and in the course of his employment with Densberger, because the injury was not caused by Tomlin's employment with Densberger; (2) finding that Tomlin sustained a repetitive trauma injury, because the injury does not meet the statutory definition of an accident; (3) finding that Tomlin suffered a repetitive trauma injury on November 8, 2002, because such finding violated Densberger's and United's due process rights and Workers' Comp. Ct. R. of Proc. 11 (2002); (4) awarding medical expenses and mileage; and (5) failing to sustain the objections to exhibits 1, 2, and 5 through 8.

STANDARD OF REVIEW

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Schwan's Sales Enters. v. Hitz*, 263 Neb. 327, 640 N.W.2d 15 (2002). 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. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

[4] An appellate court is precluded from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996). See Neb. Rev. Stat. § 48-185 (Reissue 2004).

[5,6] In analyzing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party, who also receives the benefit of all inferences that may be drawn from the evidence. *Armstrong v. Watkins Concrete Block*, 12 Neb. App. 729, 685 N.W.2d 495 (2004). The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous. *Id.*

ANALYSIS

Causation.

[7,8] Densberger and United contend that the trial court erred in finding that Tomlin's injury was caused by his employment with Densberger. Densberger and United state in their brief that Tomlin's injury was not an accident arising out of his employment because "his shoulder condition was the result of his 30 year occupation as a drywaller and not a result of his employment by Densberger." Brief for appellant at 14. The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2004), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job. *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005). "The 'arising out of' employment requirement is primarily concerned with causation

of an injury." *Misek v. CNG Financial*, 265 Neb. 837, 842, 660 N.W.2d 495, 500 (2003).

[9,10] In finding that Tomlin's injury was caused by or "arose out of" his employment with Densberger, the trial court relied on the medical opinion of Dr. Gammel and was "persuaded" by the opinions of Dr. Clare. According to the trial court, both physicians' opinions "blamed the cumulative repetitive task associated with the dry-walling trade as the cause of [Tomlin's] problem." Dr. Gammel opined, "Tomlin's repetitive, heavy, overhead work duties as a drywall installer for thirty years resulted in and substantially contributed to the development of his right shoulder degenerative joint disease." Dr. Clare stated that "the long term heavy, repetitive work [Tomlin] performed for over 30 years has at least contributed to [his] level of degenerative arthritis" and that "30 years of laying dry wall undoubtedly contributed in some form or fashion to [Tomlin's] degenerative right shoulder condition." Although Dr. Clough's opinion was that Tomlin's employment at Densberger did not cause his injury, it is the role of the compensation court as the trier of fact to determine which, if any, expert witnesses to believe. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004). Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

In addition to the medical opinions relating Tomlin's work as a drywaller to his degenerative arthritis, Tomlin testified that as a "rocker framer" for Densberger, he did "lots" of heavy lifting and overhead work. He testified that when he was hanging drywall, he lifted between 50 and 100 pounds "all day." Tomlin stated that the overhead work caused him to have "specific kinds of pain in [his] shoulder" and that it got to the point where the pain was "unbearable" and he could not lift things. He testified that before he began working at Densberger, he had aches and pains in his shoulder, but that when he began working at Densberger, his pain "got worse real quick." Tomlin testified that he had not received medical attention for his shoulder before he worked at Densberger, and Densberger and United produced no evidence to the contrary.

[11] Because both Drs. Clare and Gammel opined that overhead work and heavy lifting contributed (substantially so, in Dr. Gammel's words) to Tomlin's shoulder injury, and because Tomlin testified that he performed lots of overhead work and heavy lifting at Densberger, the trial court did not err in determining that Tomlin's injury resulted from the risks arising within the scope or sphere of his employment with Densberger, i.e., overhead work and heavy lifting. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996) (expert opinion is to be judged in view of entirety of expert's opinion and is not validated or invalidated solely on basis of presence or lack of magic words "reasonable medical certainty").

Accident.

[12,13] Densberger and United assert that the trial court erred in finding that Tomlin was injured in an "accident" that arose out of and in the scope of his employment with Densberger. The trial court found that Tomlin suffered a repetitive trauma injury. Generally, compensation for repetitive trauma injuries is to be tested under the statutory definition of an accident. See *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Three elements must be satisfied under the statutory definition of an accident: (1) The injury must be " 'unexpected or unforeseen,' " (2) the accident must happen " 'suddenly and violently,' " and (3) the accident must produce " 'at the time objective symptoms of an injury.' " See *Jordan v. Morrill County*, 258 Neb. 380, 388, 603 N.W.2d 411, 418 (1999).

[14] For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004). The trial court found that Tomlin had established the "suddenly and violently" element of an accident, because the cause was reasonably limited in time and because the result materialized at an identifiable point.

Tomlin testified in his deposition that he did not know when he was injured but that he believed his injury was caused by

continuous lifting and working overhead. He also admitted at trial that there "[wa]s no accident" and that nothing happened suddenly or violently to cause symptoms of an injury, he just had pain. He testified that he began to "notice" pain 1 to 3 years before he went to the doctor, which was in June 2002. Tomlin admitted that while he was employed at Densberger, the pain in his shoulder was "unbearable." He admitted that he did not remember if he missed work for his doctors' appointments but that he did miss work for his November 8, 2002, surgery. He did not return to work at Densberger until January 15, 2003, at which time he performed "light duty" work.

[15-17] The trial court found that when Tomlin stopped working due to his surgery on November 8, 2002, such stoppage was sufficient to satisfy the suddenly and violently test. We agree. "[S]topping work to seek medical attention, after which attention the employee returns to work, is sufficient to establish the 'identifiable point in time' component of the 'suddenly and violently' test." *Armstrong v. Watkins Concrete Block*, 12 Neb. App. 729, 738, 685 N.W.2d 495, 504 (2004). The fact that Tomlin stopped working at Densberger in order to undergo surgery on his right shoulder and returned to light-duty work more than 2 months later, which work was different from the type of work he did prior to his surgery, is sufficient to constitute an identifiable point in time after which he sought medical treatment and discontinued his employment. Because we find an identifiable point in time, we need not consider whether the cause of Tomlin's injuries is reasonably limited in time. See *Swoboda, supra* (finding identifiable point in time satisfies disjunctive test for whether employee's accidental injury occurs suddenly and violently, making it unnecessary to determine whether cause of injury is reasonably limited in time). The Nebraska Supreme Court has recognized that given the nature of the human body, not all injuries are caused instantaneously and with force, but may nevertheless be sudden and violent, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment. *Swoboda, supra*; *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). Therefore, Densberger

and United's argument that there was no "accident" causing Tomlin's injury is without merit.

Date of Injury.

Densberger and United assert that the trial court erred in finding that Tomlin's date of injury was November 8, 2002, because the finding was inconsistent with the theory upon which the case was pled and tried. We have already determined that November 8, 2002, was a proper date of injury for the trial court's finding of a compensable accident.

[18,19] In *Armstrong, supra*, we found that when an injured worker pleads a specific date of injury and fails to plead that the injury resulted from repetitive trauma, such failure is not dispositive on the issue of repetitive trauma. In following *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds, Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), we further found in *Armstrong, supra*, that when an employer will not be misled by a worker's pleading of a specific date of injury and the evidence is sufficient to support a claim of repetitive trauma, the compensation court must consider whether the injury is a result of repetitive trauma.

Here, although Tomlin pled a specific injury date of June 12, 2002, and did not plead a repetitive trauma, there were pretrial proceedings as early as 8 months before trial which clearly put the question of whether Tomlin's injury was a result of repetitive trauma in issue. For example, Tomlin testified at his deposition on January 27, 2003, that he believed the continuous lifting and overhead work at Densberger caused his injury. He admitted that he missed work only for his surgery and not for his doctors' appointments. He admitted that he worked from June 12, 2002—the date of the accident he alleged in his petition—until his surgery, that he missed work for his surgery, and that he then returned to work on January 15, 2003. Tomlin also stated at his deposition, "I don't know when I got injured" and "I don't know when [the injury] happened." He stated that nothing specific happened at work and that "over a period of time," the continuous lifting and overhead work caused his injury.

Moreover, there was abundant medical evidence obtained prior to trial showing that whether Tomlin sustained a repetitive trauma

injury was at issue. Dr. Clare stated in a letter on September 18, 2002, "Although [Tomlin] did not sustain a single, isolated work-related injury, I feel he has experienced accumulative trauma that has resulted in the degenerative condition." Dr. Gammel opined in his August 13, 2003, report, "Tomlin's repetitive, heavy, overhead work duties as a drywall installer for thirty years resulted in and substantially contributed to the development of his right shoulder degenerative joint disease."

Thus, there was sufficient evidence prior to trial that Tomlin's injury may have been a result of repetitive trauma and Densberger and United were not misled by Tomlin's pleading a June 12, 2002, date of injury. Any variance between the pleading and the evidence here was immaterial, and Densberger and United's argument that the court erred in finding an injury date of November 8, 2002, because of such variance is without merit.

Rule 11.

[20] Densberger and United contend that the trial court's decision was not a reasoned decision in compliance with rule 11 of the Workers' Compensation Court, because the trial court did not explain (1) why it used the parties' stipulated average weekly wage as of June 12, 2002, if the date Tomlin suffered his accident was November 8 and (2) why medical expenses and mileage were awarded for expenses allegedly incurred prior to November 8. Rule 11(A) provides:

> All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

The trial court stated in its award, "Given the stipulation of the parties relative to [Tomlin's] average weekly wage, i.e. $742.17, [he] would be entitled to $494.78 for each of the aforementioned weeks of temporary total disability." As to the medical bills and mileage, the trial court said, "The Court, having

reviewed the evidence (both expert and lay), is satisfied that the medical bills submitted by [Tomlin] as set forth in Exhibits 2 through 7 (the latter exhibit representing a summary of said bills) ought to be paid by [Densberger and United]." The court further stated that Tomlin "should also be paid for his mileage expense incurred in the medical treatment of his injury." We find that when the trial court's entire decision is considered, there has been compliance with rule 11.

Medical Expenses and Mileage.

Densberger and United argue that the award of medical expenses and mileage was error. The trial court ordered Densberger and United to pay the medical expenses set forth in exhibits 2 through 7 and the mileage expenses set forth in exhibit 8. The exhibits calculated both medical and mileage expenses incurred by Tomlin beginning on June 3, 2002. Densberger and United contend that they should not be liable for medical and mileage expenses incurred prior to November 8, 2002—the date of injury.

[21-25] The date of injury for repetitive trauma cases is generally the date in which the evidence shows that the employee discontinued employment and sought medical treatment. See *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004). Thus, the concept of "date of injury" in repetitive trauma cases must be conceded to be a bit of a necessary legal artifice, articulated by the appellate courts in order for repetitive trauma cases to be manageable within the statutory framework of an accident. Nonetheless, Neb. Rev. Stat. § 48-120(1) (Reissue 2004) provides: "The employer is liable for all reasonable medical, surgical, and hospital services . . . as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . ." "The only limitation on medical benefits set forth in § 48-120 is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished." *Foote v. O'Neill Packing*, 262 Neb. 467, 474, 632 N.W.2d 313, 320 (2001). Because the Nebraska Workers' Compensation Act is to be broadly construed to accomplish the

beneficent purpose of the act, see *Foote, supra*, and given the language of § 48-120 quoted above, we find no rational reason for a rule precluding the award of medical expenses incurred before the date of accident in a repetitive trauma case—remembering that such date is often fortuitously established by when the employee seeks treatment and misses work for such. See *United Wisconsin Ins. Co. v. LIRC*, 229 Wis. 2d 416, 600 N.W.2d 186 (Wis. App. 1999) (employer's argument that it could not be liable for expenses incurred prior to date of injury was rejected, because date of injury is fixed by statutory definition and can be after onset of symptoms and treatment and because there is no support for proposition that worker must stop working before being eligible for benefits). Similarly, under Nebraska precedent, the date of injury for a repetitive trauma injury is fixed by case law, meaning that the employee can incur expenses before the "technical" date of injury. The evidence regarding Tomlin's medical and mileage expenses showed that such were reasonably necessary and related to his compensable injury. Therefore, the trial court did not err in allowing both medical and mileage expenses as stated in exhibits 7 and 8.

Objections to Exhibits.

[26] Densberger and United argue that the trial court erred in failing to sustain its relevancy objections to exhibits 1, 2, and 5 through 8. Remembering that the Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence, we look to the substance of each of the exhibits. See *Baucom v. Drivers Mgmt., Inc.*, 12 Neb. App. 790, 686 N.W.2d 98 (2004). Exhibit 1 is Dr. Gammel's report, and exhibit 2 is Dr. Clare's opinion and progress notes. Exhibit 5 is Tomlin's medical records. Exhibit 6 is a letter from Tomlin's physical therapist to Dr. Clare regarding Tomlin's condition and the physical therapy objectives. Exhibit 7 is a "Medical Bills Summary," and exhibit 8 is Tomlin's mileage expenses.

[27-29] As for exhibits 1, 2, 5, and 6, they are clearly relevant to Tomlin's injury and the trial court did not err in admitting them. Exhibit 7, the summary of Tomlin's medical bills, is also relevant, because he is asking for medical expenses to be paid as part of his compensation benefits. Moreover, exhibit 19 was

also a compilation exhibit of medical expenses. Exhibit 19 was admitted without objection and is substantially similar to exhibit 7. Thus, any error in admitting exhibit 7 could not prejudice Densberger and United. See *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997) (admitting testimony objected to which is substantially similar to evidence admitted without objection is not prejudicial error). Exhibit 8 is Tomlin's mileage expenses and is relevant here because in workers' compensation cases, travel expenses are compensable if they are shown to be reasonably necessary and related to the compensable injury. See *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959). We also remind Densberger and United of the longstanding rule that when an employee presents evidence of medical expenses from a work-related injury, a prima facie case of fairness and reasonableness has been made, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable. See *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990). Therefore, Densberger and United's argument that the court erred in overruling the relevancy objections is without merit.

CONCLUSION

We affirm in all respects the decision of the trial court, which decision was affirmed by the review panel.

AFFIRMED.

RICKY L. SHURTS AND EAGLE HILLS EXCAVATING, INC., APPELLANTS, V. JESSICA E. FLYNN AND DEBORAH M. HEINSSEN, APPELLEES.

707 N.W.2d 37

Filed December 13, 2005. No. A-04-240.

1. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered

instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

3. ____: ____: ____. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous.
4. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
5. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

E. Terry Sibbernsen, Mandy L. Strigenz, and Andrew D. Sibbernsen, of Sibbernsen & Strigenz, P.C., and Richard B. Maher for appellants.

Betty L. Egan and Kylie A. Wolf, of Walentine, O'Toole, McQuillan & Gordon, for appellee Jessica E. Flynn.

Donald D. Schneider, P.C., for appellee Deborah M. Heinssen.

SIEVERS, CARLSON, and CASSEL, Judges.

CARLSON, Judge.

INTRODUCTION

In this motor vehicle accident case, Ricky L. Shurts and Eagle Hills Excavating, Inc. (collectively the appellants), appeal from a judgment of the district court for Washington County granting Deborah M. Heinssen a directed verdict and entering the jury's verdict in favor of Jessica E. Flynn. For the reasons set forth below, we reverse, and remand for a new trial on the issue of damages in regard to Flynn, and affirm the directed verdict in favor of Heinssen.

BACKGROUND

On October 23, 2002, the appellants filed a second amended petition against Flynn and Heinssen, alleging that on April 27,

2000, Flynn's vehicle rear-ended Heinssen's vehicle, causing Heinssen's vehicle to travel into Shurts' lane of traffic and collide into the side of his vehicle. Specifically, the second amended petition alleged that on April 27 at approximately 8:55 p.m., Shurts was operating a semi-trailer truck, owned by Eagle Hills Excavating, in a northerly direction on U.S. Highway 30 in Blair, Nebraska, when a vehicle operated by Flynn, which was traveling south on Highway 30, struck the rear of a vehicle operated by Heinssen, which was also traveling south on Highway 30. At that time, Heinssen's vehicle crossed the centerline and struck Shurts' vehicle on the driver's side, causing bodily injury and property damage to Shurts.

Flynn admitted that her negligence was the proximate cause of the accident, but denied the nature and extent of Shurts' injuries. Heinssen denied that she was at fault in the accident.

A jury trial took place on December 17 through 19, 2003. Shurts testified that he owns Eagle Hills Excavating and that he works as an excavating demolition contractor. He testified that at the time of the accident, he was driving a "semi-truck" attached to a flatbed trailer that was carrying a piece of heavy equipment. Shurts testified that as he was traveling north on Highway 30, a two-lane highway, he saw Heinssen's vehicle, which was traveling south, and he initially thought Heinssen was going to make a left turn in front of him. He testified that he did not think there was enough time for Heinssen to safely turn in front of him, so he slowed down and moved his truck to the right toward the shoulder of the road. He testified that he then observed Heinssen's vehicle come to an abrupt stop, as if Heinssen had changed her mind about turning in front of him and had decided to wait. He testified that when she stopped, her vehicle was approximately 6 inches across the centerline that separates the two lanes of traffic. Shurts testified that he did not know whether Heinssen had her headlights on or whether she had her left turn signal on.

Shurts testified that when Heinssen's vehicle collided with his truck, he felt a sudden jolt. He testified that when he woke up the morning after the accident, the back of his neck was stiff and sore and he had a headache. He testified that before the accident, he had never experienced any neck pain. He testified

that the pain in his neck and the headache continued for several days. On the fourth day after the accident, he could not turn his head and his headache was severe, so he made an appointment with his family physician. Shurts testified he saw his physician on May 3, 2000, and complained that he could not turn his head, that he had pain in the back of his neck and into his shoulders, and that he had a persistent headache. He returned to his physician's office on May 12 with the same symptoms. Shurts testified that on May 18, he started seeing Dr. David W. Hoffman, a chiropractor, and continued treating with him until August 1. Shurts testified that during that time, he continued to have neck pain and severe headaches.

Shurts testified that in March 2001, he went to see Dr. Huy D. Trinh, an orthopedic surgeon who specialized in spinal disorders, including neck problems. Shurts testified that at that time, he was still suffering from pain in his neck and headaches. Shurts testified that Trinh recommended physical therapy for him, but that he did not attend physical therapy because he could not afford it. Shurts testified that he saw Trinh a second time in March 2002, a year after the first visit, and that the same symptoms were still persisting. Shurts further testified that in the year before trial, there had not been a day that he had not had some pain in his neck. He testified that he had days when the pain in his neck was milder and other days when the pain was more severe. He also testified that there were days when his headache was not severe. Shurts presented an exhibit claiming that he had incurred medical expenses in the amount of $2,502.87, as a result of the accident.

Flynn's deposition was read into the record, because she was not present at trial. She testified that at the time of the accident, she was traveling south on Highway 30, it was dark outside, and she had her vehicle's headlights on. Flynn testified that she saw Heinssen's vehicle for the first time just a few seconds before the accident, when Flynn "looked up." Flynn testified that she saw the brakelights illuminated on Heinssen's vehicle, but that she did not know whether Heinssen's vehicle was completely stopped or not. Flynn testified that when she saw Heinssen's vehicle, Flynn stepped on her brakes and turned her wheel to the right. She testified that the front driver's side of her vehicle rear-ended

Heinssen's vehicle. Flynn testified that she did not know why she did not see Heinssen's vehicle sooner than she did. She testified that her "mind must have been elsewhere."

Flynn testified that she did not know whether Heinssen did anything that caused or contributed to the accident. Flynn also testified that she did not know whether Heinssen stopped abruptly, whether Heinssen's vehicle had its left turn signal on, or whether Heinssen's vehicle had its headlights on. Flynn further testified that she did not know whether Heinssen's vehicle was over the centerline before the accident.

Heinssen testified that just before the accident, she was traveling south on Highway 30 and came to a complete stop, intending to make a left turn. She testified that she had her vehicle's headlights on and left turn signal on. Heinssen testified that she saw oncoming headlights from traffic traveling northbound, so she stopped and was waiting for northbound traffic to clear before making her left turn. She testified that she came to a gradual stop and not an abrupt stop. She testified that while she was stopped, she looked in her rearview mirror and saw Flynn's vehicle coming up behind her and it appeared that Flynn was not going to stop. Heinssen testified that Flynn's vehicle then struck the right rear end of her vehicle. Heinssen testified that she had been stopped for 5 to 10 seconds before the impact occurred and that she saw Flynn's vehicle in her rearview mirror just a few seconds before impact. Heinssen testified that before Flynn rear-ended her, the front wheels of Heinssen's vehicle were positioned straight ahead and her vehicle was "straight with the lane" and was not over the centerline. Heinssen testified that after the impact with Flynn's vehicle, Heinssen's vehicle went into the northbound lane of traffic and the left front end of her vehicle struck the driver's side of Shurts' vehicle.

Lori Wheaton, a witness to the accident, also testified. Wheaton testified that just before the accident, she was driving northbound on Highway 30 and was two to three car lengths behind Shurts' vehicle. She testified that she saw Heinssen's vehicle stopped in the southbound lane, as if Heinssen was waiting to turn left. Wheaton testified that she observed Heinssen's vehicle stopped for a few seconds before the accident and that Heinssen's vehicle was positioned in its own lane and was not

over the centerline. Wheaton testified that Heinssen's vehicle had its headlights on and that Wheaton was "95 percent sure" that Heinssen's vehicle had its left turn signal on. Wheaton further testified that she observed Flynn's vehicle coming up behind Heinssen's vehicle and saw that it was not slowing down. Wheaton testified that there was not anything Heinssen could have done to prevent the accident. Wheaton further testified that following the accident, Flynn repeatedly said, "'I didn't see [Heinssen]. I did not see her stop.'"

Hoffman testified that he provided Shurts with chiropractic care from May 18 to August 1, 2000, and treated him 11 times during this period. He testified that at Shurts' first visit, Shurts complained of low-neck pain, with the pain radiating into his shoulders, and also complained of headaches. Hoffman testified that Shurts told him that following the automobile accident on April 27, 2000, Shurts initially had some discomfort in his neck and shoulders which gradually got worse and led him to seek medical attention. Hoffman testified that based on his examination of Shurts and the history that Shurts provided, he diagnosed Shurts with "cervical sprain/strain — acute/severe which is complicated by cervical somatic dysfunction." Hoffman explained that "cervical somatic dysfunction" basically means that a bone in the neck is out of place, causing swelling and putting tension on the tissues in the area, thereby causing pain. Hoffman further testified that he secondarily diagnosed Shurts with having a thoracic sprain/strain, which is a sprain/strain in the area just below the neck. Hoffman testified that it was his opinion within a reasonable degree of chiropractic certainty that the cervical sprain/strain, complicated by cervical somatic dysfunction, and the thoracic sprain/strain were caused by the automobile accident on April 27, 2000.

Hoffman testified that during the time he treated Shurts, Hoffman's diagnosis of Shurts remained the same throughout the treatment and Shurts continued to be in pain. Hoffman testified that Shurts stopped treating with him after August 1, 2000, despite Hoffman's recommendation that Shurts continue treating with him.

Trinh's video deposition was played for the jury. Trinh testified that Shurts was referred to him by Shurts' family physician.

Trinh testified that he saw Shurts on three occasions, the first being in March 2001. Trinh testified that on that date, Shurts indicated that he had been in an automobile accident on April 27, 2000, and that about 4 days after the accident, he began having pain and stiffness in his neck, as well as headaches. Trinh testified that Shurts indicated he was still having these problems at the March 2001 visit. Trinh testified that Shurts did not indicate that he had any neck problems before the accident.

Trinh testified that Shurts' MRI showed degenerative disk disease, or "discarthrosis," involving three disks in Shurts' neck. Trinh explained that discarthrosis is an aging condition of the spine. He further explained that the disk or disks become degenerated, meaning they lose water content and become "more crumbly [and] a lot of time[s] bulge out." He testified that this condition is often due to age or the amount of physical work a person does. Trinh testified that Shurts' condition developed over a period of years.

Trinh diagnosed Shurts as suffering from chronic neck pain with related headaches and gave him a secondary diagnosis of discarthrosis in three disks in his neck. Trinh testified that Shurts' discarthrosis was a preexisting condition that was aggravated by the accident. Trinh explained that a person can have this degenerative condition without any symptoms, i.e., not experience any pain, until some type of traumatic event irritates the area and triggers symptoms. Trinh testified that in Shurts' case, Trinh assumed there was some violent movement of the neck or head during the accident that irritated the degenerated area and triggered Shurts' symptoms.

Trinh testified that he saw Shurts for the second time in March 2002 and that Shurts still complained of neck pain and headaches. Trinh testified that his diagnosis of Shurts remained the same and that Shurts' preexisting discarthrosis, which was aggravated by the accident, was still causing his pain.

Trinh testified that he saw Shurts for the third time on September 8, 2003. Trinh testified that Shurts continued to complain of neck pain and that upon examination, Trinh determined that Shurts' condition remained about the same. Trinh testified that his diagnosis of Shurts also remained the same—

chronic neck pain and discarthrosis in three disks in the neck, aggravated by the April 27, 2000, accident.

Trinh testified that it was his opinion, within a reasonable degree of medical certainty, that the accident on April 27, 2000, aggravated Shurts' preexisting discarthrosis, which in turn caused Shurts' neck pain; that Shurts' chronic neck pain and related headaches were caused by the accident; and that Shurts experienced a permanent disability as a result of the aggravation of his preexisting discarthrosis.

At the close of the appellants' evidence, Heinssen moved for a directed verdict, which the trial court granted, and Heinssen was dismissed from the case. Subsequently, the jury returned a verdict in favor of Flynn. Pursuant to the jury verdict, the trial court entered a judgment in favor of Flynn. Thereafter, the appellants filed a motion for new trial and motion for judgment notwithstanding the verdict. The trial court overruled the motions, and the appellants now appeal.

ASSIGNMENTS OF ERROR

The appellants assign that the trial court erred in failing to give their proposed jury instruction regarding preexisting conditions and in directing a verdict in favor of Heinssen.

STANDARD OF REVIEW

[1] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002); *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

[2] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005); *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

[3] A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *Pribil v. Koinzan*,

266 Neb. 222, 665 N.W.2d 567 (2003); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

[4] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005); *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003).

[5] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Livingston v. Metropolitan Util. Dist., supra*; *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003).

ANALYSIS

Jury Instruction.

The appellants assign that the trial court erred in failing to give their proposed jury instruction regarding preexisting conditions. Regarding Shurts' preexisting condition, the trial court specifically instructed the jury in jury instruction No. 14: "There is evidence that [Shurts] had a neck condition prior to the accident on April 27, 2000. [Flynn] is liable only for any damages that you find to be proximately caused by the accident." The trial court refused to give the appellants' proposed jury instruction, which stated:

> There is evidence that [Shurts] had a neck condition prior to the accident on April 27, 2000. [Flynn] is liable for any damages you find to be proximately caused by the accident.
>
> If you cannot separate damages caused by the preexisting condition from those caused by the accident, then [Flynn] is liable for all of those damages.

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law,

(2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005); *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

In *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996), the Nebraska Supreme Court addressed a case similar to the one at hand. In *Ketteler*, the trial court gave the following instruction: " 'There is evidence that the plaintiff had a neck, back and hip condition prior to the accident of April 26, 1991. The defendant is liable only for any damage that you find to be proximately caused by the accident of April 26, 1991.' " 251 Neb. at 295, 556 N.W.2d at 629.

The trial court in *Ketteler* did not give the following instruction, which the plaintiff had requested:

> "There is evidence that [the plaintiff] had a pre-existing neck and back condition prior to the date of this collision. The Defendant is liable only for any damages that you find to be proximately caused by the collision of April 26, 1991.
>
> "If you cannot separate damages caused by the pre-existing condition from those caused by the accident, then the Defendant is liable for all of those damages.
>
> "The Defendant may be liable for bodily harm to [the plaintiff] even though the injury is greater than usual due to the physical condition which predisposed [the plaintiff] to the injury. In short, the Defendant takes the Plaintiff as he finds her."

251 Neb. at 295-96, 556 N.W.2d at 629.

Relying on *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996), the Nebraska Supreme Court in *Ketteler* concluded that the trial court's failure to give the plaintiff's proposed instruction was reversible error. Therefore, the Supreme Court reversed, and remanded for a new trial.

David v. DeLeon, supra, involved an automobile accident case in which the jury returned a verdict for the plaintiff. Prior to the accident, the plaintiff suffered from arthritis in his back and knees. The defendant proposed a jury instruction which stated:

> "There is evidence that the plaintiff had degenerative disc disease of the cervical spine (also called spondylosis),

> spinal stenosis of the lumbar spine, and degenerative arthritic changes in the knees prior to the date of the accident. The defendant is liable only for any damages that you find to be proximately caused by the accident."

Id. at 113, 547 N.W.2d at 729.

The trial court in *David* rejected the defendant's instruction and instead submitted the plaintiff's proposed instruction:

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

Id.

On appeal, the defendant in *David* argued that the portion of the instruction stating that if the jury could not separate damages, then the defendant was liable for all damages should not have been given. The Nebraska Supreme Court affirmed.

In rejecting the defendant's argument, the Nebraska Supreme Court in *David* relied on *McCall v. Weeks*, 183 Neb. 743, 164 N.W.2d 206 (1969), which "adopted the theory of the 'eggshell-skull' plaintiff, whom the negligent defendant must take as he finds." 250 Neb. at 114, 547 N.W.2d at 729. The Supreme Court in *McCall* held that a person injured as a result of another person's negligent acts is entitled to recover all damages which proximately resulted from those acts, including damages resulting from aggravation of a preexisting condition. In *David*, the Supreme Court found that the ruling in *McCall* justified the trial court's decision to issue its instruction.

The Nebraska Supreme Court in *David* further stated:

> [A] plaintiff is not . . . required to provide a precise line between the damages directly related to the accident and any preexisting physical or mental condition the defendant can exhume as a precondition for recovering any damages at all. . . . Once the plaintiff presents evidence from which a jury reasonably can find that damages were proximately caused by the tortious act, the burden of apportioning damages resulting from the tort rests squarely on the defendant.

> . . . .
>
> In the instant case, without the admonition that the defendant is liable for all damages if the jury cannot apportion, the instruction would have failed to address the event in which a jury finds that damages were proximately caused by a collision, but is unable to determine precisely what quantum of those damages was not preexisting. This instruction prevents the result of a jury finding that damages were proximately caused by the tortious act, but failing to award damages because it cannot demarcate preexisting illnesses from new losses.

250 Neb. at 115-16, 547 N.W.2d at 730.

Based on the above case law, we conclude that the appellants' proffered instruction should have been submitted to the jury. The appellants' adduced evidence that the accident proximately caused an aggravation of a preexisting condition. Specifically, Trinh testified that Shurts had a preexisting condition, known as discarthrosis, in three disks in his neck. Trinh testified that Shurts' preexisting discarthrosis was aggravated by the April 27, 2000, accident and that such aggravation caused Shurts' neck pain and related headaches. The burden of apportioning damages then rested squarely with Flynn. The trial court's instruction to the jury did not reflect this fact. A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003); *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996). As the Nebraska Supreme Court stated in *David*, without the admonition that Flynn is liable for all damages if the jury cannot apportion, the instruction fails to address the event in which the jury finds that damages were proximately caused by the collision, but is unable to determine precisely what quantum of those damages was not preexisting.

Accordingly, the trial court's refusal to give the appellants' requested instruction is reversible error. First, the proffered instruction correctly stated the law. Second, the instruction was warranted by the evidence, based on the testimony of Trinh. Finally, refusal by the trial court to submit the proposed instruction was prejudicial to the appellants. Thus, we reverse, and remand for a new trial on the issue of damages.

Directed Verdict.

The appellants next assign that the trial court erred in granting Heinssen's motion for directed verdict. The appellants argue that the directed verdict should not have been granted, because there was evidence of negligence on Heinssen's part which was a proximate cause of the accident. We disagree.

A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005); *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003).

The appellants specifically point to Shurts' testimony that Heinssen came to an abrupt stop and that her vehicle was resting approximately 6 inches over the centerline that separates the two lanes of traffic. While there is evidence that contradicts Shurts' testimony, in reviewing a directed verdict, we must resolve every controverted fact in the appellants' favor. See, *Livingston v. Metropolitan Util. Dist., supra*; *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003).

Assuming Heinssen did come to an abrupt stop, there is no evidence that Flynn rear-ended Heinssen as a result of Heinssen's quick stop. Flynn testified that she did not know why she did not see Heinssen's vehicle sooner than she did and that her "mind must have been elsewhere." The evidence is undisputed that Heinssen's vehicle was stopped at the time she was rear-ended by Flynn. The evidence indicates that Flynn would have rear-ended Heinssen whether Heinssen came to a gradual stop or an abrupt stop, because Flynn was simply not paying attention and did not see Heinssen until it was too late. Thus, whether Heinssen came to an abrupt stop or a gradual stop is of no consequence. Given that Heinssen was stopped in front of Flynn, Flynn was responsible for operating her vehicle in a manner that allowed her to stop her vehicle or turn it aside without colliding with Heinssen's vehicle. See *Kissinger v. United Parcel Serv.*, 8 Neb. App. 260, 263, 592 N.W.2d 169, 171 (1999) ("[n]egligence generally arises as a matter of law if one operates a motor vehicle on a public street or highway and, on account of the manner of operation, is unable to stop her or

his vehicle or turn it aside without colliding with an object or obstruction on the street or highway within the operator's range of vision"). Thus, assuming Heinssen came to an abrupt stop, such action was not a proximate cause of the accident.

Likewise, assuming Heinssen's vehicle was positioned over the centerline, there is no evidence that this was a proximate cause of the accident. Had Heinssen's vehicle not been over the centerline, Flynn would still have rear-ended Heinssen and the accident would have occurred in the same manner. Thus, we conclude that the trial court did not err in granting Heinssen's motion for directed verdict and the appellants' second assignment of error is without merit.

CONCLUSION

We conclude that the trial court erred in failing to give the appellants' proposed jury instruction regarding preexisting conditions. We further conclude that the trial court did not err in granting Heinssen's motion for directed verdict at trial. Accordingly, we reverse, and remand for a new trial on the issue of damages, and affirm the portion of the trial court's judgment granting a directed verdict in favor of Heinssen.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

IN RE INTEREST OF VERONICA H., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. ARNOLDO T. AND MELINDA O., APPELLEES, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

707 N.W.2d 29

Filed December 13, 2005. No. A-05-425.

1. **Juvenile Courts: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.

3. **Juvenile Courts: Jurisdiction.** Juvenile courts are courts of limited jurisdiction.
4. **Juvenile Courts: Counties.** Each county, depending on its population, has either a separate juvenile court or a county court with authority to sit as a juvenile court.
5. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred upon it by statute.
6. **Juvenile Courts: Legislature: Words and Phrases.** The phrase "by and with the assent of the court," which the Legislature elected to add to the language in Neb. Rev. Stat. § 43-285(1) (Reissue 2004), clearly gives the court the power to assent and, by implication, to dissent from the placement and other decisions of the Department of Health and Human Services, as well as of other entities to whom the court might commit the care of a minor.
7. **Juvenile Courts.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. It is the law in this jurisdiction that juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Jon Bruning, Attorney General, Royce N. Harper, and John M. Baker, Special Assistant Attorney General, for appellant.

No appearance for appellees.

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

INBODY, Chief Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) appeals from the judgment of the separate juvenile court of Douglas County, Nebraska, ordering DHHS to reassign the case of Veronica H. to a more experienced case manager. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

On July 26, 2002, a petition was filed in the separate juvenile court alleging that Veronica, a minor child, was a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). The petition asserted that Veronica had been subjected to inappropriate sexual contact by her stepfather, Arnoldo T., and that Veronica's natural mother, Melinda O., had taken insufficient steps to protect Veronica; therefore, the petition alleged that Veronica was at risk for harm. On that same date, the separate

juvenile court entered an "Order for Immediate Custody," placing temporary custody of Veronica with DHHS. On April 8, 2003, Veronica was adjudicated as a child within the meaning of § 43-247(3)(a), with Arnoldo and Melinda admitting to the allegations in the petition. It was also ordered that Veronica remain in the temporary custody of DHHS "for appropriate care and placement." The matter was then set for disposition.

On June 6, 2003, a disposition and permanency planning hearing was held. At that time, the separate juvenile court ordered that Veronica remain in the temporary custody of DHHS for appropriate care, which was to exclude the parental home. The juvenile court found that the permanency objective was reunification and that reasonable efforts were being made to return Veronica to the parental home and to finalize permanency. The hearing was continued to August 21, and at that hearing, the juvenile court again ordered that Veronica remain in the temporary custody of DHHS and that placement of Veronica was to exclude the parental home. A review and permanency planning hearing was held on December 11, at which point the juvenile court again found that the permanency objective was reunification and that reasonable efforts were being made to return Veronica to the parental home and to finalize permanency. The court ordered Arnoldo and Melinda to complete psychological evaluations and complete any recommended treatment; to participate in individual and family therapy; to participate with a family support worker; to maintain safe, adequate, and consistent housing for themselves and their family; and to participate in a parenting program. Arnoldo was also ordered to complete a sex offender specific psychological evaluation.

Another review and permanency planning hearing was held on March 10, 2004. The court received numerous exhibits into evidence. Custody of Veronica remained with DHHS, which placed her at an enhanced treatment group home in Columbus, Nebraska. One of the exhibits accepted into evidence was a case plan and court report authored by LaKeisha Bonam, a case manager for DHHS. In her report, Bonam noted that Arnoldo had completed his sex offender evaluation and that Dr. Theodore DeLaet had done a psychological evaluation of Arnoldo.

The juvenile court asked Bonam for "a real concrete and coordinated recommendation for what kind of treatment, who's to go, what issues are to be addressed and by whom." The court further noted that it had numerous concerns regarding the instant case, including the lack of evaluations to answer questions regarding treatment and therapy for Veronica, Arnoldo, and Melinda; the lack of confirmation that therapy was occurring despite the lack of evaluations and progress reports; and the need for a concrete plan. Bonam informed the juvenile court that Dr. DeLaet was willing to work with Veronica, Arnoldo, and Melinda, and that the family would rather work with Dr. DeLaet than with other care providers. The juvenile court asked Bonam to provide a plan to the court within 2 weeks and asked that the plan provide for individual and family therapy with a goal of reunification. The court's order from the March 10, 2004, hearing noted that Dr. DeLaet was willing to work with the family, and Dr. DeLaet was asked to provide a plan and/or an outline of treatment, to be presented to the court within 2 weeks.

Between the March 10, 2004, hearing and the next hearing on July 30, Veronica's placement had changed from the enhanced treatment group home in Columbus to an enhanced treatment group home in Omaha, Nebraska. In addition, the case was assigned to DHHS' "Integrated Care Coordination Unit" and Michelle Mutum was assigned as the new case manager. At the July 30 hearing, numerous exhibits were again accepted into evidence. The juvenile court noted at the hearing that "things [we]re in order," that reunification remained as the permanency objective, that reasonable efforts were being made to return Veronica to the parental home and to finalize permanency, and that Veronica was to remain in the custody of DHHS for continued appropriate care and placement.

Another review and permanency planning hearing was held on November 16, 2004. More exhibits were entered into evidence, including a case plan and court report authored by Mutum; a mental health and substance abuse treatment plan by Dr. DeLaet and Veronica's therapist at the enhanced treatment group home in Omaha, Jean McKechnie; and a report from Veronica's guardian ad litem, as well as other reports. In her

case plan and court report, Mutum noted that Dr. DeLaet and McKechnie had developed a new visitation plan, and a joint letter from Dr. DeLaet and McKechnie set forth a precise plan as to treatment issues and interventions. However, the juvenile court expressed dissatisfaction with the reports that were offered. The court indicated that it expected both Dr. DeLaet and McKechnie—as well as any other therapists working with Veronica, Arnoldo, and Melinda—to testify. The court further referred the case to the "LB 1184 Treatment Team," indicating that "they are to look at everything from the inception, as I'm looking back, the many difficulties in this case, including the wrong kinds of evaluations [and] the conflict of interest with regard to some of the service provisions, like the family support worker and other issues." The court noted that "somebody has to get a grip on this case from a case management standpoint, and no one has it, and the Court lacks sufficient information to be that individual."

At a January 11, 2005, evidentiary hearing, Dr. DeLaet testified. He described his involvement in the case and described the types of therapies that he had provided. He further indicated that he would no longer be providing therapy in the instant case due to a disagreement with McKechnie regarding the course of therapy to be pursued. The hearing was then continued until January 14.

At the January 14, 2005, hearing, McKechnie testified. At the conclusion of McKechnie's testimony, the juvenile court expressed frustration with the professionals involved in the instant case, citing concerns with Veronica's lack of progress. The court stated as follows:

> [I]t's quite distressful to me to have to keep saying this, and I mean no offense. . . . Mutum is a fine individual and generally a fine caseworker, so this is not any personal reflection on her, but from the first day of disposition, this matter has been about [DHHS] and [its] total lack of accountability in terms of case management, in terms of any substantive understanding of the dynamics of incest cases and the treatment protocol in those cases and it continues.

Subsequently, the juvenile court ordered DHHS "to reassign this case to an experienced case manager with demonstrated

knowledge of incest cases and the needed treatment protocol to address these cases," stating as follows:

> I am ordering [DHHS] to assign [a different case manager.] And I want to know the name and approve it. . . . I want a seasoned, competent, experienced [DHHS] case manager with savvy and understanding of the dynamics of a case involving intrafamily sexual abuse, strong personalities . . . and that has to be demonstrated to me.

DHHS has timely appealed to this court.

ASSIGNMENT OF ERROR

DHHS asserts that the separate juvenile court erred when it ordered DHHS to remove the case manager dealing with Veronica's case and replace her with a more experienced case manager.

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[2] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Marie E.*, 260 Neb. 984, 621 N.W.2d 65 (2000).

ANALYSIS

Validity of Order.

DHHS alleges that the separate juvenile court erred when it ordered DHHS to remove the case manager dealing with Veronica's case and to reassign the case to "an experienced case manager with demonstrated knowledge of incest cases and the needed treatment protocol to address these cases." DHHS asserts that the separate juvenile court lacks the authority to make such an order and that therefore, the order was made in error.

[3-5] Article V, § 27, of the Nebraska Constitution provides the following language regarding the creation and powers of juvenile courts in Nebraska: "[T]he Legislature may establish

courts to be known as juvenile courts, with such jurisdiction and powers as the Legislature may provide." Therefore, juvenile courts are courts of limited jurisdiction. See *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980). Each county, depending on its population, has either a separate juvenile court or a county court with authority to sit as a juvenile court. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002). As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred upon it by statute. *Id.*

Neb. Rev. Stat. § 43-285(1) (Reissue 2004), a statute dealing with the care of juveniles who have been removed from the parental home, provides:

> When the court awards a juvenile to the care of [DHHS], an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed. Any such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it. Such guardianship shall not include the guardianship of any estate of the juvenile.

[6] This court has previously held that the phrase "by and with the assent of the court," which the Legislature elected to add to the language in § 43-285(1), "clearly [gives] the court the power to assent and, by implication, to dissent from the placement and other decisions of [DHHS], as well as of other entities to whom the court might commit the care of a minor." *In re Interest of Crystal T. et al.*, 7 Neb. App. 921, 927, 586 N.W.2d 479, 483 (1998). We further found that "this change certainly indicates the Legislature's intent to remove [DHHS'] complete control of a minor whose care is given to [DHHS] under the Nebraska Juvenile Code." *Id.*

[7] In *In re Interest of Crystal T. et al., supra*, this court dealt with a similar issue as presented by DHHS. In *In re Interest of Crystal T. et al.*, the juvenile court entered an order directing

DHHS to conduct 10 to 12 unannounced home visits at the home of a mother whose child was under the supervision of DHHS. DHHS appealed, arguing that "the court's order constitutes an improper attempt to 'micromanag[e] the case that only [DHHS] is authorized by law to handle.' " *Id.* at 927, 586 N.W.2d at 483. We disagreed with DHHS, noting the following:

> The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. . . . It is the law in this jurisdiction that juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.

(Citation omitted.) 7 Neb. App. at 927-28, 568 N.W.2d at 483.

We find that because juvenile courts have been given the power by the Legislature to assent and, by implication, to dissent from the placement and other decisions of DHHS, the juvenile court properly exercised that power when it ordered DHHS to replace the case manager dealing with Veronica's case with "an experienced case manager with demonstrated knowledge of incest cases and the needed treatment protocol to address these cases." The juvenile court had broad discretion in its attempt to best serve the interests of Veronica, and we find that the court's order did not abuse that discretion. This assignment of error is without merit.

Separation of Powers.

DHHS concedes that this court is not the proper forum in which to challenge the constitutionality of a statute. Nevertheless, DHHS does contend that "an order that dictates case management infringes on an essential legal right belonging to [DHHS] because it crosses the separation of powers boundary." Brief for appellant at 11. DHHS further contends that "state agencies [such as DHHS] have been given the power by the Legislature to manage their own work force, including job assignments. Neb. Rev. Stat. §81-1311(9) [(Reissue 1999)]. The Legislature did not grant this authority to the court." Brief for appellant at 12.

However, we noted earlier that through § 43-285(1), the Legislature gave juvenile courts the power to assent and dissent

from the placement and other decisions of DHHS, as well as of other entities to whom the court might commit the care of a minor, and that the Legislature intended to remove DHHS' complete control of a minor whose care is given to DHHS under the Nebraska Juvenile Code. Thus, we conclude that the Legislature, when it elected to add the phrase "by and with the assent of the court" to § 43-285(1), did in fact give juvenile courts the authority to issue orders such as that issued in the instant case.

This is a case of first impression in Nebraska. Looking to other jurisdictions for guidance, we find the reasoning in *In re K.C.*, 325 Ill. App. 3d 771, 759 N.E.2d 15, 259 Ill. Dec. 535 (2001), persuasive. In *In re K.C.*, the Illinois appellate court first found that the trial court had the statutory authority to remove or reassign a caseworker, as we have found in the instant case. When addressing whether the trial court's order requiring the Department of Children and Family Services (DCFS) to remove the current caseworkers and reassign the case to a new team of caseworkers violated the doctrine of separation of powers, the Illinois appellate court found the following:

> [T]he doctrine of separation of powers was not designed to achieve a complete divorce among the three branches of government, nor does it require governmental powers to be divided into rigid, mutually exclusive compartments. . . . When the legislature creates a statute that contemplates an interplay between the courts and the executive branch, court orders directing the actions of the executive agencies do not violate the doctrine of the separation of powers. . . . Under the Juvenile Court Act, where the legislature intends an interplay between DCFS and the courts in determining the appropriate services for neglected and abused children, the evil of the court's usurping the executive discretion is absent. . . .
>
> We do not find the court's action, in ordering the removal and reassignment of alternative caseworkers, impermissibly infringed upon the administrative discretion of DCFS, as an agency of the executive branch. As previously pointed out, the court here did not order that specific caseworkers be assigned to the matter. Rather, the court, having determined the current team of caseworkers had not

> fulfilled its statutory obligation to report, simply ordered the removal and reassignment of an alternative team. The ultimate determination of which caseworkers to assign to the matter, therefore, remained within the discretion of DCFS. In our judgment, this interplay between DCFS and the court, in a situation where assigned caseworkers fail to satisfy a duty to report, is one that the legislature specifically contemplated and sanctioned under the [Juvenile Court] Act.

(Citations omitted.) *Id.* at 779-80, 759 N.E.2d at 23, 259 Ill. Dec. at 543.

We agree with the reasoning used by the Illinois appellate court. We believe that the Legislature must have contemplated the interplay between DHHS and the juvenile court when it added the phrase "by and with the assent of the court" to § 43-285(1). We therefore determine that the doctrine of separation of powers was not violated by the juvenile court's order. Whether the addition of the phrase "by and with the assent of the court" to § 43-285(1) renders the statute unconstitutional is neither before us nor possible for us to decide. This court cannot determine the constitutionality of a statute. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003). Accordingly, we decline to address this issue.

CONCLUSION

Finding that the separate juvenile court did not err when it ordered DHHS to remove the case manager dealing with Veronica's case and replace her with a more experienced case manager, we affirm the decision of the juvenile court in its entirety.

AFFIRMED.

IN RE ESTATE OF THOMAS W. TIZZARD III, ALSO KNOWN AS THOMAS W. TIZZARD, DECEASED. SANDRA J. TIZZARD, APPELLEE, V. RENA A. TIZZARD, PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS W. TIZZARD III, DECEASED, APPELLANT.

708 N.W.2d 277

Filed December 20, 2005. No. A-04-618.

1. **Jurisdiction: Judgments: Final Orders: Appeal and Error.** The appellate court has the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed, and to vacate an order of the lower court entered without jurisdiction.
2. **Taxation: Federal Acts: Courts.** The determination of whether a person owes federal income tax on money received does not occur in the Nebraska state courts.
3. ____: ____: ____. State law is not binding on federal courts in determining income tax questions pursuant to I.R.C. § 71 (2000).
4. **Decedents' Estates: Taxation: Federal Acts: Courts.** Where federal estate tax liability turns upon the character of a property interest held and transferred by a decedent under state law, federal authorities are not bound by the determination made of such property interest by a state court.
5. **Federal Acts: Courts.** In answering a question of federal law, the U.S. Supreme Court is in no way bound by state courts' answers to similar questions involving state law.
6. **Taxation: Federal Acts.** State law creates legal interests, but the federal statute determines when and how they shall be taxed.
7. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
8. **Contracts: Declaratory Judgments.** Any person interested under a written contract may have any question of construction determined and obtain a declaration of rights, status, or other legal relations thereunder.
9. **Declaratory Judgments: Justiciable Issues.** In order to grant declaratory relief, there must be a justiciable issue, meaning a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
10. **Courts: Jurisdiction.** While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska, existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska.
11. **Parties: Proof.** In order to maintain an action to enforce private rights, the plaintiff must show that he will be benefited by the relief to be granted.
12. **Courts: Declaratory Judgments: Justiciable Issues.** A court can declare the law and its application to a given set of facts only when a justiciable controversy is presented for determination, and a court is not empowered to render advisory opinions.
13. **Justiciable Issues.** To determine whether there is a justiciable issue presented, the crucial questions are as follows: (1) Is there a present substantial controversy between parties with adverse interests, (2) is such controversy susceptible of immediate

resolution and judicial enforcement, (3) will the plaintiff be benefited by the relief to be granted, and (4) is the court's decision merely an advisory opinion?

14. **Judgments: Jurisdiction: Appeal and Error.** An appellate court has the power to vacate an order entered by the lower court without jurisdiction.

Appeal from the County Court for Douglas County: JOSEPH P. CANIGLIA, Judge. Vacated and dismissed.

Jay A. Ferguson for appellant.

Dennis E. Martin and Kevin J. McCoy, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

INTRODUCTION

This appeal involves a claim that an Internal Revenue Service (IRS) "Miscellaneous Income" form 1099 (hereinafter Form 1099) issued by the personal representative of an estate was inaccurate. The recipient of the disputed Form 1099, Sandra J. Tizzard, contends that the personal representative, Rena A. Tizzard, should not have issued a Form 1099 showing that Sandra received $144,000 in miscellaneous income from the estate of Thomas W. Tizzard III, also known as Thomas W. Tizzard, who is the deceased former husband of both Sandra and Rena. The county court for Douglas County reopened Thomas' estate and ultimately granted Sandra's motion for summary judgment, finding that "at no time did the Estate pay $144,000.00 to [Sandra] as alleged in the [Form 1099] sent to [Sandra]." The court further ordered Rena, as the personal representative, to file an amended Form 1099 "showing $0 paid to [Sandra] by the Estate."

We find that Sandra did not present a justiciable issue to the county court, because her claim that she received an inaccurate Form 1099, to the extent that it presents any issue, presents only a matter of federal income tax law. Therefore, we find that the county court erred in granting summary judgment, and we vacate the judgment of the county court and order that Sandra's application be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

The record shows that Thomas, the decedent, was first married to Rena. After their divorce, Thomas married Sandra on January 1, 1989. On October 18, 1999, Sandra and Thomas' marriage was dissolved, and the decree incorporated their April 16, 1999, property settlement agreement. Part of that agreement provided as follows: "Alimony shall terminate: 1. upon the death of either party, the remarriage of [Sandra], 2. or upon [Sandra's] cohabitation with an unrelated adult with whom she shares living expenses, 3. or, the passage of 72 months."

The agreement further provided:

> [Thomas] shall maintain existing life insurance through his employer . . . on his life naming [Sandra] as primary beneficiary for an amount sufficient to cover the outstanding alimony obligation as ordered under the terms of this Decree. [Thomas] shall periodically provide proof, at [Sandra's] request, that sufficient insurance is in force and that the coverage remains adequate.

Despite the above provision, the record shows that on December 14, 1999, Thomas submitted a change of beneficiary to his life insurance company designating Rena as the primary beneficiary instead of Sandra. On January 3, 2000, Thomas died, and Rena was appointed as personal representative of Thomas' estate.

Subsequently, both Sandra and Rena made claims against Thomas' life insurance policy. In February 2000, Sandra filed a claim against the estate, alleging "[a]limony" due in the amount of $144,000. Sandra amended her claim in March to "64 monthly alimony payments" of $2,250 each, as well as life insurance proceeds of $144,000, noting in such amendment with respect to the insurance claim that the "[v]alue" of the second claim "is a repeat of Claim No. 1"—which notation is clearly Sandra's admission that she is only entitled to satisfaction of one or the other of her two claims for $144,000. Rena, as personal representative, disallowed both of Sandra's claims on April 10.

Thomas' life insurance company then filed an interpleader action in federal district court, noting Sandra's and Rena's competing claims to Thomas' life insurance proceeds and making

both Sandra and Rena parties. As part of that action, the company paid $178,500 in life insurance proceeds into federal court. The interpleader action was settled by a stipulation filed in the federal court on February 1, 2002, which provided for the execution of a mutual release by Sandra, by Rena, and notably by Rena as personal representative of the estate—although the estate was not a party in the interpleader action. Under the stipulation, Sandra and Rena agreed that Sandra would receive $144,000, which amount was described therein as "representing 63 unpaid alimony payments by Thomas . . . in the amount of $141,750.00, plus $2,250.00 in interest," and that Rena was entitled to the remainder of the proceeds of the life insurance policy. Pursuant to the stipulation, the clerk of the federal district court paid such funds to the trust accounts of Sandra's and Rena's attorneys, and the interpleader action was dismissed. The mutual release was signed by Sandra and Rena individually and again by Rena as the personal representative of Thomas' estate.

On July 24, 2002, the estate was closed by entry of an order of complete settlement. A receipt signed by Sandra was filed with the county court on July 26. That receipt states:

> [Sandra] hereby acknowledges receipt of the following described property . . . [:]
>
> Claim No. 1. 64 monthly alimony payments due to Sandra . . . in the amount of $2,250.00 per month.
>
> Claim No. 2: Life insurance proceeds due to [Sandra] for [Thomas'] policy issued through his place of employment by [Thomas' life insurance company].

In January 2003, Sandra received a Form 1099 showing payment by Thomas' estate of $144,000 to Sandra, and such amount was listed on the form in the box entitled "Other Income."

On August 26, 2003, Sandra filed an application to reopen the estate stating that Rena had sent the Form 1099 after her discharge as personal representative, that Rena was attempting to subject Sandra to income tax "by sending her a Form 1099 showing $144,000.00 in taxable income paid to her, [and that such Form 1099 was] false as to [Sandra]." In her prayer for relief, Sandra asked for a "declaration that at no time did the Estate pay $144,000.00 to [Sandra]" and asked that Rena, as the

personal representative, be ordered "to file an amended [Form] 1099 showing $0 paid to [Sandra]."

Sandra's application also stated that she discovered that Rena had submitted a petition for determination of inheritance tax, showing a deduction under "Debts Paid for Which [Thomas] Was Liable At Death" of $144,000, the amount paid to Sandra in settlement of the interpleader action. Sandra noted that Rena had taken this amount as a deduction against her own inheritance tax, reducing to $0 what otherwise would have been a taxable amount of $133,713.77. The record before us bears out that in Rena's final accounting of Thomas' estate, she deducted $144,000, describing the deduction as "Ex-wife's divorce decree alimony." Sandra alleged that at no time did she receive $144,000 in alimony from the estate, nor did the estate ever have any interest in or possession of the $144,000 in life insurance proceeds paid to Sandra via the interpleader action. Perhaps inconsistent with such pleading is Sandra's signed receipt from which we quoted above.

On December 11, 2003, the county court granted Sandra's application to reopen the estate. On April 28, 2004, Sandra filed a motion for summary judgment. In her motion, Sandra sought the same relief we have previously detailed from her application. On May 13, the court held a hearing on Sandra's motion for summary judgment at which Sandra offered into evidence a letter from Rena to the IRS dated October 6, 2003, which stated:

> Dear IRS:
>
> I am not sure exactly what to do about this. I previously sent a [Form] 1099, as [personal representative of Thomas' estate], because I thought I was supposed to report this as alimony. A copy is enclosed. Sandra . . . has raised objection to this [Form] 1099['s] being from the Estate. Enclosed please find true copies of the Federal Court documents that settled this issue, or so I thought. If this alimony was supposed to be reported by me individually then please instruct me and I will send in a new [Form] 1099. If it was supposed to be reported by the Estate, then I am sorry to have bothered you.

Attached to that letter was a copy of the Form 1099 Rena sent to Sandra. The payor is listed as Thomas' estate, with Rena as

personal representative. In the box entitled "Other Income" is the amount of $144,000, and the recipient is listed as Sandra. Sandra also offered into evidence the settlement stipulation between Sandra and Rena in the interpleader action.

Rena likewise offered two exhibits into evidence. The first was an affidavit by one of Rena's attorneys which we deem not to be pertinent except to the extent that it attached a copy of a letter, the original of which was received as Rena's second exhibit. This letter, dated May 10, 2004, was from the IRS and was signed by Mark Munsterman, "Tax Specialist." The caption on Munsterman's letter reads, "Re: Issuance of Form 1099-MISC re Alimony Payments re [Thomas' estate]," and the letter is addressed to Rena's attorneys. Munsterman's letter recites the core facts, much as we have detailed them above, including a summary of the federal court interpleader action and its resolution by payment of the $144,000 to Sandra, which payment, Munsterman said, "was to fulfill [Thomas'] alimony obligation." Munsterman's letter also states, "The fact that life insurance was the source of the funds for the payment of the alimony claim does not affect the includability of the payment as ordinary income in Sandra's income tax return for the year of receipt," citing "Income Tax Reg. §1.101-5 of the Internal Revenue Code." Munsterman concluded his letter by saying that because the payment "was made to satisfy a claim made against [Thomas' estate] and [because] Rena agreed to the payment in her capacity as the Personal Representative . . . Rena as the Personal Representative is the proper party to issue the [Form 1099] to Sandra."

ASSIGNMENTS OF ERROR

Generally, Rena contends that the county court erred in its grant of summary judgment; however, we do not set forth her exact assignments of error because ultimately, we resolve this case on a very fundamental jurisdictional premise of Nebraska law.

STANDARD OF REVIEW

[1] The appellate court has the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed,

and to vacate an order of the lower court entered without jurisdiction. See *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

ANALYSIS

After thoroughly considering the record, the briefing, and the oral argument, we believe that this litigation can be distilled down to its essence in the following brief paragraph, remembering that what transpired in Sandra's divorce, in the resolution of Thomas' estate, in the interpleader action, and with the IRS up to the time of the summary judgment hearing constitute essentially undisputed facts:

Clearly, the federal income tax consequences which Sandra perceives to be deriving from the issued Form 1099 are the core of and the motivation for this litigation. Put another way, absent adverse tax consequences for Sandra, the disputed Form 1099 is a matter of no consequence for Sandra. Sandra does not want the $144,000 classified as alimony because she would likely be obligated to pay federal income tax on the money. Therefore, as a sort of preemptive strike (against the IRS, we surmise), Sandra sought the county court's help to get a federal tax form amended to show that she got nothing from Thomas' estate rather than $144,000 as now shown by the Form 1099 issued to her by the estate. But, there is no doubt from the record that irrespective of what the Form 1099 originally said, or might be modified to say, the IRS is fully aware that Sandra received $144,000 as a result of the resolution of the federal court interpleader action. Thus, the IRS' awareness of Sandra's receipt of this money certainly does not hinge on the Form 1099 or what it says—Munsterman's letter proves this proposition. Therefore, bearing in mind the essence of the matter, the crucial question for us becomes whether Sandra presented a justiciable issue.

We answer the question by noting that the premise upon which Sandra brings this litigation is flawed. The notion that gaining the relief Sandra desires—an amended Form 1099 to show $0 received from the estate—will make a difference to the IRS is flawed because what the Nebraska state courts say about the Form 1099 does not determine a federal tax issue generally or determine the taxability of the $144,000 in particular.

[2] The determination of whether a person owes federal income tax on money received does not occur in the Nebraska state courts. Instead, if the taxpayer receives a proposed adjustment to a return from the IRS (for example, because Sandra did not report the $144,000 as taxable income), the taxpayer can in certain circumstances request that the matter be considered by the IRS Appeals Office or, in other situations, after a notice of deficiency, file a petition for redetermination of the deficiency with the U.S. Tax Court; or, the taxpayer can pay the tax and then file a request for a refund which, if denied, can then be litigated in a U.S. District Court. See 26 C.F.R. § 601.103 (2005) (summary of general tax procedure). While we have used a "bare bones" treatment of how disputes over federal income tax are resolved, it is sufficient to demonstrate the general proposition that Nebraska's courts do not determine federal taxability, and Sandra cites no authority to the contrary.

[3-6] We next turn to a longstanding principle having its roots in basic precepts of federalism, as illustrated by *Bardwell v. C. I. R.*, 318 F.2d 786 (10th Cir. 1963). In *Bardwell*, a former wife was to receive monthly payments of $425 after her divorce and her former husband was to place certain insurance policies in trust from which the former wife would be paid $600 per month if he died. Although the former husband was apparently still alive, the former wife and the IRS disagreed about how the monthly payments were to be treated, the former wife arguing that under Colorado law, the payments were not taxable alimony, but, rather, were made in discharge of a property settlement. The *Bardwell* court said that "state law is not binding on federal courts in determining income tax questions arising out of situations such as this." 318 F.2d at 789. The statutory reference in the *Bardwell* opinion regarding "situations such as this" was to the annotated counterpart to I.R.C. § 71 (1952), which was the federal statute making "[a]limony and separate maintenance payments" includable in gross income for federal tax purposes as well as defining what shall be considered alimony or separate maintenance payments. The *Bardwell* court also said that it was no more bound by the labels which parties to the payments put on them than it was by state law. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d

886 (1967) (where federal estate tax liability turns upon character of property interest held and transferred by decedent under state law, federal authorities are not bound by determination made of such property interest by state court), *nonacq. on other grounds* 1968-2 C.B. 3. See, also, *United States v. Craft*, 535 U.S. 274, 122 S. Ct. 1414, 152 L. Ed. 2d 437 (2002) (holding that state law determines only which sticks are in person's bundle; whether those sticks qualify as "property" for purpose of federal tax lien statute is question of federal law, and in answering question of federal law, the U.S. Supreme Court is in no way bound by state courts' answers to similar questions involving state law); *United States v. Mitchell*, 403 U.S. 190, 91 S. Ct. 1763, 29 L. Ed. 2d 406 (1971) (state law creates legal interests, but federal statute determines when and how they shall be taxed); *Burnet v. Harmel*, 287 U.S. 103, 53 S. Ct. 74, 77 L. Ed. 199 (1932); *Pahl v. C.I.R.*, 150 F.3d 1124 (9th Cir. 1998) (holding that courts look to federal law to determine what interest creates tax liability, but look to state law to determine whether taxpayer has requisite interest).

[7,8] Therefore, from the foregoing authority, it is abundantly clear that whatever the county court might order about the content of the Form 1099 does not make any difference on the only issue with which Sandra is truly concerned—the federal income taxability of the $144,000. The evidence which is central to our analysis of this appeal is (1) the stipulation and the mutual release earlier detailed which settled the interpleader action and (2) the property settlement agreement between Thomas and Sandra executed as part of their divorce. These key documents are subject to the law of contracts. See *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988) (settlement agreement is subject to general principles of contract law). Sandra's application which began this litigation is for "Declaratory Relief," and her prayer asks the court to declare that at no time did the estate pay her $144,000 and to order that Rena file an amended Form 1099 showing "$0 paid." Thus, this matter is in the nature of a declaratory judgment action under Neb. Rev. Stat. § 25-21,150 (Reissue 1995), which provides, "Any person interested under a . . . written contract . . . may have determined any question of

construction . . . and obtain a declaration of rights, status or other legal relations thereunder."

[9-12] In order to grant declaratory relief, there must be a justiciable issue, meaning a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. See *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989). See, also, *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982). "While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska (cf. U.S. Const. art. III, § 2), existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska." *Mullendore v. Nuernberger*, 230 Neb. 921, 925, 434 N.W.2d 511, 515 (1989). In the context of a standing inquiry in a declaratory judgment action involving classification of school districts, the Nebraska Supreme Court held that in order to maintain an action to enforce private rights, the plaintiff must show that he will be benefited by the relief to be granted. *Stahmer v. March*, 202 Neb. 281, 275 N.W.2d 64 (1979) (residents and taxpayers of Class V school district failed to demonstrate how they would benefit from declaration that one or more laws applicable to Class I school districts were invalid, and thus, sustainment of demurrers for lack of standing in declaratory judgment action was affirmed). The Nebraska Supreme Court has said numerous times that it can declare the law and its application to a given set of facts only when a justiciable controversy is presented for determination and that it is not empowered to render advisory opinions. See, *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980); *American Fed. of S., C. & M. Emp. v. State*, 200 Neb. 171, 263 N.W.2d 643 (1978). Similarly, neither we nor the Douglas County Court can render advisory opinions.

RESOLUTION

The bill of exceptions, aside from the documentary exhibits admitted in evidence, contains 102 pages of discussion between the trial judge, the lawyers for Sandra and Rena, and someone often referred to as "UNIDENTIFIED VOICE," who apparently was a representative of the Douglas County Attorney's office who

was concerned about the county inheritance tax implications of Sandra's request for declaratory relief. And while, in the course of those 102 pages, the question of the propriety of the inheritance tax determination was discussed at some length, the county court made no order concerning such propriety; Douglas County is not a party to this appeal, and thus, no inheritance tax issue is before us. Additionally, we note that Rena did not ask for any affirmative relief, nor seek summary judgment, merely maintaining the position that the Form 1099 was correct. However, Rena alleged in her responsive pleading: "The Douglas County Court does not have jurisdiction to determine whether, according to Federal Tax Laws, [the $144,000] distribution is taxable alimony to [Sandra] or not."

[13] To determine whether there was a justiciable issue and whether the county court had jurisdiction, the crucial questions are as follows: (1) Is there a present substantial controversy between parties with adverse interests, (2) is such controversy susceptible of immediate resolution and judicial enforcement, (3) will Sandra be benefited by the relief to be granted, and (4) is the court's decision merely an advisory opinion?

The answer to all of these questions becomes apparent when the true nature of the "dispute" is recognized: whether the $144,000 distribution is taxable income in the eyes of the IRS. The Form 1099 is merely a piece of paper, and its contents do not determine whether the $144,000 amount is includable in Sandra's gross income for federal income tax purposes. Thus, whether the Form 1099 says that Sandra received $0 or $144,000 from the estate is not a substantial controversy. Moreover, since Rena as the personal representative has nothing at stake as to whether Sandra pays income tax on the money, Rena as the personal representative has no interest adverse to Sandra's. The real issue presented is not subject to judicial enforcement by the Douglas County Court, because the law is quite clear that state courts' pronouncements on the nature of a payment are not binding on the IRS' treatment of money under I.R.C. § 71 (2000). Thus, it naturally follows that an order from a Nebraska state court as to what should be written in the boxes on a Form 1099 is of no benefit to Sandra. It also follows that such an order is merely advisory and does not resolve the issue which concerns

Sandra. The long and short of it is that Sandra's "fight" about the taxability of the $144,000 is not with the personal representative of her former husband's estate, but with the IRS. And, while some of the evidence involved here—such as Sandra's property settlement agreement with Thomas and the terms of the resolution of the federal court interpleader action—will clearly be important in the ultimate determination of this issue, the forum for such determination is not the Douglas County Court; it will be resolved in another forum. As an aside, we recall that the IRS tax specialist, Munsterman, said that the Form 1099 was properly issued by Rena as the personal representative.

[14] Because there was no justiciable issue presented by Sandra, the county court should not have attempted to exercise its judicial power, and it lacked subject matter jurisdiction. Therefore, the county court's order of May 18, 2004, is vacated and this appeal is dismissed. See *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999) (appellate court has power to vacate order entered by lower court without jurisdiction).

VACATED AND DISMISSED.

DEBBI JEAN LAMB, APPELLEE, V.
KEITH WILLIAM LAMB, APPELLANT.
707 N.W.2d 423

Filed December 20, 2005. No. A-05-044.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
2. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court.
4. **Child Custody.** Pursuant to Neb. Rev. Stat. § 43-1266 (Reissue 2004), a motion or other request for relief made in a child custody proceeding or to enforce a child

custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made.

5. **Child Custody: Words and Phrases.** A child custody proceeding for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act is a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue.
6. ____: ____. For purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, "commenced" means the filing of the first pleading in a proceeding.
7. **Child Custody: Jurisdiction.** In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction.
8. **Child Custody: Modification of Decree: Jurisdiction: States.** A Nebraska court may modify a custody decree from another state if (1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with Neb. Rev. Stat. §§ 43-1201 to 43-1225 (Reissue 1998) or has declined to assume jurisdiction to modify the decree and (2) the court of this state has jurisdiction.
9. ____: ____: ____: ____. A Nebraska court must first determine whether the issuing state appears to have continuing exclusive jurisdiction under the jurisdictional prerequisites enumerated in the Uniform Child Custody Jurisdiction Act; if the issuing state no longer has continuing exclusive jurisdiction, a custody decree may be modified by a Nebraska court if Nebraska itself has jurisdiction under the Nebraska Child Custody Jurisdiction Act.
10. ____: ____: ____: ____. The state which initially enters a custody decree may lose continuing exclusive jurisdiction to modify the decree if it loses all or almost all connection with the child.
11. **Child Custody: Jurisdiction: States.** When a child and all parties have moved away from the state in which an initial custody decree was granted, deference to that state's continuing jurisdiction is no longer required because the issuing state no longer meets the jurisdictional prerequisites of Neb. Rev. Stat. § 43-1203(b) (Reissue 1998).
12. **Child Custody: Jurisdiction: States: Proof.** When the issuing state no longer has continuing exclusive jurisdiction, it is unnecessary to also show that the issuing state declined jurisdiction.
13. **Child Custody: Modification of Decree: Jurisdiction: States.** A Nebraska court has jurisdiction to decide custody matters by modification if Nebraska (1) is the home state of the child at the time of commencement of the proceeding or (2) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state.
14. **Child Custody: Jurisdiction: Time: Words and Phrases.** The home state of a child for purposes of the Nebraska Child Custody Jurisdiction Act is the state in which the child, for at least 6 consecutive months immediately preceding the time involved, lived with his or her parents, a parent, or a person acting as a parent.
15. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
16. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.

17. **Child Custody: Child Support: Modification of Decree: Jurisdiction: States.** The Nebraska Child Custody Jurisdiction Act does not confer subject matter jurisdiction upon a Nebraska court to modify a child support order issued by another state.
18. **Child Support: Modification of Decree: Jurisdiction: States.** The modification of another state's child support order must be addressed under the Uniform Interstate Family Support Act, Neb. Rev. Stat. §§ 42-701 to 42-751 (Reissue 2004).
19. **Child Support: States.** The Uniform Interstate Family Support Act provides a system where only one child support order may be in effect at any one time.
20. **Child Support: Modification of Decree: Jurisdiction: States.** Upon petition, a tribunal of this state may modify a child support order issued in another state which is registered in this state if, after notice and hearing, the tribunal finds that (1) neither the child nor the individual obligee nor the obligor resides in the issuing state, a petitioner who is a nonresident of Nebraska seeks modification, and the respondent is subject to the personal jurisdiction of the Nebraska district court or (2) Nebraska is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the Nebraska district court, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for the Nebraska district court to modify the support order and assume continuing exclusive jurisdiction.
21. ____: ____: ____: ____. A party seeking to modify a child support order issued in another state shall register that order in Nebraska in accordance with Neb. Rev. Stat. §§ 42-736 to 42-739 (Reissue 2004) if the order has not been previously registered.
22. **Statutes: Foreign Judgments: Child Support.** Substantial compliance with the registration requirements of the Uniform Interstate Family Support Act is expected.
23. **Child Support: Modification of Decree: Jurisdiction: States.** Failure to register an order as required under the Uniform Interstate Family Support Act precludes a Nebraska court from modifying the issuing state's child support order.
24. ____: ____: ____: ____. Registering a child support order issued by another state under the Nebraska Uniform Enforcement of Foreign Judgments Act does not confer subject matter jurisdiction on a Nebraska court to modify the foreign order with respect to payments to be made in the future.
25. ____: ____: ____: ____. A district court may modify a registered child support order issued in another state when, among other requirements, the petitioner seeking modification is a nonresident of Nebraska.
26. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. The party must also show that a change in custody is in the child's best interests.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part reversed and vacated.

Michael S. Borders and Julianna S. Jenkins, of Sennett, Duncan, Borders & Jenkins, P.C., L.L.O., for appellant.

Cheryl C. Guggenmos, of Guggenmos, England & Peterson, for appellee.

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

SIEVERS, Judge.

INTRODUCTION

Keith William Lamb appeals the order of the Custer County District Court granting the application of Debbi Jean Lamb, now known as Debbi Jean Rhoad, to modify a Wyoming decree of dissolution. That application requested changing the custody of the parties' minor child, Daniel, to Debbi. We reject Keith's claim that the Arizona courts had jurisdiction, and we find that the Nebraska district court had jurisdiction to award Daniel's custody to Debbi but that the court lacked subject matter jurisdiction to modify the Wyoming divorce decree with respect to child support. Thus, we affirm the district court's order concerning child custody, but we reverse and vacate the district court's order concerning child support.

FACTUAL AND PROCEDURAL BACKGROUND

Debbi and Keith were married on June 12, 1976. Three children were born of the marriage: Jeremy, born March 21, 1980; Justin, born December 22, 1981; and Daniel, born December 27, 1989. Daniel is the only child at issue in these proceedings. Debbi and Keith were divorced pursuant to a decree of dissolution entered in Laramie County, Wyoming, on January 11, 1991. The decree granted custody of the three children to Debbi.

On November 8, 1995, an order modifying the divorce decree was entered by the Wyoming court, which found that there was a substantial change in circumstances warranting a modification of the custody of the minor children. Keith was given "sole, complete and exclusive care, custody and control" of the minor children, subject to Debbi's "frequent and liberal visitation." Debbi was ordered to pay child support of $176.66 per month.

After the divorce, Keith moved from Wyoming to Colorado, and then in late 1994, he moved to Arizona. On July 16, 1999, he married Michelle. One child was born of that marriage, and Keith adopted Michelle's two children from a previous marriage. Keith and Michelle were divorced in Arizona on May 30, 2003.

Michelle obtained custody of the three children, and Keith was ordered to pay child support of $2,369 per month for the three children.

Keith is employed as an airline pilot, and his 2003 income tax forms show he earned wages of $136,561 that year. Keith testified that he flies three to four international trips per month and is home about 15 to 25 days during the month. At the time of trial, Keith lived in Arizona with his girl friend, whom he had been dating for 2 years. Keith testified that although he had filed for bankruptcy prior to trial, an order of discharge had not been entered.

Debbi moved from Wyoming to Nebraska in 1998. At the time of trial, she was employed as a "personal care giver," working 17 hours per week at $8 per hour. In May 2000, Daniel came to Nebraska to visit Debbi for the summer. After that summer visit, Daniel never went back to live with Keith. Debbi testified that in the summer of 2000, Daniel came to live with her pursuant to an agreement with Keith, and that in August, Keith provided Debbi a power of attorney for Daniel. Keith claims that the parties agreed that Daniel would live with Debbi for one school year, while Debbi said that they did not agree to a specific time limitation.

On October 23, 2001, Debbie filed a "Petition for Exercise of Jurisdiction" in the Custer County District Court. While there is not a specific order ruling on such petition, the court obviously exercised jurisdiction as shown by the subsequent proceedings we detail herein. On April 4, 2002, Debbi filed an "Application for Ex Parte Order of Custody" in the district court for Custer County, and on that same day, the court granted Debbi temporary custody of Daniel pursuant to an ex parte order. Keith testified at trial that in April 2002, he came to Nebraska to retrieve Daniel but discovered Debbi had obtained temporary custody of him.

On April 4, 2002, Keith filed with the Custer County District Court a "Special Appearance," followed by an application for modification or dismissal of the ex parte order of custody filed on April 15. On April 18, the district court granted Keith's application for modification to the extent that the ex parte order was to expire on May 10, 2002, but denied the remainder of the application. The court noted that Keith's filing of the application

for modification constituted the "entry of a voluntary appearance and is the equivalent of personal service of process," thereby implicitly overruling the special appearance. On July 22, the district court entered an order continuing "the temporary custody order granted on April 18, 2002," subject to reasonable rights of visitation and weekly telephone contact.

On May 3, 2004, Debbi filed an application to modify the decree, requesting the Custer County District Court to grant her custody of Daniel and to require Keith to pay child support. The court, following a hearing on the matter, entered an order on November 4, 2004, finding that the court had had jurisdiction since October 2001 and that custody of Daniel should be awarded to Debbi. Keith was granted visitation, in accord with *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987), and was ordered to pay child support of $991 per month beginning September 1, 2004. Keith's motion for new trial was overruled, and he now appeals to this court.

ASSIGNMENTS OF ERROR

Keith asserts, reassigned and restated, that the Custer County District Court lacked jurisdiction under the Nebraska Child Custody Jurisdiction Act, lacked jurisdiction to modify the child support order from Wyoming given the provisions of Nebraska's Uniform Interstate Family Support Act, and erred in granting Debbi custody of Daniel.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

[2] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Id.*

[3] Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999).

ANALYSIS

Jurisdiction to Determine Custody of Daniel.

Keith asserts that the Custer County District Court did not have jurisdiction to modify the Wyoming decree and to grant Debbi custody and that the case is governed by the Nebraska Child Custody Jurisdiction Act (hereinafter NCCJA) and not by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The provisions of the NCCJA, Neb. Rev. Stat. §§ 43-1201 through 43-1225 (Reissue 1998), were repealed by 2003 Neb. Laws, L.B. 148, § 105, and replaced by the UCCJEA, Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2004), operative January 1, 2004. We must first determine which of the two acts—the NCCJA or the UCCJEA—is controlling here.

[4-6] Section 43-1266 provides: "A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made." A "[c]hild custody proceeding means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." § 43-1227(4). "Commenced" means "the filing of the first pleading in a proceeding." § 43-1227(5). In determining whether the NCCJA or the UCCJEA applies, we must first determine when a motion or other request for relief was filed in a "child custody proceeding."

On April 4, 2002, Debbi filed in the Custer County District Court an "Application for Ex Parte Order of Custody." On that same day, the court entered an ex parte order granting Debbi custody of Daniel for an indefinite amount of time. Keith then filed a motion to modify or dismiss the ex parte order. Because the trial judge, District Judge Ronald Olberding, was not available to hear the motion, Keith requested that another judge hear the motion. The motion was heard by then District Judge William Cassel, who entered an order on April 18 stating that Judge Olberding's ex parte order was to expire on May 10, 2002, and

that "[t]he burden of initiating such hearing for further temporary custody rests upon [Debbi]; however, nothing in this order shall preclude [Keith] from seeking an earlier hearing consistent with the notice requirements of the [NCCJA] and Rule 8-3 of this court." Judge Cassel "otherwise denied" Keith's motion to modify or dismiss the ex parte order. Therefore, Judge Cassel's order essentially terminated Judge Olberding's ex parte order by finding that such would "expire" on May 10. However, on May 2, a hearing was held on the temporary custody order, at which hearing both parties were represented by counsel. On July 22, Judge Olberding entered an order stating that "the temporary custody order granted on April 18, 2002, is continued, subject to rights of reasonable visitation in [Keith] and at least once per week telephone privileges." No appeal was taken from the orders of April 4, April 18, or July 22. On May 3, 2004, Debbi filed her "Application to Modify Order of Decree of Dissolution," and it was this pleading which resulted in the order of the Custer County District Court that Keith now appeals to this court.

We first look to Debbi's "Application for Ex Parte Order of Custody" filed on April 4, 2002, which resulted in the requested ex parte order granting Debbi temporary custody of Daniel. The question is whether such application and ruling thereupon constituted a "child custody proceeding" under § 43-1227(4), remembering that while Daniel's custody was at issue, there was no notice to Keith and no hearing in which Keith had an opportunity to participate. A "proceeding" is defined by Black's Law Dictionary 1221 (7th ed. 1999) as follows:

> 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing.

Even if Debbi's "Application for Ex Parte Order of Custody" filed on April 4, 2002, is not a motion or request for relief in a "child custody proceeding" because of the lack of notice and hearing—a question we need not decide—Keith's "Application for Modification or Dismissal of Ex Parte Order of Custody" is clearly a motion made in a child custody proceeding, given the

expansive definition of that term in § 43-1227(4). Keith's motion, filed April 15, requested that the Custer County District Court modify its ex parte order to allow Keith to maintain custody of Daniel as "decided in the District Court of Laramie County, Wyoming." A hearing was held on Keith's motion. Section 43-1266 provides: "A motion or other request for relief made in a child custody proceeding . . . which was commenced before January 1, 2004, is governed by the law in effect at the time the motion or other request was made." Because Keith's April 15, 2002, motion was made in a "child custody proceeding" well before January 1, 2004, the NCCJA is the applicable act because it was in effect on April 15, 2002.

In using Keith's April 15, 2002, "Application for Modification or Dismissal of Ex Parte Order of Custody" as the determinative pleading for purposes of commencement, we rely largely on the fact that such pleading resulted in a continuation of temporary custody for several years, until Debbi filed her "Application to Modify Order of Decree of Dissolution" asking that the "permanent care, custody and control" of Daniel "remain" with her, based on a material change of circumstances. In short, the Nebraska district court had placed temporary custody with Debbi in 2002, as a result of Keith's April 15 application, which beyond question began a "proceeding in which legal custody, physical custody, or visitation with respect to a child [wa]s an issue." See § 43-1227(4).

[7-9] We now turn to whether the district court had jurisdiction under the NCCJA. In determining whether a court should entertain a child custody proceeding having interstate implications, the court should first determine whether it has jurisdiction and then determine whether it is appropriate to exercise jurisdiction. *Paulsen v. Paulsen*, 11 Neb. App. 582, 658 N.W.2d 49 (2003). Section 43-1214 provides that a Nebraska court may modify a custody decree from another state if (1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with §§ 43-1201 to 43-1225 or has declined to assume jurisdiction to modify the decree and (2) the court of this state has jurisdiction. See, also, *Hamilton v. Foster*, 260 Neb. 887, 620 N.W.2d 103 (2000) (Nebraska court must first determine whether

issuing state appears to have continuing exclusive jurisdiction under jurisdictional prerequisites enumerated in Uniform Child Custody Jurisdiction Act; if issuing state no longer has continuing exclusive jurisdiction, custody decree may be modified by Nebraska court if Nebraska itself has jurisdiction under NCCJA). The *Hamilton* court said, "The NCCJA, Nebraska's version of the Uniform Child Custody Jurisdiction Act (UCCJA), speaks to the jurisdiction of courts of this state to modify child custody decisions initially determined in the courts of other states." 260 Neb. at 892, 620 N.W.2d at 110.

[10,11] "The state which initially enters a custody decree may lose continuing exclusive jurisdiction to modify the decree if it loses all or almost all connection with the child." *Hamilton v. Foster*, 260 Neb. at 894, 620 N.W.2d at 111. When a child and all parties have moved away from the state in which an initial custody decree was granted, deference to that state's continuing jurisdiction is no longer required because the issuing state no longer meets the jurisdictional prerequisites of § 43-1203(b). *Hamilton v. Foster, supra.*

[12] We first look to whether Wyoming retains continuing exclusive jurisdiction over the custody matter. The Wyoming court initially granted Debbi custody of Daniel pursuant to the parties' dissolution action in 1991. The Wyoming court also modified the decree in 1995, granting Keith custody of all three children. By the time the Wyoming court's 1995 modification decree was entered, Keith and the children had moved to Arizona. In 2000, Daniel moved to Nebraska to live with Debbi, and he has lived there ever since. Thus, Daniel has lived in either Arizona or Nebraska since 1995, and there is no evidence that Daniel has had any connection with Wyoming since 1995. Moreover, Keith has not lived in Wyoming since the dissolution action and Debbi has not lived there since 1998. Because both parties and Daniel have moved from Wyoming and have had no connection thereto for several years, deference to Wyoming's continuing jurisdiction is not required. See *Hamilton v. Foster, supra.* We now turn to whether Nebraska has jurisdiction. See *id.* (when issuing state no longer has continuing exclusive jurisdiction, it is unnecessary to also show that issuing state declined jurisdiction).

[13,14] Pursuant to § 43-1203(1), a Nebraska court has jurisdiction to decide custody matters by modification if

> (a) [t]his state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his or her removal or retention by a person claiming his or her custody or for other reasons, and a parent or person acting as parent continues to live in this state.

For purposes of the NCCJA, "home state" is defined as

> the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months . . . . Periods of temporary absence of any of the named persons shall be counted as part of the six-month or other period.

§ 43-1202(5).

In its November 4, 2004, order, the Custer County District Court found that Daniel had resided in Nebraska since May 2000 and that the Custer County District Court had had jurisdiction since October 2001. Daniel came to Nebraska in May 2000 so that Debbi could exercise her summer visitation. In August 2000, the parties agreed to allow Daniel to reside with Debbi for at least the 2000-2001 school year, and possibly longer. In May 2001, Keith wanted Daniel to come back to Arizona, but Debbi chose to exercise her 2001 summer visitation. Daniel continued to live in Nebraska with Debbi from 2001 until the time of trial, as we have recounted above in the "Factual and Procedural Background" portion of our opinion, although he did visit Keith in Arizona.

[15] Keith argues that Daniel was only in Nebraska because of the parties' agreement and that Daniel was merely "visiting" Nebraska. Brief for appellant at 15. The plain and ordinary meaning of the statute says that in order for Nebraska courts to have jurisdiction, Daniel must have "lived" in Nebraska with a parent for the 6 months immediately preceding the action. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002) (statutory language is to be given its plain and ordinary meaning). Webster's Encyclopedic Unabridged Dictionary of the English Language 838 (1989) defines "live" as "to dwell

or reside." Daniel was staying in Debbi's home and going to school in Nebraska from August 2000 until the time of trial. She had power of attorney as of August 11, 2000, "to do all acts and sign and execute all necessary documents pertaining to the education, health, welfare, and safety" of Daniel. The document granting Debbi power of attorney has on its face no time limit, and while the evidence is in conflict as to whether the parties' oral agreement included a time limit, the crucial fact is that the evidence undisputedly shows that Daniel has been living in Nebraska since the summer of 2000. Nebraska is Daniel's "home state," and the Custer County District Court had jurisdiction over the custody proceedings.

Jurisdiction to Modify Child Support.

[16-19] Keith asserts that the district court had no authority to modify the Wyoming child support order. Although Keith did not raise the issue of subject matter jurisdiction before the Nebraska district court, lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. See *Paulsen v. Paulsen*, 11 Neb. App. 582, 658 N.W.2d 49 (2003). Initially, we observe that the NCCJA does not confer subject matter jurisdiction upon a Nebraska court to modify a child support order issued by another state. See § 43-1202 (for purposes of NCCJA, child custody determination shall not include decision relating to child support or any other monetary obligation of any person). See, also, *In re Marriage of Zinke*, 967 P.2d 210 (Colo. App. 1998) (Uniform Child Custody and Jurisdiction Act does not confer subject matter jurisdiction upon court to modify child support order issued in another state). Thus, we address the modification of the Wyoming child support order under the Uniform Interstate Family Support Act (UIFSA), Neb. Rev. Stat. §§ 42-701 to 42-751 (Reissue 2004).

> The general purpose of UIFSA is to unify state laws relating to the establishment, enforcement, and modification of child support orders. . . . The goal of UIFSA is to streamline and expedite interstate enforcement of support decrees and to eliminate the problems arising from multiple or conflicting support orders from various states by providing for one tribunal to have continuing and exclusive jurisdiction

> to establish or modify a child support order. . . . UIFSA provides a system where only one child support order may be in effect at any one time. . . . UIFSA allows, under certain circumstances, a Nebraska court to enforce or modify a support order issued in another state or to establish a support order on behalf of a nonresident of this state when a Nebraska court has jurisdiction over the person obligated to pay support. . . . However, UIFSA does not create an independent duty of support. The purpose of UIFSA in regard to child support is to enforce or establish a child support order against someone who has a duty to pay support or to modify an existing child support order when interstate aspects are involved. . . . UIFSA's provisions may only be used to enforce an existing support order, establish a support order where no order has previously been established, or modify an existing support order.

(Citations omitted.) *Hamilton v. Foster*, 260 Neb. 887, 899-900, 620 N.W.2d 103, 114 (2000).

[20] Section 42-746 provides in part that "upon petition[,] a tribunal of this state may modify a child support order issued in another state which is registered in this state, if after notice and hearing" the tribunal finds that (1) neither the child nor the individual obligee nor the obligor resides in the issuing state, a petitioner who is a nonresident of Nebraska seeks modification, and the respondent is subject to the personal jurisdiction of the Nebraska district court or (2) Nebraska is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the Nebraska district court, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for the Nebraska district court to modify the support order and assume continuing exclusive jurisdiction.

[21-23] It is clear that under § 42-746, the first predicate for a Nebraska court to have subject matter jurisdiction to modify another state's child support order is registration in Nebraska of such order—in this case, the Wyoming child support order. Section 42-744 provides that a party seeking to modify a child support order issued in another state shall register that order in Nebraska in accordance with §§ 42-736 to 42-739 if the order has not been previously registered. Section 42-737 provides:

> (a) A support order . . . may be registered in this state by sending the following documents and information to the appropriate [district court] in this state:
>
> (1) a letter of transmittal to the tribunal requesting registration and enforcement;
>
> (2) two copies, including one certified copy, of the order to be registered, including any modification of the order;
>
> (3) a sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;
>
> (4) the name of the obligor and, if known:
>
> (i) the obligor's address and social security number;
>
> (ii) the name and address of the obligor's employer or other payor and any other source of income of the obligor; and
>
> (iii) a description and the location of property of the obligor in this state not exempt from execution; and
>
> (5) except as otherwise provided in section 42-725, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.
>
> (b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as a foreign judgment, together with one copy of the documents and information, regardless of their form.
>
> (c) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed at the same time as the request for registration or later. The pleading shall specify the grounds for the remedy sought.

Substantial compliance with the registration requirements is expected. See, *Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999); *In re Interest of Chapman*, 973 S.W.2d 346 (Tex. App. 1998); Unif. Interstate Family Support Act § 602, comment, 9 U.L.A. 243 (2005). Failure to register an order as required under the act precludes a trial court from modifying the issuing state's child support order. See, *Auclair v. Bolderson*, 6 A.D.3d 892, 775 N.Y.S.2d 121 (2004) (petitioner failed to demonstrate that Florida judgment was registered in New York; this failure to prove registration prevented New York courts from

obtaining subject matter jurisdiction under both UIFSA and Full Faith and Credit for Child Support Orders Act to modify child support order from another state); *Rivera v. Ramsey County*, 615 N.W.2d 854 (Minn. App. 2000) (registration is prerequisite to modifying existing child support order issued in another state). See, also, *Jolly v. Jolly*, 130 S.W.3d 783 (Tenn. 2004) (failure to register Kansas divorce decree in Tennessee precluded Tennessee court, under UIFSA, from enforcing child support provisions in decree).

[24] There is no evidence before us that the Wyoming child support order, issued as part of the 1995 modification decree, has been registered in Nebraska pursuant to § 42-737 or that Debbi has even sought registration of such order. The only evidence in the record that arguably suggests prior registration of the Wyoming child support order is a document from the Nebraska Department of Health and Human Services certifying a "true copy of the official record of support order payments, balances, and arrearages," which document shows that Debbi owes Keith $3,785.79 in past-due child support. Such a document makes it conceivable that the Wyoming order was registered under the Nebraska Uniform Enforcement of Foreign Judgments Act (UEFJA), Neb. Rev. Stat. § 25-1587.01 et seq. (Reissue 1995), which perhaps explains the generation of the document by the Nebraska Department of Health and Human Services. However, even if Keith or Debbi had previously registered the Wyoming order under the UEFJA, the law is clear that doing so does not confer subject matter jurisdiction on a Nebraska court to modify the foreign order with respect to payments to be made in the future. See *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992) (trial court did not have subject matter jurisdiction to modify child support provisions of foreign divorce decree registered in state under UEFJA, and former wife's compliance with provisions of UEFJA did not invoke separate provisions of Revised Uniform Reciprocal Enforcement of Support Act). We note that the provisions of the Revised Uniform Reciprocal Enforcement of Support Act, Neb. Rev. Stat. §§ 42-762 to 42-7,105 (Reissue 1988 & Cum. Supp. 1992), were repealed by 1993 Neb. Laws, L.B. 500, § 61, and replaced by UIFSA, operative January 1, 1994, the statutes involved in the present case.

[25] But, the lack of evidence of registration is only one reason why the Nebraska district court lacked subject matter jurisdiction. Section 42-746(a)(1) allows a district court to modify a registered child support order issued in another state when, among other requirements, the petitioner seeking modification is a nonresident of Nebraska. Debbi, who petitioned for modification, is clearly a resident of Nebraska. While the district court could have obtained subject matter jurisdiction under § 42-746(a)(2) if "all of the parties who are individuals ha[d] filed consents in a record in the issuing tribunal [Wyoming] for a tribunal of this state [Nebraska district court] to modify the support order and assume continuing, exclusive jurisdiction." However, there is no evidence of any such consents by Keith and Debbi in our record.

Therefore, the Custer County District Court was without subject matter jurisdiction to modify the child support order issued by the Wyoming court. We reverse and vacate the Custer County District Court's order concerning child support.

Custody of Daniel.

[26] Keith asserts that the district court erred in granting Debbi custody of Daniel, because there was not a material change in circumstances, nor was it in Daniel's best interests. A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. *Mace v. Mace*, 13 Neb. App. 896, 703 N.W.2d 624 (2005). The party must also show that a change in custody is in the child's best interests.

In the record, the report of the district court commissioner from the Wyoming district court includes a "Basis for Findings and Recommendations" section which provides the reasons the Wyoming court granted Keith custody of the children in 1995, the order that Debbi seeks to modify. The Wyoming court found that Debbi was "unwilling to foster" frequent and liberal contact between the children and Keith. The court stated that Debbi's conduct in involving the children in her "struggle to either keep [Keith] or at least to eliminate any other relationships he may

develop" was inappropriate. The court found that Debbi was a full-time student with no income other than child support and student loans or grants and that Keith was an airline pilot who earned "sufficient income" to support the children. The court found that Debbi did not show stability because she was unemployed and had changed her major after 3 years of school. The Wyoming court concluded that it was in the best interests of the children to live with Keith.

At the time of the August 31, 2004, trial in the Custer County District Court, Debbi had moved to Nebraska, obtained employment, and gotten married, all of which were a change in circumstances from the time of the 1995 modification decree. As for Keith's life since the 1995 modification decree, he has been charged on two different occasions with domestic assault, has been married twice, and has gotten divorced twice. He also has filed for bankruptcy, which proceeding has not been discharged, and is paying child support for three children resulting from the marriage with Michelle. We find that these changes to Debbi's and to Keith's lives clearly constitute a material change in circumstances.

We now turn to whether a change in custody is in Daniel's best interests. Daniel testified at the modification hearing that he "feel[s] very comfortable with both parents" and that he "kinda ha[s] mixed feelings" about living with Debbi for the reason that he does not want to have to decide between his two parents, because he is afraid he is "eventually going to hurt one person." Daniel has been doing well in his current school in Nebraska. The guardian ad litem stated in her report that according to school reports, Daniel was "very withdrawn and under socialized" when he entered school in Nebraska. However, 2 years later, he was "very well adjusted and his socialization skills were much improved." At the time of trial, Daniel had lived in Nebraska with Debbi for 4 years, and he had initially wanted to live with her because he had "troubles" with Michelle, Keith's third wife.

From this record, and we have purposefully omitted from this opinion a number of salacious details, we have no illusions that either parent offers a perfect environment for Daniel. Debbi's husband is a "practicing alcoholic," and she testified that she is

"stuck" in the marriage "for financial stability." Debbi works about 17 hours per week at $8 per hour. However, Debbi has provided for Daniel for 4 years without any child support from Keith. Keith has been divorced a total of three times and is now cohabitating with his latest girl friend. Keith has been involved in two instances of domestic assault and has filed for bankruptcy, despite earning a salary of over $135,000 in 2003. Keith pilots international flights and, according to his testimony, is home between 15 and 25 days each month.

The guardian ad litem recommended that Debbi be granted custody of Daniel, finding that the guardian ad litem's paramount concern is Daniel's best interests and that Debbi "would place the best interest of [Daniel] as her primary goal." The guardian ad litem stated that her only concern about Debbi is her husband. The guardian ad litem opined that Keith's occupation provides an unpredictable schedule, that he lacks stability in regard to his relationships with the opposite sex, and that he has a criminal history relating to domestic abuse. Based on the record, the Nebraska district court did not abuse its discretion in determining that granting Debbi custody of Daniel was in Daniel's best interests.

CONCLUSION

The Nebraska district court had jurisdiction over the custody matter and did not err in granting Debbi custody of Daniel. However, that court did not have subject matter jurisdiction over the issue of child support. Therefore, we affirm the Nebraska district court's order concerning child custody, but we reverse and vacate the district court's order requiring Keith to pay child support.

AFFIRMED IN PART, AND IN PART
REVERSED AND VACATED.

TERRY BRONZYNSKI, APPELLANT, V. MODEL ELECTRIC, INC., APPELLEE.

707 N.W.2d 46

Filed December 20, 2005. No. A-05-054.

1. **Workers' Compensation.** In the context of body as a whole injuries, an applicant who must fulfill the requirements set forth in Neb. Rev. Stat. § 48-141 (Reissue 2004) by demonstrating a change in incapacity must establish both a change in the employee's physical condition, or impairment, and a change in the employee's disability.
2. **Workers' Compensation: Words and Phrases.** The term "impairment" is a medical assessment, while the term "disability" is a legal issue.
3. ____: ____. Under the workers' compensation law, "disability" refers to loss of earning capacity and not to functional or medical loss alone.
4. ____: ____. As a legal term, "disability" is construed in terms of "impairment" and its effect on earning capacity.
5. ____: ____. "Disability," for the purpose of the workers' compensation statutes, is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.
6. ____: ____. Showing a change in "incapacity," as provided in Neb. Rev. Stat. § 48-141 (Reissue 2004), requires a showing of change in impairment and change in disability.
7. ____: ____. An impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury.
8. **Workers' Compensation.** A modification to a Nebraska Workers' Compensation Court award cannot be applied retroactively to a date earlier than that on which the application for modification was filed.
9. ____. After a Nebraska Workers' Compensation Court award is given, an employee's further impairment and treatment due to a work-related injury do not automatically entitle the employee to further temporary total disability payments.
10. ____. An application to modify a Nebraska Workers' Compensation Court award is essential before a determination can be made as to the merit of a claim for further temporary benefits.
11. ____. Neb. Rev. Stat. § 48-121(5) (Reissue 2004) makes clear that an employee is entitled to temporary total disability benefits for vocational rehabilitation purposes only if the employee is actively undergoing rehabilitation.
12. **Workers' Compensation: Attorney Fees: Time.** Where there is no reasonable controversy regarding an employee's entitlement to workers' compensation, Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes an award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent compensation payments.
13. **Workers' Compensation: Words and Phrases.** "Compensation," as used in Neb. Rev. Stat. § 48-125(1) (Reissue 2004) in reference to additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death.

14. **Workers' Compensation: Penalties and Forfeitures.** A waiting-time penalty is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of medical payments.
15. **Workers' Compensation: Attorney Fees: Interest.** When an attorney fee is allowed pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004), interest shall be assessed on the final award of weekly compensation benefits.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Ross A. Stoffer, of Mueting & Stoffer, for appellant.

James D. Hamilton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Terry Bronzynski appeals an order of a three-judge review panel of the Nebraska Workers' Compensation Court, which reversed in part, and in part affirmed a decision of a single judge of the Workers' Compensation Court upon an application to modify an award of benefits. Bronzynski asserts that the review panel erred in reversing the trial court's decision to increase his permanent partial disability award, in failing to award further temporary total disability benefits, and in failing to award additional penalties and fees. We conclude that in cases involving an application to modify a prior award of permanent partial disability benefits, wherein the applicant must demonstrate a change in incapacity, a showing of change in the applicant's impairment and disability is required. We find that while Bronzynski showed a change in impairment, he failed to satisfy his burden because he did not also demonstrate that he sustained a change in disability. Additionally, we find that the trial court appropriately awarded attorney fees regarding an award of delinquent medical payments. The trial court was also correct in not awarding a 50-percent waiting-time penalty, because under the pertinent 50-percent waiting-time penalty provision, such a penalty is not available for an award of delinquent medical expenses. Further, the trial court was correct in not awarding interest, since interest is assessable only on "weekly compensation benefits" under

Neb. Rev. Stat. § 48-125 (Reissue 2004). Therefore, we affirm the order of the review panel.

II. BACKGROUND

1. Procedural History

Bronzynski suffered a work-related injury on April 24, 2000, while working for Model Electric, Inc. He fell several feet from the top of a ladder, striking his head on the floor. On January 22, 2002, a hearing was held before the Nebraska Workers' Compensation Court to determine the extent of Bronzynski's injuries. In the award filed February 8, the Workers' Compensation Court determined that Bronzynski's injury resulted in a 15-percent loss of earning power. *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 (Neb. Work. Comp. Ct. Feb. 8, 2002). The court awarded temporary total disability benefits for the period of April 3 to August 13, 2001, permanent partial disability benefits for loss of earning power, future medical expenses, and vocational rehabilitation. *Id.*

On March 28, 2003, Bronzynski filed a motion to enforce the award, seeking payment of various medical expenses and disability benefits. The court dismissed Bronzynski's motion to enforce on April 23, and Bronzynski did not appeal.

Bronzynski filed his application to modify the February 8, 2002, award on November 5, 2003, seeking payment of various medical expenses, temporary total disability benefits for the period of December 17, 2001, to June 16, 2003, vocational rehabilitation benefits, and penalties and fees. A hearing on the application to modify the award was held by a single judge of the Nebraska Workers' Compensation Court on March 31, 2004. In the application, Bronzynski alleged that he "was required to undergo revision fusion surgery of his cervical spine on January 16, 2003 based on findings of a nonunion/pseudoarthrosis at the site of his previous fusion." He asserted that due to this surgery, he was entitled to further temporary total disability benefits, additional loss of earning power benefits, additional vocational rehabilitation, a 50-percent waiting-time penalty, attorney fees, and interest.

In its award entered June 4, 2004, the trial court concluded that Bronzynski "experienced a material and substantial increase of incapacity . . . sufficient to entitle him to a 25 percent loss of earning power . . . from and after November 5, 2003, the date the Application to Modify Award was filed." The court ordered payment by Model Electric of medical expenses totaling $35,156.14 and attorney fees in the amount of $1,500. However, the court denied Bronzynski's request for other temporary total disability benefits for the period of December 17, 2001, to June 16, 2003. The court explained that the requested period for benefits preceded the date of the application to modify the award, which application was filed on November 5, 2003, and that it was precluded from modifying an award retroactively prior to such date. Model Electric appealed, and Bronzynski cross-appealed.

A review hearing was held by a three-judge panel on October 26, 2004. Model Electric alleged that the trial court had erred in awarding attorney fees and in finding that Bronzynski experienced an increase of incapacity entitling him to an increase in loss of earning power benefits. On cross-appeal, Bronzynski alleged that the trial court had erred in failing to award further temporary total disability benefits, interest, penalties, and attorney fees. In its order of December 29, the review panel reversed the trial court's finding that Bronzynski was entitled to an increase in permanent partial disability benefits and affirmed the court's order of attorney fees and denial of temporary total disability benefits, interest, and penalties. Bronzynski timely appeals this decision.

2. Medical Treatment

As noted above, on April 24, 2000, Bronzynski suffered a work-related accident, falling several feet from a ladder and striking his head on the floor. "He experienced nearly immediate loss of hearing and ringing in his ears, blurry vision and 'slight pain' in his neck." *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 at *1 (Neb. Work. Comp. Ct. Feb. 8, 2002). Bronzynski's neck pain was subsequently diagnosed as "a 'huge C5C6 disc herniation.' " *Id.*

The record reveals that at least four doctors and a rehabilitation consultant were involved in Bronzynski's case and treatment,

Dr. J.R.S. Froggatt, Dr. Mark Puccioni, Dr. Ric Jensen, Dr. James Bertus, and David Utley. Bronzynski states that Dr. Froggatt performed an "anterior cervical diskectomy and interbody fusion" on his spine on April 3, 2001. Brief for appellant at 7. On May 23, Dr. Froggatt opined that Bronzynski "should probably be fit to attempt to return to the work force." One week later, Dr. Froggatt gave Bronzynski work restrictions, indicating that he could lift or carry a "maximum of 25 to 30 lbs[.]" but was "not to lift at or above the shoulder level."

Dr. Puccioni examined Bronzynski and recorded his findings on September 19, 2001. He recommended that Bronzynski seek pain management and stated that "there were no objective tests that [Dr. Puccioni] could see that would limit [Bronzynski's] work."

On December 4, 2001, Bronzynski was referred to Utley, the rehabilitation consultant, who prepared a "Loss of Earning Capacity Analysis." In the analysis, Utley reported that he considered, inter alia, the lifting restrictions that Dr. Froggatt imposed and Dr. Froggatt's opinion that Bronzynski suffered a " '7% total body disability.' " Utley concluded that Bronzynski "is employable but has sustained a loss of earning capacity of approximately 15%."

On December 17, 2001, Dr. Jensen evaluated Bronzynski and recommended that he obtain conservative treatments for his physical condition and that he undergo "dynamic plain films (flexion/extension) of the cervical spine . . . to assess the status of the fusion with regards to stability and bony consolidation." According to Dr. Jensen, Bronzynski was suffering "sustained posterior cervical pain and bilateral shoulder pain since the time of his operative therapy with regards to the anterior cervical fusion."

On January 18, 2002, Dr. Jensen reported that the flexion-extension dynamic plain films Bronzynski underwent indicated "sagittal rotation at the site of [Bronzynski's] previous fusion at the C5-6 intersegmental level." Dr. Jensen reported that he intended to perform a high-resolution "CT scan" and to follow up with Bronzynski. In his correspondence to Dr. Bertus dated January 21, 2002, Dr. Jensen noted that "[Bronzynski] appears to have reached a maximum level of medical improvement with

respect to his cervical fusion." Subsequently, the Nebraska Workers' Compensation Court held a hearing on January 22 and entered the original February 8 award, wherein it stated that it had relied on, inter alia, the "Loss of Earning Capacity Analysis" by Utley indicating that Bronzynski suffered a 15-percent loss of earning capacity. *Bronzynski v. Model Electric, Inc., supra.*

On February 18, 2002, Dr. Jensen evaluated Bronzynski, and in subsequent correspondence to Dr. Bertus, he reported that the

> [f]lexion/extension dynamic plain film images of the cervical spine have indicated that [Bronzynski] may have a pseudoarthrosis with evidence of sagittal rotation at the C5-6 intersegmental level (site of previous fusion). Additionally, high resolution CT scan imaging of the cervical spine performed at my request on 1/30/02 reveals evidence of pseudoarthrosis and bony non-union at the C5-6 intersegmental level.

At this time, Dr. Jensen indicated the possibility of "revision cervical fusion." On February 18, Dr. Jensen had also provided Bronzynski with a "Return to Work or School" note remarking, "[Bronzynski] is to remain off work until further notice. Cervical spine surgery is planned."

The record indicates that Bronzynski properly requested vocational rehabilitation services as required in the February 8, 2002, award. However, on March 25, 2002, Utley declined to initiate Bronzynski's vocational rehabilitation due to the results of the CT scan imaging and Dr. Jensen's "Return to Work or School" note.

Although the February 8, 2002, award limited the duration of temporary total disability benefits to the period of April 3 to August 13, 2001, Bronzynski requested in a letter dated February 20, 2002, and again in subsequent correspondence of March 7 and 29 and April 30, that Model Electric pay further temporary total disability benefits. These requests appear to have been based on the facts that Bronzynski required additional surgery for his neck and that he had continued to remain in off-work status. However, Model Electric "denied the surgery" and no such payments were tendered.

Bronzynski reports that on January 16, 2003, he underwent a "cervical spinal fusion procedure" performed by Dr. Jensen.

Brief for appellant at 10. Bronzynski was discharged with instructions to "engage in moderate activities only until further notice." On February 17, Dr. Jensen instructed Bronzynski that he was to "maintain light activity restrictions for 1 month additional." On April 10, Dr. Jensen rated Bronzynski's "permanent partial impairment . . . of the whole person with respect to the cervical spine at 14 percent." He further indicated that Bronzynski would reach a maximum level of medical improvement on June 16.

Dr. Jensen recommended that a "Functional Capacity Evaluation [would] further clarify reduction in range of motion of [Bronzynski's] cervical spine and [enable] the assessment and establishment of permanent activity restrictions." The record lacks evidence of any such evaluation subsequent to Bronzynski's January 2003 procedure. Dr. Jensen performed a "Lumbar Spine Physical Capacity Evaluation" on June 6 which indicated work restrictions regarding the length of time Bronzynski could sit, stand, and walk, as well as lifting and carrying limitations. However, Bronzynski's lumbar spine injury was unrelated to the work-related accident in question, and thus, the evaluation as it related to that injury was not relevant to Bronzynski's work restrictions due to the work-related accident.

III. ASSIGNMENTS OF ERROR

Bronzynski assigns, restated, that the Nebraska Workers' Compensation Court review panel erred (1) in reversing the trial court's finding that he suffered an increase in loss of earning power, (2) in failing to award certain temporary total disability benefits, and (3) in failing to award attorney fees, interest, and waiting-time penalties.

IV. STANDARD OF REVIEW

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.

Morris v. Nebraska Health System, 266 Neb. 285, 664 N.W.2d 436 (2003); *Meredith v. Schwarck Quarries*, 13 Neb. App. 765, 701 N.W.2d 387 (2005).

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Id.* Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* However, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

V. ANALYSIS

1. Permanent Partial Disability

Bronzynski alleges that the review panel erred in reversing the trial judge's finding that his loss of earning power had increased from 15 percent at the time of the February 8, 2002, award to 25 percent at the time of the June 4, 2004, award. He asserts that there was sufficient evidence to support the trial court's factual conclusions and that the review panel erred in substituting its view of the facts. He contends that the review panel relied on his statement that "as far as he knew, his restrictions were the same as before the second surgery; however, [he had not] worked since before the first trial." Brief for appellant at 13. He further contends that he did not obtain the "Functional Capacity Evaluation" recommended by Dr. Jensen after the January 16, 2003, procedure "because of Model Electric's refusal to pay benefits." *Id.* We agree with the review panel and find that the trial court erred in finding an increase in incapacity and, therefore, in awarding an increase in permanent partial disability benefits. Bronzynski did not fulfill the statutory requirements for modification of an award pursuant to Neb. Rev. Stat. § 48-141 (Reissue 2004).

To obtain a modification, an applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). The applicant must prove there exists a material and substantial change for the better or worse in the condition—a

change in circumstances that justifies a modification, distinct and different from the condition for which the adjudication had previously been made. *Id.*

Section 48-141 provides, in pertinent part, that

> the amount of any agreement or award payable periodically may be modified as follows: . . . after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of *incapacity* due solely to the injury.

(Emphasis supplied.)

[1] In the context of body as a whole injuries, an applicant who must fulfill the requirements set forth in § 48-141 by demonstrating a change in incapacity must establish both a change in the employee's physical condition, or impairment, and a change in the employee's disability. See *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998) (finding that without showing of change in applicant employee's physical condition and that such change was cause of change in earning capacity, modification of prior award was improper).

[2-5] The term "impairment" is a medical assessment, while the term "disability" is a legal issue. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Under the workers' compensation law, "disability" refers to loss of earning capacity and not to functional or medical loss alone. See *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959). Therefore, as a legal term, "disability" is construed in terms of "impairment" and its effect on earning capacity. Contrary to Bronzynski's apparent position, it is not self-evident that an increase in physical impairment results in an increase in disability.

> [D]isability for purposes of [the workers' compensation] statute[s] is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.

Wolfe v. American Community Stores, 205 Neb. 763, 765-66, 290 N.W.2d 195, 197-98 (1980). Accord, *Miller v. Peterson*, 165 Neb. 344, 85 N.W.2d 700 (1957); *Shotwell v. Industrial Builders, Inc.*, 187 Neb. 320, 190 N.W.2d 624 (1971).

[6] The terminology has been further clarified by the Nebraska Supreme Court, which explained that "'"'[p]ermanent medical impairment is related directly to the health status of the individual, whereas disability can be determined only within the context of the personal, social, or *occupational* demands, or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment.'"'" (Emphasis supplied.) *Green v. Drivers Mgmt., Inc.*, 263 Neb. at 204-05, 639 N.W.2d at 102 (quoting *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W.2d 377 (1999) (Gerrard, J., concurring)). Given the foregoing definitions, showing a change in "incapacity," as provided in § 48-141, requires a showing of change in impairment and change in disability.

[7] A comparison of the conclusions of Drs. Froggatt and Jensen indicates that Bronzynski had suffered an increase in physical impairment since the January 2002 hearing. In the award entered as a result of that hearing, the court expressed that it had relied on an opinion of Dr. Froggatt wherein Bronzynski was determined to have a 7-percent impairment rating. *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 (Neb. Work. Comp. Ct. Feb. 8, 2002). Dr. Jensen now indicates that Bronzynski has a "permanent partial impairment rating of the whole person with respect to the cervical spine [of] 14 percent." However, an impairment rating is simply a medical assessment of what physical abilities have been adversely affected or lost by an injury. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). Bronzynski relies on *Swanson* for the proposition that the court can award an increased loss of earning capacity rating "[o]nce an employee submits evidence of either a permanent impairment or physician-ordered permanent physical restrictions." Brief for appellant at 15. Yet, *Swanson* also indicates that "'the ultimate issue is not the extent of anatomical disability but that of vocational disability, the percentage of which does not definitively depend on the medical proof regarding a percentage of anatomical disability.'" 267 Neb. at 143, 672 N.W.2d at 414-15.

The trial court reviewed the evidence and found:

> Dr. Jensen reported that [Bronzynski] reached maximum medical improvement subsequent to the second cervical

> fusion on June 16, 2003, and experienced a 14 percent permanent functional impairment of the whole person . . . . His evaluation of permanent impairment is twice the degree of impairment first assessed by Dr. Frogg[a]tt . . . . [Bronzynski] described his current limitations regarding activities. From the medical evidence and the testimony of [Bronzynski], which was credible, I find [that he] has experienced a material and substantial increase of incapacity due solely to the original accident and cervical injury, sufficient to entitle him to a 25 percent loss of earning power . . . from and after November 5, 2003, the date the Application to Modify Award was filed.

Nowhere does Bronzynski argue that he has sustained an increase in loss of earning capacity. Indeed, his argument is based upon the premise that an increase in physical impairment is synonymous with an increase in incapacity. As previously indicated, this is not the law in Nebraska. Moreover, Bronzynski's testimony indicates that there has been little change in his condition since the initial award. When asked as follows by Model Electric's attorney whether the restrictions Dr. Froggatt imposed after the first surgical procedure were an accurate assessment of his current abilities, Bronzynski responded thus:

> Q. [Y]ou've had a chance to review [Dr. Froggatt's medical report of May 30, 2001]. Do you recall seeing . . . the last paragraph that says lifting maximum of 25 to 30 pounds carrying, not to lift at or above shoulder level?
>
> A. Yes.
>
> Q. Was that an accurate assessment of your abilities at that time?
>
> A. As far as I know. As I remember.
>
> Q. Has Dr. Jensen since your surgery of January of 2003 given you any idea of what your permanent restrictions are?
>
> A. As far as I know it's basically the same.
>
> Q. Okay.
>
> A. Stuff above my head.
>
> Q. Same restrictions?
>
> A. Basically, yeah.
>
> Q. Okay. In fact, isn't it true that there hasn't been . . . any real change in your abilities after the surgery of January

2003 [as compared to] those abilities you had prior to January of 2003, isn't that right?

A. You mean on restrictions?

Q. Yes.

A. As far as I know.

Bronzynski argues that he did not have a basis of knowledge of current restrictions because he had been unable to work since before the first trial. Additionally, he asserts that he was unable to obtain a "Functional Capacity Evaluation to determine the impact these restrictions would have on his ability to obtain employment" because Model Electric had refused to pay benefits. Brief for appellant at 13. However, Bronzynski was required to show a substantial change in incapacity and, pursuant to Nebraska law, was obligated to show a change in disability or earning capacity. The record lacks evidence of a change in Bronzynski's disability or earning capacity. Therefore, we conclude that the trial court was clearly wrong in finding that Bronzynski proved by a preponderance of the evidence that there had been a substantial increase in his incapacity. We find no merit to Bronzynski's assigned error that the Workers' Compensation Court review panel erred in reversing the trial judge's finding that Bronzynski's loss of earning power had increased.

2. Temporary Total Disability

Bronzynski's application to modify the award requests temporary total disability benefits from December 17, 2001, to June 16, 2003, the date by which Bronzynski had reached maximum medical improvement after the January 2003 procedure according to Dr. Jensen. Bronzynski assigns that the Workers' Compensation Court review panel erred in failing to award "temporary total disability benefits from at least February 18, 2002, which is the date Dr. Jensen took [him] off work pending surgery . . . until such time as [he] completes his vocational rehabilitation." All the above dates predate the November 5, 2003, filing of the application to modify.

(a) Retroactive Modification

Bronzynski contends that temporary total disability benefits should be expressly awarded for the requested time period because Model Electric had refused to pay medical benefits as

dictated by the original award. More specifically, Bronzynski argues, Model Electric's refusal should be construed by the court as a de facto application for modification, and as such, all the statutory burdens associated with an application for modification fall on Model Electric to fulfill. Consequently, Bronzynski argues that Model Electric attempted to "unilaterally modify" the award by refusing to pay for his requested medical expenses and that therefore, we must construe the filing date for Model Electric's de facto application to modify as the date of Model Electric's refusal, June 28, 2002.

This argument is without merit. Model Electric denied medical benefits to Bronzynski; i.e., he wanted surgery performed, and Model Electric would not pay for it. The fact that this denial related to future medical benefits and not to disability benefits previously ordered in the 2002 award is critical. Bronzynski is equating apples to oranges, or, rather, previously awarded medical benefits to previously awarded disability benefits. Therefore, the filing date of Bronzynski's "Application to Modify Award" must be construed as the operative date for awarding retroactive benefits, and we affirm the decision of the review panel upholding the trial court's determination that it was precluded from modifying the award retroactively prior to the filing date of Bronzynski's application.

[8] It is well established that a modification to a Nebraska Workers' Compensation Court award cannot be applied retroactively to a date earlier than that on which the application for modification was filed. See, *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001); *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000); *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

[9] Bronzynski was originally awarded temporary total disability benefits for the period of April 3 to August 13, 2001, the latter being the date by which Dr. Froggatt considers Bronzynski to have reached maximum medical improvement. See *Bronzynski v. Model Electric, Inc.*, No. 201-1039, 2002 WL 198546 (Neb. Work. Comp. Ct. Feb. 8, 2002). The record reveals that such payments were made and that there was no cessation of payments related to the award of temporary total disability benefits. The

fact that Bronzynski had further impairment and treatment due to the work-related injury does not automatically entitle him to further temporary total disability payments.

[10] Bronzynski's correspondence to Model Electric indicates that he requested temporary total disability benefits based on the "Return to Work or School" note from Dr. Jensen and an "X-ray report dated 1/30/02." However, this request was incongruent with the original 2002 award of temporary total disability benefits, and all those benefits had been paid. Bronzynski's request for further temporary total disability benefits would have properly been the subject of an application for modification when he became aware of the need for further medical treatment. An application to modify the original award is essential before a determination can be made as to the merit of a claim for further temporary benefits. As such, temporary total disability benefits cannot be awarded retroactively prior to the date on which the application to modify was filed in this case. See, *Hagelstein v. Swift-Eckrich, supra*; *Sheldon-Zimbelman v. Bryan Memorial Hosp., supra*; *Starks v. Cornhusker Packing Co., supra.*

Therefore, we affirm the review panel's decision upholding the trial court's determination that it was precluded from modifying the 2002 award to include temporary total disability benefits prior to the filing date of the application to modify. Bronzynski's argument is without merit.

(b) Nonparticipation in Vocational Rehabilitation

Bronzynski maintains that Model Electric "would have been liable for temporary total disability payments during the time [he] was participating in the vocational rehabilitation plan and likewise[,] Model Electric . . . should be liable for temporary total disability payments for preventing [him] from participating in a vocational rehabilitation plan." Brief for appellant at 27. He contends that Model Electric's refusal to pay medical expenses delayed his revision fusion surgery and that as a result, Utley declined to initiate his vocational rehabilitation. Therefore, Bronzynski argues, he was unable to participate in vocational rehabilitation and, thus, was entitled to temporary total disability benefits. However, this argument is not supported in the law, and therefore, it is without merit.

Neb. Rev. Stat. § 48-121(5) (Reissue 2004) articulates:

> The employee shall be entitled to compensation from his or her employer for temporary disability while undergoing physical or medical rehabilitation and while undergoing vocational rehabilitation whether such vocational rehabilitation is voluntarily offered by the employer and accepted by the employee or is ordered by the Nebraska Workers' Compensation Court or any judge of the compensation court.

[11] Section 48-121(5) makes clear that Bronzynski was entitled to temporary total disability benefits for vocational rehabilitation purposes only if he was actively undergoing rehabilitation. Bronzynski offers no authority, and we have found none, that supports his contention. Whatever the reason for his nonparticipation in a rehabilitation program, the record reflects that Bronzynski was not actively receiving vocational rehabilitation and was therefore not entitled to compensation.

Hence, we affirm the trial court's determination that Bronzynski is not entitled to the requested temporary total disability benefits, and we find that the review panel did not err in affirming the trial court's finding. Bronzynski's argument is without merit.

3. Other Penalties

Bronzynski's application to modify the award requested "a 50% waiting penalty, interest and attorney's fees." Bronzynski now assigns as error that the Workers' Compensation Court review panel failed to award interest, a 50-percent waiting-time penalty, attorney fees, and costs. He argues that "no reasonable controversy existed" and that "[o]nly by [the court's] enforcing the penalty provisions set out in the workers[’] compensation statutes will employers quit placing the burden of going back before the court to enforce the award previously entered on employees and follow the modification procedures." Brief for appellant at 28-29. The trial court awarded attorney fees based on its award of delinquent medical payments, finding that "no reasonable controversy existed regarding the necessity and reasonableness of the second cervical fusion." We affirm the review panel's findings that attorney fees were properly ordered

concerning the award for medical expenses and that no interest or waiting-time penalty was appropriate.

Section 48-125 provides, in pertinent part:

> (1) Except as hereinafter provided, all amounts of *compensation* payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court. . . . Whenever the employer refuses payment of compensation or *medical payments* subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay *medical payments* subject to such section after thirty days' notice has been given of the obligation for *medical payments*, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award. . . .
>
> (2) When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . . Interest shall apply only to those *weekly compensation benefits* awarded which have accrued at the time payment is made by the employer.

(Emphasis supplied.)

[12,13] Where there is no reasonable controversy regarding an employee's entitlement to workers' compensation, § 48-125 authorizes an award to the employee of an attorney fee and a 50-percent payment for waiting time on delinquent compensation payments. See *Roesler v. Farmland Foods*, 232 Neb. 842, 442 N.W.2d 398 (1989). However, it is important to understand the meaning of "compensation" as it is used in § 48-125. The Nebraska Supreme Court explained in *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 553, 451 N.W.2d 910, 920 (1990), that " '[c]ompensation,' used in § 48-125(1) in reference to

additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death." The Nebraska Legislature further clarified matters when it later amended § 48-125 regarding attorney fees only, adding language providing specifically for attorney fees for delinquent "medical payments." See *id.*

[14,15] Taken together, these authorities make it apparent that a 50-percent waiting-time penalty cannot be awarded on the basis of an award of delinquent medical payments; a waiting-time penalty is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of "medical payments." Additionally, we have acknowledged above that when an attorney fee is allowed pursuant to § 48-125, interest shall be assessed on the final award of weekly compensation benefits. Thus, § 48-125 makes clear that interest, which would otherwise be assessed when attorney fees are awarded, is not proper in the instant case because an award of medical payments is plainly not one of "weekly compensation benefits." See *id.*

The trial court modified the original award only to the extent that it increased Bronzynski's permanent partial disability benefits and ordered Model Electric to pay medical expenses. The review panel reversed the trial court's finding with regard to the permanent partial disability benefits, and as such, no attorney fee, waiting-time penalty, or interest could properly be assessed with regard to that portion of the award. However, the trial court found that "no reasonable controversy existed regarding the necessity and reasonableness of the second cervical fusion." In addition, the court determined that "[t]he medical expenses were provided [to Model Electric] more than 30 days in advance of trial." As such, the court's award of attorney fees regarding the delinquent medical expenses was proper, pursuant to § 48-125. Therefore, Bronzynski's assignment of error is without merit, and we affirm the decision of the review panel as it relates to attorney fees, waiting-time penalties, and interest.

VI. CONCLUSION

The judgment of the Workers' Compensation Court review panel is affirmed. The review panel properly reversed the trial

court's award of further permanent partial disability benefits, and it properly affirmed the court's denial of temporary total disability benefits and further attorney fees, interest, and waiting-time penalties.

AFFIRMED.

AZIZ Y. ANIS, M.D., APPELLANT, V. BRYANLGH HEALTH SYSTEM, A CORPORATION, APPELLEE.

707 N.W.2d 60

Filed December 27, 2005. No. A-04-661.

1. **New Trial: Jury Misconduct: Proof.** In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
2. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
3. **Jurors: Verdicts.** A quotient verdict is one in which the jurors, for the purpose of arriving at a verdict, agree that each should write on his or her ballot a sum representing his or her judgment, that the aggregate should be divided by the number of jurors, and that the jurors will be bound by the quotient as their verdict.
4. **Verdicts.** Quotient verdicts are generally considered invalid.
5. **Juries: Verdicts.** The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict is whether the jury agreed beforehand to be bound by the result reached.
6. **Jury Misconduct: Proof.** The burden of establishing prejudice rests on the party claiming jury misconduct.
7. **Jury Instructions: Presumptions.** It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.
8. **Jury Misconduct: Trial.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.
9. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.
10. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Thomas M. Locher, Joel E. Feistner, and Doug Krenzer, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

Dean J. Sitzmann, Stephen L. Ahl, and Justin E. Driscoll, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Aziz Y. Anis, M.D., appeals the order of the district court for Lancaster County which overruled his motion for new trial in his tort action against BryanLGH Health System (BryanLGH). Because we conclude that Anis failed to meet his burden of proving by clear and convincing evidence that he was prejudiced by alleged jury misconduct, we affirm.

BACKGROUND

Anis initiated a negligence action against BryanLGH for injuries Anis suffered when he slipped and fell on some ice in a parking garage owned and operated by BryanLGH. At the conclusion of the trial, the jury was instructed, inter alia, as follows:

> The law forbids you to return a verdict determined by chance. You may not, for instance, agree in advance that each juror will state an amount to be awarded in damages, that all of those amounts will be added together, that the total will be divided by the number of jurors, and that the result will be returned as the jury's verdict.
>
> A verdict determined by chance is invalid.

This instruction is identical to the pattern jury instruction. See NJI2d Civ. 4.02. During the formal jury instruction conference, Anis did not specifically object to this instruction. Anis offered proposed instructions and verdict forms, which the trial court rejected and none of which addressed the topic of a verdict determined by chance. At the close of the conference, counsel for Anis stated:

> The only other matter that I would just raise for the purpose of the record, Judge, [Anis] would object to the instructions

> as a whole. It's not accurately stating the law and failing to instruct the jurors on the specific instructions that have been offered and marked for purposes of that.

Read in context, this broad objection merely notes the divergence between the court's instructions and verdict forms and those particular instructions and verdict forms requested by Anis, none of which spoke to the subject of a verdict determined by chance. This objection served only to further preserve Anis' objection to the trial court's refusal to use the particular instructions and verdict forms preferred by Anis.

During deliberations, the jury submitted a single set of written questions to the trial court which the trial court answered, as follows:

> We have found both parties to be neglectful.
>
> Question A.: Do we have to unanimously agree on the percentage of neglect? If other than 50-50?
>
> Answer: Please reread the instructions.
>
> Question B.: Can we have a calculator?
>
> Answer: No
>
> Question C.: What is our time situation[?]
>
> Answer: What time situation are you referring to?
>
> Question D.: % of neglect

ex.	P[laintiff]	D[efendant]	Do we add these up and divide by 12?
	60	40	
	50	50	
	70	30	

> Answer: Please reread the instructions.

Both parties and their counsel waived their appearances at the reading of the verdict. The jury found BryanLGH to be 32 percent negligent and Anis to be 68 percent negligent. Following the court's instructions, the jury returned a verdict for BryanLGH. After the jury announced its verdict, the court polled each of the jurors and each confirmed the verdict. The court entered judgment pursuant to the jury's verdict. Anis moved for a new trial, alleging that the jury's verdict was not sustained by the evidence "and/or" was contrary to law. After a hearing at which neither party offered any evidence, the trial court denied the motion for new trial. Anis appeals to this court.

ASSIGNMENTS OF ERROR

Anis alleges that (1) the verdict rendered by the jury was an improper quotient verdict based upon chance and lottery, and must therefore be set aside, and (2) the trial court abused its discretion in overruling Anis' motion for new trial without conducting any independent evaluation of all the circumstances of the case and without making specific findings for review based upon that evaluation.

STANDARD OF REVIEW

[1,2] In order for a new trial to be ordered because of juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion. *Id.*

ANALYSIS

Evidence of Quotient Verdict.

[3-5] Anis alleges that the jury's verdict was an improper quotient verdict based on chance and lottery. A quotient verdict is one in which the jurors, for the purpose of arriving at a verdict, agree that each should write on his or her ballot a sum representing his or her judgment, that the aggregate should be divided by the number of jurors, and that the jurors will be bound by the quotient as their verdict. See *Haarberg v. Schneider*, 174 Neb. 334, 117 N.W.2d 796 (1962). Quotient verdicts are generally considered invalid. See *id.* They do not represent the deliberate judgment of the jurors, are subject to manipulation, and evoke the nature of a lottery. See *Winston v. Davis*, 187 Neb. 522, 192 N.W.2d 413 (1971). An after-the-fact agreement to use an average does not invalidate the verdict. See *McGuire v. Thompson*, 152 Neb. 28, 40 N.W.2d 237 (1949).

> "The invalidity of quotient verdicts depends not upon the method of arriving at the verdict, or the result reached, but on the previous agreement to be bound by the result of the quotient process. The test to be applied in determining the validity of a verdict which is attacked as a quotient verdict

> is whether the jury agreed beforehand to be bound by the result reached . . . ."

Spreitzer v. State, 155 Neb. 70, 76, 50 N.W.2d 516, 522 (1951), quoting 53 Am. Jur. *Trial* § 1031 (1945).

[6] Anis argues that the jury's questions during deliberations raise a reasonable inference that the jury agreed on a quotient process to determine the outcome of the trial. The burden of establishing prejudice rests on the party claiming jury misconduct. See *In re Petition of Omaha Pub. Power Dist., supra*. While we could infer the existence of an agreement to be bound by a quotient process from the final question of the set of questions submitted by the jury during deliberations, it is equally possible to infer that the jury reread the instructions as advised by the court and did not agree to be bound by a quotient verdict. As such, Anis has not sustained his burden of proof. See *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995) (where inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with facts proved, plaintiffs do not sustain their position by reliance alone on inferences which would entitle them to recover).

[7] The same can be said of Anis' argument that the "odd numbers" of the verdict prove that the verdict was based on a prior agreement to adhere to a quotient process. Brief for appellant at 11. Even if we were to make the unlikely inference that the jury's assessment of comparative fault demonstrates an agreement to be bound by a quotient verdict, the facts lend equal—if not greater—support to the inference that the jurors assessed fault after thoughtful deliberation and unanimous agreement. It is presumed a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004). We cannot find the required affirmative showing merely from an inference which is no stronger than the opposing inference.

Moreover, Anis did not object to the court's response to the jury's questions. Indeed, the argument on the motion for new trial suggests that Anis' counsel had approved of the court's answers to the jury's questions. Also, recalling that the moving party bears

the burden of establishing prejudice from the alleged misconduct, we observe that all of the examples of allocations of Anis' negligence provided in the jury question—60, 50, and 70 percent, respectively—were numbers greater than or equal to the percentage of negligence sufficient to bar Anis' claim. See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995). We conclude that Anis did not satisfy his burden of proving by clear and convincing evidence that prejudice occurred, and therefore, we conclude that the trial court did not abuse its discretion in overruling Anis' motion for new trial.

Independent Evaluation and Specific Findings.

[8] Anis contends that the trial court abused its discretion in overruling Anis' motion for new trial without conducting any independent evaluation of all the circumstances of the case and without making specific findings for review based upon that evaluation. In *Hunt v. Methodist Hosp.*, 240 Neb. 838, 849, 485 N.W.2d 737, 744-45 (1992), the Nebraska Supreme Court set forth the trial court's duties in determining whether jury misconduct has occurred as follows:

> "When an allegation of misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed."

Quoting *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). The *Hunt* court concluded: "Thus, a judge must conduct an evidentiary hearing to determine whether a party was denied a fair trial; in any event, should the court conclude that no misconduct or prejudice occurred, it must make adequate findings so that the ruling may be reviewed." 240 Neb. at 849, 485 N.W.2d at 745.

In the instant case, by providing Anis with the opportunity to present evidence upon his motion for new trial, the district court

provided the evidentiary hearing contemplated in *Hunt*. As discussed above, Anis did not support his allegations of jury misconduct with any evidence. He relies solely on the jury's questions to the trial court during deliberations. Despite having the opportunity to present evidence at the hearing on Anis' motion for new trial, Anis merely argued the motion.

On appeal to this court, Anis argues:

> As noted during the hearing on [Anis'] [m]otion for [n]ew [t]rial, after the jury question was submitted but before the verdict was read, counsel for [Anis] requested that the [t]rial [c]ourt poll the jurors to ensure that the verdict was proper, as it appeared, based upon the jury['s] question, that the jurors had agreed to render a quotient verdict.

Brief for appellant at 12. This argument fails for two reasons.

[9] First, the bill of exceptions does not contain any of the proceedings between the close of the formal jury instruction conference and the return of the jury to the courtroom for the receipt of the jury's verdict. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Ondrak v. Matis*, 270 Neb. 46, 699 N.W.2d 367 (2005). Anis failed to include in the record his request for polling of the jury, and thus, the record does not support Anis' contention regarding the specific nature of that request.

Second, the record does show that the jury was polled in precisely the manner specified by Neb. Rev. Stat. § 25-1124 (Reissue 1995). What Anis seems to be suggesting, however, is that when polling the jury, the trial court had the obligation to go beyond the procedure specified by § 25-1124 and inquire into the basis for the jury's determination of the percentage of Anis' negligence. We reject Anis' contention that the trial court was required to make that inquiry, because it could not have done so without invading the province of the jury.

Neb. Rev. Stat. § 27-606(2) (Reissue 1995) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from

> the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

In *Lambertus v. Buckley*, 206 Neb. 440, 293 N.W.2d 110 (1980), the Nebraska Supreme Court affirmed the trial court's refusal to admit jurors' affidavits stating that they had misunderstood and misapplied the court's quotient verdict instruction. The court in *Lambertus* explained that the jurors' understanding of the quotient verdict instruction and details regarding the calculation of damages inhered in the verdict and did not constitute extraneous, prejudicial information.

[10] Anis also argues that he was prejudiced by the trial court's failure to make specific findings in ruling upon Anis' motion for new trial. Even assuming, without deciding, that the trial court erred in not making specific findings, such error is harmless. Under § 27-606(2), the lower court could have reviewed only the written questions from the jury, and this court is in the same position. Because we conclude that the jury's questions do not constitute clear and convincing evidence of prejudice from jury misconduct, the absence of specific findings did not prejudice Anis. See *In-Line Suspension v. Weinberg & Weinberg*, 12 Neb. App. 908, 687 N.W.2d 418 (2004) (motion for new trial is to be granted only when error prejudicial to rights of unsuccessful party has occurred).

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not abuse its discretion in overruling Anis' motion for new trial, and we affirm.

AFFIRMED.

IRWIN, Judge, participating on briefs.

IRENE M. HARVEY, APPELLANT, V. RANDY C. HARVEY, APPELLEE.

707 N.W.2d 444

Filed December 27, 2005. No. A-04-846.

1. **Judgments.** A judgment is the final determination of the rights of the parties in an action.
2. ____. If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment.
3. ____. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
4. **Divorce: Final Orders.** If any substantial rights of the parties remain undetermined and the cause is retained for further action, the order, including the dissolution of the marriage, is interlocutory and not final.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Appeal dismissed, and cause remanded with directions.

Michael E. Piccolo, of Dawson & Piccolo, for appellant.

James C. Bocott, of McCarthy, Moore & Hall, for appellee.

IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Irene M. Harvey appeals from the order of the district court for Lincoln County which denied the parties' motions for new trial after their marriage was dissolved. Irene challenges the district court's distribution of property and award of alimony in the decree of dissolution. We conclude that the district court's distribution of property is a conditional judgment, the impact of which is speculative. As a result, the dissolution decree entered by the district court fails to determine substantial rights of the parties concerning the distribution of marital property and is not a final order for the purpose of appeal. The appeal is dismissed, and the case is remanded with directions.

II. BACKGROUND

Irene and Randy C. Harvey were married on December 30, 1970. Irene filed a petition for dissolution of the marriage on

August 14, 2003. Randy filed an answer on August 22. The district court entered a decree on June 2, 2004.

In the decree, the district court purported to distribute the marital property and debts, ordered Randy to pay alimony, and ordered Randy to pay an attorney fee on Irene's behalf. Relevant to our resolution of this appeal is the district court's purported distribution of the marital home, the primary asset of the parties. With respect to the home, the court decreed as follows:

> The Court finds that the home of the parties . . . should be awarded to [Randy] if he is able to obtain refinancing in his name only and remove [Irene's] name from the mortgage and second mortgage upon the property. If he is unable to do so within 60 days, the Court finds that the property should be sold, and any proceeds remaining after the costs of sale should be divided equally, and any liabilities due and owing after the costs of sale should be divided equally. The Court finds that the value of the property is the sum of $197,400 which is the market analysis less a realtor's fee. Based on that, the Court finds that [Randy] should pay to [Irene] the sum of $6,200 as her interest in the property for the equity remaining. Should [Randy] elect not to take the property, it shall be sold as setout [sic] above.

Irene filed a motion for new trial on June 8, 2004. Randy filed a similar request on June 14. The district court entered an order denying the requests for new trial on June 22. This appeal followed.

III. ASSIGNMENTS OF ERROR

Irene has assigned six errors, including five that concern the district court's purported distribution of the marital home and one that concerns the district court's alimony award.

IV. ANALYSIS

All of the assignments of error presented in this appeal relate to the district court's distribution of the marital home. As noted above, Irene has made several assignments of error which specifically challenge the court's purported award of the home to Randy, and she has also assigned an error concerning the alimony award, which award the district court specifically based in part on "the house payment" which Randy might have assumed

under the court's purported distribution of the home. We conclude that the district court's purported distribution of the marital home is a conditional order because it leaves to speculation and conjecture what its final effect may be; the order fails to resolve the substantial rights of the parties concerning the marital property and is not a final, appealable order.

[1-3] In Nebraska, a judgment is the final determination of the rights of the parties in an action. Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2004). However, if a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Simons v. Simons*, 261 Neb. 570, 624 N.W.2d 36 (2001). A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Vogel v. Vogel, supra.*

The district court's purported distribution of the marital home is a conditional order because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect will be. The effect of the order on the net distribution of property depends entirely on whether Randy is able to obtain refinancing in his name only or is either forced or elects to attempt to sell the home. If Randy obtains the requisite refinancing, the order appears to determine the value of the home and Irene's share of the equity; however, if the home is to be sold, whatever unknown amount of equity there might be in the sale proceeds is to be divided "equally." At the present time, there is no way for this court to know what amount Irene is to receive or what effect the order will ultimately have.

[4] The Nebraska Supreme Court has said: "[I]f any substantial rights of the parties remain undetermined and the cause is retained for further action, the order, including the dissolution of the marriage, is interlocutory and not final." *Kimball v. Kimball*, 228 Neb. 702, 705-06, 424 N.W.2d 122, 125 (1988). In the instant case, the district court's order fails to finally resolve the property distribution because it fails to finally distribute the marital home. After the decree was entered, and after a notice of appeal was already filed, a substantial number of motions and orders were filed by the parties with the court concerning the home. We believe that these filings further illustrate

the fact that the court's purported distribution of the home left to speculation and conjecture what its effect would be.

On August 20, 2004, Randy filed for an extension of time within which to secure refinancing, asking the court for an additional 60 days. On August 25, Irene objected to Randy's request for an extension. On August 27, Randy's attorney filed an affidavit attesting to Randy's attempts to refinance. Also on August 27, the district court entered an order finding that the home "may be lost if no action is taken by the Court" and granting Randy's request for an additional 60 days to complete refinancing.

On September 24, 2004, Randy filed a request for the court to compel Irene to execute a quitclaim deed. Randy alleged that he had proffered to Irene her interest in the home, but that she had rejected the money proffered. On October 4, the district court ordered Irene to execute the quitclaim deed. On October 13, Irene filed a motion asking the court to reconsider. On November 2, Irene filed a request for approval to have the home listed for sale. On November 9, the district court entered an order granting Irene's request, but specifically indicating that if Randy "receives financing on the [marital] home within twenty days, the marital home shall not be listed for sale."

Based on the record presented, it is apparent that the effect of the purported distribution of the home in the June 2, 2004, decree is left to speculation and conjecture. Not only does the plain language of the decree leave uncertain what amount Irene will ultimately be entitled to as a share of the home, but the subsequent actions of the parties and the court thoroughly demonstrate the uncertainty of the provision's effect. The court continued to enter further orders concerning the marital home, and even the last such order contained in the transcript presented to this court purports to order one course of action, listing the home for sale, but makes the action contingent on the uncertain occurrence of another event, Randy's failure to secure refinancing within another 20 days.

The substantial rights of the parties concerning their property distribution remain undetermined. The district court has continued to take further action concerning this property distribution. Further, the district court's alimony award was premised specifically on the uncertain outcome of the purported distribution of

the home. As such, substantial rights of the parties remain undetermined, the case has been retained for further action, and the order is interlocutory and not final. See *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984). There being no final order, the appeal must be dismissed. See *id.*

V. CONCLUSION

The appeal is ordered dismissed because the district court's purported distribution of the marital home was a conditional order and was not a final resolution of the substantial rights of the parties. The district court is ordered to, within 5 days of the entry of the mandate from this court, determine all issues between these parties and make findings and orders as to all issues between them. See *id.*

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

CARLSON, Judge, participating on briefs.

JOHN H. WELLS, APPELLANT, V. GOODYEAR TIRE & RUBBER COMPANY, APPELLEE.

707 N.W.2d 438

Filed December 27, 2005. No. A-05-202.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. ____: ____. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
5. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
6. **Workers' Compensation: Jurisdiction: Equity.** The Workers' Compensation Court does not have the jurisdiction of a court of equity.
7. **Workers' Compensation.** The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act.

8. **Judgments: Jurisdiction: Appeal and Error.** As a necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a court lacking subject matter jurisdiction and was thus void, an appellate court has the power and duty to vacate the void order and, if appropriate, remand the cause for further proceedings.

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

Rolf Edward Shasteen, of Shasteen, Brock & Scholz, P.C., for appellant.

Rod Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., also filing brief and arguing on behalf of the Rehm law firm.

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

MOORE, Judge.

INTRODUCTION

The present appeal arises out of a workers' compensation action wherein John H. Wells sought compensation for injuries sustained in an accident arising out of and in the course of his employment with Goodyear Tire & Rubber Company (Goodyear). Subsequent to the trial court's award of certain benefits to Wells, a dispute arose over the division of the attorney fee between Wells' first attorneys, Rehm Law Firm, P.C. (the Rehm law firm), and Wells' second attorney, Rolf Edward Shasteen. A series of determinations by the trial court and review panel regarding the attorney fee issue ensued and culminated in the present appeal. This appeal has been filed by Shasteen, ostensibly on Wells' behalf. A cross-appeal has been filed by Rod Rehm on behalf of the Rehm law firm. Because we find that the trial court lacked jurisdiction to consider the dispute between the Rehm law firm and Shasteen, this court also lacks jurisdiction to consider the matter on appeal. Accordingly, we dismiss for lack of jurisdiction both the appeal and the cross-appeal.

BACKGROUND

Wells retained the Rehm law firm to represent him in his workers' compensation case on or about October 25, 1999. A fee agreement or contract was signed which provided that Wells

would pay a sum equal to 22.5 percent of any and all amounts recovered before a hearing and a sum equal to 30 percent of any and all amounts recovered after a hearing. There was nothing in the fee agreement regarding how much, if any, Wells was to pay the Rehm law firm in the event it was discharged as Wells' counsel. Wells was represented by Daniel Fix, an employee of the Rehm law firm, until Fix's resignation from the firm effective February 1, 2000. Wells discharged the Rehm law firm on June 19 and subsequently retained Shasteen to represent him in Wells' workers' compensation case. On September 27, Shasteen filed a petition in the compensation court on Wells' behalf. The trial court entered an award of certain benefits to Wells on March 14, 2002.

Prior to the March 14, 2002, award, the Rehm law firm was given a lien for attorney fees, the amount of which lien was to be determined at a later date. On April 30, the Rehm law firm filed a motion referencing the previously sought lien and seeking "a hearing on said request since negotiations have failed." The Rehm law firm's motion was heard by the trial court on May 24. At the May 24 hearing, the trial court heard testimony from Rehm, Wells, Fix, and Goodyear's attorney and received various exhibits. Because we resolve this appeal on jurisdictional grounds, we need not detail the evidence further.

On May 28, 2002, the trial court ordered Shasteen to pay to the clerk of the Nebraska Workers' Compensation Court the sum of $6,135 and ordered the clerk to hold the sum until further order of the court. On October 15, the court entered an order dividing the $6,135 sum between the Rehm law firm and Shasteen. The court concluded that the Rehm law firm was entitled to a reasonable attorney fee, which it set at $1,250. The court then ordered the clerk to pay out the sum of $1,250 to the Rehm law firm and the sum of $4,885 to Shasteen.

Shasteen, on behalf of Wells, appealed to the review panel the October 15, 2002, order of the trial court. Following a hearing, the review panel entered an "Order of Affirmance in Part and Reversal in Part and Remand in Part on Review" on July 7, 2003. The review panel affirmed the award of the trial court to the extent that it determined that the Rehm law firm was entitled to a reasonable fee, but the review panel reversed the

amount awarded as clearly excessive and remanded for a finding regarding a reasonable attorney fee. No appeal was taken from this order.

The trial court entered an "Order on Remand" on March 30, 2004. The trial court again awarded a fee of $1,250 to the Rehm law firm, finding that such amount was an "equitable distribution of the fee based upon the services performed by each of the lawyers."

Following the trial court's March 30, 2004, order, Shasteen again appealed to the review panel, which entered an "Order of Reversal and Remand on Review" on February 7, 2005. The review panel found that the trial court's findings on remand were contrary to both Nebraska's appellate jurisprudence and the order of the review panel. The review panel again remanded the matter to the trial court with instructions to determine from the existing record both the hours expended and a reasonable hourly rate for the services rendered. Shasteen subsequently perfected his appeal to this court, and Rehm perfected his cross-appeal.

ASSIGNMENTS OF ERROR

Shasteen generally assigns that the trial court erred in awarding any portion of the attorney fee to the Rehm law firm because it failed to carry its burden of proof establishing the fee as fair, reasonable, and necessary. On cross-appeal, Rehm generally assigns that the review panel abused its discretion in finding the attorney fee awarded to the Rehm law firm by the trial court to be unreasonable.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Gabel v. Polk Cty. Bd. of Comrs., supra.* Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction

sua sponte. *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002). When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

[5-7] As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). The Workers' Compensation Court does not have the jurisdiction of a court of equity. *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991). The Workers' Compensation Court can only resolve disputes that arise from the provisions of the Nebraska Workers' Compensation Act. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

The discussion between the trial court and those present at the May 24, 2002, hearing on the Rehm law firm's motion to determine attorney fees reflected a general confusion as to how the motion should be treated by the compensation court. The trial court initially stated: "Okay. To be quite correct, we don't really have [a] plaintiff." During the course of the hearing, a colloquy ensued between the trial court, Rehm, Shasteen, and Goodyear's attorney. The discussion involved the court's having given the Rehm law firm a lien on the attorney fees award and reveals that Goodyear's attorney had issued a check for attorney fees to Shasteen and Wells jointly. Shasteen then deposited the check in his business account. At the May 24 hearing, the discussion turned to where the $6,135 should be held and reflects a general agreement that Shasteen's business account was not the proper place. The trial court initially ordered Shasteen to deposit the money back into Shasteen's trust account and then, after further discussion, ordered Shasteen to pay the money to the clerk of the Workers' Compensation Court. The trial court correctly observed, "It's Mr. Wells' money." See *Sarpy County v. Gasper*, 149 Neb. 51, 30 N.W.2d 67 (1947) (overruling holding in earlier compensation court case that while attorney fees are allowed and awarded to client, they actually belong to attorney; holding that

only when provided for by statute can attorney fees be allowed and taxed as costs and that when provided for by statute, fees are payable to party statute designates).

The power of the Workers' Compensation Court to award attorney fees is derived from Neb. Rev. Stat. § 48-108 (Reissue 2004), which provides as follows:

> No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the Nebraska Workers' Compensation Act shall be an enforceable lien against the amounts to be paid as damages or compensation or be valid or binding in any other respect, unless the same be approved in writing by the judge presiding at the trial or, in case of settlement without trial, by a judge of the Nebraska Workers' Compensation Court. After such approval, if notice in writing be given the defendant of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation. When the employee's compensation is payable by the employer in periodical installments, the compensation court shall fix, at the time of approval, the proportion of each installment to be paid on account of legal services and disbursements.

This court has interpreted § 48-108 as limiting the compensation court's regulation and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. In *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992), this court addressed, among other things, the issue of whether a health care insurer who is reimbursed as the result of an injured employee's successful workers' compensation suit is obligated to pay attorney fees to the employee's attorney. The claim in *Kaiman* was brought in the district court. The *Kaiman* court examined the question of jurisdiction and concluded that jurisdiction was properly with the district court rather than the compensation court. In reaching this conclusion, the *Kaiman* court considered the effect of § 48-108 and examined *Dysart v. Yeiser*, 110 Neb. 65, 192 N.W. 953 (1923), *affirmed* 267 U.S. 540, 45 S. Ct. 399, 69 L. Ed. 775 (1925) (first case to construe section essentially identical to present § 48-108). Based on its

examination of *Dysart*, the *Kaiman* court held that § 48-108 limits the Workers' Compensation Court's regulation of attorney fees and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. The *Kaiman* court observed, under the predecessor to Neb. Rev. Stat. § 48-120 (Reissue 2004), that a health care insurer cannot be a party to the underlying workers' compensation case which, if successful, results in the reimbursement of the health care insurer, nor can it be later joined after a successful result, due to the absolute prohibition of that section. The *Kaiman* court concluded that therefore, § 48-108 does not give the Workers' Compensation Court subject matter jurisdiction to determine whether a health care insurer or a health maintenance organization is obligated to share in the cost of obtaining reimbursement when the injured worker successfully asserts a claim for workers' compensation benefits.

We have found no Nebraska cases directly discussing the issue of whether the compensation court has jurisdiction to consider an attorney fee dispute between an injured party's current attorney and his or her former attorney; however, our research has yielded a case from a Pennsylvania court which addressed the issue. In *Pitt v. W.C.A.B. (McEachin)*, 161 Pa. Commw. 60, 62, 636 A.2d 235, 236 (1993), the appellate court addressed the question: "Where a claimant fires one attorney and hires another and the referee, in addition to granting the claimant's petition for benefits, awards counsel fees, does the referee also have jurisdiction to decide a fee dispute between the lawyers and may he apportion the counsel fees?" The court answered the question in the negative. The applicable Pennsylvania statute considered by the court is similar to Nebraska's § 48-108, but the Pennsylvania statute differs in that it states that the referee is to approve " 'all counsel fees, agreed upon by claimant and his attorneys.' " (Emphasis omitted.) 161 Pa. Commw. at 62, 636 A.2d at 237. The Pennsylvania court stated that the independent cause of action arising under the Pennsylvania statute was distinct from any claim which a discharged lawyer might assert against his former client, or that client's subsequent counsel, over his discharge and replacement. The court further stated that the first attorney in that case was not representing a party to the workers' compensation

claim and litigation but was litigating on his own behalf a cause of action which was a common-law claim for breach of contract, a claim on principles of quantum meruit, or an equitable claim for damages under a theory of unjust enrichment.

As discussed above, this court has previously interpreted § 48-108 as limiting the compensation court's regulation and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. Also relevant to our consideration of the jurisdictional issue in the present case is Neb. Rev. Stat. § 48-162.03(1) (Reissue 2004), which provides as follows:

> The Nebraska Workers' Compensation Court or any judge thereof may rule upon any motion addressed to the court *by any party to a suit or proceeding*, including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial or motions for reconsideration. Several objects may be included in the same motion, if they all grow out of or are connected with the action or proceeding in which it is made.

(Emphasis supplied.)

In the present case, the Rehm law firm, neither a party to nor at that time representing a party to Wells' proceeding in the compensation court, filed a motion asking the compensation court to determine the attorney fee dispute between the Rehm law firm and Shasteen. Stated another way, the Rehm law firm was asking the compensation court to take money awarded to Wells on his claim and divide the money between individuals who were not parties to that claim.

We conclude that the compensation court did not have jurisdiction to determine the dispute between the Rehm law firm and Shasteen over the division of the attorney fee awarded to Wells in his claim before the compensation court. Nebraska case law interprets § 48-108 as limiting the compensation court's regulation and disbursements matters to those which arise between the injured worker and the attorney representing the injured worker. The dispute in the present case arose not between Wells and Shasteen, but between the Rehm law firm and Shasteen. Further, § 48-162.03(1) grants the compensation court the authority to

hear motions brought only by parties to a suit or proceeding before the court. The Rehm law firm is not a party to a proceeding before the compensation court, nor did it represent a party to such a proceeding at the time it filed its April 30, 2002, motion. We conclude that the compensation court lacked jurisdiction to consider the issue raised by the Rehm law firm's motion. Accordingly, this court lacks jurisdiction to consider the merits of the present appeal and cross-appeal and must dismiss both the appeal and the cross-appeal.

CONCLUSION

[8] Because the trial court lacked jurisdiction to consider the dispute between the Rehm law firm and Shasteen, we dismiss for lack of jurisdiction both the appeal and the cross-appeal. The cause is remanded to the review panel with instructions to direct the trial court both to vacate its orders awarding attorney fees and to dismiss the motion of the Rehm law firm. As a necessary incident to an appellate court's power to determine that it lacks jurisdiction over the merits of an appeal because the order appealed from was entered by a court lacking subject matter jurisdiction and was thus void, an appellate court has the power and duty to vacate the void order and, if appropriate, remand the cause for further proceedings. *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999).

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

IN RE INTEREST OF CHELSEY D., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. CHELSEY D., APPELLEE.

707 N.W.2d 798

Filed December 27, 2005. No. A-05-334.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

2. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

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

Jon Bruning, Attorney General, Royce N. Harper, and Bradley Gianakos, Special Assistant Attorney General, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The State of Nebraska appeals from that portion of the order of the separate juvenile court of Lancaster County which prohibited any change in the placement of Chelsey D. without prior court approval. We conclude that the juvenile court exceeded its statutory authority in imposing that restriction, and we therefore modify the order to delete that provision, but otherwise affirm.

BACKGROUND

Following a hearing on June 6, 2002, the juvenile court adjudicated Chelsey as a child within the provisions of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2002). On June 21, the court committed Chelsey to the custody of the Department of Health and Human Services, Office of Juvenile Services (OJS), for a residential evaluation and ordered that Chelsey be returned to the court for further hearing upon completion of the evaluation. On July 19, the court committed Chelsey to the custody of OJS for placement at the group-home level and ordered that she remain in detention at the Lancaster County juvenile detention center until the court approved a less restrictive placement. In an order filed on October 23, the court found that Chelsey's level of custody should be upgraded, and the court committed her to the custody of OJS for placement at a residential treatment center.

On February 9, 2005, the court held a hearing to review the commitment to OJS. No sworn testimony was offered during the hearing, but the court received two exhibits: a court report prepared January 27, 2005, and a letter from Chelsey dated February 7, 2005, wherein Chelsey stated that she did not feel she would be safe at home and that she would feel safer at a foster home. The court report stated that Chelsey had been in placement at "Cedars Tur[n]ing Point Treatment Group Home" since August 2004 and that the placement was meeting all of her treatment and safety needs. A case plan—labeled "Draft Only" —included within the court report showed a permanency objective of reunification with a target date of July 1, 2005, and a concurrent plan of guardianship with a target date of December 31, 2005. On the same date as the hearing, the court entered an order approving the plan of OJS but prohibiting any change in Chelsey's placement without prior court approval. The State timely appeals from that February 9 order.

ASSIGNMENT OF ERROR

The State alleges that the juvenile court erred in prohibiting any change in Chelsey's placement without prior court approval.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003).

ANALYSIS

Although it is clear that the juvenile court maintains jurisdiction over any juvenile committed to the custody of OJS until such time as the juvenile is discharged from OJS' custody, Neb. Rev. Stat. § 43-408(2) (Reissue 2004), this appeal raises the issue of whether Nebraska statutes grant to the juvenile court the authority to enter an order prohibiting any change without prior court approval in the placement of a juvenile committed to OJS' custody.

[2,3] As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been

conferred on it by statute. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

Section 43-408(4) addresses the transfer of juveniles committed to the custody of OJS from one place of treatment to another and states in pertinent part:

> (a) Except as provided in subdivision (b) of this subsection, if [OJS] proposes to transfer the juvenile from a less restrictive to a more restrictive place of treatment, a plan outlining the proposed change and the reasons for the proposed change shall be presented to the court which committed the juvenile. Such change shall occur only after a hearing and a finding by the committing court that the change is in the best interests of the juvenile . . . . ;
>
> (b) [OJS] may make an immediate temporary change without prior approval by the committing court only if the juvenile is in a harmful or dangerous situation, is suffering a medical emergency, is exhibiting behavior which warrants temporary removal, or has been placed in a non-state-owned facility and such facility has requested that the juvenile be removed. Approval of the committing court shall be sought within fifteen days of making an immediate temporary change, at which time a hearing shall occur before the court. . . . ; and
>
> (c) If the proposed change seeks to transfer the juvenile from a more restrictive to a less restrictive place of treatment or to transfer the juvenile from the juvenile's current place of treatment to another which has the same level of restriction as the current place of treatment, [OJS] shall notify the juvenile, the juvenile's parents, custodian, or legal guardian, the committing court, the county attorney, the counsel for the juvenile, and the guardian ad litem of the proposed change. The juvenile has fifteen days after the date of the notice to request an administrative hearing with [OJS], at which time [OJS] shall determine whether

> it is in the best interests of the juvenile for the proposed change to occur . . . . If the juvenile is aggrieved by the administrative decision of [OJS], the juvenile may appeal that decision to the committing court within fifteen days after [OJS'] decision.

Under § 43-408(4)(a), OJS cannot transfer a juvenile to a more restrictive place of treatment without assent by the juvenile court. However, an order such as the juvenile court's in the instant case prohibiting any change in placement without prior approval clearly usurps OJS' authority to make an immediate temporary change under § 43-408(4)(b) and also infringes on OJS' ability to transfer a juvenile to a less restrictive place or to a place of the same level of restriction when the juvenile does not request a hearing on and review of the proposed transfer.

In *In re Interest of David C.*, 6 Neb. App. 198, 572 N.W.2d 392 (1997), this court concluded that although a juvenile court's jurisdiction over an adjudicated minor continued after the juvenile was committed to a treatment center under the control of OJS, the juvenile court did not have the power to require OJS to submit a treatment and placement plan prior to the juvenile's release, to notify the court before release or parole, to report any change of placement to the court, or to submit monthly progress reports. Similarly, in the instant case, it does not appear that the juvenile court has the power to enter a blanket order prohibiting OJS from making any change in placement without the court's approval.

We are mindful of the Nebraska Supreme Court's decision in *In re Interest of Tamantha S.*, 267 Neb. 78, 79, 672 N.W.2d 24, 26 (2003), where the juvenile court placed the juvenile in the custody of OJS and later ordered that the juvenile be placed under a "Conditions of Liberty contract" for 1 year unless such period was extended or revoked by the court. OJS appealed, claiming that the court did not have authority to order such a contract for a prescribed period of time and that the order improperly deprived OJS of the power to discharge the juvenile from OJS' custody. OJS relied on *In re Interest of David C.*, *supra*, to support its argument, but the Nebraska Supreme Court recognized that the Legislature amended the juvenile code after the decision in *In re Interest of David C.*, observed that those

amendments were controlling, and therefore concluded that it would not "rely entirely" on *In re Interest of David C.* in resolving the appeal. *In re Interest of Tamantha S.*, 267 Neb. at 81, 672 N.W.2d at 27. The Supreme Court stated that although § 43-408(2) referenced juveniles' being "'discharged from [OJS' custody],'" the statute did not state that OJS discharges the juveniles, and that "while OJS may make an initial determination with regard to the advisability of the discharge of a juvenile committed to OJS, the committing court, as a result of its statutorily imposed continuing jurisdiction, must approve the discharge of the juvenile." *In re Interest of Tamantha S.*, 267 Neb. at 82, 672 N.W.2d at 28. The Supreme Court thus concluded that the juvenile court's imposition of a 1-year time limit on the "Conditions of Liberty contract" was "merely an exercise of the court's responsibility to review the placement and treatment of committed juveniles," that the court's "statutorily mandated continuing jurisdiction would be rendered meaningless" if the court were not permitted to conduct such periodic review, that the court's order did not usurp OJS' authority to assess the advisability of a juvenile's discharge, and that the order "merely provide[d] a time limit for the Conditions of Liberty contract but d[id] not provide that [the juvenile] would be discharged at the end of the 1-year time period." *Id.* at 83, 672 N.W.2d at 28.

In the instant case, however, the juvenile court's order cannot be characterized as a mere exercise of its jurisdiction or of its responsibility to review placements of a juvenile. The language and framework of § 43-408 provide juvenile courts with the ability to review placements by OJS, but that section also provides OJS with the authority to make certain placements without prior approval by the juvenile court. We conclude that the restriction prohibiting any change in the placement of Chelsey without prior court approval is void for the reason that the provision exceeds the statutory authority of the juvenile court.

CONCLUSION

The juvenile court exceeded its statutory authority to the extent that it attempted to prohibit any change in Chelsey's placement without court approval. We therefore modify the juvenile court's February 9, 2005, order to delete the provision which

states, "IT IS FURTHER ORDERED that the placement of Chelsey . . . shall not be changed without the prior approval of the Court."

AFFIRMED AS MODIFIED.

JON S. MCKENZIE ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

708 N.W.2d 286

Filed January 10, 2006. No. A-04-1134.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Municipal Corporations: Ordinances: Statutes: Appeal and Error.** In analyzing a municipal ordinance, a legislative enactment, an appellate court will follow the same rules as those of statutory analysis.
4. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
6. ____. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
7. ____. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
8. **Administrative Law: Municipal Corporations: Ordinances.** Administrative ordinances deal with the organization and activities of the municipality itself.
9. **Contracts: Municipal Corporations: Ordinances.** Contract ordinances are ordinances providing for contracts or authorizing an agreement between the municipality and another party.
10. **Municipal Corporations: Ordinances.** A municipality is not allowed to violate its own ordinance.
11. **Municipal Corporations: Ordinances: Words and Phrases.** The term "ordinance" is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality.

12. **Municipal Corporations: Ordinances.** A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance.
13. **Administrative Law: Municipal Corporations: Ordinances.** The crucial test for determining that which is legislative (ordinance) from that which is administrative or executive (resolution) is whether the action taken was one making a law, or executing or administering a law already in existence.
14. **Municipal Corporations: Ordinances.** A municipality cannot do by resolution what its charter mandates must be done by ordinance.
15. **Ordinances.** Whether an action is an ordinance or a resolution depends not on the name given to it but on the substance of the action.
16. **Words and Phrases.** "Or" may be employed as a coordinate conjunction introducing a synonymous word or phrase, or it may join different terms expressing the same idea or thing.
17. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

John P. Fahey, of John P. Fahey Law Office, P.C., for appellants.

Michelle Peters, Assistant Omaha City Attorney, for appellee.

INBODY, Chief Judge, and CARLSON and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The appellants (Firefighters) in this case are a group of Omaha firefighters who contend that a contract for services between the Millard Suburban Fire Protection District (Millard) and the Omaha Fire Department triggered Omaha Mun. Code (OMC), ch. 23, art. III, § 23-148 (1980), so as to entitle them to a pay increase. The district court for Douglas County granted the motion of the City of Omaha (City) for summary judgment. Because we conclude that the Firefighters were not "senior in rank, grade or class" to the former Millard personnel under the plain language of OMC § 23-148, we affirm.

BACKGROUND

In November 1997, the City contracted to provide fire protection services to Millard beginning January 1, 1998. As a result,

sworn Millard personnel became employees of the City's fire department as of 11:59:59 p.m. on December 31, 1997. According to the contract,

> (b) all such sworn personnel shall be classified as "Firefighters" in the City's standard classification, and paid at the City's pay step which gives full effect and is based on all years of service with [Millard's] Fire Department, but in no event shall such step placement be greater than [the City's highest pay step for the classification of firefighter], (c) all benefits and seniority shall be th[ose] of a new City Fire Department sworn employees [sic] as of the date when employment with the City starts. Certain of those benefits are set forth by the parties [in a statement of conditions and understandings] in order to avoid confusion and lend clarity to this Agreement . . . .

The statement of conditions and understandings addresses the treatment of former Millard firefighters regarding sick leave, "trade time," "call back," health and dental insurance, staffing, personal leave days, probationary status, and employee evaluations. In particular, the sections on trade time and employee evaluations take years of employment at Millard into account. The statement concludes, "In all other respects such [Millard] employees shall be considered regular sworn employees of the City Fire Department as provided for and subject to the [collective bargaining agreement between the City and an Omaha labor union] and all other City rules and regulations."

The Omaha City Council approved the contract by ordinance No. 34398, as required by the Omaha City Charter, art. V, § 5.17 (1996), which provides in part, "All contracts involving the payment of money from appropriations of more than one fiscal year of the City Government shall be approved by Ordinance."

On July 10, 2001, the Firefighters filed a petition against the City in the district court, seeking to collect backpay. The petition alleged that at the time of the contract, some of the former Millard firefighters who were placed in the City's system were classified as firefighters at the top step of the pay scale. The Firefighters, however, had not yet completed sufficient length of service with the City to reach the top firefighter pay step and remained at lower pay steps. The Firefighters claimed that they

were entitled to pay increases by OMC § 23-148, which states, in pertinent part:

> When a uniformed member of the fire or police department is paid at a rate which exceeds that at which such member's senior in rank, grade or class is being paid, such senior officer or officers shall be increased to the next higher step within the assigned pay range irrespective of the date of last increase. . . . This provision shall not apply when a member has been reduced in pay, grade or class for disciplinary reasons or when he has not been granted a pay increase due to unsatisfactory performance; neither shall it apply when such condition is the result of use of the two-step salary increase provision.

In their prayer, the Firefighters requested backpay and related relief.

The case first came before this court on the Firefighters' interlocutory appeal after the district court sustained the City's motion to disqualify one of the Firefighters' counsel. On September 2, 2003, we reversed and vacated the order and remanded the matter to the district court for further proceedings. See *McKenzie v. City of Omaha*, 12 Neb. App. 109, 668 N.W.2d 264 (2003).

Both sides filed motions for summary judgment. The parties agreed that no genuine issue of material fact existed, and each side contended that it was entitled to judgment as a matter of law in its favor. The district court conducted a hearing on the motions and received exhibits. We have summarized most of the evidence above and will summarize additional relevant evidence in the analysis portion of this opinion. On September 9, 2004, the district court entered an order sustaining the City's motion and overruling the Firefighters' motion. The Firefighters now appeal.

ASSIGNMENTS OF ERROR

The Firefighters allege that the district court erred in (1) sustaining the City's motion for summary judgment, denying the Firefighters' motion for summary judgment, and dismissing the Firefighters' petition for declaratory and monetary relief; (2) ruling that OMC § 23-148 should be read in pari materia with the merger agreement, which was passed as an ordinance as required

by the Omaha City Charter; and (3) ruling that OMC § 23-148 was construed to mean that certain new Millard firefighters were " 'senior officers' " to the Firefighters, who were members of the City's fire department prior to the merger.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

ANALYSIS

General Principles of Interpreting Ordinances.

The Firefighters argue that OMC § 23-148 does not contain any ambiguity calling for construction of its plain language. While we agree that OMC § 23-148 is not ambiguous, we reject the Firefighters' interpretation of its language. We begin by summarizing the principles governing the interpretation of OMC § 23-148.

[3-7] In analyzing the OMC, a legislative enactment, we follow the same rules as those of statutory analysis. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005). An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491

(2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004). We therefore address whether it is proper to consider OMC § 23-148 and ordinance No. 34398 in pari materia.

Considering Contract Ordinance In Pari Materia.

[8-10] The Firefighters classify OMC § 23-148 as an administrative ordinance and ordinance No. 34398 as a contract ordinance and argue that the two cannot be construed in pari materia. Administrative ordinances deal with the organization and activities of the municipality itself; they provide the machinery for performing the functions of municipal government. See 1 Thomas A. Matthews et al., Municipal Ordinances § 5.02 (2d ed. 1998). Contract ordinances are "[o]rdinances providing for contracts or authorizing an agreement between the municipality and another party . . . ." *Id.*, § 5.03 at 64.

> [A]n ordinance . . . has the force of law over the community in which it is adopted.
>
> . . . A municipality is not allowed to violate its own ordinance. . . .
>
> . . . .
>
> Where applicable, an ordinance enters into and forms a part of a contract by operation of law. . . . A contract authorized by and entered into under an ordinance is not given by the ordinance the force of law.

5 Eugene McQuillin et al., The Law of Municipal Corporations § 15:12 at 126-32 (3d ed. 2004). Even though OMC § 23-148 and ordinance No. 34398 may fall into the categories proposed by the Firefighters, the authorities cited by the Firefighters do not support the Firefighters' contention that such classification precludes considering the ordinances in pari materia. Both ordinances reflect the Omaha City Council's intent, and we assume that ordinance No. 34398 did not violate OMC § 23-148, but, rather, was consistent with it.

[11-15] The Firefighters also assert that ordinance No. 34398 is nothing more than a resolution and was not meant to be read

in pari materia with an ordinance. Ordinances and resolutions are distinguishable:

> The term *ordinance* is generally used to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality. 5 Eugene McQuillin, The Law of Municipal Corporations § 15.01 (3d ed. 1996). A resolution is generally not the equivalent of an ordinance, but is rather an act of a temporary character; is ordinarily sufficient for council action on ministerial, administrative, or executive matters; and does not rise to the dignity of an ordinance. Charles S. Rhyne, The Law of Local Government Operations § 8.1 (1980 & Supp. 1985). . . . "[T]he crucial test for determining that which is legislative [ordinance] from that which is administrative or executive [resolution] is whether the action taken was one making a law, or executing or administering a law already in existence." *Kelley v. John*, 162 Neb. 319, 321, 75 N.W.2d 713, 715 (1956).

Kubicek v. City of Lincoln, 265 Neb. 521, 529-30, 658 N.W.2d 291, 298 (2003). See, also, *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005) (distinguishing ordinance and resolution). A municipality cannot do by resolution what its charter mandates must be done by ordinance. See 5 McQuillin, *supra*, § 15:2. Whether an action is an ordinance or a resolution depends not on the name given to it but on the substance of the action. See *id.*

The Omaha City Charter requires contracts like the one in this case to be approved by ordinance. Such was done with the agreement between the City and Millard, which agreement was approved as part of ordinance No. 34398 after discussion by the Omaha City Council. However, it appears that the substance of ordinance No. 34398 fits the definition of a resolution. Regardless of whether ordinance No. 34398 is a resolution, we find no authority which would forestall us from considering an ordinance conjunctively with a resolution for the purpose of interpreting the ordinance. We consider OMC § 23-148 and ordinance No. 34398 in pari materia and proceed to interpret OMC § 23-148 accordingly.

Interpretation of OMC § 23-148.

OMC § 23-148 provides, "When a uniformed member of the fire or police department is paid at a rate which exceeds that at which such member's senior in rank, grade or class is being paid, such senior officer or officers shall be increased to the next higher step within the assigned pay range . . . ." The Firefighters contend that OMC § 23-148 clearly pertains only to police or firefighters employed by the City and that police or firefighters from other municipalities cannot "bring their seniority with them." Brief for appellants at 15. However, the Firefighters implicitly read the key phrase as the equivalent of "such member's senior in length of service within the same rank, grade or class." In our opinion, this reading errs in two critical and interrelated respects.

First, the Firefighters equate the words "such member's senior" with someone who has greater seniority in length of service. Second, the Firefighters treat the phrase as comparing individuals of the same rank, grade, or class. We consider both of these readings to be inconsistent with the plain meaning of OMC § 23-148. Correctly interpreted, "such member's senior in rank, grade or class" refers to an officer who has a greater or higher rank, grade, or class than the "uniformed member" being compared. See *id.*

This interpretation naturally flows from the paramilitary nature of police and fire organizations. By its terms, OMC § 23-148 applies to the City's police department as well as its fire department. The purpose can be readily understood and easily demonstrated in the more familiar ranks of a typical police department. The ordinance simply contemplates the possibility that for some unspecified reason, a lower ranking officer such as a sergeant might be paid more than a higher ranking officer such as a lieutenant. In that situation, OMC § 23-148 operates to resolve the disparity between rank and pay by increasing the pay of the higher ranking officer. That purpose is completely absent in the instant case. The legislative history for OMC § 23-148—which consists of a very brief letter from an assistant city attorney to the Omaha City Council—paraphrases the language of the ordinance and does not affect our interpretation of the ordinance's plain language.

The evidence before us demonstrates that all of the Millard personnel absorbed by the City and all of the Firefighters are of the same "rank," namely the rank of "firefighter," which is the lowest rank within the bargaining unit of the City's fire department. Although at the time of the contract, the Millard personnel held various ranks at Millard, the contract placed all of the former Millard personnel at the rank of "firefighter" in the City's fire department. None of the Millard personnel were granted a higher rank within the City's hierarchy of firefighting personnel. By deduction, none of the Millard personnel were granted any greater or higher rank than any of the Firefighters. Length of service is simply irrelevant in this comparison.

Similarly, the City's salary schedule for the "fire bargaining unit" is entitled "Classifications - Fire Bargaining Unit" and lists various ranks, such as "Firefighter," "Firefighter/Paramed.," "Fire Apparatus Engineer," and "Fire Captain," under the heading "Class Title." Hence, the term "class," as used in OMC § 23-148, is synonymous with "rank" and likewise does not depend on length of service. For the same reason explained above, the Firefighters and the absorbed Millard personnel were placed in the same classification or "class" within the meaning of OMC § 23-148.

[16] We find no exhibit illustrating the meaning of "grade." However, considering that rank and class have the same meaning and that those two terms are joined with "grade" by the word "or," we deduce that the three terms express an " 'alternative of terms, definitions, or explanations of the same thing in different words.' " See *Phillips v. State*, 154 Neb. 790, 804, 49 N.W.2d 698, 707 (1951) (quoting *Smith v. R. F. Brodegaard & Co.*, 77 Ga. App. 661, 49 S.E.2d 500 (1948)). See, also, *State v. Ramsey*, 311 S.C. 555, 430 S.E.2d 411 (1993) ("or" may be employed as coordinate conjunction introducing synonymous word or phrase, or it may join different terms expressing same idea or thing). Therefore, like "rank" and "class," "grade," as used in OMC § 23-148, does not depend on length of service. Therefore, we conclude that the district court did not err in sustaining the City's motion for summary judgment and overruling the Firefighters' motion.

Although our analysis does not require us to consider OMC § 23-148 in pari materia with ordinance No. 34398, we undertake that comparison for the sake of completeness. Both OMC § 23-148 and, by reference, ordinance No. 34398 address rank, grade, or class and compensation. Therefore, we may consider them conjunctively and construe them in pari materia in determining the meaning of "senior in rank, grade or class." See, OMC § 23-148; *Forgét v. State*, 265 Neb. 488, 658 N.W.2d 271 (2003) (when considering series or collection of statutes pertaining to certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine intent of Legislature, so that different provisions of act are consistent and sensible).

Ordinance No. 34398 approved the services agreement between the City and Millard and incorporated the language of the agreement by reference. The agreement states, in part:

> [Former Millard firefighters] shall be classified as "Firefighters" in the City's standard classification, and paid at the City's pay step which gives full effect and is based on all years of service with [Millard's] Fire Department, but in no event shall such step placement be greater than [the City's highest pay step for the classification of firefighter].

This language, incorporated as part of the ordinance, is consistent with our interpretation of the language in OMC § 23-148. As noted above, because the Millard personnel entered the employ of the City as "firefighters," they entered the City's employment at the same "rank, grade or class" as that of the Firefighters. See *id.*

[17] We recognize that our reasoning differs in some respects from that of the district court. Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

CONCLUSION

We conclude that under the plain language of OMC § 23-148, the Firefighters were not "senior in rank, grade or class" to the

former Millard personnel. Therefore, we conclude that the district court did not err in sustaining the City's motion for summary judgment and overruling the Firefighters' motion, and we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JAY E. BRUNA, APPELLANT.

710 N.W.2d 329

Filed January 10, 2006. No. A-05-529.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. ____: ____. When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte.
5. **Judges.** Neb. Rev. Stat. § 24-303 (Reissue 1995) allows a district judge of this state to hold court for another district judge of this state upon request, and such request need not be in writing.
6. **Constitutional Law: Judges.** Article V, § 12, of the Nebraska Constitution authorizes judges of the district court to hold court for each other.
7. **Statutes: Judges.** Neb. Rev. Stat. § 24-734 (Cum. Supp. 2004) provides that a judge of any court of this state, at chambers anywhere within the state, shall, in any case in which that judge is authorized to act, have power to exercise the powers conferred upon a judge and upon a court, and specifically to, with the consent of the defendant, hear and determine pretrial and posttrial matters in criminal cases.
8. **Due Process: New Trial: Convictions: Sentences.** Due process of law requires that vindictiveness against a defendant for having successfully attacked the defendant's first conviction must play no part in the sentence the defendant receives after a new trial.
9. **New Trial: Convictions: Sentences: Presumptions.** The application of the presumption of vindictiveness where a sentence has been increased after a new trial arising from a successful challenge of a prior conviction is limited to cases which pose a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority.
10. **Judges: Sentences: Presumptions.** There is no presumption of judicial vindictiveness in cases in which the defendant successfully appealed an initial sentence by one judge only to receive a greater sentence upon resentencing by a different judge.

11. **Judges: Sentences: Appeal and Error.** A defendant may prevail on a claim of judicial vindictiveness by showing actual vindictiveness in resentencing.
12. **Appeal and Error.** Absent plain error, an appellate court will not consider errors that were neither assigned nor argued.
13. **Sentences: Evidence.** A sentencing authority is to be accorded very wide discretion in determining an appropriate sentence and should be allowed to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.
14. **Sentences.** Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Sarpy County: JAMES T. GLEASON, Judge. Affirmed.

Lawrence G. Whelan for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Jay E. Bruna appeals his resentencing for first degree sexual assault on a child because it exceeded the original sentence, which had been vacated. We conclude (1) that the presumption of vindictiveness in sentencing set forth in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), does not apply when the second sentencing judge is someone other than the initial sentencing judge and (2) that Bruna failed to prove actual vindictiveness. We therefore affirm.

BACKGROUND

Pursuant to a jury verdict, Bruna was convicted in the district court for Sarpy County, Nebraska, of first degree sexual assault on a child. One of the district judges for the Second Judicial District—which includes Sarpy County—sentenced Bruna to 15 to 50 years in prison. Bruna appealed to this court, alleging,

inter alia, that the first judge made inappropriate remarks during sentencing. We found merit in this claim, and we vacated the sentence and remanded the cause with directions that Bruna be resentenced by a different judge. See *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

Upon remand, a new sentencing hearing was held in Douglas County, Nebraska, before one of the district court judges for the Fourth Judicial District, which consists of only Douglas County. Bruna, his counsel, and counsel for the State were present at the hearing, and no one raised any objection to the hearing's being held in Douglas County. The record does not show that Bruna expressly consented to the location of the hearing.

Before pronouncing the new sentence, the second judge noted that Bruna's presentence report had not been updated since the previous sentencing and that the judge had reviewed the court file and presentence report. The judge then sentenced Bruna to 20 to 50 years' imprisonment. Bruna appeals.

ASSIGNMENT OF ERROR

Bruna alleges that the district court abused its discretion and violated Bruna's right to due process of law under the 14th Amendment by imposing a harsher sentence on remand than was imposed by the original sentencing judge.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005).

ANALYSIS

Jurisdiction.

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005). When lack of jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is

the duty of a reviewing court to raise and determine the issue of jurisdiction sua sponte. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

[5,6] We begin by noting that the second judge is a district judge for the Fourth Judicial District. See Neb. Rev. Stat. § 27-201 (Reissue 1995) (court may take judicial notice of facts if those facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). It is unclear from the record how this matter came to be assigned to the second judge. However, Neb. Rev. Stat. § 24-303 (Reissue 1995) allows a district judge of this state to hold court for another district judge of this state upon request, and such request need not be in writing. See *Iron Bear v. Jones*, 149 Neb. 651, 32 N.W.2d 125 (1948). Moreover, the Nebraska Constitution authorizes judges of the district court to hold court for each other. See Neb. Const. art. V, § 12. Thus, the fact that the second judge was not one of the regular judges for the Second Judicial District does not raise a jurisdictional issue.

[7] The sentencing hearing at issue in this case was held in Douglas County rather than Sarpy County. Neb. Rev. Stat. § 24-734 (Cum. Supp. 2004) provides:

> (1) A judge of any court of this state, . . . at chambers anywhere within the state, shall, in any case in which that judge is authorized to act, have power to exercise the powers conferred upon a judge and upon a court, and specifically to:
>
> . . . .
>
> (d) With the consent of the defendant, hear and determine pretrial and posttrial matters in criminal cases.

The second judge apparently proceeded with sentencing—a posttrial matter—outside of Sarpy County, pursuant to the authority granted by § 24-734(1)(d). Bruna was present and spoke at the sentencing hearing in Douglas County, but the record does not show that he expressly consented to that venue. We find no Nebraska cases stating whether under § 24-734(1)(d), the defendant's consent must be expressed or may be implied, nor do we find any legislative history elucidating the issue.

We find a similar factual scenario in the Texas case of *Rodriguez v. State*, 918 S.W.2d 34 (Tex. App. 1996). In that

case, the defendant was arrested for possession of marijuana in Kenedy County, Texas, and was indicted for the offense by a grand jury in Kleberg County, Texas, which is in the same judicial district as Kenedy County. Texas' code of criminal procedure provided that the offense of possession of marijuana could be prosecuted in the county where the offense occurred or, " 'with the consent of the defendant,' " in a county adjacent to and in the same judicial district as the county where the offense occurred. *Id.* at 36. On appeal, the defendant alleged that the Kleberg County grand jury lacked jurisdiction to indict him. The Texas Court of Appeals observed that the defendant had not objected to his case's being presented to the Kleberg County grand jury, that the defendant did not seek to either quash the indictment or object to being tried in Kleberg County, and that following voir dire examination and the swearing in of the jury, both parties announced that they were ready for the case to proceed. The court referred to Texas' penal code and defined consent as "assent in fact, whether express or apparent." *Id.* The court concluded that the defendant had consented to the case's being tried in Kleberg County.

While we found no Nebraska cases on point, the holding in *Rodriguez v. State, supra*, appears to be consistent with the view of consent in Nebraska. The Nebraska Supreme Court has construed a defendant's failure to object to a continuance of a hearing date as consent to the continuance. See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). In the context of tort law, the Nebraska Supreme Court has defined "consent" as a willingness in fact for conduct to occur which may be expressed by action or inaction, and it has defined "apparent consent," in the same context, as words or conduct reasonably understood by another to be intended as consent. See *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

In the instant case, Bruna participated in the sentencing hearing and, like the defendant in *Rodriguez v. State, supra*, raised no objection as to venue. Bruna's conduct implied consent to the venue of the sentencing proceedings. We conclude that Bruna's implied consent was sufficient to satisfy the consent requirement of § 24-734(1)(d) and that the second judge had jurisdiction to conduct the sentencing hearing in Douglas County. Because

the district court possessed jurisdiction, we have jurisdiction to consider Bruna's appeal and now turn to the issue he raises on appeal.

Presumption of Vindictiveness.

[8] Bruna argues that the increased sentence violated his constitutional right to due process because, he claims, it was the product of vindictiveness. In *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), the U.S. Supreme Court held that due process prohibited a defendant from receiving a harsher sentence at resentencing after the defendant's successful attack of the first conviction, which success triggered vindictiveness on the part of the sentencing judge. The Court stated:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

395 U.S. at 725-26. The Court recognized that the U.S. Constitution does not absolutely bar the imposition of a more severe sentence upon reconviction. Courts have construed *Pearce* as applying a presumption of vindictiveness where a sentence has increased after a new trial arising from a successful challenge of a prior conviction. See *Wasman v. United States*, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984). Bruna contends that he is entitled to the presumption of vindictiveness.

[9] Subsequent U.S. Supreme Court cases have refined the holding of *Pearce*. The Court has limited the application of the *Pearce* rule to cases which pose a " 'reasonable likelihood' . . . that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Alabama v. Smith*, 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) (quoting *United States v. Goodwin*, 457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)).

In *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972), the U.S. Supreme Court held that the presumption of vindictiveness does not apply when the harsher sentence is imposed by the higher court in a two-tiered trial system. In *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), the U.S. Supreme Court held that the rule does not apply when one jury imposes the initial sentence and another jury imposes a harsher sentence after retrial. The Court explained:

> [T]he second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.

412 U.S. at 27.

In *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986), the defendant was convicted and sentenced by a jury to 20 years in prison. The case was retried before a jury in front of the same judge who had presided over the first trial. The jury convicted the defendant, and the judge sentenced him to 50 years in prison, basing the increased sentence on new evidence. The Court stated:

> Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks an acquittal. . . . We decline to adopt the view that the judicial temperament of our Nation's trial judges will suddenly change upon the filing of a successful post-trial motion. The presumption of

> *Pearce* does not apply in situations where the possibility of vindictiveness is this speculative . . . .
>
> The presumption is also inapplicable because different sentencers assessed the varying sentences that [the defendant] received. In such circumstances, a sentence "increase" cannot truly be said to have taken place. . . . Here, the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more, particularly since trial judges must be accorded broad discretion in sentencing.

Texas v. McCullough, 475 U.S. at 139-40.

The *McCullough* Court further declined to read *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), as governing situations in which there are two different sentencing judges. The Court noted:

> *Pearce* itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. . . . That fact, however, may not have been drawn to the Court's attention and does not appear anywhere in the Court's opinion in *Pearce*. Clearly the Court did not focus on it as a consideration for its holding.

Texas v. McCullough, 475 U.S. at 140 n.3.

In the instant case, Bruna was sentenced by two different judges, and we find no Nebraska case applying the presumption of vindictiveness to such a situation. We recognize that *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997), involved two trials and two different sentencing judges. In that case, the defendant argued that the second sentencing court had erred in imposing a sentence that was harsher than the first sentence, which had been overturned on a motion for postconviction relief. The Nebraska Supreme Court discussed some of the foregoing authority and concluded: "Because events in the second trial shed new light on the defendant's character and because the reasons for imposing a heavier sentence appeared in the record, any presumption of vindictiveness under *Pearce* is effectively

rebutted." *State v. Wilson*, 252 Neb. at 657, 564 N.W.2d at 255. The court in *Wilson* did not focus on whether the presumption of vindictiveness applied.

[10] Other jurisdictions have declined to apply the presumption of judicial vindictiveness in cases in which the defendant successfully appealed an initial sentence by one judge only to receive a greater sentence upon resentencing by a different judge. See, e.g., *Gauntlett v. Kelley*, 658 F. Supp. 1483 (W.D. Mich. 1987); *State v. Parmelee*, 121 Wash. App. 707, 90 P.3d 1092 (2004); *State v. Mitchell*, 670 N.W.2d 416 (Iowa 2003); *State v. Hilton*, 291 S.C. 276, 353 S.E.2d 282 (1987). Based on the foregoing authorities, we decline to apply the presumption in this case also.

In the case before us, the procedural history does not support Bruna's position that his successful appeal was the motivation for the greater sentence. The second judge did not have a personal stake in the first sentence or a personal motive for vindication, and like the U.S. Supreme Court in *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986), we decline to base the presumption on speculations of judicial vindictiveness. We recognize that judges bring their varying life experiences to the bench, which circumstances can result in judges' imposing different sentences after having reviewed the same evidence. This is a natural consequence of the standard which allows judges to use their discretion in sentencing. See *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005) (enumerating factors judge may consider in imposing sentence). Because the judge who imposed Bruna's second sentence is not the same judge who imposed the first sentence, we conclude that there is no reasonable likelihood that vindictiveness contributed to the sentence appealed in this case.

Actual Vindictiveness.

[11-14] A defendant may still prevail on a claim of judicial vindictiveness by showing actual vindictiveness in resentencing. See *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Bruna alleges vindictiveness in resentencing, based on the increase between his first and second sentences. He does not argue that his second sentence resulted from actual

vindictiveness, and absent plain error, we will not consider errors that were neither assigned nor argued. See *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999). We find no evidence of actual vindictiveness in the record. A sentencing authority "is to be accorded very wide discretion in determining an appropriate sentence" and should be allowed to consider "any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *Wasman v. United States*, 468 U.S. 559, 563, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984). Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Anglemyer, supra*. The second judge based the sentence on permissible considerations and apparently viewed the situation differently from the original sentencing judge. We conclude that Bruna has failed to prove actual vindictiveness by the judge in the resentencing of Bruna.

CONCLUSION

For the foregoing reasons, we conclude that the presumption of vindictiveness in sentencing set forth in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds, Alabama v. Smith, supra*, does not apply when the second sentencing judge is someone other than the initial sentencing judge and that Bruna failed to prove actual vindictiveness. We therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ADOLFO MONTANEZ HOLGUIN, APPELLANT.

708 N.W.2d 295

Filed January 17, 2006. No. A-05-091.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on

the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.

2. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause.
3. ____: ____: ____. The magistrate who is evaluating a probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
4. **Probable Cause.** Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found.
5. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
6. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
7. **Search Warrants: Police Officers and Sheriffs.** Observations by a fellow officer engaged in a common investigation are a reliable basis for a search warrant.
8. **Search Warrants: Affidavits: Hearsay.** An affidavit for a search warrant may be based on hearsay information and need not reflect the direct observations of the affiant so long as the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions.
9. **Search Warrants: Affidavits: Police Officers and Sheriffs: Proof.** Although, in general, no special showing of reliability is necessary where an affidavit for a search warrant indicates the source of information to be a law enforcement officer, there must be some basis revealed in the affidavit beyond the fact that one officer informed another, who then made the affidavit.
10. **Search Warrants: Affidavits: Hearsay.** An affidavit for a search warrant should include the veracity and basis of knowledge of persons supplying hearsay information.
11. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
12. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** Where the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to deference, but, rather, must be reviewed de novo.

13. **Search Warrants: Affidavits: Judges: Motions to Suppress.** Evidence obtained pursuant to an invalid search warrant should be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid.
14. **Search Warrants: Affidavits: Probable Cause.** In determining whether a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court looks to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, to determine whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.
15. **Search and Seizure: Motions to Suppress: Records: Appeal and Error.** In assessing the totality of the circumstances for the purpose of the exclusionary rule's good faith exception, set out in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the appellate court may look to the record of the suppression hearing.
16. **Search Warrants: Affidavits: Words and Phrases.** A "bare bones" affidavit for a search warrant is one which relies on uncorroborated tips or mere suspicion.
17. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for a new trial.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Matthew M. Enenbach for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

INTRODUCTION

Adolfo Montanez Holguin (Montanez) appeals his conviction in the Scotts Bluff County District Court for aiding and abetting in the manufacture of a controlled substance other than

marijuana, premising one of his assignments of error on the trial court's denial of his motion to suppress. We find that the search warrant relied on in this case was invalid and that a good faith exception to the exclusionary rule does not apply. Thus, the evidence seized from Montanez' motel room pursuant to that warrant should not have been received in evidence. Therefore, we reverse the conviction and remand the cause for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2004, Montanez was charged by information in the Scotts Bluff County District Court with the manufacture or distribution of a controlled substance (cocaine), or possession for such purpose, pursuant to Neb. Rev. Stat. § 28-416(1)(a) (Supp. 2003), and with conspiracy to manufacture a controlled substance (cocaine), pursuant to § 28-416(1)(a) and Neb. Rev. Stat. § 28-202(1)(a) (Reissue 1995). The dates in the information were amended, and such amended information was filed on October 26. The charges against Montanez were based on evidence seized, pursuant to a search warrant, during a June 18 search of a Scottsbluff, Nebraska, motel room (room No. 11), registered to Montanez. The evidence obtained in the search included a beer bottle containing eight clear plastic sandwich baggies with corners cut off, a black leather wallet with identification cards, $560 in cash, a digital scale, a small piece of tinfoil with a white powdery substance, a soft drink can with suspected marijuana residue, two 200-count boxes of 6¾- by 8-inch sandwich baggies, a corner of a clear plastic sandwich baggie with suspected cocaine residue, a gum wrapper with suspected cocaine residue, a pair of small blue scissors, a yellow-handled razor knife, and a motel receipt for room No. 11 in Montanez' name.

The affidavit in support of the warrant to search room No. 11 was signed by Scotts Bluff County Deputy Sheriff Trent Zwickl. Zwickl's affidavit stated that on June 17, 2004, while performing road patrol, he identified a red 1993 Mazda that he believed had expired in-transit stickers. Zwickl executed a traffic stop and made contact with the driver. Deputy Bob DeLara, a Spanish-speaking officer, was called to the scene because the driver appeared not to speak English. The driver was asked to

exit the vehicle based on a strong odor of alcohol and suspicious activity. Zwickl worked his drug detection dog around the vehicle, and the dog alerted on the vehicle. Upon searching the vehicle, an officer "found nine individually packaged small plastic baggies of a white substance possibly cocaine, inside a larger clear plastic baggy, between the [console] and the front passenger seat." Chemical field tests performed at the scene indicated a positive result for cocaine. A drug investigator, Det. Kent Ewing, was called to the scene. The driver identified himself as Julio Mendoza. After Mendoza was placed under arrest, officers placed him in one patrol car and then transferred him to another patrol car. After transferring Mendoza to the other patrol car, a search was conducted of the first patrol car and the officers recovered two corner pieces of plastic baggies with small amounts of residue of a white powdery substance.

The affidavit stated that during an interview with Mendoza, a key to room No. 11 was found on Mendoza's person. Permission to search the motel room was requested of Mendoza, but he refused, stating that the room belonged to someone else.

Zwickl stated in the affidavit that he, Ewing, and DeLara went to the motel, where Ewing was informed by an employee of the motel that the registered occupant of room No. 11 was "Alfredo [sic] Montanez." Zwickl stated that he was "aware that . . . Ewing as a member of [a] Drug Task Force ha[d] intelligence regarding . . . Montanez traveling back and forth between Greeley, Colorado and Scottsbluff . . . while transporting Cocaine." Zwickl's affidavit then concluded that there was probable cause to believe that "cocaine, paraphernalia associated with the use of cocaine, paraphernalia used for the measuring of cocaine, [and] paraphernalia for packaging and distributing cocaine, including but not limited to scales, baggies, baggie ties, mirrors, razor blades, needles, tubes and [vials]," were being kept in room No. 11.

On September 14, 2004, Montanez filed a motion to suppress the evidence seized in the search of room No. 11. Following an October 2004 hearing on the motion, the trial court overruled it, finding that "there was probable cause from the affidavit" to issue the warrant.

At trial, Montanez renewed his motion to suppress and made the necessary objections to preserve the matter of the legality of the search of room No. 11 for appellate review. At the conclusion of the jury trial, Montanez was found guilty of aiding and abetting the manufacture of cocaine and not guilty of conspiracy to manufacture cocaine. Montanez was sentenced to 2 to 4 years' imprisonment, with credit for 223 days served. Montanez appeals the conviction and sentence.

ASSIGNMENTS OF ERROR

Montanez asserts that the trial court erred in (1) overruling his motion to suppress evidence seized at the motel pursuant to a search warrant and (2) imposing an excessive sentence.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005).

ANALYSIS

Did Affidavit Make Showing of Probable Cause?

Montanez contends that the trial court erred in overruling his motion to suppress because the affidavit was not sufficient to establish probable cause for the search warrant and because the statement in the affidavit regarding Montanez' transportation of cocaine between Greeley and Scottsbluff tainted the affidavit, as there was no corroborating information supporting such statement.

[2-4] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Hernandez*, 268 Neb. 934, 689 N.W.2d 579 (2004). The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.*

Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found. *State v. Shock*, 11 Neb. App. 451, 653 N.W.2d 16 (2002).

[5,6] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Hernandez, supra.* The question for the appellate court is whether, under the totality of the circumstances, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. See *id.*; *State v. Shock, supra.*

The essence of the affidavit before us is that after Zwickl stopped a red Mazda, driven by Mendoza, with suspected expired in-transit stickers, another officer found nine individually packaged small plastic baggies of what field tests showed to be cocaine inside a larger, clear plastic baggie within that vehicle. Officers also uncovered two corner pieces of plastic baggies with small amounts of residue of a white powdery substance. Mendoza had a motel room key in his pocket upon his arrest, and the motel room was registered to Montanez. And, Ewing, a member of a drug task force, had "intelligence" regarding Montanez' "traveling back and forth between Greeley . . . and Scottsbluff . . . while transporting Cocaine."

At the October 2004 suppression hearing, the trial court said:

> In overruling [Montanez'] Motion to Suppress, also, the Court finds there was probable cause from the affidavit to authorize Judge Lippstreu to issue a warrant to search Room 11 at [the] Motel because what was in that basis for the warrant was that [the driver of the red Mazda who was identified in the affidavit as Mendoza] had just been found with a pile of cocaine and key to a motel which one could infer cocaine came from, and evidence concerning it could still be there because he was alone, no one else would know. And, since he had access to that room, access to the car, and had cocaine in his possession, it's reasonable to

> infer that there was evidence of how he got that cocaine in his car from that motel.

When one focuses on "probability," the foregoing inferences by the trial court are not practical and commonsensical inferences; nor do they reveal a substantial basis upon which the warrant was issued, unless it was by use of the claim that Montanez was known to be transporting cocaine between Greeley and Scottsbluff. Mendoza's concurrent possession of cocaine and somebody else's motel room key does not make it probable, without more information, that Mendoza's cocaine came from such motel room—bearing in mind (1) the numerous other ways that Mendoza could have come to possess the cocaine and (2) that the affidavit lacks any information that other collaborative investigation had revealed this motel room to be a cocaine trafficking location.

[7-10] Thus, Ewing's "intelligence" about Montanez, asserted by Zwickl in the affidavit, becomes crucial, and we turn to whether Zwickl's statement that Ewing had "intelligence" regarding Montanez' transporting cocaine between Greeley and Scottsbluff is entitled to any recognition in the issuing magistrate's determination that there was probable cause that evidence of cocaine possession or trafficking would be found in room No. 11. Although observations by a fellow officer engaged in a common investigation are a reliable basis for a search warrant, *State v. Bockman*, 11 Neb. App. 273, 648 N.W.2d 786 (2002), Ewing's "intelligence" regarding Montanez' transportation of cocaine was not explained in Zwickl's statement in the affidavit as being Ewing's personal knowledge from firsthand observation, from investigation, or from informants. The affidavit simply does not explain how Ewing obtained this "intelligence"—for example, from an informant who had been shown to be reliable. See *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998) (discussing how reliability of various types of informant is established), *disapproved in part on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Thus, the affidavit reveals no "underlying circumstances" supporting the assertion that Montanez was transporting cocaine between Greeley and Scottsbluff. See *State v. Huggins*, 186 Neb. 704, 706, 185 N.W.2d 849, 851 (1971) (affidavit may be based on hearsay and need not reflect direct

observations of affiant so long as magistrate is informed of some of underlying circumstances supporting affiant's conclusions). Although, in general, no special showing of reliability is necessary where the affidavit indicates the source of information to be a law enforcement officer, see *State v. Bockman, supra*, there must be some basis revealed in the affidavit beyond the fact that one officer informed another, who then made the affidavit. See *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998) (affidavit should include veracity and basis of knowledge of persons supplying hearsay information). Because Zwickl asserted what Ewing, another officer, knew, some basis for Ewing's "intelligence" about Montanez had to be in the affidavit. Without such basis, the magistrate could not properly evaluate the statement that Ewing had "intelligence" that Montanez was transporting cocaine.

[11] Also lacking in the affidavit is any information as to when Montanez was allegedly transporting cocaine between Greeley and Scottsbluff in relation to the seizure of cocaine from Mendoza's vehicle—whether it was recently or years before is unsaid. See *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). See, also, *State v. Johnson, supra* (proof of probable cause justifying issuance of search warrant generally must consist of facts so closely related to time of issuance of warrant as to justify finding of probable cause at that time), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). For these reasons, neither the issuing magistrate, the suppression hearing judge, nor this court can consider the claim that Ewing had "intelligence" that Montanez was transporting cocaine between Greeley and Scottsbluff.

[12] "[W]here the affidavit before the issuing magistrate contains information that an appellate court will not consider in a probable cause determination, the decision of the issuing magistrate is not entitled to [great] deference, but, rather, must be reviewed de novo." *State v. Lee*, 265 Neb. at 678, 658 N.W.2d at 683. The remaining pertinent information in the affidavit was that upon the traffic stop of the red Mazda driven by Mendoza, an officer found nine individually packaged small plastic baggies of what field tests showed to be cocaine inside a larger, clear plastic baggie within that vehicle. Officers also uncovered

two corner pieces of plastic baggies with small amounts of residue of a white powdery substance in the police cruiser where they first placed Mendoza while searching the Mazda. Additionally, Mendoza had a motel room key in his pocket upon his arrest, and such motel room was determined to be registered to Montanez.

In *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999), *overruled on other grounds, State v. Davidson, supra*, Michael E. Johnson argued that the affidavit upon which a search of his home was premised was insufficient for the magistrate to have found probable cause. Johnson was arrested pursuant to a warrant for failure to pay child support. Upon his arrest, the arresting officer searched him and found a "small, clear plastic vial" on his person which field tests showed to contain methamphetamine. *State v. Johnson*, 256 Neb. at 135, 589 N.W.2d at 112. A search of Johnson's vehicle produced "a plastic bag containing two small paper packets" that the officer suspected to be " 'snow seals,' " which, according to the affidavit, were containers commonly used in the sale of controlled substances. *Id.* at 136, 589 N.W.2d at 112. The arresting officer, in preparing the affidavit, requested a warrant to search Johnson's home for controlled substances, drug paraphernalia, currency, weapons, and other items "generally associated with illicit drug trafficking." *Id.* However, the quantity of the methamphetamine found was not specified within the affidavit. The affidavit stated that the arresting officer was aware from training and experience and from information received from other officers that individuals frequently keep controlled substances at their residences and that Johnson was a person known to have engaged in the use and sale of controlled substances and who had " 'previously been convicted of drug charges.' " *Id.* A warrant was issued, and Johnson's residence was searched.

Johnson filed motions to suppress the seized evidence, alleging that the warrant was not supported by probable cause; the motions were overruled, and Johnson appealed. We reversed, finding that the affidavit did not establish probable cause because it "contained generalizations about the habits of users and dealers of controlled substances but lacked 'articulable facts . . . to support a finding of probable cause that these generalizations

applied to Johnson.' " *Id.* at 138, 589 N.W.2d at 113, quoting *State v. Johnson*, 6 Neb. App. 817, 578 N.W.2d 75 (1998). The Nebraska Supreme Court affirmed our decision, analyzing the facts and merits as follows:

> [T]he general statements in the affidavit concerning Johnson's prior conviction and involvement with controlled substances do not provide the temporal nexus necessary to establish probable cause. However, that nexus is present with respect to the methamphetamine and snow seals which were found in Johnson's possession hours before the search warrant was requested. The question, then, is whether these facts establish probable cause to believe that evidence of a crime would be found at Johnson's residence.

State v. Johnson, 256 Neb. 133, 144, 589 N.W.2d 108, 116 (1999), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). The *Johnson* court continued its analysis, finding "nothing in the affidavit which would lead to a reasonable inference that Johnson was engaged in the sale of controlled substances at or near the time of his arrest." 256 Neb. at 144, 589 N.W.2d at 117. The court reasoned:

> The general statement that [the affiant arresting officer] was aware of Johnson's previous conviction of "drug charges" would not support such an inference, since there is no indication of the date of the conviction or whether it involved the sale, as opposed to possession, of controlled substances. Likewise, the fact that Johnson was in possession of an unspecified quantity of methamphetamine and three snow seals, described in the affidavit as "[items] used for the sale of controlled substances," provides no basis for inferring that Johnson was a seller of controlled substances, rather than a purchaser. Thus, even if we were to accept the State's premise that incriminating evidence is likely to be found in the homes of drug dealers, the affidavit on its face contains no facts from which it could reasonably be inferred that Johnson was a drug dealer at or near the time of his arrest. For these reasons, the district court's findings of fact upon which it denied Johnson's motions to suppress were clearly erroneous, and the Court of Appeals correctly concluded that [the officer's] affidavit

> did not establish probable cause to justify the search of Johnson's residence.

Id. at 144-45, 589 N.W.2d at 117.

Here, the only information contained in the affidavit connecting Mendoza to room No. 11 was that he had a key to it. The fact that Mendoza possessed an unspecified amount of cocaine contained in nine small baggies, as well as a motel key, does not provide a basis for inferring that Mendoza was a seller of cocaine, rather than a purchaser for personal use, or a basis for inferring that evidence of any such sales by Mendoza would probably be found in someone else's motel room. In looking within the four corners of the affidavit, one cannot infer that there was a fair probability that contraband or evidence of a crime would be found in room No. 11, remembering that according to the affidavit, the room was registered not to Mendoza, the driver of the red Mazda, but, rather, to Montanez—and any assertion of any connection between Montanez and Mendoza must be ignored, as discussed above. Moreover, there were no facts recited in the affidavit to even suggest that room No. 11 had been investigated or watched by police, let alone that such investigation or surveillance produced something suggestive of drug trafficking. Because the affidavit did not make a showing of probable cause that evidence of a crime would be found in room No. 11, the search warrant for that motel room was invalid.

Good Faith Exception to Warrant Requirement.

[13,14] However, when a search warrant is invalid, we still must consider the "good faith exception" to the exclusionary rule, which exception had its genesis in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). A concise explanation thereof, as well as the appellate court's analytical task in the case of an invalid warrant, is found in *State v. Edmonson*, 257 Neb. 468, 485-86, 598 N.W.2d 450, 463 (1999):

> [P]ursuant to *Leon*, evidence obtained pursuant to an invalid search warrant should be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly

abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient—such as in failing to particularize the place to be searched or the things to be seized—that the executing officer cannot reasonably presume it to be valid. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In determining whether a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court looks to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit, to determine whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.

[15] The record reveals that only category 3 from *State v. Edmondson, supra*, is involved in this case. Therefore, for the purpose of this issue, we look outside the affidavit to the evidence adduced at the suppression hearing to determine whether the police officers who searched room No. 11 acted in objectively reasonable good faith in relying on the warrant. And, clearly, the only place we can look to assess the "totality of the circumstances" is within the record of the suppression hearing. See *U.S. v. Leach*, 80 Fed. Appx. 444 (6th Cir. 2003) (collecting cases holding that information possessed by officers, but not included in affidavit, can be considered for application of good faith exception set forth in *United States v. Leon, supra*). Obviously, the fruits of the search cannot be used to establish good faith. In short, we examine the evidence from the suppression hearing to determine what the involved officers knew and when they knew it.

The nature and extent of the connection between Montanez, Mendoza, and room No. 11, as well as Ewing's "intelligence" about Montanez, are the key analytic elements in this case when

we examine the totality of the circumstances. Ewing's testimony reveals that he is a seasoned member of a drug task force with significant experience in investigating drug cases, although this was apparently the first affidavit for a search warrant written entirely by Zwickl.

At the suppression hearing, evidence was admitted that Mendoza was the driver of the vehicle involved in a sale of cocaine to a confidential informant in a "controlled buy" on May 29, 2004, in Gering, Nebraska. While this buy was originally going to occur at a house in Gering which officers had under surveillance for drug trafficking due to "stop and go" traffic, the sellers changed the location to a bowling alley in Gering. A Scottsbluff Police Department investigator testified that the red Mazda Mendoza was driving on June 17 was the same vehicle the sellers used in the controlled buy on May 29, and, as noted above, there was evidence that Mendoza was the driver of the vehicle involved in the sale at the bowling alley. The evidence shows that the packaging and quantities of cocaine acquired from the controlled buy on May 29 and from the seizure from Mendoza on June 17 were very similar. Thus, from the totality of the circumstances, we conclude that the officers were aware, prior to the search of room No. 11, that Mendoza was a "drug dealer." However, there was no evidence adduced at the suppression hearing that Montanez, the man to whom room No. 11 was registered, was involved in the controlled sale to the confidential informant on May 29.

Moreover, there was no evidence of any prior surveillance of room No. 11 except that when describing finding the key to that room on Mendoza's person on June 17, 2004, Zwickl testified: "I found a key to Room No. 11 [of] the . . . Motel. . . . Ewing was, also, on [the] scene, and he had further information involving Room No. 11 at [that] Motel." But, when Ewing testified at the suppression hearing, he responded as follows to the State's attorney's questions:

> Q. Who applied for the search warrant?
>
> A. . . . Zwickl applied for the warrant.
>
> Q. And, what was the location they were asked in [sic] the search?

A. Room at the . . . Motel. I believe it was No. 11.

Q. Why did they seek to search Room No. 11?

A. . . . Zwickl had information — I believe he might have found a room key to the . . . Motel that had that number on it.

Q. Did you assist in the execution of the search warrant at the . . . Motel?

A. Yes, I did.

Therefore, Zwickl's testimony that Ewing had "further information" about room No. 11 was not substantiated in any way when Ewing was given an open-ended question as to why the room was searched—Ewing said only that it was because of the key found on Mendoza. He said nothing regarding his "intelligence" about Montanez' moving cocaine between Greeley and Scottsbluff, nothing about "further information" he had on room No. 11, nothing about any connection between Montanez and the house in Gering where the above-described controlled buy was originally to occur, and nothing about a connection between Montanez and the known drug dealer Mendoza. For completeness, we note that the record reveals that the surveillance of the house in Gering revealed that a white Mercury automobile was part of the traffic observed there, but Montanez was not connected to that vehicle, in the evidence before us, until he was arrested on the morning after the search, at which time he was driving that vehicle, which was registered to him. But, significantly, this connection was made after the search and does nothing to help make a showing of "good faith" as contemplated in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

[16] In this case, the issue of the *Leon* good faith exception comes down to the statement in the affidavit that Ewing had "intelligence" that Montanez transported cocaine between Greeley and Scottsbluff and Zwickl's testimony that Ewing had "further information" about room No. 11. But, these statements are not substantiated, explained, or shown to be reliable in any respect by any evidence at the suppression hearing from Ewing or anyone else. Thus, on the record before us, Zwickl's unsubstantiated assertions about Montanez' transportation of cocaine or "further information" possessed by Ewing about room No. 11

provide no basis for any police officer with a reasonable knowledge of what the law prohibits, judged on an objective standard, to believe that reliance could be placed on the warrant. This is because the affidavit is so clearly lacking in indicia of probable cause on its face, being what has frequently been called a " 'bare bones' " affidavit in previously decided cases, see *U.S. v. Koons*, 300 F.3d 985, 991 (8th Cir. 2002) ("bare bones" affidavit is one which relies on uncorroborated tips or mere suspicion). Without the "intelligence" or "further information," Mendoza and Montanez are only tenuously connected by a motel room key and nothing else. While Ewing's "intelligence" or "further information" may have been such that he could reasonably believe that room No. 11 probably contained evidence of drug trafficking, the problem is that no basis for reliance on that belief is found anywhere in the record, and the standard is an objective one for a police officer with a reasonable knowledge of what the law prohibits, rather than a subjective one of what Ewing knew but did not disclose in the suppression hearing or in the affidavit.

The connection between Mendoza and Montanez is the solitary fact that Mendoza had a key to a motel room that was registered in Montanez' name. The fact that Mendoza, a cocaine dealer, has a key to a motel room does not make it probable that evidence of cocaine trafficking will be in that motel room, particularly when it is not registered to him, and the police, at least on the record before us, had no knowledge or even reason to believe—prior to the execution of the warrant—that Montanez or room No. 11 was involved with Mendoza's cocaine selling activities. For the *Leon* good faith exception to apply in the instant case, it must be "probable" from the totality of the circumstances that the officers objectively and reasonably believed that incriminating evidence would be found in room No. 11.

In conclusion, even when the totality of the circumstances is considered, the affidavit seeking a warrant for the search of room No. 11 was so lacking in indicia of probable cause as to render official belief in the existence of such cause entirely unreasonable. In this regard, Ewing's "intelligence" about Montanez' transportation of drugs between Greeley and Scottsbluff may well have filled the gaps, but no evidence about such transportation was introduced at the suppression hearing.

And, if Ewing had "further information" about room No. 11, as Zwickl said, that evidence might also have plugged the gaps; but likewise, no evidence was offered on that point. We cannot speculate about what the officers knew and when they knew it to fill in the gaps in the proof, and we apply an objective standard to the officers, not a subjective one. In others words, Ewing may well have had in hand plenty of evidence to link Mendoza and Montanez, to link Montanez to the transportation of cocaine from Greeley to Scottsbluff, or to link Montanez to the house in Gering, but such evidence must be in the record before we can consider it in the totality of the circumstances test under the good faith exception set out in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). In short, this case reveals a failure of proof, not "bad faith" by the officers. Therefore, the good faith exception does not apply here and the trial court erred in overruling Montanez' motion to suppress. The fruit of the illegal search—the items seized from room No. 11 pursuant to a search on June 18, 2004—should have been suppressed.

Remedy and Resolution.

[17] In deciding, based on the erroneously admitted evidence, whether to remand this cause for a new trial, we must determine whether the evidence presented by the State was sufficient to sustain the conviction. The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005). Although the evidence derived from the unlawful search of room No. 11 was erroneously admitted, we consider it in our analysis of the sufficiency of the evidence. See *id.* Considering such evidence and the other trial evidence, the evidence was clearly sufficient to sustain Montanez' conviction for aiding and abetting the manufacture of cocaine. Therefore, Montanez may be retried, but without the fruits of the unlawful search of room No. 11. We therefore reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.