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THIS BOOK CONTAINS THE OFFICIAL REPORTS OF CASES

DECIDED BETWEEN

JANUARY 12, 2001 and JUNE 21, 2001

IN THE

Supreme Court of Nebraska

VOLUME CCLXI

PEGGY POLACEK

OFFICIAL REPORTER

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BY PEGGY POLACEK, REPORTER OF THE SUPREME COURT
AND THE COURT OF APPEALS

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Orville L. Coady	Hebron
		Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Michael W. Amdor	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Jack B. Lindner	Lincoln
		Mary L. Doyle	Lincoln
		Laurie J. Yardley	Lincoln
		Jean A. Lovell	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary F. Hatfield	Central City
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

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

WORKERS' COMPENSATION COURT AND JUDGES

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

ATTORNEYS
Admitted Since the Publication of Volume 260

DeShawne Lee Bird-Sell
Ryan Nelson Boe
Mark L. Boyer
Stephanie A. White Buchanan
Charles Walter Busch
Dana E. Christian
Terri L. Crawford
Justin Craig Dawson
Jason Cosmo Demman
Ryan J. Dougherty
Denise K. Drake
Carrie S. Duff
LeAnn Larson Frobom
Theresa Gase
William D. Gilner
Daniel Bernard Giroux
Charles A. Hamilton
Ann L. Henning
Nicholas Todd Hogan
Dana L. Holmquist
Grace Ellen Honeywell
David Michael Hosmer
E. Robbin Wilson Hutton
Frederick E. Kearns
Mark P. Keating
Marne Beth Koerber
James Leland Kovarik
Robert B. Lamb
Alexander N. Lamme
Ryan J. Lewis
Paul Linde
Darin Mackender
Timothy M. Maher
Garry Joseph McCubbin
Scott E. McFarland
Claudia McKnight
Bryan C. Meismer
Kenneth J. Melilli
Susanna Mould
Michael Moyer
Jennifer A. Mullin
Joseph Mullin
Brian Robert Neary
Jayson D. Nelson
Shannon O'Connor
Daniel Arthur Peterson
Brian Self
Carol A. Sewell
Bryan Eugene Smith, Jr.
Jennifer Jae Starr
Lisa Stream
Stephen D. Stroh
Michael Suberly
Scott Ronald Swier
William Tangeman
Chad Christopher Thompson
Sara Turman-Vedral
Bryan D. Van Brunt
Bethanie Victor

EDWARD VIERK
BRENT R. WADMAN
KATHRYN E. WALKER
AMY ABBOUD WARE
TIFFANY A. WASSERBURGER
TIMOTHY M. WATTS
ROBERT M. WILLIAMS
CHARLES H. WISEMAN
LARRY N. ZIMMERMAN

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LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-99-663: **Wooldridge v. Wooldridge**. Affirmed in part, and in part reversed and remanded with directions. Hendry, C.J.

No. S-99-714: **Bauer v. Rasmussen**. Reversed and remanded for further proceedings. Hendry, C.J.

No. S-99-1022: **State v. Gutierrez**. Affirmed. Per Curiam.

No. S-99-1084: **Hageman v. BioNebraska, Inc**. Petition for further review reversed and remanded with instructions. Stephan, J.

No. S-99-1203: **Sigman v. Guyett**. Affirmed in part, and in part reversed and remanded with directions. Miller-Lerman, J.

No. S-99-1334: **Frenkel v. Lerner**. Affirmed. Miller-Lerman, J.

No. S-00-135: **J.K. v. St. Paul Fire & Marine Ins. Co**. Affirmed. Per Curiam.

No. S-00-272: **State v. Reinsch**. Appeal dismissed. McCormack, J.

No. S-00-1087: **State v. Sheppard**. Affirmed. Stephan, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-98-524: **State ex rel. NSBA v. Aupperle**. Application for reinstatement granted.

No. S-99-702: **Hofferber v. Great Plains Co-op**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-99-1112: **In re Estate of Stark**. Stipulation allowed; appeal dismissed at cost of appellant.

No. S-99-1377: **In re Application of Running Horse Enters. v. R & F Hobbies**. Stipulation allowed; appeal dismissed.

No. S-00-042: **Myers v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. S-00-084: **State ex rel. NSBA v. Giles**. Application for reinstatement denied without prejudice. See rule 16.

No. S-00-113: **State v. Pieschke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-00-742: **State v. Niemann**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-00-763: **Sacco v. Carothers**. Motion of appellee for summary affirmance sustained. See, rule 7B(2); *Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999); *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997). See, also, *Ashby v. First Data Resources*, 242 Neb. 529, 497 N.W.2d 330 (1993).

No. S-00-795: **Twin Towers Dev. v. Butternut Apartments**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. S-00-948: **Berger v. Progressive Classic Ins. Co**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-00-950: **State v. Price**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-00-1006: **State v. Nguyen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-00-1013: **Olsen v. Olsen**. Stipulation allowed; appeal dismissed.

No. S-00-1078: **State v. Recek**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-00-1161: **State ex rel. NSBA v. Jarrin**. Respondent suspended from the practice of law in the State of Nebraska until further order of this court, effective upon the entry of this order.

No. S-00-1162: **The Retech Group v. Oxford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-00-1199: **Nuss v. Alexander**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. S-00-1326: **State v. White**. Motion of appellee sustained; motion of appellant to dismiss appeal contained in appellant's filing of April 4, 2001, sustained; appeal dismissed.

No. S-01-005: **State v. Bottolfson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-01-088: **State ex rel. NSBA v. Gallner**. Cause having not been shown, respondent suspended from the practice of law in the State of Nebraska until further order of this court, effective upon the entry of this order.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

Nos. S-98-1326, S-98-1327, S-98-1328: **Folgers Architects v. Kerns**, 9 Neb. App. 406 (2000). Petition of appellant for further review sustained on January 4, 2001.

Nos. S-98-1326, S-98-1327, S-98-1328: **Folgers Architects v. Kerns**, 9 Neb. App. 406 (2000). Petition of appellee for further review sustained on January 4, 2001.

No. A-99-161: **Bruckner v. Bruckner**. Petition of appellant for further review overruled on January 4, 2001.

Nos. A-99-376 through A-99-381: **Thielen v. Kirkpatrick, Pettis**. Petition of appellant for further review overruled on June 13, 2001.

No. A-99-382: **State v. Ruisi**, 9 Neb. App. 435 (2000). Petition of appellant for further review overruled on January 31, 2001.

No. A-99-472: **Hawbaker v. Hawbaker**. Petition of appellant for further review overruled on March 21, 2001.

No. A-99-474: **McLeay v. Bergan Mercy Health Sys.** Petition of appellee for further review overruled on May 9, 2001.

No. S-99-574: **City of Lincoln v. Nebraska Liquor Control Comm.**, 9 Neb. App. 390 (2000). Petition of appellant for further review sustained on January 18, 2001.

No. S-99-586: **Eastroads v. Omaha Zoning Bd. of Appeals**, 9 Neb. App. 767 (2000). Petition of appellee for further review sustained on February 14, 2001.

No. A-99-674: **Folgers Architects v. Pavel**. Petition of appellant for further review overruled on March 21, 2001.

No. A-99-685: **Lambert v. Lambert**, 9 Neb. App. 661 (2000). Petition of appellee for further review overruled on January 4, 2001.

No. A-99-796: **Minnig v. Nelson**, 9 Neb. App. 427 (2000). Petition of appellee for further review overruled on January 18, 2001.

No. A-99-972: **Sawyer v. United of Omaha Life Ins. Co.** Petition of appellee for further review overruled on January 24, 2001.

No. A-99-1057: **State v. Hunsaker**. Petition of appellee for further review overruled on March 14, 2001.

No. A-99-1060: **State v. Shelby**. Petition of appellant for further review overruled on April 11, 2001.

No. A-99-1073: **State v. Briggs**. Petition of appellant for further review overruled on May 9, 2001.

No. A-99-1082: **Chrysler Corp. v. Lee Janssen Motor Co.**, 9 Neb. App. 721 (2000). Petition of appellant for further review overruled on January 24, 2001.

No. A-99-1086: **Trackwell v. Nebraska Dept. of Admin. Servs**. Petition of appellant for further review overruled on January 4, 2001.

No. S-99-1091: **Hess v. Heger**, 9 Neb. App. 748 (2000). Petition of appellant for further review sustained on January 24, 2001.

No. A-99-1113: **Krula v. Krula**. Petition of appellant for further review overruled on March 21, 2001.

No. A-99-1126: **Victory Lake Marine v. Velduis**, 9 Neb. App. 815 (2000). Petition of appellee for further review overruled on April 11, 2001.

No. A-99-1127: **Tyler v. Tyler**. Petition of appellant for further review overruled on January 18, 2001.

No. A-99-1132: **State v. Grant**, 9 Neb. App 919 (2001). Petition of appellant for further review overruled on April 11, 2001.

No. A-99-1171: **Krause v. Krause**, 9 Neb. App. 774 (2000). Petition of appellant for further review overruled on January 4, 2001.

No. A-99-1182: **Johnson Bros. Liq. Co. v. Nebraska Liq. Cont. Comm**. Petition of appellee for further review overruled on March 21, 2001.

No. A-99-1192: **Tidwell v. Department of Health**. Petition of appellant for further review overruled on January 24, 2001.

No. A-99-1205: **Simmons v. Hayford**. Petition of appellant for further review overruled on January 24, 2001.

No. A-99-1242: **State v. Enriquez-Beltran**, 9 Neb. App. 459 (2000). Petition of appellee for further review overruled on January 31, 2001.

No. A-99-1272: **Walker v. Walker**, 9 Neb. App. 694 (2000). Petition of appellant for further review overruled on March 14, 2001.

No. S-99-1277: **Fine v. Fine**. Petition of appellant for further review sustained on January 31, 2001.

No. A-99-1321: **Mumin v. Hopkins**. Petition of appellant for further review overruled on January 31, 2001.

No. A-99-1343: **Gerlach v. State**, 9 Neb. App. 806 (2000). Petition of appellant for further review overruled on February 22, 2001.

No. A-99-1368: **State v. Miller**. Petition of appellant for further review overruled on January 24, 2001.

No. A-99-1380: **Prokop v. Santin**. Petition of appellant for further review overruled on April 11, 2001.

No. A-99-1381: **Prokop v. Koziol**. Petition of appellant for further review overruled on April 11, 2001.

No. A-99-1459: **In re Interest of Nicholas C**. Petition of appellant for further review overruled on January 31, 2001.

No. A-99-1459: **In re Interest of Nicholas C**. Petition of appellee Kate C. for further review overruled on January 31, 2001.

No. A-99-1463: **State Farm Mut. Ins. Cos. v. Amco Ins. Co.**, 9 Neb. App. 872 (2001). Petition of appellant for further review overruled on April 11, 2001.

No. A-99-1463: **State Farm Mut. Ins. Cos. v. Amco Ins. Co.**, 9 Neb. App. 872 (2001). Petition of appellee State Farm for further review overruled on April 11, 2001.

No. A-00-004: **Byabato v. Byabato**. Petition of appellant for further review overruled on January 18, 2001.

No. A-00-026: **Blankemeyer v. Federal Land Bank of Omaha**. Petition of appellant for further review overruled on March 21, 2001.

No. A-00-043: **State v. Davis**. Petition of appellant for further review overruled on April 11, 2001.

No. A-00-083: **Payzant v. Coufal Lumber Co**. Petition of appellant for further review overruled on February 22, 2001.

No. S-00-095: **Vonderschmidt v. Sur-Gro**. Petition of appellee for further review sustained on March 21, 2001.

No. A-00-102: **State v. Bauer**. Petition of appellant for further review overruled on March 14, 2001.

No. A-00-119: **Brown v. Ryder Trans. Servs., Inc**. Petition of appellant for further review overruled on March 21, 2001.

No. A-00-163: **Duerr v. Armstrong**. Petition of appellee for further review overruled on April 11, 2001.

No. S-00-177: **State v. Baker**. Petition of appellant for further review sustained on April 11, 2001.

No. A-00-182: **Maibaum v. Maibaum**. Petition of appellee for further review overruled on May 23, 2001.

No. A-00-184: **Brouilette v. DBV Enters.**, 9 Neb. App. 757 (2000). Petition of appellant for further review overruled on January 24, 2001.

No. A-00-188: **In re Interest of Schoenrock**. Petition of appellant for further review overruled on January 18, 2001.

No. A-00-188: **In re Interest of Schoenrock**. Petition of appellee for further review overruled on January 18, 2001.

No. A-00-194: **Tempelmeyer v. Cushman, Inc**. Petition of appellant for further review overruled on February 14, 2001.

No. A-00-210: **Huber v. Aurora Co-op Elev. Co**. Petition of appellant for further review overruled on January 4, 2001.

Nos. A-00-256, A-00-257: **State v. McGinness**. Petition of appellant for further review overruled on January 31, 2001.

No. A-00-277: **In re Interest of Sabrienia B.**, 9 Neb. App. 888 (2001). Petition of appellee for further review overruled on April 18, 2001.

No. A-00-279: **State v. Smiley**. Petition of appellant for further review overruled on January 18, 2001.

No. A-00-301: **State v. Frazier**. Petition of appellant for further review overruled on June 13, 2001.

No. A-00-345: **State v. McSwine**. Petition of appellant for further review overruled on January 4, 2001.

No. A-00-380: **Dehart v. Faith**. Petition of appellant for further review overruled on March 28, 2001.

No. A-00-386: **In re Guardianship & Conservatorship of Dylan B. et al**. Petition of appellant for further review overruled on March 28, 2001.

No. A-00-413: **Killin v. Sharp Servs**. Petition of appellant for further review overruled on February 14, 2001.

No. A-00-420: **State v. Poderys**. Petition of appellant for further review overruled on January 18, 2001.

No. A-00-423: **In re Interest of Christopher B. & Brittani B**. Petition of appellant for further review overruled on May 9, 2001.

No. A-00-424: **Gonzalez v. Gonzalez**. Petition of appellant for further review overruled on May 23, 2001.

No. A-00-475: **State v. Graff**. Petition of appellee for further review overruled on May 23, 2001.

No. A-00-484: **Ortiz v. IBP, inc**. Petition of appellant for further review overruled on February 14, 2001.

No. A-00-499: **State v. Skeen**. Petition of appellant for further review overruled on January 24, 2001.

No. A-00-500: **State v. Dean**. Petition of appellant for further review overruled on January 4, 2001.

No. S-00-516: **State v. French**, 9 Neb. App. 866 (2001). Petition of appellant for further review sustained on March 21, 2001.

No. A-00-524: **Cato v. Department of Corr. Servs**. Petition of appellant for further review overruled on January 29, 2001.

No. A-00-569: **State v. Sims**. Petition of appellant for further review overruled on March 21, 2001.

No. A-00-589: **State v. Schaffer**. Petition of appellant for further review overruled on March 14, 2001.

No. S-00-592: **State v. Johnson**. Petition of appellant for further review sustained on March 14, 2001.

No. A-00-615: **In re Interest of Meyer**. Petition of appellant for further review overruled on February 14, 2001.

No. A-00-616: **Hayes v. State**. Petition of appellant for further review overruled on April 11, 2001.

No. A-00-617: **State v. Champ**. Petition of appellant for further review overruled on May 17, 2001.

No. A-00-651: **State v. Hodges**. Petition of appellant for further review overruled on February 28, 2001.

No. A-00-666: **In re Interest of Azia B.**, 10 Neb. App. 124 (2001). Petition of cross-appellant for further review overruled on June 13, 2001.

No. A-00-674: **State v. Orosco**. Petition of appellant for further review overruled on March 14, 2001.

No. A-00-683: **Haro v. Beef America**, 9 Neb. App. 957 (2001). Petition of appellant for further review overruled on April 11, 2001.

No. A-00-685: **State v. Harper**. Petition of appellant for further review overruled on March 21, 2001.

No. A-00-687: **Romero v. IBP, Inc.**, 9 Neb. App. 927 (2001). Petition of appellee for further review overruled on May 9, 2001.

No. A-00-703: **State v. Johnson**. Petition of appellant for further review overruled on January 24, 2001.

No. A-00-704: **Gomez v. Beef America**. Petition of appellant for further review overruled on April 25, 2001.

No. A-00-705: **Loeffler v. Imperial Manor Nursing Home**. Petition of appellant for further review overruled on February 22, 2001.

No. A-00-708: **State v. Hernandez**. Petition of appellant for further review overruled on January 23, 2001.

No. S-00-717: **Rodriguez v. Monfort, Inc.**, 10 Neb. App. 1 (2001). Petition of appellant for further review sustained on May 9, 2001.

No. A-00-723: **State v. Zollars**. Petition of appellant for further review overruled on January 31, 2001.

No. A-00-726: **State v. Culbreth**. Petition of appellant for further review overruled on February 14, 2001.

No. A-00-782: **Waite v. Hippe**. Petition of appellant for further review overruled on January 16, 2001.

No. S-00-798: **State v. Jones**. Petition of appellant for further review sustained on February 14, 2001.

No. A-00-825: **State v. Pickering**. Petition of appellee for further review overruled on April 25, 2001.

No. A-00-840: **State v. James**. Petition of appellant for further review overruled on April 18, 2001.

No. A-00-907: **State v. Marshall**. Petition of appellee for further review overruled on June 6, 2001.

No. A-00-926: **Tag v. Charlie**. Petition of appellant for further review overruled on February 28, 2001.

No. A-00-933: **State v. Nation**. Petition of appellant for further review overruled on February 28, 2001.

No. A-00-936: **In re Interest of Dickson**. Petition of appellant for further review overruled on May 17, 2001.

No. A-00-992: **Borowiak v. Neafus Land & Cattle Co.** Petition of appellant for further review overruled on February 14, 2001.

No. A-00-1014: **Ellinger v. Wahrman**. Petition of appellant for further review overruled on May 9, 2001.

No. A-00-1043: **State v. Abraham**. Petition of appellant for further review overruled on May 9, 2001.

No. A-00-1067: **State v. Eberly**. Petition of appellant for further review overruled on June 13, 2001.

No. A-00-1084: **State v. McDermott**. Petition of appellant for further review overruled on March 21, 2001.

No. A-00-1116: **State v. Starr**. Petition of appellant for further review overruled on May 17, 2001.

No. A-00-1120: **State v. Kyle**. Petition of appellant for further review overruled on June 13, 2001.

No. A-00-1132: **State v. Tyrrell**. Petition of appellant for further review overruled on June 6, 2001.

No. A-00-1138: **In re Interest of Thompson**. Petition of appellant for further review overruled on May 9, 2001.

No. A-00-1141: **State ex rel. Tyler on behalf of Penigar v. Superintendent Norfolk Reg. Ctr**. Petition of appellant for further review overruled on May 9, 2001.

No. A-00-1154: **Cole v. Cole**. Petition of appellant for further review overruled on January 18, 2001.

No. A-00-1167: **Nucor Cold Finish v. Egr**. Petition of appellant for further review overruled on February 14, 2001.

No. A-00-1195: **State v. Trine**. Petition of appellant for further review overruled on June 6, 2001.

No. A-00-1203: **State v. Rodriguez**. Petition of appellant for further review overruled on May 17, 2001.

No. A-00-1227: **Jordan v. Kenney**. Petition of appellant for further review overruled on February 22, 2001.

No. A-00-1249: **State v. Smith**. Petition of appellant for further review overruled on May 17, 2001.

No. A-00-1270: **State v. Moore**. Petition of appellant for further review overruled on May 23, 2001.

No. A-00-1279: **State v. Wagner**. Petition of appellant for further review overruled on March 28, 2001.

No. A-01-024: **Jones v. Kenney**. Petition of appellant for further review overruled on June 6, 2001.

No. A-01-038: **American National Bank v. Cutler**. Petition of appellant for further review overruled on April 11, 2001.

No. A-01-064: **State v. Colchin**. Petition of appellant for further review overruled on June 11, 2001.

No. A-01-181: **Alick v. Hudson**. Petition of appellant for further review overruled on May 17, 2001.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JACQUELINE CASEY, APPELLANT, AND RICHARD CASEY, APPELLEE, v. MICHAEL A. LEVINE, M.D., ET AL., APPELLEES.

621 N.W.2d 482

Filed January 12, 2001. No. S-99-079.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Malpractice: Limitations of Actions.** The general rule for the application of the statute of limitations in medical malpractice is that the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed.
4. **Health Care Providers: Negligence: Liability: Agents.** Hospitals are generally responsible for the acts of their agents via vicarious liability and respondeat superior.
5. **Health Care Providers.** The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.
6. **Malpractice: Physician and Patient.** Allowing a physician an opportunity to correct any malpractice and not disrupting the physician-patient relationship are the primary considerations underlying the continuing treatment doctrine in Nebraska.
7. **Malpractice: Limitations of Actions: Statutes.** Actions based upon professional negligence often turn upon minute and precise factual distinctions, and the purpose of Neb. Rev. Stat. § 25-222 (Reissue 1995) is to ensure that such actions would be brought shortly after the alleged negligence occurred or was discovered so that the professional could have a fair chance to defend on the merits and not find his or her defenses eroded by the lapse of time.
8. **Health Care Providers: Malpractice: Limitations of Actions.** A claim for malpractice against a hospital based upon the negligence of its nursing staff accrues when the patient is discharged from the hospital, and the continuing treatment doctrine does not toll the statute of limitations for subsequent admissions to the hospital authorized by the patient's affiliated but independent physician.
9. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden is on the plaintiff to show: (1)

the generally recognized medical standard of care, (2) a deviation from that standard by the defendant, and (3) the deviation was the proximate cause of the plaintiff's alleged injuries.

10. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony.
11. **Malpractice: Limitations of Actions: Proof.** A plaintiff seeking to extend the tolling of the 2-year statute of limitations in a medical malpractice case must prove facts which indicate that the physician continued to treat him or her after the allegedly wrongful act or omission and that the treatment was related to the alleged negligence.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, GARY B. RANDALL, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded for further proceedings.

Edward F. Fogarty, of Fogarty, Lund & Gross, and Karen L. Tibbs for appellant.

James A. Snowden and Thomas B. Wood, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellees Michael A. Levine, M.D., and Andrew Robertson, M.D.

Patrick W. Meyer, of Sodoro, Daly & Sodoro, for appellee Methodist Hospital.

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

CONNOLLY, J.

This medical malpractice appeal presents the question whether the continuing treatment doctrine that tolls the statute of limitations against a physician should be extended to the alleged negligent acts of a hospital's nursing staff. We conclude in this case that in a malpractice claim against a hospital for the negligence of its nursing staff, the doctrine does not toll the statute of limitations past the date of the patient's discharge from the hospital.

Jacqueline Casey brought this medical and hospital malpractice claim against Michael A. Levine, M.D.; Andrew Robertson, M.D.; and Methodist Hospital, claiming malpractice following

the delivery of her ninth child at the hospital on October 27, 1995.

We granted petitions for further review from Levine, Robertson, and the hospital. We affirm the Nebraska Court of Appeals' decision reversing the district court's grant of summary judgment in favor of Levine and Robertson. We reverse, however, the Court of Appeals' decision reversing the district court's grant of summary judgment in favor of the hospital.

BACKGROUND

On October 27, 1995, Casey prematurely delivered an infant at the hospital while under the medical care provided by Levine and Robertson. Casey was released from the hospital on October 28. She was readmitted to the hospital for complications allegedly related to that delivery on November 3 and remained in the hospital's intensive care unit for 18 days.

On November 7, 1997, Casey filed a petition alleging medical malpractice on the part of Levine, Robertson, and the hospital. The operative petition, a "corrected amended petition" which includes Richard Casey as a plaintiff, alleges that Levine and Robertson misdiagnosed and improperly treated her. She does not specifically allege that either Levine or Robertson treated her during her second admission to the hospital.

Casey alleges the following facts: In 1995, she sought the assistance of Levine and Robertson because of their expertise with problem pregnancies and because Levine had previously diagnosed her as having atypical postpartum eclampsia after the delivery of her eighth child. Preeclampsia is a potentially life-threatening complication in pregnant women associated with protein in the urine, hypertension, and edema in the face, hands, and feet. If left untreated, it can progress to eclampsia, which is characterized by coma and convulsive seizures in the pregnant woman. Casey's symptoms did not develop until after the delivery of her child.

On October 28, 1995, the day after her delivery, Casey reported to Robertson that she was experiencing swelling in her hands and face, headaches, and visual changes. Casey stated to Robertson that she believed she was experiencing the same postpartum symptoms that had accompanied her complications fol-

lowing the delivery of her eighth child. She alleges she asked for a diuretic, which Robertson prescribed but the nurses failed to administer, and further that the hospital staff failed to "evaluate, monitor and treat" her with ordinary and reasonable care.

Casey asked Robertson to keep her in the hospital while she was experiencing these symptoms, and Robertson said he would authorize another day. However, a hospital nurse, Eileen Eckert, informed Casey that her insurance company would not approve another day. Casey was released from the hospital on October 28, 1995.

Three nights after her release, Casey's family rushed her to the hospital's emergency room for high blood pressure and severe headaches. Casey alleges that Levine also failed to appropriately treat her condition at that time. Then, on November 3, 1995, she was admitted to the intensive care unit of the hospital, where she remained until November 20. A neurologist was not consulted until November 11, according to Casey.

Casey alleges that she developed eclampsia and suffered grand mal seizures, loss of vision, and alteration in the function of the right side of her body as a result of her untreated hypertension.

The hospital answered, generally denying the allegations. Levine and Robertson answered, generally denying the allegations and further alleging that the case was barred by the statute of limitations.

Levine and Robertson moved for summary judgment on the grounds that there was no genuine issue of material fact and that the defendants were entitled to judgment as a matter of law. The hospital filed a motion for summary judgment on the ground that Casey was unable to prove a prima facie case based on the pleadings, depositions, and other discovery to date.

During the summary judgment hearing, the court granted leave to the hospital to amend its answer to affirmatively assert the statute of limitations defense. Casey offered exhibit 6, which states that she had been seen at the hospital under the direction of Levine and Robertson at all times and that her hospitalization under their care ended November 20, 1995. A hospital record was attached in support of her statement showing Levine as the admitting physician and Robertson as an attending physician.

The district court granted summary judgment in favor of all three defendants after finding that the continuous treatment doctrine did not apply and that, therefore, Casey's petition was filed outside of the 2-year statute of limitations for medical malpractice.

The Court of Appeals on review concluded that there were genuine issues of material fact as to whether Casey's treatment by Levine, Robertson, and the hospital continued until her second discharge on November 20, 1995. The Court of Appeals therefore reversed the district court's grant of summary judgment and remanded the cause for further proceedings.

ASSIGNMENTS OF ERROR

In petitioning for further review, Levine and Robertson assign that the Court of Appeals erred in (1) failing to determine whether Casey's subsequent treatment was related to the allegedly wrongful acts or omissions of both Levine and Robertson, as required by *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994), and (2) concluding that Casey's affidavit stating that she was under the care of Levine and Robertson until November 20, 1995, and the hospital record showing Levine as the admitting physician and Robertson as the attending physician were sufficient to demonstrate that Levine and Robertson actually treated Casey at any time after November 3, 1995.

The hospital assigns that the Court of Appeals erred in applying the continuing treatment doctrine to the hospital's nursing staff when Casey alleged no specific acts of negligence on the hospital's part after Casey's initial discharge from the hospital.

STANDARD OF REVIEW

[1] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000); *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

[2] 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. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000); *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000).

ANALYSIS

Casey contends that the statute of limitations for her medical malpractice claims against Levine, Robertson, and the hospital was tolled until her second discharge from the hospital on November 20, 1995.

The hospital has elected not to come under the provisions of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1993, Cum. Supp. 1994 & Supp. 1995). The doctors alleged that Casey's petition is barred under either Neb. Rev. Stat. § 25-222 (Reissue 1995) or § 44-2828. The record does not indicate whether the doctors have elected to come under the Nebraska Hospital-Medical Liability Act. The wording, however, of §§ 25-222 and 44-2855 is essentially the same. Therefore, we analyze Casey's claims against both the doctors and the hospital under § 25-222, which provides in part:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action[.]

Consequently, Casey's petition, filed on November 7, 1997, more than 2 years after her initial discharge from the hospital on October 28, 1995, was filed out of time unless the statute of limitations was tolled.

[3] The Court of Appeals correctly noted that Nebraska has adopted the continuing treatment doctrine in medical malpractice actions. In fact, Nebraska has merged this doctrine with the occurrence rule. In *Healy v. Langdon*, 245 Neb. 1, 5, 511 N.W.2d 498, 501 (1994), we held: "In medical malpractice cases, the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed."

The Court of Appeals determined that

> on this record, it is reasonable to conclude, for statute of limitations purposes, that a genuine issue of material fact exists as to whether Casey was subjected to continuing medical treatment for her previously existing complaints by Levine, Robertson, and Methodist Hospital personnel until her discharge from Methodist Hospital on or about November 20, 1995.

Casey v. Levine, No. A-99-079, 2000 WL 558220 at *3 (Neb. App. May 2, 2000) (not designated for permanent publication).

METHODIST HOSPITAL

The hospital contends that the doctrine of continuous treatment should not be applied to it because there are no allegations of negligence on the part of the nursing staff during Casey's second hospitalization from November 3 through 20, 1995.

[4] Hospitals are generally responsible for the acts of their agents via vicarious liability and respondeat superior. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

[5] The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992).

In *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990), we held that hospital staff members lack authority to alter or depart from an attending physician's order for a hospital patient and lack authority to determine what is a proper course of medical treatment for a hospitalized patient. We have, however, held hospitals, on occasion, liable for the negligence of their nurses. See *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995) (holding as matter of law that nurses had duty to report medically significant changes in condition of patient without delay to attending physician and concluding that hospital's failure to do so created issue of fact on causation); *Miles v. Box Butte County, supra* (concluding there was issue of fact whether nurse's negligent interpretation of fetal heart monitor tracings had caused doctor's failure to consult with obstetrician for second opinion, thereby causing injury

to infant). Even so, we have never applied the continuing treatment doctrine to hospitals for the negligence of their nursing staff. When this court first adopted the continuing treatment doctrine in 1941, we stated that the purpose for the exception to the statute of limitations was to aid both patients and physicians:

> [I]t is just to the physician and surgeon that he [or she] may not be harassed by premature litigation instituted in order to save the right of the patient in the event there should be substantial malpractice. The physician and surgeon must have all reasonable time and opportunity to correct the evils which made the observation and treatment necessary and to correct the ordinary and usual mistakes incident to even skilled surgery. The [continuing treatment exception] is conducive to that mutual confidence which is highly essential in the relation between surgeon and patient. The treatment and employment should be considered as a whole, and if there occurred therein malpractice, the statute of limitations should begin to run when the treatment ceased.

Williams v. Elias, 140 Neb. 656, 662-63, 1 N.W.2d 121, 124 (1941).

[6] It is apparent that allowing a physician an opportunity to correct any malpractice and not disrupting the physician-patient relationship are the primary considerations underlying the continuing treatment doctrine in Nebraska. *Id.* See, also, *McDermott v. Torre*, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 1112, 452 N.Y.S.2d 351, 355 (1982) ("the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure [and] implicit in the policy is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so"). It is the trust relationship that may make discovery of a claim difficult. See *Miller v. United States*, 458 F. Supp. 363, 366 (D. Puerto Rico 1978) ("[t]he rationale for the [continuing treatment doctrine] is the protection of the confidential physician-patient relationship . . . as well as the fear that the treating physician, 'knowing of his actionable mistake, might be able to conceal it from his patient or continuously to lull the patient into failing to institute suit within the ordinarily permissible time period' ").

Neither policy consideration, however, is applicable to this case. In the few cases where courts have considered the application of the continuing treatment doctrine against hospitals for the negligence of their nursing staff, the statute of limitations either has not been tolled or has not been tolled past the date of the patient's discharge from the hospital. See, e.g., *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962) (tolling statute of limitations for over 1 year against hospital for negligence of its nurses and doctors where infant was never released from hospital); *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996) (tolling statute of limitations against hospital for nurses' negligence until corrective surgery was performed in case where patient was in hospital's continual confinement). See, also, *Dunagan v. Shalom Geriatric Center*, 967 S.W.2d 285 (Mo. App. 1998) (declining to apply continuing treatment doctrine to nursing home facility for injuries allegedly caused by facility's nursing staff and noting that in Missouri, doctrine is only applicable where single physician has provided continuing treatment, not where entity has provided continuing care).

Some courts, however, have applied the continuing treatment doctrine against hospitals when the alleged malpractice involved the hospital's physicians. See, e.g., *Ganapolskaya v. V.I.P. Med. Associates*, 221 A.D.2d 59, 644 N.Y.S.2d 735 (1996) (tolling statute of limitations where hospital's physician negligently performed abortion and patient was then transferred to another hospital in order to save her life); *Neureuther v. Calabrese*, 195 A.D.2d 1035, 600 N.Y.S.2d 526 (1993) (applying doctrine of continuing treatment against hospital where hospital engaged in 7 years of corrective treatments after negligent surgery which damaged patient's urinary tract).

In order to toll the statute of limitations against a hospital, however, most courts require that there be an ongoing physician-patient relationship for the continuing treatment doctrine to apply. See, e.g., *Adam v. Park Ridge Hosp.*, 261 A.D.2d 862, 690 N.Y.S.2d 381 (1999) (concluding patient's subsequent physical therapy at hospital for injuries sustained when patient fell from hospital table after colonoscopy performed by hospital physician was renewal of treatment, not continuation of treatment,

because patient failed to raise issue of fact whether there was mutual expectation of additional treatment following her discharge from hospital); *Young v. New York City Health & Hosp.*, 91 N.Y.2d 291, 296, 693 N.E.2d 196, 199, 670 N.Y.S.2d 169, 172 (1998) (explaining that generally, "continuous treatment" requirement could not be extended past patient's last visit connected with his or her condition unless further care or monitoring is explicitly anticipated by both physician and patient); *Wheeler v. Schmid Laboratories, Inc.*, 451 N.W.2d 133, 138 (N.D. 1990) (declining to adopt the continuing treatment doctrine where, after surgery, physician had only written prescription for patient and had not examined her because "[t]he continuing treatment concept is premised upon an ongoing and continuous relationship between patient and physician").

Moreover, courts also require that the physician be a hospital employee before tolling the statute of limitations under the continuing treatment doctrine. See, e.g., *Meier v. Huntington Hosp. Ass'n*, 186 A.D.2d 637, 588 N.Y.S.2d 421 (1992) (concluding that plaintiff's subsequent admission to hospital at direction of her attending physician did not toll statute of limitations against hospital for negligent diagnostic services; readmission was renewal rather than continuation of hospital-patient relationship). But see, *Wehrman v. U.S.*, 830 F.2d 1480 (8th Cir. 1987) (applying doctrine against Veterans' Administration hospital where patient had been treated by several doctors from facility for same condition and had repeatedly been advised to forgo surgery); *Henderson v. Marx*, 251 A.D.2d 988, 674 N.Y.S.2d 247 (1998) (concluding continuing treatment doctrine could be asserted against hospital for negligence of independent doctor where plaintiff sought out care of hospital and not doctor).

Statutes of limitations exist for a reason—to afford security against stale claims. The mischief which a statute of limitations is intended to remedy is general inconvenience resulting from a delay in the assertion of a legal right which it is practicable to assert. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996).

[7] In addition, we have stated that

> "[a]ctions based upon professional negligence often turn upon minute and precise factual distinctions," and the pur-

> pose of § 25-222 was to ensure that such actions "would be brought shortly after the alleged negligence occurred or was discovered so that the professional could have a fair chance to defend on the merits and not find his [or her] defenses eroded by the lapse of time."

Alegent Health Bergan Mercy Med. Ctr. v. Haworth, 260 Neb. 63, 72, 615 N.W.2d 460, 467 (2000). This policy consideration becomes more acute when the defendant in a medical malpractice case is a hospital.

Tolling the statute of limitations until the end of a patient's continued care presents no hardship to an individual physician's overseeing the patient's treatment because the physician has firsthand knowledge of the relevant facts during the entire period. Under agency principles, when the physician is an employee of the hospital and the patient remains under that physician's continual care past his or her discharge, that knowledge may be imputed to the hospital in some circumstances.

Patients do not, however, remain under the continued care or observation of the hospital's nursing staff after discharge. There may be a significant gap between hospital stays; different nurses may be on staff when the patient is readmitted; or, as in this case, the patient may be readmitted to a completely different department of the hospital.

[8] We hold that a claim for malpractice against a hospital based upon the negligence of its nursing staff accrues when the patient is discharged from the hospital and that the continuing treatment doctrine does not toll the statute of limitations for subsequent admissions to the hospital authorized by the patient's affiliated but independent physician. Because Casey's cause of action accrued on October 28, 1995, her date of discharge, her petition filed on November 7, 1997, was barred by the statute of limitations.

LEVINE AND ROBERTSON

In their petition for further review, Levine and Robertson contend that the Court of Appeals erred by failing to determine whether Casey's subsequent treatment from November 3 through 20, 1995, was related to the allegedly wrongful acts or omissions of both Levine and Robertson during Casey's initial

stay in the hospital on October 27 and 28. They also argue that the Court of Appeals erred in finding Casey's evidence was sufficient to demonstrate that either doctor had actually treated Casey at any time after November 3.

[9] In a malpractice action involving professional negligence, the burden is on the plaintiff to show: (1) the generally recognized medical standard of care, (2) a deviation from that standard by the defendant, and (3) the deviation was the proximate cause of the plaintiff's alleged injuries. *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000).

Levine's affidavit stated that he, Robertson, and the hospital's staff had been "at all times in compliance with the generally recognized standards of care applicable in Omaha, Nebraska, or similar communities for medical practitioners, hospitals and other health care providers in the field of obstetrics who attended patients under the [same or similar] circumstances." This evidence was sufficient to establish a prima facie showing that Levine and Robertson met the applicable standard of care. See *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). The burden then shifted to Casey to introduce competent evidence to rebut the defendants' evidence and show that there was a genuine issue of fact. See *id.*

[10] Ordinarily, in a medical malpractice case, the plaintiff must prove the physician's negligence by expert testimony. See *Fossett v. Board of Regents*, 258 Neb. 703, 707, 605 N.W.2d 465, 468 (2000), quoting *Halligan v. Cotton*, 193 Neb. 331, 227 N.W.2d 10 (1975) (" 'whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony' ").

Dr. John Dale Dunn, Casey's medical expert, submitted affidavits establishing the generally recognized standard of care for doctors under these conditions. He concluded that Levine and Robertson had failed to meet those standards. After reviewing the hospital records, Dunn's opinion was that Robertson had fallen below this standard by failing to arrange for further monitoring of Casey and in discharging her from the hospital. He also opined that Levine had fallen below this standard because he was aware of Casey's history yet failed to inform the hospi-

tal nurses of her hypertension problem during her first hospitalization, failed to recognize the emergent nature of Casey's problems during her emergency room admission on November 3, 1995, failed to pursue immediate control of her hypertension, and failed to seek immediate consultation upon her readmission.

Dunn's affidavit also states that the delay caused by Levine's and Robertson's failure to anticipate and recognize Casey's uncontrolled hypertension resulted in Casey's developing "hypertensive encephalopathy, and a delay in proper consultation and management . . . resulted in permanent brain damage." Thus, for purposes of summary judgment, Dunn's affidavit is sufficient to create a genuine issue of material fact of Levine's and Robertson's negligence.

[11] Next, we consider whether Casey has raised a genuine issue of material fact regarding the tolling of the statute of limitations. In *Healy v. Langdon, supra*, we stated that the 2-year statute of limitations on medical malpractice claims begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed. Therefore, a plaintiff seeking to extend the tolling of the 2-year statute of limitations in a medical malpractice case must prove facts which indicate that the physician continued to treat him or her after the allegedly wrongful act or omission and that the treatment was related to the alleged negligence. As discussed above, Dunn's affidavit establishes as an issue of material fact that the treatment for Casey's complications from November 3 through 20, 1995, was directly related to the delay in her diagnosis after the delivery of her child.

Casey does not specifically allege that she was treated by Levine or Robertson during her second hospitalization from November 3 through 20, 1995. Casey, however, submitted a second affidavit at the summary judgment hearing, in which she stated, "I retained the services of Drs. Levine and Robertson due to previous medical problems with my prior pregnancies. At all times during my prenatal and postnatal treatment, I was seen at Methodist Hospital for examination and tests and always at the direction of Drs. Levine or Robertson . . . ." Casey goes on to state, "My hospitalization in November, 1995, at Methodist under the care of Drs. Levine and Robertson, ended November

20, 1995." The attached hospital record shows Levine as the admitting physician and Robertson as an attending physician.

Levine and Robertson correctly note that the hospital record also lists nine other treating physicians. However, the issue is whether *they* were involved in continuing treatment of Casey as a result of their alleged wrongful acts or omissions during her first hospitalization.

Viewing the evidence in the light most favorable to Casey and giving her the benefit of all reasonable inferences deducible from the evidence, we conclude that the Court of Appeals correctly determined that Casey's affidavit and the attached medical record summary were sufficient to raise a genuine issue of material fact whether the statute of limitations was tolled in her claim against Levine and Robertson until her second discharge from the hospital on November 20, 1995.

CONCLUSION

We conclude that the Court of Appeals erred in reversing the district court's grant of summary judgment in favor of the hospital because Casey's cause of action for malpractice against the hospital accrued upon her discharge on October 28, 1995.

We also conclude that the Court of Appeals correctly reversed the district court's grant of summary judgment in favor of Levine and Robertson because there were genuine issues of material fact whether the statute of limitations was tolled against Levine and Robertson until Casey's second discharge from the hospital on November 20, 1995, and remand the cause for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. LARRY G. BRACEY, APPELLANT.

621 N.W.2d 106

Filed January 12, 2001. No. S-99-1136.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.

2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ___: ___. When a county court acts upon a mandate issued by a district court sitting as an appellate court, the district court loses jurisdiction over the cause except upon a subsequent appeal.
4. **Judgments: Jurisdiction: Time: 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 allowing the appeal to be filed out of time was entered by a court lacking jurisdiction to do so and was thus void, an appellate court has the power and duty to vacate the void order and, if necessary, remand the cause with appropriate directions.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Order of District Court vacated, appeal dismissed, and cause remanded with directions.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

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

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

GERRARD, J.

FACTUAL AND PROCEDURAL BACKGROUND

Larry G. Bracey was charged in the county court with one count of child abuse and one count of third degree assault. Bracey waived his right to a jury trial. After a bench trial, the county court found Bracey guilty of third degree assault, acquitted him of child abuse, and sentenced Bracey to serve 30 days in jail. Bracey filed in the county court his notice of appeal to the district court on February 18, 1999. The county court suspended Bracey's sentence during the appeal process. On May 4, finding no error on the record, the district court affirmed the judgment and sentence of the county court. The district court's order stated that if no further appeal was filed within 30 days of the order, the clerk of the district court was to issue a mandate consistent with the order to the county court.

The record shows that, for reasons unknown, neither Bracey nor his attorney received notice of the district court's May 4, 1999, decision affirming the county court's judgment. Thirty days thereafter, no further appeal having been taken, the clerk of the district court issued a mandate to the clerk magistrate of the county court in accordance with the May 4 order. The county court then received the mandate, entered judgment thereon, and ordered Bracey to begin serving the sentence imposed.

When Bracey received the order from the county court directing him to surrender himself to serve his jail sentence and his attorney first received notice from the county court on June 22, 1999, that the district court had affirmed Bracey's conviction, Bracey immediately filed a motion in the district court to recall its mandate so that he could appeal the affirmance of his conviction. Bracey also filed a motion in county court to defer execution of the sentence while his motion to recall the district court's mandate was being considered in the district court.

Upon Bracey's motion to recall the mandate, the district court found that the county court's act of ordering Bracey to serve his sentence was not a "proceeding" sufficient to deprive the district court of jurisdiction to recall the mandate. On August 25, 1999, the district court entered an order to recall its mandate and allowed Bracey 30 days to file a notice of appeal in the district court. Bracey filed his notice of appeal in the district court on September 24 to challenge the assault conviction, and we, on our own motion, removed this matter to our docket.

ASSIGNMENTS OF ERROR

Bracey assigns that the district court incorrectly determined that the county court did not err in (1) admitting out of court declarations by the victim in violation of the Nebraska rules of evidence and (2) finding the evidence sufficient to support the conviction.

STANDARD OF REVIEW

[1] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000).

ANALYSIS

[2] 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.* The question presented in the instant case is whether the district court was divested of jurisdiction to recall the mandate it had issued to the county court after the county court took action upon the mandate by ordering Bracey to serve his sentence.

[3] It is a well-established rule that, generally, once a trial court acts upon a mandate by an appellate court, the appellate court loses jurisdiction over the cause except upon a subsequent appeal. See *State v. Belmarez*, 254 Neb. 436, 577 N.W.2d 255 (1998). The same principle applies when a district court sits as an appellate court and issues a mandate to a county court. Thus, when a county court acts upon a mandate issued by a district court sitting as an appellate court, the district court loses jurisdiction over the cause except upon a subsequent appeal. See, *id.*; *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950); *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929).

In *State Bank of Beaver Crossing v. Mackley, supra*, we addressed a situation where we had ruled on a case and issued a mandate to the district court below. We recalled the mandate in that case because it appeared, at the time, that the district court had not acted upon our mandate. *Id.* However, it was subsequently discovered that the district court had taken action upon the mandate prior to our recall of the mandate. *Id.* Therefore, we stated that at the time we recalled the mandate and for some time prior to that date,

> we had lost jurisdiction of the case because of the fact that the district court had taken action upon the mandate previously issued. . . . It is not conceivable that both [an appellate court] and the [trial] court could at the same time have jurisdiction of this cause. On the filing of the mandate in the district court, and some action being taken thereon by it, that court acquired jurisdiction, and this court lost any power thereafter to act in the case except upon a subsequent appeal.

> . . . [W]hen some action was taken by the district court upon the mandate, that court acquired exclusive jurisdiction of the cause and did not lose jurisdiction because of its vacating a previous order by it entered.

Id. at 735, 226 N.W. at 318. In *State Bank of Beaver Crossing v. Mackley, supra*, because we had no power to act upon the case after the lower court had acquired jurisdiction, we vacated all actions we had taken after the district court had acted upon our original mandate.

In the case at bar, the district court determined that even though the county court had ordered Bracey to begin serving his sentence, there had been no "proceedings" per se in the county court prior to the county court's issuing the order for Bracey to serve the sentence. Thus, the district court concluded that the action taken by the county court had not deprived it of jurisdiction to recall the mandate, and the district court did, in fact, recall its mandate. Although we can appreciate why the district court may have attempted to fashion a remedy under the circumstances, we conclude that the district court did not have jurisdiction to recall its mandate in the instant matter.

The county court clearly took action on the district court's mandate when it ordered Bracey to serve his jail sentence. Indeed, it is difficult to think of a more definitive act that a lower court could take than the act of ordering a defendant to serve a jail sentence. At the time the county court acted upon the district court's mandate, it acquired exclusive jurisdiction and divested the district court of jurisdiction over the instant case. See *id.* It is not conceivable that both the district court and the county court could at the same time have jurisdiction of this case. See *id.*

[4] Therefore, the district court did not have jurisdiction to recall its mandate from the county court as the county court acquired jurisdiction at the time it took action on the district court's mandate by ordering Bracey to serve his jail sentence. As a result, the district court's order recalling the mandate is void. We have held that 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). Likewise, we conclude that 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 allowing the appeal to be filed out of time was entered by a court lacking jurisdiction to do so and was thus void, an appellate court has the power and duty to vacate the void order and, if necessary, remand the cause with appropriate directions.

CONCLUSION

Because the district court did not have jurisdiction to recall the mandate it had issued to the county court, we vacate the district court's order recalling the mandate from the county court, dismiss the appeal, and remand the cause with directions to carry out the district court's original mandate. Bracey's remedy, if any, would be more appropriately sought in another action.

ORDER VACATED, APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

GOTTSCH FEEDING CORP., APPELLANT,
V. STATE OF NEBRASKA ET AL., APPELLEES.

621 N.W.2d 109

Filed January 12, 2001. No. S-99-1156.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. ___: ___. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.

5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
7. **Taxation: Words and Phrases.** One found to be a "successor" pursuant to Neb. Rev. Stat. § 77-2707 (Reissue 1996) would logically be considered the kind of "transferee" denominated "successor" under Neb. Rev. Stat. § 77-27,110 (Reissue 1996).
8. **Taxation: Liability.** A court's duty is to construe the successor liability statute, Neb. Rev. Stat. § 77-2707 (Reissue 1996), with a fair, unbiased, and reasonable interpretation, without favor to the taxpayer or the state, to the end that the legislative intent is effectuated and the public interests to be subserved are thereby furthered.

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

David A. Domina and James F. Cann, of Domina Law, P.C., for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Gottsch Feeding Corp. (GFC) appeals the order of the district court for Lancaster County which affirmed an order of the State Tax Commissioner (Commissioner) sustaining deficiency assessments for Nebraska use and withholding taxes issued by the State of Nebraska, Department of Revenue (Department) against GFC.

The deficiency assessment for unpaid use tax was based on the Department's determination that GFC was liable for such taxes as a "successor" to RFD-TV, Inc. (RFD), pursuant to Neb. Rev. Stat. § 77-2707 (Reissue 1996). The deficiency assessment for unpaid withholding taxes was based on the Department's determination that GFC was liable for such taxes as a "transferee" of RFD, pursuant to Neb. Rev. Stat. § 77-27,110 (Reissue 1996). The Commissioner agreed with the Department's rulings.

In affirming the order of the Commissioner on appeal, the district court found that RFD sold its stock of goods to GFC, that GFC acquired the RFD business, and that GFC did not conduct itself merely as a stockholder and concluded that GFC was the "successor" and "transferee" of RFD under §§ 77-2707 and 77-27,110.

GFC argues on appeal that because it purchased stock of RFD, it became a mere shareholder of RFD but did not become either a "successor" or a "transferee" of RFD and was, therefore, not liable for RFD's unpaid use and withholding taxes. Based on the facts of this case, we affirm the order of the district court.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This case has previously been before us. In our memorandum opinion, *Gottsch Feeding Corp. v. Department of Revenue*, 254 Neb. xvii (case No. S-97-205, Apr. 29, 1998), we dismissed the appeal for lack of jurisdiction because the summary judgment entered by the Commissioner from which the appeal was taken was entered without authority. Because the Commissioner's order was a nullity, the district court and this court lacked jurisdiction to review the Commissioner's order. *Id.*

Following our memorandum opinion and order in case No. S-97-205, an administrative hearing was held on September 17, 1998, after which hearing the Commissioner issued an order dated December 15, 1998. The Commissioner determined that GFC was liable for the deficiency assessments as a "successor" and a "transferee" of RFD within the scope of §§ 77-2707 and 77-27,110, respectively. The Commissioner further determined, however, that pursuant to § 77-2702(2), GFC's liability for RFD's unpaid use and withholding tax was limited to the purchase price GFC paid for RFD stock. The Commissioner therefore ordered that the combined tax liability of GFC be reduced to $56,611.96 plus a 10-percent penalty and interest at the statutory rate from December 29, 1989.

GFC appealed the Commissioner's order to the district court for Lancaster County pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1999) of the Administrative Procedure Act. The district court reviewed the case pursuant to its standard of review, which is de novo on the record. See § 84-917(5)(a). The district court

determined that the facts were generally not in dispute and adopted the facts as set forth in the Commissioner's December 15, 1998, order as well as determining additional facts. The facts set forth in the Commissioner's order as adopted by the district court were as follows:

> [RFD], a Nebraska corporation, with its executive offices located in Omaha, Nebraska, was incorporated on, or about January 13, 1988. RFD's primary business was the operation of a 24-hour, seven-day-a-week television network, which broadcasted to approximately 380,000 homes in the United States and Canada, via satellite. The focus of RFD's programming was information of special interest to rural area [sic], such as commodities, weather, and educational programs directed at the farming and ranching communities. The principal officers of RFD were Patrick G. Gottsch, who served as Chairmen [sic] of the Board and Chief Executive Officer; Edward L. Zachary, who served as President; and Terese Spalding (sister of Patrick Gottsch), who served as Secretary and Treasurer of the corporation.
>
> RFD's business did not prove financially viable. On July 25, 1989, Patrick Gottsch and Edward Zachary, directors of RFD, adopted a resolution authorizing the officers of the corporation to file a Petition for Relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Nebraska. Also authorized by the directors was the execution of a "Post-Petition Loan and Security Agreement" between RFD and Livestock Marketing Association of Kansas City, Missouri . . . .
>
> On or about July 27, 1989, RFD filed for reorganization under Chapter 11 of the Bankruptcy Code . . . . Also, on, or about July 27, 1989, RFD filed a motion in the Bankruptcy Court, requesting the incurrence of secured and superpriority indebtedness, pursuant to Section 346(c) of the Bankruptcy Code (11 USCS § 3624(c)) [sic], in order to continue to operate its business . . . . Included in the motion was the agreement between RFD and Livestock Marketing Association securing post-petition loans, and other financial accommodations . . . .

On August 14, 1989, a special meeting of RFD's shareholders met to, among other things, approve or disapprove an offer by Livestock Marketing Association to acquire, by warrant, an eighty percent (80%) ownership interest in RFD. This offer included [a] financial and capital contribution of $500,000.00. Prior to a vote of the RFD shareholders on the Livestock Marketing Association's proposal, Robert Gottsch, on behalf of [GFC], was allowed to present an alternative offer, whereby GFC would acquire eighty percent (80%) interest in the shares of RFD. GFC's proposal was identical in most respects to the proposal presented by the Livestock Marketing Association, except for the following changes:

1. [GFC] was to be substituted for Livestock Marketing Association;

2. [GFC] would advance $700,000.00 to RFD by November 1, 1989;

3. That in the twelve-month period following November 1, 1989, [GFC] would advance, at its discretion, up to $1,500,000.00 to RFD; and

4. [GFC] would be granted, at $0.01 per share, shares sufficient in number, as of September 8, 1989, to allow [GFC] to acquire an eighty percent (80%) interest in RFD.

It was unanimously adopted by RFD's shareholders to accept GFC's proposal . . . and an "Agreement of Understanding" was executed between RFD and GFC . . . . It was on August 14, 1989 that, "Gottsch took over total and daily management and operation of RFD[.]" . . .

[GFC] is a South Dakota corporation, domesticated in Nebraska, with business locations in Elkhorn, Nebraska and South Dakota. The corporation's principal business is the feeding of livestock and all activities associated therewith. Robert Gottsch is the President of the corporation; Robert L. Gottsch, Jr., is Vice-President; and Brett A. Gottsch is Secretary/Treasurer . . . .

On August 17, 1989, Livestock Marketing Association unconditionally transferred to GFC, in consideration of $186,673.99, all rights, title, and interest in any, and all agreements executed in favor of RFD . . . . On August 24,

1989, RFD filed a motion in Bankruptcy Court seeking approval of the assigned and modified agreement in favor of GFC . . . .

On September 6, 1989, the Bankruptcy Court entered an order approving the assigned and modified agreement in favor of GFC, and also approved RFD's incurrence of secured superpriority indebtedness. . . . Accordingly, a common stock purchase warrant was executed, on September 8, 1989, between Edward Zachary, as President of RFD, and Robert Gottsch, as President of GFC, whereupon exercise of the warrant GFC would acquire 5,661,096 shares of RFD common stock at $0.01 par value per share. This acquisition would represent eighty percent (80%) of RFD's common shares then issued and outstanding . . . .

On September 8, 1989, the RFD Shareholders met and adopted several resolutions . . . :

1. The number of shares of the corporation (RFD) to be owned by [GFC] would be in a number equal to four times the number of shares issued and outstanding as of September 8, 1989;

2. The authorized shares of RFD stock authorized to be issued would be increased from 5,00[0],000 to 7,500,000 shares;

3. The resignations of Patrick Gottsch, Edward Zachary, and Sam Curley as Chairmen [sic] of the Board and Chief Executive Officer, and President and Chief Operating Officer, and Vice President, respectively, were accepted;

4. The number of authorized directors of RFD were [sic] reduced from ten to not less than one and no more than three directors;

5. Mr. Robert Gottsch and Mr. Brett Gottsch were unanimously elected new directors of RFD; and

6. The filing of the Voluntary Chapter 11 bankruptcy action was ratified.

Later in the morning of September 8, 1989, the two newly elected directors of RFD, Robert and Brett Gottsch, met in a special meeting of the Board of Directors . . . . Robert Gottsch was elected Chairman of the board, Chief Executive officer, and President of RFD. Brett Gottsch was

elected Vice-President. Terese Spalding was elected Secretary, and David Weiler was elected Treasurer of RFD. David Weiler was also the controller of GFC . . . . On September 20, 1989, David Weiler was also elected Secretary of RFD, due to the resignation of Terese Spalding . . . .

On or about September 25, 1989, RFD filed a motion in Bankruptcy Court requesting authorization to exercise the common stock purchase warrant . . . . Included among the attached exhibits to the motion was an exercise of warrant statement prepared for the signature of Robert G. Gottsch, and dated December 29, 1989 . . . .

On November 10, 1989, to secure compliance with 47 USCS 310(d), an application was filed by RFD with the Federal Communications Commission (hereinafter "FCC") for their [sic] consent to transfer control of RFD's common carrier radio station construction permit or license to GFC . . . . It was represented to the FCC that control of RFD would be transferred to GFC by means of the exercise of the common stock purchase warrant. In describing how the control of RFD was to be transferred to GFC, the application stated:

"RFD TV, Inc. has entered into a Common Stock Purchase Warrant (copy attached) with the Transferee, [GFC]. Upon FCC approval of the transfer of the earth station license requested herein, and satisfaction of other conditions, Transferee may exercise its warrant and acquire 5,661,096 shares of common stock of RFD TV, Inc., representing 80% of the common shares then issued and outstanding. [Citation to record omitted.]"

The application for consent to transfer control was granted by the FCC on February 9, 1990, whereupon the parties had 60 days to consummate the transaction. On April 10, 1990, an extension of time was requested in order to consummate the transaction, which extension was granted by the FCC on June 28, 1990, until August 10, 1990 . . . . Mr. Griffin received no further information, nor had any knowledge that the common stock purchase warrant had been exercised by GFC . . . .

On December 27, 1989, Judge Mahoney [U.S. Bankruptcy Court for the District of Nebraska], by means of a Journal Entry, authorized GFC to exercise the common stock purchase warrant . . . . On December 29, 1989, Mr. Robert Gottsch wrote, on a GFC check, a check (#5738) in the amount of $56,611.96 to the order of RFD. The notation on the deposit slip of RFD stated "stock purchase." The check was deposited in RFD's bank account on, or about January 3, 1990 . . . . There is no direct evidence in the record that the stock certificates were actually issued by RFD to GFC, or that the warrant was transferred on the books of RFD. However, it was represented to the Bankruptcy Court in RFD's operating report that such stock transfer indeed occurred . . . .

RFD was required to submit regular reports to the bankruptcy court. One such report includes a comparative balance sheet for the months of January and February of 1990. . . . The Comparative Balance Sheet shows an entry in shareholders equity, common stock for January 1990 of $70,637. The shareholders equity, common stock entry for February 1990 is $14,025. . . . The difference between the common stock entries is $56,612. On the source and Use of Cash report, a decrease in common stock is listed for February 1990 as $56,612. . . . This may show a return of the consideration paid for the purchase of stock. However, RFD's bank records for the corresponding time period do not show a withdrawal of $56,612 to support the accounting entries showing a return of the purchase price of the common stock. . . . The bank records do show the deposit of $56,611.96 in early January, 1990. . . .

In August of 1990, [GFC] filed an Objection to Disclosure Statement with the Bankruptcy Court. In this pleading, [GFC] represents itself as, "the Super-Priority Debtor in this action and/or the majority shareholder in the corporation of RFD-TV, Inc." . . .

At some point in time after determining that RFD could no longer operate, Robert Gottsch attempted to sell some of the property of RFD in order to pay off creditors. Much

> of the property was not sellable [sic] and was given to Channel 12 in Lincoln. . . .
>
> On April 23, 1990, Robert Gottsch informed all current employees that, because RFD remained unprofitable, its last day of broadcasting would be April 27, 1990 . . . .
>
> On January 24, 1991, the Nebraska Department of Revenue issued a deficiency determination to GFC for the unpaid sales/use tax liability of RFD in the amount of $21,766.88 as a "successor-in-interest," pursuant to *Neb. Rev. Stat.* § 77-2707 (Reissue 1996). GFC timely protested this assessment on January 30, 1991. By letter dated March 14, 1991, the Department set aside the previously issued assessment. However, on March 10, 1993, the Department "after reviewing additional documentation" reissued the deficiency assessment to GFC for the unpaid use tax liabilities of RFD in the total amount of $174,195.30. Also, on March 10, 1993, the Department issued another assessment to GFC for the unpaid withholding liabilities of RFD in the amount of $9,415.30. GFC timely protested the Department's withholding assessment on June 2, 1993.

(Citations to record omitted.)

Upon review, the district court concluded that GFC was RFD's "successor" under § 77-2707 and its "transferee" under § 77-27,110 and was therefore liable for the use and withholding taxes due from RFD. The district court's conclusion was based in part on its findings that "GFC acquired the business of RFD," which we understand to mean that RFD sold out its business to GFC, that "RFD became a part of GFC and was operated by GFC," that RFD sold its "stock of goods" to GFC, that GFC ran RFD's business, and that although GFC had purchased 80 percent of RFD's common stock on December 27, 1989, "GFC clearly did not conduct itself merely as a stockholder" of RFD. The district court's specific factual findings are detailed in the "Analysis" section below. The district court affirmed the Commissioner's December 15, 1998, order. GFC appeals.

ASSIGNMENTS OF ERROR

GFC asserts that the district court erred in (1) determining that GFC was RFD's "successor" pursuant to § 77-2707; (2)

determining that GFC was RFD's "transferee" pursuant to § 77-27,110; (3) determining that RFD sold out its business and its stock of goods to GFC; and (4) determining that GFC was liable for unpaid use and withholding taxes of RFD. Neither party addresses or challenges the limits of liability under either § 77-2707 or § 77-27,110, in regard to which the Commissioner held that GFC's total liability was limited to the amount it paid to purchase RFD's stock. Accordingly, we do not address this issue.

STANDARDS OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[4,5] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.* Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

The Department assessed liability against GFC for the unpaid use taxes of RFD based on § 77-2707, which provides:

> (1) If any person liable for any sales or use tax under the provisions of the Nebraska Revenue Act of 1967 sells out his business or stock of goods or quits the business, his successor or assign shall withhold sufficient of the purchase price to cover such amount until the former owner

> produces a receipt from the Tax Commissioner showing that it has been paid or a certificate stating that no amount is due.
>
> (2) If the purchaser of a business or stock of goods fails to withhold a portion of the purchase price as required, he shall become personally liable for the payment of the amount required to be withheld by him to the extent of the purchase price, valued in money. Within sixty days after receiving a written request from the purchaser for a certificate, or within sixty days from the date the former owner's records are made available for audit, whichever period expires later, the Tax Commissioner shall either issue the certificate or mail notice to the purchaser at his address as it appears on the records of the Tax Commissioner of the amount that must be paid as a condition of issuing the certificate. Failure of the Tax Commissioner to mail the notice shall release the purchaser from any further obligation to withhold a portion of the purchase price as provided in this subsection. The time within which the obligation of the successor may be enforced shall start to run at the time the former owner sells out his business or stock of goods or at the time that the determination against the former owner becomes final, whichever event occurs later.

The Department assessed liability against GFC for the unpaid withholding taxes of RFD based on § 77-27,110(1), which provides:

> The liability, at law or in equity, of a transferee of property of a taxpayer for any income tax, addition to such tax, penalty or interest due the Tax Commissioner under the provisions of the Nebraska Revenue Act of 1967, shall be assessed, paid and collected in the same manner and subject to the same provisions and limitations as in the case of the tax to which the liability relates. Transferee shall include donee, heir, legatee, devisee, distributee, successor, and assignee.

[6,7] The liability for sales and use taxes addressed in § 77-2707 applies to "successors" or "assigns." See § 77-2707(1). We note that the broad category of "transferee" in the successor income tax statute, § 77-27,110, includes, inter

alia, "successors" and "assignees." Both § 77-2707, pertaining to sales and use tax, and § 77-27,110, pertaining to income tax, were enacted as part of the Nebraska Revenue Act of 1967. A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999). Reading §§ 77-2707 and 77-27,110 together, we conclude that one found to be a "successor" pursuant to § 77-2707 would logically be considered the kind of "transferee" denominated "successor" under § 77-27,110. Accordingly, we may look to the sales and use concepts applicable to a successor under § 77-2707 and comparable statutes elsewhere to determine liability under both §§ 77-2707 and 77-27,110.

We have not previously had occasion to construe § 77-2707. However, other state courts have interpreted similar state statutes which impose liability for sales and use tax on successors. Some states construe successor tax liability statutes broadly while others construe such statutes strictly.

Those courts which have construed successor tax liability statutes broadly do so in order to achieve the purpose of securing the collection of tax due the state by imposing liability on a successor. See *Bates v. Director of Revenue*, 691 S.W.2d 273 (Mo. 1985) (purpose of successor liability statutes is to secure collection of taxes by imposing derivative liability on purchasers of business who are generally in better financial position to collect or pay tax); *Bank of Commerce v. Woods*, 585 S.W.2d 577 (Tenn. 1979) (clear intention of successor liability statutes is to provide that tax debt follows business, its assets or any portion of them and such statutes are broadly construed in order not to jeopardize interest of public in ensuring collectability of taxes); *Tri-Financial Corp. v. Dept. of Rev.*, 6 Wash. App. 637, 495 P.2d 690 (1972) (successor provisions intended to ensure collectability of taxes remaining unpaid by taxpayer who quits, sells out, exchanges, or otherwise disposes of business or stock of goods); Annot., 65 A.L.R.3d 1181 (1975). See, also, *Revenue Cabinet v. Triple R Food A Rama*, 890 S.W.2d 638, 640 (Ky. App. 1994) (citing *Bates* and *Woods* and stating interpretation of Kentucky law is consistent with that in Missouri and Tennessee and is demanded by "public interest in collecting taxes").

Those states which have construed successor liability statutes strictly do so in order to favor the taxpayer, especially where the statutes seek to impose the tax liability of one person on another. *In re McKeever*, 169 Ariz. 312, 819 P.2d 482 (1991); *Knudsen Dairy Products Co. v. State Bd. of Equalization*, 12 Cal. App. 3d 47, 90 Cal. Rptr. 533 (1970).

[8] It has also been suggested that neither a "broad" nor "strict" approach need be adopted, but, rather, the statute should be interpreted to effectuate intent as evidenced by the language of the statute. See, e.g., *Sterling Title Co. of Taos v. Commissioner of Rev.*, 85 N.M. 279, 511 P.2d 765 (N.M. App. 1973) (Sutin, J., specially concurring). We favor the approach articulated in the concurrence in *Sterling Title Co. of Taos*, to the effect that we need not characterize the interpretation of the successor tax liability statutes as either a "strict" or a "liberal" interpretation for or against the taxpayer, but, rather, "[o]ur duty is to construe the statute with a fair, unbiased and reasonable interpretation, without favor to the taxpayer or the state, to the end that the legislative intent is effectuated and the public interests to be subserved thereby furthered." 85 N.M. at 282, 511 P.2d at 768.

GFC argues that the district court erred in finding it to be RFD's successor because RFD did not "sell out its business or stock of goods" to GFC or "quit the business." See § 77-2707(1). GFC argues that it is not RFD's successor because RFD merely sold shares of its stock to GFC and RFD continued in business after selling its stock to GFC. We do not find error by the district court which found that RFD sold out its business to GFC, that RFD sold its stock of goods to GFC, and that "GFC did not conduct itself merely as a stockholder or creditor of RFD" and concluded that GFC was RFD's "successor."

We note that the provisions of § 77-2707(1) imposing successor tax liability apply when a taxpayer "sells out his business or stock of goods or quits the business." The conditions for creating a successor under § 77-2707 are stated in the disjunctive, and it is therefore not required that a taxpayer sell out the business *and* the stock of goods *and* quit the business. Under the statute, the district court could have properly concluded on the record before it that GFC was RFD's successor based solely on a finding sup-

ported by competent evidence that RFD had sold out its business to GFC and/or sold its stock of goods and/or quit the business.

In reviewing the district court's determination that GFC was RFD's successor, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.* The district court in its order set forth its factual findings and conclusions as follows:

> From the time the bankruptcy court entered the order on September 6, 1989 approving the "Post-Petition Loan Agreement" between RFD and GFC and the secured and super-priority indebtedness, GFC assumed total control of RFD's operations. Robert Gottsch and Brett Gottsch replaced RFD's directors, and, together with other GFC personnel, replaced RFD's officers and management. GFC financed the operation and payroll obligations of RFD. GFC paid creditors of RFD, including an outstanding loan to Mid-City Bank of Omaha on October 4, 1989. RFD was advertised as an affiliate of GFC.
>
> RFD had very little in tangible assets or goods. They included, primarily, office furniture and machines, leased office space, a leased satellite dish, broadcasting and weather equipment and some movie tapes, almost all of which were encumbered in one way or another, with a nominal net value. There were very few customers purchasing advertising, although the existing affiliate stations could be considered as customers. RFD's only significant "asset" was the actual television broadcast going to the homes of its viewers, the number of which is unknown.
>
> The fact that GFC and RFD shared board members, that Robert Gottsch was president of both corporations and that Robert was actively involved in the management of RFD do not, in and of themselves, establish that RFD sold its stock of goods to GFC; however, taken as a whole, the evidence does support such a finding.

A strong indication of a sale of RFD's stock of goods to GFC is the van purchased by RFD in September 1989 to haul equipment, the title to which was later transferred to GFC. Another factor was GFC's advertising on RFD during the period of the Chapter 11 reorganization. Advertising time, which is comparable to customer lists and customer goodwill and, as such, assets of a company, was one of RFD's few viable assets. Although GFC used considerable advertising time, the record does not show that it made any payments to RFD for this service.

Another significant indication of GFC controlling RFD's assets comes from the decision to cease RFD's broadcasting. The notice to employees advising them that RFD was ceasing operations was by a letter dated April 23, 1990, on GFC letterhead, signed by Robert Gottsch, as president of GFC. At the time of the letter, Robert Gottsch had two avenues of authority available to him: the authority as the president of RFD to control all operational aspects of RFD and the authority as the president of GFC, a superpriority lien holder. There is no directive from RFD's board of directors to cease operations, and, as mentioned, the notice was from GFC. A close reading of the April 23 letter provides significant insight into Robert Gottsch's view of RFD. It was the view of a manager of the business, not a mere stockholder or lienholder.

The letter's explanation of the closing sounds like RFD's president is talking. It says that the closing is the result of obtaining no new advertising or affiliate subscriptions. Robert Gottsch does not say that the closing is because GFC has refused to loan any more money to RFD; rather, the closing is because RFD has remained unprofitable for eights [sic] months, despite GFC's efforts. During his deposition, Robert Gottsch said, "After eight months and no sales, you have to close it down." This is the decision of a manager or owner, not a superpriority lien holder.

The clearest way to establish that GFC took over RFD's stock of goods would be evidence that GFC became title holder of RFD's tangible assets. Such evidence does not exist; however, there is evidence that relates to that issue.

As previously noted, GFC acquired a security interest in certain of RFD's assets, when it was assigned the promissory note in favor of Mid-City Bank, in September of 1989. In exchange for the assignment, GFC paid Mid-City Bank $150,000. Acquiring the promissory note, at a discount, was a curious transaction by a superpriority lien holder. It appears that this was a purely voluntary act by GFC, since, under the terms of the stock purchase warrant, GFC agreed to indemnify RFD employees or shareholders for any amounts due Mid-City Bank for loans due on or before November 1, 1989, but was not required to acquire the promissory note.

Generally speaking, unless a creditor takes steps to operate or control a business, the creditor is not considered to be a successor with respect to the business. In the instant case, RFD and GFC had an interconnected and complex relationship, beyond that of creditor and debtor. The assigned promissory note from Mid-City Bank is just one example of that relationship.

It is clear that RFD became a part of GFC and was operated by GFC as a going concern. GFC became the successor of RFD. GFC clearly did not conduct itself merely as a stockholder or creditor of RFD - it acquired RFD's assets and ran the business of RFD.

In addition, the court finds that GFC acquired the business of RFD and was a successor. Although GFC denies that it actually exercised the stock purchase warrant, the evidence does not support this. According to the warrant, GFC was to pay $56,610.96, on or before November 1, 1989. As noted above, GFC issued a check in this amount, payable to RFD, on December 27, 1989. Obviously, the parties waived the time limitations of the warrant. This check was deposited on January 3, 1990 with a RFD deposit slip that contained the notation "stock purchase." Additionally, GFC later represented to the bankruptcy court that it was a majority stockholder in the August 9, 1990 objection to disclosure statement filed by RFD. The court finds GFC did purchase 80 percent of RFD's common stock on December 27, 1989.

> This conclusion is consistent with the deposition testimony of [the] attorney who represented RFD during the first seven months of 1989, who noted the importance of the 80 percent ownership in order to file consolidated tax returns. This would allow losses of RFD to be used to offset the income of GFC. Further, GFC's application to the FCC in November of 1989 stated that GFC intended to purchase 80 percent of the stock of RFD.

We have reviewed the district court's judgment for errors appearing on the record. As a result of that review, we determine that competent evidence supports the district court's factual findings and we do not substitute our findings therefor. See *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). We conclude that the district court's factual findings support its conclusion that GFC was RFD's "successor" and its "transferee." See §§ 77-2707 and 77-27,110.

Given the circumstances in this case, the district court reasonably found that RFD sold out its business and stock of goods to GFC and that GFC "did not conduct itself merely as a stockholder." With respect to the stock, GFC's purchase of RFD stock was one part of a series of steps by which GFC took over control of RFD's assets and business. Rather than purchasing outstanding stock from existing shareholders, GFC purchased stock which was newly issued in an amount equal to four times the then-existing shares in order to create and give GFC an 80-percent interest in the resulting common stock of RFD. GFC did not merely acquire RFD stock. On the contrary, there was evidence that GFC and its management became actively involved in the management and operation of RFD shortly before and subsequent to the stock purchase. There was also evidence that RFD sought and gained approval from the FCC to transfer its license to GFC and that title to a van purchased by RFD was transferred to GFC. The district court's conclusion that GFC was RFD's "successor" is supported by competent evidence.

GFC argues that its relationship to RFD was merely that of a shareholder and that a shareholder cannot become liable for the unpaid taxes of a corporation merely by purchasing stock in the corporation. We are aware that ordinarily under corporate law, stockholders are not personally liable for the debts of the corpo-

ration and that a stockholder stands to lose what he, she, or it has dedicated to the corporate enterprise and nothing more. See *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). However, the determination of successor tax liability under §§ 77-2707 and 77-27,110 is made pursuant to Nebraska tax statutes, and our analysis is guided by concepts in the area of tax law. In this regard, we note that as detailed more below, tax law makes certain distinctions in situations in which a corporation, as distinguished from an individual or other entity, owns or purchases a controlling interest in another corporation.

In connection with GFC's stock ownership of RFD, we observe that the 80-percent level of stock ownership which GFC acquired is significant in various aspects of federal corporate tax law. For example, the Internal Revenue Code allows corporations to file a consolidated tax return if a common parent corporation directly owns stock possessing at least 80 percent of the total voting power and having a value at least equal to 80 percent of the total value of the stock of the corporation. I.R.C. §§ 1501 and 1504(a)(2) (1994). The 80-percent requirement is also significant in determining whether a corporation is part of a controlled group, see I.R.C. § 1563(a) (1994), and a purchasing corporation may elect to have its purchase of another corporation's stock meeting the 80-percent requirement of § 1504(a)(2) treated as an asset acquisition rather than as a stock purchase, see I.R.C. § 338 (1994).

We do not intend to imply that federal corporate income tax law controls the interpretation of the Nebraska sales and use tax and withholding statutes. Nor do we intend to delineate a bright-line rule that a purchase of 80 percent or more of a corporation's stock invariably makes the purchaser the successor of that corporation under § 77-2707 or § 77-27,110 or that the purchase of less than 80 percent shields the purchaser from successor tax liability pursuant to § 77-2707 and thus § 77-27,110. Instead, we observe that the 80-percent feature in other areas of tax law indicates a legislative determination in those areas that acquisition of 80 percent or more of another corporation's stock by a purchaser corporation suggests control of one corporation by another. Therefore, the fact that GFC purchased 80 percent of RFD's stock tends to support the district court's findings that

"RFD became a part of GFC," that GFC ran RFD's business, and, ultimately, that RFD "sold out its business" to GFC.

We agree with GFC that the mere purchase of stock in a corporation standing alone would not ordinarily be sufficient to impose successor tax liability under § 77-2707 and thus § 77-27,110. However, we determine that under the totality of the facts of this case, the district court's determination that GFC was a successor and transferee is supported by competent evidence and was not arbitrary, capricious, or unreasonable.

As noted above, the record in this case shows that in addition to the 80-percent ownership, RFD's board of directors was replaced by GFC personnel, that RFD's officers were replaced by GFC personnel, that GFC management operated RFD, and that RFD transferred or took steps to transfer its tangible and intangible assets to GFC. GFC's purchase of an 80-percent stock ownership when combined with other evidence that GFC took control of RFD's assets and the management and operation of RFD's business is competent evidence supporting the district court's finding that RFD sold out its business and stock of goods to GFC. The district court's conclusion that GFC was a "successor" and a "transferee" for tax liability purposes under §§ 77-2707 and 77-27,110 was not error.

CONCLUSION

We determine that the district court's findings that RFD sold out its business and stock of goods to GFC and that GFC acquired the RFD business are supported by competent evidence. The district court's conclusion that GFC was RFD's "successor" pursuant to § 77-2707 and RFD's "transferee" pursuant to § 77-27,110 and therefore liable for unpaid use tax under § 77-2707 and withholding tax under § 77-27,110 was not error. The order of the district court affirming the order of the Commissioner is, therefore, affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, v. DAVID LEE QUINTANA, APPELLANT.

621 N.W.2d 121

Filed January 12, 2001. Nos. S-99-1249, S-99-1250.

1. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
4. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
5. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
6. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
7. **Criminal Law: Constitutional Law: Trial: Witnesses: Juries.** A violation of an accused's right of confrontation occurs when a defendant in a criminal case is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby expose facts from which jurors could appropriately draw inferences relating to the reliability of the witness.
8. **Constitutional Law: Witnesses: Impeachment: Appeal and Error.** Constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless error analysis.
9. **Constitutional Law: Trial: Witnesses: Evidence: Appeal and Error.** In determining if a Confrontation Clause violation is harmless error, the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.
10. **Juror Qualifications.** The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury.

When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to the competency of the jurors.

11. ___. Where a party has not exhausted his or her peremptory challenges, it will be assumed that the party was satisfied that the jurors empaneled were fair and impartial.
12. **Jurors: Appeal and Error.** Even where a party's peremptory challenges are exhausted, the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
13. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.
14. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on evidence presented in court.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **Jury Instructions: Proximate Cause.** An instruction on proximate cause, pursuant to *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975), is appropriate where the evidence presents a jury question as to whether the death of the victim was proximately caused by an act of the defendant or the defendant's accomplice.
17. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is not prejudicial error.
18. **Homicide: Proximate Cause.** Causation, in the context of felony murder, requires that the death of the victim result from an act of the defendant or the defendant's accomplice.
19. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
20. **Jury Instructions: Appeal and Error.** It is the rule in this state that a defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error.
21. ___: ___. It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.
22. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
23. **Motions to Strike: Jury Instructions.** Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.

24. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.

Appeals from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, David Lee Quintana, was convicted and sentenced to life imprisonment for first degree murder by intentionally aiding and abetting Jaime Rodriguez (Rodriguez) to commit the crime of robbery of Roger Baumann, during which robbery the death of Baumann resulted. Quintana was also sentenced to not less than 7 nor more than 15 years' imprisonment for his conviction of aiding and abetting the use of a firearm to commit a felony. Cases Nos. S-99-1249 and S-99-1250 were consolidated for oral argument and disposition in this court. This court took this case on direct appeal due to the imposition of a life sentence.

ASSIGNMENTS OF ERROR

Quintana assigns that the trial court erred (1) in failing to dismiss the case when the evidence was insufficient to sustain a conviction as a matter of law, (2) in failing to grant a change of venue, (3) in failing to properly instruct the jury regarding the essential element of proximate cause, (4) in limiting Quintana's cross-examination of Abie Cash regarding alcohol use and/or arrest prior to trial, (5) in failing to properly instruct the jury regarding accomplice testimony, (6) in failing to grant a mistrial, (7) in permitting cumulative testimony regarding a statement by Quintana that he asked if Rodriguez had gotten Baumann's wallet, and (8) in not striking potential juror W.W. for cause.

BACKGROUND

On January 22, 1999, Quintana, along with his girl friend Wendy Grim and two other friends, Rodriguez and Tony Rodriguez (no relation), went to the Days Inn motel to visit Baumann. Tony Rodriguez testified that on the way to the motel, Quintana said that "[Baumann] had owed him some money, and he was going to get it." Quintana left a small pistol with Tony Rodriguez, and then Quintana and Grim went to Baumann's room. Tony Rodriguez and Rodriguez went to a nearby convenience store and then remained in the car. According to Grim's testimony, when Quintana and Grim entered the motel room, Baumann was there, but Quintana and Grim immediately became suspicious because there was another man talking on the telephone with his back toward them. Neither Quintana nor Grim knew the identity of this man. Quintana and Grim stayed only a few minutes and then left.

Testimony from several witnesses establishes that both Quintana and Grim believed that Baumann was a "narc" and were therefore angry and suspicious toward Baumann. Grim testified that she thought Baumann had violated his parole earlier and therefore should have been in jail. According to Cash, Quintana believed he was being set up. After Quintana and Grim left Baumann's motel room, they went to Rodriguez' house. Cash testified that Quintana called Baumann and asked him to meet at the "Chug-a-Lug" bar the following evening.

That next evening, Cash drove Quintana, Grim, Rodriguez, and Stacie Miller to the Chug-a-Lug bar. Later, they all went to Rodriguez' house, where Baumann "laid out some lines" of "meth" for Quintana, Grim, and Miller. Believing Baumann was a "narc," Quintana and Grim did not consume any methamphetamine. Shortly after 1 a.m., Quintana, Grim, and Rodriguez left to go to a party with Baumann in Baumann's pickup truck. Baumann drove, Quintana sat in the middle, Grim sat on Quintana's lap, and Rodriguez sat in the passenger seat next to the window. Grim was going to ride with Cash and Miller, but Quintana stated that he wanted her to go with him because Baumann would "think something's up." Grim testified that Quintana said to her that Baumann "was going to get fucked up." Cash testified that in talking to Quintana and Rodriguez

before they all left to go to the party, the plan was that they were going to find out what Baumann was up to, and if he was up to no good, then they stated that they were going to "fuck him up," "take him," and "roll him." Cash also testified that "rolling" meant to take his money, drugs, and whatever he had on him.

Instead of going directly to the party, Baumann, Quintana, Grim, and Rodriguez went to the residence of Larry Kinkade, Jr., who allegedly owed Quintana some money. Grim testified that when they were driving to Kinkade's place, Quintana kept asking Grim to "scoot up" and to "get up" and to "move." Grim believed it was because she was sitting on Quintana's lap. Grim was later told by Quintana and Rodriguez that Quintana was passing a gun to Rodriguez.

When they arrived at Kinkade's residence, Rodriguez got out of the truck and then Quintana also got out and walked 20 to 30 feet away from it. Rodriguez got back in the truck for a second, then walked to the back of the truck. Baumann got out and asked, "[D]id you bring the beer?" Rodriguez said "no," and Baumann then stated something to the effect of "stupid fuckers" in response. At that time, Grim heard a "pop" and then Rodriguez jumped back into the truck. Rodriguez had shot Baumann. The State and the defense agree Rodriguez was the shooter. Quintana came back and asked, "[D]id you get the wallet?" Rodriguez then got out, got Baumann's wallet, and then got back into the truck and drove Quintana and Grim to the party. Grim started having anxiety attacks, and Quintana told Grim to forget about it or something was going to happen to her. Cash testified that at the party, Quintana took Cash into a backroom and said "we killed him," but Cash did not take him seriously.

At around 6 a.m. on Sunday, the party was winding down and Grim talked to Quintana and Rodriguez about what they should do with Baumann's truck. Grim suggested dumping it in a nearby lake. They all decided to leave the party, and Quintana told Cash and Miller to follow them. Rodriguez drove Baumann's truck, along with Quintana and Grim, to the lake. The truck was dumped into the lake, and Quintana, Grim, Rodriguez, Cash, and Miller all went back to Rodriguez' residence. Quintana told Grim that he had gotten $110 out of

Baumann's wallet, although he told Cash that there "wasn't shit in the wallet."

Grim testified that while at Rodriguez' house, it began to fill with smoke because everyone was in the kitchen burning Baumann's wallet in a pot. Tony Rodriguez testified that he was suspicious that Quintana and Rodriguez were involved in Baumann's death. Tony Rodriguez asked Rodriguez to step into his room and asked Rodriguez what was going on. Rodriguez said "we done it," then Rodriguez motioned with his hand, indicating that he had pulled the trigger. On that following Wednesday, Quintana and Rodriguez went over to Miller's house to dispose of the gun and also the clothes that Quintana and Rodriguez were wearing the night of the shooting. Miller then melted the gun down with his welder and burned the clothes. Quintana and Grim were arrested on January 28, 1999, after Baumann's body was discovered on January 24. Rodriguez was also arrested. Rodriguez was tried for first degree murder before Quintana's trial, and Rodriguez was acquitted.

Before trial, Quintana made a motion for a change of venue based on the publicity of the murder trial of Rodriguez and several newspaper articles which referred to Quintana's involvement in the murder of Baumann. Quintana argued that his refusal to testify in Rodriguez' trial, the fact that Rodriguez was acquitted, and the fact that Rodriguez' defense was that Quintana committed the murder meant that the public would believe Quintana must have committed the murder. The trial court stated that it believed Quintana's showing of publicity was not sufficient and stated that a showing that the publicity tainted the entire jury pool was also needed. The trial court, therefore, denied Quintana's request for change of venue and said that it would consider the subject again during actual jury selection. During the jury selection, Quintana renewed his motion for change of venue and the trial court overruled the motion.

During jury selection, Quintana asked to excuse prospective juror W.W. for cause. Juror W.W. had stated that he "kinda halfway" felt Quintana was guilty because of what he had read and heard about the case. Juror W.W. then agreed that Quintana was really innocent until proved guilty and that he would try to put aside the things he had read and heard about Quintana. The

trial court denied Quintana's request to strike juror W.W. for cause. Quintana, therefore, had to use one of his peremptory challenges to remove juror W.W. from the jury.

At trial during the direct examination of Grim by the State, Grim testified that immediately after Rodriguez had shot Baumann, Quintana asked Rodriguez, "[D]id you get the wallet?" After a series of questions about the sequence of events, the State asked, "And is it at that point that [Quintana] made his statement? What did he say?" Quintana objected as asked and answered, the trial judge overruled the objection, and Grim repeated the statement that Quintana had asked, "Did you get the wallet?" Quintana now argues that this is cumulative evidence. The State argues that the second question was asked to clarify when Quintana asked about the wallet in the sequence of events.

During the cross-examination of Cash, Cash was asked whether he had been arrested in July for making terroristic threats, which was after the crime in the present case. The State objected as to relevance, and the trial court sustained the objection. Quintana made an offer of proof and argued that the testimony was relevant because a pending criminal charge would go to Cash's bias or motive to cooperate with the State in his testimony. The trial court asked Cash if he had had any discussions with the county attorney's office, directly or through counsel, concerning any immunity or plea agreement, and Cash responded, "Nothing." The State renewed its objection to the offer of proof, and the trial court sustained the objection.

After the State rested its case, Quintana called Kinkade to the witness stand to testify. Baumann was shot near Kinkade's residence. Quintana's attorney propounded a series of questions to Kinkade about Kinkade's relationship with Quintana and about some money that Kinkade may have owed Quintana. On cross-examination, the State questioned Kinkade about the last time Quintana was at Kinkade's residence. Kinkade stated that the last time Quintana had been at his residence was "probably the night [Quintana] got out of prison." Quintana made a motion to strike the answer, and the trial court sustained the motion and asked the jury to disregard the last portion of Kinkade's answer.

After Quintana rested his case, he made a motion for a mistrial based on Kinkade's reference to prison, arguing that it

would be very hard for the jury to disregard the reference to prison. Kinkade never met with Quintana before trial to talk about his proposed testimony despite Quintana's several attempts to do so. The State responded that the admonishment by the trial court was sufficient. The trial court stated that although it was unfortunate that the witness would not cooperate in advance, Kinkade was a defense witness, and therefore the trial court overruled the motion for a mistrial. It should be noted that during jury selection and at points throughout the trial, references were made about Quintana's being in jail and his involvement in drug abuse and other illegal activities.

At both the end of the State's case and the end of Quintana's case, Quintana made motions to dismiss. Quintana argued that the State had failed to prove a prima facie case. Quintana claimed that the State failed to prove that Quintana had any knowledge about the robbery, that all statements indicating a plan to rob Baumann were ambiguous, and that Quintana's taking of Baumann's wallet was just an afterthought. Quintana also argued that the State failed to prove a prima facie case as to the use of a firearm to commit a felony charge. The trial court overruled both motions.

Quintana requested jury instructions regarding accomplice testimony pertaining to Grim, Cash, and Miller. Quintana wanted the jury instruction to mirror NJI2d Crim. 5.6. The instruction actually given to the jury states that Grim, Cash, and Miller were "accessories after the fact" and that "[y]ou should closely examine their testimony for any possible motive they might have to testify falsely." Quintana claimed that the instruction differs from NJI2d Crim. 5.6 in that it omits the following proposed language:

> You should hesitate to convict the defendant if you decide that Wendy Grim, Abie Cash or Stacie Miller testified falsely about an important matter and that there is no other evidence to support his or her testimony.
>
> In any event, you should convict the defendant only if the evidence satisfies you beyond a reasonable doubt of his guilt.

Quintana also requested a jury instruction regarding proximate cause. Quintana believed that an instruction should state

that the killing must have occurred "in a natural and continuous sequence." The defense that Quintana had offered was that taking the wallet was an afterthought and that the actual proximate cause of Baumann's death was Baumann's own derogatory comment to Rodriguez, angering Rodriguez to shoot Baumann. Quintana offered a proposed jury instruction similar to NJI2d Crim. 4.1 with an added section entitled "Efficient Intervening Cause." This added section had language taken from the case *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975). The State objected, and the trial court sustained the objection.

The case was submitted to a jury, and it returned a verdict of guilty of aiding and abetting first degree murder and guilty of aiding and abetting the use of a firearm to commit a felony. Quintana was convicted pursuant to the jury verdict.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999).

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999); *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998); *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998).

[3] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999).

[4] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. Strohl, supra*; *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[5] Whether jury instructions given by a trial court are correct is a question of law. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000); *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

[6] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Bjorklund, supra*; *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999).

ANALYSIS

CONFRONTATION CLAUSE

We first address Quintana's contention that the trial court erred in restricting his cross-examination of Cash regarding the fact that prior to trial, Cash had been arrested for making terroristic threats but then released and, as of the date of trial, had not been prosecuted for the offense. Quintana argues that this restriction violated his rights under the Confrontation Clause of the Sixth Amendment and was prejudicial in that cross-examination on this subject would have permitted the jury to draw "an inference that Cash was aware that the prosecutor holds the keys to his future and consequently Cash was testifying in such a manner as to appease the Buffalo County Attorney's office and to continue to avoid prosecution." Brief for appellant at 32.

[7] Quintana cites *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), in support of this argument. In that case, the defendant's attorney sought to impeach a prosecution witness during cross-examination by questioning the witness about a public drunkenness charge which had been dismissed in exchange for his agreement to speak with the prosecutor concerning the murder charge against the defendant. The trial court refused to permit this cross-examination. On appeal, the Delaware Supreme Court reversed based upon its determination that the restriction of cross-examination deprived the defendant of rights secured by the Confrontation Clause. *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984). The U.S. Supreme Court agreed:

> The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer v. Texas*, 380 U.S. 400 (1965), "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S., at 315. Indeed, " '[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*' " *Id.*, at 315-316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis in original). Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis, supra,* at 316-317 (citing *Green v. McElroy*, 360 U.S. 474, 496 (1959)).

Delaware v. Van Arsdall, 475 U.S. at 678-79. The Court concluded by stating "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." 475 U.S. at 679. Relying on *Van Arsdall* and the U.S. Supreme Court's subsequent decision in *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), we have recognized that a violation of an accused's right of confrontation occurs when a defendant in a criminal case is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and thereby expose facts from which jurors could appropriately draw inferences relating to the reliability of the witness. *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998).

The circumstances of Cash's arrest for making terroristic threats and his subsequent release without being charged, all occurring shortly prior to his testimony at the trial of this case, were relevant to the issue of his credibility. As a component of his right to confront Cash by cross-examining him, Quintana was entitled to present these circumstances to the jury so that it

could decide whether Cash's testimony was biased by a personal desire to curry favor with law enforcement authorities regarding the offense for which he was arrested but not yet charged. Accordingly, we conclude that the trial court's refusal to permit cross-examination on this subject violated Quintana's rights under the Confrontation Clause and constituted error.

HARMLESS ERROR

[8,9] In *Delaware v. Van Arsdall, supra*, the Court held the "constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to . . . harmless error analysis." 475 U.S. at 684. The Court also articulated the test for harmless error to be applied in this circumstance, stating:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), citing *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), and *Schneble v. Florida*, 405 U.S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972). The Court remanded the cause to the Delaware Supreme Court for determination of whether the error was harmless.

In assessing the "damaging potential" of the erroneously excluded cross-examination in the present case, we note that the facts are in some respects distinguishable from those in *Van Arsdall*. In that case, there was an agreement between the witness and the prosecution which resulted in the dismissal of the public drunkenness charge in exchange for the witness agreeing to speak to the prosecutor about the murder. In Quintana's offer

of proof, made outside the presence of the jury, Cash testified that he had no agreement with the State regarding any charges which might arise from his arrest for making terroristic threats. In addition, the offer of proof revealed that other persons who were arrested along with Cash but had no involvement in the present case were similarly released without being charged. Thus, while a jury could have drawn an inference of bias from the circumstances surrounding Cash's arrest and release, it could likewise have reasonably concluded that these events were completely unrelated to Cash's testimony in this case.

It is against this less than compelling "damaging potential" of the excluded cross-examination testimony that the other evidence of Quintana's guilt must be considered in our harmless error analysis. As Quintana points out, Cash was the only witness who used the term "rolling" with respect to the intent of Quintana and Rodriguez toward Baumann, defining it to mean robbery. However, even if Cash's testimony were disregarded, there is compelling evidence that Baumann was shot during the commission of a robbery which was planned by Quintana and Rodriguez. The testimony of Grim establishes that Quintana was angry with Baumann and believed that Baumann was a "narc." Grim stated that Quintana had robbed Baumann previously. Grim also testified that Quintana said that Baumann "was going to get fucked up." Although Grim stated that she did not know what this meant, she did state that she "knew something was going to happen." Grim likewise stated that Quintana wanted Grim to come with Baumann and Rodriguez so Baumann would not be suspicious or "think something's up." In addition, Tony Rodriguez testified that on the way to the motel, Quintana said that "[Baumann] had owed him some money, and he was going to get it." Tony Rodriguez also testified that he was suspicious that Quintana and Rodriguez were involved in Baumann's death. Tony Rodriguez asked Rodriguez to step into his room and asked Rodriguez what was going on. Rodriguez said "we done it," and then motioned with his hand, indicating that he had pulled the trigger. Most importantly, Grim testified that Quintana passed a handgun to Rodriguez just prior to the shooting and that immediately after the shooting, Quintana asked, "[D]id you get the wallet?" Based upon all of the properly

admitted evidence, we conclude that the error in restricting Quintana's cross-examination of Cash with respect to his arrest and release was harmless beyond a reasonable doubt.

Failure of Trial Court to Dismiss Case

Quintana argues the evidence is insufficient as a matter of law to support the essential elements of the offense charged. Quintana asserts that there is no evidence in the record or reasonable inference from the evidence that establishes that he knew that Rodriguez intended to rob Baumann or that he performed some affirmative act to encourage the commission of the robbery. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999); *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998); *State v. Hill*, 254 Neb. 460, 577 N.W.2d 259 (1998).

In reviewing the record, as was done in the above Confrontation Clause-harmless error analysis, we conclude that the record as a whole and the evidence contained in it, taken in the light most favorable to the State, were sufficient to sustain Quintana's conviction.

Prospective Juror

Quintana assigns as error that he was prejudiced by the trial court's not striking potential juror W.W. for cause. Quintana argues that W.W.'s statements that he would "try" to issue an impartial verdict upon the law and evidence presented fall short of that which is statutorily required under Neb. Rev. Stat. § 29-2006 (Reissue 1995). Quintana concludes that because of the trial court's failure to strike juror W.W. for cause, he had to use one of his peremptory challenges to remove juror W.W. and was thus prejudiced.

Section 29-2006 provides, in relevant part:

> The following shall be good causes for challenge to any person called as a juror or alternate juror, on the trial of any indictment: . . . (2) that he has formed or expressed an opin-

> ion as to the guilt or innocence of the accused; PROVIDED, if a juror or alternate juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror or alternate juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, and the juror or alternate juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror or alternate juror is impartial and will render such verdict, may, in its discretion, admit such juror or alternate juror as competent to serve in such case . . . .

The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999).

[10-12] The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to the competency of the jurors. *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983); *Bufford v. State*, 148 Neb. 38, 26 N.W.2d 383 (1947). Furthermore, where a party has not exhausted his or her peremptory challenges, it must be assumed that the party was satisfied that the jurors empaneled were fair and impartial. See *State v. Rife, supra*. Even where a party's peremptory challenges are exhausted, the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges. See *Bufford v. State, supra*. See, also, *Nichols v. State*, 109 Neb. 335, 191 N.W. 333 (1922); *Kennison v. State*, 83 Neb. 391, 119 N.W. 768 (1909).

[13] Quintana does not specifically argue that he would have used his peremptory challenge on another biased juror but for being forced to use it on juror W.W. The record does not establish that Quintana even used all of his peremptory challenges. The burden is on Quintana to provide these facts and to present a record to substantiate his argument that he was prejudiced. It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997); *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997).

The record does not establish that Quintana exhausted his peremptory challenges or that a biased juror sat on the jury as a result of any error on the part of the trial court. We further note that although Quintana's appellate argument is premised entirely on § 29-2006 and that he has not presented a claim under the Due Process Clause, the U.S. Supreme Court has set forth standards with regard to the overruling of challenges for cause that are coextensive with those provided by Nebraska law. See *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (holding that if defendant elects to cure error in overruling of challenge for cause by exercising peremptory challenge, and is subsequently convicted by jury on which no biased juror sat, defendant has not been deprived of constitutional right).

Consequently, we need not determine if the trial court abused its discretion in overruling Quintana's challenge to juror W.W., as Quintana has not shown that the error he alleges was prejudicial. Quintana's assignment of error is without merit.

Failure to Grant Change of Venue

Quintana asserts as error the trial court's refusal to grant his motion for a change of venue based on the publicity of the murder trial of Rodriguez and several newspaper articles which referred to Quintana's involvement in the murder of Baumann. Quintana argues that the fact that Rodriguez was acquitted, and Rodriguez' defense was that Quintana committed the murder, meant that the public would believe Quintana must have committed the murder. Quintana further argues that "[a]ny reasonable

juror on this panel would have known that an acquittal of Quintana would have meant that no one would be prosecuted and convicted for the murder of Baumann." Brief for appellant at 38.

[14] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998); *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based on evidence presented in court. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Strohl, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999).

The record shows that several of the prospective jurors had heard something about the case from a variety of sources. The trial court asked, "So what we're asking you is not really have you heard something but is there anything that you feel or are you at a point that you can't set aside that information and start all over and base your decisions in this case upon what you hear in court." Two jurors were excused for cause by the trial court because they could not set aside information that they knew of and just base their decisions from what they heard in court. Quintana also believed juror W.W. could not set aside information that he knew about and also that he could not base his decisions solely on the evidence presented to him in court. Therefore, Quintana used one of his peremptory challenges to remove juror W.W. from the jury. There is no indication in the record that Quintana used any more of his peremptory challenges on prospective jurors, believing that they could not meet the juror standard set forth above.

The remaining jurors agreed that they could set aside any information that they knew about the case and that they would make decisions solely from what they heard in court, which facts render them as acceptable to sit on Quintana's jury. Because the jurors averred that they could act fairly and impartially, we conclude that Quintana has not shown that he could not receive a fair trial in Buffalo County. See, e.g., *State v.*

Tucker, 242 Neb. 336, 494 N.W.2d 572 (1993); *State v. Goham*, 187 Neb. 34, 187 N.W.2d 305 (1971). As such, we conclude that the trial court did not abuse its discretion in denying Quintana's motion for a change of venue.

Failure to Properly Instruct Jury Regarding Essential Element of Proximate Cause

[15] Quintana assigns as error the trial court's refusal to give Quintana's proposed instruction on proximate cause. Quintana argues in his brief that there was a question of fact as to whether the shooting was a result of the robbery attempt or some other independent reason. Whether jury instructions given by a trial court are correct is a question of law. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000); *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000); *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000); *State v. Bjorklund, 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. *State v. Garner, supra*; *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999).

Quintana relies upon the testimony of Cash and Grim, both of whom testified that Baumann had called Rodriguez and the others "stupid fuckers" immediately before the shooting. Grim testified that Rodriguez later told her that Rodriguez had thought Baumann's remark was a racial slur toward Mexicans and that Baumann was shot because Rodriguez was angered by the remark. Quintana's argument, in short, is that Baumann's comment was an "efficient intervening cause" that severed the causal connection between any plan to rob Baumann and the shooting.

Quintana's proposed instruction stated:

> **A. "Proximate Cause"**
>
> The defendant's aiding and abetting Jaime Rodriguez in perpetrating a robbery of Roger Baumann caused the death of Roger Baumann if Roger Baumann's death occurred in a natural and continuous sequence, and without the defendant's act Roger Baumann's death would not have

occurred. Proximate cause is, a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.

B. "Concurring Cause"

Where the independent acts of more than one person combine to proximately cause the same injury, each such act is a proximate cause, and each such person may be held responsible for causing the result.

NJI 2d Crim. 4.1 (with minor revision)

C. "Efficient Intervening Cause"

An efficient intervening cause is a new and independent act, itself a proximate cause of death, which breaks the causal connection between the original illegal act and the death. *State v Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

In order to find the defendant guilty of felony murder, you must find beyond a reasonable doubt that the robbery was the proximate cause of Roger Baumann's death. If you do not so find or if you find that Roger Baumann's death was caused by an efficient intervening cause, then you must find the defendant not guilty.

In *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975), upon which Quintana's proposed instruction was based, the defendant was found guilty of felony murder after allegedly killing the victim in the attempted perpetration of a robbery. The victim, an elderly woman, had resisted when the defendant and his accomplice attempted to snatch the woman's purse. *Id.* The victim fell to the ground and was kicked by her assailants, and she suffered a broken hip, either from the fall or the blows inflicted by her assailants. *Id.* The victim was hospitalized for treatment, and surgery was performed, but the victim died approximately 6 weeks after the assault, without having been released from the hospital. *Id.*

The defendant argued and also adduced medical testimony to the effect that the victim's death was not caused by the acts of her assailants, but was the result of intervening events, including a myocardial infarction and an unrelated infection. *Id.* This court concluded that the jury in that case had been properly instructed that an efficient intervening cause is a new and independent act, itself a proximate cause of the death, that broke the

causal connection between the original illegal act and the death. *Id.* See, also, *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986) (holding that heart attack caused by felonious conduct establishes necessary causal connection for felony murder); *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975) (stating identical rule in appeal from conviction of *Harris* defendant's accomplice).

We discussed *State v. Harris, supra*, in *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990). In that case, the defendant was accused of lighting a fire at an apartment building that resulted in the death of one of the building's residents. The defendant argued that the victim caused his own death by voluntarily reentering the building after he was safe and that his contributory negligence was an efficient intervening cause which broke the causal connection between the original illegal act and the death of the victim. *Id.* We concluded otherwise, holding that the victim's contributory negligence would not relieve the defendant from criminal responsibility for the homicide unless it was a supervening, and thus sole, cause of the death. *Id.*

Our holdings in *State v. Harris, supra*, and subsequent cases indicate that the instruction proffered by Quintana was a correct statement of the law. It is evident, however, that the instruction was not warranted by the evidence in the instant case. The argument made by Quintana relates not to the cause of Baumann's death, but to whether the shooting occurred during the course of a robbery.

[16] An instruction on proximate cause, pursuant to *State v. Harris, supra*, is appropriate where the evidence presents a jury question as to whether the death of the victim was proximately caused by an act of the defendant or the defendant's accomplice. In this case, there is no dispute that the proximate cause of Baumann's death was that Baumann was shot by Rodriguez. The immediate reason for Rodriguez to shoot Baumann does not affect the fact that the shooting was the cause of Baumann's death. The question for the jury was instead whether the shooting occurred during the course of a robbery.

In *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985), the defendant argued that the jury instructions as given were erroneous because they did not require there to be a causal connec-

tion between the robbery and murder for felony murder to occur. The jury had been instructed:

> "A defendant who is engaged in the perpetration of a robbery or attempted robbery who has knowledge that another has actively joined in such defendant's criminal enterprise and who continues to participate in the robbery or attempted robbery in any degree cannot escape responsibility for a homicide which occurs during the course of the robbery or attempted robbery because as a result either of fear or even of a better motive he concludes to desist from further participation or flee prior to the consummation of the robbery or attempted robbery."

Id. at 499, 364 N.W.2d at 26. The defendant argued that this instruction did not clearly require that the murder had occurred in the course of the crime. This court stated:

> Instruction No. 10 as written was sufficient to establish that the murder must flow from the course of the robbery. Any concern that it did not adequately express that the murder must occur during the res gestae of the robbery is dispelled by instruction No. 12, which provided in part:
>
> "You are instructed that in order to establish that a homicide was committed in the perpetration of or attempt to perpetrate a robbery it is not necessary for the State to prove that the homicide was committed before or during the actual perpetration of or attempted perpetration of a robbery; *a homicide is committed in the perpetration of or attempt to perpetrate a robbery if it is committed in the res gestae of the perpetration of or attempted perpetration of a robbery; that is, if the initial crime of perpetration or of attempt to perpetrate a robbery and the homicide were closely connected in point of time, place and causal relation, and were parts of one continuous transaction.*" . . .
>
> When read together, the instructions given fairly stated the elements of felony murder.

(Emphasis in original.) *Id.* at 500, 364 N.W.2d at 26-27.

[17] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is not prejudicial error. *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000); *State v. Brown*, 258 Neb. 346, 603 N.W.2d 456

(1999). The jury instructions given in this case required the jury to find, as an element of the offense, that Baumann was killed during the course of Rodriguez' robbery of or attempt to rob Baumann. Instruction No. 14 as given in pertinent part states:

> A death occurs while in the course of committing or attempting to commit a robbery if the act that killed *is closely connected in time and place with the robbery or attempted robbery* so that the act that killed and the *robbery or attempted robbery may be considered one continuous event.*
>
> *If the intent to rob is formed prior to or contemporaneously with the act that results in death, then the death occurs in the course of the commission of the robbery or attempted robbery.*
>
> If the taking of the property was an after thought then the killing is not in the commission of a robbery or an attempted robbery and you should find the defendant not guilty of aiding and abetting first degree murder.

(Emphasis supplied.)

The jury in this case was properly instructed, pursuant to *State v. Perkins, supra*, that in order for Quintana to be found guilty of felony murder, the shooting must have occurred in the course of a robbery. Quintana was free to argue to the jury that there was no plan to rob Baumann, but that the shooting was incited by Baumann's alleged racial slur. Given the evidence regarding a plan to rob Baumann, if believed, the evidence would permit the jury to find Quintana guilty of aiding and abetting felony murder, however, even if the shooting was prompted by Baumann's remark.

[18,19] Causation, in the context of felony murder, requires that the death of the victim result from an act of the defendant or the defendant's accomplice. The question of why Rodriguez shot Baumann does not address whether the shooting caused Baumann's death, and there is no dispute that it did. Because there was no dispute as to proximate cause, Quintana was not entitled to his proffered proximate cause instruction. A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record. *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Instead, the presence of a

possible alternative motive for the shooting relates to whether or not the shooting took place in the course of a robbery, and the jury was properly instructed on that issue. In reading instruction No. 14 along with the rest of the jury instructions, we determine that the instructions given are a correct statement of the law regarding felony murder and that Quintana has not met his burden of establishing reversible error.

Instruction as to Accomplice Testimony

Quintana requested an instruction based on NJI2d Crim. 5.6 regarding accomplice testimony of Grim, Cash, and Miller. The request was denied, and the jury was given instruction No. 10, which stated as follows:

> There has been some evidence offered that Wendy Grim, Stacie Miller, Abie Cash and Ed Corder were accessories after the fact to the charge for which the defendant has been charged in that these individuals may have concealed or destroyed evidence or assisted the defendant in concealing and destroying evidence of the crime. You should closely examine their testimony for any possible motive they might have to testify falsely.

NJI2d Crim. 5.6 provides:

> There has been testimony from (here insert name), a claimed accomplice of the defendant. You should closely examine (his, her) testimony for any possible motive (he, she) might have to testify falsely. [You should hesitate to convict the defendant if you decide that (here insert name) testified falsely about an important matter and that there is no other evidence to support (his, her) testimony.
>
> In any event, you should convict the defendant only if the evidence satisfies you beyond a reasonable doubt of (his, her) guilt.]

In Quintana's case, Grim and Miller were not accomplices, although they were arguably accessories after the fact in that they participated in disposing of Baumann's truck, burning Baumann's wallet, and melting down the gun Rodriguez had used to shoot Baumann. Cash, because he testified that he was aware of the plan to rob Baumann, was arguably an accomplice to the crime.

[20] It is the rule in this state that a defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction is reversible error. *Jungclaus v. State*, 170 Neb. 704, 104 N.W.2d 327 (1960). In this case, instruction No. 10 properly instructed the jury to consider the credibility and weight to be given to the testimony presented. In addition, instruction No. 12 instructed the jury that the State was required to prove each and every element of the offense charged beyond a reasonable doubt and that otherwise the jury was to find Quintana not guilty.

[21] In considering the instructions as a whole, see *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000), we conclude that the substance of Quintana's proposed instruction was presented to the jury. It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997), *disapproved on other grounds, State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

We conclude that Quintana's assignment of error that the trial court erred in failing to properly instruct the jury regarding the essential element of proximate cause and the further assignment of error that the trial court erred in failing to properly instruct the jury regarding accomplice testimony are without merit.

Failure to Grant Mistrial

Quintana next asserts error in the trial court's refusal to grant a mistrial because of remarks made by a defense witness. Kinkade remarked that he "saw [Quintana] at — probably the night he got out of prison." There was a motion to strike, which the trial court sustained as to "probably the night he got out of prison" and asked the jury to disregard it. In instruction No. 3, the jury was told that anything the trial judge told the jury to disregard was not evidence. Quintana argues that the unexpected reference to prison, while not intentional on the part of the prosecution, resulted in the jury's receiving improper and unduly prejudicial evidence which would be difficult if not impossible to erase from the jurors' minds.

[22] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999). Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993), *overruled on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

The record reveals six other references regarding Quintana's being in jail in addition to the prison comment made by Kinkade. No objection was raised to these other references to Quintana's incarceration, and some of that testimony was adduced by Quintana. We note also that references are made in the record about Quintana's previously robbing Baumann and being involved in drug abuse and other illegal activities. In light of these references to Quintana's being in jail and being involved in other illegal activities, we conclude that the prison comment did not prejudice Quintana to the point where he did not have a fair trial.

[23] Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. *State v. Lotter, supra*. We determine that the trial court did not abuse its discretion in denying Quintana's motion to grant a mistrial. The trial court's instruction to the jury to disregard the improper remark was sufficient to prevent prejudice to Quintana in the light of all the evidence.

Permitting Cumulative Testimony

[24] Quintana's final assignment of error concerns the trial court's admission of cumulative testimony. At trial during the direct examination of Grim by the State, Grim testified about the events immediately after the shooting of Baumann and stated

that after Rodriguez had shot Baumann, Quintana asked him, "[D]id you get the wallet?" Subsequently, after a series of questions about the sequence of events, the State asked, "And is it at that point that [Quintana] made his statement? What did he say?" Quintana objected as asked and answered, and the trial court overruled the objection. Even if this question was asked and answered (cumulative), erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998); *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

Quintana also argues that the cumulative admission of this testimony violated Neb. Rev. Stat. § 27-403 (Reissue 1995). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. § 27-403. In this case, the State claimed that the testimony was repeated in order to clarify the sequence of events to which the witness was testifying. Given that explanation, we cannot conclude that the probative value of the testimony was substantially outweighed by the cumulative nature of the testimony.

We conclude that the cumulative testimony presented did not violate § 27-403 and that the error in admitting this testimony, if any, was harmless beyond a reasonable doubt. Thus, Quintana's assignment of error is without merit.

CONCLUSION

For the reasons outlined in the above opinion, we conclude that Quintana's assignments of error are either without merit or constitute harmless error. For these reasons, we determine that the judgments of the trial court convicting Quintana of first degree murder and aiding and abetting the use of a firearm to commit a felony should be, and are, affirmed.

AFFIRMED.

TILT-UP CONCRETE, INC., A NEBRASKA CORPORATION, APPELLANT, V. STAR CITY/FEDERAL, INC., A SOUTH DAKOTA CORPORATION, APPELLEE.

621 N.W.2d 502

Filed January 19, 2001. No. S-99-799.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader.
2. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Pleadings: Limitations of Actions: Demurrer.** A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute.
5. **Mechanics' Liens: Debtors and Creditors.** In the absence of some provision to the contrary, the remedy upon a mechanic's lien and the remedy upon the debt are distinct and concurrent, and may be pursued at the same time or in succession.
6. **Statutes: Intent.** A statutory construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
7. **Demurrer: Pleadings: Records.** A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action.
8. **Supersedeas Bonds: Appeal and Error.** A supersedeas bond serves only to suspend further proceedings on the judgment or decree appealed from.
9. **Supersedeas Bonds: Judgments.** A supersedeas bond furnished in one cause will not operate to suspend or prevent the enforcement of a judgment or decree rendered in another and different action.
10. **Mechanics' Liens: Claims.** The object of a mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
11. **Mortgages: Property: Words and Phrases.** A mortgage is a contract by which specific real property capable of being transferred is hypothecated for the performance of an act without requiring a change in possession and includes a transfer of an interest in real property made only to secure the performance of an act.
12. **Mortgages: Liens: Words and Phrases.** A mortgage is created by the voluntary act of the parties, whereas the typical lien is created and attaches to the specific property by action of law and regardless of the consent of the parties.

13. **Demurrer: Pleadings: Judicial Notice: Records.** While a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it, in ruling on a demurrer, a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated.
14. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
15. **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 Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Edward H. Tricker, Kerry L. Kester, and Craig C. Dirrim, of Woods & Aitken, L.L.P., for appellant.

Robert T. Grimit and Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

GERRARD, J.

FACTUAL AND PROCEDURAL BACKGROUND

In April 1994, Tilt-Up Concrete, Inc. (Tilt-Up), filed a petition in the district court against Star City/Federal, Inc. (Star City), seeking foreclosure of a construction lien. The facts of the underlying dispute are set out more fully in this court's decision in that matter. See *Tilt-Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 (1998) (*Tilt-Up I*). The district court in *Tilt-Up I* determined that Tilt-Up had a valid construction lien in the amount of $852,243.70 and entered judgment accordingly. On appeal, we held that when a prime contractor has not substantially performed a contract, the contractor is entitled to a construction lien only for the reasonable value of the labor performed and the materials furnished; consequently, this court reduced the amount of Tilt-Up's lien to $235,418. *Id.*

In October 1998, Tilt-Up filed another petition in the district court, seeking a deficiency judgment and damages for breach of an oral contract. Star City demurred on the ground that the action was barred by the 4-year statute of limitations for oral contracts. See Neb. Rev. Stat. § 25-206 (Reissue 1995). The dis-

trict court sustained the demurrer, and Tilt-Up filed an amended petition. Star City again demurred, and the district court again sustained the demurrer. Tilt-Up elected to stand on its amended petition, the district court dismissed the action, and Tilt-Up appeals.

STANDARD OF REVIEW

[1] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000); *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 612 N.W.2d 213 (2000).

[2] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000); *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000).

[3] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000); *Gage Cty. Bd. v. Nebraska Tax Equal. & Rev. Comm.*, 260 Neb. 750, 619 N.W.2d 451 (2000).

ASSIGNMENTS OF ERROR

Tilt-Up assigns, as consolidated and restated, that the district court erred in determining that (1) Tilt-Up was not barred from bringing a breach of contract action by the supersedeas bond in *Tilt-Up I*, (2) Tilt-Up was not barred from bringing a breach of contract action by Neb. Rev. Stat. § 25-2140 (Reissue 1995), (3) Tilt-Up did not state a cause of action under Neb. Rev. Stat. § 52-157 (Reissue 1998), and (4) Tilt-Up's action was barred by the doctrine of election of remedies.

ANALYSIS

We initially note that Tilt-Up's appellate arguments are exclusively directed at its theory of recovery for breach of contract and do not address its claim for a deficiency judgment. The district court determined that Tilt-Up obtained only a construction lien in *Tilt-Up I* and did not obtain a judgment for the full amount of its contract damages. Tilt-Up's appellate assignments of error do not challenge this determination. Accordingly, Tilt-Up's deficiency judgment claim is not at issue. See, *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000); *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999) (error must be assigned and argued to be considered by appellate court).

Pursuant to § 25-206, Tilt-Up had 4 years from the breach of its contract with Star City to bring its action on the oral contract. Tilt-Up's amended petition alleges that its contract with Star City was breached on January 20, 1994. Tilt-Up's first petition for breach of contract was filed on October 16, 1998. Consequently, the bar of the statute of limitations is apparent on the face of the petition.

[4] A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Ohio Nat. Life Ins. Co. v. Rust*, 255 Neb. 372, 585 N.W.2d 438 (1998); *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995). Therefore, the primary question presented in this case is whether Tilt-Up's amended petition effectively alleges an excuse which tolls the operation and bar of the statute. See *id.*

The argument advanced by Tilt-Up is that the statute of limitations was equitably tolled during the pendency of its construction lien foreclosure action because Tilt-Up was barred during that time from bringing a breach of contract action. Tilt-Up advances several theories as to why it was barred from bringing a breach of contract action. Assuming arguendo that the statute of limitations would have been tolled had Tilt-Up actually been barred from bringing its breach of contract action, we proceed to consider each of Tilt-Up's theories as to why its breach of contract action may have been precluded.

EFFECT OF NEBRASKA CONSTRUCTION LIEN ACT

Tilt-Up's construction lien was brought under the Nebraska Construction Lien Act (NCLA), Neb. Rev. Stat. §§ 52-125 through 52-159 (Reissue 1998). See *Tilt-Up I*. The first issue we address is whether the NCLA precludes a construction lienholder from also pursuing an action for breach of contract.

[5] The general rule is long established that "in the absence of some provision to the contrary . . . the remedy upon a mechanic's lien and the remedy upon the debt are distinct and concurrent, and may be pursued at the same time or in succession." *Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co.*, 133 F. 267, 271 (8th Cir. 1904). See, generally, 53 Am. Jur. 2d *Mechanics' Liens* §§ 338 and 339 (1996). See, also, e.g., *Great Western Sav. v. George W. Easley*, 778 P.2d 569 (Alaska 1989); *Pine Gravel, Inc. v. Cianchette d/b/a Site Prep.*, 128 N.H. 460, 514 A.2d 1282 (1986); *Sentry Engineering v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 338 S.E.2d 631 (1985); *Meier v. Novak*, 338 N.W.2d 631 (N.D. 1983); *Lane-Tahoe, Inc. v. Kindred Constr. Co.*, 91 Nev. 385, 536 P.2d 491 (1975), *disapproved on other grounds, County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 653 P.2d 1217 (1982); *McHugh Elec. Co. vs. Hessler Rlty. & Dev. Co.*, 50 Del. 296, 129 A.2d 654 (1957); *W. Va. Engin. Corp. v. Kurish*, 137 W. Va. 856, 74 S.E.2d 596 (1953); *Herro v. Heating & Plumbing F. Corp.*, 206 Wis. 256, 239 N.W. 413 (1931); *Southern Sur. Co. v. York Tire Service*, 209 Iowa 104, 227 N.W. 606 (1929); *Alberti v. Moore et al.*, 20 Okla. 78, 93 P. 543 (1908); *Groesbeck v. Linden*, 321 N.J. Super. 349, 729 A.2d 47 (1999); *Old Kent v Whitaker Constr Co*, 222 Mich. App. 436, 566 N.W.2d 1 (1997), *appeal denied* 457 Mich. 858, 581 N.W.2d 729 (1998); *Brook-Hattan Utilities v. 893 Const.*, 180 A.D.2d 660, 579 N.Y.S.2d 705 (1992); *Jaric, Inc. v. Chakroff*, 63 Ohio App. 3d 506, 579 N.E.2d 493 (1989); *Kenko, Inc. v. Lowry Hill Const. Co.*, 392 N.W.2d 18 (Minn. App. 1986); *St. Regis Paper Co. v. Quality Pipeline*, 469 So. 2d 820 (Fla. App. 1985), *review denied* 479 So. 2d 118; *Tighe v. Kenyon*, 681 P.2d 547 (Colo. App. 1984); *Costanzo v. Stewart*, 9 Ariz. App. 430, 453 P.2d 526 (1969); *Culbertson v. Cizek*, 225 Cal. App. 2d 451, 37 Cal. Rptr. 548 (1964); *Rockwood Sprinkler*

Co. v. Phillips Co., 265 Ill. App. 267 (1932). But see *Drywall Interior Systems v. Ladue Bldg.*, 857 S.W.2d 523 (Mo. App. 1993).

[6] This rule is consistent with the well-known principle that a statutory construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it. See, *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999); *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998). The NCLA contains neither an express provision nor any language indicating that the NCLA was meant to preclude other remedies that a construction lienholder might pursue to collect a contractual debt. We therefore conclude that the NCLA does not take away a construction lienholder's common-law right to sue for breach of contract.

Because the NCLA does not preclude an action for breach of contract, Tilt-Up was entitled to bring such an action despite the pendency of its construction lien foreclosure action. The only limitation is that any amount recovered for breach of contract damages would be credited to satisfy the construction lien when necessary to prevent a double recovery. See, *Culbertson v. Cizek, supra* (money collected on personal judgment to be credited to mechanic's lien); § 52-136(1) (amount of lien is for *unpaid* part of contract price). Compare *Tilt-Up I* (payments previously made by Star City to Tilt-Up credited to lien).

Tilt-Up argues that it was nonetheless barred from bringing a breach of contract action because it had obtained a judgment from the district court in the construction lien foreclosure action which included breach of contract damages and could not seek further damages for breach of contract until after this court's modification of the construction lien judgment. This argument is without merit. Tilt-Up was entitled to pursue damages in a breach of contract action; any judgment from the breach of contract action, if recovered, would simply have been credited to the lien. See, e.g., *Hafeman v. Gem Oil Co.*, 163 Neb. 438, 80 N.W.2d 139 (1956) (multiple judgments may be had, but only one satisfaction). Since Tilt-Up was not barred from bringing its breach of contract action by the NCLA, the statute of limitations for breach of contract was not tolled on that basis.

SUPERSEDEAS BOND

[7] Tilt-Up next argues that it was precluded from bringing its breach of contract action by a supersedeas bond filed by Star City pending the disposition of Star City's appeal in *Tilt-Up I*. Tilt-Up alleges in its amended petition that the supersedeas bond "secured the full amount of the lien and breach of contract damages awarded by the District Court." The bond, a copy of which was attached to the amended petition, required Star City to prosecute its appeal without delay and pay all money and costs which may be found against it on the final determination of the cause. A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. *Horton v. Ford Life Ins. Co.*, 246 Neb. 171, 518 N.W.2d 88 (1994).

[8,9] A supersedeas bond, however, serves only to suspend further proceedings on the judgment or decree appealed from. *Kleeb v. Kleeb*, 213 Neb. 537, 330 N.W.2d 484 (1983). Manifestly, a supersedeas bond furnished in one cause will not operate to suspend or prevent the enforcement of a judgment or decree rendered in another and different action. *State v. Ramsey*, 50 Neb. 166, 69 N.W. 758 (1897). Thus, the supersedeas bond filed by Star City in *Tilt-Up I* served only to suspend further proceedings in the district court on the judgment of construction lien foreclosure and did not stay Tilt-Up from taking such other measures as were available to secure its right to damages for breach of contract.

Furthermore, the statute providing for a supersedeas bond where, as here, the decree orders the sale of real estate, Neb. Rev. Stat. § 25-1916(3) (Reissue 1995), states:

> When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond, deposit of United States Government bonds, or cash deposit shall be in such sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay, will not during the pendency of such appeal commit or suffer to be committed any waste upon such real estate, and will pay all costs and all rents or damages to such real estate which may accrue during the pendency of such appeal and until the appellee is legally restored thereto . . . .

These conditions would not have been violated by Tilt-Up pursuing a breach of contract action. Tilt-Up was merely precluded from seeking to enforce the judgment it had already obtained, not from seeking another judgment under a collateral theory of recovery. Consequently, the supersedeas bond did not act to toll the running of the statute of limitations on Tilt-Up's breach of contract action. This assignment of error is without merit.

MORTGAGE FORECLOSURE STATUTES

Tilt-Up also argues that it was precluded from bringing its breach of contract claim during *Tilt-Up I* by § 25-2140, which provides: "After [a mortgage foreclosure] petition shall be filed, while the same is pending, and after a decree is rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court."

Tilt-Up claims that its action in *Tilt-Up I* was necessarily brought under the mortgage foreclosure statutes, Neb. Rev. Stat. §§ 25-2137 through 25-2155 (Reissue 1995), such that § 25-2140 would bar it from seeking a concurrent remedy for Star City's contractual debt. Tilt-Up relies upon § 52-155(3), which provides, in relevant part, that "[f]oreclosure [of a construction lien] may be by any method available for foreclosure of security interests in real estate, or otherwise, as ordered by the court." Tilt-Up argues that since the mortgage foreclosure statutes are the only method provided by the Nebraska statutes for foreclosure of security interests in real estate, the mortgage foreclosure statutes are necessarily applied to foreclosure of construction liens.

Tilt-Up's argument, however, is contrary to the plain language of § 52-155. That section quite specifically *does not* limit the district court to the mortgage foreclosure statutes, but instead provides that the district court may utilize *any method* available for foreclosure, including but not limited to the mortgage foreclosure statutes. Particularly enlightening in this regard are the comments to article 5 of the Uniform Simplification of Land Transfers Act, upon which the NCLA was based. Compare § 52-155 with Unif. Simplification of Land Transfers Act § 5-401 (1976), 14 U.L.A. 360 (1990). Comment 1 to § 5-401 states:

> This Act does not specify the method of foreclosure to be used in foreclosing construction liens. The court may use the method of foreclosure applicable to security interest (mortgage) foreclosure in the state, or the procedure applicable to realization on judgments, or other available procedure. It is specifically intended that private sale foreclosure be available if it would be available in a judicial foreclosure of a security interest.

[10] We have stated that the object of a mechanic's lien being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. *Midlands Rental & Mach. v. Christensen Ltd.*, 252 Neb. 806, 566 N.W.2d 115 (1997). Tilt-Up's interpretation of § 52-155 would place a limitation upon the ability of the district court to give effect to the provisions of the NCLA and, thus, runs contrary to our established principle regarding interpretation of the NCLA.

[11,12] Moreover, Tilt-Up is incorrect in asserting that for these purposes, a construction lien is equivalent to a mortgage. This court has distinguished a mortgage from a lien, concluding that a lien is more comprehensive than a mortgage and that " '[e]very lien is not a mortgage.' " See *Dupuy v. Western State Bank*, 221 Neb. 230, 233, 375 N.W.2d 909, 912 (1985). A mortgage has been defined as a contract by which specific real property capable of being transferred is hypothecated for the performance of an act without requiring a change in possession and includes a transfer of an interest in real property made only to secure the performance of an act. See *Wagner v. Wagner*, 612 N.W.2d 555 (N.D. 2000). A mortgage is created by the voluntary act of the parties, whereas the typical lien is created and attaches to the specific property by action of law and regardless of the consent of the parties. *In Re Najarian*, 44 R.I. 499, 119 A. 498 (1923). See, also, *Dupuy v. Western State Bank, supra*; Black's Law Dictionary 1026 (7th ed. 1999) (defining "mortgage" as "lien against property that is *granted* to secure an obligation").

[13] Finally, we note that although Tilt-Up alleges that it filed its foreclosure petition in *Tilt-Up I* pursuant to the mortgage

foreclosure statutes, none of its pleadings or filings in *Tilt-Up I* reference these statutes; nor, indeed, is there any reference to these statutes in the entire transcript from *Tilt-Up I*. While a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it, in ruling on a demurrer, a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated. See *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994).

In short, we conclude that a construction lien is not equivalent to a mortgage for purposes of applying § 25-2140. Tilt-Up was not precluded by § 25-2140 from bringing a breach of contract action during the pendency of *Tilt-Up I*, the statute of limitations on its breach of contract claim was not tolled by § 25-2140, and its assignment of error is without merit.

Remedy for Wrongful Conduct

Tilt-Up asserts that regardless of the fate of its breach of contract claim, its amended petition stated a cause of action pursuant to § 52-157(1), which provides:

> If a person is wrongfully deprived of benefits to which he or she is entitled under sections 52-125 to 52-159 by conduct other than that described in section 52-156:
>
> (a) He or she is entitled to damages; and
>
> (b) The court may make orders restraining the owner or other person, or ordering them to proceed on appropriate terms and conditions.

Tilt-Up's assignment of error is clearly without merit, as it has not been wrongfully deprived of benefits to which it was entitled under the NCLA. This court determined in *Tilt-Up I* that Tilt-Up was entitled, under the NCLA, to a construction lien in the amount of $235,418. Tilt-Up's amended petition alleges that Star City satisfied this construction lien on September 9, 1998, by payment to the clerk of the district court in the amount of the lien, interest, and costs, totaling $272,753.91. Consequently, Tilt-Up received all of the benefits to which this court determined it was entitled under the NCLA, and the amended petition does not state a cause of action pursuant to § 52-157. Tilt-Up's assignment of error is without merit.

ELECTION OF REMEDIES

Tilt-Up finally claims that the district court erred to the extent that it sustained Star City's demurrer based on the doctrine of the election of remedies. Based on our analysis of the NCLA above, this assignment of error might have had merit, had the district court actually relied upon the election of remedies. The district court determined, however, and we agree, that foreclosure of a construction lien and an action for breach of contract are not inconsistent remedies. Thus, the district court did not err, as it did not rely on the doctrine of election of remedies.

[14,15] In any event, this issue is irrelevant to our disposition of the appeal, as we have already determined that Star City's demurrer was properly sustained on the basis of the statute of limitations and for failure to state a cause of action pursuant to § 52-157. An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000); *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000). An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000); *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000).

CONCLUSION

Tilt-Up's amended petition failed to state a cause of action, as it failed to allege facts sufficient to overcome the bar of the statute of limitations, or to establish a wrongful deprivation of benefits under § 52-157. Star City's demurrer was properly sustained; the district court did not err in dismissing Tilt-Up's amended petition. The judgment of the district court is therefore affirmed.

AFFIRMED.

ROBIN ALETA HARRIS, APPELLEE, V. TERRY FRANCIS HARRIS, APPELLANT.

621 N.W.2d 491

Filed January 19, 2001. No. S-99-914.

1. **Divorce: 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.
2. **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.
3. **Judgments: Evidence: Appeal and Error.** In a de novo review 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.
4. **Appeal and Error.** Errors assigned but not argued will not be addressed.
5. ___. Errors argued but not assigned will not be considered on appeal.
6. **Divorce: Property Division: Pensions.** In dissolution actions, the marital estate includes only that portion of a pension which is earned during the marriage.
7. ___: ___: ___. In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties.
8. ___: ___: ___. In dissolution actions, ordering one party to pay for a pension survivor benefit payment preserves a spouse's right to receive his or her share of a marital asset.
9. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate.
10. ___: ___. A spouse's income which accumulates during the parties' marriage is a marital asset.
11. ___: ___. That portion of a savings fund which accumulates during the parties' marriage as a result of deposits made from one spouse's income is a marital asset.
12. **Property Division: Proof.** The burden of proof to show that property is a nonmarital asset remains with the person making the claim.
13. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed as modified.

Mark S. Bertolini, of Bertolini, Schroeder & Blount, for appellant.

David Riley for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Terry Francis Harris appeals from the July 14, 1999, order of the Sarpy County District Court, which dissolved Terry's marriage to Robin Aleta Harris; awarded custody of the parties' two children to Robin, with reasonable rights of visitation granted to Terry; and divided the parties' marital property. Terry challenges the district court's division of certain property. For the reasons stated below, we affirm as modified.

STATEMENT OF FACTS

Terry and Robin were married on October 1, 1987. The couple have two children, twin daughters, who were minors at the time of the dissolution. At the time the parties married, Robin was 18 years old and had graduated from high school. Terry was on active duty with the U.S. Air Force, a career he had begun in January 1972. Terry holds a bachelor of arts degree from Bellevue University and an associate degree from Los Angeles Community College.

Robin worked during a large portion of the parties' marriage. Before the birth of the children, she worked for a temporary service, a position she left when the twins were born. In 1989, she worked for approximately 9 months with First Data Resources. She left that position to care for the couple's children. Two years later, she began working for Sears Credit Central in Omaha, but she was forced to leave this employment when Terry was assigned by the Air Force to remote service in Alaska.

In April 1992, Robin began working and studying at the Montclair Nursing and Rehab Center in Omaha, with the goal of becoming a certified nursing assistant. She obtained her certification approximately 6 months later, and in September, Robin started employment at the Huntington Park Care Center in Omaha. In 1999, Robin began working at the Douglas County Hospital, where she was earning $10.51 per hour working approximately 40 hours per week on an on-call basis at the time of trial.

In January 1998, Terry retired from the Air Force after 26 years of service with the rank of senior master sergeant. He was receiving a military pension at the time of trial. During the par-

ties' marriage, Terry had purchased a survivor benefit plan (SBP) in favor of Robin, which plan guaranteed that Robin would receive her share of Terry's pension in the event she survived him. The monthly premium for the SBP was $137.68. After deducting certain payments, Terry's income from his military pension was $1,893 per month. At trial, the parties stipulated that Robin was entitled to 19.7 percent of Terry's military pension.

At the time of trial, Terry was employed by the U.S. Postal Service, working between 32 and 50 hours per week, at a base hourly rate of $13.88, plus a 10-percent nighttime differential. Terry also worked part time for the Omaha Park and Recreation Department as a sports official, for which he earned $2,778 in 1998. Terry was also employed part time as a schoolbus driver for Laidlaw Transit, Inc., where he worked approximately 10 to 12 hours a week at $10.25 per hour.

The family residence is located at 3259 Briar Oak, Omaha, Nebraska, and was purchased by Terry in 1982. The record shows the value of the home in 1982 was $54,500; however, the record does not show what Terry's equity in the residence was at the time of the 1987 marriage. In 1992, the parties encumbered the residence with a mortgage from Chase Manhattan Mortgage Corporation. In 1996, the parties obtained a second mortgage on the residence from Commercial Credit Corporation. At the time of trial, the two debts served by these mortgages were in the approximate amounts of $45,600 and $15,000, respectively. During the divorce proceedings, the parties stipulated that the residence was worth $82,000.

In December 1984, Terry opened a mutual fund savings plan (savings fund). The savings fund was intended to be a 15-year systematic investment plan, with a monthly investment of $300. Prior to the parties' marriage, the savings fund contained 186.5 shares, valued at $11.42 per share, for a total value of $2,129.83. During the parties' marriage, Terry continued to make the monthly $300 investment. Robin's name was not added to the savings fund.

Throughout the parties' marriage, the parties maintained essentially separate financial accounts. Terry paid the mortgages and certain household expenses. Robin used her income to buy clothing for herself and the children, to pay for the children's

school supplies and activities, and to purchase groceries and other household necessities. Robin was the primary caregiver for the children. The record shows Terry engaged in gambling.

Terry testified that he reported $3,662.50 in gambling winnings on his income taxes in 1995 and $5,600 in 1996. He testified that he had gambling losses but that he could not remember the amounts of those losses for tax years 1995 through 1998.

Beginning in May 1995, Terry began making large withdrawals from the savings fund. Terry deposited all of the amounts that he withdrew into a credit union account in his name. Robin was not an authorized party on the credit union account, nor was she a signatory. Robin testified at trial that she was not aware of these withdrawals. The chart below details the dates and amounts of Terry's withdrawals from the savings fund.

Date of Withdrawal	Amount of Withdrawal
May 1, 1995	$ 5,504.00
February 9, 1996	13,296.00
April 15, 1996	9,795.00
November 8, 1996	6,200.00
January 6, 1997	4,672.00
April 7, 1997	100.00
April 7, 1997	1,073.06
April 21, 1997	1,182.00
June 16, 1997	675.00
July 16, 1997	1,037.25
August 8, 1997	706.00
September 22, 1997	727.00
October 20, 1997	725.00
November 11, 1997	714.00
December 17, 1997	370.00
April 13, 1998	757.50
May 26, 1998	749.00
June 16, 1998	373.75
Total	$48,656.56

By June 1998, the savings fund held only 11.184 shares, worth a total of approximately $167.21.

Robin first filed for divorce in 1990, and she and Terry separated for approximately 1 year. The testimony indicates the par-

ties were estranged in 1995. According to the testimony, in April 1995, Robin "asked" Terry for a divorce. On May 27, 1998, Robin again filed to dissolve the parties' marriage.

During the course of the divorce proceedings, the district court entered temporary orders with regard to support and maintenance issues. One such order, entered July 9, 1998, awarded Robin the temporary and exclusive use of the family residence and required that she pay the monthly mortgage statements and utility bills. At some point, Robin apparently fell behind in these payments, and Terry was forced to pay an arrearage of $1,744 (arrearage) to satisfy these obligations. In a temporary order dated November 13, the district court "preserved" the arrearage. During the divorce proceedings, the parties stipulated to the existence and amount of the arrearage attributable to the mortgages and utilities.

Trial was held on Robin's dissolution petition on March 15, 1999. In the decree entered July 14, the district court determined that the parties' marriage was irretrievably broken and should be dissolved. The district court awarded custody of the parties' two children to Robin, with reasonable rights of visitation to Terry. Terry was ordered to pay child support in the amount of $880 per month for two children as well as alimony to Robin in the sum of $1 per year for a period of 10 years. The parties were to split child-care expenses and expenses for health care that were not covered by insurance. Personal property and debts were divided between the parties in accordance with documentary evidence received at trial. None of those provisions of the decree are challenged on appeal. The decree contained further orders pertaining to property with which Terry takes issue. The issues raised by Terry on appeal involve the arrearage incurred during the pendency of the dissolution action, the SBP, the residence, and the savings fund.

The district court awarded Terry the family residence as his sole property, subject to the first and second mortgages, for which Terry was ordered to be solely responsible. The district court awarded Robin $375 per month from Terry's Air Force pension and ordered Terry to continue to pay the cost for the SBP in favor of Robin. The district court also found that Terry had dissipated the parties' savings fund and ordered Terry to pay

Robin $24,000, representing Robin's share of the savings fund before dissipation. In connection with this determination, Terry was ordered to pay to Robin installments of $500 per month for a period of 48 months. It is from these various provisions of the decree that Terry appeals.

Terry filed his notice of appeal on August 11, 1999. Additional facts will be set forth below where pertinent to our analysis of Terry's assignments of error.

ASSIGNMENTS OF ERROR

Terry assigns five errors which combine to form four. Terry claims, restated, that the district court erred (1) in failing to order Robin to repay Terry the amount of the arrearage which Terry paid during the pendency of the dissolution proceedings due to Robin's failure to comply with a temporary order entered by the district court; (2) in requiring Terry to pay for the SBP; (3) in failing to set off as Terry's separate property the savings fund and the parties' residence; and (4) assuming arguendo that the savings fund was marital property, in finding that Terry had dissipated the parties' savings fund and ordering Terry to pay Robin $24,000 as Robin's share of the dissipated savings fund.

STANDARDS OF REVIEW

[1-3] 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. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000); *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000); *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). 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. *Heald v. Heald, supra*. In a de novo review 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. *Brunges v. Brunges, supra*; *Heald v. Heald, supra*.

ANALYSIS

Terry claims on appeal that certain portions of the decree in which the district court divided the parties' marital assets are

unreasonable and unfair. As stated above, the division of marital property is a matter initially entrusted to the trial judge, and on appeal, we will not disturb the trial court's findings, absent an abuse of discretion. *Heald v. Heald, supra.* Following our de novo review of the record, we conclude the district court abused its discretion with respect to its treatment in the decree of the savings fund. As set forth more fully below, we modify in two respects that portion of the decree that awarded Robin a proportionate share of the savings fund. We first deduct as Terry's separate property the value of the savings fund prior to the parties' marriage. Second, we modify the decree by reducing the amount of the savings fund which Robin is to receive.

Arrearage: Temporary Support Order.

[4,5] On appeal, Terry assigns as error the district court's failure to order Robin to repay to Terry the amount of the arrearage which Terry paid but which was Robin's responsibility under the temporary order. In the argument section of his brief, Terry purports to argue this assigned error as follows: "The court apparently failed to take into consideration the approximate amount owed by [Robin] to [Terry] pursuant to the Temporary Order." Brief for appellant at 18-19. Terry follows this statement in his brief with four citations to pages in the bill of exceptions which refer to the temporary order. Terry's brief does not contain any legal discussion or argument regarding this claimed error. Errors assigned but not argued will not be addressed. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). In this same section of his brief, Terry states that the district court also failed to take into consideration a loan that Robin received which was secured by a motor vehicle. We note that Terry did not assign this claim as error. Errors argued but not assigned will not be considered on appeal. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998). Accordingly, we do not address either of these claims.

Survivor Benefit Plan (SBP).

On appeal, Terry claims that the district court erred by requiring him to pay the SBP. We do not agree.

[6] This court has recognized that in dissolution actions, the marital estate includes only that portion of a pension which is

earned during the marriage. See, *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998); *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). See, also, Neb. Rev. Stat. § 42-366(8) (Reissue 1998). As stated above, Terry's monthly retirement pay as a result of his military pension was $1,893 after deducting certain payments from this amount. Terry paid $137.68 per month for the SBP. At trial, the parties stipulated that Robin was entitled to 19.7 percent of Terry's military pension. The district court awarded Robin $375 per month from Terry's Air Force pension which, in actuality, equals 19.8 percent of Terry's monthly retirement after deducting certain payments. Terry does not challenge this award, but he argues on appeal that the district court erred in ordering him to pay the SBP premium of $137.68 per month.

This court has not addressed the issue of whether it is appropriate to order one spouse to pay an SBP premium which favors another spouse. In *Kramer v. Kramer*, 1 Neb. App. 641, 510 N.W.2d 351 (1993), however, the Nebraska Court of Appeals considered whether, in a dissolution action, the district court abused its discretion in not ordering a former spouse to pay for an SBP. The Court of Appeals recognized that federal law requires military pension benefits to terminate with the death of the soldier, absent the purchase of an SBP. In *Kramer*, the Court of Appeals noted that without the SBP payments, if a soldier died prematurely, his or her spouse would be deprived of the ownership of this marital asset. If the soldier purchased an SBP, however, "benefits can continue to be paid to the beneficiary, including a former spouse." *Id.* at 649, 510 N.W.2d at 356. The Court of Appeals reasoned that requiring the purchase of an SBP "gives the division of a nondisability military pension more of the attributes of a true property division." *Id.* On remand, the Court of Appeals ordered the soldier husband to purchase an SBP for his wife as part of his pension benefits.

A similar approach has been followed by a number of other jurisdictions. See, e.g., *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995) (ordering husband to pay for wife's SBP gives wife right already enjoyed by husband, that is "the right to receive her share of the marital property awarded to her"); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts

have discretion to order spouse to maintain annuity for former spouse under SBP); *Smith v. Smith*, 190 W. Va. 402, 438 S.E.2d 582 (1993) (ordering husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife's receiving nothing if husband predeceases her).

In the instant case, the SBP is necessary to guarantee that Robin continues to receive an important marital asset if Terry, who is 15 years her senior, predeceases her. Terry testified that he voluntarily purchased the SBP for Robin while the parties were married, and it is undisputed that since Terry's retirement from the military, the SBP payments have been subtracted from Terry's pension checks.

[7,8] In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties. See, *Shockley v. Shockley, supra*; *Rockwood v. Rockwood*, 219 Neb. 21, 360 N.W.2d 497 (1985). The district court's order maintains the character of this marital asset, thereby guaranteeing that Robin will continue to be eligible to receive a marital asset awarded to her in the event Terry predeceases her. The district court did not abuse its discretion by requiring Terry to pay for the SBP.

Savings Fund and Residence as Marital Assets.

In the decree, the district court treated the savings fund and the parties' residence as marital assets. The district court split the value of the savings fund prior to the withdrawals by Terry commencing in 1995 between the parties and awarded Terry the parties' residence. Terry argues on appeal that the district court erred in not setting aside, as his separate property, the savings fund and the parties' residence.

Initially, we note that prior to the time the parties were married, the savings fund contained 186.5 shares, valued at $11.42 per share, for a total value of $2,129.83. This amount was an asset which Terry brought into the marriage and should have been set aside as his separate property. See *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000) (property which party brings into marriage is generally excluded from marital estate). We will discuss Terry's separate interest in the savings fund in greater detail below in which we conclude that with the exception of the

$2,129.83 value of the savings fund which Terry brought into the marriage, the savings fund was a marital asset which Terry partially dissipated during the time the parties were estranged.

[9] On appeal, Terry urges that the entirety of the savings fund is his separate property. This court has long held that as a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate. See, generally, *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). Terry argues that because he brought the savings fund into the marriage, the savings fund was solely in his name, and he made the deposits to the savings fund, the entirety of the savings fund belongs to him. We disagree.

[10] Terry's argument ignores the fact that during the parties' marriage, the savings fund grew as a result of income Terry earned during the parties' marriage. Terry's income which accumulated during the parties' marriage was a marital asset. Compare, *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000) (holding income tax liability incurred during marriage is one of accepted costs of producing marital income and should be treated as marital debt for purposes of determining equitable distribution of marital estate); *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999) (compensation spouse receives from personal injury lawsuit for lost wages that compensates for diminution of marital estate properly included in marital estate in dissolution action); *Gibson-Voss v. Voss*, 4 Neb. App. 236, 541 N.W.2d 74 (1995) (workers' compensation award properly treated as marital property to extent it recompenses for loss of income during marriage).

[11] The money that Terry deposited into the savings fund was an asset belonging to both Terry and Robin. Thus, that portion of the savings fund which accumulated during the parties' marriage was a marital asset, regardless of the fact that the savings fund was in Terry's name. Accordingly, the district court did not abuse its discretion in including in the marital estate that portion of the savings fund that was accumulated during the parties' marriage.

With respect to the residence, initially, we note that the district court gave Terry full and complete title to the house, but did not set it aside as his separate property. On appeal, Terry argues

that since he owned the parties' residence at 3259 Briar Oak prior to the parties' marriage, the district court should have set the residence aside as Terry's separate property. The record indicates that the house was an asset that Terry brought into the marriage. We agree with Terry that the equity in the house at the time of the parties' marriage was an asset which, if established, should be set aside as Terry's separate property. See *Heald v. Heald, supra*. We disagree, however, with Terry's claim that he is entitled to the entirety of the equity of the residence at the time of dissolution.

During the parties' marriage, equity in the house grew, in part due to mortgage payments made from marital income. At trial, Robin adequately demonstrated, through documentary and testimonial evidence, that she paid for certain home improvements. Compare *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997). The equity in the house grew during the parties' marriage and is a marital asset, which growth in equity should be divided equitably between the parties. See, generally, *Ward v. Ward*, 7 Neb. App. 821, 585 N.W.2d 551 (1998).

In the instant case, the record reflects that at the time of the dissolution action, the house was worth $82,000, but was encumbered by two mortgages in the approximate amounts of $15,000 and $45,600. Thus, at the time of the dissolution proceedings, it appears that there was approximately $21,400 of equity in the house. The record also reflects that at the time the parties married, the house was worth approximately $54,000. The record does not reflect, however, the equity Terry had in the house at the time of the marriage.

[12] The burden of proof to show that property is a nonmarital asset remains with the person making the claim. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). Therefore, Terry has the burden of showing the equity in the house at the time of the parties' marriage.

A review of the record shows that Terry has failed to meet this burden. Although the record in this appeal contains evidence of the value of the house at the time Terry and Robin were married, there is no evidence by which to determine whether the house was either encumbered or unencumbered and, if encumbered, to what extent. At oral argument in this case, Terry's counsel con-

ceded the record was silent on the issue of the equity in the house, if any, at the time of the marriage. We therefore conclude that the district court did not err in including the entirety of the equity in the residence in the marital estate.

Dissipation of Assets.

[13] Terry's final assignment of error claims, assuming arguendo the savings fund is a marital asset, that the district court erred in concluding that Terry dissipated over $48,000 of the parties' savings fund and that he must repay Robin her share of the savings fund. We agree with the district court that during the breakdown of the marriage to the extent Terry used moneys from the savings fund accumulated during the marriage for purposes other than paying for marital expenses, he dissipated a marital asset and should be ordered to repay Robin her share of the moneys Terry dissipated from the savings fund. The district court erred, however, first in its determination of the amount of money which Terry dissipated from the savings fund and, second, in failing to set aside the $2,129.83 which was in the savings fund prior to the time of the parties' marriage as Terry's separate property.

We have reviewed this case de novo on the record for abuse of discretion, as we must. See *Brunges v. Brunges, supra.* We note that although the record regarding Terry's financial evidence is deficient in several respects, certain facts have been established. First, with respect to the amount dissipated, the record shows that from May 1, 1995, until June 16, 1998, a period of time during which the parties were estranged, Terry withdrew $48,656.56 from the savings fund, and by way of testimonial and documentary evidence, he has accounted for having spent $30,938.96 on marital expenses. See *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000). The expenses which Terry has demonstrated were marital expenses include payments for such things as car payments, utilities for the home, and supermarket purchases. Accordingly, rather than finding that the entire $48,656.56 had been dissipated by Terry, the district court should have deducted the $30,938.96 used for marital expenses from the value of the savings fund when determining the amount to be treated as a dissipation of marital property.

Second, with respect to the amount of the savings fund prior to the time of the marriage, the record demonstrates that the savings fund was worth $2,129.83. Terry adequately demonstrated that this was his separate property. See *Heald v. Heald, supra.* The district court erred in failing to set aside the $2,129.83 portion of the savings fund which existed prior to the marriage as Terry's separate property.

Dissipation of marital assets is generally defined as "one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown." 24 Am. Jur. 2d *Divorce and Separation* § 560 (1998). See, generally, Annot., 41 A.L.R.4th 416 (1985).

In *Brunges v. Brunges*, 260 Neb. at 667, 619 N.W.2d at 462, this court held that in a marital dissolution action, the trial court erred in not including in the marital estate assets "liquidated" by one spouse after the parties had separated and for which that spouse had not properly accounted. See, also, *Pittman v. Pittman*, 216 Neb. 746, 345 N.W.2d 332 (1984) (husband's substantial withdrawals from parties' joint savings account following their separation taken into account during division of marital assets).

Other jurisdictions have similarly included in the marital estate marital assets expended by one spouse for purposes unrelated to the marriage after the marriage was irretrievably broken. In *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. App. 2000), for example, the court found that testimony which established that almost $80,000 worth of marital assets was unaccounted for and not used for a marital purpose was sufficient to demonstrate dissipation of marital assets. The Kentucky Court of Appeals observed that "[s]uch dispersal of marital property without an accounting is sufficient justification to include the unaccounted amount in the total marital assets." *Id.* at 799.

In *In re Marriage of Morrical*, 216 Ill. App. 3d 643, 576 N.E.2d 465, 159 Ill. Dec. 796 (1991), the evidence demonstrated that the husband had sold stocks worth $32,000 at a time when the marriage was undergoing difficulty. At trial, the husband failed to give a satisfactory accounting as to what had happened to the money and the husband admitted some of the money was

used for gambling. The trial court in *In re Marriage of Morrical* concluded that the evidence was sufficient to show that the husband had dissipated the $32,000. The appellate court affirmed the trial court's award of one-half of the $32,000 to the wife in its division of the marital assets.

The record in the instant case demonstrates that following Robin's "request" for a divorce from Terry in 1995, Terry began to make repeated and substantial withdrawals from the parties' savings fund. In this regard, we note that exhibits in the record demonstrate that at the same time that Terry was withdrawing sums from the savings fund and depositing them into his individual bank account, he was also making withdrawals from automatic teller machines located at Ameristar Casino Hotel and Bluffs Run Casino, gambling casinos in Council Bluffs, Iowa, and testimony establishes that Terry was incurring gambling losses. Terry offered some evidence, however, as we have discussed above, that during this same time period, he was paying for certain household expenses and did not dissipate the entire $48,656.56 withdrawn from the savings fund during the time the parties were estranged. We have concluded upon review of this record that Terry has failed to demonstrate that the total amount he withdrew was expended on marital expenses.

The district court treated the entirety of the savings fund as a marital asset and ordered Terry to pay Robin approximately one-half of the value of the savings fund withdrawn by Terry between May 1995 and June 1998. The trial court failed to give Terry credit for the marital expenses he demonstrated and failed to treat the $2,129.83 in the savings fund prior to the time of the parties' marriage as Terry's separate property. Thus, we find errors by the trial court and modify the decree accordingly.

Prior to the parties' marriage, the savings fund was worth $2,129.83. As stated above, this amount was Terry's separate property in that this was an asset Terry owned prior to the marriage. See *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). From April 1995 to June 1998, Terry withdrew $48,656.56, such that in June 1998, the savings fund held only 11.184 shares, worth a total of approximately $167.21. Adding the withdrawn amounts to the June 1998 balance gives the savings fund, on the record available to us, a total value of $48,823.77. Setting aside and sub-

tracting Terry's premarital asset of $2,129.83, we determine that the value of the savings fund as a marital asset was $46,693.94. From this amount, we subtract $30,938.96, which equals those moneys we determine Terry established were used for marital expenses. The remaining amount is $15,754.98. One-half of this amount, or $7,877.49, would properly be Robin's share of the savings fund. We modify the portion of the decree which awarded Robin $24,000 of the savings fund by reducing Robin's share to $7,877.49 and further modify the decree to order Terry to pay this amount to Robin in 15 monthly installments of $500 each, with a 16th and final installment of $377.49. In all other respects, the decree is affirmed.

CONCLUSION

The decree is affirmed in all respects except for the trial court's treatment of the savings fund, which we modify in accordance with the opinion herein.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
BHUPINDER M. GANGAHAR, APPELLANT.

621 N.W.2d 305

Filed January 19, 2001. No. S-99-968.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, LARRY F. FUGIT, Judge. Judgment of Court of Appeals affirmed.

Glenn A. Shapiro, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

McCormack, J.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *State v. Gangahar*, 9 Neb. App. 205, 609 N.W.2d 690 (2000), is correct and accordingly affirm the decision of the Court of Appeals.

AFFIRMED.

In re Referral of Lower Platte South Natural Resources District.
Donald Chadd, appellant, v. Lower Platte South Natural Resources District and Carl Godwin, appellees.

621 N.W.2d 299

Filed January 19, 2001. No. S-00-439.

1. **Administrative Law: Waters: Statutes: Appeal and Error.** On questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director of the Department of Water Resources.
2. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
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.
4. **Legislature: Waters.** Nebraska's common law does not allow water to be transferred off overlying land, but the Legislature may provide exceptions to the common-law rule.
5. **Statutes: Legislature: Intent: Waters.** The Legislature's purpose in enacting Neb. Rev. Stat. § 46-691 (Cum. Supp. 2000) was to carve out two exceptions from Nebraska's common-law prohibition against transfers of water off overlying land: (1) for agricultural purposes and (2) pursuant to a remediation plan under the Environmental Protection Act.
6. **Administrative Law: Complaints: Waters.** Only parties who are affected by the transfer of ground water off overlying land for agricultural purposes or pursuant to a water remediation plan, as required under the Environmental Protection Act, may object to such transfer by the procedures outlined in Neb. Rev. Stat. § 46-691(2) (Cum. Supp. 2000).

7. ___: ___: ___. Upon the objection to a transfer of ground water pursuant to Neb. Rev. Stat. § 46-691(2) (Cum. Supp. 2000), a resources district shall conduct an investigation to determine whether the transfer of water complained of by the objector, which objectionable transfer must be for agricultural purposes or pursuant to a water remediation plan as required under the Environmental Protection Act, is consistent with the requirements of § 46-691(1) that the transfer (a) will not significantly adversely affect any other water user, (b) is consistent with all applicable statutes and rules and regulations, and (c) is in the public interest.

Appeal from the Department of Water Resources. Appeal dismissed.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant Donald Chadd.

Lee W. Orton, of Orton, Thomas & O'Connell, for appellee Carl Godwin.

Steven G. Seglin, of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Lower Platte South Natural Resources District.

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

GERRARD, J.

INTRODUCTION

Donald Chadd filed a written objection, under Neb. Rev. Stat. § 46-691 (Cum. Supp. 2000), with the Lower Platte South Natural Resources District (NRD) regarding the withdrawal and transfer of ground water from his property. The water was being transferred away from the overlying land to a neighbor's property and was being utilized for domestic purposes. Pursuant to the procedures in § 46-691, the NRD requested that the Nebraska Department of Water Resources (Department), now the Department of Natural Resources, hold a hearing to determine whether the transfer of water had a significant adverse effect upon Chadd. The issue to be decided in this appeal is whether the Department, under § 46-691, has jurisdiction over the withdrawal and transfer of ground water off overlying land for domestic purposes when the transfer is not part of an Environmental Protection Act remediation plan. The Department concluded that under the plain language of

§ 46-691, it did not have the authority to hear Chadd's claim. We agree and dismiss Chadd's appeal for lack of jurisdiction.

FACTUAL BACKGROUND

On January 21, 1999, Chadd filed a written objection with the NRD under § 46-691 regarding the withdrawal and transfer of ground water from his property. The water was being transferred from Chadd's property to Carl Godwin's property where it was used solely for domestic purposes. The withdrawal and transfer of the water was done via a well, owned by Godwin, located on Chadd's property. Godwin had a legal easement for the well and waterline to his property from Chadd's property. The validity of the easement was judicially determined in prior litigation involving Chadd and Godwin and is not at issue here. Chadd claims that after 4 to 6 hours of Godwin's use of his well, Chadd's well would go dry. The parties have stipulated that Godwin's use of the water was for domestic purposes only and was neither for agricultural purposes nor pursuant to a ground water remediation plan as required by the Environmental Protection Act, including providing water for domestic purposes under such a ground water remediation plan. The Department eventually found that under previous rulings by the Department, Godwin's transfer was a transfer off the overlying land. Pursuant to the procedures contained in § 46-691, because the NRD could not determine whether the water transfer significantly adversely affected another water user, it requested that the Department hold a hearing to decide the issue.

On July 19, 1999, Godwin moved for dismissal of the proceedings in the Department for lack of jurisdiction or authority. The Department initially determined that it had jurisdiction under § 46-691 and denied Godwin's motion to dismiss on October 20. The case proceeded to an administrative hearing on January 20, 2000, where evidence was heard as to the effects of the Godwin well on the Chadd well and where Godwin renewed his motion to dismiss for lack of jurisdiction under § 46-691. On March 31, the Department determined that the evidence and stipulations clearly showed that Godwin's use of the water was for domestic purposes and not pursuant to a remediation plan. The Department determined that it did not have authority to hear

Chadd's claim because § 46-691 does not apply to transfers for domestic purposes, except when part of a remediation plan as required under the Environmental Protection Act. The Department therefore dismissed the case for lack of jurisdiction, and it is from this order that Chadd appeals.

ASSIGNMENTS OF ERROR

Chadd assigns that the Department erred in (1) determining that § 46-691 does not apply to domestic ground transfers except when part of a remediation project under the Environmental Protection Act, (2) granting Godwin's motion to dismiss, (3) failing to address whether Nebraska common law prohibits the transfer of ground water for domestic purposes, (4) failing to find that Chadd had been adversely impacted by Godwin's well, and (5) failing to enjoin Godwin from withdrawing and transferring ground water from Chadd's property.

STANDARD OF REVIEW

[1] On questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal determinations made by the director of the Department of Water Resources. *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996).

ANALYSIS

We first address whether the Department was correct in its determination that it lacked authority to hear this case because § 46-691 does not apply to domestic transfer cases, unless part of a remediation plan as required by the Environmental Protection Act. Chadd asserts that § 46-691 expands the Department's jurisdiction beyond situations where the ground water transfer is for agricultural purposes or pursuant to a remediation plan.

[2,3] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997); *Brown v.*

Wilson, 252 Neb. 782, 567 N.W.2d 124 (1997). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

[4] At the outset, we find it helpful to engage in a brief discussion of Nebraska's common law regarding the transfer of water off overlying land as such discussion will give some background relative to the Legislature's intent when it enacted § 46-691 in 1995. Nebraska's common law does not allow water to be transferred off overlying land. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985); *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *reversed on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982); *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933). However, we have made it clear that the Legislature may provide exceptions to this common-law rule. In *State ex rel. Douglas v. Sporhase*, 208 Neb. at 706-07, 305 N.W.2d at 617, we stated:

> Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.
>
> . . . [T]he Legislature has the power to determine public policy with regard to ground water and . . . it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.

Similarly, in *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. at 190, 376 N.W.2d at 547, we observed:

> By enacting the Municipal and Rural Domestic Ground Water Transfers Permit Act as a part of Nebraska's policy, the Legislature altered certain aspects of common law governing use of ground water. Permittees under the act are exonerated from the common-law prohibition against transfer and transportation of ground water.

Finally, in *Ponderosa Ridge LLC v. Banner County*, 250 Neb. at 962, 554 N.W.2d at 163, we said that "the transportation of Nebraska ground water from the underlying land for any use, interstate or intrastate, is severely curtailed. The transportation of ground water for intrastate use is prohibited except for specific statutory exceptions." See, also, *Springer v. Kuhns*, 6 Neb. App. 115, 571 N.W.2d 323 (1997) (for thorough discussion of ground water law and intent of Legislature in enacting § 46-691).

With the general rule that the Legislature may provide exceptions to the common-law prohibition of the transfer of ground water off the overlying land in mind, we now turn to the statute in question. Section 46-691 states, in relevant part:

> (1) Any person who withdraws ground water for agricultural purposes, or for any purpose pursuant to a ground water remediation plan as required under the Environmental Protection Act, including the providing of water for domestic purposes, from aquifers located within the State of Nebraska may transfer the use of the ground water off the overlying land if the ground water is put to a reasonable and beneficial use within the State of Nebraska and is used for an agricultural purpose, or for any purpose pursuant to a ground water remediation plan as required under the Environmental Protection Act, including the providing of water for domestic purposes, after transfer, and if such withdrawal, transfer, and use (a) will not significantly adversely affect any other water user, (b) is consistent with all applicable statutes and rules and regulations, and (c) is in the public interest. . . .
>
> (2) Any affected party may object to the transfer of ground water by filing written objections, specifically stating the grounds for such objection, in the office of the natural resources district containing the land from which the ground water is withdrawn. Upon the filing of such objections or on its own initiative, the natural resources district shall conduct a preliminary investigation to determine if the withdrawal, transfer, and use of ground water is consistent with the requirements of subsection (1) of this section. Following the preliminary investigation, if the district

> has reason to believe that the withdrawal, transfer, or use may not comply with any rule or regulation of the district, it may utilize its authority under the Nebraska Ground Water Management and Protection Act to prohibit such withdrawal, transfer, or use. If the district has reason to believe that the withdrawal, transfer, and use is consistent with all rules and regulations of the district but may not comply with one or more other requirements of subsection (1) of this section, the district shall request that the Department of Natural Resources hold a hearing on such transfer.

[5] The Legislature's obvious purpose in enacting § 46-691 was to carve out two exceptions from Nebraska's common-law prohibition against transfers of water off overlying land: (1) for agricultural purposes and (2) pursuant to a remediation plan under the Environmental Protection Act. When § 46-691 is read in conjunction with our statement in *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 706, 305 N.W.2d 614, 617 (1981), that "legislative action [is] necessary to allow for transfers off the overlying land," it is clear that the Legislature intended to specifically allow for the transfer of ground water "for agricultural purposes, or for any purpose pursuant to a ground water remediation plan as required under the Environmental Protection Act, . . . off the overlying land if the ground water is put to a reasonable and beneficial use within the State of Nebraska," § 46-691(1). Subsection (1) is narrow in scope as it provides only two exceptions to the common-law rule.

With the knowledge that the Legislature intended to create two exceptions to the common-law prohibition against transfers of water off overlying land, we now turn to the issue at bar. Chadd urges us to interpret § 46-691 as allowing the Department to hear cases that do not involve transfers of water either for agricultural purposes or pursuant to a remediation plan as required under the Environmental Protection Act. He effectively asserts that § 46-691(2) expands the Department's jurisdiction to hear all cases involving transfers of water, regardless of whether they are for an agricultural purpose or are pursuant to a remediation plan as required under the Environmental Protection Act. Chadd bases his assertion on the language in subsection (2) which states that

"[a]ny affected party may object to the transfer of ground water by filing written objections" as well as the subsection (2) requirement that transfers of water be consistent with the requirements of subsection (1). Chadd appears to read this language independent of the context of the statute and without the common-law and legislative intent in mind. We disagree with the meaning that Chadd ascribes to § 46-691. In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *American Employers Group v. Department of Labor*, 260 Neb. 405, 617 N.W.2d 808 (2000). The language of § 46-691 is plain and unambiguous; it is not necessary to "interpret" the statutory language in the instant case.

[6] The first sentence of § 46-691(2) means that only parties who are affected by the transfer of ground water off overlying land for agricultural purposes or pursuant to a water remediation plan, as required under the Environmental Protection Act, may object to such transfer by the procedures outlined in § 46-691(2). In other words, the only parties who may avail themselves of the process for objecting under § 46-691(2) are those who are affected by a transfer of water which is for an agricultural purpose or is pursuant to a remediation plan as required by the Environmental Protection Act.

[7] The second sentence of § 46-691(2) means that a resources district shall conduct an investigation to determine whether the transfer of water complained of by the objector, which objectionable transfer must be for agricultural purposes or pursuant to a water remediation plan as required under the Environmental Protection Act, is consistent with the requirements of § 46-691(1) that the transfer "(a) will not significantly adversely affect any other water user, (b) is consistent with all applicable statutes and rules and regulations, and (c) is in the public interest." The plain language is consistent with the legislative purpose in enacting § 46-691—to carve out two exceptions to the common-law prohibition against transfers of water off overlying land.

We conclude that the Department was correct in its determination that it did not have jurisdiction to hear this case under

§ 46-691. To hold otherwise would not only ignore the Legislature's proper role of altering certain aspects of the common law governing ground water use, but would also vitiate the Legislature's intent in enacting § 46-691. Thus, § 46-691 is limited in procedural scope to claims where a party is affected by the transfer of water for agricultural use or pursuant to a remediation plan as required by the Environmental Protection Act. Because Chadd filed his objection with the NRD pursuant to § 46-691 in a situation where the transfer objected to was concededly a domestic transfer not pursuant to a remediation plan, the NRD did not have proper statutory authority to investigate the claim. Moreover, the Department did not have jurisdiction to hear the claim under the procedural provisions of § 46-691.

CONCLUSION

Because the procedural provisions of § 46-691 do not give the Department jurisdiction to settle disputes where the transfer of water is not for agricultural purposes or pursuant to a remediation plan as required by the Environmental Protection Act, the Department properly dismissed the case for lack of jurisdiction. We consequently lack jurisdiction and dismiss Chadd's appeal.

APPEAL DISMISSED.

ROBERT GENETTI AND SHERRIE GENETTI, APPELLEES, CROSS-APPELLANTS, AND CROSS-APPELLEES, V. CATERPILLAR, INC., A DELAWARE CORPORATION, APPELLANT AND CROSS-APPELLEE, AND GENERAL MOTORS CORPORATION, A DELAWARE CORPORATION, APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE.

621 N.W. 2d 529

Filed January 26, 2001. No. S-99-813.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Directed Verdict.** The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.

3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. ___: ___. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
5. **Appeal and Error.** The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.
6. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
7. **Rules of the Supreme Court: Appeal and Error.** The rules regarding the manner of presenting a cross-appeal are the same as the rules applicable to an appellant's brief.
8. **Waiver: Appeal and Error.** Errors not assigned in the initial brief on cross-appeal are waived and may not be asserted for the first time in an answer brief.
9. **Breach of Warranty: Products Liability: Proof.** In order for a plaintiff to recover for breach of an express warranty, he or she must show, among other things, that the goods did not comply with the warranty, that is, that they were defective.
10. **Breach of Warranty: Products Liability: Damages: Evidence.** Where no evidence is provided to show that a defect in a product caused a plaintiff's damages, he or she cannot recover for breach of warranty.
11. **Uniform Commercial Code: Products Liability: Proof.** A precise or specific defect does not need to be proved in order to find a product defective under either article 2 of the Uniform Commercial Code or Neb. Rev. Stat. § 60-2701 et seq. (Reissue 1998).
12. **Warranty: Products Liability: Proof.** Proof that a warranted product is defective may be circumstantial in nature and may be inferred from the evidence.
13. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
14. **Trial: 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.
15. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
16. **Evidence.** An issue as to the existence or occurrence of a particular fact, condition, or event may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events under the same or substantially similar circumstances.
17. **Actions: Pleadings: Equity.** The essential character of a cause of action and the remedy or relief it seeks as shown by the allegation of the complaint determine whether a particular action is one at law or in equity.
18. ___: ___: ___. The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
19. ___: ___: ___. The determination of whether an action is at law or in equity is unaffected by the conclusions of the pleader or what the pleader calls it.

20. **Equity: Statutes.** Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to.
21. **Actions: Products Liability.** An action under Neb. Rev. Stat. § 60-2701 et seq. (Reissue 1998) is an action at law.
22. **Election of Remedies.** Where a party pleads alternative theories of recovery which are inconsistent in the sense that he or she cannot logically choose one without renouncing the other, he or she must elect between them.
23. ___. When alternative theories of recovery are consistent, a party must proceed on the alternative theories or forever forgo one theory over the other.
24. ___. The doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party.
25. **Damages.** A party may not have double recovery for a single injury, or be made more than whole by compensation which exceeds the actual damages sustained.
26. **Actions.** Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had.
27. **Election of Remedies: Products Liability.** Under Neb. Rev. Stat. § 60-2708 (Reissue 1998), a theory of recovery under Neb. Rev. Stat. § 60-2701 et seq. (Reissue 1998) may be brought together with other theories of recovery.
28. **Election of Remedies: Breach of Warranty: Products Liability.** Theories of recovery for both breach of warranty and for recovery under Neb. Rev. Stat. § 60-2701 et seq. (Reissue 1998) may be submitted to the jury, but once a plaintiff receives verdicts under both theories of recovery, he or she must elect between them.
29. **Negligence: Liability.** Under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.
30. **Negligence: Tort-feasors: Liability: Damages.** Under tort law, where joint tort-feasors do not act as part of a common enterprise or plan, Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) alters the common law by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's proportionate liability in an action involving more than one defendant.

Appeal from the District Court for Douglas County: STEVEN A. DAVIS, Judge. Affirmed in part, and in part reversed and remanded.

Aaron A. Clark, of McGrath, North, Mullin & Kratz, P.C., and Mark L. Tripp, of Bradshaw, Fowler, Proctor & Fairgrave, P.C., for appellant Caterpillar.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellee General Motors.

Gregory C. Scaglione and Thomas F. Ackley, of Koley Jessen, P.C., for appellees Robert and Sherrie Genetti.

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

CONNOLLY, J.

After the engine in their truck failed four times, Robert Genetti (Genetti) and Sherrie Genetti brought suit against Caterpillar, Inc., and General Motors Corporation for breach of express warranty under the Uniform Commercial Code (U.C.C.) and relief under the "Manufacturer's Warranty Duties" statutes (Warranty Act), also known as the "lemon laws," Neb. Rev. Stat. § 60-2701 et seq. (Reissue 1998). The engine was manufactured by Caterpillar, and the truck was manufactured by General Motors. A jury awarded damages against both parties for breach of express warranty and found that General Motors was also liable under the Warranty Act.

After the verdict, the district court initially ordered the Genettis to make an election of remedies, but later dismissed the Warranty Act claim, finding that a claim under the Warranty Act was in equity and determining that the Genettis had an adequate remedy at law under the U.C.C. The primary questions on appeal are (1) whether a specific defect must be proved under the U.C.C. and the Warranty Act; (2) whether an action under the Warranty Act is an action at law or in equity; and (3) whether an election of remedies must be made when an action is brought, stating theories of recovery both under the Warranty Act and for breach of express warranty under article 2 of the U.C.C.

I. BACKGROUND

On February 26, 1996, the Genettis, who are in the business of delivering furniture nationwide, bought a new 1996 GMC truck and trailer from Omaha Truck Center, Inc. The truck was manufactured by General Motors and was equipped with a model 3116 diesel engine manufactured by Caterpillar. The model 3116 engine is generally described as a medium-duty engine. The purchase price for the truck was $97,043, and the Genettis took possession around March 8. The warranties issued by General Motors and Caterpillar stated that the truck was warranted for 3 years or 150,000 miles. From the time of purchase, it was serviced only through General Motors and Caterpillar dealerships.

Following a series of problems with the engine, the Genettis brought suit against both Caterpillar and General Motors seeking relief for breach of express warranty under the U.C.C. and relief under the Warranty Act. In their operative petition, the Genettis prayed for an order requiring Caterpillar and General Motors, jointly and severally, to replace the truck with a comparable vehicle with similar features or to accept the return of the truck from the Genettis and refund the full purchase price along with the sales tax and licensing and registration fees. The Genettis also sought general damages and an award of attorney fees and costs.

In their amended answers, Caterpillar and General Motors raised as affirmative defenses that (1) the Genettis' claim was barred by the express terms of the warranties; (2) the use and market value of the truck was not substantially impaired; and (3) the nonconformities alleged were the result of abuse, neglect, or unauthorized modifications or alteration of the truck by the Genettis.

Genetti testified that he had 18 years of experience in driving, operating, and maintaining diesel engines and that it was his custom to check daily for engine problems such as leaking fluids. Furthermore, the truck was serviced according to the schedule provided by General Motors.

1. First Engine Failure

Genetti testified that one of his drivers called him on September 23, 1996, and reported that the truck had a sudden loss of power and that a white vapor had suddenly come out of the tailpipe. The driver had pulled to the side of the road immediately, and Genetti had instructed him to have the truck towed to the nearest General Motors dealership. The dealership where the truck was towed told Genetti that the problem was a complete engine failure due to bad pistons and valves and a cracked block. The record shows that the dealership found coolant leaking from the engine. The truck was repaired by disassembling the engine, replacing the block, and reassembling the engine with some new parts, some remanufactured parts, and some original parts.

2. Second Engine Failure

Genetti testified that the truck broke down again on October 30 or 31, 1996. The driver called Genetti and told him that, like the first breakdown, the truck had experienced a sudden loss of power. The driver pulled over immediately and made arrangements for the truck to be towed to the nearest Caterpillar dealer. The dealership informed Genetti that a valve and piston had failed in the engine and that the repair work would be covered by the warranty. According to Genetti, he discussed the possibility of receiving a new engine with Wayne Allen Mohr, the service manager at the facility where the truck was repaired. Genetti stated Mohr informed him that the chances of getting a new engine paid for under the warranty were slim to none and that he was never offered a new engine by Mohr at any time. Mohr, however, testified that he sought and received authority to put a new engine in the truck, and a repair record shows a notation on it to that effect. Mohr did not specifically state whether the new engine was authorized to be entirely paid for under the warranty. Mohr also testified that he felt it was an adequate and proper remedy to repair, instead of replace, the engine. The truck was repaired with a remanufactured cylinder head group and turbocharger, and the pistons and rings were replaced. The truck was out of service for approximately a week while being repaired.

3. Third Engine Failure

The third failure occurred on January 2, 1997, outside of Salt Lake City, Utah. Genetti testified that he was driving and that he was accompanied by John T. Seeley, an employee. Like the other breakdowns, the truck suddenly lost power and a white vapor came out of the exhaust. The truck was towed to a Caterpillar service center, and after a day or two, Genetti was told that there had been a complete engine failure. Genetti then called Caterpillar and informed them that he wanted a new engine. Caterpillar authorized the replacement of the engine under the warranty. There is conflicting evidence in the record regarding how many original parts from the truck were put back onto the new engine after it was installed. Ervin A. Stepanek, the expert witness for the Genettis, testified that the turbo and other items would not be replaced but would be taken off the old

engine and put back onto the new one. Gary G. Valbert, an expert for Caterpillar, testified that a new engine would include a turbo, but some General Motors components from the old engine would be put back onto the new one. The record does not specifically show which component parts were replaced and which were reused. During the time the engine was being replaced, Genetti was required to rent several trucks in order to complete his deliveries.

4. Fourth Engine Failure

Seeley was driving the truck when the fourth failure occurred in March 1997. Seeley testified that he was driving over a mountain pass when he noticed that the truck lost power and that the temperature gauge was higher than normal. Seeley did not observe a sudden puff of smoke like he had noticed during the third breakdown, but he did observe some smoke. Seeley continued to drive the truck until the gauge indicated that the engine was warmer than it should be and then pulled over to the side of the road to allow it to cool down. After the truck had cooled down, Seeley checked the coolant level, found it to be about half full, and added more coolant. Seeley then waited for the truck to completely cool down before starting to drive again. After Seeley began to drive again, the truck continued to overheat. Seeley testified that he had to stop and allow the truck to cool down "quite a few" times.

Seeley testified that once the truck got over the mountain pass, it was still running a little warm, but was also running all right. Seeley finished his deliveries and started back to Nebraska. When Seeley attempted to return to Nebraska, the truck began overheating again. Seeley took the truck to a General Motors dealership in Commerce City, Colorado. On the way to the dealership, Seeley stopped to add coolant to the truck and allow it to cool down. During one stop, Seeley observed that the truck was leaking coolant. Seeley did not allow the truck to overheat to the point where the temperature gauge went into the "red zone" for more than a couple of seconds during any of the overheating incidents.

When Seeley arrived at the dealership, an employee of the dealership told Seeley to park the truck and leave it running.

After 20 to 45 minutes had passed, an employee told Seeley to turn the truck off because it would be a while before the dealership could look at it. Genetti was later informed that Caterpillar had determined that the truck had been allowed to overheat and that it was not going to honor the warranty. Genetti was also told that the repairs would cost approximately $12,000, but Genetti did not authorize the repairs because he could not afford to pay for them. The dealership, however, repaired the truck using remanufactured components and issued an invoice to the Genettis for the repairs on March 28, 1997.

On March 26, 1997, 2 days before the invoice for repairs was issued, the Genettis' attorney sent a letter to both General Motors and Caterpillar stating that the truck had experienced engine problems on four different occasions and that due to those problems, the truck had been out of service for a cumulative total of more than 40 days. The letter stated that the Genettis did not wish to retain the truck and demanded that the manufacturer either replace the truck with a comparable vehicle or refund the full purchase price, including taxes and fees paid. Both Caterpillar and General Motors stipulated that they received the letter on March 26. The Genettis were unable to continue to make payments on the truck. Through a deal with a finance company, however, the finance company paid for the repairs, the Genettis picked up the truck in Commerce City, and the truck was sold on the open market to Eldon W. Heiser.

5. Testimony of Subsequent Purchaser

Before trial, Caterpillar and General Motors made motions in limine to exclude testimony from Heiser regarding further breakdowns of the truck while he owned it because the testimony was irrelevant. The Genettis argued that the testimony was relevant to show that the fourth repair to the truck had also failed. The court reserved ruling on the issue until trial. At trial, both parties renewed their objections, which were overruled. However, the court gave a limiting instruction to the jury, stating that the testimony was to be considered only as evidence against General Motors on the Warranty Act claim.

Heiser testified by video deposition that he had experienced mechanical problems with the truck after he had purchased it.

These problems included the truck's losing power and smoking excessively. Heiser testified that on another occasion, the engine locked up and water came out of the exhaust pipe. It was later determined that the engine block on the truck was cracked between the cylinders. As a result, Caterpillar and/or General Motors replaced the engine under the truck's warranty. Heiser testified that he was told before he purchased the truck that the engine had been replaced but that he was not given any other repair history.

6. Expert Testimony

Stepanek testified for the Genettis and gave opinions regarding the cause of the breakdowns. Stepanek testified that he had 25 to 30 years of experience as a mechanic working on heavy-duty trucks and that he had performed just about every type of repair that could be done to diesel engines. He further stated that he had worked with Caterpillar diesel engines, including rebuilding and overhauling such engines. Stepanek reviewed documents regarding the repairs made to the truck, viewed photographs, spoke with Genetti and his drivers about their experiences with the truck, and looked at photographs of the engine in the truck. On cross-examination, Stepanek conceded that he did not consider himself to be an expert in engine design or truck sales and admitted that he had not personally seen any of the damaged parts from the truck's engine.

Over objection, Stepanek testified that the repairs done to the truck were indicative of a complete engine failure each time. He stated that trucks can heat up when climbing a mountain or steep grade and that he did not think that such use would do damage to a truck if it was not run into the red zone on the temperature gauge. Stepanek testified that an engine failure could cause radiator fluid to come out of the tailpipe, but eliminated damage to the radiator as a possible cause of the fourth breakdown because no radiator leak was found. He believed the coolant leak indicated an engine failure possibly due to a cracked head, cracked head gasket, or some other failure that allowed an intrusion of coolant into the engine.

Stepanek stated that he did not see any evidence that the Genettis had abused the truck and opined that the first two repairs

had presented to Caterpillar and General Motors a reasonable opportunity to fix the problem and that the additional problems should never have occurred. Stepanek also testified that in his opinion, the use and fair market value of the truck had been substantially impaired. On cross-examination, Stepanek conceded that he could not identify a specific manufacturing defect or worker defect related to any one of the four breakdowns.

Testimony from employees of both Caterpillar and General Motors indicate that there was no evidence that the truck had been altered or modified in a way that would void the warranties. Generally, the employees were unable to state an opinion as to the cause of the first three breakdowns. In regard to the fourth breakdown, Douglas M. Chevalier, a mechanical engineer at Caterpillar who inspected parts from the truck, disagreed with Stepanek's testimony that the cause of the fourth breakdown could have been due to an engine failure evidenced by coolant running into the engine and/or coming out of the tailpipe. Chevalier provided testimony to refute Stepanek's theories and also provided testimony regarding "cavitation erosion," a condition Chevalier observed on the engine that is normally not seen until a vehicle has high mileage, hours, or load. Chevalier opined that the cause of the fourth breakdown was overheating and stated that he found no signs of defects in manufacturing or workmanship.

Chevalier testified that theoretically, he would not consider the actions taken by Seeley of stopping and adding coolant while keeping the temperature gauge out of the red zone to be improper maintenance. He stated that in practice, however, the truck arrived at Commerce City in an overheated condition.

Valbert, another Caterpillar expert, testified that based on the weight information and a calculation that indicates how hard the engine has to work to do its job, the truck fell into a range labeled "severe application." Valbert testified that it did not mean the use of the truck was prohibited, but that it meant the truck was placed in a severe environment. Valbert testified that in his opinion, the cause of the fourth breakdown was overheating.

7. Posttrial Motions

At the conclusion of the Genettis' evidence, General Motors and Caterpillar moved for a directed verdict, arguing that there

was an absence of proof of a defect in material or workmanship. The motions were overruled. At the instruction conference, General Motors objected to the verdict form pertaining to the U.C.C. claim, arguing that a parenthetical notation on the form was not a correct statement of the law. The form reads as follows:

> If you find for the Plaintiffs:
>
> 1. Please write in the blank the Plaintiffs total damages: _____
>
> 2. How much of these damages were proximately caused by Defendant Caterpillar's breach of warranty: _____
>
> 3. How much of these damages were proximately caused by Defendant General Motor's [sic] breach of warranty: _____
>
> (NOTE: The totals of lines numbered 2 and 3 must equal that of line number 1.)

The objection was overruled.

8. Verdict

The jury returned a verdict in favor of the Genettis on the breach of warranty claim. The jury found the total damages to be $105,000 with $36,500 allocated to Caterpillar and $68,500 allocated to General Motors. The jury also found that General Motors was liable under the Warranty Act but did not assess damages. The Genettis then made motions to amend their petition for an award of prejudgment interest, costs, and attorney fees. The Genettis also made a motion to assess damages against General Motors under the Warranty Act. In that motion, the Genettis requested damages of at least $53,578.71 and argued that any damages under the Warranty Act were concurrent with damages assessed for breach of express warranty under the U.C.C. up to that amount. On May 3, 1999, Caterpillar made a motion to set aside the verdict and for a new trial and General Motors made a motion for a new trial.

On June 8, 1999, the district court issued an order concluding that breach of express warranty under the U.C.C. and a violation of the Warranty Act were separate statutory proceedings, each complete in themselves. The order also stated that a mistake had probably been made in submitting the theory of recovery under

the Warranty Act to the jury. The court then ordered the Genettis to file an election of remedies within 10 days.

On June 24, 1999, the district court issued a memorandum stating that it had taken under advisement a motion by the Genettis to withdraw or reconsider the order of June 8. In the memorandum, the district court concluded that an action under the Warranty Act was equitable in nature and that the Genettis had an adequate remedy at law under the U.C.C. As a result, the court stated that it intended to dismiss the claim under the Warranty Act and denied an award of attorney fees. In its final order, the district court awarded prejudgment interest and dismissed the Warranty Act claim, resulting in a judgment against Caterpillar of $39,600.47 and a judgment against General Motors of $74,319.88. Caterpillar appeals, and the Genettis and General Motors cross-appeal.

II. ASSIGNMENTS OF ERROR

Caterpillar assigns that the district court erred in denying its motion for a (1) directed verdict and motion to set aside the verdict based on the finding that the Genettis did not have to prove an engine defect to recover for breach of warranty and (2) new trial based on the admission of Heiser's testimony in light of the fact that the court later dismissed the Warranty Act claim.

In its first brief filed on cross-appeal, General Motors joins Caterpillar in assigning that the district court erred in overruling the motions for a directed verdict and motions for a new trial and joins Caterpillar's arguments regarding proof of a defect. General Motors also assigns that the district court erred in admitting Heiser's testimony, but advances a somewhat different argument than Caterpillar on the issue. Finally, General Motors assigns that the district court erred in submitting a verdict form to the jury which required them to allocate damages between the defendants.

In its second brief filed on cross-appeal, General Motors assigns three additional, different assignments of error.

The Genettis assign on cross-appeal, rephrased, that the district court erred in requiring them to make an election of remedies between the Warranty Act and the U.C.C.; dismissing their Warranty Act claim; and because the Warranty Act claim was

dismissed, failing to award attorney fees and costs under the Warranty Act.

III. STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000); *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

[2] The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Smith v. Paoli Popcorn Co.*, 260 Neb. 460, 618 N.W.2d 452 (2000); *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

[3] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[4] A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *McLain v. Ortmeier, supra*; *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999).

IV. ANALYSIS

1. General Motors' Second Cross-Appeal

Before addressing the merits of this appeal, we first address which assignments of error are properly before us. Caterpillar filed an appeal of the district court's order, and the Genettis and General Motors filed cross-appeals. On January 25, 2000, General Motors filed a brief of the appellee and brief on cross-appeal containing five assignments of error. On April 21, General Motors filed an answer brief on Genettis' cross-appeal and a brief on cross-appeal containing three new assignments of error. The Genettis filed an answer brief contending in part that

the second brief on cross-appeal filed by General Motors was out of time and that Neb. Ct. R. of Prac. 9 (rev. 2000) does not authorize the filing of two cross-appeals in the same proceeding. We agree.

[5,6] We have said that the purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief. *Keithley v. Black*, 239 Neb. 685, 477 N.W.2d 806 (1991). Thus, errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief. *Id.*

[7,8] The rules regarding the manner of presenting a cross-appeal are the same as the rules applicable to an appellant's brief. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). Thus, we conclude that errors not assigned in the initial brief on cross-appeal are waived and may not be asserted for the first time in an answer brief. Accordingly, we will not address the assignments of error raised in General Motors' second brief on cross-appeal.

2. Proof of Defect

Caterpillar and General Motors argue that the district court should have directed a verdict in their favor because the Genettis failed to present expert testimony to prove that the fourth breakdown was caused by a defect in material and workmanship. In particular, it is argued that Stepanek failed to provide an opinion with any reasonable degree of certainty regarding what caused the breakdowns and could not point to a specific defect in material or workmanship. The Genettis contend that they need not prove the specific defect that caused the breakdowns in order to prove that the engine was defective.

The Warranty Act provides:

> If the manufacturer, its agents, or authorized dealers are unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and market value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall replace the motor vehicle with a comparable motor vehicle or accept return of the vehicle from the consumer and refund

> to the consumer the full purchase price including all sales taxes, license fees, and registration fees and any similar governmental charges, less a reasonable allowance for the consumer's use of the vehicle. . . . It shall be an affirmative defense to any claim under sections 60-2701 to 60-2709 (1) that an alleged nonconformity does not substantially impair such use and market value or (2) that a nonconformity is the result of abuse, neglect, or unauthorized modifications or alterations of a motor vehicle by a consumer.

§ 60-2703.

[9,10] Concerning breach of express warranty, we have said that in order for a plaintiff to recover, he or she must show, among other things, that " 'the goods did not comply with the warranty, that is, that they were defective.' " *Delgado v. Inryco, Inc.*, 230 Neb. 662, 666-67, 433 N.W.2d 179, 183 (1988). Thus, where no evidence is provided to show that a defect in a product caused the plaintiff's damages, he or she cannot recover for breach of warranty. *Id.* We have further said:

> "The reliance on eyewitnesses alone is not fatal when a defect is obvious to a layman, but when standards of performance of the product are not generally known, other evidence, usually expert testimony, is necessary to prove proper or acceptable standards of performance. That evidence may be by evidence as to usages in the trade, the characteristics exhibited by similar goods manufactured by other sellers, or by government standards and regulations in the area."

Id. at 667, 433 N.W.2d at 183, quoting *Durrett v. Baxter Chrysler-Plymouth, Inc.*, 198 Neb. 392, 253 N.W.2d 37 (1977). We have not decided, however, whether a precise or specific defect must be proved in order to find that a product is defective under either the U.C.C. or the Warranty Act.

Of the few jurisdictions that have directly addressed the issue, the majority do not require proof of a specific defect under either the U.C.C. or a statutory scheme similar to the Warranty Act. See, e.g., *Universal Motors, Inc. v. Waldock*, 719 P.2d 254 (Alaska 1986) (applying federal Magnuson-Moss Warranty Act and stating that same principle applies under U.C.C.); *Mason v. Porsche Cars of North America*, 688 So. 2d 361 (Fla.

App. 1997) (applying Magnuson-Moss Warranty Act and state's warranty act); *Osburn v. Bendix Home Systems, Inc.*, 613 P.2d 445 (Okla. 1980) (applying U.C.C.); *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302 (1971) (applying rule in breach of warranty action without stating if it was under U.C.C.). Rather, it is generally held that a plaintiff is not required to prove the specific product defect and that the proof may be circumstantial in nature or inferred from the evidence. See, *Mason, supra*; *Osburn, supra*; *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664 (Tex. 1996) (applying U.C.C.); *Vernon, supra*; *Colorado Serum Company v. Arp*, 504 P.2d 801 (Wyo. 1972) (applying U.C.C.). See, generally, *Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (1981).

As one court explained, "Problems arise when a consumer is required to prove that there are defects in specific materials or particular workmanship." *Universal Motors, Inc.*, 719 P.2d at 259. Under the Warranty Act, the consumer must present credible evidence that the defect is caused by materials or workmanship, but the burden to show consumer abuse is on the warrantor. This burden of proof requirement is basically ignored if the consumer is charged with proving not only that a defect existed, but the specific or precise cause of the defect. See *id.* (discussing this consideration under Magnuson-Moss Warranty Act). Further, under many warranties, including the warranties at issue in this case, a consumer requiring warranty service on a vehicle may take the damaged vehicle only to a service department at an authorized dealer. Thus, in a case involving an automobile, the Alaska Supreme Court stated:

> Placing the burden on the consumer to prove a precise defect is unfair and unconscionable since the dealer and manufacturer could tamper (whether intentionally or inadvertently) with the evidence. For example, [the consumer] claims that [the manufacturer's] work on the engine destroyed evidence of timing problems because the cylinder head was removed.
>
> . . . To impose an unreasonably heavy burden on consumers is to deny them a meaningful remedy.

Universal Motors, Inc., 719 P.2d at 259. This principle applies to a claim under either the Warranty Act or the U.C.C. Likewise,

the Florida Court of Appeals has stated that "[i]n light of the technological complexity of most automobiles currently on the market, forcing consumers to identify the cause, rather than the effect, of a defect would be unrealistically burdensome to the very persons the Warranty Act was meant to aid." *Mason*, 688 So. 2d at 367. See, also, *Vernon*, 26 Utah 2d at 275, 488 P.2d at 306 ("warranty should be given effect, not in any unduly precise or technical interpretation, but in accordance with what the ordinary purchaser would understand from its language").

[11,12] We find these cases persuasive and hold that a precise or specific defect does not need to be proved in order to find a product defective under either the U.C.C. or the Warranty Act. Although expert testimony pointing to a specific defect would be the best means of proving the existence of a defect in some cases, proof that the warranted product is defective may be circumstantial in nature and may be inferred from the evidence. We now turn to the question of whether the Genettis presented sufficient evidence of a defect in order to overcome Caterpillar's and General Motors' motions for a directed verdict.

Although Stepanek could not specifically state what caused the fourth breakdown to occur, he did advance several reasons supported by the testimony and repair records. Stepanek testified that he did not believe the breakdown was due to overheating, but was instead due to an engine failure, such as a cracked head gasket or cracked block that caused coolant to run into the engine. It was not required that Stepanek testify regarding a specific design defect. Further, the Genettis presented evidence that the actions of their employees during the fourth breakdown were proper, including an admission from Chevalier that, theoretically, Seeley's actions were not improper. Thus, the Genettis presented evidence eliminating abuse or misuse as the alternate cause of the breakdown. At that point, it was reasonable for a jury to conclude that if the breakdown was not due to improper use of the truck, then it was due to a defect such as one of those suggested by Stepanek. See, generally, *Colorado Serum Company v. Arp*, 504 P.2d 801 (Wyo. 1972) (plaintiffs adduced proof eliminating alternate causes of their damages, leaving inference of defect). Looking at the evidence, a jury using common sense and experience could reasonably arrive at the con-

clusion that the fourth breakdown was caused by a defect in the engine and should have been covered by the warranty. See *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302 (1971). Accordingly, we conclude that the district court did not err when it refused to direct a verdict.

3. Heiser's Testimony

Caterpillar and General Motors argue that Heiser's testimony was not relevant and should not have been admitted. Both argue that because Heiser did not testify to a specific defect in the engine, the jury could conclude through improper inference that the problems Heiser had with the truck were related to the problems the Genettis had. Caterpillar additionally argues that because Heiser's testimony was admitted against General Motors only on the Warranty Act claim and that that claim was later dismissed, the district court erred in overruling their motions for a new trial.

[13-16] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000); *Snyder v. EMCASCO Ins.* Co., 259 Neb. 621, 611 N.W.2d 409 (2000). 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. See, *Snyder, supra*; *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000). An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Holden, supra.* We have said that an issue as to the existence or occurrence of a particular fact, condition, or event may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events under the same or substantially similar circumstances. *Id.*

In this case, the Genettis offered Heiser's testimony to show that the engine in the truck broke down a fifth time in a manner that was the same or substantially similar to the previous break-

downs. Heiser testified that after he purchased the truck, he encountered problems where the truck lost power and smoked excessively. Later, the engine locked up and water came out of the exhaust pipe, and it was determined that the engine block on the truck was cracked between the cylinders. As a result, General Motors and/or Caterpillar replaced the engine under the truck's warranty. Thus, Heiser testified that the truck broke down in a same or substantially similar manner as it did during the first four breakdowns.

Heiser's testimony was relevant to show that even after repairs were done to the truck in Colorado following the fourth breakdown, the truck still had an unrepaired defect. The testimony was also relevant to disprove allegations that the cause of the fourth breakdown was an overheating of the truck. By presenting evidence that the engine continued to fail in the same manner as it had before, a jury could infer that a defect that went undetected and unrepaired caused not only the fourth breakdown, but the breakdown Heiser encountered as well. As we have previously discussed, we do not require testimony of a specific or precise defect. Evidence of whether a defect continued in the truck and whether the fourth breakdown was caused by a defect as opposed to abuse or misuse of the truck was relevant to the Genettis' theories of recovery under both the Warranty Act and the U.C.C. Thus, we conclude that the district court did not err in admitting Heiser's testimony. Because we conclude that the testimony was relevant under both of the Genettis' theories of recovery, we further conclude that the district court did not err in overruling Caterpillar's motion for a new trial.

4. Genettis' Cross-Appeal

(1) Dismissal of Warranty Act Claim

The Genettis contend that the district court erred when it dismissed their Warranty Act claim, finding that the Warranty Act was in equity and that the Genettis had an adequate remedy at law under the U.C.C. We have not previously addressed whether the Warranty Act is an action at law or an action in equity.

[17-20] We have, however, set out general principles for determining whether a cause of action is equitable or at law. The essential character of a cause of action and the remedy or relief

it seeks as shown by the allegation of the complaint determine whether a particular action is one at law or in equity. *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999). The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. *Id.* This determination is unaffected by the conclusions of the pleader or what the pleader calls it. *Id.* Where a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to. *Southwest Trinity Constr. v. St. Paul Fire & Marine*, 243 Neb. 55, 497 N.W.2d 366 (1993).

In determining that an action under the Warranty Act is in equity, the district court relied on *Motor Vehicle Mfrs. v. State*, 75 N.Y.2d 175, 550 N.E.2d 919 (1990). In that case, the New York Court of Appeals addressed the constitutionality of a mandatory arbitration clause under the state's warranty act based on the argument that an action under the act was at law, thus affording the right to a jury trial. The court further concluded that an action under the act was in equity. In reaching this conclusion, the court reasoned that the replacement remedy provided for under New York's warranty act was akin to specific performance, an equitable remedy. The court determined that the refund remedy was like the remedy of rescission, also an equitable remedy. The court distinguished the state's warranty act remedies from a similar remedy under the U.C.C. for remedy of revocation of acceptance on the basis that under the state's warranty act, cancellation of the contract does not occur before litigation. See, also, *Motor Vehicle Manufacturers Assn. of the United States v. O'Neill*, 212 Conn. 83, 561 A.2d 917 (1989) (no right to jury trial under state warranty act because it was essentially equitable claim for specific performance or rescission; superseded by statute on other grounds as stated in *General Motors Corp. v. Dohmann*, 247 Conn. 274, 722 A.2d 1205 (1998)).

We are not persuaded by the reasoning of these cases. The New York Court of Appeals considered the state's warranty act before it as providing for a cancellation of the contract after litigation. We do not interpret Nebraska's Warranty Act in this manner. Although the remedy afforded by the Warranty Act is similar to the remedy of rescission, not all forms of rescission

are in equity. In particular, the remedy of revocation of acceptance under the U.C.C., a remedy similar to the remedy afforded under the Warranty Act, yet also much like an action based on rescission, is an action at law and not in equity. *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). See Neb. U.C.C. § 2-608 (Reissue 1992).

In *Koperski*, we stated:

> Although rescission was originally an equitable remedy, it is now clear that there are two types of rescission, one being applied to a law action and the other designated as equitable rescission. . . . The Uniform Commercial Code, however, does not use the term "rescission" with reference to Neb. U.C.C. § 2-608 (Reissue 1971), but refers to that remedy under its statutory provisions as "revocation of acceptance." In White & Summers, Uniform Commercial Code (2d ed. 1980), these authorities discuss the relationship between "rescission" and "revocation of acceptance" in § 8-1 at 295 as follows: "A word should be devoted to the ambiguous action called 'rescission.' Some use the word rescission to encompass what the Code defines as a rejection or revocation of acceptance; others use it to mean simply the buyer's act in returning the goods; still others use it to cover the buyer's cancellation of the executory terms of the contract; and finally some might call it the buyer's cause of action for fraud, (including presumably the return of the goods, cancellation of the executory portion of the contract and the return of money paid). It is the apparent intention of the drafters to restrict the word rescission to a rather limited number of cases, those involving a mistake or in which the seller has committed fraud, duress, or the like."

208 Neb. at 37-38, 302 N.W.2d at 660, citing § 2-608, comment 1. We then held that since the plaintiff's action was based on the U.C.C., the action was at law. *Koperski, supra.* See, also, *G.M.A.C. v. Jankowitz*, 216 N.J. Super. 313, 523 A.2d 695 (1987) (since revocation of acceptance is statutory remedy and not equitable action for rescission, it is action at law).

[21] We are persuaded that the remedy under the Warranty Act is essentially the same in character as the U.C.C. remedy of

revocation of acceptance. Unlike a true equitable rescission, the Warranty Act does not base its provision of a remedy on fraud or mistake. Compare *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986) (principal thrust of Nebraska Consumer Protection Act is to prevent unfair or deceptive practices, thus act is in equity). Rather, the Warranty Act provides a remedy essentially the same as revocation of acceptance, but removes what were viewed as some roadblocks to recovery under the U.C.C. Therefore, we determine that the appropriate analogy is to revocation of acceptance rather than to equitable rescission. As we explained in *Koperski*, such a remedy is obtained through an action at law. Accordingly, we hold that an action under the Warranty Act is an action at law and that the district court erred when it dismissed the Genettis' claim under the Warranty Act.

(2) Election of Remedies

The Genettis next contend that if the Warranty Act is an action at law, the district court erred when it originally ordered them to make an election of remedies. The Genettis contend that their action under the U.C.C. for breach of warranty and the action under the Warranty Act are theories of recovery under which they can recover different damages without concerns of obtaining a double recovery because the U.C.C., unlike the Warranty Act, allows recovery of incidental and consequential damages, while the Warranty Act allows recovery of attorney fees. Thus, the Genettis argue that they should recover under the Warranty Act against General Motors up to the amount awarded under the Warranty Act and then recover the remainder of the jury verdict against both Caterpillar and General Motors under the U.C.C.

[22,23] Where a party pleads alternative theories of recovery which are inconsistent in the sense that he or she cannot logically choose one without renouncing the other, he or she must elect between them. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). See *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000). But when alternative theories are consistent, a party must proceed on the alternative theories or forever forgo one theory over the other. *Life Investors Ins.*

Co. v. Citizens Nat. Bank, 223 Neb. 663, 392 N.W.2d 771 (1986). For example, a party cannot proceed on a theory of recovery which is premised on the existence of a contract and at the same time proceed alternatively on a theory that is premised on the lack of a contract. *Vowers and Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998); *Tobin, supra.* Consequently, one who has been induced to enter into an agreement by virtue of a material misrepresentation, that is to say, by virtue of fraud, may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract. *Vowers and Sons, Inc., supra.* This is so because one remedy, damages, depends upon the existence of a contract, and the other, rescission, depends upon the concept that because of the fraud, no contract came into existence. *Id.* Likewise, we have held that the remedies of rescission and damages are inconsistent; the former proceeding upon disaffirmance, and the latter on affirmance of the contract. *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955).

[24-26] The doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party. *Vowers and Sons, Inc., supra.* However, a party may not have double recovery for a single injury or be made " 'more than whole' " by compensation which exceeds the actual damages sustained. 254 Neb. at 516, 576 N.W.2d at 825. Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had. *Id.*

We have never addressed whether damages can be recovered under both the Warranty Act and the U.C.C. for breach of warranty. As previously stated, the remedy under the Warranty Act is essentially the same as the U.C.C. remedy of revocation of acceptance. Thus, in the absence of cases involving an election of remedies between the U.C.C. and a state's warranty act, we find guidance from cases analyzing the remedy of revocation of acceptance.

Other jurisdictions have held that when recovery is sought under the U.C.C. for both breach of warranty and revocation of acceptance, the plaintiff cannot recover under both theories.

General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 703 P.2d 169 (1985); *Adams v. Grant*, 292 S.C. 581, 358 S.E.2d 142 (S.C. App. 1986). See, generally, *Griffith v. Latham Motors, Inc.*, 128 Idaho 356, 913 P.2d 572 (1996) (stating that revocation of acceptance and breach of warranty are two different claims; plaintiff was entitled to bring both, but plaintiff could have only one satisfaction); *Hardy v. Winnebago*, 120 Md. App. 261, 706 A.2d 1086 (1998) (implying in dicta that plaintiff may not recover under both state's warranty act and breach of warranty claims). But see, *Maserati Automobiles Inc. v. Caplan*, 522 So. 2d 993 (Fla. App. 1988), *disapproved on other grounds, Perez-Borroto v. Brea*, 544 So. 2d 1022 (Fla. 1989) (stating that election is not required between revocation of acceptance and breach of warranty and concluding that election was not required under state warranty act); *Garrett v. Mazda Motors of America*, 844 S.W.2d 178 (Tenn. App. 1992) (holding that election is not required between action for fraud or punitive damages and state's warranty act claim).

In *Anaya, supra*, the New Mexico Supreme Court held that once a jury found the plaintiffs had successfully proved all the elements essential to establish a rightful revocation of acceptance, a claim based on breach of warranty was extinguished. The court noted that although New Mexico's version of the U.C.C. § 2-608, comment 1, states that a buyer is not required to elect between revocation of acceptance and recovery of damages for breach, the nonalternative nature of the remedies does not entitle the buyer to a double recovery. Accordingly, the court stated that "although initially a buyer may present both theories and need not elect between them, the finding of either final acceptance or revocation of acceptance of nonconforming goods ultimately determines the available remedy." *Anaya*, 103 N.M. at 74, 703 P.2d at 171.

Likewise, in *Adams, supra*, the South Carolina Court of Appeals held that a trial court properly submitted a case to a jury on whether the plaintiff had properly revoked acceptance of a vehicle and breach of warranty, utilizing special verdict forms. The court noted that the basic purpose of an election of remedies is to avoid a double recovery. The court stated, "In many instances, this means the case can go to the jury on all causes of

action supported by the evidence at trial, with election required after verdict but before judgment is entered." *Adams*, 292 S.C. at 585, 358 S.E.2d at 144.

Concerning revocation of acceptance, we have stated that once goods are accepted, the buyer is entitled to cancel the contract and recover so much as has been paid upon establishing that he or she has justifiably revoked his or her acceptance. See, *Warner v. Regan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992); *Wendt v. Beardmore Suburban Chevrolet*, 219 Neb. 775, 366 N.W.2d 424 (1985). The U.C.C. also provides that the buyer may recover damages in a suit for breach of warranty in regard to accepted goods. *Id.* We have said that the two options are nonalternative in character and that the buyer may pursue either remedy or both, but the remedies are treated in entirely different sections of the U.C.C. and offer separate forms of relief. *Id.*

Although we have not specifically discussed when, or if, an election must be made between remedies for breach of warranty and revocation of acceptance, in *Warner, supra*, and *Wendt, supra*, we cited to *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982), a case which indicates but does not clearly hold that an election is required. Further, when holding that a remedy for revocation of acceptance extinguishes recovery for breach of warranty, the court in *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 703 P.2d 169 (1985), also cited to *Harper* for this proposition.

[27,28] We are persuaded by those cases which hold that an election must be made between remedies for breach of warranty and the remedy of revocation of acceptance but that both theories may be presented to the jury. Although the remedy under the Warranty Act is not the remedy of equitable rescission, it is based on a disaffirmance of the contract, while the U.C.C. remedy for breach of warranty is based on affirmance of the contract. Section 60-2708 provides that nothing in the Warranty Act "shall in any way limit the rights or remedies which are otherwise available to a consumer under any other law." We read this section to mean that a theory of recovery under the Warranty Act may be brought together with other theories of recovery. Because actions for relief under the Warranty Act and the U.C.C. have different elements of proof, a plaintiff could prove

one theory but not the other. Thus, both theories may be submitted to the jury. Recovery under both, however, is inconsistent. Once a plaintiff receives verdicts under both theories of recovery, he or she must elect between them. In this case, the Genettis could elect to recover damages and attorney fees under the Warranty Act or elect to recover damages, including incidental and consequential damages, under the U.C.C. They cannot, however, recover from both.

5. Allocation of Damages

General Motors contends that the district court erred in utilizing a verdict form which required the jury to allocate damages between General Motors and Caterpillar on the breach of warranty claim. General Motors contends that the district court should have entered a single judgment against both Caterpillar and General Motors jointly and severally. The Genettis do not object to such a judgment as long their assignments of error are preserved and prejudgment interest is recalculated.

[29,30] Under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. *Lackman v. Rouselle*, 257 Neb. 87, 596 N.W.2d 15 (1999), citing *Gergen v. The Western Union Life Ins. Co.*, 149 Neb. 203, 30 N.W.2d 558 (1948); *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994) (where two causes produce single indivisible injury, joint and several liability attaches). Under tort law, where joint tort-feasors do not act as part of a common enterprise or plan, Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) alters the common law by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's proportionate liability in an action involving more than one defendant. *Lackman, supra.*

This case does not involve a tort claim under which an allocation of damages between the parties might be necessary. Rather, this case involves a single injury caused by either defendant's breach of warranty. Thus, the Genettis could recover their damages from either defendant who could then seek indemnity or contribution from the other defendant. At oral argument, counsel for General Motors stated that an agreement

for indemnity or contribution did indeed exist between itself and Caterpillar, but such an agreement is not in the record. We further note that the Genettis' petition prayed for joint and several liability. We conclude that the district court erred in entering separate judgments against General Motors and Caterpillar on the U.C.C. claim.

V. CONCLUSION

We conclude that the district court properly overruled General Motors' and Caterpillar's motions for a directed verdict. We also hold that the district court did not err in allowing Heiser's testimony into evidence and in overruling Caterpillar's motion for a new trial. The district court erred, however, in dismissing the Genettis' claim under the Warranty Act. We hold that although a claim under the Warranty Act is not an action in equity, an election of remedies must be made between recovery under the Warranty Act and under the U.C.C. for breach of warranty before a judgment is entered. We also hold that the court erred in entering separate judgments against Caterpillar and General Motors on the U.C.C. claim.

The record in this case reflects that the issue of damages under the Warranty Act was not submitted to the jury. Further, although the Genettis stated at oral argument that the district court initially made a determination of damages under the Warranty Act, we do not find any determination of damages in the record. Accordingly, we reverse, and remand for a new trial on the issue of damages under the Warranty Act and for an election of remedies if needed.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

WRIGHT and STEPHAN, JJ., not participating.

JOHN MICHAEL MARTIN, APPELLEE,
v. DEBBIE MARTIN, APPELLANT.

621 N.W.2d 511

Filed January 26, 2001. No. S-99-853.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, in which case the appellate court must reach a conclusion independent from the lower court's decision.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Vacated and remanded with directions.

Thomas R. Hickey for appellant.

Patrick T. Riskowski, of Gallup & Schaefer, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court entered a decree on March 8, 1999, dissolving the marriage of John Michael Martin and Debbie Martin and ordering the disbursement of proceeds from the sale of the marital residence. On July 16, the district court confirmed various liens and directed their satisfaction from the proceeds. Debbie appeals.

SCOPE OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, in which case the appellate court must reach a conclusion independent from the lower court's decision. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999).

FACTS

On March 8, 1999, the district court entered a decree of dissolution which provided, inter alia, that the sum of $83,902.88 from the sale of the marital residence should be divided equally between the parties after payment of certain bills. The bills to be paid included a guardian ad litem fee of $8,362.12, a court

reporter fee of $628, and John's attorney fee in the amount of $20,000.

On March 29, 1999, Debbie's attorney filed what was characterized as a notice of an attorney's lien in the amount of $13,321.67. On June 3, the district court entered an order commanding the clerk of the district court to disburse $20,000 to John's attorney and $8,362.12 to the guardian ad litem. On June 15, Debbie's attorney filed what was characterized as an amended notice of an attorney's lien in the amount of $13,582.17 and a motion to compel distribution of the marital residence proceeds and to have the district court confirm or deny the several liens against the funds. Debbie's motion to compel was heard by the district court on June 21, but there is no transcript of the hearing.

On July 16, 1999, the district court entered an order concerning the motion to compel. The order stated:

> THIS MATTER came on for hearing on the 21st day of June, 1999, on Respondent's motion to compel the distribution of certain funds held by the Clerk of the Douglas County District Court. More specifically, both the Respondent and the Petitioner, along with the guardian ad litem herein, ask the Court to confirm or deny the validity of their respective attorney liens.
>
> As the Court recited in its opinion letter dated July 15, 1998, the protracted, dilatory, painful and inexcusable amount of time and money expended for the resolution of this matter lie squarely on the shoulders of the Respondent and her most recent counsel. The Nebraska Supreme Court provided guidance to this Court regarding allocation of fees in Cedars Corporation v. Sun Valley Development Co, 253 Neb. 999 (1998). Pursuant to Jensen v. State, 184 Neb. 802, 172 N.W. 2d 607, the determination of reasonable attorney's fees should be considered upon the importance and result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the difficulty of questions raised, and the time and labor necessarily required in the performance of those

duties. Counsel for Respondent shall not be rewarded for and Petitioner punished by Respondent and her counsel's frivolous behaviors.

IT IS THE ORDER AND JUDGMENT of this Court that Attorney Patrick T. Riskowski's lien in the amount of $25,515.40 is hereby confirmed and ordered to be disbursed by the Clerk of this Court forthwith.

IT IS THE ORDER AND JUDGMENT of this Court that Attorney Karen L. Vervaecke's lien in the amount of $8,362.12 is hereby confirmed and ordered to be disbursed by the Clerk of this Court forthwith.

IT IS THE ORDER AND JUDGMENT OF this Court that Attorney Thomas R. Hickey's lien is confirmed in the amount of $1,200.00, and the Clerk is directed to disburse to Thomas R. Hickey the amount of $1,200.00 forthwith.

FURTHER, IT IS THE ORDER AND JUDGMENT OF this Court that the remaining funds shall be distributed equally between the Petitioner and Respondent. The Respondent has previously been ordered to pay the costs of this action and said costs shall be deducted prior to the final disbursement to the Respondent.

It is from this order of July 16, 1999, that Debbie appeals.

ASSIGNMENTS OF ERROR

Debbie claims, summarized and restated, that the district court erred by issuing ex parte orders without proper motion, notice, or hearing and by modifying its decree of dissolution and the amount of attorney fees awarded to John's attorney after the decree of dissolution had become final.

ANALYSIS

Debbie first argues that the district court erroneously entered ex parte orders without motion, notice, or hearing. She points to numerous instances in the guardian ad litem's time slips where the guardian ad litem telephoned or met with the judge ex parte. The trial docket indicates that the district court entered at least five orders at the request of the guardian ad litem and that two of the orders were designated "ex parte." Debbie also contends that the order entered June 3, 1999, which disbursed $20,000 to

John's attorney and $8,362.12 to the guardian ad litem was entered ex parte.

We point out that each of these orders, with the exception of the June 3, 1999, order, was entered prior to the decree of dissolution. Therefore, we conclude that such matters are not properly before us, since they are matters that occurred prior to the decree of dissolution and could or should have been addressed in an appeal from the decree entered March 8. The order signed on June 3 did nothing more than order the clerk to do what the clerk had previously been ordered to do by the decree of March 8. Therefore, we conclude that this assignment of error is without merit.

Next, Debbie argues that the district court lacked subject matter jurisdiction to enter the July 16, 1999, order, which she contends wrongfully modified the decree by increasing the amount of attorney fees payable. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, in which case the appellate court must reach a conclusion independent from the lower court's decision. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999).

There is no record of what transpired at the June 21, 1999, hearing referred to in the July 16 order. At oral argument, John's attorney stated that on June 21, he appeared in chambers with John and the guardian ad litem. Debbie's attorney participated via telephone. It was the understanding of both parties' counsel that the district court's bailiff had called Debbie's counsel at the direction of the court and told Debbie's counsel not to appear. A court reporter was not present at the hearing, and no record was made of the proceeding. After this proceeding, the district court entered the July 16 order.

The order of July 16, 1999, confirmed an attorney's lien in favor of John's attorney in the amount of $25,515.40 and ordered that this amount be paid out of the funds held by the clerk of the district court prior to distribution to the parties. The order also confirmed a lien in favor of Debbie's attorney in the amount of $1,200 despite the fact that the district court did not award attorney fees to Debbie in the decree. This amount was also to be paid out of the funds held by the clerk of the district court. Consequently, the proceeds to be divided equally by the parties were decreased by $6,715.40.

The issue is whether the district court's order of July 16, 1999, was valid. John argues that the district court had subject matter jurisdiction to issue this order under common-law rules of equity and Neb. Rev. Stat. § 42-351 (Reissue 1998). He relies upon our decision in *Gatchell v. Henderson*, 156 Neb. 1, 54 N.W.2d 227 (1952), in which we stated that where a court dealing in equity has money or property under its jurisdiction, it has the power to appropriately direct its application in order to carry out justice.

The general proposition stated in *Gatchell* does not apply to the facts of this case. This court stated in *Gatchell*, 156 Neb. at 11, 54 N.W.2d at 233, that "'"[e]quity will devise a remedy to meet emergencies, and will adjust the property interests of litigants whenever it can do so *without prejudice to the legal or equitable rights of any person*."'" (Emphasis supplied.) For the district court to subsequently modify an award of attorney fees after a decree of dissolution has been entered and no appeal has been taken from such decree is clearly prejudicial to Debbie's rights.

Nor does § 42-351 support John's position. Section 42-351(1) states:

> In proceedings under sections 42-347 to 42-381, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorney's fees.

This statutory provision merely confers subject matter jurisdiction on the county and district courts to hear domestic relations disputes. While § 42-351 conferred jurisdiction upon the district court to make an award of attorney fees in the first instance, it does not authorize the district court to modify, sua sponte, a final order from which no appeal has been taken.

We treat the order of July 16, 1999, as an invalid attempt by the district court to modify the decree of dissolution sua sponte. No application to modify the terms of the decree was filed. The proceedings which spawned the July 16 order were conducted in

chambers, without a court reporter. No record was made of the proceedings, and opposing counsel was apparently not permitted to attend in person. We conclude that the actions of the district court were improper and an abuse of discretion. We therefore vacate the July 16 order and declare it to be void and of no force and effect.

CONCLUSION

For the reasons set forth herein, we vacate the district court's order of July 16, 1999, and we remand the cause with directions that the funds held by the clerk of the district court be distributed forthwith in accordance with the decree of dissolution entered March 8.

VACATED AND REMANDED WITH DIRECTIONS.

GARVEY ELEVATORS, INC., APPELLANT, V. ADAMS COUNTY BOARD OF EQUALIZATION, APPELLEE.

621 N.W.2d 518

Filed January 26, 2001. No. S-00-226.

1. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Taxation: Valuation: Presumptions: Evidence: Proof: Appeal and Error.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) creates a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.
3. **Taxation: Valuation: Proof: Appeal and Error.** In an appeal from a county board of equalization, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed on the property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

4. **Taxation: Valuation: Words and Phrases.** Actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade.
5. **Taxation: Valuation.** Based upon the applicable law, a county board of equalization need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the board's valuation was unreasonable or arbitrary.

Appeal from the Nebraska Tax Equalization and Review Commission. Affirmed.

Carl J. Sjulin, of Rembolt Ludtke & Berger LLP, for appellant.

Donna Fegler Daiss, Adams County Attorney, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Garvey Elevators, Inc. (Garvey), protested the 1998 assessment valuation of two parcels of commercial property it owned in Adams County, Nebraska. The Adams County Board of Equalization (Board) reduced the value of one of the parcels, but not the other. Garvey appealed the Board's determination to the Tax Equalization and Review Commission (TERC), which affirmed the decision of the Board. Garvey timely appealed to the Nebraska Court of Appeals, and we moved this case to our docket pursuant to our power to regulate the caseloads of this court and the Court of Appeals.

SCOPE OF REVIEW

[1] Any party aggrieved by a final decision in a case appealed to TERC shall be entitled to judicial review in the Court of Appeals. See Neb. Rev. Stat. § 77-5019(1) (Supp. 1999). In such an appeal, the appellate court reviews for errors appearing on the record of TERC. See § 77-5019(5). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000).

FACTS

Garvey is in the grain storage and merchandising business. At one time, it owned approximately 30 elevator sites throughout Kansas, Texas, and Nebraska. Since 1994, Garvey has been in the process of winding down its business and has sold all but three of its sites, one of which is the subject of this appeal.

The property in question consists of two parcels of property located in Adams County, Nebraska. The first parcel, which we refer to as the "improved parcel," consists of approximately 22.09 acres. The improvements on this parcel have a total capacity of 8 million bushels, including a grain elevator terminal which has a concrete elevator with a total of 258 bins and 4,733,000 bushels of storage capacity. The elevator has a "headhouse" with access to various bins from both the top and bottom. There are two legs in the house that can handle 25,000 bushels per hour and two legs outside that can handle 7,000 bushels.

The improved parcel also has a "rail loadout facility" at the east end. In addition, there is a steel tank with a capacity of approximately 818,000 bushels. There is a flat storage building that is made of concrete and has a storage capacity of 2.5 million bushels. Other improvements include a grain dryer with two legs, two rail pits, two truck scales, an office/shop/break room, a storage building, and a "[c]over truck pit cover with two pits." The improved parcel has rail service from both Burlington Northern and Union Pacific railroads and has 4,600 feet of onsite rail trackage which may be used to load grain. The second parcel of property, which we refer to as the "unimproved parcel," consists of approximately 83.82 acres of solely agricultural land.

Garvey alleged in its protest to the Board that for the tax year 1998, the Adams County assessor proposed valuing the improved parcel in the amount of $1,965,375. This amount included $1,845,395 for the improvements on the property and $119,980 for the land itself. However, the property record card for the improved parcel indicates that the assessor had proposed valuing the improved parcel in the amount of $1,871,785, which included $1,757,520 for the improvements on the property and $114,265 for the land itself. As TERC noted, nothing in the record explains the difference between the valuations.

Garvey filed its protest regarding the improved parcel with the Board on June 16, 1998. Garvey requested that the valuation of the improved parcel be reduced to zero. On July 29, the Board reduced the 1998 assessment value of the improved parcel to $1 million. This amount included $880,020 for the improvements on the property and $119,980 for the land itself.

With respect to the unimproved parcel, Garvey claimed that the assessor had proposed valuing this property in the amount of $72,415 for the tax year 1998. Garvey also protested the valuation of the unimproved parcel and requested that the valuation be reduced to zero. TERC concluded that the Board's final determination of value for the unimproved parcel was $72,415.

On July 31, 1998, Garvey appealed the Board's decision to TERC. However, neither party filed a transcript of the proceedings before the Board as a part of the record.

At the hearing, TERC took notice of certain documents, as authorized by Neb. Rev. Stat. § 77-5016(5) (Supp. 1999), including

> *the 1998 County Profiles for Adams County* . . . the 1998 Assessor's Interviews by the Property Tax Division; the 1998 Qualified Sales Report Profiles; the *1999 Formal Plan of Equalization*; the 1998 *Statewide Equalization Proceedings*; the Nebraska Real Estate Appraiser Board Certification Requirements . . . the *Marshall Valuation Service* Historical Information . . . three standard reference works published by the International Association of Assessing Officers: *Property Assessment Valuation, Second Edition* (1996); *Property Appraisal and Assessment Administration* (1990) . . . *Glossary for Property Appraisal and Assessment* (199[7]); the Soil Survey for Adams County; the *Uniform Standards of Professional Appraisal Practice (1999)*; and 42 U.S.C. § 9601 and related statutes.

In its order, TERC made certain findings of fact and conclusions which are set forth below: TERC found that Garvey was the owner of record of the two parcels of property in question and that the Board had granted Garvey's protest in part by reducing the assessed value of the improved parcel to $1 million. TERC found that Garvey had also protested the assessor's

proposed value of $72,415 for the unimproved parcel, but noted that there was no record of the Board's action on this portion of the protest.

The evidence showed that AGP Grain Cooperative (AGP) had offered to purchase 30 grain elevators from Garvey in the early 1990's subject to an environmental site assessment for each property. AGP acquired 27 of these elevators from Garvey but did not purchase the other 3 based on the results of the environmental site assessments. When a "Phase I Environmental Site Assessment" was conducted on the property in question, it was determined that the soil was contaminated with carbon tetrachloride in an area consisting of approximately 502,655 square feet extending down to the water table. The total soil affected was estimated to be 55 million cubic feet.

The results from the second stage of the assessment showed that tap water samples contained 199 micrograms per liter of carbon tetrachloride. The maximum level of carbon tetrachloride allowed in ground water in Nebraska is 5 micrograms per liter. The measured concentrations of carbon tetrachloride obtained from the site exceeded both state and federal standards. It was undisputed that none of the buildings on the property were contaminated or otherwise affected.

Garvey offered evidence that it had submitted proposed remediation plans to the Nebraska Department of Environmental Quality (DEQ) to address both the soil and ground water contamination. As of January 1, 1998, Garvey had not begun remediation efforts to correct the contamination caused by the carbon tetrachloride.

The evidence showed that instead of selling this property to AGP, Garvey had entered into a "Put Through Agreement" with AGP. The term of the agreement was 5 years commencing April 1, 1997, and ending March 31, 2002. The agreement granted AGP the exclusive right to "put through" its grain, seed, feed, and other similar commodities at Garvey's facility. AGP agreed to pay Garvey a fee equal to three-quarters of 1 cent per bushel of grain loaded out by Garvey. It guaranteed that no less than 1,444,444 bushels of grain would be loaded out each month. Pursuant to this agreement, the minimum fee that Garvey would receive was $10,833.33 per month. In addition, if the number of

bushels loaded out at the end of the year exceeded 17,333,333, AGP agreed to pay Garvey three-quarters of 1 cent per bushel in excess of that amount. AGP also agreed to pay Garvey reasonable operating costs incurred in connection with the property during the agreement. It further agreed to pay $61,211.27 at the execution of the agreement as reimbursement for improvements made to the property by Garvey. The agreement contained a purchase option which permitted AGP to purchase the property for $1.7 million.

TERC found that from the record before it, the actual or fair market value (including the effect on value of the contamination) as of the assessment date was $1 million for the improved parcel. TERC found that the property record card for the unimproved parcel demonstrated that the Board's final determination of value for the unimproved parcel was $72,415 and that $72,415 was the actual or fair market value as of the assessment date. TERC concluded that there was not sufficient evidence to establish that the decision of the Board was unreasonable or arbitrary. TERC therefore affirmed the decision of the Board. Accordingly, TERC determined that for the 1998 tax year, the value of the improved parcel was $1 million and the value of the unimproved parcel was $72,415. Garvey timely appealed.

ASSIGNMENTS OF ERROR

Garvey asserts that TERC erred (1) in affirming the decision of the Board, (2) in finding that the Board's valuation was entitled to a presumption of validity, (3) in disregarding the substantial competent evidence adduced by Garvey which demonstrated that the valuation was arbitrary and unreasonable, and (4) in overruling Garvey's objections and considering arbitrary, capricious, and irrelevant evidence.

ANALYSIS

Our review is for errors appearing on the record of TERC. Any party aggrieved by a final decision in a case appealed to TERC shall be entitled to judicial review in the Court of Appeals. See § 77-5019(1). In such an appeal, the appellate court reviews for errors appearing on the record of TERC. See § 77-5019(5). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the

law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000).

[2,3] Neb. Rev. Stat. § 77-1511 (Reissue 1996) provides that TERC shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action taken by the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low. We have held that § 77-1511 creates a presumption that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. See *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000). That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Id.* From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Id.* In an appeal from a county board of equalization, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed on the property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

Garvey first argues that the Board's valuation is not entitled to any presumption because the Board failed to act upon its own information and failed to utilize any of the required statutory methods for determining the actual value of the property. Garvey claims that because the Board did not offer any evidence to support its valuation of the subject property, the Board was not entitled to a presumption of validity regarding the $1 million valuation.

In support, Garvey relies upon *First Nat. Bank v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989). At that time, an appeal from the county board of equalization was tried de novo in the district court. On appeal to the Supreme Court, an equity case involving an action by a county board of equalization was a trial of factual questions de novo on the record, requiring the Supreme Court to reach a conclusion independent of the findings of the trial court.

The dissent in *First Nat. Bank*, citing *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966), stated:

> The record shows that the county assessor had never been in the building, did not personally inspect or measure the property, and relied entirely upon the determination that had been made by the appraisal company. Where the assessor does not act upon his own information, or does not make a personal inspection of the property, there is no presumption that the official assessment is valid.

First Nat. Bank, 233 Neb. at 422, 445 N.W.2d at 887.

The denial of this presumption was based upon *H/K Company v. Board of Equalization*, 175 Neb. 268, 121 N.W.2d 382 (1963), in which we stated that generally the valuation of property made by an assessor for taxation purposes is presumed to be correct if it reflects the assessor's own information and judgment. If the assessor does not inspect the property and accepts the valuation fixed by another person, this presumption does not exist.

We are not persuaded by Garvey's argument that the Board was not entitled to such presumption. The cases relied upon by Garvey address the presumption given to the determination made by the assessor. At the hearing before TERC, the current assessor testified that she was not the assessor at the time the Board made its determination. The testimony did not establish that the assessor who valued the property had failed to perform any analysis to support the assessor's valuation of the property. No record was made of the proceedings before the Board, and there was no evidence to establish that a valid assessment of the property had not been made. Each party was in agreement that the value of the property before consideration of the contamination issue was $1.9 million.

Accordingly, we determine Garvey did not establish that the Board was not entitled to a presumption that the Board faithfully performed its official duties in making the assessment and acted upon sufficient competent evidence to justify its action. What is before us is the Board's reduction of the valuation made by the assessor. Accordingly, Garvey's attempt to show that the assessor did not perform his or her official duties in making the assessment of the property is not at issue.

[4] In conjunction with this argument, Garvey claims that the Board failed to utilize any of the methods required by Neb. Rev. Stat. § 77-112 (Cum. Supp. 1998) to determine the actual value of the property.

> Actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, taking into account factors such as location, zoning, and current functional use, (2) income approach, and (3) cost approach.

§ 77-112. Garvey claims the Board was required to produce evidence to show how it determined the actual value of the property in accordance with § 77-112. Garvey claims that because the Board did not contradict its evidence in support of a zero valuation, such evidence was therefore undisputed and TERC's decision must be reversed. This argument also fails.

As set forth above, since the burden is upon Garvey to show that the Board's valuation was unreasonable, it must first rebut the presumption given to the Board that it has faithfully performed its duties and has acted upon sufficient competent evidence. Unless Garvey presents competent evidence to rebut such presumption, TERC must affirm the action of the Board. It is only if Garvey successfully presents competent evidence to rebut this presumption that the reasonableness of the valuation fixed by the Board becomes one of fact based upon all the evidence presented. If Garvey successfully rebuts the presumption, then the Board would be required to present evidence in support of its determination of value of the property. Here, it was uncontested that the value of the property if not contaminated was

approximately $1.9 million. The Board then reduced the value of the improved parcel to $1 million. Garvey must show by competent evidence that this action by the Board was unreasonable or arbitrary.

[5] In *Bottorf v. Clay Cty. Bd. of Equal.*, 7 Neb. App. 162, 168, 580 N.W.2d 561, 566 (1998), the Court of Appeals stated: "Based upon the applicable law, the Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary." In discussing how this presumption is to be overcome, we stated in *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 871, 606 N.W.2d 786, 791 (2000), that "[t]he threshold hurdle that the appellants must overcome is the presumption that the Board faithfully performed its official duties in making an assessment and acted upon sufficient competent evidence to justify its action." In order to successfully rebut this presumption, Garvey must present competent evidence to the contrary. Until there has been competent evidence presented, the Board does not have to present any evidence to support its valuation.

TERC determined that Garvey had presented no evidence of comparable properties in Adams County. TERC found that Garvey's evidence of actual value, a "Summary Appraisal Report" (exhibit 2) and a "Restricted Appraisal Report" (exhibit 17), were not credible. Since TERC concluded that Garvey's evidence was not credible, it found that Garvey had not successfully rebutted the existing presumption. Thus, TERC concluded that there was insufficient evidence to establish that the Board's decision was unreasonable or arbitrary.

Garvey argues that even if the Board is entitled to the aforementioned presumption, it successfully rebutted such presumption and that, therefore, the Board was required to put on evidence to support its valuation. See *Bottorf v. Clay Cty. Bd. of Equal., supra*. In support, Garvey argues that because the actual value of the improved parcel if uncontaminated was approximately $1.9 million and because a buyer would incur $4,884,000 in remediation expenses, the property had no market value. Garvey contends that no rational buyer would be willing to assume such liability, and therefore, the property has no value.

We therefore proceed to determine whether TERC was clearly wrong in its conclusion that the evidence presented by Garvey was not credible. See *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000). The unreasonableness of the valuation must be established by clear and convincing evidence that such valuation when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty and not mere errors of judgment. See *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). Unless such unreasonableness is shown, TERC must affirm the action taken by the Board. See § 77-1511.

In analyzing Garvey's evidence, TERC found that there were two professionally accepted valuation methodologies for the valuation of contaminated property. Under the first and preferred method, the unimpaired value of the property is determined and then the costs of remediation must be accounted for.

TERC noted that in the first methodology,

> "[t]he starting point for determining market value for properties affected by contamination is the unencumbered, or unimpaired value. This is the value that property would have if no adjustment were made for any environmental problems. Unencumbered value is obtained using standard appraisal methods. Having arrived at an unencumbered value, the appraiser considers costs to correct or control environmental problems as a deduction."

TERC found that the appraiser's reports, which fully deducted the costs to correct or control environmental problems from the unimpaired value, would overstate value lost. Each of the reports showed that if the cleanup costs were deducted directly from the value of the property, a negative property value would be obtained. TERC concluded that such a result was not credible because the property has value in use.

A similar situation was discussed by the New Jersey Supreme Court in *Inmar Associates, Inc. v. Borough of Carlstadt*, 112 N.J. 593, 549 A.2d 38 (1988). There, the court concluded that the methodology for resolving the question of valuation was not simply to deduct the cost of the cleanup from a putative value of

the property. The court stated that such methodology would reflect only the cost accounting practices of the current owners.

Garvey's summary appraisal report concluded that the actual or fair market value of the property as of the assessment date was zero. TERC found that this conclusion was based on the assumptions that there was a dollar-for-dollar reduction in the value of the property by the amount of all the costs of remediation and that all of the capital costs should be deducted in the first year. TERC found that Garvey's appraiser had not justified the use of a dollar-for-dollar reduction in value for the costs of soil remediation and that nothing in the record established that a dollar-for-dollar reduction for these costs should be made against the unimpaired value. The remaining costs were for ground water remediation and ground water monitoring which had not been approved by DEQ. However, Garvey's evidence showed that it did not have an immediate goal of implementing a ground water remediation plan which would achieve 5 parts per billion of carbon tetrachloride.

TERC concluded that if Garvey did not intend to implement such a plan, then the costs for ground water remediation should not be deducted from the value of the property. There was also an issue as to whether Garvey was in fact required by DEQ to remediate the contamination. TERC found that given the clear and convincing standard imposed on Garvey to show that the Board's action was unreasonable, it could not conclude that the dollar-for-dollar reduction incorporated in Garvey's appraiser's opinion of value was appropriate.

TERC also found that Garvey's assumption that all capital costs should be charged off in the first year was not supported by the evidence. Garvey's treasurer testified that as of January 1, 1998, the assessment date, no remediation efforts had been undertaken. Under those circumstances, TERC found that it could be inferred that no capital improvements had been made in 1997 and that, therefore, the costs were speculative as of the assessment date. In addition, Garvey's appraiser did not explain why the entire amount of capital improvements should be charged off in 1 year.

In considering the weight and credibility of the appraisal reports, TERC found that the appraiser's conclusions regarding

value differed widely between the two reports. These appraisals identified two different sets of remediation costs. The first set of remediation costs included the costs of onsite remediation. The summary appraisal report purported to derive these costs from Garvey's remediation plan. However, there were several significant differences in the numbers. The restricted appraisal report's remediation plan set out the costs for a 5-year remediation program, while the summary appraisal report used a period of 10 years to complete the remediation. The soil remediation plan in the restricted appraisal report cost $193,000 for operation and maintenance per year, while the summary appraisal report used an annual maintenance cost of $105,000 per year. Despite differences in the cost figures used in each of these documents, the total cost for the onsite remediation was approximately the same—$2.3 million.

The summary appraisal report also considered costs for offsite down-gradient treatment, which Garvey's remediation plan did not include. These costs were not found in any of the engineering reports, and Garvey's appraiser testified that he did not know where these numbers came from and that they were not in the reports. TERC concluded that since Garvey's treasurer had testified that no remediation efforts had been undertaken as of the assessment date, all the costs were speculative.

The reports also gave different estimates of cash flow for the property. The restricted appraisal report estimated that the net cash flow would be $290,860 for each year after the first year. The summary appraisal report estimated a negative cash flow of $121,140 for years two through six and a positive $378,860 thereafter.

Both appraisals stated an uncontaminated value of $1.9 million, but the restricted appraisal report gave an actual fair market value of $410,000. The summary appraisal report valued the property at zero. Because both appraisals had deducted all the capital costs in the first year on a dollar-for-dollar basis from the actual market value of the property, TERC concluded that Garvey's appraiser's final opinion of value did not comply with the International Association of Assessing Officers' standards on valuation of property affected by environmental contamination.

The second valuation methodology requires a determination of the "value in use." The phrase "value in use" is defined as the value of property for a specific use. See International Association of Assessing Officers, Glossary for Property Appraisal and Assessment 153 (1997). In discussing the value in use of the property, TERC found that Garvey's appraiser's opinion that the subject property had zero value was contradicted by professionally accepted mass appraisal methods. Specifically, TERC noted:

> "Two concepts of value that must be considered in reference to environmentally distressed property are the unencumbered value and the value in use of the property.
>
> "The unencumbered value is the value that the property would have if no adjustment were made for any environmental encumbrance. This value can be obtained using standard appraisal methods. There is a tendency to discount this value based on costs related to remediating or isolating the environmental contamination. Fully deducting the costs may overstate the decline in value, because the value in use concept would then be ignored. Value in use suggests that a property which is still in use, or which can be used in the near future, has a value to the owner. This would be true even if costs to cure environmental problems exceed the nominal, unencumbered value. The value in use will most nearly reflect the market value of the property."

As previously stated, TERC found that the evidence established that the subject property had value in use. Garvey's appraiser testified that the highest and best use of the property was as a grain elevator. The improved parcel was currently being put to its highest and best use as of the assessment date and was generating income. The Put Through Agreement between Garvey and AGP generated $10,833.33 per month. AGP was also required to pay Garvey $61,211.27 at the execution of the agreement as reimbursement for improvements made upon the property and to reimburse Garvey for reasonable operating costs. The agreement had an initial term of 5 years and contained a 5-year option. There was also an option to purchase the property at any time during the life of the agreement for an additional payment of $1.7 million.

TERC found that Garvey's appraiser lacked training, education, and experience in the valuation of contaminated properties and that the appraiser's opinions regarding the impact of contamination on the actual or fair market value of the subject property as of the assessment date were not credible. It concluded that Garvey's appraiser was not an expert in the valuation of contaminated property and that the appraisal reports were not credible evidence that the property had no value. TERC concluded that since this evidence was Garvey's only evidence of the impact of the contamination on the value of the subject property, Garvey had not sustained its burden of proof.

As to the unimproved parcel, TERC found that the record did not establish what action, if any, the Board took regarding the assessed value. The property record card showed that the 1998 valuation was $72,415. TERC therefore inferred from the limited record before it that the Board, after protest, determined that the actual or fair market value of the unimproved parcel was $72,415.

From the entire record before it, TERC concluded that Garvey had failed to demonstrate that the actions of the Board were unreasonable and arbitrary. We agree.

Our review of TERC's decision is to determine whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000). We conclude that TERC's determinations that Garvey failed to provide credible evidence that the Board's actions were unreasonable or arbitrary and that Garvey did not rebut the presumption that the Board faithfully performed its duties and acted upon sufficient competent evidence were not clearly wrong. Garvey failed to establish by clear and convincing evidence that the valuations placed upon its property when compared to valuations placed on other similar property were grossly excessive and the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. See *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

Garvey's final argument asserts that TERC erred in overruling its objections and in considering arbitrary, capricious, and irrele-

vant evidence. The evidence to which Garvey objected related to the status of other properties that Garvey currently owned or owned at one time. We conclude that the information derived from this line of questioning did not factor into TERC's analysis of the valuation of the subject property. TERC's decision was based on the conclusion that the summary appraisal report and the restricted appraisal report were not credible. Therefore, we conclude that this assignment of error is without merit.

CONCLUSION

Based upon our review for errors appearing on the record, we conclude that TERC did not act arbitrarily, capriciously, or unreasonably in affirming the decision of the Board. TERC's determination is supported by competent evidence and conforms to the law. We therefore affirm.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. GARY REX LAUCK, ALSO KNOWN AS GERHARD REX LAUCK, APPELLANT.

621 N.W.2d 515

Filed January 26, 2001. No. S-00-258.

1. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
5. **Final Orders: 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 Lancaster County: STEVEN D. BURNS, Judge. Appeal dismissed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Gary E. Lacey, Lancaster County Attorney, John A. Colborn, and Keith Allenstein, Jr., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The Lancaster County Attorney's office filed an information charging appellant Gary Rex Lauck, also known as Gerhard Rex Lauck, with providing false information, a Class IV felony, on an application for a handgun certificate in violation of Neb. Rev. Stat. § 69-2408 (Reissue 1996). On December 22, 1999, Lauck filed a plea in abatement. A plea in abatement hearing was held on January 18, 2000, the issue being whether a person can be prosecuted under § 69-2408 for providing false information on an application for a handgun certificate based on falsely answering a question on the application other than what is statutorily required (i.e., Lauck's name, Social Security number, address, and date of birth). The district court entered an order overruling Lauck's plea in abatement dated February 23, 2000. Lauck appeals the district court's order overruling his plea in abatement. This court denied the State's motion for summary dismissal.

BACKGROUND

On June 25, 1999, Lauck filled out an application for a handgun permit. Lauck produced his driver's license for identification and the name, address, and date of birth which Lauck filled out on the application form matched that same information on his driver's license. On the application to "Purchase, Lease, Rent, or Receive Transfer of Handgun," Lauck circled "NO" to the question:

> Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year?

(Note: A "yes" answer is necessary if the judge could have given a sentence of more than one year. A "yes" answer is not required if you have been pardoned for the crime or the conviction has been expunged or set aside, or you have had your civil rights restored and, under the law where the conviction occurred, you are not prohibited from receiving or possessing any firearm.)

Lauck was charged with providing false information, a Class IV felony, on an application for a handgun certificate in violation of § 69-2408. At the preliminary hearing, translated German documents indicated that in Germany, Lauck was arrested and sentenced to jail for 4 years for incitement of the people, inciting racial hatred, distributing means of propaganda, and using symbols of an anticonstitutional organization. The county court bound over Lauck to the district court.

Lauck filed a plea in abatement, and a hearing was held wherein Lauck argued that he could be prosecuted for providing false information under § 69-2408 only if he "willfully provides false information on the application form regarding his name, social security number, address, and date of birth. The evidence adduced at the preliminary hearing was that [Lauck] did not provide false information regarding his name, social security number, address or date of birth." The district court entered an order overruling Lauck's plea in abatement.

ASSIGNMENT OF ERROR

Lauck assigns that the district court erred in overruling his plea in abatement.

STANDARD OF REVIEW

[1] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

ANALYSIS

[3] We first consider whether an order overruling Lauck's plea in abatement is a final, appealable order. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

It is clear that the order in this case overruling Lauck's plea in abatement did not prevent a judgment, nor was it made by summary application after the judgment was rendered. This case involves the remaining type of final order. Therefore, the question is whether an order overruling a plea in abatement affects a substantial right in a special proceeding.

[4,5] A substantial right is an essential legal right, not a mere technical right. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *State v. Bjorklund, supra*; *State v. Jacques, supra*.

Lauck argues that this case involves statutory interpretation which is a question of law. At his plea in abatement hearing, Lauck argued that he could be prosecuted for providing false information under § 69-2408 only if he willfully provided false information on the application form regarding his name, Social Security number, address, and date of birth. The evidence adduced at the preliminary hearing was that Lauck did not provide false information regarding his name, Social Security number, address, or date of birth. Lauck now argues that in strictly construing Neb. Rev. Stat. § 69-2404 (Reissue 1996), he committed no crime under § 69-2408. Lauck argues that if the plea in abatement in this case was sustained, it would be dispositive.

Therefore, Lauck concludes that the order overruling his plea in abatement is a final order that can be appealed.

The order overruling the plea in abatement does not diminish any claim or defense available to Lauck at trial. Lauck may still present all of the defenses that he could have presented before the order overruling his plea in abatement. Lauck can argue, through the rules of statutory interpretation, that he did not commit any crime at all or that he did not commit the crime of false information under § 69-2408. Lauck is not precluded from making a motion to dismiss after the State rests its case. Lauck may still argue the additional issues that his rights are protected under the First Amendment, or that any false information present on the form was not done willfully. If Lauck were convicted of the charge against him, he would not be prohibited from raising on appeal the issue of whether there was sufficient evidence to convict him. See *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

Accordingly, we conclude the order overruling Lauck's plea in abatement does not affect a substantial right and is therefore not a final, appealable order. Having made this determination, we need not address the additional issues of whether a plea in abatement hearing is a special hearing or the assigned error of whether the district court erred in overruling Lauck's plea in abatement.

This court has consistently held that a plea in abatement order is not a final order from which a direct appeal can be made. See, *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975); *Kruger v. Brainard*, 183 Neb. 455, 161 N.W.2d 520 (1968); *Gartner v. State*, 36 Neb. 280, 54 N.W. 516 (1893).

Accordingly, we conclude the order overruling Lauck's plea in abatement does not affect a substantial right and is therefore not a final, appealable order.

CONCLUSION

Having concluded that there is no final, appealable order in this case, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

IN RE APPEAL OF ASHER L. STOLLER FOR ADMISSION TO THE NEBRASKA STATE BAR. ASHER L. STOLLER, APPELLANT, V. NEBRASKA STATE BAR COMMISSION AND NEBRASKA STATE BAR ASSOCIATION, APPELLEES.

622 N.W.2d 878

Filed February 2, 2001. No. S-34-990002.

1. **Jurisdiction.** The question of jurisdiction is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own independent conclusions.
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. **Rules of the Supreme Court: Attorneys at Law.** An applicant to the bar who is denied an accommodation for a disability, or who claims that an accommodation offered by the Nebraska State Bar Commission is unsatisfactory, may appeal that determination pursuant to Neb. Ct. R. for Adm. of Attys. 10 (rev. 2000) despite not failing or being denied permission to take the bar examination.
5. **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.
6. **Rules of the Supreme Court: Attorneys at Law.** The power to admit persons to the practice of law in Nebraska is vested exclusively in the Nebraska Supreme Court.
7. ___: ___. The Nebraska Supreme Court has delegated administrative responsibility for bar admissions solely to the Nebraska State Bar Commission.

Original action. Appeal dismissed.

Asher L. Stoller, pro se.

James J. DeMars, of DeMars, Gordon, Olson & Shively, for appellee Nebraska State Bar Commission.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Nebraska State Bar Association.

WRIGHT, CONNOLLY, GERRARD, and MCCORMACK, JJ., and CHEUVRONT, D.J.

PER CURIAM.

NATURE OF CASE

Asher L. Stoller, the appellant, sought reimbursement from the Nebraska State Bar Commission (Bar Commission) and the Nebraska State Bar Association (Bar Association) for costs and damages allegedly incurred as a result of Stoller's application

for admission to the Bar Association. For the reasons stated herein, we conclude that Stoller's appeal has not been timely perfected and must therefore be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

Stoller was diagnosed with dyslexia during his sophomore year in college. Following this diagnosis, Stoller began to receive accommodations for his disability, including double time to complete examinations. Stoller also completed graduate studies with double time for examinations. Stoller was given time and one-half to complete the LSAT (Law School Admission Test) and GMAT (Graduate Management Admission Test).

Stoller later applied for law school and business school. Stoller was given double time on examinations in business school and, after some legal action, Stoller began receiving double time for examinations during his second semester of law school. Stoller also received double time on the MPRE (Multistate Professional Responsibility Examination). Stoller then applied for admission to the Bar Association.

In a letter dated January 22, 1999, the Bar Commission advised Stoller that it was in possession of his request for accommodations on the bar examination. Although the record does not reflect it, Stoller's initial request was presumably filed with his application to take the bar examination, as required by Neb. Ct. R. for Adm. of Attys., appendix C(III)A2 (rev. 2000). The letter further advised Stoller that he needed to complete the forms attached to the letter and return them to the Bar Commission by April 1. On a form dated January 23, 1999, Stoller requested that he be given double time on the bar examination and a "separate testing room," and that he be "allowed to bring water into the testing area and consequently, periodic bathroom breaks."

In a letter dated April 28, 1999, the Bar Commission informed Stoller that he would be provided with a separate room and time and one-half to take the bar examination. The letter further stated that allowing water into the testing area was standard for all applicants and that Stoller could use the bathroom when he wished, but that additional time would not be provided for that purpose. The same conditions were set forth in a letter dated May 3, 1999, from the Bar Commission to Stoller's attorney.

In a letter dated June 17, 1999, the Bar Commission informed Stoller that he had double time to take the bar examination. Testimony from the hearing before the special master indicates that prior to this letter, Stoller had again sought double time to take the bar examination, and in connection with this request, the Bar Commission required Stoller to be tested, at Stoller's expense, by an expert chosen by the Bar Commission. Stoller was examined by the Bar Commission's chosen expert on May 21.

The June 17, 1999, letter also informed Stoller of the time and place of the examination, and informed him that the provision of double time would be revoked if Stoller did not sign and return an attached affidavit. On July 6, Stoller signed the affidavit, in which Stoller agreed not to communicate with anyone regarding the examination during the 3 days over which Stoller was to be tested and not to possess review materials during the examination.

The June 17, 1999, letter informed Stoller that he would be taking the bar examination in Lincoln, Nebraska. The main examination, however, was given in Omaha, Nebraska. The Bar Commission director of admissions explained that Stoller was examined in Lincoln instead of Omaha because Stoller's request for double time resulted in Stoller's needing 3 days to complete the examination, instead of the usual 1½ days. The director of admissions testified that Stoller was examined in Lincoln so that the Bar Commission would not be required to hire additional proctors to monitor Stoller's examination.

In a letter dated October 13, 1999, the chair of the Bar Commission denied Stoller reimbursement for expenses that Stoller presumably claimed had been incurred in connection with taking the bar examination. The letter stated that it was in response to a letter from Stoller, dated October 1, 1999, to the former chair of the Bar Commission, and a letter from Stoller, dated September 24, 1999, to the president of the Bar Association. The Bar Association also sent a letter to Stoller, dated September 30, 1999, in which it referred Stoller to the Bar Commission with respect to his request for reimbursement. On November 9, Stoller filed a "Notice of Appeal" in this court with respect to the denial of his requests for reimbursement.

In two letters dated January 5, 2000, Stoller again sought reimbursement from the Bar Commission and Bar Association,

this time for attorney fees. In a letter dated January 10, 2000, the Bar Association again referred Stoller's request to the Bar Commission. The record does not reflect the Bar Commission's response to Stoller's letter. Ultimately, this court appointed a special master to preside over a hearing into Stoller's claims. The special master's findings were filed on March 30, 2000, in which the special master recommended that the relief requested by Stoller be denied. Stoller filed his objections to those findings on April 7.

ARGUMENTS ON APPEAL

Stoller claims that the Bar Commission discriminated against him on the basis of his disability in its disparate treatment of him during his application process and bar examination. Specifically, Stoller claims that he was discriminated against in that he was required to take the bar examination in Lincoln while the other applicants took the examination in Omaha and in that other applicants were allegedly not required to sign an affidavit such as the one Stoller signed on July 6, 1999. Stoller also claims that it was unreasonable for the Bar Commission to require him to be examined by its expert in order to determine that Stoller should receive double time.

Stoller claims that this treatment was in violation of his rights pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (1994 & Supp. IV 1998); the Rehabilitation Act, 29 U.S.C. § 794 et seq. (1994 & Supp. III 1997); and the Due Process and Equal Protection Clauses of the U.S. Constitution. Stoller claims that he is entitled to reimbursement for the costs of testing by the Bar Commission's expert, hotel costs and other expenses incurred while taking the bar examination in Lincoln, and attorney fees. Stoller also seeks punitive damages and a declaration that his rights were violated.

STANDARD OF REVIEW

[1,2] The question of jurisdiction is a question of law. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000). On questions of law, an appellate court has an obligation to reach its own independent conclusions. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

ANALYSIS

The instant case concerns the request of an applicant for accommodations for a disability. Neb. Ct. R. for Adm. of Attys. 5D (rev. 2000) provides, with reference to applicants with a disability, that "[t]he bar commission will follow special rules set forth in the Policy on Applicants with a Disability, Appendix C."

> It is the policy of the Nebraska State Bar Commission to administer the bar examination in a manner that does not discriminate, on the basis of disability, against a qualified applicant with a disability. An applicant who is otherwise eligible to take the Nebraska bar examination may file a request for special testing accommodations.

Neb. Ct. R. for Adm. of Attys., appendix C(I).

A request for special testing accommodations for an examination must be filed with the application to take the bar examination and by the deadline for filing that application. Neb. Ct. R. for Adm. of Attys., appendix C(III)A2. The Bar Commission will review all requests for special testing accommodations that are properly filed in accordance with this policy. Neb. Ct. R. for Adm. of Attys., appendix C(IV)A1.

> 2. In reviewing a request, the commission will follow these procedures.
>
> (a) The commission will make a determination, and the secretary of the commission will send notification of the determination to the applicant, no fewer than 25 days before the examination.
>
> (b) The commission's denial of a request will be in writing and sent to the applicant by certified mail to the address provided by the applicant on the request. The commission's denial will include a statement of the commission's reasons for denial. The commission will also provide the applicant with a copy of the written report of any expert it consulted in reviewing the request.
>
> (c) The applicant may appeal the denial of a request to the Supreme Court in accordance with rules 10 and 15.

Neb. Ct. R. for Adm. of Attys., appendix C(IV)A.

Thus, the rules that set forth the means by which an applicant may seek and obtain an accommodation incorporate by reference

the mechanisms for appeal set forth in Neb. Ct. R. for Adm. of Attys. 10 and 15 (rev. 2000). Rule 10 provides, in relevant part:

> Any applicant who has failed to pass the bar examination or to be admitted on motion, who has been denied admission on the basis of fitness or character, or who has been refused permission to take the examination, may, within 30 days after the mailing of the notice of failure, refusal of permission, denial of admission on motion, or denial of admission on the basis of fitness or character, request a hearing before the bar commission. . . . The commission will then review and consider the reasons presented. Upon reaching a determination, the commission will advise the applicant of its decision in writing. In the event that the applicant is dissatisfied with the decision of the commission, the applicant may, within 30 days from the date of the letter from the commission, appeal the decision to the Supreme Court. The appeal must be taken and perfected in accordance with rule 15.

Rule 15 then provides, in relevant part:

> Any applicant entitled to appeal from a final adverse determination of the bar commission in accordance with rule 10 must file an original and 7 copies of a notice of appeal with the Clerk of the Supreme Court within 30 days following the date notice of the decision was mailed to the applicant at the address given to the commission by the applicant at the time of the hearing before the commission.

[3] With the foregoing rules in mind, we first turn to the Bar Commission's argument that this court lacks jurisdiction over Stoller's appeal. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

Denial of Accommodations

The Bar Commission argues that Stoller has no standing to appeal because his request for accommodations was granted, not denied. For purposes of this appeal, however, we assume, with-

out deciding, that a request for accommodations can be effectively denied within the meaning of appendix C(IV)A2(c) if an applicant's request is substantially granted by the Bar Commission but the Bar Commission places additional conditions on the accommodations that the applicant claims are unacceptable.

Appeal Despite Not Failing Examination

The Bar Commission next argues that Stoller cannot appeal because he did not fail the bar examination and, thus, failed to satisfy the "conditions precedent to review expressed in Rule 10." Brief for appellee Bar Commission at 11. This argument is without merit. Rule 10 does not establish "conditions precedent" for appealing an adverse determination of the Bar Commission, but instead sets forth the types of adverse determinations that may be appealed pursuant to the rule. In other words, under rule 10, an applicant may appeal from a failure on the examination, a denial of permission to take the examination, denial of admission on motion, or denial of admission on the basis of fitness or character. These are not "conditions precedent," but are simply the categories of adverse determination that may be appealed.

[4] Appendix C(IV)A2(c) then states that an applicant "may appeal the denial of a request to the Supreme Court in accordance with rules 10 and 15." Appendix C, when read in conjunction with rule 10, sets forth another category of adverse determination, in addition to the categories listed in rule 10, that may be appealed using the procedures established by rules 10 and 15. We hold that an applicant to the bar who is denied an accommodation for a disability, or who claims that an accommodation offered by the Bar Commission is unsatisfactory, may appeal that determination pursuant to rule 10 despite not failing or being denied permission to take the bar examination.

Timeliness of Appeal

The Bar Commission further argues that Stoller's appeal is untimely. Stoller's appeal claims that he should be reimbursed for the cost of the expert evaluation required by the Bar Commission, for the expenses Stoller incurred while taking the

bar examination in Lincoln instead of Omaha, and for the attorney fees associated with obtaining accommodations. Stoller further seeks damages for the Bar Commission's treatment of him, particularly with reference to the requirement that Stoller sign an affidavit prior to taking the examination.

The record reflects, however, that Stoller was examined by the Bar Commission's chosen expert on May 21, 1999, and Stoller had obviously been informed of the Bar Commission's requirement of the expert examination prior to that date. The record further reflects that Stoller was informed that his examination would be in Lincoln, and of the affidavit requirement, no later than the June 17 letter from the Bar Commission to Stoller. The conditions attached by the Bar Commission to the granting of Stoller's accommodations were thus made known to Stoller on a date no later than June 17. In any event, a denial of accommodations, or offer of unsatisfactory accommodations, could under no circumstances have been issued by the Bar Commission later than the date of the bar examination itself, which Stoller took on July 27 through 29.

Consequently, the time for Stoller to appeal such an adverse determination, if one was in fact made, would have run no later than 30 days after July 29, 1999. Since that date fell on a weekend in 1999, the time for Stoller to appeal could have under no circumstances elapsed later than August 30. The purported "notice of appeal" filed in this court, however, was filed on November 9, and the record does not reflect that Stoller sought reimbursement in any way prior to his September 24 letter to the president of the Bar Association. Stoller's appeal was clearly filed out of time.

Stoller has attempted to raise his statutory and constitutional claims in this court by way of the Bar Commission's refusal to reimburse Stoller for the costs Stoller allegedly incurred in complying with the Bar Commission's conditions relating to Stoller's accommodations. Stoller's appellate argument makes plain, however, that his complaint is that the conditions were themselves discriminatory. The proper time to make that complaint was when the decisions to require those conditions were made, and not in a collateral attack after the time for appealing the decisions has expired. Based on this analysis, we conclude that Stoller's

appeal was not timely filed and that we consequently lack jurisdiction to consider the merits, if any, of his appeal.

FAILURE TO REQUEST HEARING AND FAILURE TO PLEAD DAMAGES

The Bar Commission argues that Stoller did not comply with the requirements of rule 10 because he did not request or appear at a hearing before the Bar Commission prior to appealing to this court. The Bar Commission also argues that this court cannot award money damages in an appeal from the Bar Commission and that Stoller has not pled or proved a case for damages.

[5] Given our determination that Stoller's appeal was in any event untimely, we need not and do not consider the Bar Commission's arguments in this regard. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *King v. Crowell Memorial Home, post* p. 177, 622 N.W.2d 588 (2001); *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000).

APPEAL UNDER RULE 12

Stoller attempts to bypass the requirements of rules 10 and 15 by claiming that this court has jurisdiction to review the Bar Commission's decisions under Neb. Ct. R. for Adm. of Attys. 12 (rev. 2000). Rule 12 provides that "[t]he bar commission is authorized to make, subject to the approval of the Supreme Court, such further rules and regulations as it deems necessary or expedient to carry out the intent and purpose of these rules." Stoller claims that the Bar Commission has engaged in rulemaking pursuant to rule 12 and that this court has the power under rule 12 to review the Bar Commission's conduct.

Rule 12 is a grant of authority to the Bar Commission to make rules in order to carry out the intention of this court's rules regarding the admission of attorneys. The language in rule 12 that the Bar Commission's rulemaking authority is "subject to the approval of the Supreme Court" is simply a recognition that this court has supervisory authority over the Bar Commission's rules. In order for this court to act pursuant to rule 12, the Bar Commission must first have made a rule. In this case, however, the Bar Commission has not made rules, but

simply applied existing published rules to the facts of the case. Thus, the Bar Commission's actions in this case have not involved rulemaking.

Furthermore, rule 12 does not provide a cause of action for an individual aggrieved by the adoption of a rule. Rule 12 merely grants authority to the Bar Commission and addresses the relationship between this court and the Bar Commission in order to make clear that this court retains its constitutional power to make rules regarding the admission of attorneys. See *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998). See, also, Neb. Const. art. II, § 1, and art. V, §§ 1 and 25. Rule 12 does not provide an alternative procedure for appealing Bar Commission decisions to this court. Stoller's claim is without merit.

BAR ASSOCIATION

Stoller has also consistently attempted to include and maintain the Bar Association as a party to this proceeding, on the theory that the Bar Association and Bar Commission share common members and that the Bar Association thus influences the actions of the Bar Commission.

[6,7] Stoller's argument is without merit, as Stoller's complaints relate entirely to the process of admission to the bar. The power to admit persons to the practice of law in Nebraska is vested exclusively in this court. See, *In re Application of Converse*, 258 Neb. 159, 602 N.W.2d 500 (1999); *In re Application of Collins-Bazant, supra*. This court has, in turn, delegated administrative responsibility for bar admissions solely to the Bar Commission. See Neb. Ct. R. for Adm. of Attys. 9 (rev. 2000).

Consequently, the Bar Association is not responsible for the admission of attorneys to the bar and is not a proper party to this proceeding. In any event, our conclusion that Stoller's appeal is untimely disposes of Stoller's claims against both the Bar Commission and Bar Association.

CONCLUSION

The actions of the Bar Commission from which Stoller seeks to appeal occurred and were known to Stoller more than 30 days

prior to Stoller's first attempts to seek reimbursement or otherwise appeal. Consequently, Stoller's appeal is untimely, and this court has no jurisdiction to address his statutory and constitutional claims. We therefore dismiss Stoller's appeal.

APPEAL DISMISSED.

HENDRY, C.J., and STEPHAN and MILLER-LERMAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RANDY C. PORTSCHE, APPELLANT.

622 N.W.2d 582

Filed February 2, 2001. Nos. S-99-793, S-99-1044.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
3. ___. When considering a statute's meaning, it is appropriate for a court to consider the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy to which its terms apply and to give the statute such an interpretation as appears best calculated to effectuate the design of the legislative provisions.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Motor Vehicles: Licenses and Permits: Convictions.** Former Neb. Rev. Stat. § 60-524(3) (Reissue 1998) does not terminate a court-ordered suspension required as part of a criminal conviction under Neb. Rev. Stat. § 60-6,196 (Reissue 1998).
6. **Motor Vehicles: Licenses and Permits: Circumstantial Evidence.** In a driving under suspension case, circumstantial evidence may serve to establish the operation of a motor vehicle.
7. **Motor Vehicles: Words and Phrases.** Starting a vehicle is an act within the meaning of "operating" a motor vehicle under Neb. Rev. Stat. § 60-6,196(6) (Reissue 1998).

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

Dennis R. Keefe, Lancaster County Public Defender, and Timothy M. Eppler for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Randy C. Portsche appeals two separate convictions for driving during a 15-year suspension in violation of Neb. Rev. Stat. § 60-6,196(6) (Reissues 1993 & 1998). Case No. S-99-793 involves an incident which occurred on January 3, 1998, and case No. S-99-1044 involves an incident which occurred on November 14, 1998. Portsche's two cases involve common issues of law and were consolidated on appeal.

Portsche asserts that notwithstanding his court-ordered 15-year driving suspension, both convictions should be reversed because at the time of each arrest he was eligible to have his license reinstated pursuant to Neb. Rev. Stat. § 60-524(3) (Reissue 1998), which statute was in effect on the dates of the incidents at issue but which was subsequently revised effective May 6, 1999, when subsection (3) was eliminated and subsection (4) became the current subsection (3). Portsche further asserts that the conviction in S-99-793 should be reversed on the additional ground that on January 3, 1998, he was not "operating a motor vehicle" as required by the driving under suspension provision found in § 60-6,196(6). We affirm both convictions.

STATEMENT OF FACTS

To put these consolidated cases in context, we recite the facts relevant to Portsche's prior driving under the influence and driving under suspension history. On February 26, 1987, Portsche pled guilty to a charge of driving under the influence, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986). On July 24, 1987, Portsche was sentenced to 90 days in jail and fined $500. The court also ordered Portsche not to drive any motor vehicle in Nebraska for any purpose for 15 years and ordered his operator's license revoked and suspended for a like period.

Portsche was arrested on April 12, 1988, and charged with driving during a 15-year suspension. Portsche was convicted and was sentenced on August 22 to a term of 18 months' imprisonment. Portsche was discharged on November 12, 1989.

Portsche was again arrested on April 25, 1991, and charged with driving during a 15-year suspension. Portsche was convicted and was sentenced on February 13, 1992, to a term of 20 months' to 5 years' imprisonment. He was paroled and subsequently discharged on December 5, 1994.

Portsche's convictions in the two current cases arose from incidents which occurred on January 3 and November 14, 1998. With respect to case No. S-99-793, on January 3, Lincoln police were dispatched to the area of Seventh and Sumner Streets in response to complaints that a vehicle had been revving its engine for approximately an hour. Police found a vehicle parked on Seventh Street with its engine running and its left turn signal blinking. Portsche was seated slumped over in the driver's seat and appeared to the police to be intoxicated. After some difficulty, the police roused Portsche and asked him what he was doing. Portsche responded that he was on his way home, and when the police asked him whether he intended to drive home, he said yes. The police ran a check which revealed that Portsche's license was under a 15-year suspension. They then arrested Portsche for driving under suspension and "suspicion" of driving under the influence. Portsche was convicted by the district court for Lancaster County of driving under suspension and was sentenced on May 25, 1999, to a term of 20 months' to 5 years' imprisonment.

With respect to case No. S-99-1044, on November 14, 1998, police stopped Portsche on 28th Street for a traffic infraction. When stopped by police and asked for his license, Portsche admitted to the officer that he did not have a valid license. Portsche was again arrested for driving under a 15-year suspension. He was convicted and sentenced on July 29, 1999, to a term of 20 months' to 5 years' imprisonment. Portsche appeals both convictions.

ASSIGNMENTS OF ERROR

In connection with each of the convictions in cases Nos. S-99-793 and S-99-1044, Portsche asserts that the district court

"erred by ruling that [he] was driving under a 15 year suspended license and not a generic suspension." In connection with case No. S-99-793, Portsche further asserts that he was not guilty of driving under a 15-year suspension because the district court erred in finding that he was "operating" a motor vehicle on January 3, 1998.

STANDARD OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000).

ANALYSIS

Suspension.

In 1987, Portsche was convicted of driving under the influence, third offense, in violation of § 39-669.07, which statute was subsequently transferred to § 60-6,196. Pursuant to the language in § 39-669.07, which is now contained in subsections (2)(c) and (d) of § 60-6,196, the county court, on July 24, 1987, as part of Portsche's criminal sentence, ordered Portsche not to drive any motor vehicle in Nebraska for any purpose for 15 years and ordered his operator's license revoked and suspended for a like period. Section 60-6,196(2)(c) and (d) provides that as to a person convicted of a third or subsequent offense of driving under the influence,

> the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of fifteen years from the date ordered by the court and shall order that the operator's license of such person be revoked for a like period.

At the time of Portsche's third-offense driving under the influence conviction, he was also subject to imprisonment of up to 6 months. See, Neb. Rev. Stat. § 28-106 (Reissue 1989); § 39-669.07. Under the current statutes, an individual convicted of third-offense driving under the influence is subject to imprisonment of up to 1 year, see §§ 28-106 and 60-6,196(2)(c), and for driving under the influence convictions subsequent to a third

offense, an individual is subject to imprisonment for up to 5 years, see Neb. Rev. Stat. § 28-105 (Reissue 1995) and § 60-6,196(2)(d).

Although the suspension and revocation of Portsche's license ordered by the county court in 1987 extended until July 24, 2002, Portsche argues that on January 3 and November 14, 1998, rather than being under a 15-year suspension pursuant to § 39-669.07 (now found at § 60-6,196), he was under a "generic suspension" and was entitled to have his license reinstated pursuant to former § 60-524(3), which was in effect at the time of Portsche's 1998 arrests.

In response to Portsche's claim, the State argues that former § 60-524(3) is inapplicable to Portsche's court-ordered sentence of a 15-year suspension under § 60-6,196. The State argues that former § 60-524(3) did not entitle Portsche to restoration of his license following his release from prison because, inter alia, subsection (3) was intended to apply only to the restoration of licenses which had been revoked by the Department of Motor Vehicles and did not apply to a court-ordered criminal conviction, the sentence for which included a 15-year suspension pursuant to § 60-6,196. We agree with the State that former § 60-524(3) did not entitle Portsche to the restoration of his license.

Section 60-6,196(6), the driving under suspension statute, provides:

> Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) or (2)(d) of this section shall be guilty of a Class IV felony [the period of incarceration for which is 0 to 5 years, § 28-105]. If such person has had a conviction under this subsection prior to the date of the current conviction under this subsection, such person shall be guilty of a Class III felony [the period of incarceration for which is 1 to 20 years, § 28-105].

Pursuant to § 60-6,196(6), in both cases Nos. S-99-793 and S-99-1044, Portsche was charged and convicted of a Class IV felony.

At the time of Portsche's arrests in these cases, § 60-524(3) read as follows:

> Whenever a person whose license has been suspended or revoked and he has been committed to or incarcerated in a state institution, penal or otherwise, for a period of longer than one year, such person shall be entitled to have his operator's license restored to him upon his release from the institution by passing a satisfactory examination for obtaining an operator's license.

A review of legislative history shows that in 1937, the Legislature enacted Neb. Rev. Stat. § 60-4,101 (Reissue 1998), which required that a license be revoked when a person was incarcerated, and that § 60-524 was enacted in 1949 to provide for the restoration of licenses following incarceration. In 1999, § 60-4,101 was repealed and § 60-524 was revised to eliminate former subsection (3).

It is undisputed that subsequent to the county court's order revoking and suspending Portsche's operator's license for 15 years in 1987, Portsche was convicted in 1988 and in 1992 of driving under suspension, and pursuant to each conviction, he was sentenced to imprisonment and was incarcerated in a state penal institution for a period of longer than 1 year. Portsche argues generally that due to these periods of incarceration and upon his release in 1994, his license was under a "generic suspension" under former § 60-524(3), and he was therefore no longer under a "15 year suspension" under § 60-6,196 as ordered by the county court in 1987. Brief for appellant in case No. S-99-793 at 6. Portsche argues specifically in his brief that upon his release from prison, he was "eligible for reinstatement" of his operator's license under former § 60-524(3), and that because of such eligibility, his operator's license was no longer suspended under the 15-year suspension provision of § 60-6,196. Brief for appellant in case No. S-99-793 at 5. We reject Portsche's argument.

[2-4] It is well settled that in construing a statute, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). When considering a statute's meaning, it is appropriate for a court to consider the evil and mischief attempted to be remedied, the

objects sought to be accomplished, and the scope of the remedy to which its terms apply and to give the statute such an interpretation as appears best calculated to effectuate the design of the legislative provisions. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

[5] In construing former § 60-524(3), we must not consider that subsection in isolation but must consider it in context. Section 60-524 is part of the Motor Vehicle Safety Responsibility Act, whereas § 60-6,196 is part of the Nebraska Rules of the Road. The other subsections of § 60-524 refer to situations in which the Department of Motor Vehicles, rather than a court, suspends or revokes a driver's license. Put into such context, it is apparent that the provisions of former § 60-524(3) should not be construed to terminate a court-ordered suspension required as part of a criminal conviction under § 60-6,196. The provisions of § 60-6,196, requiring a court to revoke the license of a defendant who has multiple convictions for driving under the influence and making it a separate offense to drive during a time of such suspension, have the obvious purpose of preserving the public safety by preventing a person who has a history of driving under the influence from driving in this state for a period of years following such conviction. To apply former § 60-524(3) to a license suspension imposed under § 60-6,196(6) and thereby excuse from revocation a defendant who has served a year's incarceration for a conviction on any basis would defeat the purpose of a § 60-6,196 revocation and frustrate the objects sought to be accomplished by § 60-6,196. We reject Portsche's argument that former § 60-524(3) eliminated the 15-year driving suspension imposed on him under § 60-6,196.

In rejecting Portsche's argument that former § 60-524(3) should be applied to his driving suspension, we observe that § 60-6,196(2)(c) and (d), which requires the 15-year revocation of a license upon conviction of a third or subsequent offense for driving under the influence, also provides for the potential imposition of imprisonment for up to 1 year upon conviction for

a third offense and up to 5 years for offenses subsequent to a third-offense driving under the influence. Furthermore, § 60-6,196(6) provides for potential imprisonment of up to 5 years for a first-offense driving under suspension conviction and for potential imprisonment of up to 20 years for a subsequent driving under suspension conviction. If former § 60-524(3) was interpreted to allow restoration of a license after a year's incarceration despite a court-ordered 15-year revocation, the purpose of a § 60-6,196 revocation to prevent driving by individuals with a history of driving under the influence would be defeated by imposition of a sentence of incarceration of more than 1 year upon conviction under § 60-6,196. Such interpretation would create disharmony not only between §§ 60-524(3) and 60-6,196, but, also, within § 60-6,196 itself. In sum, Portsche urges upon this court constructions of former § 60-524(3) and § 60-6,196 which are not harmonious and would defeat the purpose of § 60-6,196. We reject the constructions urged by Portsche.

The evidence in these cases established that on January 3 and November 14, 1998, Portsche's license had been revoked and suspended by the county court pursuant to § 39-669.07 (now § 60-6,196) and had not been restored in any manner. We conclude that former § 60-524(3) did not entitle Portsche on such dates to have his license reinstated, and we therefore reject Portsche's first assignment of error.

"Operating a Motor Vehicle."

Portsche argues that in connection with the January 3, 1998, incident in case No. S-99-793, he was not "operating" a motor vehicle as required by the language of § 60-6,196(6) and that the district court erred in concluding that he was driving during a 15-year suspension under § 60-6,196(6). We reject Portsche's claim.

On January 3, 1998, the police found Portsche slumped over in the driver's seat of a vehicle that was running with its turn signal blinking. Portsche argues that § 60-6,196 makes a distinction between "operating" a vehicle and "being in actual physical control" of a vehicle because under the language of subsection (1) of the statute, a person can commit driving under the influence by either "operating" or "being 'in actual physical control'" of a

vehicle, whereas a person can violate subsection (6) of the statute pertaining to driving under suspension only by " 'operating' " a vehicle. Brief for appellant in case No. S-99-793 at 10. That is, subsection (6) of § 60-6,196, pertaining to driving under suspension, does not contain the "actual physical control" language which is found in subsection (1), pertaining to driving under the influence. Portsche argues that while the evidence might support a finding that he was in "actual physical control" of the vehicle on January 3, it does not support a finding that he was "operating" the vehicle under § 60-6,196(6), pertaining to driving under suspension and for which he was convicted.

The district court stated that it did not need to resolve the question of whether a distinction existed between "operating" and "being in physical control" of a vehicle because it found as a fact that Portsche was "operating" the vehicle as required by § 60-6,196(6). The district court based this finding on evidence that Portsche was "the only person in his car, was found slumped over in the driver's seat, with the engine running and the left blinker on." The district court also cited evidence that Portsche told the police that he was " 'on his way home.' " We conclude that the district court, as the finder of fact, did not err in finding that on January 3, 1998, Portsche was "operating a [motor] vehicle" while his license was revoked, as the quoted phrase is used under § 60-6,196(6).

[6,7] We have previously held that in a driving under suspension case, circumstantial evidence may serve to establish the operation of a motor vehicle. *State v. Hanger*, 241 Neb. 812, 491 N.W.2d 55 (1992). See, similarly, *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970) (holding in driving under influence case that circumstantial evidence may serve to establish operation of vehicle). The evidence in the instant case that Portsche was in the driver's seat and was the sole occupant of the vehicle on a city street, that the vehicle's engine was running and its turn signal was blinking, and that Portsche told police that he was "on his way home" was sufficient to support the district court's ruling that Portsche was "operating a motor vehicle" while his license was revoked within the meaning of § 60-6,196. See, *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998); *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996); *State v.*

Baker, 236 Neb. 261, 461 N.W.2d 251 (1990); *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Eckert, supra*. See, also, *United States v. Weston*, 466 F.2d 435 (D.C. Cir. 1972) (under driving under suspension statute, defendant was "operating" automobile when seated alone in vehicle behind steering wheel with ignition key in switch and motor running). The district court could reasonably have inferred that at a minimum, Portsche had started the vehicle which is an act within the meaning of "operating" a motor vehicle. See, *Leake v. Com.*, 27 Va. App. 101, 497 S.E.2d 522 (1998) ("operating" includes starting engine or manipulating mechanical or electrical equipment of vehicle without actually putting car into motion); *State v. Hines*, 478 N.W.2d 888 (Iowa App. 1991) (defendant was "operating" vehicle when he started engine). See, also, *Daily v. Bond*, 623 F.2d 624 (9th Cir. 1980) (attempting to start aircraft constitutes "operating" an aircraft under FAA regulations). The district court properly determined that Portsche was operating a vehicle on January 3, 1998, and was, therefore, driving under suspension. We reject Portsche's second assignment of error.

CONCLUSION

For the reasons stated above, we conclude that Portsche's assignments of error are without merit. Accordingly, we affirm the convictions in cases Nos. S-99-793 and S-99-1044.

AFFIRMED.

STEVEN M. JACOB, APPELLANT, V. MARGARET SCHLICHTMAN, FORMERLY KNOWN AS MARGARET SHUCK, SPECIAL ADMINISTRATOR OF THE ESTATE OF MELODY HOPPER, DECEASED, APPELLEE.

622 N.W.2d 852

Filed February 2, 2001. No. S-99-1123.

1. **Affidavits: Appeal and Error.** An appellate court shall review a decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.

3. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below.
4. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
5. ___: ___: ___. The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
6. **Statutes: Words and Phrases.** In the context of Neb. Rev. Stat. § 25-2301(2) (Cum. Supp. 2000), security means security for those costs and expenses specifically enumerated in chapter 25, article 23, of the Nebraska Revised Statutes that an in forma pauperis litigant is excused from paying.

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

Steven M. Jacob, pro se.

Thomas E. Zimmerman, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellee.

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

STEPHAN, J.

Steven M. Jacob appeals from an order of the district court for Lancaster County denying his motion for leave to proceed in forma pauperis. We find no error and affirm.

BACKGROUND

Jacob is currently serving a life sentence following his conviction of first degree murder in the death of Melody J. Hopper. See *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). He commenced this replevin action against the special administrator of Hopper's estate to recover property which he claims to have been wrongfully executed upon in partial satisfaction of a wrongful death judgment obtained by the special administrator in a related action. The Nebraska Court of Appeals resolved a previous appeal in this action from a prior order denying leave to proceed in forma pauperis. See *Jacob v. Schlichtman*, 8 Neb.

App. 439, 594 N.W.2d 691 (1999). We quote the following procedural background from that opinion:

> On December 18, 1996, Jacob filed a motion for leave to proceed in forma pauperis. In the attached affidavit, Jacob stated that he had cash of "approx. $300" and was earning $1.21 per day. On December 19, the district court denied Jacob's motion without a hearing. The court's minute entry states that the motion was denied because Jacob had sufficient income to pay "filing and service fees."
>
> On December 20, 1996, Jacob filed a petition in replevin against Margaret V. Schlichtman, formerly known as Margaret V. Shuck, special administrator of the estate of Melody J. Hopper, deceased. On February 4, 1997, the defendant filed her special appearance. The defendant contended that the court lacked personal jurisdiction of her. After a hearing on the special appearance held on February 14, the special appearance was sustained.
>
> On February 20, 1997, Jacob filed another motion for leave to proceed in forma pauperis. In the attached affidavit, Jacob stated that he had cash of $.69 and had an income of $24.20 per month. The court denied Jacob's motion on the same date without a hearing. The court's minute entry states that the motion is "denied — see entry of December 19, 1996." A request for reconsideration subsequently filed by Jacob was also denied.
>
> On March 14, 1997, Jacob filed a notice of appeal in which he stated that he was appealing the court's decision to grant the defendant's special appearance and the "courts [sic] repeated denial of in forma pauperis status to the Plaintiff." . . .
>
> Ultimately, on April 14, 1997, the district court granted Jacob leave to appeal the "denial of the original request to proceed in forma pauperis." In its minute entry, the court stated that the "request to appeal the sustaining of the special appearance filed by the Defendant without payment of costs is denied for the reasons set forth in the order dated April 7, 1997."

Jacob v. Schlichtman, 8 Neb. App. at 440-41, 594 N.W.2d at 693.

In the first appeal, the Court of Appeals determined that the district court abused its discretion in not conducting a hearing on Jacob's request to proceed in forma pauperis. Accordingly, it reversed the judgment and remanded the cause for further proceedings.

Following remand, Jacob filed another motion for leave to proceed in forma pauperis which was heard on August 27, 1999, with Jacob participating by telephone. Jacob's inmate account records were received in evidence at that hearing. On September 3, the district court entered an order denying Jacob's request to proceed in forma pauperis. Based upon the record, which included Jacob's inmate account records, the district court found that Jacob had sufficient funds to pay costs in the case. Specifically, the court noted that "as of June 25, 1999, [Jacob] had a balance of $118.88. [The inmate account records] also show [that Jacob] has an average monthly income of approximately $115.00." The district court opined that "[a]pparently [Jacob] is of the belief that Lancaster County should be responsible for the bond (replevin) required by NEB. REV. STAT. § 25-1098 (Reissue 1995) and that such a bond is 'security' as set forth in NEB. REV. STAT. § 25-2301 (Reissue 1995)." The court implicitly rejected this contention.

Jacob now appeals from the order denying him leave to proceed in forma pauperis. We moved the appeal to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Jacob contends that the district court abused its discretion in denying him leave to proceed in forma pauperis. He also asserts that the district court "erred in ruling that the in forma pauperis statutes, Neb.Rev.Stat. §25-2301 et seq. (Reissue 1995) and Neb.Rev.Stat. §25-2301 et seq. (Cumm.[sic] Supp. 1999) would not permit a party to invoke the replevin remedy without providing the security required by the replevin statutes." Finally, Jacob maintains that if the term security, as it is used in the in forma pauperis statutes, is construed not to include a replevin bond, then the replevin statutes deny him equal protection of the

law because they burden a poor person's ability to proceed with a replevin action.

STANDARD OF REVIEW

[1,2] An appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court. Neb. Rev. Stat. § 25-2301.02(2) (Cum. Supp. 2000). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000); *Smith v. Paoli Popcorn Co.*, 260 Neb. 460, 618 N.W.2d 452 (2000).

ANALYSIS

Proceedings in forma pauperis are governed by chapter 25, article 23, of the Nebraska Revised Statutes. See Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Cum. Supp. 2000). We note that the effective date of the current version of these statutes is August 28, 1999, which date was subsequent to the filing of Jacob's motion and hearing thereon but prior to the order denying the motion. We agree with the suggestion in Jacob's brief that the current statutes are substantially unchanged from the previous version and should be applied in resolving this appeal.

The term "in forma pauperis" is defined by statute as "the permission given by the court for a party to proceed without prepayment of fees and costs or security." § 25-2301(2). One seeking such permission must file an application including "an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress." § 25-2301.01. There is a statutory right of interlocutory appellate review of a decision denying in forma pauperis eligibility to be conducted "de novo on the record based on the transcript of the hearing or the written statement of the court." § 25-2301.02(2).

Jacob contends that he must be allowed to proceed with his replevin action in forma pauperis because he is without the means to post the bond he claims is required by Neb. Rev. Stat. § 25-1098 (Reissue 1995), which he argues is "security" within

the meaning of §§ 25-2301(2) and 25-2301.01. Nebraska's replevin statutes permit, but do not require, the plaintiff in a replevin action to seek a temporary order to obtain possession of the property which is the subject of the action prior to final determination on the merits. Neb. Rev. Stat. §§ 25-1093 to 25-10,106 (Reissue 1995). When a temporary order is issued, the sheriff is required to execute the order by taking possession of the property in question. § 25-1097. Whether such property is then delivered to the plaintiff or returned to the defendant pending final determination of the action is governed by § 25-1098, which provides:

> The sheriff, or other officer, shall not deliver to the plaintiff, his agent or attorney, the property so taken, until there has been executed by one or more sufficient sureties of the plaintiff a written undertaking to the defendant, in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him, and return the property to the defendant, in case judgment for a return of such property is rendered against him. The undertaking shall be returned with the order.
>
> If, before the actual delivery to the plaintiff, the defendant executes within twenty-four hours from the time of the levy, by one or more sufficient sureties a written undertaking to the plaintiff, in at least double the value of the property, to the effect that the defendant shall duly defend the action and pay all costs and damages which may be awarded against him, and deliver the property to the plaintiff, in case judgment for delivery of such property is rendered against him, the undertaking shall be returned with the order by the officer, who shall return the property to the defendant.

See, also, § 25-10,101 (providing that "the property shall be delivered to the plaintiff when the undertaking required by section 25-1098 has been given"); § 25-10,100 (providing in part that "[i]f the undertaking required by section 25-1098 is not given within twenty-four hours from the taking of the property under said order, the sheriff or other officer shall return the property to the defendant"). When the plaintiff does not obtain possession of the property pursuant to a temporary order and furnishing of the bond required by § 25-1098, then "the action

may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper." § 25-10,106.

[3-5] The issue presented in this appeal is whether the bond that § 25-1098 requires as a condition for transfer of possession of property pending final disposition in a replevin action is "security" within the meaning of the statutes governing proceedings in forma pauperis, so that its cost would be a factor in the court's determination of in forma pauperis status. The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below. *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999). In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Abboud v. Papio-Missouri River NRD*, 253 Neb. 514, 571 N.W.2d 302 (1997); *Brown v. Wilson*, 252 Neb. 782, 567 N.W.2d 124 (1997). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). We therefore consider the entire statutory scheme of chapter 25, article 23, in determining whether a replevin bond is a form of "security" within the meaning of § 25-2301(2).

[6] After defining "in forma pauperis" and establishing a statutory procedure for determining whether a litigant may proceed in that status, the Legislature made specific provisions for waiver or payment of various costs and expenses which the in forma pauperis litigant is excused from paying. Section 25-2302 provides that upon determining that a party may proceed in forma pauperis, the court "shall direct the responsible officer of the court to issue and serve all the necessary writs, process, and proceedings and perform all such duties without charge." Counties are required to pay other essential costs incurred by the

in forma pauperis litigant. See, § 25-2303 (expense of process by publication, if required); § 25-2304 (payment of process and fees to secure presence of witnesses whom court finds to have evidence material and necessary to case); §§ 25-2305 to 25-2307 (costs associated with briefs and record on appeal). There is no statutory provision for the payment of bond premiums on behalf of a litigant who proceeds in forma pauperis. From the plain language of the provisions of chapter 25, article 23, read as a whole, we conclude that in forma pauperis status does not excuse the litigant from paying the cost of a premium for a replevin bond pursuant to § 25-1098, and that therefore, such cost need not be considered in determining whether a litigant "is unable to pay the fees and costs or give security required to proceed with the case," § 25-2301.01. We hold that in this context, "security" means security for those costs and expenses specifically enumerated in chapter 25, article 23, that an in forma pauperis litigant is excused from paying. We further note that a litigant is not required to furnish a bond to proceed with a replevin action, since under § 25-10,106, a litigant who does not elect to seek a temporary order and furnish the required undertaking in connection therewith may still pursue the action to recover "such damages as are right and proper." § 25-10,106.

The district court specifically found that "as of June 25, 1999, [Jacob] had a balance of $118.88. [The inmate account records] also show [that Jacob] has an average monthly income of approximately $115.00." As a result, the district court found that Jacob had sufficient funds to pay the cost of proceeding with the case. Our de novo review of the record leads us to the same conclusion.

Finally, Jacob argued to this court that if the term security in the in forma pauperis statutes does not include a replevin bond, then the replevin statute must be declared unconstitutional as a violation of the Equal Protection Clause of both the state and the federal Constitutions. As this argument was not made below, we cannot entertain it for the first time on appeal. See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

CONCLUSION

The term "security" as it is used in this state's in forma pauperis statutes does not include the cost of the replevin bond

described in § 25-1098, and therefore, the district court did not err in declining to consider such cost in determining whether Jacob was entitled to proceed in forma pauperis. Based upon the record, we find no error in the determination that he was not so entitled. Consequently, we affirm the order of the district court denying Jacob's motion to proceed in forma pauperis.

AFFIRMED.

JOHN KING, SPECIAL ADMINISTRATOR OF THE ESTATE OF LOIS KING, DECEASED, APPELLANT, V. CROWELL MEMORIAL HOME, APPELLEE.

622 N.W.2d 588

Filed February 2, 2001. No. S-99-1307.

1. **Directed Verdict: Proof: Appeal and Error.** In considering an appeal from an order granting a motion for a directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
3. **Pleadings: Appeal and Error.** The overruling of a motion in limine is not reviewable on appeal.
4. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
5. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition.
6. **Negligence: Evidence: Proximate Cause.** A plaintiff in a negligence action is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was a cause of the plaintiff's injury.
7. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
8. **Trial: Negligence: Proximate Cause.** Determination of causation is ordinarily a question for the trier of fact.
9. **Negligence: Proximate Cause.** An allegation of negligence is insufficient where the finder of fact must guess the cause of the accident.
10. **Negligence: Circumstantial Evidence: Proof: Proximate Cause.** While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of a plaintiff's injury.

11. **Trial: Evidence: Proximate Cause.** Speculation and conjecture are not sufficient to establish causation; the evidence must be sufficient to make the theory of causation reasonable and not merely possible.
12. **Trial: Evidence: Proof.** The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another.
13. **Summary Judgment: Directed Verdict: Trial: Evidence.** Evidence offered in summary judgment proceedings, but not offered at trial, cannot be considered in determining whether the evidence adduced at trial is sufficient to preclude a directed verdict.
14. **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 Washington County: DARVID D. QUIST, Judge. Affirmed.

Gary F. Smolen for appellant.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellee.

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

GERRARD, J.

FACTUAL AND PROCEDURAL BACKGROUND

Lois King (the decedent) was a resident of the Crowell Memorial Home (the Home) in Blair, Nebraska. The decedent died on October 11, 1995, at the age of 84. John King (King), the decedent's son and the special administrator of her estate, brought suit against the Home on behalf of the decedent's estate.

King's operative second amended petition, filed on February 18, 1998, alleged that the Home was negligent in several respects. The petition alleged that the Home was negligent in failing to prevent the decedent from choking to death by having adequate support staff available, by having planning or procedures in place to prevent the death, or by preparing liquified food. The petition further alleged that the Home was negligent in incorrectly classifying the decedent as a "No CPR" patient, despite King's request that lifesaving measures be taken, and that the Home consequently failed to resuscitate the decedent when she stopped breathing.

Prior to trial, the Home filed a motion to strike the allegations in the petition relating to inadequate support staff and failure to resuscitate. The motion was sustained with respect to the support staff allegations, but overruled as to the resuscitation allegations. The district court then ordered all pretrial motions to be filed by March 16, 1999. Despite this, the Home filed a motion in limine on September 27, seeking to exclude evidence of King's holding a health care power of attorney for the decedent, or King's allegations relating to resuscitation. After a telephonic hearing, the motion in limine was overruled, but the district court directed the parties not to raise the power of attorney or resuscitation issues during voir dire or opening statements.

The matter came on for trial on October 18, 1999. King did not attempt to present, or otherwise raise, the issues of power of attorney or resuscitation during voir dire or opening statements.

King was the sole witness to testify during the plaintiff's case in chief. King testified that he visited the decedent in the Home once or twice a week. King proffered exhibits 8 and 9, which were, respectively, a general power of attorney and a durable power of attorney for health care, both held by King for the decedent. The Home objected on the bases of foundation and relevance, and the district court reserved ruling on the objections.

King testified that in October 1994, he observed the decedent's medical records at the Home and saw that she was designated "No CPR," which he understood to refer to cardiopulmonary resuscitation. King then proffered exhibit 10, which was a copy of a letter from King to the Home instructing the Home to use "any and all medical measures" on the decedent. The Home objected on the bases of foundation and relevance, and the objection was sustained. King reproffered exhibits 8 and 9, and the Home's objections to those exhibits were also sustained.

King testified that it was "[his] understanding . . . that [CPR] was not [performed]" on the decedent. The basis for this understanding was not explained at trial. Other than this testimony, no evidence was presented regarding what measures were taken to prevent the decedent's death. No evidence was presented that at the time of the decedent's death, she was still a "No CPR" patient or that King's instructions regarding the decedent's care had not been followed. No evidence was presented at trial, from

a medical expert or otherwise, that any efforts to resuscitate the decedent would have been in any way successful. In fact, no evidence was presented at trial to even establish the decedent's medical cause of death.

The Home did not cross-examine King, and after he was excused, the plaintiff rested. The Home made a motion for directed verdict, arguing that there was no evidence presented supporting any of the allegations contained in the second amended petition. The Home's motion for directed verdict was sustained, and King's petition was dismissed. King appeals.

ASSIGNMENTS OF ERROR

King assigns, restated and reordered, that (1) the district court erred in allowing the Home's motion in limine to be argued in light of the court's prior ruling on the Home's motion to strike and the progression order establishing a deadline for pretrial motions; (2) the district court erred in not preserving and producing a record of the hearing on the Home's motion in limine; (3) the district court erred in prohibiting the use of the issues of power of attorney and cardiopulmonary resuscitation during voir dire and opening statements; (4) the district court's interpretation of the "Nebraska Health Care Power of Attorney" statutes, Neb. Rev. Stat. ch. 30, art. 34 (Reissue 1995), unconstitutionally infringed upon the decedent's rights of substantive due process; (5) the district court erred in sustaining the Home's motion for a directed verdict; and (6) the district court abused its discretion in sustaining the Home's objections to exhibits 8, 9, and 10.

STANDARD OF REVIEW

[1,2] In considering an appeal from an order granting a motion for a directed verdict at the close of the plaintiff's case, an appellate court must determine whether the cause of action was proved and in so doing must consider the plaintiff's evidence as true and give the plaintiff the benefit of reasonable conclusions deducible from that evidence. *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000); *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995). A directed verdict is proper at the close of all the evidence only where reasonable minds cannot

differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Cole v. Loock, supra*; *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

ANALYSIS

[3,4] King's first and second assignments of error argue that the district court erred in permitting the Home's motion in limine to be argued and in not preserving a record of the hearing. However, the Home's motion in limine was overruled. The overruling of a motion in limine is not reviewable on appeal. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). Moreover, error without prejudice provides no ground for appellate relief. *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998). As King prevailed on the Home's motion in limine, he was not prejudiced by the consideration of the motion or the failure to preserve a record of the hearing. We need not determine if the district court erred regarding the motion in limine, as such error, if any, did not prejudice King and provides no basis for reversing the judgment of the district court.

King's third assignment of error is that the district court erred in limiting his voir dire and opening statements. Again, we need not decide whether the district court erred in this regard, because King was not prejudiced by the district court's ruling. The judgment on appeal is the result of a directed verdict entered by the district court, and not the determination of a jury. Consequently, errors in the selection of the jury, if any, had no effect on the ultimate judgment. See *id.*

Similarly, King was not prejudiced by the district court's restriction on his opening statement because the district court directed a verdict against him based upon his failure to prove his case. Declarations made in opening statements may not be used as evidence in determining the issues in a case. See *Twenty Club v. State*, 167 Neb. 37, 91 N.W.2d 64 (1958). King's opening statement, then, had no relation to the directed verdict that was entered at the conclusion of his case in chief. As King was not prejudiced by the restrictions placed on voir dire and opening statements, his assignment of error provides no basis for appellate relief. See *Willers v. Willers, supra.*

[5] King's fourth assignment of error is not properly before this court, as it was not presented in the district court. An appellate court will not consider a constitutional question unless it has been properly presented to the trial court for disposition. *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000). Since King had the opportunity to present his due process claim to the district court and failed to do so, we do not consider this argument on appeal.

King's fifth assignment of error is that the district court erred in granting the Home's motion for directed verdict. That motion was premised on the Home's argument that King failed to adduce evidence supporting any of the allegations made in his second amended petition. King's appellate arguments do not appear to contest that he presented no evidence relating to the allegations that the Home failed to implement planning or procedures to prevent the decedent's death, or that the Home failed to provide liquified food. King's appellate claim is that there was sufficient evidence to support his allegations relating to resuscitation, and our analysis is limited to that claim.

[6,7] A plaintiff in a negligence action is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was a cause of the plaintiff's injury. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999). A "proximate cause" is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

[8-10] Determination of causation is ordinarily a question for the trier of fact. *Id.* However, an allegation of negligence is insufficient where the finder of fact must guess the cause of the accident. *Parker v. Lancaster Cty. Sch. Dist. No. 001, supra.* While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of a plaintiff's injury. *Id.*

[11,12] Speculation and conjecture are not sufficient to establish causation. *Pendleton Woolen Mills v. Vending Associates, Inc.*, 195 Neb. 46, 237 N.W.2d 99 (1975). The evidence must be sufficient to make the theory of causation reasonable and not

merely possible. *Id.* The burden of proving a cause of action is not sustained by evidence from which a jury can arrive at its conclusion only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another. *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991).

A review of the evidence presented at trial relating to proximate cause demonstrates a complete failure of proof on this issue. King's theory of the case was that he directed the Home to resuscitate the decedent if necessary, but the Home failed to follow that instruction, failed to resuscitate the decedent, and that the decedent died as a result. At trial, however, no evidence was presented regarding what measures were taken to prevent the decedent's death, other than King's statements that no resuscitation was performed "to his knowledge." No evidence was presented that any efforts to resuscitate the decedent could have been in any way successful. No evidence was presented at trial to establish the decedent's medical cause of death.

In short, there was no evidence presented at trial upon which a jury could have based a reasonable conclusion that the decedent's death was caused by a failure on the part of the Home to perform resuscitation. Absent such evidence, King did not meet his burden of proof on the issue of causation, and the district court did not err in determining, as a matter of law, that King failed to prove his cause of action.

[13] King's appellate brief makes some reference to affidavits, contained in the bill of exceptions, which were received in evidence during pretrial summary judgment proceedings. Those affidavits, from the decedent's physician and two nurses who worked at the Home, contain some evidence of the events surrounding the decedent's death. In one of the affidavits, the decedent's physician opines as to the decedent's cause of death, although the physician specifically refused to state an opinion regarding whether resuscitation, if performed, could have been successful. None of the medical evidence set forth in these affidavits, however, was either offered or received in evidence at trial. Evidence offered in summary judgment proceedings, but not offered at trial, cannot be considered in determining whether

the evidence adduced at trial is sufficient to preclude a directed verdict. See, e.g., *Howell v. Douglas Cty.*, 8 Neb. App. 572, 597 N.W.2d 636 (1999).

[14] Finally, our conclusion with respect to the directed verdict makes it unnecessary for us to consider whether the district court erred in excluding exhibits 8, 9, and 10. Those exhibits contain nothing to support a finding that the decedent's death was proximately caused by any act or omission of the Home. Consequently, those exhibits would not affect our conclusion that the district court did not err in directing a verdict for the Home, and we need not decide whether they should have been admitted. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000); *In re Interest of Battiato*, 259 Neb. 829, 613 N.W.2d 12 (2000).

CONCLUSION

King failed to adduce evidence at trial sufficient for a jury to find, absent speculation or conjecture, that any act or omission of the Home proximately caused the decedent's death. King has assigned no other error that would support reversal of the district court's judgment. We therefore affirm the judgment of the district court.

AFFIRMED.

WARREN H. NOFFSINGER ET AL., APPELLANTS, V. NEBRASKA STATE BAR ASSOCIATION, APPELLEE.

622 N.W.2d 620

Filed February 9, 2001. No. S-99-1080.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.

3. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.
4. **Demurrer: Jurisdiction.** Under Neb. Rev. Stat. § 25-806(1) (Reissue 1995), lack of jurisdiction is a proper ground for demurrer.
5. **Disciplinary Proceedings: Rules of the Supreme Court: Immunity.** Neb. Ct. R. of Discipline 22(B) (rev. 1996), regarding immunity and privileges, states that the Counsel for Discipline, his or her representatives, and members of the Disciplinary Review Board and Committees on Inquiry shall be immune from suit for any conduct in the course of their official duties under these rules.
6. **Judges: Immunity: Actions: Damages.** Judges are immune from civil actions for damages for acts performed in the course of their official functions and judicial capacity.
7. **Rules of the Supreme Court.** The power to regulate the bar, as an inherent power of the Supreme Court, is judicial in nature.
8. ___. Inherent powers are not subject to delegation to committees and representatives, although these agencies may be utilized for investigation or factfinding purposes and to make recommendations, but the final decision must rest with the Supreme Court.
9. **Rules of the Supreme Court: Immunity.** The Nebraska State Bar Association, as an arm of the Supreme Court, has quasi-judicial immunity in its own right.
10. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that an amendment will correct the defect.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Frank B. Morrison, Jr., of Morrisons, McCarthy & Baraban, for appellants.

Robert T. Grimit, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellants Warren H. Noffsinger, individually and doing business as Rush Creek Ranch; Terry B. Noffsinger, doing business as Rush Creek Ranch; Warren, Terry, and Thomas H. Noffsinger, as cotrustees of the Audrey M. Noffsinger Trust; J.R. Brown; and BSM Technologies, Inc., filed an appeal from the trial court's order sustaining the demurrer of appellee Nebraska State Bar Association. Appellants filed a petition

alleging negligence by appellee, through the conduct of the Counsel for Discipline, in failing to investigate the misconduct of former attorney Terrence D. Malcom. Appellants claim that this failure resulted in Malcom's later conversion of appellants' money. The trial court sustained appellee's demurrer on the ground that appellants did not have standing to sue and did not rule on the other grounds. Appellants filed an appeal from this order. For the reasons stated below, we affirm the trial court's order sustaining the demurrer.

BACKGROUND

Appellants allege that they were clients of Malcom, an attorney practicing law in Red Willow County, Nebraska, in 1995 and 1996. Noffsingers allege that on December 15, 1995, and January 4, 1996, Malcom received funds in his capacity as their attorney and that those funds were illegally converted to the use of Malcom, thereby permanently depriving Noffsingers of those funds in the sum of $245,000. Brown alleges that on July 3, 1996, Brown delivered the sum of $150,000 to Malcom as Brown's attorney and that Malcom converted this money, thereby permanently depriving Brown of it. Noffsingers and Brown obtained judgments against Malcom in the sum of $245,000 and $150,000 respectively, but neither of these judgments has been paid.

Appellants allege that in September 1993, prior to the above-described events, the law firm where Malcom was a partner discovered that Malcom had been stealing money from the firm and immediately reported the theft to the Counsel for Discipline of appellee. According to appellants, the Counsel for Discipline failed to require Malcom to file an accounting after the reported theft from his law firm and no investigation was done of the alleged theft. Appellants claim that the Counsel for Discipline did not request trust account statements, even though the law firm had reported to him that it had reason to believe that Malcom was out of trust and had engaged in theft. Appellants allege that the Counsel for Discipline was acting within the scope and course of his employment with appellee and that he is charged by law with the responsibility of investigating the merits of the allegations and reporting his findings to the Supreme

Court so that an order of temporary suspension could be issued. Appellants allege that the Counsel for Discipline failed to fulfill this duty and that this failure allowed Malcom to continue to practice law through 1996 without the public's being informed of his criminal propensity. As a result, Malcom was in a position to and did convert appellants' funds.

Appellee demurred to appellants' petition on four grounds: (1) that appellants lacked standing to sue, (2) that appellee and its employees and agents are immune from the claims set forth in the petition, (3) that the petition does not state facts sufficient to constitute a cause of action, and (4) that the trial court has no jurisdiction of the subject of this action. The trial court sustained appellee's demurrer on the basis of standing but did not rule on the other grounds asserted. From this order, appellants filed an appeal.

ASSIGNMENT OF ERROR

Appellants claim as their sole assignment of error that the trial court erred in sustaining appellee's demurrer.

STANDARD OF REVIEW

[1] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Danler v. Rosen Auto Leasing*, 259 Neb. 130, 609 N.W.2d 27 (2000).

[2] Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *White v. Board of Regents*, 260 Neb. 26, 614 N.W.2d 330 (2000); *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000); *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

ANALYSIS

[3] Appellants argue that because the trial court sustained appellee's demurrer on the basis of standing alone, this court should address only that issue on appeal. An order sustaining a demurrer will be affirmed if any one of the grounds on which it

was asserted is well taken. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000); *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). Thus, on appeal, we may consider any of the four grounds asserted by appellee below, provided that they are proper grounds for demurrer under Neb. Rev. Stat. § 25-806 (Reissue 1995).

[4] Appellee asserted immunity below as an alternative ground for demurrer. The asserted ground of immunity in this case is jurisdictional. See *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000) (holding that because state had not waived its sovereign immunity, district court lacked jurisdiction). Under § 25-806(1), lack of jurisdiction is a proper ground for demurrer. Accordingly, we address the issue of immunity.

[5,6] Neb. Ct. R. of Discipline 22(B) (rev. 1996), regarding immunity and privileges, states that "[t]he Counsel for Discipline, his or her representatives, and members of [the Disciplinary Review] Board and Committees [on Inquiry] shall be immune from suit for any conduct in the course of their official duties under these Rules." The Counsel for Discipline's immunity exists not merely by rule; rather it derives from the common-law immunity possessed by judges for the performance of judicial functions. As a general rule, judges are immune from civil actions for damages for acts performed in the course of their official functions and judicial capacity. *Frey v. Blanket Corp.*, 255 Neb. 100, 582 N.W.2d 336 (1998); *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977). In certain situations, this immunity has been extended to individuals who are not judges, but who perform functions which are closely related to the judicial process. *Frey v. Blanket Corp., supra.* The rule is that where an officer is invested with discretion and is empowered to exercise his or her judgment in matters brought before the officer, he or she is sometimes called a quasi-judicial officer and when so acting, is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority and without willfulness, malice, or corruption. *Id.* However, quasi-judicial immunity from any suit or damages based upon the performance of duties within a person's

authority attaches not to particular offices, but to particular official functions. *Id.*

The question becomes whether the functions of the Counsel for Discipline performed in this case are judicial functions. In determining whether to grant quasi-judicial immunity, courts examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted and seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. *Id.*

[7,8] To determine whether the Counsel for Discipline's functions are judicial in nature, we must first determine their source. The Nebraska Constitution vests the judicial power of the state in the Supreme Court. Neb. Const. art. II, § 1, and art. V, § 1. As we have stated previously, when the Supreme Court was created, it brought with it inherent powers, i.e., powers that are essential to the existence, dignity, and functions of the court from the very fact that it is a court. *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). Among those powers are the powers to admit and discipline attorneys. *Id.* "The matter of the admission, suspension, discipline and disbarment of attorneys . . . rests in this court, and this court alone." *Id.* at 290, 275 N.W. at 268-69. Pursuant to its power to regulate the bar, the Supreme Court has promulgated rules for the admission and discipline of attorneys, should the need arise. The power to regulate the bar, as an inherent power of the Supreme Court, is judicial in nature. *Id.* "The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government." *Id.* at 289, 275 N.W. at 268. See, also, *Simons v. Bellinger*, 643 F.2d 774 (D.C. Cir. 1980) (stating that determining who is authorized to practice law is inherent judicial function); *Sassower v. Mangano*, 927 F. Supp. 113 (S.D.N.Y. 1996) (stating that state bar disciplinary proceedings are clearly judicial in nature); *Cohran v. State Bar of Georgia*, 790 F. Supp. 1568 (N.D. Ga. 1992) (stating that state bar disciplinary proceedings are clearly judicial in nature). Inherent powers are "not subject to delegation to committees and representatives, although these agencies may be utilized for investigation

or factfinding purposes and to make recommendations, but the final decision must rest with the court." *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. at 289, 275 N.W. at 268.

In exercising its inherent power to regulate the bar, this court uses the Counsel for Discipline for investigative purposes. The Counsel for Discipline has been given, among other things, the power to investigate allegations of misconduct, prepare and file charges of misconduct against attorneys, and dismiss charges. See Neb. Ct. R. of Discipline 8 (rev. 2000). The exercise of these powers and duties expressly involves discretion and judgment. See *id.* Thus, in performing his or her powers and duties, the Counsel for Discipline is performing a judicial function and is entitled to quasi-judicial immunity. Rule 22 is merely a recognition of the immunity he or she already possesses.

Were the Counsel for Discipline not granted immunity in performing his or her official duties, he or she would be a probable target for harassing lawsuits. See *Simons v. Bellinger, supra.* Indeed, because the Counsel for Discipline investigates and prosecutes only attorneys, who could use their familiarity with the legal process to explore vindication in other forums, the Counsel for Discipline would be a more likely target for litigation than judges or prosecutors. See *id.* Thus, immunity is an appropriate shield.

The question remains, however, whether the Counsel for Discipline was entitled to immunity for his actions in this case. Appellants allege that the Counsel for Discipline was negligent in failing to investigate the allegations of misconduct against Malcom. The investigation of attorney misconduct is at the core of the Counsel for Discipline's official duties. Thus, the Counsel for Discipline was performing a judicial function, and it is about his performance of this function that appellants complain. Because the Counsel for Discipline is immune from suit for the performance of his official duties, he is thus entitled to quasi-judicial immunity in this case.

This determination is consistent with the case law in other jurisdictions. See, *Simons v. Bellinger, supra* (holding that members of committee on unauthorized practice of law were entitled to immunity because they were performing judicial function in determining who was authorized to practice law); *Sassower v.*

Mangano, supra (holding that because state disciplinary proceedings are judicial in nature, quasi-judicial immunity bars claims against members of state bar disciplinary and grievance committees); *Eston v. Van Bolt*, 728 F. Supp. 1336 (E.D. Mich. 1990) (holding that members and employees of attorney discipline board and attorney grievance commission served as arm of state supreme court and thus were entitled to quasi-judicial immunity); *Niklaus v. Simmons*, 196 F. Supp. 691 (D. Neb. 1961) (holding that state attorney general, to extent he participated in disbarment proceedings, was entitled to judicial immunity); *Black v. Clegg*, 938 P.2d 293 (Utah 1997) (holding that when state bar and its officials participate judicially in regulation of bar, state supreme court's cloak of judicial immunity reaches far enough to cover them).

Because the Counsel for Discipline is immune, there cannot be vicarious liability on the part of appellee under appellants' sole theory of recovery.

[9] In addition, appellee, as an arm of the Supreme Court, has quasi-judicial immunity in its own right. The instant case is similar to *Bailey v. Utah State Bar*, 846 P.2d 1278 (Utah 1993). In that case, the plaintiffs alleged negligence on the part of the state bar in failing to protect them from a particular attorney. *Id.* The state bar had prepared to file charges against the attorney, but delayed several months in filing them, during which time the attorney caused damages to the plaintiffs. *Id.* The court stated that the bar's duties in regard to discipline were judicial in nature and that to that extent, the bar was entitled to immunity. *Id.* See, also, *Cohran v. State Bar of Georgia*, 790 F. Supp. 1568 (N.D. Ga. 1992) (holding that state bar, as agent of state supreme court, was immune from liability for its conduct with respect to disciplinary proceedings). Because appellee acts under the authority of the Supreme Court and because the Supreme Court enjoys immunity from liability for judicial acts, appellee enjoys quasi-judicial immunity to the extent it is involved in disciplinary proceedings. Therefore, we affirm the trial court's ruling sustaining appellee's demurrer to appellants' petition.

[10] We further determine that the trial court's action in dismissing appellants' petition without granting leave to amend was correct. When a demurrer to a petition is sustained, a court must

grant leave to amend the petition unless it is clear that no reasonable possibility exists that an amendment will correct the defect. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997). We determine that there is no reasonable possibility that an amendment of the petition could overcome the immunity granted to the Counsel for Discipline under rule 22.

CONCLUSION

We hold that the immunity granted to the Counsel for Discipline prevents suit against appellee for the alleged negligent acts of the Counsel for Discipline. We further determine that there is no reasonable possibility that an amendment to the petition could overcome appellee's immunity. Because these determinations are dispositive of this case, it is not necessary to, and we do not, address the other grounds raised by appellee's demurrer.

AFFIRMED.

HENDRY, C.J., and WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ORESTES SANCHEZ-LAHORA, APPELLANT.

622 N.W.2d 612

Filed February 9, 2001. No. S-99-1129.

1. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **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 of the court below.
3. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Sexual Assault: Evidence.** Neb. Rev. Stat. § 28-321 (Reissue 1995) does not permit a trial court to weigh the credibility of a defendant's allegations of past consensual sexual conduct with a victim.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal

thereto from the District Court for Adams County, STEPHEN ILLINGWORTH, Judge. Judgment of Court of Appeals affirmed.

Nicholas D. Valle, of Langvardt & Valle, P.C., for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

CONNOLLY, J.

Appellant, Orestes Sanchez-Lahora, was convicted of first degree sexual assault and terroristic threats. The Nebraska Court of Appeals reversed the judgment and remanded the cause for a new trial because the trial court excluded the evidence of the victim's alleged prior sexual conduct with Sanchez-Lahora. See *State v. Sanchez-Lahora*, 9 Neb. App. 621, 616 N.W.2d 810 (2000). We granted the State's petition for further review.

The issue presented by this case is the trial court's role under Neb. Rev. Stat. § 28-321 (Reissue 1995), Nebraska's rape shield statute, in determining the admissibility of evidence regarding the victim's alleged prior sexual conduct. The Court of Appeals held that a trial court is to determine only the relevance of the evidence at an in camera hearing under § 28-321 and should leave the issue of credibility for the jury. We agree and accordingly affirm.

ASSIGNMENTS OF ERROR

The State assigns that the Court of Appeals erred in determining that (1) at an in camera hearing, a trial court can determine only the relevance of the evidence presented to the issue of consent and cannot weigh the credibility of the evidence, and (2) evidence presented by Sanchez-Lahora at the in camera hearing was relevant to the issue of consent and tends to establish a pattern of conduct relevant to the issue of consent to the extent that the jury should have been allowed to consider it.

BACKGROUND

The full background of this case can be found in the Court of Appeals' opinion. See *State v. Sanchez-Lahora, supra*. We

granted Sanchez-Lahora's petition for further review on the sole issue of the admissibility of the victim's alleged prior sexual conduct with Sanchez-Lahora and, therefore, relate only the facts which are pertinent to that issue.

Sanchez-Lahora was convicted by a jury of first degree sexual assault and terroristic threats and was sentenced to consecutive sentences of 10 to 15 years' imprisonment and 1 to 3 years' imprisonment, respectively, for events occurring on or about November 6, 1998. Sanchez-Lahora asked for an in camera hearing and order allowing him to offer evidence at trial of specific instances of the victim's past sexual behavior with him.

At the in camera hearing and after a formal waiver of his right to remain silent, Sanchez-Lahora testified that he had known the victim for 3 to 4 months before November 6, 1998. He stated that during this time, the victim had sexual relations with him approximately eight to nine times at his home and three to four times at motels. He admitted to having sexual intercourse with the victim on November 6, but he claimed that she participated voluntarily.

On cross-examination, the State asked Sanchez-Lahora why he had denied knowing the victim when asked by the police and had admitted knowing the victim only after being informed that the police had obtained a videotape from a convenience store. Sanchez-Lahora spoke little English and explained that he knew the victim by a different version of her name other than the one used by the police investigator during the first interview. He had also asked to see the videotape, but it was not shown to him.

The State also inquired into Sanchez-Lahora's relationship with two witnesses, Scott Kinney and Jamie Sund. Sanchez-Lahora testified that these two men knew of his relationship with the victim. Sanchez-Lahora's counsel objected to the testimony as being beyond the scope of direct examination. The trial court overruled the objection upon the State's explanation that Kinney was "under" Sanchez-Lahora in the distribution of illicit drugs, a hierarchy which the State believed bore on Kinney's credibility and bias. The trial court also allowed the State to ask Sanchez-Lahora if he and Kinney were involved in the distribution of illegal drugs after the State agreed not to use the answer in a prosecution if he admitted to the activity. He then answered that he and Kinney were involved in the distribution of illegal drugs.

Sanchez-Lahora also testified that he told two other witnesses about his sexual relationship with the victim; however, he could not provide information on their whereabouts. He further stated that his neighbor knew of his relationship with the victim, but the neighbor did not testify at the in camera hearing. Kinney testified that he knew Sanchez-Lahora and the victim, but he refused to answer further questions based on his Fifth Amendment right against self-incrimination.

The State requested that Sanchez-Lahora's motion to introduce evidence of his alleged relationship with the victim be denied. The State argued that under *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), Sanchez-Lahora had failed to meet his burden in adducing evidence other than his allegation. The court agreed this was the standard and also informed Sanchez-Lahora's counsel that if the court found that he had met his burden under *Hopkins*, then the State would be given an opportunity to present further evidence. The court then ruled in the State's favor, finding that the "defendant did not meet the standard set out in Neb. Rev. Stat. § 28-321 (2)(b)."

Sanchez-Lahora filed a motion for reconsideration and included an accompanying motion for a grant of immunity to Kinney. A hearing was held on May 21, 1999. In support of his requests, affidavits of Sanchez-Lahora and his counsel were admitted into evidence over the State's objection. His counsel's affidavit stated that he had interviewed Kinney and that Kinney had admitted seeing the victim at Sanchez-Lahora's home on several occasions prior to November 6, 1998, and had observed the victim perform a "striptease" for Sanchez-Lahora. Kinney also stated that the victim was known to exchange sexual favors for controlled substances. Sanchez-Lahora's affidavit stated that he had had sexual relations with the victim, with her consent, before and on November 6. He also stated that before November 6, the victim had requested the same type of sex as that which had occurred on November 6.

The court acknowledged that Sanchez-Lahora's theory of consensual sex permitted the court to admit evidence of the victim's past sexual conduct with him under § 28-321. The court noted, however, that Sanchez-Lahora's affidavit stated only that the consensual relations were similar in nature, without specify-

ing what type of sex was involved. Based upon this finding, the court determined that Sanchez-Lahora had failed to demonstrate that the past activity showed a relation to the conduct involved in the case and tended to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent. The court denied both Sanchez-Lahora's motion for witness immunity and his motion to introduce evidence of the victim's past sexual behavior with him.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by such rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in the admissibility of evidence. *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

[2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000); *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

ANALYSIS

Nebraska's rape shield statute, § 28-321(2), governs the admissibility of a victim's past sexual conduct:

> Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior. Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: . . . (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

The Court of Appeals stated that the only issue on the admissibility of the claimed prior sexual conduct was whether the evidence tended to establish a pattern of conduct or behavior of the victim relevant to the issue of consent. *State v. Sanchez-Lahora*, 9 Neb. App. 621, 616 N.W.2d 810 (2000). The court then concluded that any evidence of the victim's past consensual sexual relations with Sanchez-Lahora, if believed, would be relevant. The court framed the issue as whether the trial court can weigh the credibility of evidence presented at the in camera hearing or is limited to determining the relevance of the evidence to the issue of consent. *Id.*

In *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), we set out the general guidelines for admitting evidence of the victim's past sexual conduct under § 28-321 when the defendant's affirmative defense is the victim's consent to the prosecuted act. The trial court must make three determinations before admitting the evidence of past sexual relations: (1) whether the proffered evidence tends to prove the defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against him; (2) whether the victim's past sexual behavior shows a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RELEVANCE

The State contends that Sanchez-Lahora failed to establish a pattern of conduct on the part of the victim that was relevant to the issue of consent. During the hearing on Sanchez-Lahora's motion to reconsider, the trial court, in its ruling, focused only on Sanchez-Lahora's affidavit. The court noted that he stated that the prior sexual relations between himself and the victim were consensual and similar in nature, without specifying what type of sex was involved. The trial court did not comment on his live testimony at the in camera hearing. Based upon this finding, the court concluded that Sanchez-Lahora had failed to satisfy

the requirements of § 28-321 that the evidence show a relation to the conduct involved in the case and that it tend to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent. The court therefore overruled his motion to offer the evidence at trial.

Admittedly, there are occasions when past consensual sexual relations between the victim and the defendant may not be relevant to the prosecuted act. For example, the past relations may be too remote in time to be relevant. See, e.g., *State v. Stellwagen*, 232 Kan. 744, 659 P.2d 167 (1983) (affirming trial court's exclusion of prior relationship on remoteness ground). Courts have also found that prior consensual single-partner intercourse was not relevant to an allegation of multiple-participant rape. See, e.g., *People v Williams*, 416 Mich. 25, 330 N.W.2d 823 (1982).

A court may also limit a defendant's testimony or questioning of a complainant in order to prevent undue prejudice when the facts of the prior relations seem dissimilar to the prosecuted act. See, e.g., *People v. Schuldt*, 217 Ill. App. 3d 534, 577 N.E.2d 870, 160 Ill. Dec. 545 (1991) (trial court properly limited defendant to eliciting testimony from complainant that she had sexual intercourse with defendant twice where defendant could not show that prior relations had involved consensual sado-masochistic sexual conduct as complainant alleged occurred during the act in question).

Finally, evidence of prior consensual relations is not relevant to cases where the victim's injuries preclude the possibility of consent. See, e.g., *State v. Jones*, 716 S.W.2d 799 (Mo. 1986) (en banc) (affirming exclusion of defendant's testimony regarding prior consensual relations where physician's testimony supported victim's allegation that she had been choked and physician had found cervical tear); *State v. Neumann*, 179 Wis. 2d 687, 508 N.W.2d 54 (Wis. App. 1993) (concluding erroneous jury instruction to disregard prior consensual sexual relations was harmless error where evidence overwhelmingly showed defendant had used force and violence against victim). In this case, however, the physical evidence of the victim's injuries, while not irrelevant, was not of the nature such as to preclude the possibility of consent based upon that evidence alone.

Section 28-321 requires the trial court to determine whether the victim's past sexual behavior with the defendant shows a pattern of conduct or behavior on the part of the victim that is relevant to consent. However, in cases where the defendant alleges a history of consensual, single-partner sexual relations, the statute does not require the defendant to color-match intimate details of those past relations with the act in question in order to show relevancy. Compare, Nev. Rev. Stat. § 48.069(1) (2000) (requiring accused to submit to court written offer of proof and sworn statement of specific facts that he expects to prove); Minn. R. Evid. 412 (West Cum. Supp. 2001) (defendant must set out with particularity offer of proof of evidence that accused intends to offer relative to previous sexual conduct of victim).

Sanchez-Lahora testified that he engaged in sexual conduct with the victim on 12 to 13 occasions during the 3 to 4 months before the prosecuted act. He also stated that the sexual encounters always occurred at his home or a motel and were consensual and similar in nature on each occasion, including the night in question. Although the trial court might have limited any testimony regarding the details of the past relations under Neb. Rev. Stat. § 27-403 (Reissue 1995), under the facts of this case, it erred by finding Sanchez-Lahora had failed to satisfy the requirement of § 28-321 that the evidence show a pattern of conduct on the part of the victim which is relevant to consent.

Assessing Credibility of Evidence

During the in camera hearing, the State moved to overrule Sanchez-Lahora's motion to introduce evidence of his alleged relationship with the victim because *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), indicated that Sanchez-Lahora had failed to meet his burden in adducing evidence *other than* his allegation. The court agreed this was the standard and also informed Sanchez-Lahora's counsel that if the court found that he had met his burden under *Hopkins*, then the State would be given an opportunity to present further evidence. These statements indicate that the court apparently believed its role was to assess the credibility of the evidence presented by the defendant.

In *State v. Hopkins, supra*, the defendant did not admit to having sexual relations with the victim on the night charged. Rather,

he stated he was too drunk to remember the events. Thus, he presented no evidence showing consent for the prosecuted act, and we were not presented with the issue whether the trial court should weigh the credibility of the evidence adduced at the in camera hearing under § 28-321.

[3] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000); *State v. Hernandez*, 259 Neb. 948, 613 N.W.2d 455 (2000).

In its petition for further review, the State argues that Sanchez-Lahora's evidence is not credible and urges this court to adopt the standard in *Holloway v. State*, 695 S.W.2d 112 (Tex. App. 1985) (two-judge panel), *affirmed on other grounds* 751 S.W.2d 866 (Tex. Crim. App. 1988) (en banc) (concluding that victim's reputation for being prostitute was not material to fact at issue).

In *Holloway*, the Texas rape shield statute in effect at the time of the offense was quoted in relevant part:

> "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted [in sexual assault cases] only if, and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

751 S.W.2d at 867 n.2.

In *Holloway v. State, supra*, the defendant sought to present evidence of the victim's reputation for being a prostitute. The Court of Appeals affirmed the trial court's exclusion of the evidence, based on its conclusion that "the trial judge is the sole judge of the credibility of the witnesses and as such he may accept or reject any part or all of the testimony given." 695 S.W.2d at 117, citing *Bellah v. State*, 653 S.W.2d 795 (Tex. Crim. App. 1983).

However, the State neglected to inform this court that this ruling was specifically rejected by the Texas Court of Criminal Appeals. In *Holloway v. State*, 751 S.W.2d 866 (Tex. Crim. App. 1988), the Court of Criminal Appeals pointed out that the case

relied upon by the Court of Appeals for its holding dealt with a pretrial hearing on the admissibility of the defendant's confession. See *Bellah v. State, supra.* Deciding whether a confession was voluntarily and knowingly made by the defendant and therefore admissible is an established preliminary question requiring the trial court to weigh the credibility of witnesses on this factual issue. See *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972) (applying preponderance standard to question of voluntariness). Accord *State v. Lopez*, 249 Neb. 634, 645, 544 N.W.2d 845, 854 (1996) ("[t]here is no question that the State has the burden to establish by a preponderance of the evidence that a defendant's statement was voluntary and not coerced"). The Texas Court of Criminal Appeals emphasized, however, that "[a] rule of admissibility such as [the rape shield statute] is 'not concerned with the weight of the evidence.'" *State v. Holloway*, 751 S.W.2d at 870.

Not only was the wording of the statute different in *Holloway*, but the reasoning the State asks us to adopt was specifically rejected on appeal. Instead, we turn to the history of rape shield legislation for guidance on the trial court's role in assessing the credibility of the evidence presented at the in camera hearing.

All states now have some form of a rape shield statute or rule of evidence. See Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U. L. Rev. 709 (1995) (citing statutes or rules of evidence for 48 states). See, also, Ariz. Rev. Stat. § 13-1421 (West Cum. Supp. 2000); Utah R. Evid. 412. The main purposes served by § 28-321 were set out in *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985), and, in particular, include preventing the use of the victim's past sexual behavior with persons other than the defendant to infer consent by the victim to the prosecuted act or to undermine the victim's credibility.

Most state statutes are patterned after rule 412 of the federal rules of evidence. See *State v. Hopkins, supra*, citing 1A John H. Wigmore, Evidence in Trials at Common Law § 62 n.11 (Tillers rev. 1983). When federal rule 412 was originally enacted in 1978, it included the following language:

> [I]f the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

See Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540 § 2(a), 92 Stat. 2046, 2047 (1978) (amended, Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7046(a), 102 Stat. 4395, 4400 (1988)).

Some states patterned their rape shield statute after the original federal rule and still incorporate this provision. See, e.g., D.C. Code Annot. § 22-4122(B)(b)(2) (Michie 1996); Haw. R. Evid. 412, Haw. Rev. Stat. § 626-1 (1993 & Cum. Supp. 2000); Idaho R. Evid. 412(c)(2); Iowa R. Evid. 412(c)(2); Miss. Evid. Rule 412(c)(2); N.C.R. Evid. 412(d). The statutes containing this provision arguably authorize the trial court to make factual findings on the issue of consent before admitting the evidence of past consensual relations between the defendant and the alleged victim.

However, federal rule 412 was amended in 1994 to delete the language from subsection (c) that authorized the trial court to make factual findings before admitting the evidence permitted under the rule. The action was based upon the advisory committee's concern that the provision was causing confusion over whether a trial court could exclude evidence of past consensual sexual relations between the victim and the defendant if the trial court did not believe that such acts had occurred, raising substantial constitutional concerns. See Fed. R. Evid. 412, Notes of Advisory Committee ("[s]uch an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments").

Nebraska enacted its rape shield statute in 1977 and amended it in 1984, but in both instances, the Nebraska Legislature chose not to include the judicial determination provision found in the original federal rule 412(c)(2). Because the Nebraska rape shield statute is patterned after federal rule 412, see *State v. Hopkins, supra*, citing Introducer's Statement of Intent, L.B. 79, Judiciary Committee, 88th Leg., 2d Sess. (Jan. 26, 1983), we conclude that

the Legislature rejected any factfinding role for the trial court by omitting this language from the Nebraska statute.

[4] We find no language in § 28-321 that permits the trial court to weigh the credibility of a defendant's allegations of past consensual sexual conduct with a victim. Accordingly, we conclude that the Court of Appeals correctly determined that the question of the credibility of Sanchez-Lahora's factual account of his alleged history with the victim is for the jury to decide.

AFFIRMED.

THE VILLAGE OF WINSLOW, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT, V. CALBURT SHEETS, ALSO KNOWN AS CAL SHEETS, ALSO KNOWN AS CALVIN SHEETS, DOING BUSINESS AS CLUB 77, APPELLANT AND CROSS-APPELLEE.

622 N.W.2d 595

Filed February 9, 2001. No. S-99-1224.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both Neb. Const. art. I, § 5, and the U.S. Constitution.
4. **Constitutional Law: Obscenity.** Nonobscene nude dancing is expressive conduct within the outer ambit of the First Amendment's protection.
5. ___: ___. When a nude dancing ordinance on its face is designed to target nudity that contains an erotic message, the ordinance is a content-based restriction, subject to strict scrutiny.
6. ___: ___. When a nude dancing ordinance is content neutral, the proper standard of review is the intermediate scrutiny, expressive conduct test first enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).
7. **Constitutional Law: Ordinances.** A court will not strike down an otherwise constitutional ordinance on the basis of an alleged illicit motive in enacting the ordinance.
8. **Constitutional Law: Municipal Corporations: Ordinances: Obscenity.** A nude dancing ordinance will satisfy the requirements of the First Amendment if the munic-

ipality can show that the ordinance (1) is within the constitutional power of the government to enact, (2) reasonably furthers a substantial government interest, (3) is unrelated to the suppression of free expression, and (4) imposes a restriction that is no greater than is essential to the furtherance of the substantial governmental interest.

9. **Constitutional Law: Obscenity.** The government has a substantial interest in combating the harmful secondary effects associated with nude dancing.
10. **Constitutional Law: Ordinances.** The void-for-vagueness doctrine requires that an ordinance define the prohibited conduct with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Affirmed.

Anthony S. Troia for appellant.

David C. Mitchell and Timothy M. Schulz, of Yost, Schafersman, Lamme, Hillis, Mitchell, Schulz & Twidwell, P.C., for appellee.

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

HENDRY, C.J.

INTRODUCTION

Café 77, Inc., owned and operated by Calburt Sheets, appeals the district court's decision granting a permanent injunction to the Village of Winslow, Nebraska (Village), which enjoined Café 77 from providing totally nude dancing, consisting of exposure of the dancers' genitals, pubic area, and/or buttocks while performing on stage or for individual clients.

FACTUAL BACKGROUND

Winslow is an incorporated village consisting of approximately 140 people, located just outside the city limits of Fremont, Nebraska. On June 8, 1998, the Village adopted ordinance No. 90, which states:

> WHEREAS, it is the intent of the Village of Winslow to prohibit the exploitation of human nudity for the purpose of advertising, selling, or otherwise promoting the economic interests of any type of business enterprise. It is also the intent of the Village of Winslow to further the govern-

> ment's interest in avoiding the harmful secondary effects of this activity such as prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure. This prohibition is not intended to extend to any expression of opinion or the performance of a bona fide play, ballet, or drama protected by the First Amendment to the Constitution of the United States or by Article I, § 5 of the Constitution of the State of Nebraska[.]
>
> . . . .
>
> . . . It shall be unlawful for any person to intentionally expose his or her genitals, pubic area, or buttocks while employed in providing any service, product, or entertainment in any business or commercial establishment. It shall also be unlawful for anyone to aid, abet, assist or direct another person to intentionally expose his or her genitals, pubic area, or buttocks while employed in providing any service, product, or entertainment in any business or commercial establishment.
>
> . . . .
>
> . . . [A]ny activities in violation of this Section shall be deemed to be a nuisance and may be abated and suppressed by injunctive or other equitable relief as allowed by law.

The Village passed ordinance No. 90 a few weeks after Café 77, an establishment offering completely nude exotic dancing along with food and nonalcoholic drinks, opened along Main Street in the Village. The Village was not aware that Café 77 intended to offer nude dancing, and Café 77 did not apply for a business permit from the Village prior to opening. Café 77 was open for business on Friday and Saturday nights from midnight to at least 3 a.m. Complaints from Village citizens led the Village board to call a meeting on June 8, 1998, to adopt ordinance No. 90.

The minutes of the June 8, 1998, meeting state the concerns of the citizens regarding the operation of Café 77, including patrons' consuming alcohol on Main Street in front of the establishment, urinating in the street, parking illegally, harassing people on Main Street, swearing, carrying alcohol, and littering. It was also noted in the minutes that a female resident had been

propositioned to dance at the establishment and that having a completely nude dancing establishment in the Village was not good for the children in the community.

After ordinance No. 90 was adopted, the Village filed a motion for a temporary and permanent injunction against Café 77, which was heard on July 7, 1998. The Village introduced evidence that Café 77 was operating in violation of ordinance No. 90 by offering completely nude dancing inside its premises. The court granted a temporary injunction and enjoined Café 77 from providing totally nude dancing. Sheets voluntarily closed Café 77, and it has not been in operation since that time.

Ordinance No. 90 was amended and readopted as ordinance No. 96 on June 9, 1999. Ordinance No. 96 contains language identical to the language in ordinance No. 90, except that the wording of § 2, dealing with fines for violating the ordinance, was changed. The punishment for a violation under ordinance No. 90 was a fine of up to $100 per violation and payment of prosecution costs. Ordinance No. 96 added to the punishment "any other costs and expenses as allowed by law."

Trial on the permanent injunction was held on September 28, 1999. The parties submitted a stipulation as to various facts in the case. Included in this stipulation was the agreement that the named business in the case should be Café 77, which had been misidentified as Club 77 in the original pleadings. The parties also stipulated that both ordinances were passed and adopted by the Village in a procedurally correct manner. In addition to the stipulated facts, evidence was also presented by various witnesses.

Launette Kotik, the Village clerk, testified that she lives next door to the building where Café 77 is housed. Kotik testified that on Friday and Saturday evenings, when Café 77 was operating, she observed large numbers of people going into Café 77. Some of these patrons parked in her backyard and refused to move their cars when she asked them to. Kotik testified that the music was very loud and that several of the patrons appeared drunk. Kotik also observed patrons urinating in her yard and throwing beer cans in her yard whenever Café 77 was open. On one occasion, Kotik saw some men standing outside the bar speaking to her daughter as she was walking into their house.

Since the Village does not have its own law enforcement personnel, Kotik called the Dodge County Sheriff's office to report people urinating and littering on at least two occasions. However, by the time law enforcement could arrive, the offenders were no longer present.

Ed Leeper, the chairman of the Village board, also testified. He stated that he observed patrons urinating in the street by Café 77 and off the back deck of Café 77. He also saw patrons throwing beer cans in the street and in the surrounding yards. He noted that Café 77 caused extra traffic and parking problems on Friday and Saturday evenings. He also noted that he received complaints from the citizens of the Village about the impact of Café 77 on the community's children.

Kotik's daughter testified that one night as she was returning home about 12:30 a.m., the two doormen at Café 77 called out to her and asked if she was one of the dancers. She said no. They responded, "We could pretend that this is amateur night and you could come in and dance for us." She did not answer and went inside her house. This was the same incident Kotik had observed.

Sheets, the owner of Café 77, also testified. He stated that in addition to owning Café 77, he also owns the Lariat Club, Inc. The Lariat Club is a bar located in nearby Fremont which features topless dancing. When Café 77 opened, the marquee outside the Lariat Club read:

NOW OPEN CAFE 77
DANCERS FRI SAT
JUICE SERVED 12 AM

Sheets testified that on a typical evening at Café 77, between five and six dancers would perform dances, including dancing completely nude. The dancers also performed in a "tent" area, where the dancers gave similar performances, but for one patron alone and at an additional charge. Sheets also stated that he believed he had to shut down Café 77 after the temporary injunction was issued, although the injunction says nothing about closing Café 77, but simply prohibits the dancers from appearing with "genitals, pubic area, or buttocks" exposed. Sheets still owns the building where Café 77 operates and maintains the outside of the premises. Sheets' testimony indicates

that he intends to operate Café 77 as a completely nude dancing establishment if the injunction is lifted.

Finally, Michele Lynn Winslow, a dancer at the Lariat Club, Café 77, and other establishments, testified. She stated that her dances include costumes, music, and practiced routines. She stated that about half of her income comes from dancing at topless establishments like the Lariat Club and half from completely nude dancing establishments like Café 77. The attorney for the Village asked her, "So if I understand you correctly then, you're able to convey your erotic message equally to clubs where you — where it is topless only as opposed to totally nude, correct?" She responded, "Yes."

The court found that ordinance No. 90, as amended by ordinance No. 96 (hereinafter ordinance No. 96), is a valid ordinance "not specifically directed at expression and there are no vested rights or first amendment rights of the Defendant which are being unlawfully impinged upon by the Plaintiff." The court granted a permanent injunction, to wit:

> "Defendants, and each of them, are hereby enjoined and prohibited from providing totally nude dancing or entertainment consisting of the exposure of the employee or dancer's genitals, pubic area and/or buttocks while performing at the establishment located on 301 Main Street in Winslow, Nebraska which is known as Cafe 77."

Café 77 appealed, and we moved the case to our court pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Café 77 asserts, restated, that the trial court erred in (1) finding that ordinance No. 96 is not specifically directed at expression, (2) finding that ordinance No. 96 does not violate the First Amendment, (3) failing to find that ordinance No. 96 is unconstitutionally vague, and (4) finding that the entertainment presented at Café 77 constituted a nuisance as defined by ordinance No. 96.

In its cross-appeal, the Village asserts, rephrased, that the trial court erred in determining the Village had failed to prove other

nuisance activities were taking place at Café 77 in addition to the completely nude dancing.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999); *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998).

[2] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Champoux*, 252 Neb. 769, 566 N.W.2d 763 (1997).

ANALYSIS

FIRST AMENDMENT

[3] The 1st Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment, requires that the state "make no law . . . abridging the freedom of speech." The parameters of the constitutional right to freedom of speech are the same under both Neb. Const. art. I, § 5, and the U.S. Constitution. *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). See, also, *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *reversed on other grounds sub nom. Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

[4] The U.S. Supreme Court has stated that while "[b]eing 'in a state of nudity' is not an inherently expressive condition," nonobscene nude dancing is "expressive conduct . . . within the outer ambit of the First Amendment's protection." *Erie v. Pap's A. M.*, 529 U.S. 277, 289, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). See, also, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991). As such, the first step in our analysis is to determine the appropriate level of scrutiny to apply to ordinance No. 96 under the First Amendment.

[5,6] Recently, in *Erie v. Pap's A. M., supra*, the U.S. Supreme Court addressed this issue in analyzing a nude dancing ordinance enacted by the city of Erie, Pennsylvania. The Erie ordinance in part enjoined one from appearing in public with genitals, pubic hair, buttocks, or breasts uncovered. The plurality stated that when the ordinance on its face is designed to "target nudity that contains an erotic message," the ordinance is a content-based restriction, subject to strict scrutiny. 529 U.S. at 290. See, also, *Erie v. Pap's A. M., supra* (Souter, J., concurring in part, and in part dissenting); *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000). If the ordinance instead seeks to regulate the "secondary effects" caused by establishments which offer nude dancing, the ordinance is content neutral, and strict scrutiny does not apply. *Erie v. Pap's A. M.*, 529 U.S. at 291. See, also, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). When the ordinance is content neutral, the proper standard of review is the intermediate scrutiny, expressive conduct test first enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (First Amendment challenge to federal law making it crime to burn one's draft card). See, also, *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998).

Contrary to the assertions of Café 77, we conclude that ordinance No. 96 on its face is a content-neutral ordinance designed to regulate the secondary effects of nude dancing establishments. The ordinance prohibits any person from "intentionally expos[ing] his or her genitals, pubic area, or buttocks while employed in providing any service, product, or entertainment in any business or commercial establishment." This prohibition does not on its face target nude dancing, but prohibits a certain state of undress in any business or commercial setting.

The preamble to the ordinance states that in enacting the ordinance "it is . . . the intent of the Village of Winslow to further the government's interest in avoiding the harmful secondary effects of this activity such as prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." Ordinance No. 96 is addressing secondary effects similar to those discussed in *Erie v. Pap's A. M., supra*, seeking to combat "crime and other negative secondary

effects caused by the presence of adult entertainment establishments." 529 U.S. at 291. Under the *Erie* standard, the Village ordinance is a content-neutral ordinance seeking to combat the secondary effects of establishments offering nude dancing.

[7] Café 77 argues that strict scrutiny should apply because the ordinance was actually enacted with the intention of targeting Café 77 and attempting to silence the expressive message conveyed by the nude dancing. A similar argument was made in *Erie*, where the defendants asserted that the city "also had an illicit motive in enacting the ordinance," by attempting to suppress the expressive message of nude dancing. *Erie v. Pap's A. M.*, 529 U.S. 277, 292, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000). The Supreme Court rejected that argument, as we do here. A court "will not strike down an otherwise constitutional [ordinance] on the basis of an alleged illicit motive" in enacting the ordinance. *Id.* See, also, *Renton v. Playtime Theatres, Inc., supra*; *United States v. O'Brien, supra*; *J&B Entertainment, Inc. v. City of Jackson, Miss.*, 152 F.3d 362 (5th Cir. 1998); *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991). While the opening of Café 77 clearly made the Village aware of the problems associated with adult entertainment establishments, the ordinance enacted by the Village is a generally applicable content-neutral ordinance and does not target the expressive message conveyed by Café 77's dancers.

[8] Therefore, we determine that the proper standard of review for ordinance No. 96 is the intermediate scrutiny, expressive conduct test first announced in *United States v. O'Brien, supra*. Under the *O'Brien* test, ordinance No. 96 will satisfy the requirements of the First Amendment if the Village can show that the ordinance (1) is within the constitutional power of the government to enact, (2) reasonably furthers a substantial government interest, (3) is unrelated to the suppression of free expression, and (4) imposes a restriction that is no greater than is essential to the furtherance of the substantial government interest. *Erie v. Pap's A. M., supra.*

Regarding the first prong, it is within the power of a municipality to regulate public nudity as a matter of "public health and safety." *Erie v. Pap's A. M.*, 529 U.S. at 300. Thus, it is within the power of the Village to enact ordinance No. 96.

[9] The second prong requires the Village to show it has a substantial governmental interest in regulating public nudity and that the ordinance does in fact reasonably further this substantial interest. *Erie v. Pap's A. M., supra.* We address the two subparts of the second prong separately. Regarding the existence of a substantial governmental interest, the plurality in *Erie* agreed that the government has a substantial interest in "combating the harmful secondary effects associated with nude dancing." 529 U.S. at 300. See, also, *Erie v. Pap's A. M., supra* (Souter, J., concurring in part, and in part dissenting). This rationale was first expressed in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (Souter, J., concurring in judgment), where Justice Souter opined that combating the secondary effects of adult entertainment establishments, including increased criminal activity, prostitution, and sexual crimes, constitutes a substantial governmental interest. This rationale has also been adopted by several federal circuit courts in interpreting the *Barnes* decision. See, e.g., *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994); *D.G. Restaurant Corp. v. City of Myrtle Beach, supra.*

The Village noted in the preamble that the ordinance was designed to combat the secondary effects of establishments offering completely nude dancing, including increased criminal activity and the degradation of women. The Village also provided evidence to show that the deleterious secondary effects of nude dancing establishments in the Village are real and actual, not merely conjectural.

In the minutes of the meeting at which the ordinance was first enacted, the Village noted several deleterious secondary effects, namely an increase in public drunkenness, public urination, illegal parking, and one instance of a female community member being propositioned. This evidence was later supported by eyewitness testimony provided by residents of the Village during the hearing on the injunction. The Village has accordingly demonstrated that it has a substantial interest in regulating the secondary effects of establishments which offer nude dancing.

The Village must also show that its substantial interest in regulating the secondary effects is in fact furthered by the regulation. *Erie v. Pap's A. M.*, 529 U.S. 277, 120 S. Ct. 1382, 146 L.

Ed. 2d 265 (2000) (Souter, J., concurring in part, and in part dissenting). We conclude that the record shows that ordinance No. 96 reasonably furthers the Village's interest in combating deleterious secondary effects. The Village ordinance essentially bans bottomless dancing, while allowing topless dancing. While this might initially seem to render ordinance No. 96 even less effective at combating secondary effects than the *Erie* ordinance, which prohibited both topless and bottomless dancing, such a conclusion would overlook the context of the Village's decision. Ordinance No. 96 was drafted with the recognition that topless dancing is permitted in nearby Fremont. The record shows that Sheets, the owner of Café 77, also owns and operates a topless bar, the Lariat Club, in Fremont. In hopes of enticing the Lariat Club customers to another late-hour adult entertainment establishment in the Village, the owner advertised Café 77 on the marquee outside the Lariat Club.

The Village, by passing this ordinance, simply required that the dancing provided at Café 77 in the Village be subject to the same restrictions as the dancing at the Lariat Club in Fremont. Accordingly, there would be no extra incentive to operate or visit a nude dancing establishment in the Village, a town of less than 150 people. This would help to reduce the amount of patrons willing to travel to the Village, which would help lessen the secondary effects associated with nude dancing establishments. Accordingly, we determine the record establishes that ordinance No. 96 reasonably furthers a substantial and important governmental interest by reducing the deleterious secondary effects associated with nude dancing establishments.

The third prong of the test in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), requires that the regulation be unrelated to the suppression of free expression. See *Erie v. Pap's A. M., supra*. Ordinance No. 96 on its face addresses nudity at any commercial or business establishment, "regardless of whether that nudity is accompanied by expressive activity." *Erie*, 529 U.S. at 290. This, and the fact that the ordinance allows one to appear topless, shows that the ordinance is intended to regulate the conduct of appearing with "genitals, pubic area, or buttocks" exposed and not intended to silence the expressive message conveyed by all nude dancing.

Finally, the fourth prong of the *O'Brien* test requires that the ordinance impose no greater restriction than is essential to the furtherance of the governmental interest. *Erie v. Pap's A. M., supra.* We conclude that ordinance No. 96 meets this standard because any incidental impact on the expressive element of nude dancing created by the ordinance is "*de minimis*." See *Erie*, 529 U.S. at 301. In *Erie*, the plurality reasoned that requiring dancers to wear pasties and G-strings is a restriction which "leaves ample capacity to convey the dancer's erotic message." *Id.* Ordinance No. 96 is even less restrictive than the ordinance at issue in *Erie* in that the Village's ordinance does not require the wearing of any clothing above the waist. The de minimis nature of the restriction upon expression imposed by ordinance No. 96 is further supported by Michele Lynn Winslow's testimony. She stated that she was able to convey the same erotic message whether dancing totally or partially nude. Ordinance No. 96 imposes no greater restriction than is essential to further the Village's interest in combating the secondary effects of completely nude dancing establishments.

For the foregoing reasons, we determine that ordinance No. 96 does not violate the First Amendment.

VAGUENESS

Café 77 also asserts that ordinance No. 96 is unconstitutionally vague, based on the following savings clause in the ordinance, which states, "[t]his prohibition is not intended to extend to any expression of opinion or the performance of a bona fide play, ballet, or drama protected by the First Amendment . . . ."

[10] The void-for-vagueness doctrine requires that an ordinance define the prohibited conduct with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). Ordinance No. 96 prohibits one from "intentionally expos[ing] his or her genitals, pubic area, or buttocks while employed in providing any service, product, or entertainment in any business or commercial establishment." This language is not vague as applied to the dancing which occurred at Café 77.

However, Café 77 argues that the exception of "any expression of opinion or the performance of a bona fide play, ballet, or drama" encourages arbitrary enforcement. Café 77 asserts that because nude dancing is a type of "communicative art[]," brief for appellant at 7, it is not reasonably clear under ordinance No. 96 whether nude dancing such as the kind performed at Café 77 would be considered a bona fide ballet, play, or drama. In support of its assertion, Café 77 relies upon the testimony of Michele Lynn Winslow, who testified that the dancers use different types of music, costumes, and tempos and that they rehearse their routines.

We determine that the savings clause contained in ordinance No. 96 is not vague. No reasonable person would consider the nude dancing provided in Café 77 to be a ballet, play, or drama as those terms are commonly understood. Michele Lynn Winslow defined her communicative art form as "tak[ing] our clothes off." Adding music and costumes cannot transform nude dancing at Café 77 into a ballet, play, or drama. See *Walker v. City of Kansas City, Mo.*, 911 F.2d 80 (8th Cir. 1990) (nude dancing not serious literary, artistic, or political endeavor).

Finally, Café 77 asserts the trial court erred in determining that the entertainment presented in Café 77 constituted a nuisance as defined by ordinance No. 96. The ordinance states: "any activities in violation of [the ordinance] shall be deemed to be a nuisance and may be abated and suppressed by injunctive or other equitable relief as allowed by law." The evidence at trial established that dancers inside Café 77 were appearing completely nude. This is a violation of the ordinance, and as such, the court correctly found that such activity constituted a nuisance under ordinance No. 96.

CROSS-APPEAL

The Village asserts in its cross-appeal that the trial court erred in failing to separately enjoin the excessive noise, littering, and public urination taking place at Café 77 as public nuisances. The record shows that these secondary effects occurred while Café 77 was being operated as a totally nude dancing establishment. Under the permanent injunction issued by the district court, Café 77 cannot be operated as a totally nude dancing establish-

ment, and the secondary effects associated with completely nude dancing no longer exist. The Village's cross-appeal seeks to determine a question which does not rest upon existing facts or rights, and is therefore moot. See *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

CONCLUSION

We find that Café 77's assignments of error are without merit. No First Amendment rights have been violated by ordinance No. 96. Accordingly, the permanent injunction issued by the Dodge County District Court is affirmed.

We further find that the Village's cross-appeal is moot and is hereby dismissed.

AFFIRMED.

ROSALIE FAY, APPELLANT AND CROSS-APPELLEE, V. DOWDING, DOWDING & DOWDING AND UNITED FIRE & CASUALTY COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES AND CROSS-APPELLANTS.

623 N.W. 2d 287

Filed February 9, 2001. No. S-00-123.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ___: ___. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of 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 is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Jurisdiction.** The Nebraska Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute.
5. **Workers' Compensation.** The only Nebraska Workers' Compensation Act provisions which permit the Workers' Compensation Court to modify or change previously issued orders are Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1998).

6. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** When construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute.
7. **Statutes: Appeal and Error.** As an aid to statutory interpretation, appellate courts must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. **Statutes: Legislature: Intent.** When considering a series or a collection of statutes pertaining to a certain subject matter which are in pari materia, such statutes may be conjunctively considered to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
9. **Judgments.** The function of a nunc pro tunc order is to correct a clerical or scrivener's error.
10. **Courts: Workers' Compensation.** Neb. Rev. Stat. § 48-180 (Reissue 1998) is the statutory embodiment of nunc pro tunc principles, and pursuant to § 48-180, the Nebraska Workers' Compensation Court is statutorily authorized to issue proper nunc pro tunc orders.
11. **Judgments.** It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
12. **Workers' Compensation.** A condition resulting from repetitive trauma has the characteristics of both an accidental injury and an occupational disease.
13. **Workers' Compensation: Words and Phrases.** Under Neb. Rev. Stat. § 48-151(2) (Cum. Supp. 2000), 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: Proof.** In order to receive compensation benefits for an accident, the injured employee must prove that he or she has sustained an injury resulting in disability and the disability must be such that the employee can no longer perform the work required.
15. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.

Appeal from the Nebraska Workers' Compensation Court. Nunc pro tunc order vacated. Order of affirmance affirmed.

Raymond P. Atwood, Jr., and Ryan C. Holsten, of Atwood & Associates Law Firm, P.C., L.L.O., for appellant.

Darin L. Lang and Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Rosalie Fay appeals from a nunc pro tunc order of reversal on review entered by a three-judge review panel of the Nebraska Workers' Compensation Court. In the nunc pro tunc order, the review panel (1) withdrew an order of affirmance on review which had been entered earlier by the same review panel and which had affirmed an award to Fay and (2) in lieu of the order of affirmance, reversed the decision of a single Workers' Compensation Court judge awarding benefits to Fay. Dowding, Dowding & Dowding (Dowding), a law firm and Fay's employer, and United Fire & Casualty Company (United), Dowding's workers' compensation insurance carrier, cross-appeal from the order of affirmance. For the reasons stated below, we vacate the nunc pro tunc order and consider and affirm the order of affirmance. Because we affirm the order of affirmance, we reject Dowding and United's cross-appeal. Fay is awarded $3,000 in attorney fees in connection with this appeal.

STATEMENT OF FACTS

In this workers' compensation action, Fay alleges that she sustained a cumulative trauma injury to her neck and upper left shoulder, which injury arose out of and in the course of her employment with Dowding. Fay alleges that her injury was caused by the repeated turning of her head from side to side and tilting her head up and down in the performance of her work-related duties. On December 2, 1997, Fay filed a petition with the Nebraska Workers' Compensation Court seeking workers' compensation benefits as a result of her alleged injury. On December 23, Dowding and United filed an answer, generally denying that Fay had sustained a work-related injury. On January 26, 1999, Fay's petition came on for trial before a single judge of the Nebraska Workers' Compensation Court.

The evidence offered at trial established the following: Fay has worked as a law office secretary, office manager, or bookkeeper, at least on a part-time basis, since 1977. In 1990, she began working for Dowding in Grand Island, Nebraska, where she was employed at the time of the hearing before the single judge. Since 1990, Fay has performed essentially the same

duties for Dowding. Fay's daily tasks may include organizing the mail, posting checks, taking dictation, making telephone calls, writing the office checks, meeting with sales representatives, handling the office accounts, organizing files, supervising staff, assisting with any minor computer problems that may develop, and performing bookkeeping duties for certain Dowding corporate clients. Approximately 85 to 90 percent of her workday is spent at her desk.

Beginning in December 1995, Fay began to notice numbness and tingling in her left hand and arm, together with pain in her left shoulder. Later, the pain spread to her neck. In her deposition testimony, Fay stated that there were occasions when the pain was so severe that she could not get out of bed in the morning to report to work. As a result of her pain, Fay missed several half-days from work in December 1995 and January 1996.

Fay also testified that she voluntarily took 4 days off from work, from March 19 to 22, 1996, to see if her symptoms improved when she was not at the office. She testified that it was taking this time off that led her to conclude that her injury was work-related because during those 4 days, her symptoms abated.

Fay initially sought medical treatment for her injury on January 4, 1996, with her family physician, Dr. D.R. Cronk. Dr. Cronk diagnosed Fay as having multiple bone spur formations at the C3-7 levels, together with a narrowing of the disks. In letters which are in evidence, Dr. Cronk opined that Fay's work "aggravates" her symptoms and that the repetitive nature of Fay's work, in which she turns her head from side to side and tilts her head up and down, "can result in the type of pain and symptoms that have resulted in her present condition." Dr. Douglas Long, whom Fay apparently saw for a second opinion, stated in a report dated August 2, 1996, that Fay's symptoms of neck and left shoulder pain "appear to be aggravated by work."

Dr. D.M. Gammel examined Fay on May 15, 1998, for the purpose of assigning Fay an impairment rating and in a report dated that same day, stated, "It is my opinion that Ms. Fay's work duties have aggravated her degenerative condition and caused the cumulative trauma injury to musculature of her cervical spine with radiation to the left shoulder area." On the basis

of this diagnosis, Dr. Gammel assigned Fay a whole-body impairment rating of 5 percent.

Also received into evidence by the single judge were reports by two vocational rehabilitation counselors. In a report dated August 20, 1998, Robert Anderson, the court-appointed vocational rehabilitation counselor, opined that as a result of her injury, Fay had a 0-percent loss of earning capacity, because there were no jobs for which Fay had training, experience, and the physical capability to perform prior to her injury that she could not perform after her injury. In a rebuttal report dated October 16, 1998, vocational rehabilitation counselor Paulette Freeman wrote that Fay had sustained an 8- to 12-percent loss of earning capacity, primarily because of Fay's loss of access to other jobs in the labor market.

On August 2, 1999, the single judge entered an award in which the judge determined that on or about January 4, 1996, Fay suffered an injury to her cervical spine as a result of an accident arising out of and in the course of her employment with Dowding. The award stated that Fay's repetitive turning of her neck from side to side, tilting of her head up and down, and bending and flexing her upper back, neck, and shoulders, all during her performance of work-related activities, had caused her injury. The award stated that causation for Fay's injury was found in Dr. Cronk's medical reports. The single judge found that Fay had reached maximum medical improvement on June 25, 1996, the last day she was treated by Dr. Cronk for her neck injury. The single judge declined to award Fay any temporary total disability payments, finding that there was no evidence that the 4 days Fay missed work in March 1996 had been prescribed by any physician. Nevertheless, the single judge awarded Fay $34.85 per week for 300 weeks in permanent partial disability payments, representing a 10-percent loss of earning capacity.

On August 13, 1999, Dowding and United filed an application for review, seeking review of the single judge's award by a three-judge panel of the Nebraska Workers' Compensation Court. Their appeal came on for hearing on December 14.

The review panel affirmed the single judge's award in the order of affirmance dated and filed on December 23, 1999. However, 6 days later, on December 29, the same review panel

entered an order styled "nunc pro tunc" withdrawing the order of affirmance and, instead, reversing the award.

In this nunc pro tunc or second order, the review panel explained its rationale for the issuance of the nunc pro tunc order and stated:

> [Following the December 14, 1999, hearing the] review panel discussed [Dowding and United's] appeal among its members and an order of affirmance on review was prepared and signed by all the members of the review panel. The file, to include the order of affirmance on review, was transported by courier from Omaha, Nebraska, to the Workers' Compensation Court at the State Capitol Building in Lincoln on December 21, 1999. On that same date, the Court received the opinion of Jordan v. Morrill County, 258 Neb. 380, a decision of the Nebraska Supreme Court rendered on December 17, 1999. After discussion among the review panel members, there was unanimous agreement that the Jordan case required that the order of affirmance on review be withdrawn and an order of reversal substituted in its place. And this is where the clerical error arose. In communicating to the office in Lincoln that this file should be held so that the new opinion could be substituted, there was reference to the Dowding file. On December 14, 1999, there was also argued a case in which the employee's name was Phyllis Dowding. Inadvertently, the order of affirmance on this cause was sent out and the opinion was held in the Phyllis Dowding file. We believe that this is the kind of clerical error that is correctable by a nunc pro tunc order.

In its nunc pro tunc order, the review panel withdrew the order of affirmance and substituted a three-paragraph opinion in which it concluded, on the basis of this court's decision in *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), that the single judge's award should be reversed. In *Jordan*, this court held that in order for an injured worker claiming a cumulative or repetitive trauma injury as a result of an accident to be entitled, as a matter of law, to receive benefits under Nebraska's workers' compensation statutes, "[t]he injury must require the employee to discontinue employment and seek

medical treatment. . . . The injury must result in a disability, and the disability must be such that the employee can no longer perform the work required." *Id.* at 389, 603 N.W.2d at 419.

The review panel determined in its second order that it was

> unable to say [the single judge] was clearly wrong in finding that [Fay] suffered no temporary total disability [because the single judge found] that the plaintiff was still physically able to perform the duties of her employment although she chose not to work for four days in the month of March, 1996.

Given these factual findings, the review panel concluded in its second opinion that the single judge reached an erroneous legal conclusion in awarding Fay workers' compensation benefits because under the *Jordan* opinion, "a repetitive trauma injury must result in a disability, and the disability must be such that the employee can no longer perform the work required." The review panel noted in its second order that implicit in the single judge's denial of temporary total disability, the single judge "did not find that . . . Fay was unable to perform the work required." Given this finding, the review panel concluded that because Fay had not suffered a disability such that she was unable to perform her work, she had failed to prove that she had sustained an injury under the Nebraska Workers' Compensation Act. In its nunc pro tunc order, the review panel reversed the award entered by the single judge and dismissed Fay's petition for workers' compensation benefits.

Fay appeals the review panel's nunc pro tunc order. Dowding and United have filed a cross-appeal, challenging the order of affirmance.

ASSIGNMENTS OF ERROR

On appeal, Fay assigns three errors which, restated, claim that the review panel erred (1) in entering its second order, (2) in reversing and dismissing the award entered by the single judge, and (3) in substituting its view of the facts for those of the single judge. On cross-appeal, Dowding and United assign three errors which combine to form two. They assert, restated, that should this court conclude that the order of affirmance is controlling, such order is in error because it affirms the award of the single

judge who erred (1) as a matter of law in determining that Fay had suffered an "accident," which accident arose out of and in the course of her employment with Dowding, and (2) in admitting the opinion of Fay's rebuttal vocational rehabilitation counselor.

STANDARDS OF REVIEW

[1-3] Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000); *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). 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. *Logsdon v. ISCO Co., supra.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Logsdon v. ISCO Co., supra*; *Sheldon-Zimbelman v. Bryan Memorial Hosp., supra.*

ANALYSIS

As an initial matter, we must determine which order is properly on review before this court. Fay has appealed, challenging the propriety of the entry of the review panel's nunc pro tunc or second order and rulings therein which resulted in a reversal of the award of the single judge. Dowding and United have cross-appealed the order which affirmed the award of the single judge. For the reasons set forth below, we conclude that the review panel exceeded its statutory authority in issuing the nunc pro tunc order, and accordingly, we vacate this second order. Accordingly, we consider the order of affirmance initially entered by the review panel, and for the reasons set forth below, we affirm that order.

LACK OF AUTHORITY OF REVIEW PANEL TO ENTER NUNC PRO TUNC ORDER

[4] We have repeatedly held that the Nebraska Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute. See, e.g., *Sheldon-Zimbelman v. Bryan Memorial Hosp., supra*; *Crabb v. Bishop Clarkson Mem. Hosp.*, 256 Neb. 636, 591 N.W.2d 756 (1999); *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997).

[5] In its second order, the review panel does not cite to any statutory authority for its issuance of its "nunc pro tunc" order which by its terms changes its original order of affirmance to a reversal. In *Sheldon-Zimbelman*, we determined that the only Nebraska Workers' Compensation Act provisions which permit the Workers' Compensation Court to modify or change previously issued orders were Neb. Rev. Stat. §§ 48-141 and 48-180 (Reissue 1998). Accordingly, we review the appropriateness of the second order under these sections.

Section 48-141 permits, inter alia, the Workers' Compensation Court to modify an award "on the ground of increase or decrease of incapacity due solely to the injury." § 48-141(2). Because the review panel's nunc pro tunc order reversing the single judge's award was not based upon an increase or decrease in Fay's incapacity, the nunc pro tunc order cannot be justified under § 48-141.

Section 48-180 provides that the Nebraska Workers' Compensation Court may, "on its own motion, modify or change its findings, order, award, or judgment at any time before appeal and within ten days from the date of such findings, order, award, or judgment for the purpose of correcting any ambiguity, clerical error, or patent or obvious error." Although the review panel did not cite to § 48-180 in its second order, it appears the review panel was attempting to come within the section's provisions by stating that the basis for the second order was a "clerical error." The second order states that "[i]nadvertently, the order of affirmance on this cause was sent out . . . . We believe that this is the kind of clerical error that is correctable by a nunc pro tunc order." Accordingly, we analyze the review panel's second order which it characterized as necessitated by clerical error under § 48-180.

[6-8] When construing a statute, we are guided by the presumption that the Legislature intended a sensible, rather than an absurd, result in enacting the statute. *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000); *Battle Creek State Bank v. Haake*, 255 Neb. 666, 587 N.W.2d 83 (1998). As a further aid to statutory interpretation, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.* When considering a series or a collection of statutes pertaining to a certain subject matter which are in pari materia, we have stated that they may be conjunctively considered to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Sheldon-Zimbelman v. Bryan Memorial Hosp., supra.*

[9,10] The language used by the Legislature in § 48-180 is comparable to language generally describing a court's inherent power to issue nunc pro tunc orders. In this regard, we have repeatedly recognized that the function of a nunc pro tunc order is to correct "a clerical error or a scrivener's error." *Neujahr v. Neujahr*, 223 Neb. 722, 726, 393 N.W.2d 47, 50 (1986). See, also, *Continental Oil Co. v. Harris*, 214 Neb. 422, 333 N.W.2d 921 (1983) (nunc pro tunc order corrects clerical error); *Larson v. Bedke*, 211 Neb. 247, 318 N.W.2d 253 (1982), *modified* 212 Neb. 134, 322 N.W.2d 367 (same); *State ex rel. Schuler v. Dunbar*, 208 Neb. 69, 302 N.W.2d 674 (1981) (same). Section 48-180 is the statutory embodiment of nunc pro tunc principles. Thus, pursuant to § 48-180, the Nebraska Workers' Compensation Court is statutorily authorized to issue proper nunc pro tunc orders. We therefore examine the review panel's second order under nunc pro tunc principles in order to determine if it was properly issued.

[11] We have previously recognized that "[t]he office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded." *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 113, 459 N.W.2d 519, 522 (1990). See, also, *Andersen v. American Family Mut. Ins. Co.*, 249 Neb. 169, 542 N.W.2d 703 (1996). We have also held that "[i]t is not the function of an order nunc pro tunc to

change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended." *Interstate Printing Co. v. Department of Revenue*, 236 Neb. at 113, 459 N.W.2d at 522. See, also, *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983) (nunc pro tunc order cannot be used to enlarge judgment as originally rendered or to change rights fixed by judgment); *Continental Oil Co. v. Harris*, 214 Neb. at 424, 333 N.W.2d at 923 (nunc pro tunc order cannot "be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do"); *Gunia v. Morton*, 175 Neb. 53, 56, 120 N.W.2d 371, 373 (1963) ("[i]t is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court").

In its nunc pro tunc order, the review panel did not seek to correct the issuance of an order which did not accurately reflect the decision of the review panel. Instead, the review panel sought to substitute a reversal for an affirmance. As demonstrated in the above cases, an order nunc pro tunc cannot be used to change or reverse a judgment entered. The review panel could not change the action previously taken affirming the award of the single judge to reversing the award under the auspices of a nunc pro tunc order. Thus, the review panel exceeded its authority under § 48-180 in issuing its second order, and accordingly, we vacate the review panel's second order and consider the order of affirmance originally entered.

Repetitive Trauma Claim

Having determined that the review panel was without authority to issue its second order and having vacated that order, we now consider the review panel's order of affirmance. Based upon our review of the law and the facts in this case, we conclude that the review panel's order which affirmed the single judge's award should be affirmed.

On appeal, Fay argues that the order of affirmance was correctly decided. On cross-appeal, Dowding and United argue that the review panel erred in affirming the award entered by the sin-

gle judge because the single judge erred as a matter of law in determining that Fay suffered an accident, which accident arose out of and in the course of employment. We agree with Fay.

In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, this court, like the review panel, reviews the findings of the single judge who conducted the original hearing. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000); *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000). 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. *Logsdon v. ISCO Co., supra.*

[12] Pursuant to Neb. Rev. Stat. § 48-101 (Reissue 1998),

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

We have previously stated that a condition resulting from repetitive trauma has the characteristics of both an accidental injury and an occupational disease. See *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). In the instant case, the single judge held that Fay "had suffered an injury to her cervical spine as a result of an accident." Accordingly, we will consider the alleged injury as caused by an accident, in the same manner as did the compensation court. See *id.*

[13] Under Neb. Rev. Stat. § 48-151(2) (Cum. Supp. 2000), which subsection remains the same as that in effect in 1996, an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." We have previously recognized that under § 48-151(2), 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." *Sandel v. Packaging Co. of*

America, 211 Neb. 149, 153, 317 N.W.2d 910, 913 (1982). These three elements are conjunctive, and a failure to establish any one precludes an award based on a claim of accident.

In the instant case, there is no dispute on appeal that Fay produced evidence of the first and third elements of an accident, that is, that Fay's alleged injury was unexpected and unforeseen and that Fay complained of symptoms. See *Jordan v. Morrill County, supra*. The remaining issue is whether Fay satisfied the second element of an accident, that is, that the accident must happen "suddenly and violently."

We addressed the second element in *Jordan v. Morrill County, supra*. In *Jordan*, we stated that "[f]or 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." 258 Neb. at 389, 603 N.W.2d at 419. We explained that the "injury must result in a disability, and the disability must be such that the employee *can no longer perform the work required*." (Emphasis supplied.) *Id.* Finally, we disapproved our previous decisions in *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), and *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991), to the extent that those decisions could be interpreted to mean that the interruption of employment was something other than the discontinuation of employment. In *Jordan*, the claimant operated a road grader for Morrill County, Nebraska, and alleged that he had sustained a repetitive trauma injury to his right shoulder. We affirmed the judgment of the review panel reversing the single judge's award of benefits to the claimant, concluding that the review panel properly determined that he had not satisfied the second element of an accident because he had not missed any time from work.

In the instant case, the single judge found, inter alia, as follows:

> The Court . . . finds that [Fay] did have to interrupt employment and seek medical treatment for [her] injuries, which interruption occurred on January 4, 1996, as well as during 4 days in March, 1996. [Fay] testified that in March, during her physical therapy, she took off the rest of

> a week, Tuesday through Friday, which the Court finds was from and including March 19, 1996, through and including March 22, 1996, a period of 4/7 weeks. The Court declines to find that this entitles [Fay] to temporary total disability for these dates, as there is no evidence in the record that any doctor had written an off work slip for this absence from work.

By these findings, it is evident that the single judge refused to award Fay temporary total disability benefits for her voluntary absence from work in March 1996. It is equally evident, however, that the single judge determined that on January 4, 1996, Fay could not work, interrupted her work, and sought medical treatment.

[14] As we stated in *Jordan v. Morrill County*, 258 Neb. 380, 389, 603 N.W.2d 411, 419 (1999), in order to receive compensation benefits for an accident, the injured employee must prove that he or she has sustained an injury resulting in disability and "the disability must be such that the employee can no longer perform the work required." With regard to Fay's evidence that she voluntarily absented herself from work in March 1996, the single judge was correct that such evidence is insufficient to prove that Fay was unable to perform the work required. It is axiomatic that no disability benefits will be paid under the Nebraska Workers' Compensation Act unless there is evidence that a disability has been suffered. See *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984).

The single judge found, however, that on January 4, 1996, Fay could not work as a result of her injury and that she was forced to seek medical treatment. These factual findings satisfy our requirements set forth in *Jordan* that "[t]he injury must require the employee to discontinue employment and seek medical treatment." 258 Neb. at 389, 603 N.W.2d at 419. We further observe that there was medical evidence in the record upon which the single judge could conclude that Fay's condition was work related.

The single judge's finding of fact with regard to Fay's inability to work on January 4, 1996, and her pursuit of medical treatment has the effect of a jury verdict and will not be disturbed unless clearly wrong. See *Logsdon v. ISCO Co.*, 260 Neb. 624,

618 N.W.2d 667 (2000). Finding no error, we affirm the review panel's order which affirmed the single judge's award of workers' compensation benefits to Fay.

Admission of Rebuttal Report

[15] On appeal, Dowding and United also claim that the single judge erred "as a matter of law" with the admission into evidence of Freeman's rebuttal vocational rehabilitation loss of earning capacity report essentially based on a criticism of its content and methodology. Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000); *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997). Neb. Rev. Stat. § 48-162.01(3) (Reissue 1998) sets forth that "[i]t shall be a rebuttable presumption that any opinion expressed [by a court-appointed vocational rehabilitation counselor] as the result of such a loss-of-earning-power evaluation is correct." The statute, therefore, anticipates the admission of evidence to rebut the presumption of correctness statutorily assigned to any loss of earning capacity report prepared by the court-appointed vocational rehabilitation counselor. In the instant case, the single judge admitted into evidence Freeman's report as a rebuttal to the report of Fay's loss of earning capacity prepared by Anderson, the court-appointed vocational rehabilitation counselor. We determine there was no abuse of discretion in the single judge's ruling admitting the rebuttal vocational rehabilitation report, and accordingly, there is no merit to this assignment of error.

Attorney Fees

Pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2000), Fay has moved for an award of attorney fees in this appeal. In accordance with § 48-125, Fay is entitled to attorney fees because both Dowding and United cross-appealed and failed to obtain any reduction in Fay's award. We determine that $3,000 is a fair and reasonable attorney fee and accordingly award Fay that amount. Pursuant to § 48-125(2), interest on the final award is also assessed against Dowding and United.

CONCLUSION

The review panel did not possess the statutory authority under § 48-180 to issue the nunc pro tunc order, and accordingly, we vacate the nunc pro tunc order. For the reasons set forth herein, the review panel's order which affirmed the award of the single judge is affirmed, and the cross-appeal is determined to be without merit. Attorney fees are awarded to Fay in the amount of $3,000.

NUNC PRO TUNC ORDER VACATED.
ORDER OF AFFIRMANCE AFFIRMED.

STEPHAN, J., not participating.

FIRETHORN INVESTMENT, A NEBRASKA GENERAL PARTNERSHIP, AND FIRETHORN DEVELOPMENT CORP., A NEBRASKA CORPORATION, APPELLANTS, V. LANCASTER COUNTY BOARD OF EQUALIZATION, APPELLEE.

622 N.W. 2d 605

Filed February 9, 2001. No. S-00-485.

1. **Taxation: Judgments: Appeal and Error.** Appellate review of a final decision of the Nebraska Tax Equalization and Review Commission shall be conducted for errors on the record of the commission. When reviewing an order 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.
2. **Taxation: Valuation: Evidence: Proof: Appeal and Error.** Under Neb. Rev. Stat. § 77-1511 (Reissue 1996), the Nebraska Tax Equalization and Review Commission shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action taken by the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low.
3. **Taxation: Valuation: Presumptions.** Neb. Rev. Stat. § 77-1511 (Reissue 1996) creates a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.
4. **Taxation: Valuation: Presumptions: Evidence: Appeal and Error.** A presumption remains under Neb. Rev. Stat. § 77-1511 (Reissue 1996) until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the rea-

sonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented.

5. **Taxation: Valuation: Proof: Appeal and Error.** The burden of showing a valuation to be unreasonable rests upon the taxpayer on appeal from the action of a board of equalization.
6. **Real Estate: Taxation: Valuation: Words and Phrases.** Under Neb. Rev. Stat. § 77-112 (Cum. Supp. 1998), actual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade.
7. **Sales: Political Subdivisions.** A sale may not be disregarded solely because it is a sale to a political subdivision.
8. **Sales: Valuation.** A single sale may in some instances provide evidence of market value.
9. **Taxation: Valuation.** In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded for further proceedings.

William F. Austin, of Erickson & Sederstrom, P.C., for appellants.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellee.

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

CONNOLLY, J.

The appellants, Firethorn Investment and Firethorn Development Corp. (Firethorn), filed protests with the Lancaster County Board of Equalization (Board) after the assessed value of one of their properties, a golf course, was increased. The Board denied the protests, and Firethorn appealed to the Nebraska Tax Equalization and Review Commission (TERC). TERC upheld the Board's assessed valuation, and Firethorn appeals. We conclude that TERC erred in disregarding three sales of property as comparable sales solely because they were sales to a political subdivision. We further conclude that TERC erred in disregarding a comparable sale due to erroneous findings that no adjustments had been made to the sale and that a single sale of property could not provide evidence of market value. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

Firethorn owns four tracts of land which compose a private golf course. At issue in this case is the value of the land underlying the golf course. The course was developed in 1979 pursuant to a special permit issued by the city of Lincoln (City) for the development of private recreational facilities and a community unit plan consisting of 82 dwelling units. The development was later expanded and now consists of 144 dwelling units. Under the community unit plan, the allowed residential density under zoning ordinances was transferred from some pieces of property to others. This allowed the construction of dwelling units in a smaller area than would normally be allowed, as long as the total number of dwellings constructed did not exceed the density authorized for all of the land. Under the community unit plan, the remaining open space, occupied by the golf course, is required to be devoted to recreational purposes. The property is outside the Lincoln city limits, does not have city utilities, and is zoned as an agricultural residential district (AGR).

In 1998, Firethorn developed and/or conveyed some of its real property. As a result, Firethorn requested a density bonus permit to allow the community unit plan to remain at 144 dwelling units. As a condition of receiving the permit, Firethorn granted the City conservation and preservation easements on the real property consisting of the golf course. The easements provided that the property be devoted to only open space and golf course uses for a period of 100 years. Richard Youngscap, the managing partner of Firethorn Investment and president of Firethorn Development Corp., testified that the community unit plan is an asset to Firethorn, but he considers the conservation easements to be a liability.

In 1999, the Lancaster County assessor notified Firethorn of tax increases due to an increase in the assessed valuation of the property. Under the 1999 assessment, the value of the property increased from $3,504,476 to $6,171,000. The increase was based primarily on an assigned land value of $15,000 per acre. Firethorn appeared before a referee appointed by the Board, Wayne Kubert, who recommended no change to the valuation. Firethorn then appeared before the Board, which also accepted the valuation. Firethorn then appealed to TERC.

Proceedings Before TERC

Steven Allen, a certified real estate appraiser, testified for Firethorn. Allen testified that he appraised the golf course property using 31 comparable sales, with emphasis placed on 9 sales, but only 4 that were primarily relied on.

Allen testified that he inspected the property from the periphery before he did his appraisal. Because the property was limited to use only as an open space or golf course, Allen determined those were the highest and best uses of the property. Allen also testified that the property was outside of the city limits and did not have city utilities, such as sewer and water.

The first sale Allen relied on consisted of 160 acres purchased by the City for $2,500 per acre in September 1997 for purposes of expanding a nature center at a city park and to add nine holes to a golf course located at the park. The land was zoned agricultural (AG) instead of AGR and was located outside the city limits, and there were no utilities on the property.

The second sale consisted of 40 acres purchased by the City in September 1995 for $2,475 per acre. The land was zoned AG and was outside the city limits.

The third sale consisted of 156.55 acres purchased by the City for $2,900 per acre in June 1994, for development as a park. The land was zoned AG, did not have utilities available, and was located outside of the city limits.

The fourth sale consisted of 159.56 acres purchased for $4,237 per acre by a private party in October 1997 for development as a golf course. The property was zoned AG, was outside the city limits, and did not have utilities available.

Allen admitted that three of the four sales were to the City. Allen testified that he confirmed that the sales were arm's-length transactions by speaking with the City and that they were based on an appraisal of like-kind properties, with the purchase price negotiated from that price. Allen did not know if the properties were initially offered for sale on the open market or if real estate agents were involved. He also testified that properties zoned AGR would typically be more valuable than property zoned AG if the AGR property could be utilized for low-density residential purposes.

Allen testified that he adjusted the four sales for time and considered what might be superior or inferior about the properties before reaching a conclusion. In particular, Allen found the adjusted price of the fourth sale to be $4,558 per acre. Based on the sales, Allen opined that the fair and reasonable market value of the underlying land of the golf course property was $3,500 per acre.

Robert Stanley, the county appraiser who performed the assessment on the property, testified that when he made his assessment, he was unaware of the conservation and preservation easements on the property but that he was aware that the property was included in a community unit plan. The record shows that the Board was aware of the conservation and preservation easements.

In assessing the property, Stanley looked at sales of 14 properties but placed emphasis on 5 sales ranging in price from $10,000 to $24,758 per acre. None of the 14 properties were part of a community unit plan. The properties that Stanley emphasized most were generally either inside the city limits or had city services. The properties, however, were generally close in proximity to Firethorn's golf course property, including several that were across the street. The properties were generally zoned AG.

Stanley testified that he did not consider the sales Allen relied on comparable for several reasons. In regard to the sales to the City, Stanley testified that even in the absence of an overt threat of condemnation, the ability of the City to take the property is always present, thus making it a distressed sale. Stanley stated the policy of the county assessor's office was to always disqualify sales to or from governmental entities under Neb. Rev. Stat. § 77-1371 (Reissue 1996). Concerning the remaining sale, Stanley testified that the sellers of the property had an offer to sell the property for $5,000 per acre to a group planning to develop residential acreages. The sellers, however, chose to accept $4,200 per acre from the party who intended to use the land as a golf course because the sellers lived adjacent to the property and wanted a golf course next to them instead of additional homes.

In its findings and order, TERC found that the community unit plan and the conservation easements did not affect the fair

market value of the golf course property and that the highest and best use of the property was as a golf course. TERC further found that three of the four most comparable sales used by Allen were ones in which the City was the buyer. Based on this, TERC found that the record did not establish that any of the sales to the City reflected the current market value.

In finding that the sales to the City were not comparable, TERC relied largely on Stanley's testimony that the threat of condemnation is always present, along with the policy of the county assessor's office to always disqualify such sales. In addition, TERC cited to § 77-1371 for the proposition that "sales prices of real property which result from sales to or purchases from political subdivisions are generally not considered as representative of 'market value.' " In regard to the fourth sale presented by Allen, TERC concluded that nothing in the record established that any adjustments were made to the sale for time, location, and physical characteristics. TERC further concluded that one sale does not establish market value.

Utilizing information regarding Firethorn's purchase and sale of other property in 1998, TERC further reasoned that the remaining portions of Firethorn's property, including the golf course, were worth $16,814 per acre without taking into account substantial changes and differences in zoning among various portions of the property. In its brief, Firethorn presents figures indicating that the reasoning applied by TERC should actually show a value of $1,052.63 per acre. The Board states that it does not disagree that this finding by TERC was erroneous, but contends that any error was harmless.

Finally, TERC concluded that the comparable sales presented by the Board also caused concerns, but that the burden of persuasion was on Firethorn. TERC concluded that the action of the Board was not unreasonable or arbitrary and affirmed. Firethorn appeals.

ASSIGNMENTS OF ERROR

Firethorn assigns, rephrased, that the district court erred in (1) failing to find that the community unit plan and conservation easements adversely affected the fair market value of the property and finding that the Board gave due regard to the restricted

use, (2) disregarding three comparable sales offered by Allen for the reason that the purchaser in those sales was a political subdivision, (3) disregarding the testimony of Allen that the fair market value of the property was $3,500 per acre, (4) determining that Firethorn paid $16,814 per acre for a portion of the property when the evidence showed that the actual purchase price was in the vicinity of $1,000 per acre, and (5) finding that the Board's assessment was supported by competent evidence and was not unreasonable or arbitrary and that Firethorn did not meet its burden of proof.

STANDARD OF REVIEW

[1] Appellate review of a final decision of TERC shall be conducted for errors on the record. When reviewing an order 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. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

ANALYSIS

Firethorn first contends that TERC acted unreasonably when it found that the Board gave due regard to the restricted use of the property. In particular, Firethorn argues that Stanley was unaware of the conservation easements on the property and that the Board disregarded the effect of the easements. Although Stanley was unaware of the conservation easements on the property, he was aware of the community unit plan. In upholding the assessed value, the Board was aware of both the community unit plan and the conservation easements. Both parties presented testimony that the highest and best use of the property was as a golf course and neither was able to locate sales of other properties subject to conservation easements when determining value based on comparable sales. TERC specifically found that due regard was given to the effect of the conservation easements on the property.

The Conservation and Preservation Easements Act, Neb. Rev. Stat. § 76-2,111 et seq. (Reissue 1996), provides:

> Real property subject to a conservation or preservation easement shall be assessed with due regard to the restricted

> uses which the property may be devoted. The conservation or preservation easement in the hands of the holder shall be subject to assessment, taxation, or exemption from taxation in accordance with general laws applicable to assessment and taxation of interests in real property.

§ 76-2,116.

[2-5] Under Neb. Rev. Stat. § 77-1511 (Reissue 1996), TERC shall affirm the action taken by a county board of equalization unless evidence is adduced establishing that the action taken by the board was unreasonable or arbitrary or unless evidence is adduced establishing that the property of the appellant is assessed too low. Section 77-1511 creates a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000). That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. *Id.* From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000). The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board. *Id.*

We recognize the difficulty involved in valuing a unique property such as a golf course subject to a community unit plan and conservation easements. We note, however, that the parties chose to use the comparable sales approach to value the property but did not present evidence of sales of property subject to conservation easements. Instead, the parties generally presented evidence only of sales of open land in the local area, instead of looking to sales of golf courses in other areas. See, generally, *Wolf Creek Golf Links, Inc. v. Board of Johnson County Comm'rs*, 18 Kan. App. 2d 263, 853 P.2d 62 (1993) (appraisal considered sales of over 70 golf courses throughout United States and narrowed analysis to golf courses of comparable market and property characteristics). See, also, Daniel C. Stockford, *Property Tax Assessment of Conservation*

Easements, 17 B.C. Envtl. Aff. L. Rev. 823 (1990) (noting difficulty in using comparable sales approach to value property burdened with conservation easements).

In this case, both parties testified that the highest and best use of the property was as a golf course and that the property was used as a golf course subject to the community unit plan before the granting of the conservation easements. Stanley testified that he considered the effect of the community unit plan when making his assessment and that the easements had no effect on the highest and best use of the property as a golf course. Kubert also testified that he did not consider the conservation easements to have any bearing on the property's highest and best use. Thus, it was reasonable for the Board and TERC to determine that the limitations placed on the property by the conservation easements did not act to lower the value of the property since the limitations were generally similar to restrictions placed on the property through the community unit plan and to the use that has always been made of the property. See *Ross v. Town of Santa Clara*, 266 A.D.2d 678, 698 N.Y.S.2d 90 (1999). See, also, *Matter of Adirondack Mountain Reserve v. Board of Assessors of Town of North Hudson*, 99 A.D.2d 600, 471 N.Y.S.2d 703 (1984) (restrictions on property did not affect highest and best use).

In addition, Firethorn did not present evidence to show how the conservation easements affected the value of the property. Without evidence of sales of property that are restricted in use, it is impossible to conclude that the restricted use of Firethorn's property actually lowered its value. See generally, *Wesson v. Town of Bremen*, 667 A.2d 596, 598 (Me. 1995) ("[i]f the taxpayer . . . fails to present credible evidence of just value, the [Bremen] Board [of Assessment Review] has no way of comparing the assessment and the taxpayer's view of just value"). Thus, in the absence of evidence through the use of comparable sales or another assessment method showing how the conservation easements affected the value of the property, and to what dollar amount, Firethorn has failed to meet its burden to overcome the presumption that the Board acted reasonably. Accordingly, we find this assignment of error to be without merit.

[6] Firethorn next contends that TERC erred in failing to consider three sales of property to the City. Section 77-1371 provides:

"When using comparable sales in any method of determining actual value provided in section 77-112, the following guidelines shall be considered in determining what constitutes a comparable sale: . . . (6) Whether sales to or from federal or state agencies or local political subdivisions reflect current market value." Under Neb. Rev. Stat. § 77-112 (Cum. Supp. 1998), "[a]ctual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade."

[7] In its order, TERC stated that the sales were disregarded because sales to a political subdivision implicitly carry a threat of condemnation and because it was the policy of the county assessor's office to disqualify such sales. Although TERC stated it found that the sales of property to the City did not reflect current market value, a reading of the order as a whole shows that this conclusion was based solely on the finding that sales to a political subdivision are always under a perceived threat of condemnation. Such a finding would act to always disqualify sales to a political subdivision. Nowhere do the statutes state that sales to a political subdivision are to be automatically excluded from consideration. Rather, this finding is contrary to the provisions of § 77-1371 which states that consideration shall be given to whether such a sale reflects market value. Thus, implicit in § 77-1371 is that such a sale could reflect market value under some circumstances. See, also, *Hon. Redev. Agncy. v. Pun Gun*, 49 Haw. 640, 426 P.2d 324 (1967) (holding in condemnation action that sales to political subdivision should not automatically be excluded as comparable sales as matter of law). Accordingly, we hold that a sale may not be disregarded solely because it is a sale to a political subdivision.

Allen testified that City officials confirmed that the sales were arm's-length transactions. Allen further stated that the sales were based on an appraisal price and negotiated from that price. Allen also testified, however, that he did not speak with the sellers of the properties and did not know whether the properties were placed for sale on the open market or if real estate agents were involved. Other than presenting evidence that sales to political subdivisions implicitly carry the threat of condemnation and that the policy of the county assessor was to always disqualify such sales, the Board presented no evidence that the

sales were not otherwise arm's-length transactions. TERC's order does not reflect that it considered these factors when determining whether the sales reflected market value. Accordingly, we reverse, and remand for TERC to consider whether the sales to the City reflected market value.

[8,9] Firethorn next contends that TERC erred in disregarding evidence of a fourth sale consisting of land sold in a private sale for the purpose of being developed into a golf course. TERC's order shows that consideration was not given to the fourth sale presented by Firethorn solely due to a finding that adjustments had not been made and because of a determination that a single sale cannot show market value. The record shows that Allen did make some adjustments to the property. Thus, we conclude that TERC's factual finding to the opposite was not supported by competent evidence. We further hold that a single sale may in some instances provide evidence of market value. We have recognized that in tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). A single sale should not be excluded merely because it is a single sale. Rather, the fact that evidence of other sales is not presented goes to the weight of the evidence. TERC's order indicates that it gave no consideration to the sale due to an erroneous factual finding and because it was only one sale. Thus, we conclude that TERC erred in disregarding the fourth sale.

Firethorn finally contends that TERC erred in utilizing information regarding Firethorn's purchase and sale of property in 1998 to conclude that remaining portions of Firethorn's property, including the golf course, were worth $16,814 per acre without taking into account substantial changes and differences in zoning among various portions of the property. In its brief, the Board agrees that TERC erred, but contends that the error was harmless. We agree that TERC erred in making this calculation. Accordingly, TERC may not rely on this calculation on remand. Because we remand the cause for further consideration, we need not address whether the error was harmless.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ALLSTATE INSURANCE COMPANY, APPELLEE, V. JOHN LARANDEAU, APPELLANT.

622 N.W.2d 646

Filed February 16, 2001. No. S-99-1149.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Contracts: Insurance: Subrogation: Tort-feasors.** In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
5. **Property: Real Estate: Words and Phrases.** Waste is a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

William T. Ginsburg for appellant.

Thomas H. Cellilli III, Joel E. Feistner, and Matthew D. Hammes, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Allstate Insurance Company (Allstate) filed a petition against John LaRandeau seeking to recover money it expended as a result of LaRandeau's intentionally setting fire to and completely destroying the residence of LaRandeau and his wife. After both parties moved for summary judgment, the district

court for Douglas County sustained Allstate's motion and entered judgment against LaRandeau in the amount of $123,663.32. LaRandeau timely appealed.

SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Casey v. Levine, ante* p. 1, 621 N.W.2d 482 (2001).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000).

FACTS

On September 15, 1994, LaRandeau intentionally set fire to a residence he owned in joint tenancy with his wife. The fire completely destroyed the structure of the home as well as its contents. Both LaRandeau and his wife were insured under a homeowner's insurance policy issued by Allstate. The relevant portion of the policy excluded coverage for the destruction of the dwelling or any personal property when caused by or consisting of "[i]ntentional or criminal acts of or at the direction of any **insured person**, if the loss that occurs: a) may be reasonably expected to result from such acts; or b) is the intended result of such acts." The policy also provided in part: "When **we** pay for any loss, an **insured person's** right to recover from anyone else becomes **ours** up to the amount **we** have paid."

In December 1994, LaRandeau's wife submitted estimates of the scope and amount of damage. Allstate paid her $181,937.44, which was one-half of the total property damage. Allstate made no payments to LaRandeau. LaRandeau was charged with and convicted of arson and ordered to pay restitution to Allstate in the amount of $55,000.

Allstate then sued LaRandeau, seeking recovery for the payments made to his wife and other expenses incurred in investigating the claim. Allstate alleged that it was the "Subrogee/Assignee of Patricia LaRandeau." Allstate alleged

that LaRandeau intentionally set fire to the residence, that his act was the sole proximate cause of the damage sustained by Allstate, and that "[a]s a result of the above-described waste, the market value of the premises has been diminished by $363,874.88, and Plaintiff's interest in the property has been damaged in the amount of $181,937.44, representing half that market value."

Both parties moved for summary judgment. On September 1, 1999, the district court sustained Allstate's motion and overruled LaRandeau's motion. Judgment was subsequently entered in a stipulated amount of $123,663.32. LaRandeau timely appealed.

ASSIGNMENT OF ERROR

LaRandeau assigns as error the district court's decision sustaining Allstate's motion for summary judgment and overruling his motion for summary judgment.

ANALYSIS

[3] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Casey v. Levine, ante* p. 1, 621 N.W.2d 482 (2001). 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.*

Whether one is entitled to judgment as a matter of law is by definition a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000).

The parties agree that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts. The only question presented is whether Allstate was entitled to a judgment as a matter of law.

LaRandeau argues that as a matter of law, Allstate has no right of subrogation against him because he is one of Allstate's insureds. We have stated that no right of subrogation can arise in

favor of an insurer against its own insured. See, *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995); *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988); *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984); *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341 (1976); *Midwest Lumber Co. v. Dwight E. Nelson Constr. Co.*, 188 Neb. 308, 196 N.W.2d 377 (1972).

However, in those cases in which we have applied this rule, the "insured" suffered a loss covered by the insurance policy. We have not previously considered a situation where the loss was due to arson committed by one of the named insureds. Here, we must determine whether Allstate may proceed with a subrogation claim against a policyholder whose intentional acts caused a loss which is specifically excluded from coverage under the insurance policy issued to the policyholder.

There are two public policy considerations that support the prohibition of an insurer's subrogating against its insured. First, the insurer should not be able to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased. See, *Control Specialists v. State Farm Mut. Auto. Ins. Co., supra*; *Reeder v. Reeder, supra*; *Stetina v. State Farm Mut. Auto. Ins. Co., supra*. Second, "the insurer should not be placed in a situation where there exists a potential conflict of interest, thereby possibly affecting the insurer's incentive to provide a vigorous defense for one of its insureds." 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 224:3 at 224-19 (2000). Here, neither consideration is threatened by allowing subrogation against a party whose intentional act has caused a loss not covered under the policy.

[4] In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor. *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997).

> Courts have generally allowed an insurer to subrogate against an insured arsonist responsible for causing the loss. In essence, while an insurer does not ordinarily have a right

> of subrogation or indemnification against its own insured, adhering to that principle when one of the insureds is responsible for producing the insured loss by arson would defeat a purpose of subrogation of ultimately placing the loss on the wrongdoer, since the wrongdoer and the insured are the same person under these circumstances.

16 Couch, *supra*, § 224:11 at 224-27 to 224-28, citing *LaSalle Nat. Bank v. Massachusetts Bay Ins. Co.*, 958 F. Supp. 384 (N.D. Ill. 1997); *Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 388 A.2d 603 (1978); *Madsen v. Threshermen's Mut. Ins. Co.*, 149 Wis. 2d 594, 439 N.W.2d 607 (Wis. App. 1989).

LaRandeau argues that no right of subrogation can arise in favor of an insurer against its own insured because, by definition, subrogation exists only with respect to rights of the insurer against *third persons to whom the insurer owes no duty*. See *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984). LaRandeau contends that, as an insured, he is not a third person to whom no duty is owed and that, therefore, he cannot be subject to a subrogated claim.

The problem with this argument is that LaRandeau's intentional act of arson was not covered under the homeowner's insurance policy. Therefore, Allstate owed him no duty under the policy. Further, LaRandeau is a third party to the relationship between Allstate and his wife.

LaRandeau's wife has subrogated her right to recover from LaRandeau, the wrongdoer, in the amount for which she received payment from Allstate. The policy states: "When **we** pay for any loss, an **insured person's** right to recover from anyone else becomes **ours** up to the amount **we** have paid." According to the terms of the policy, her acceptance of Allstate's payment resulted in a contractual, or conventional, subrogation of her right to recover that amount from LaRandeau, the wrongdoer.

[5] The petition filed by Allstate as subrogee against LaRandeau also alleges waste. Here, LaRandeau's wife could have maintained in her own right a suit seeking compensation based upon a theory of waste against LaRandeau. Waste is a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title

or the full estate. *Bee Building Co. v. Peters Trust Co.*, 106 Neb. 294, 183 N.W. 302 (1921).

Long ago, we cited with approval the law laid down in England by Statutes of Westminster II, cc. 6 and 22, which gave to joint tenants an action for waste. See *Schuster v. Schuster*, 84 Neb. 98, 120 N.W. 948 (1909). "Joint tenants have equal rights of possession. From this unity of possession it follows that damage to the freehold caused by one joint tenant is an injury to another joint tenant." 4 Thompson on Real Property § 31.07(a) at 37 (David A. Thomas ed. 1994).

Nor does the doctrine of interspousal tort immunity prove any barrier to an action for waste against a spouse, since we abrogated the doctrine in *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979). It is clear that LaRandeau's wife, as a joint tenant and a spouse, can maintain in her own right an action for waste against LaRandeau. Based on our reasoning above, it follows that LaRandeau's wife could have subrogated that right to Allstate.

We conclude that Allstate may pursue its claim against LaRandeau, whose intentional act caused a loss not covered under the policy, to the detriment of an innocent coinsured. The rule against subrogation by an insurer should not preclude Allstate from asserting its subrogated claim against LaRandeau because the policy did not cover the risk at issue. With respect to the fire loss in question here, LaRandeau was not an innocent insured, but, rather, a wrongdoer who intentionally caused the loss. Accordingly, recognition of Allstate's subrogation claim against him for the amounts which it paid to his wife, who *was* considered an innocent insured, serves the legitimate purpose of placing ultimate responsibility for the loss upon the intentional wrongdoer.

LaRandeau also argues that Allstate needed statutory authorization to prosecute a subrogated claim against one of its insureds, which authorization he claims did not exist in Nebraska until 1998. LaRandeau asserts that the Unfair Discrimination Against Subjects of Abuse in Insurance Act, found at Neb. Rev. Stat. § 44-7401 et seq. (Reissue 1998), created a new and theretofore nonexistent right of subrogation that insurers may maintain against certain insureds who have abused

innocent coinsureds to which the insurers became obligated to pay. This issue is without merit. In the case at bar, recovery is not based upon § 44-7401 et seq. The insurance policy permitted a right of subrogation for any amounts paid.

CONCLUSION

We conclude that Allstate has a right of subrogation against LaRandeau, whose intentional act caused a loss not covered under the policy, to the detriment of his wife, an innocent insured. The wife's acceptance of Allstate's payment operated as a subrogation (under the terms of the policy) of her right to recover that amount from LaRandeau. Since there are no disputed issues of fact, Allstate is entitled to judgment as a matter of law. For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

IN RE ESTATE OF IRMA A. JAKOPOVIC, DECEASED. STEVE JAKOPOVIC, APPELLEE, V. JAMES RALPH BROWN, PERSONAL REPRESENTATIVE OF THE ESTATE OF IRMA A. JAKOPOVIC, DECEASED, APPELLANT.

622 N.W.2d 651

Filed February 16, 2001. No. S-99-1329.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
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. **Decedents' Estates: Antenuptial Agreements: Contracts: Waiver.** Antenuptial agreements that waive the right of election are statutorily authorized by Neb. Rev. Stat. § 30-2316 (Reissue 1995).
4. **Antenuptial Agreements.** As a contract, an antenuptial agreement is governed by the same principles that are applicable to other contracts, but is subject to the particular statutory requirement that an antenuptial agreement must be based on fair disclosure.
5. **Decedents' Estates: Wills: Waiver.** Under Neb. Rev. Stat. § 30-2316(d) (Reissue 1995), "a waiver of 'all rights,' or equivalent language, in the property or estate of a present or prospective spouse . . . is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him

or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement."

6. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract.
7. **Courts: Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the County Court for Lincoln County: KENT E. FLOROM, Judge. Affirmed.

Patrick B. Hays for appellant.

Glenn Van Velson for appellee.

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

CONNOLLY, J.

This is an appeal from the estate proceeding of Irma A. Jakopovic (Irma), deceased. Steve Jakopovic (Jakopovic), her surviving spouse, filed a request for a homestead allowance, an exempt property allowance, and a family allowance, as well as a petition for an elective share of Irma's estate. Irma's son, James Ralph Brown, was appointed as personal representative. He objected to Jakopovic's request for the statutory allowances and petition for an elective share on the ground that Jakopovic had waived any interest in Irma's estate by signing an antenuptial agreement.

The primary issue presented by this appeal is whether Irma's government series E bonds valued at $46,780.24, which were issued to her before her marriage to Jakopovic but were not listed in their antenuptial agreement, were part of her augmented estate for the purpose of calculating Jakopovic's elective share. We conclude that the bonds were not subject to the antenuptial agreement and properly included in the augmented estate. We affirm.

ASSIGNMENTS OF ERROR

The personal representative assigns that the county court erred in including the value of Irma's government series E bonds in calculating Jakopovic's elective share and in awarding the full

family allowance and full exempt property allowance to Jakopovic.

BACKGROUND

Irma and Jakopovic were married on September 20, 1980. On September 11, 1980, they entered into an antenuptial agreement. The agreement stated that should either predecease the other, "the survivor shall in no way obtain an interest by inheritance or intestate succession or by way of augmented estate in the *certain property described hereinafter*." (Emphasis supplied.) The property described as being the exclusive personal property of Irma included a parcel of real estate, specified certificates of deposit, and an itemized six-page list of Irma's jewelry, furniture, and other sundry possessions.

Irma died testate on August 9, 1998. Her last will and testament was filed for probate, and Brown was appointed personal representative. Article II of Irma's will stated, "Not being unmindful of my Husband, STEVE JAKOPOVIC, I expressly direct that he not share in my estate under the provisions of this Will as he and I have agreed to this arrangement prior to our marriage."

The personal representative submitted an inventory, which included 12 government series E bonds valued at $46,780.24 that were issued to Irma before she married Jakopovic but not listed in the antenuptial agreement. Jakopovic filed a petition for an elective share of Irma's estate. In his calculation, he used the full value of Irma's estate as set out in the inventory.

Jakopovic acknowledged the antenuptial agreement, but he alleged that he had not waived his rights to a homestead allowance, an exempt property allowance, or a family allowance. In a separate petition, he requested the full amounts permitted under Neb. Rev. Stat. §§ 30-2322 through 30-2325 (Reissue 1995) for each of these allowances. According to Jakopovic's worksheet, 50 percent of the augmented estate would have given him an elective share of $23,238.01. Based upon the worksheet calculation, each of Irma's three sons should contribute $7,746.

The personal representative objected to the petition for an elective share and request for allowances on the sole ground that Jakopovic had waived any interest in Irma's estate as shown by

the antenuptial agreement and Irma's last will and testament. Jakopovic then petitioned the court for relief to compel Brown to pay him the homestead, exempt property, and family allowances.

At the hearing on the request for relief and petition for elective share, Jakopovic stated that the basic terms of the antenuptial agreement were "what was hers' [sic] before we got married, would remain so. And what was mine before we got married, would remain mine. No infringement." He also stated that the pension checks he received from his railroad retirement were the only source of income used for both his and Irma's living expenses and medical expenses during their marriage. During the first 9 years of their marriage, Irma and Jakopovic resided in Jakopovic's house. After that, they lived in Irma's home. There was also evidence that funds from Jakopovic's retirement were paid into Irma's burial fund and used to pay the taxes on their joint tax returns when necessary and on an inheritance that Irma had received.

Jakopovic stated that although Irma told him after they were married that she had "put away" about $35,000, he did not have access to that asset. He also stated that he was unaware of Irma's government series E bonds, that she had not disclosed this asset to him before the marriage, and that the bonds were not included in the antenuptial agreement or any discussions of the agreement.

The county court found that Jakopovic was entitled to the homestead and family allowances and exempt property only if the amount of Irma's estate exceeded the value of the items which were included in the antenuptial agreement. Section 30-2322 provides for a homestead allowance of $7,500. Section 30-2323 entitles the surviving spouse to exempt property not to exceed $5,000, and §§ 30-2324 and 30-2325 allow for a reasonable family allowance not to exceed $9,000. Because the value of Irma's estate was $132,064.32 and the items listed in the antenuptial agreement were valued at $58,000, the court granted Jakopovic the full amount of the three statutory allowances amounting to $21,500. The court made no findings on Jakopovic's available resources or needs.

The court also found that the administrative expenses must be included in the calculation of the augmented estate and, there-

fore, adjusted Jakopovic's elective-share calculation to reflect this deduction. The final elective share was determined to be $20,273.07. Based on these findings, the court ordered the estate to pay Jakopovic $41,773.07 within 30 days. The personal representative appeals.

STANDARD OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999); *In re Estate of West*, 252 Neb. 166, 560 N.W.2d 810 (1997).

[2] 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. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000).

ANALYSIS

The personal representative cites *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982), for the proposition that a challenge to statutory elections is an equity action reviewed by appellate courts de novo on the record. That standard of review, however, was based on a statute that no longer exists. See *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996). The correct standard of review of probate cases is for error appearing on the record made in the county court. See, *In re Estate of Myers, supra*; *In re Estate of West, supra.*

ANTENUPTIAL AGREEMENT

The personal representative contends that Jakopovic was not entitled to an elective share in Irma's government series E bonds, which were valued at $46,780.24 at the time of her death. Although the government series E bonds were not listed in the antenuptial agreement, the personal representative argues that the bonds existed before the marriage and that Jakopovic and Irma intended that all separate property before the marriage remain separate property.

[3] Antenuptial agreements that waive the right of election are statutorily authorized by Neb. Rev. Stat. § 30-2316 (Reissue 1995), which provides in part: "The right of election of a sur-

viving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse." See, also, *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986) (concluding that this section allows parties to antenuptial agreement to waive right to elect share of both real and personal property of deceased spouse).

[4] We have also held that as a contract, an antenuptial agreement is governed by the same principles that are applicable to other contracts, but is subject to the particular statutory requirement that an antenuptial agreement must be based on fair disclosure. *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993).

The antenuptial agreement entered into by Jakopovic and Irma stated that should either predecease the other, "the survivor shall in no way obtain an interest by inheritance or intestate succession or by way of augmented estate in the *certain property described hereinafter*." (Emphasis supplied.) The agreement then lists six pages of exclusive personal property belonging to Irma, including everything from her home to a "Kleenex dispenser."

The personal representative cites *Anderl v. Willsey*, 193 Neb. 698, 229 N.W.2d 46 (1975), for the proposition that the intent of the parties to an antenuptial agreement must be determined by considering the conditions and circumstances surrounding the parties at the time the agreement was made. He argues that Jakopovic's statement at the hearing demonstrates that Jakopovic and Irma intended at the time of their agreement for the government series E bonds to remain Irma's separate property.

In *Anderl v. Willsey*, 193 Neb. at 699, 229 N.W.2d at 47, the antenuptial agreement stated that " 'all properties of any kind or nature, real, personal or mixed, wherever the same may be found, which belong to each party, shall be and forever remain the estate of said party . . . .' " The decedent had not changed the name of his beneficiary on two insurance policies when his first wife died, and the issue was whether these policies were among the assets included in the antenuptial agreement with his second wife. This court held that proceeds of the insurance policies were subject to the antenuptial agreement.

[5] In *Anderl*, the court was deciding whether the parties intended an unlisted asset to be included in an antenuptial agreement with unspecified property provisions. Although the court considered extrinsic evidence, the antenuptial agreement in that case indicated that the parties had waived *all* rights to the other's property. In such a case, § 30-2316(d) provides:

> [A] waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse . . . is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

In contrast, Jakopovic and Irma were very specific about what property they intended to remain separate property. *Anderl* is not controlling.

[6] When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000).

In this case, there is no reason to go outside the terms of the agreement itself. Jakopovic and Irma were free to create a contract in which they waived all rights to each other's property had that been their intent. The antenuptial agreement demonstrates that Jakopovic and Irma intended to waive their rights only to the property which was listed in the agreement itself, and the government series E bonds were not listed in the agreement.

Although Jakopovic testified that he and Irma intended their separate property to remain separate, he also testified that he was unaware that Irma had put away $35,000 and that she never informed him of the bonds. Given the extensive accounting of Irma's property in the antenuptial agreement, it is unlikely that an asset of such importance would have been omitted unintentionally. The specificity of the agreement itself is the best indi-

cation of Irma's intent. The fact that Irma had possession of these bonds before her marriage to Jakopovic leads to the conclusion that she would have included the bonds in the antenuptial agreement had that been her intention.

We hold that the county court's finding that Jakopovic had waived his rights only as to those assets listed in the antenuptial agreement conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000). Thus, the county court correctly found that the government series E bonds were not included in the antenuptial agreement and properly included them in the calculation of Jakopovic's elective share.

FAMILY ALLOWANCE AND EXEMPT PROPERTY PROVISIONS

The personal representative also contends that the county court erred in granting Jakopovic the full family allowance under § 30-2325 and the full exempt property allowance under § 30-2323. The record reflects that the personal representative objected to the allowances because Jakopovic had waived the allowances under the antenuptial agreement.

As discussed, the county court correctly concluded that Jakopovic had not waived his rights to any property except those assets listed in the antenuptial agreement. Because the estate was sufficiently solvent to cover the statutory allowances after deducting the value of Irma's assets which were included in the antenuptial agreement, the court granted Jakopovic the full exempt property and family allowances permitted under § 30-2323 and § 30-2324, respectively. The county court made no findings regarding Jakopovic's available resources or needs. The personal representative, however, did not object to the allowances as unreasonable. As noted, the personal representative's only objection to Jakopovic's petitions for an elective share and statutory allowances was made on the ground that he had waived his rights in the antenuptial agreement.

[7] An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000); *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). Because the reasonable-

ness of the claimed statutory allowances was not challenged by the personal representative and therefore not specifically adjudicated by the county court, we do not consider this issue on appeal.

CONCLUSION

We affirm the county court's finding that Jakopovic had waived his rights only as to Irma's assets included in the antenuptial agreement, and therefore, the court's inclusion of Irma's government series E bonds in the calculation of Jakopovic's elective share was correct.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JEFFREY S. FLORES, RESPONDENT.

622 N.W.2d 632

Filed February 16, 2001. No. S-00-114.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
4. **Principal and Agent.** A power of attorney authorizes another to act as one's agent. Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal.
5. ___. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.
6. ___. An agent is prohibited from profiting from the agency relationship to the detriment of the principal.
7. **Attorney and Client: Conflict of Interest.** The relationship between an attorney and client is one of the highest trust and confidence such as to require the attorney to observe the utmost good faith and not to allow the attorney's private interests to conflict with those of the client.
8. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court

considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.

9. ___. For the purpose of determining the proper discipline, the Nebraska Supreme Court considers the respondent's acts both underlying the events of the case and throughout the disciplinary proceeding.
10. ___. The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors.
11. ___. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of suspension.

Denise E. Frost and Clarence E. Mock, of Johnson & Mock, for respondent.

John W. Steele for relator.

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

PER CURIAM.

This is an attorney disciplinary case in which the Nebraska State Bar Association (NSBA), relator, seeks to discipline Jeffrey S. Flores, respondent.

I. BACKGROUND

The Committee on Inquiry of the Third Disciplinary District filed formal charges against Flores pursuant to Neb. Ct. R. of Discipline 10 (rev. 2001). In count I, Flores was charged with violation of Canon 1, DR 1-102(A)(1), (3), (4), and (6) of the Code of Professional Responsibility in connection with an alleged failure to apply pension benefits belonging to Edith Erling to her nursing home care bills during an 11-month period. In count II, Flores was charged with violating DR 1-102(A)(1), (3), (4), and (6) with respect to an alleged failure to relinquish certain personal property of Erling to the personal representative of her estate. In count III, Flores was charged with violating DR 1-102(A)(1) and (6) for failing to ensure that Erling's personal funds remained sufficient to fund the type of funeral she desired. The provisions at issue provide:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (3) Engage in illegal conduct involving moral turpitude.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

In his answer to the formal charges, Flores denied the factual allegations and specifically denied that he breached any provision of the code.

At Flores' request, the matter was submitted to a referee pursuant to Neb. Ct. R. of Discipline 10(J). The referee conducted a formal evidentiary hearing at which Flores was present and represented by counsel. At the conclusion of the hearing, counsel for Flores moved to dismiss counts II and III of the formal charges and, therefore, only count I was submitted to the referee. The referee made the following factual findings with respect to count I:

> Flores was admitted to the practice of law in the State of Nebraska on September 22, 1980. He was engaged in private practice in Hooper and Scribner, Nebraska with the law firm of Hurt & Gallant [sic] from September, 1980 through September, 1986. On October 4, 1986 he accepted a position at the First National Bank & Trust in Fremont, Nebraska, as a trust officer. This bank was subsequently sold to FirsTier and will hereinafter be referred to as "FirsTier". He left that position in May, 1994 and thereafter took time off from the practice of law. He is currently under "suspension" for failure to pay dues to the NSBA which was a voluntary act on his part as he did not intend to actively practice law for a while. He presently manages a greenhouse in Des Moines, Iowa, where he recently moved to be near his children who reside with their mother in eastern Iowa.
>
> Erling started out at the age of 16 as a secretary at FirsTier and later became vice president. She was the first

female to hold an officer's position at any bank in Fremont, Nebraska.

Erling and FirsTier were designated as co-personal representatives of the Estate of Wilma Tiegler, a resident of Fremont, who died in an automobile collision in 1987. The Tiegler Estate proceeded through the probate process in the County Court of Dodge County, Nebraska. Erling and Flores worked together on the Tiegler Estate. This Estate was complicated and required years to complete its administration. In fact, as of the date of the hearing in this matter (June 8, 2000) administration of the Tiegler Estate was still in progress and the Estate had not yet been closed.

During the course of their work together on the Tiegler Estate, Flores and Erling developed a close, personal friendship. The scope of the relationship came to include Erling's friendship with Flores' then-wife, Julie Flores, and Flores' three young children.

After she retired from her full time employment at FirsTier in 1988, Erling continued to speak to and/or meet with Flores several times a week regarding her continuing work on behalf of the Tiegler Estate as well as personal and social matters. At her retirement ceremony, Flores was asked to be the emcee by the bank president even though the bank president had known Erling much longer than Flores had.

Erling was an only child and never married. She had no children. Flores described the bank as being her "family".

Flores and Erling had several things in common. They liked to go out to eat, attend civic events, and attend other social events. They both enjoyed art and music. Erling would oftentimes go to the Flores home and she traveled with Flores and his family on vacations, including a trip to the Plaza in Kansas City to see the Christmas lights.

Erling spent Christmas Eve and other holidays, as well as family celebrations such as birthdays and baptisms, with Flores and his family.

Erling always sent cards or gifts to the Flores children on days such as Halloween, Valentine's Day, Christmas and birthdays. She often commented about how fortunate she felt to be a part of the Flores family.

Between 1988 and 1992 Erling and Flores usually met for lunch twice a week, every week.

Flores was the one who would take Erling to the doctor, take her shopping, take her wherever she needed to go. This occurred on a regular basis. When she had to move out of her apartment, Flores took two weeks of vacation and spent the days and evenings cleaning out her apartment and boxing up her personal effects for storage. He stored all of Erling's personal effects either at his parents' home in Scribner, Nebraska, or at Denning Storage in Fremont, Nebraska. He used his parents' home to store the more valuable personal effects such as china, sterling, jewelry, silverware, etc. Flores testified that he paid all the storage expenses at Denning Storage.

In 1990, Erling told Flores that she had added his name to her checking account at FirsTier. In 1991, the two opened another joint checking account at First Federal of Lincoln ("First Federal"). During this same time frame Erling also placed Flores' name on four CDs as joint owner. Each of these CDs was approximately $10,000.00 in value. At this time, Erling's assets consisted of approximately $40,000.00 in CDs and a $10,000.00 car in addition to miscellaneous personal effects. The car was subsequently sold and the proceeds ($10,000.00) were placed in one of Erling's checking accounts. (Parenthetically, it is noted that the Stipulation between the parties identified three CDs with a total value of approximately $25,000.00).

When told that he had been added to the financial accounts Flores told Erling he was very grateful but she didn't have to do that. Her response was that Flores didn't have to do all that he did for her either but she truly appreciated it. He was uncomfortable about being added to these accounts so he went to Erling's friend and co-worker, Marilyn Anderson, and spoke to her about it. The specifics of that discussion were not revealed at the hearing.

Flores testified that both Erling and Flores had their own check books for the FirsTier account and that Flores maintained possession of the check book for the First Federal

account, while Erling maintained a cash card for that account.

The FirsTier monthly statement would go to Erling. Each month Flores would discuss with Erling all the checks cashed that month. The First Federal statements went to Flores. Flores testified that all monies spent out of either checking account or the CDs were spent with the full knowledge and consent of Erling.

When the CDs were cashed the proceeds were placed in one or the other checking account.

Of the approximately $50,000.00 in available cash from and after 1990, Flores estimated he spent $20,000.00 of it for his own personal benefit/use with the knowledge and consent of Erling. The remainder was spent on items requested by Erling or to pay bills on behalf of Erling. At one point in time, Erling was paying for three different residences - her home, an assisted living apartment, and the nursing home at Arbor Manor.

At the same time Erling advised Flores that she had named him as a joint owner of the checking and CD accounts, she likewise advised him that she had signed both a Durable Power of Attorney ("POA") naming him as her attorney-in-fact and a Living Will giving Flores the power and authority to make medical care decisions on her behalf if she became unable to participate in such decisions.

In addition, in August, 1991, Erling signed her Last Will and Testament wherein she made specific dollar amount bequests to nine different individuals totaling $7,000.00. The residual/remainder of her Estate was willed to Flores and, in the event he did not survive her, then to the Presbyterian Church in Fremont, Nebraska. Flores played no part in the preparation of this Will nor any of the other aforedescribed legal documents, nor was he aware of their existence until after they were prepared and signed.

Flores testified he never performed any legal work for Erling. Tom Thomsen ("Thomsen") did all of her legal work, including the Durable Power of Attorney, Living Will, and Last Will and Testament. Thomsen was also the attorney for FirsTier.

It was stipulated that if Thomsen was called to testify as a live witness at the hearing, he would state that he perceived Erling was competent and knew, understood and intended the nature and effect of her acts when she executed her Power of Attorney and Living Will documents. There was no other evidence to the contrary. I specifically find that Erling neither lacked testamentary capacity nor was she the subject of undue influence when she participated in the various activities detailed hereinabove (adding Flores to the checking accounts and CDs, and executing the POA, Living Will, and Last Will and Testament).

Regarding Erling's physical and mental health, Flores testified that in the latter part of 1991 and spring of 1992 he starting seeing a little "slipping", she became "a little forgetful". Examples he gave were misplacing her keys and not recalling immediately which day of the week it was when he would call her for lunch.

At that time, Flores and Erling shared the same physician. He inquired of the physician about her mental health and was told that the tests were "all right". Despite this, he took her to the Nebraska Geriatric Clinic for a second opinion and was again advised the tests were "all right".

Flores recalled that by the fall of 1992 Erling was not able to physically care for herself and it was stipulated that she was admitted to Arbor Manor, a nursing home in Fremont, Nebraska, in October of 1992. However, during this time he would still visit with her and she continued work on the Tiegler Estate while in the nursing home. It was sometime during 1994 that she was no longer able to handle her financial affairs by herself.

Flores acknowledged that from 1990 until the death of Erling (December 11, 1997) he expended more funds than he contributed to Erling's accounts. However, between 1993 and the end of 1995 he contributed about $9,000.00 more to the joint account than was taken out. This will be further explained infra and is detailed in Exhibit 54.

On or about February 16, 1993, Flores, on behalf of Erling, applied for Medicaid assistance with NDSS [Nebraska Department of Social Services]. Exhibit 4 is the

Application which Flores and/or the NDSS case worker filled out. On page 2 of Exhibit 4 Flores is twice identified as the POA for Erling. The signature page (last page of Exhibit 4) is signed by E. Edith Erling "by Jeff Flores". There is no mention of POA on that signature. The Application (Exhibit 4) does not contain a copy of the POA attached to it nor was there any testimony or other evidence that the POA was produced, used or required at the time Flores filled out the Application for Erling.

Flores acknowledged that he knew he was making the application based on the POA and because he was Erling's friend. He also testified that most everything he did for Erling he did without the use of the POA. I specifically find, however, based on his own testimony, that Flores was, at least in part, relying upon or utilizing the POA in his efforts to secure Medicaid funding for Erling.

. . . .

When Erling retired in 1988 her monthly income consisted of pension benefits and social security benefits. The monthly pension benefit amount at that time and thereafter was $502.28. The monthly social security benefits at the time Application was made with NDSS for Medicaid assistance was $1,001.00.

Flores testified that he had assisted in several applications to NDSS for Medicaid for others prior to the Application he made on behalf of Erling. The exact number was not revealed. It was also not revealed which of these occurred while he was in private practice and which occurred while he was a trust officer at the bank.

Flores acknowledged that it was his understanding that both the monthly social security payment ($1,001.00) and the monthly pension ($502.28) were to be applied to Erling's care at Arbor Manor. He later testified that he didn't believe there was any priority on the pension funds that ear-marked them for the Arbor Manor obligation.

The original mechanism for payment to Arbor Manor was that both the social security and the pension were paid into one of Erling/Flores [sic] joint checking accounts and then Flores wrote checks each month to Arbor Manor.

Sometime in 1995 the Social Security started being paid directly to Arbor Manor, presumably at the behest of Arbor Manor. However, the pension fund continued to be paid into the Erling/Flores checking account and then Flores wrote a check to Arbor Manor each month for the full amount of the pension payment. This was the procedure followed from and after Erling's admission to Arbor Manor (October, 1992) until December, 1995, at which time Flores ceased paying the $502.28 pension amount to Arbor Manor. As of December, 1995, he started paying that amount to himself. This practice of paying the pension amount to himself continued from December, 1995 through November, 1996, at which time Anderson was appointed guardian conservator by the County Court of Dodge County at the behest of NDSS. The conservatorship was represented by attorney Schneider.

The process of the pension and social security funds being paid directly into the checking account(s) started before Flores was put on the accounts as joint owner.

Attorney Schneider, an acquaintance and former classmate of Flores, received a phone call from Arbor Manor in about March, 1996, complaining it had not been paid the $502.28 pension payment since December, 1995. Schneider agreed to check into it but had difficulty contacting Flores. He eventually reached Flores at Flores' parents' home on Easter weekend, Saturday, April 6, 1996. At that time he advised Flores that he had been told the pension monies had not been paid for three or four months. He testified that Flores acknowledged to Schneider those payments had not been made and the reason they had not been made was because Flores had been "on the road" a lot and had not had time to make the payments.

Schneider suggested a couple of ways to make the payments in the future, including direct deposit to Arbor Manor. Flores rejected that idea but assured Schneider, according to Schneider, that he would go to FirsTier the following week and set up an automatic payment plan where the amount would be paid by the bank out of the FirsTier checking account directly to Arbor Manor on a monthly basis.

Schneider testified that it was very clear to him that Flores knew this money was supposed to be paid to Arbor Manor each month. I specifically find that Flores was aware that Arbor Manor was entitled to receive the $502.28 pension payment each month and further specifically find that he acknowledged that awareness to Schneider in April, 1976 [sic].

This matter of the unpaid pension amount then "drifted" according to Schneider for another six months or so, at which time the NDSS contacted him in November, 1996, asking that a conservatorship be set up because the pension money still was not being paid to Arbor Manor and had now gone unpaid for approximately twelve months.

Attorney Schneider is the one who filed the initial Complaint with the NSBA against Flores.

Flores acknowledged having the April 6, 1996 phone conversation with Schneider and agreed with Schneider's account of the conversation to the extent that they discussed the money owed Arbor Manor and the need to take care of it. However, he disagreed as to what he told Schneider about getting in contact with the bank. It was Flores' testimony he told Schneider he would contact the bank to get this paid. By that he meant he would contact the bank about getting the remaining Personal Representative (PR) fee due and owing to Erling from the Tiegler Estate to take care of the back pension monies due and owing to Arbor Manor. To that end, Flores called Jeff Denison, trust officer for FirsTier in Norfolk, Nebraska, and asked when the remaining PR fee for Erling could be expected. Flores testified he had earlier contacted Mr. Denison in December, 1995, and had been told the PR fee would be paid possibly in 1995 but, if not then, for sure in 1996. When Flores called Denison again in response to the phone call he had received from Schneider in April, 1996, Denison assured him Erling would get paid although this was somewhat contingent on the "crops coming in".

The Tiegler Estate was valued at $1.9 million. Erling had agreed to perform her co-personal representative duties at a charge of three-quarters of 1% ($14,250.00). To

date, it is believed Erling had received approximately $10,000.00 of that fee. That money was received in 1989 or 1990. The parties stipulated that the sum of approximately $5,098.00 is still owed to Erling and her Estate in unpaid PR fees.

Flores testified that he started taking the pension check for his own use in December of 1995 because he had paid a lot of bills on behalf of Erling over the previous two to three years out of his own personal funds and from money he borrowed from his parents. In December, 1995, he was operating under the belief that Erling was about to receive $5,000.00 to $6,000.00 in PR fees and he felt it was acceptable to recoup back some of what he had, in essence, "loaned" to Erling. He acknowledged that he never discussed with Erling the fact he was paying some of her bills with his personal funds nor the fact he was now taking her pension check to repay himself. Erling was never aware of this "loan".

Erling had previously suffered two falls, one in 1993 as a result of a thyroid condition, and one in 1994 as a result of which she broke her hip. In both instances she was hospitalized.

She had little or no insurance to pay the doctor and hospital bills and Flores took it upon himself to pay at least a portion of those for her. As noted above, he did not tell her he was making payments on these bills. He recalled that the first hospitalization totaled approximately $6,700.00 and the second hospitalization totaled more. At another point, he testified that the second hospitalization cost somewhere between $10,000.00 and $12,000.00. He did not pay all of her bills. Exhibit 54 is a recapitulation of what Flores paid into the joint checking account, the amount he took out, and some of the bills paid between 1993-1996 on behalf of Erling. The withdrawals are not individually identified.

Flores acknowledged that he was generally not employed in 1995 or 1996 and he was living primarily off of his pension plan from the bank and the sale of his Fremont home as a result of his divorce which was final-

ized in January, 1994, as well as some part time periodic employment.

Flores acknowledged he did not research his right to take the pension monies because he did not view it as anything related to an attorney/client relationship.

In addition to the above findings of fact, based upon clear and convincing evidence, I also make the following specific findings of fact, keeping in mind that I observed the demeanor of Flores throughout his testimony and the rest of the hearing. . . .

I believe and find, clearly and convincingly, that Flores truly cared for Erling and her well-being and that she felt the same toward him. With or without the POA, Flores would have done all that was within his power to secure the Medicaid funding for Erling.

I find that he had no ulterior motive for using his own and borrowed funds to help pay off Erling's medical bills and for making contributions to the joint account in 1993-95.

I further find that he was motivated solely by a genuine feeling of care for Erling to include her in his family and to give her the attention and assistance he did from and after approximately 1988.

I believe and find the relationship between Erling and Flores would have been the same over the years regardless of whether Flores' name had been added to the various financial accounts and regardless of the POA. I believe and find these two shared a very close relationship.

The referee concluded that the NSBA had proved by clear and convincing evidence that Flores violated DR 1-102(A)(1), (4), and (6), as well as the attorney's oath of office. The referee determined that Flores did not violate DR 1-102(A)(3). The referee recommended that Flores be suspended from the practice of law for 3 years.

II. ASSIGNMENTS OF ERROR

In his timely exceptions to the referee's report and in his brief to this court, Flores asserts the referee erred in (1) finding there was " 'approximately $50,000 in available cash from and after 1990' " available to Flores from assets formerly owned solely by

Erling but to which she added Flores as a joint owner, (2) finding Flores relied upon or utilized his authority as Erling's power of attorney in assisting her to obtain medicaid assistance from the Nebraska Department of Social Services in February 1993, (3) finding Flores "knew" he had an affirmative duty to make monthly payments for Erling's benefit to Arbor Manor nursing home from a bank account titled jointly to Flores and Erling, (4) finding Flores' unexercised authority as Erling's power of attorney created an affirmative duty for Flores to ensure that Erling's nursing home bills were paid from the joint checking account, (5) finding Flores " 'appeared to recognize and accept the fact' " that Erling's pension benefits deposited in the joint account " 'rightly belonged to Arbor Manor,' " (6) finding Flores' actions regarding distribution of the funds in the joint account were " 'a matter of Flores retaking what he wrongfully felt was rightfully his,' " (7) finding Flores violated any provision of the Code of Professional Responsibility, (8) finding Flores is subject to discipline for actions which were not criminal or illegal and were not taken within the scope of an attorney-client relationship, and (9) finding Flores should be disciplined and recommending that he be suspended from the practice of law for a period of 3 years.

III. STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000); *State ex rel. NSBA v. Miller*, 258 Neb. 181, 602 N.W.2d 486 (1999). Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. NSBA v. Mefferd, supra.*

IV. ANALYSIS

For analytical purposes, we have summarized Flores' nine assignments of error into three: (1) the referee erred in finding

the factual allegations were proved by clear and convincing evidence, (2) the referee erred in concluding Flores is subject to discipline for actions which were neither criminal nor illegal and were not within the scope of an attorney-client relationship, and (3) the referee erred in recommending a 3-year suspension from the practice of law. We address each of these assigned errors in turn, recognizing that our review is de novo on the record. See, *State ex rel. NSBA v. Mefferd, supra*; *State ex rel. NSBA v. Miller, supra.*

1. Clear and Convincing Evidence to Support Factual Findings

(a) Finding That There Was $50,000 in Assets Available to Flores From and After 1990

The referee found that there was $50,000 in Erling's assets available to Flores from and after 1990. Flores argues that the evidence of Erling's assets was "limited and controverted," brief for appellant at 17, and that thus this finding was not based upon clear and convincing evidence. Flores testified that Erling showed him four certificates of deposit in early 1990, which he assumed to be in "fairly even denominations" of $10,000 each. He also testified that Erling owned a car in 1990, which was subsequently sold for $10,000. In contrast, the parties stipulated that Erling owned certificates of deposit with an approximate value of $25,000. There is thus some dispute in the record regarding the total sum of Erling's assets. Upon our de novo review, we find that the record clearly and convincingly establishes that Erling's assets totaled $35,000 in 1990, consisting of $25,000 in certificates of deposit and $10,000 from the sale of her car. We note, however, that this finding is not critical to our resolution of this appeal.

(b) Finding That Flores Utilized Power of Attorney in Obtaining Medicaid Benefits on Behalf of Erling

The referee specifically found that Flores relied upon the power of attorney, at least in part, in seeking medicaid benefits on behalf of Erling. Flores asserts the evidence in the record does not support this finding. The application for medicaid benefits submitted on behalf of Erling is signed "E. Edith Erling by

Jeff Flores" and dated "02/16/93." In response to specific questions included in the application, Flores is identified as an individual acting under the power of attorney for Erling. The "For Office Use Only" portion of the application notes that "Identity" was established by "Insurance card" and "POA [power of attorney] papers." Moreover, on direct examination during the hearing before the referee, Flores admitted that he filled out the application form and further testified as follows:

> Q. And in making this application, you knew that you were doing this based on the power of attorney in which Ms. Erling had named you as her attorney-in-fact?
>
> A. Correct.
>
> Q. And you were also filling this out because she was a friend of yours, you were trying to help her out?
>
> A. Yes.

We conclude that there is clear and convincing evidence that Flores relied upon the power of attorney, at least in part, in seeking the medicaid benefits to be used for Erling's care at Arbor Manor and that thus the referee's finding is supported by the record.

(c) Finding That Flores "Knew" He Had Duty to Make Payments to Arbor Manor From Joint Checking Account

The referee found that Flores clearly knew he had a duty to pay the pension benefits to Arbor Manor. Flores argues that the notice of medicaid award, exhibit 51, directed only that $1,429.28 from sources other than medicaid be paid to the nursing home for Erling's care. The notice did not dictate the source or sources from which this amount must be paid. He thus contends that the record does not establish that he "knew" the pension benefits were to be paid to the nursing home.

Schneider testified that Flores acknowledged his understanding that the pension benefits were to be paid to the nursing home. According to Schneider's testimony, there was no doubt about Flores' understanding of this matter. Although Flores testified that he did not think the pension benefits were specifically "ear-tagged" for the nursing home, it is undisputed that he indeed paid those funds to Arbor Manor for approximately 3

years. In addition, Flores testified that he understood both Erling's Social Security and pension benefits were to be applied to her account at Arbor Manor. We conclude that there is clear and convincing evidence that Flores knew that Erling's pension benefits were to be paid to Arbor Manor for Erling's care.

(d) Finding That Flores' Unexercised Authority as Power of Attorney Created Duty to Pay Nursing Home Bills From Joint Checking Account

[3] This assignment of error is not argued in Flores' brief to this court. Errors that are assigned but not argued will not be addressed by an appellate court. *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000). Moreover, as noted above, Flores acknowledged in his own testimony that he did in fact exercise his authority as Erling's power of attorney in applying for the medicaid benefits, and thus this assignment of error is without merit.

(e) Finding Pension Benefits "Rightly Belonged" to Arbor Manor

Flores challenges the referee's "legal conclusion" that the pension benefits "rightly belonged" to Arbor Manor. He argues that while Arbor Manor was an unsecured creditor of Erling, he too was merely an unsecured creditor by virtue of the funds he advanced to help pay her health care bills. This argument ignores Flores' fiduciary relationship with Erling arising from his use of the power of attorney to obtain medicaid benefits for her care at Arbor Manor. Flores acted as Erling's agent in paying the monthly proceeds from her pension to Arbor Manor under the terms of the medicaid benefit award, for which he had applied on her behalf. As her agent, he was prohibited from profiting from the transaction or from having a personal stake in the transaction that was in conflict with Erling's interest. See *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989). Flores knew that Erling's medicaid benefits were conditioned upon $1,429.28 being paid to Arbor Manor each month, an amount representing the approximate total of her Social Security and monthly pension benefits. Flores paid the sums due to Arbor Manor for a period of 3 years and at all times knew the payments were to be made to Arbor Manor. Thus, there is clear

and convincing evidence that at least $1,429.28 of the Social Security and pension benefits received by Erling each month "rightfully belonged" to Arbor Manor.

(f) Finding That Flores' Actions Were "Matter of Flores Retaking What He Wrongfully Felt Was Rightfully His"

With respect to this assignment of error, Flores argues that he committed no ethical impropriety in applying the pension funds to the repayment of Erling's debt to him due to his voluntary payment of certain of her medical bills. He also argues that the record does not establish that he utilized the power of attorney in applying for Erling's medicaid benefits. Because we have considered and determined that the record does establish that he did utilize the power of attorney in applying for the medicaid benefits, we need not readdress this issue. The issue of the ethical propriety of his conduct will be addressed below.

(g) Conclusion

We conclude, based upon our de novo review of the record, that the evidence clearly and convincingly establishes that Flores relied upon the power of attorney at least in part in applying for Erling's medicaid benefits. We further conclude that Flores knew the $502.28 monthly pension benefits were to be paid to Arbor Manor and that he failed to do so during the 11-month time period at issue.

2. Is This Conduct Subject to Discipline?

Flores argues that even if his conduct was based in part upon the exercise of the power of attorney, such conduct cannot subject him to discipline under the code because the conduct did not occur within the scope of an attorney-client relationship and was neither criminal nor illegal in nature. The referee specifically found that the conduct at issue did not occur during the course of an attorney-client relationship. The referee did determine, however, that the conduct related, at least in part, to Flores' role as Erling's attorney in fact based upon the power of attorney. The issue presented is whether Flores' actions in these circumstances subject him to discipline.

[4-6] A power of attorney authorizes another to act as one's agent. *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998).

Generally, an agent is required to act solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. *Id.* An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal. *Id.* An agent is prohibited from profiting from the agency relationship to the detriment of the principal. *Id.*

In the instant case, Flores has established that he paid certain of Erling's medical bills from his own funds and intended to be reimbursed for his expenditures. He contends that he therefore was entitled to repay himself by utilizing the monthly pension benefits, which were paid into an account on which he was a joint owner. However, Flores' status as an unsecured creditor cannot and does not diminish his role as Erling's agent pursuant to the power of attorney. Once he utilized the power of attorney in seeking medicaid benefits for Erling, he was acting as her fiduciary with regard to those benefits and the conditions upon which they were awarded. Flores' decision to apply Erling's pension benefits to her "debt" to him rather than to her account at Arbor Manor enabled him to benefit from the agency relationship, in direct violation of his fiduciary duty. See *Cheloha v. Cheloha, supra.* In addition, his decision to discontinue paying the pension moneys to Arbor Manor, with full knowledge that the medicaid award was premised upon the payment of those sums to Arbor Manor for Erling's care, was an act that subjected Erling to potential harm, either in the form of eviction from the nursing home or discontinuation of medicaid benefits. The record therefore establishes that Flores' conduct violated his fiduciary duty to Erling.

Our prior case law has not limited conduct subject to discipline to that which occurs within the scope of an attorney-client relationship. See, *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987); *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981). See, also, Neb. Ct. R. of Discipline 3(B) (rev. 1996), stating that acts or omissions which violate the Code of Professional Responsibility "shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise." While Flores was not convicted of a crime and there is

no showing that his conduct was illegal, we find that his violation of a fiduciary duty nevertheless subjects him to discipline under the code.

The evidence reflects that between 1993 and 1996, the sum of the deposits Flores made into the joint account and the bills he paid for Erling from his own funds exceeded his withdrawals from the account by $3,696.40. Thus, this is not a case of theft or misappropriation of client funds, and we conclude that there is no clear and convincing evidence that Flores engaged in conduct involving moral turpitude, dishonesty, fraud, deceit, or misrepresentation. We therefore find no violation of DR 1-102(A)(3) or (4).

[7] However, we conclude that Flores' breach of his fiduciary duties as attorney in fact for Erling, as discussed above, constituted conduct that adversely reflected on his fitness to practice law and therefore violated DR 1-102(A)(6), which also constitutes a violation of DR 1-102(A)(1). The relationship between an attorney and client is one of the highest trust and confidence such as to require the attorney to observe the utmost good faith and not to allow the attorney's private interests to conflict with those of the client. *Bauermeister v. McReynolds*, 254 Neb. 118, 575 N.W.2d 354 (1998). Canon 5 of the Code of Professional Responsibility adopted by this court requires a lawyer to exercise independent professional judgment on behalf of a client. EC 5-1 states:

> The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of the lawyer's client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to his or her client.

EC 5-3 provides in part:

> The self-interest of a lawyer resulting from the lawyer's ownership of property in which his or her client also has an interest or which may affect property of the client may interfere with the exercise of free judgment on behalf of the client. If such interference would occur with respect to a prospective client, a lawyer should decline employment

> proffered by him or her. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer's professional judgment in the representation of his or her client. Even if the property interests of a lawyer do not presently interfere with the exercise of the lawyer's independent judgment, but the likelihood of interference can reasonably be foreseen by him or her, a lawyer should explain the situation to his or her client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure.

As noted, Flores' decision to use Erling's pension benefits to reimburse himself instead of making her required payments to Arbor Manor subjected Erling to potential if not actual harm. Although this conduct did not occur in the context of an attorney-client relationship, it nevertheless reflects adversely upon Flores' fitness to practice law because it calls into question his ability to subordinate his personal interests in order to exercise independent judgment on behalf of a client. Accordingly, there is a violation of DR 1-102(A)(6) which warrants discipline.

3. Discipline to Be Imposed

[8-11] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000); *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000). For the purpose of determining the proper discipline, we consider the respondent's acts both underlying the events of the case and throughout the disciplinary proceeding. *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000). The determination of an appropriate penalty to be imposed on an attorney also requires consideration of any mitigating factors. *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000). Each attorney discipline case must be evaluated individ-

ually in light of its particular facts and circumstances. *State ex rel. NSBA v. Jensen, supra.* In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *State ex rel. NSBA v. Rothery, supra*; *State ex rel. NSBA v. Howze, supra.*

The record supports the referee's finding that the relationship between Erling and Flores was genuinely based upon mutual friendship of substantial duration. This relationship should be considered in determining Flores' discipline. See *State ex rel. NSBA v. Gilroy*, 240 Neb. 578, 483 N.W.2d 135 (1992). In addition, we consider the facts that Flores' conduct was not unlawful and did not subject Erling to actual loss or harm. Further, the record reflects that Flores was generally cooperative and forthcoming in his dealings with the Counsel for Discipline in these proceedings, and he has had no prior disciplinary violations.

In several cases involving a lawyer's conduct occurring outside the attorney-client relationship which did not constitute a misappropriation of funds, we have imposed a 6-month license suspension. See, *State ex rel. NSBA v. Schleich*, 254 Neb. 872, 580 N.W.2d 108 (1998) (respondent installed listening device on wife's telephone, unrelated to attorney-client relationship); *State ex rel. NSBA v. Caskey*, 251 Neb. 882, 560 N.W.2d 414 (1997) (respondent knowingly failed to pay corporate payroll taxes over period of months, unrelated to attorney-client relationship); *State ex rel. Nebraska State Bar Assn. v. Butterfield*, 169 Neb. 119, 98 N.W.2d 714 (1959) (respondent, acting as notary public, falsely certified that his cousin personally acknowledged execution of deed). We conclude that a 6-month suspension is the appropriate disciplinary sanction in the present case.

We note that Flores' license to practice law is currently under nondisciplinary suspension for nonpayment of annual dues and assessments. Under article III, paragraph 5, of the Rules Creating, Controlling, and Regulating Nebraska State Bar Association adopted by this court, "[w]henever a member suspended for nonpayment of dues and/or assessments shall make payment of all arrears, and shall satisfy the Supreme Court of his or her qualification to then return to the active practice of law, such member shall be entitled to reinstatement upon request." In order that it have meaning, the 6-month disciplinary

suspension which we impose herein will be added to Flores' current nondisciplinary suspension. Flores will therefore not be eligible for reinstatement until 6 months after he has paid all delinquent dues and assessments, submitted proof of compliance with Neb. Ct. R. of Discipline 16 (rev. 2001), and paid the costs of this proceeding which are hereby taxed to him.

V. CONCLUSION

For the reasons stated, we find in our de novo review that Flores should be suspended from the practice of law for a period of 6 months immediately following the date when he becomes otherwise eligible for reinstatement from his current nondisciplinary suspension for nonpayment of dues and assessments.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT E. WRIGHT, APPELLANT.

622 N.W.2d 676

Filed February 23, 2001. No. S-98-1213.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
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. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
4. **Homicide: Motor Vehicles: Lesser-Included Offenses.** Motor vehicle homicide is not a lesser-included offense of manslaughter under current statutes.
5. **Homicide: Motor Vehicles: Lesser-Included Offenses: Case Disapproved.** To the extent *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), and *State v. Kelley*, 211 Neb. 770, 320 N.W.2d 455 (1982), hold that motor vehicle homicide is a lesser-included offense of manslaughter, they are disapproved.
6. **Criminal Law: Prosecuting Attorneys.** In a situation wherein a set of facts is sufficient to constitute the violation of one of several crimes, the prosecutor is free to

> choose under which crime he or she will seek a conviction, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Johnson County: ROBERT T. FINN, Judge. Judgment of Court of Appeals affirmed.

Louie M. Ligouri, of Ligouri Law Office, and George B. Achola, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Robert E. Wright appealed his conviction for manslaughter to the Nebraska Court of Appeals. On appeal to the Court of Appeals, Wright made various assignments of error, including an assertion that the district court for Johnson County erred in failing to instruct the jury on motor vehicle homicide as a lesser-included offense of manslaughter. The Court of Appeals rejected Wright's assignments of error, including the claimed error with respect to the purported lesser-included offense, and affirmed his conviction. See *State v. Wright*, No. A-98-1213, 2000 WL 1207155 (Neb. App. Aug. 22, 2000) (not designated for permanent publication).

Wright petitioned this court for further review of the decision of the Court of Appeals. Although Wright assigned various errors, we granted Wright's petition limited to the issue of whether motor vehicle homicide is a lesser-included offense of manslaughter and, if so, whether the evidence in this case justified giving the lesser-included instruction. Because we conclude that motor vehicle homicide is not a lesser-included offense of manslaughter, we affirm the decision of the Court of Appeals.

STATEMENT OF FACTS

On the evening of August 4, 1997, Jill Louise Eisenhauer was southbound on a bicycle on state Highway 50 near Tecumseh, Nebraska. At about 8:47 p.m., she was struck and killed by a southbound pickup truck occupied by Wright and his employee Lisa Stark.

On September 17, 1997, an information was filed in the district court for Johnson County charging Wright with the crime of motor vehicle homicide, pursuant to Neb. Rev. Stat. § 28-306 (Reissue 1995). The information alleged that Wright had been operating his vehicle while intoxicated, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1998). The information further alleged that Wright had previously been convicted of violating § 60-6,196, which would make the motor vehicle homicide charge a Class III felony. See § 28-306(3)(b).

On or about January 28, 1998, the information was amended to a charge of manslaughter pursuant to Neb. Rev. Stat. § 28-305 (Reissue 1995). The amended information alleged that Wright had unintentionally killed Eisenhauer while committing one or more of the following acts: (1) driving at an unreasonable speed, in violation of Neb. Rev. Stat. § 60-6,185 (Reissue 1998); (2) operating his vehicle carelessly, in violation of Neb. Rev. Stat. § 60-6,212 (Reissue 1998); (3) operating his vehicle recklessly, in violation of Neb. Rev. Stat. § 60-6,213 (Reissue 1998); (4) operating his vehicle while under the influence of alcohol, in violation of § 60-6,196; (5) driving his vehicle on the shoulder of the highway, in violation of Neb. Rev. Stat. § 60-6,142 (Reissue 1998); (6) committing third degree assault, in violation of Neb. Rev. Stat. § 28-310 (Reissue 1995); and (7) committing second degree assault, in violation of Neb. Rev. Stat. § 28-309 (Reissue 1995). Manslaughter is a Class III felony under § 28-305(2).

Wright was tried before a jury beginning on October 13, 1998. The evidence adduced at trial showed that Wright operated a business that involved cleaning exhaust hoods in restaurant kitchens. From approximately 1:30 until 3:30 p.m. on August 4, 1997, Wright and his employee Stark had cleaned the exhaust hood at T-Bird's, a restaurant and grill in Cook, Nebraska. When they finished, they each had two beers at T-

Bird's and left around 5 p.m. At around 5:30 p.m., they arrived at B & J's Family Restaurant in Syracuse, Nebraska, where each drank three or four additional beers. Jeffrey Holland, an off-duty Syracuse police officer, testified that he observed Wright at the restaurant in Syracuse and that Wright spoke in a slurred manner, discontinued speaking in the middle of sentences, and mumbled to himself while Stark was absent from their table. Wright and Stark left Syracuse at around 8 p.m.

Andrew Bossung testified at trial that he observed the truck being driven by Wright southbound on Highway 50, about 3 miles north of Tecumseh, at approximately 8:35 p.m. Bossung testified that he followed the truck for about 2½ miles, during which time it appeared to be traveling at about 60 miles per hour. According to Bossung, the truck swerved onto the shoulder of the highway three times, the last time striking Eisenhauer. The truck then veered across the centerline of the highway and returned to the right shoulder, where it overturned. Another witness, Neal Gary Tate, testified that he was northbound on Highway 50 and that as the truck approached him, it twice went onto the shoulder before leaving the road and turning over.

Wright was removed from the truck by emergency personnel and taken by ambulance to a hospital in Tecumseh. One of the emergency personnel, Mary Schropfer, testified that she smelled alcohol on Wright and that he told her he had consumed five beers. At the hospital, Wright was treated by Dr. Keith Shuey, who testified that Wright "was somewhat belligerent and . . . smelled of alcohol" and that Wright said he was the driver of the truck.

At trial, Wright requested that the jury be instructed on motor vehicle homicide as a lesser-included offense of manslaughter. Wright's requested lesser-included offense instruction was denied by the court. The jury was instructed as follows:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of manslaughter are:
>
> (1) that the defendant . . . without malice, caused the death of Jill Louise Eisenhauer;
>
> (2) that the defendant did so unintentionally while he was in the commission of an unlawful act or acts;

(3) that said unlawful act or acts consisted of one or more of the following: driving too fast for conditions; or careless driving; or reckless driving; or driving under the influence of alcoholic liquor; or driving on highway shoulders; or assault in the third degree; or assault in the second degree;

(4) that he did so on or about August 4, 1997, in Johnson County, Nebraska.

If you find that the State has proved beyond a reasonable doubt all elements of manslaughter, it is your duty to find the defendant "Guilty". If however, you find the State has failed to prove any one of the elements beyond a reasonable doubt, then it is your duty to find the defendant "Not Guilty".

On October 20, 1998, the jury returned a verdict finding Wright guilty of manslaughter. On November 18, Wright was sentenced to not less than nor more than 20 years' imprisonment.

Wright appealed his conviction to the Court of Appeals, assigning various errors, including the district court's refusal of the lesser-included offense jury instruction on motor vehicle homicide. The Court of Appeals rejected all of Wright's assignments of error and affirmed his conviction for manslaughter. We granted Wright's petition to review whether the Court of Appeals erred in affirming his conviction and specifically limited our review to the issue of whether or not motor vehicle homicide is a lesser-included offense of manslaughter and, if so, whether the facts of this case justified giving the lesser-included instruction.

ASSIGNMENT OF ERROR

Wright asserts that the Court of Appeals erred by affirming the district court's denial of the requested lesser-included offense jury instruction for motor vehicle homicide.

STANDARDS OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000). 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. *Id.*

ANALYSIS

Proper Analysis of Lesser-Included Claims.

The current elements approach used in Nebraska to determine the appropriateness of a lesser-included offense instruction was set forth in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). The elements approach adopted in *Williams* replaced the prior cognate-evidence approach. The history of the two approaches was outlined in *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997). In *Al-Zubaidy*, we noted that in *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997), we had recently declined an invitation to abandon an elements approach and return to the cognate-evidence approach. Therefore, in the current case, we apply the *Williams* elements test to determine whether motor vehicle homicide is a lesser-included offense of manslaughter.

[3] The elements test was set forth in *Williams* as follows:

> [A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

243 Neb. at 965, 503 N.W.2d at 566. Although stated simply in the conjunctive in *Williams*, in *Al-Zubaidy*, we characterized the *Williams* test as a two-part test in which the preferred analysis was to pose the two inquiries set forth in *Williams* in a sequential manner. In the first step, a court is to analyze the elements of both crimes at issue to determine whether the lesser offense is a lesser-included offense of the greater offense. If the lesser offense is found to be a lesser-included offense, a court thereafter goes on to the second part of the *Williams* test to determine whether an instruction on the lesser-included offense is justified based on the evidence at trial. *State v. Al-Zubaidy, supra.*

In *Al-Zubaidy*, we quoted a portion of the U.S. Supreme Court's opinion in *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989), in which the Court stated that the elements test was the preferable analysis in that it was

" 'far more certain and predictable in its application' " because it " 'involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial.' " 253 Neb. at 362, 570 N.W.2d at 716. The Court further stated that the elements approach " 'promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference.' " *Id.*, quoting *Schmuck v. United States, supra.*

In *State v. Becerra*, 253 Neb. 653, 664, 573 N.W.2d 397, 405 (1998), we stated that "[i]n determining whether an offense is a lesser-included one, a court looks initially not to the evidence in a particular case, but, rather, to the elements of the criminal offense." In order to enjoy the advantages of the elements approach noted by the U.S. Supreme Court in *Schmuck*, it is important that a court first determine under the first part of the *Williams* test whether or not a lesser offense is a lesser-included offense before going on to the second part of the test and examining the evidence in a particular case to determine whether a lesser-included offense instruction is justified by such evidence.

In its disposition of the instant case, although the Court of Appeals properly cited the elements test as controlling whether or not the district court erred in refusing to instruct the jury on motor vehicle homicide as a lesser-included offense, it failed to follow the sequential approach urged in *State v. Becerra, supra*, and *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997). In its opinion, the Court of Appeals referred to *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), for the proposition that motor vehicle homicide had previously been held to be a lesser-included offense of manslaughter, but noted that it was arguable that the holding in *Roth* was no longer a sound statement of Nebraska law. In this regard, we note that *Roth* was decided during a period of applicability of the elements test but relied on *State v. Kelley*, 211 Neb. 770, 320 N.W.2d 455 (1982), the latter of which held, prior to adoption of the elements test, that motor vehicle homicide was a lesser-included offense of manslaughter. The Court of Appeals determined that it was not necessary to its disposition of the instant case to determine whether or not motor

vehicle homicide was a lesser-included offense of manslaughter under the elements test because it determined that under the second part of the *Williams* test, the evidence in the instant case did not produce a rational basis for acquitting Wright of the manslaughter charge and convicting him of motor vehicle homicide. Because we conclude as set forth below that motor vehicle homicide is not a lesser-included offense of manslaughter and that the district court correctly rejected Wright's requested lesser-included instruction, we conclude that although the Court of Appeals did not follow the approach set forth under *Becerra* and *Al-Zubaidy*, it reached the correct result in affirming the district court's decision, and we affirm the Court of Appeals' decision on this basis. See, *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000); *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999) (upon further review from judgment of Court of Appeals, this court will not reverse judgment which we deem to be correct merely because we may disagree with reasoning employed by Court of Appeals).

Motor Vehicle Homicide Is Not Lesser-Included Offense of Manslaughter Under Current Statutes.

Wright claims that motor vehicle homicide is a lesser-included offense of manslaughter. Applying the first part of the *Williams* test, we reject the claim as a matter of law. See *State v. Mitchell*, 244 Neb. 574, 508 N.W.2d 552 (1993). See, also, *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997).

[4] Manslaughter is a Class III felony under § 28-305(2), and motor vehicle homicide, depending on the specific law violated, may be either a Class I misdemeanor under § 28-306(2), a Class IIIA felony under § 28-306(3)(a) or (b), or a Class III felony under § 28-306(3)(c), and, therefore, motor vehicle homicide would generally be considered the "lesser offense" and manslaughter the "greater offense." Under the relevant statutes, "[a] person commits manslaughter if he . . . causes the death of another unintentionally while in the commission of an unlawful act," § 28-305(1), whereas a person commits motor vehicle homicide if he or she "causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any

city or village ordinance," § 28-306(1). Because the unlawful act committed in manslaughter connected to the unintentional death of another may be an unlawful act which does not involve the unlawful operation of a motor vehicle, one can commit manslaughter without invariably or simultaneously committing motor vehicle homicide, and therefore, motor vehicle homicide is not a lesser-included offense of manslaughter under the current statutes.

In the instant case, the first part of the *Williams* test requires us to analyze whether one cannot commit manslaughter without simultaneously committing motor vehicle homicide. That is, the issue is whether the elements of the lesser offense of motor vehicle homicide for which an instruction is requested are such that one cannot commit the greater offense of manslaughter without simultaneously committing the lesser offense of motor vehicle homicide.

Although both crimes require that a person cause the death of another unintentionally while committing an unlawful act, motor vehicle homicide requires that the person cause such death while engaged in the unlawful operation of a motor vehicle, whereas a death deemed to be manslaughter is caused while in the commission of an unspecified "unlawful act." Under the first part of the *Williams* test, the elements of motor vehicle homicide and of manslaughter are such that one can commit the greater offense of manslaughter without simultaneously committing the lesser offense of motor vehicle homicide because one who causes the death of another unintentionally while in the commission of "an unlawful act," § 28-305(1), that does not involve the operation of a motor vehicle can commit manslaughter without simultaneously committing motor vehicle homicide. See, e.g., *State v. Capek*, 234 Neb. 214, 450 N.W.2d 212 (1990) (death deemed manslaughter caused while knowingly, intentionally, or negligently causing minor child to be placed in situation that endangered her life or to be cruelly punished); *State v. Kistenmacher*, 231 Neb. 318, 436 N.W.2d 168 (1989) (death deemed manslaughter caused while in commission of third degree assault); *State v. White*, 217 Neb. 783, 351 N.W.2d 83 (1984) (death deemed manslaughter caused while in commission of child abuse). Motor vehicle homicide, therefore, is not a

lesser-included offense of manslaughter under the first part of the *Williams* test.

We recognize, as did the Court of Appeals, that motor vehicle homicide has previously been held to be a lesser-included offense of manslaughter. See, *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986); *State v. Kelley*, 211 Neb. 770, 320 N.W.2d 455 (1982). These cases were decided during a time when this court's approach to determining the appropriateness of a lesser-included offense instruction was in a state of flux, see *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997), and the holdings in *Roth* and *Kelley* that motor vehicle homicide is a lesser-included offense of manslaughter are hereby disapproved.

Kelley was decided approximately 2 months before an elements approach was adopted in *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982). In *Kelley*, the court held that motor vehicle homicide was a lesser-included offense of manslaughter. The test stated in *Kelley* was that

> "[a] lesser-included offense is one, the elements of which include some, but not all, of the elements of the greater offense, i.e., the lesser is fully embraced in the greater." . . . Stated another way, a lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.

(Citation omitted.) 211 Neb. at 774-75, 320 N.W.2d at 458. The court concluded in *Kelley* that because "both crimes require that the person charged cause the death of another unintentionally while in violation of the law, motor vehicle homicide is a lesser-included offense of manslaughter." 211 Neb. at 775, 320 N.W.2d at 458. The court further stated that "[m]anslaughter can be committed when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law." *Id.*

[5] In *Roth*, the court cited *Kelley* for the proposition that motor vehicle homicide was a lesser-included offense of manslaughter where death was caused by the use of a motor vehicle. The court in *Roth*, however, did not refer to the elements approach which had been adopted after *Kelley* and 4 years earlier in *Lovelace*, but merely referred to the above-quoted language from *Kelley*. We believe our conclusion that motor vehicle homicide is not a lesser-included offense of

manslaughter is compelled under the current elements test set forth in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). To the extent *Roth* and *Kelley* hold that motor vehicle homicide is a lesser-included offense of manslaughter, they are hereby disapproved.

Prosecutorial Discretion in Charging Either Manslaughter or Motor Vehicle Homicide.

Wright argues that if motor vehicle homicide is not a lesser-included offense of manslaughter, then the State should have been required to charge him with motor vehicle homicide rather than manslaughter. We reject this argument.

Wright notes that the specific acts for which he was charged meet the elements of both motor vehicle homicide and manslaughter. Wright claims that the motor vehicle homicide statute, § 28-306, is a specific statute which controls over the general manslaughter statute, § 28-305, and that the prosecutor must, therefore, be limited to charging motor vehicle homicide. Wright argues that deaths caused unintentionally while committing an unlawful act involving operation of a motor vehicle must be prosecuted under the specific statute dealing with motor vehicle homicide rather than the general manslaughter statute. This argument was rejected by the court in *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), and we conclude that this portion of *Roth* remains good law.

[6] In *Roth*, the court held that in a situation wherein a set of facts is sufficient to constitute the violation of one of several crimes, the prosecutor is free to choose under which crime he or she will seek a conviction, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Similar to the instant case, the defendant in *Roth* argued that where death is caused by a motor vehicle, the defendant must be charged with motor vehicle homicide and may not be charged with manslaughter. We rejected this argument, noting that

> [t]here is nothing in the legislative history of either § 28-305 or § 28-306 to indicate that the Legislature intended to bring about the result urged by [the defendant], nor are the statutes repugnant to each other so as to cause

> the type of conflict which requires a court to consider that a statute has been repealed by implication.

Roth, 222 Neb. at 122, 382 N.W.2d at 350-51.

Our holding that motor vehicle homicide is not a lesser-included offense of manslaughter and partial disapproval of *Roth* does not affect either the analysis in *Roth* of the legislative intent behind §§ 28-305 and 28-306 or the holding in *Roth* that a prosecutor is free to choose under which crime a conviction will be sought when the facts are sufficient to constitute a violation of either crime. In this regard, we recently stated that

> [w]hile it is true that under the present statutory scheme the same conduct could result in substantially different criminal penalties depending upon whether one is charged and convicted of manslaughter or motor vehicle homicide, such potential disparity exists by virtue of the unambiguous language of the statutes which define the two offenses. It is not within the province of a court to read a meaning into a statute that is not warranted by the language, or to read anything plain, direct, and unambiguous out of a statute.

State v. Burnett, 254 Neb. 771, 776, 579 N.W.2d 513, 517 (1998). Indeed, we noted in *Roth* that "[i]t is not uncommon for an act to constitute a violation of more than one crime, some of which may be lesser-included offenses and some of which may be separate and distinct." 222 Neb. at 122, 382 N.W.2d at 351. If there is a perceived unfairness in Nebraska law which allows a prosecutor to choose whether to seek conviction under the motor vehicle homicide statute or under the manslaughter statute in any case where death is caused by unlawful operation of a motor vehicle, the remedy lies with the Legislature to amend the statutes.

CONCLUSION

We conclude that under the *Williams* elements test, motor vehicle homicide is not a lesser-included offense of manslaughter and that the district court was not required to give the lesser-included offense jury instruction requested by Wright. We therefore conclude that the Court of Appeals did not err in rejecting Wright's lesser-included offense argument and in affirming

Wright's conviction, and upon further review, we affirm the decision of the Court of Appeals in all respects.

AFFIRMED.

MARY LORENE BROOKS, NOW KNOWN AS LORI RYAN, APPELLANT, V. DENNIS EARL BROOKS, APPELLEE.

622 N.W. 2d 670

Filed February 23, 2001. No. S-99-777.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support: Rules of the Supreme Court: Presumptions.** A court may deviate from the Nebraska Child Support Guidelines where one or both parties have provided sufficient evidence to rebut the presumption that the guidelines should be applied.
3. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.
4. ___: ___. Under the Nebraska Child Support Guidelines, a deviation is permissible whenever application of the guidelines in an individual case would be unjust or inappropriate. Deviations from the guidelines also must take into account the best interests of the child.
5. **Child Support: Rules of the Supreme Court: Proof.** The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.
6. **Child Support.** Under certain circumstances, it may be appropriate for a trial court to consider subsequently born children of a party when determining child support. This determination is entrusted to the discretion of the trial court.
7. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
8. **Child Support: Rules of the Supreme Court.** It is not an abuse of discretion to refuse to consider support for subsequently born children when the proposed deviation from the Nebraska Child Support Guidelines would provide more support for the current family than for the previous one.
9. ___: ___. Paragraph C of the Nebraska Child Support Guidelines requires that all orders for child support, including modifications, must include a basic income and support calculation worksheet 1.
10. ___: ___. In the event of a deviation from the Nebraska Child Support Guidelines, the reason for the deviation shall be contained in the findings portion of the decree or

order, or worksheet 5 of the guidelines should be completed by the court and filed in the court file. The trial court is required to state the amount of support that would have been required under the guidelines absent the deviation.

11. **Child Support.** When determining a support obligation where there are children from a subsequent marriage, the support for each family should be determined after a deduction for the support to the subsequent family.

Appeal from the District Court for Harlan County: JOHN J. BATTERSHELL, Judge. Reversed and remanded.

Pamela P. Beck for appellant.

William A. Tringe, Jr., for appellee.

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

PER CURIAM.

NATURE OF CASE

This case presents questions regarding whether deviation from the Nebraska Child Support Guidelines is appropriate when there are children from a subsequent marriage and how such a deviation may be calculated. Appellant, Mary Lorene Brooks, now known as Lori Ryan (Ryan), filed a motion for modification of child support, alleging a material change in circumstances. Appellee, Dennis Earl Brooks, filed an answer generally denying the allegations. In calculating the support due, the trial court granted a deviation from the guidelines based upon Brooks' obligation to support the four children from his subsequent marriage but failed to take into account a child from Brooks' marriage to Ryan when making such calculation. Ryan appeals. We conclude that the trial court abused its discretion in failing to take into account the child from Brooks' marriage to Ryan when calculating his child support obligation.

BACKGROUND

The marriage between Ryan and Brooks was dissolved on May 19, 1988. Under the decree, custody of the parties' three minor children, Nichole Johanna, Christina Marie, and Dennis Erik, was awarded to Ryan. Brooks was ordered to pay child support of $100 per child per month, for a total of $300. In

September 1992, custody of Nichole was transferred to Brooks; however, his child support obligation remained at $300 per month for the two children in Ryan's custody. In December 1996, Brooks' child support obligation was reduced to $203 per month because Christina had been in his physical custody since December 1995.

On May 8, 1998, Ryan filed a motion for modification of child support. She alleged that Christina had been living in her home since May 1997, and she requested child support for Christina retroactive to May 8, 1998. Brooks generally denied these allegations. At the time of trial, only Dennis was still a minor.

At trial, Ryan testified that she worked either part time or full time at wages of $5.50 to $6.50 per hour. Ryan experienced some periods of unemployment due to problems with herniated disks, for which she had surgery. She had remarried and had two children from her subsequent marriage. From the 1997 and 1998 tax returns filed jointly by Ryan and her husband, it is not clear which portion of the 1998 income was earned by Ryan and which portion was earned by her husband. She did not respond when asked if $867 per month was a fair amount to use as her income in calculating child support.

Brooks had also remarried and had four minor children from his subsequent marriage. He requested the trial court to consider the support he paid for the four children from his subsequent marriage. Brooks earned $3,400 per month. A 1998 tax return filed jointly by Brooks and his current wife showed that Brooks earned $40,800 in 1998 and that his wife earned $19,981.60. Brooks provided health insurance benefits for Dennis and the children from his subsequent marriage.

The trial court modified Brooks' child support obligation to $339 per month commencing May 1, 1999. The trial court did not utilize worksheet 1 of the guidelines, but included worksheet 5 with its order. Worksheet 5 set forth $867 per month as Ryan's income, with a notation stating "Testimony," and listed Brooks' income as $2,572. The trial court deducted $1,134 from Brooks' income for support of the four children from his subsequent marriage but did not describe how it had reached this amount. Ryan's motion for new trial was overruled, and she appeals.

ASSIGNMENTS OF ERROR

Ryan claims, rephrased, that the trial court erred in calculating Brooks' child support obligation and in failing to order a modification of support retroactive to the date the motion for modification was filed.

STANDARD OF REVIEW

[1] Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000); *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000).

ANALYSIS

Ryan first contends that the trial court abused its discretion in allowing a deduction for the children of Brooks' subsequent marriage because Brooks failed to show that application of the guidelines would create a hardship or was unjust or inappropriate. Brooks contends that the evidence supported a deviation from the guidelines.

[2,3] While we require that the guidelines be utilized, the reality is that the guidelines are applied as a rebuttable presumption to both temporary and permanent support. *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992). A court may deviate from the guidelines where one or both parties have provided sufficient evidence to rebut the presumption that the guidelines should be applied. *Id.* Thus, the guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure. *Id.*

[4,5] Under the guidelines, a deviation is permissible whenever application of the guidelines in an individual case would be unjust or inappropriate. Nebraska Child Support Guidelines, paragraph C. Deviations from the guidelines also must take into account the best interests of the child. See *id.* The party requesting a deviation from the guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the

income of the other parent of the child or children of the subsequent relationship. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999).

[6,7] Under certain circumstances, it may be appropriate for a trial court to consider subsequently born children of a party when determining child support. *Id.* This determination is entrusted to the discretion of the trial court. See, *Sears v. Larson, supra*; *Gammel v. Gammel, supra.* An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[8] In *Czaplewski*, we held that the trial court did not abuse its discretion by considering support for children of a subsequent marriage. In *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994), we reached the opposite conclusion and held that it was an abuse of discretion to fail to consider a parent's obligation to subsequent children when calculating support. In *Lodden v. Lodden*, 243 Neb. 14, 497 N.W.2d 59 (1993), we held that it was not an abuse of discretion to refuse to consider support for subsequently born children when the proposed deviation from the guidelines would provide more support for the current family than for the previous one. In *Lodden*, the trial court apparently determined that the application of the guidelines would not be unjust or inappropriate.

[9,10] Paragraph C of the guidelines requires that all orders for child support, including modifications, must include a basic income and support calculation worksheet 1. In the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order, or worksheet 5 should be completed by the court and filed in the court file. Nebraska Child Support Guidelines, paragraph C. The trial court is required to state the amount of support that would have been required under the guidelines absent the deviation. See *id.* Although either stating the reason for the deviation in the decree or order or completing worksheet 5 is sufficient, we encourage trial courts to do both.

This case is complicated by the fact that the trial court allowed a deviation from the guidelines, but did not make any specific findings in support of the deviation. Because the trial court completed worksheet 5, however, it is apparent that the court determined that a deviation from the guidelines was warranted.

The record also creates difficulties in our determination of whether the trial court abused its discretion by deviating from the guidelines. Nevertheless, Brooks and Ryan did submit evidence of their respective incomes, the incomes of their spouses, and the number of minor children living with them from both the marriage of the parties and their subsequent marriages. We therefore conclude from the facts presented that the decision of the trial court to deviate from the guidelines based on Brooks' support obligation to the four children from his subsequent marriage was not an abuse of discretion.

Citing to *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), Ryan next contends that the trial court erred in calculating the amount of support because the court failed to consider Brooks' obligation to his previous family when calculating such support.

[11] In *Prochaska*, the Nebraska Court of Appeals held that when determining a support obligation where there are children from a subsequent marriage, the support for each family should be determined after a deduction for the support to the subsequent family. In *Prochaska*, the trial court deviated from the guidelines based on the obligation of the parent's paying support to a subsequent child. In calculating the deviation, the trial court used the guidelines to determine the support obligation for the subsequent child and then deducted this amount from the parent's income before calculating support for the children from the previous marriage. The Court of Appeals reasoned that by calculating the deduction in this manner, the trial court provided a benefit to the parent's current family at the expense of the other family. It then recalculated support using what it termed "interdependent arithmetic." *Id.* at 308, 573 N.W.2d at 781. Under this calculation, the parent's obligation to his or her subsequent child is considered when determining support for the previous children. The Court of Appeals also considered the parent's obliga-

tion to his previous children when determining the obligation to the subsequent child. The Court of Appeals did not provide additional details on how the calculations were performed, but it is clear that the court used a formula under which one family did not benefit at the expense of the other.

In *Krause v. Krause*, 9 Neb. App. 774, 619 N.W.2d 611 (2000), the Court of Appeals addressed the confusion resulting from *Prochaska* as to how such support should be calculated. In *Krause*, Chief Judge Irwin stated in concurrence:

> Since *Prochaska*, we have seen a variety of valid methods of computing child support interdependently. So long as the principles of *Prochaska* are satisfied, no one specific method or formula is mandated. In *Prochaska*, we noted that child support should be computed interdependently so that a benefit is not conferred on one family at the expense of another. It is within the discretion of the trial court to determine how that is done.

9 Neb. App. at 781, 619 N.W.2d at 617. In a separate concurrence, Judge Sievers added:

> [T]he appropriate language and rule is that the problems presented in such cases require an "interdependent consideration" by the trial court of the parent's obligations to the children of his or her now dissolved marriage and the children resulting from a subsequent marriage so that both families are treated as fairly as possible. The more information the trial courts provide as to how they make such interdependent considerations, the better the parties will understand the matter, and the more effective will be our review of how the two competing obligations were handled by the trial court.

Id. at 781-82, 619 N.W.2d at 617.

We conclude that there is no precise mathematical formula applicable to situations where a court deviates from the guidelines when children from subsequent relationships are involved. Subsequent familial relationships vary widely from case to case. When a deviation from the guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships. In considering the obligation to those subsequent children, the trial court should take into

consideration the income of the other parent of these children as well as any other equitable considerations.

We hold that the specific formula for making such calculations is left to the discretion of the trial court, as long as the basic principle that both families are treated as fairly as possible is adhered to. We again emphasize that the trial court shall include the appropriate worksheets with its order and provide in its order the amount of support that would have been required under the guidelines absent a deviation. We further emphasize the importance of providing the methods used when calculating a deviation by showing this either on the worksheets or in the order.

Here, the trial court failed to include worksheet 1 with its order. Thus, we are unable to ascertain the manner in which the trial court arrived at the income of the parties. Although the trial court wrote on worksheet 5 that Ryan's income figure was based on "testimony," we do not find this figure testified to in the record. The trial court also listed the figure of $2,572 per month for Brooks' income, but we do not find this figure in the record. Without worksheet 1, we do not know how it was ascertained. We again note that trial courts are required under the guidelines to provide worksheet 1 as part of their orders. See, *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999); Nebraska Child Support Guidelines, paragraph C.

Further, the record does not show that the trial court calculated the deviation in a manner that properly considered Brooks' support obligation to both families. The order did not set forth the amount of support that would have been required under the guidelines absent a deviation. Without worksheet 1 and additional information, we are unable to determine whether the trial court considered Brooks' obligation to Dennis when it calculated a deviation based on the support of Brooks' other children. The inference is that it did not do so.

CONCLUSION

By deviating from the guidelines without considering Brooks' obligation to both families, the trial court abused its discretion when making its calculations. Accordingly, we reverse the judgment of the trial court and remand the cause for a calculation of child support consistent with this opinion. Because

we reverse, and remand, we do not address Ryan's second assignment of error.

REVERSED AND REMANDED.

IN RE ESTATE OF IDA PEARL SUTHERLIN, DECEASED. NANCY E. PELSTER, APPELLEE, V. CARL SUTHERLIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA PEARL SUTHERLIN, DECEASED, APPELLANT.

622 N.W.2d 657

Filed February 23, 2001. No. S-99-1204.

1. **Statutes: Appeal and Error.** The interpretation of a statute presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
3. **Decedents' Estates: Executors and Administrators.** Under Neb. Rev. Stat. § 30-2412(c) (Reissue 1995), when two or more persons share a priority for appointment as personal representative, they must either renounce that right or concur in the nomination of one to act on their behalf, or apply for the appointment.
4. **Decedents' Estates: Executors and Administrators: Notice.** Neb. Rev. Stat. § 30-2423 (Reissue 1995) requires a moving party to give notice as described by Neb. Rev. Stat. § 30-2220 (Cum. Supp. 2000) of his or her intention to informally seek an appointment to any person having a prior or equal right to appointment not waived in writing and filed with the court.
5. **Decedents' Estates: Executors and Administrators.** Under Neb. Rev. Stat. § 30-2421 (Reissue 1995), an applicant with a shared priority to appointment can obtain priority entitling him or her to appointment only through the consent of those with equal priority.
6. ___: ___. Under Neb. Rev. Stat. § 30-2412(e) (Reissue 1995), appointment of one who does not have priority may be made only in formal proceedings except that appointment of one having priority resulting from renunciation or nomination may be made in informal proceedings.
7. ___: ___. Neb. Rev. Stat. § 30-2438 (Reissue 1995) provides a direct, formal procedure for removing a personal representative whose appointment was not made in compliance with the priorities stated in Neb. Rev. Stat. § 30-2412 (Reissue 1995), regardless of whether that appointment was made formally or informally.
8. **Dececents' Estates: Notice: Time.** When notice is required in an estate proceeding, Neb. Rev. Stat. § 30-2220 (Cum. Supp. 2000) requires the petitioner to give notice of the time and place of the hearing to any interested person at least 14 days in advance

by mail when the addresses of the parties are known and to file proof of that notice with the court.

9. **Decedents' Estates: Executors and Administrators.** It is implicit in the requirements of Neb. Rev. Stat. § 30-2438 (Reissue 1995) that the petitioner will nominate a personal representative.
10. ___: ___. In a hearing pursuant to Neb. Rev. Stat. § 30-2438 (Reissue 1995), a judge should determine who has priority under Neb. Rev. Stat. § 30-2412 (Reissue 1995) and make a proper appointment.
11. **Summary Judgment: Decedents' Estates: Executors and Administrators.** Summary judgment is an incorrect procedure for making a priority determination that removes or replaces a personal representative when the hearing does not comply with the procedural requirements of a formal proceeding under Neb. Rev. Stat. § 30-2438 (Reissue 1995).

Appeal from the County Court for Garfield County: GARY G. WASHBURN, Judge. Reversed and remanded for further proceedings.

Gregory G. Jensen, of Jensen Law Office, for appellant.

Robert D. Stowell, of Stowell, Kruml & Geweke, P.C., for appellee.

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

CONNOLLY, J.

The county court granted summary judgment to remove Carl Sutherlin (Sutherlin) as the personal representative of the estate of Ida Pearl Sutherlin (Ida). The county court held that Sutherlin failed to comply with Neb. Rev. Stat. § 30-2412(c) (Reissue 1995). That statute requires that an applicant for personal representative with priority equal to that of other heirs must obtain the consent of those other heirs to the nomination unless they have renounced their right to appointment in writing and filed with the court. Sutherlin did not obtain the consent or renunciation of the other heirs. He now appeals. Because we determine that Neb. Rev. Stat. § 30-2438 (Reissue 1995), rather than summary judgment, provides the proper procedure for resolving conflicts when the priority of a previously appointed personal representative is challenged by parties with equal priority, we reverse, and remand for further proceedings.

BACKGROUND

In November 1996, Ida died intestate in Garfield County, Nebraska. In January 1997, Sutherlin, Ida's grandson, nominated himself as personal representative of her estate. In his application, he listed four other grandchildren as having "prior or equal right to appointment." No information was given regarding whether the other grandchildren had renounced their rights to appointment or had consented to have Sutherlin represent them as the personal representative. In an informal proceeding, the registrar issued Sutherlin his letters of appointment on the same day. The registrar's appointment letter was prepared by Sutherlin's counsel and stated that "the person whose appointment is sought has priority entitling such person to appointment."

Sutherlin filed an inventory on May 14, 1997, showing that Ida's estate consisted of $9,338.62 in a checking account. However, no further action was taken until December 8, 1998, when Nancy E. Pelster, Ida's granddaughter, filed a petition to remove Sutherlin. Pelster withdrew her petition after it appeared from Sutherlin's answer that he was prepared to distribute the assets and close the estate. The record shows that Sutherlin received his share of Ida's estate but did not make distribution to the other heirs.

In August 1999, Pelster filed a second motion to remove Sutherlin, followed by a motion for summary judgment. The petition alleged that Sutherlin did not have priority for appointment and that an informal appointment was therefore incorrect. Pelster also alleged that a personal representative was unnecessary for this estate under the small estates statutes and that Sutherlin had mismanaged the estate's assets and failed to act in the best interests of the estate. At the hearing, the court sustained Pelster's motion for summary judgment based on the sole ground that Sutherlin's appointment was made without following state statutes because the other parties had not concurred in his appointment or renounced their rights to appointment.

ASSIGNMENTS OF ERROR

Sutherlin assigns the county court erred in sustaining Pelster's motion for summary judgment to remove him, in over-

ruling his motion to strike the motion for summary judgment, and in finding that his appointment was illegal or void.

STANDARD OF REVIEW

[1] The interpretation of a statute presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000); *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999).

ANALYSIS

There are two questions presented by this appeal: (1) Whether the county court correctly determined that the appointment was not made in compliance with the law and (2) what is the correct procedure for removing a personal representative for noncompliance with the statutory requirements of the application process.

Sutherlin contends that Neb. Rev. Stat. § 30-2420(b) (Reissue 1995) prohibits the retroactive vacation of his appointment and that under this statute, the only permissible avenue for his removal is for cause under Neb. Rev. Stat. § 30-2454(b) (Reissue 1995). He further contends that the only criterion the court could have used for removing him under § 30-2454(b) was intentional misrepresentation of material facts in the proceedings leading to his appointment. This finding, he contends, is contrary to the facts of the case.

The record indicates, however, that the court removed Sutherlin because his appointment was not made in compliance with § 30-2412(c). Subsection (c) of this statute requires that the other parties with equal priority either renounce their right to appointment or concur in the nomination of another.

PRIORITIES

The interpretation of a statute presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Brown v. Kindred, supra*; *In re Interest of Rachael M. & Sherry M., supra.*

[2] The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively consid-

ered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

[3] As noted, § 30-2412(c) requires that when two or more persons share a priority for appointment as personal representative, they must either renounce that right or concur in the nomination of one to act on their behalf, or apply for the appointment. Neb. Rev. Stat. § 30-2414(1) (Reissue 1995), which sets out the application contents, requires the applicant to provide only his or her own priority in the application and the names of any persons having equal priority under § 30-2412(a). Sutherlin provided this information.

[4] Neb. Rev. Stat. § 30-2421 (Reissue 1995), however, requires the registrar in an informal appointment proceeding to determine whether from the statements in the application the person whose appointment is being sought has priority entitling him or her to the appointment. See § 30-2421(7). In this case, the application was not accompanied by any renunciation of the right to appointment or any nomination of Sutherlin by those heirs with equal priority. Neither did Sutherlin give any indication that he had notified the other heirs of his intent to seek informal appointment as required by Neb. Rev. Stat. § 30-2423 (Reissue 1995). Section 30-2423 requires a moving party to "give notice as described by section 30-2220 of his intention to seek an appointment informally . . . (2) to any person having a prior or equal right to appointment not waived in writing and filed with the court." Despite these deficiencies, the registrar issued Sutherlin his letters of appointment. The letters of appointment were provided by Sutherlin's counsel and stated that Sutherlin had priority entitling him to appointment.

[5] Although Sutherlin shared a priority with others, he did not have priority entitling him to the appointment. The comment to the Uniform Probate Code § 3-308, upon which § 30-2421 is based, indicates that a priority entitling an applicant with a shared priority to appointment could be obtained only through the consent of those with equal priority. See Unif. Probate Code § 3-308, comment, 8 U.L.A. 64-65 (1998) ("[u]nder [the priori-

ties section], one or more of the same class may receive priority through agreement of the others").

[6] Because Sutherlin did not have priority entitling him to appointment, § 30-2412(e) is applicable:

> Appointment of one who does not have priority may be made only in formal proceedings except that appointment of one having priority resulting from renunciation or nomination may be made in informal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

Thus, the registrar's issuance of Sutherlin's appointment letters through an informal proceeding did not comply with § 30-2412(e) or § 30-2423, and the county court correctly determined that the appointment was made outside of the statutory mandates.

PROCEDURE

The next issue is what procedure should be used for the removal of a personal representative for noncompliance with the statutory requirements of the informal application process.

[7] The Nebraska Probate Code provides a direct, formal procedure for removing a personal representative whose appointment was not made in compliance with the priorities stated in § 30-2412, regardless of whether that appointment was made formally or informally. Section 30-2438 provides:

> (a) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by section 30-2426 [governing contents of petitions for formal testacy or appointment], as well as by this section. In other cases, the petition shall contain or adopt the statements required by section 30-2414(1) [governing informal application contents] and describe the question relating to priority or

> qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.
>
> (b) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 30-2412, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 30-2454.

See, also, Unif. Probate Code § 3-402, comment, 8 U.L.A. 79 (1998) ("[i]f a formal order of appointment is sought because of disagreement over who should serve, Section 3-414 [§ 30-2438] describes the appropriate procedure").

Pelster's petition to remove the personal representative contained several allegations against Sutherlin. The county court based its order on her allegation that Sutherlin had failed to obtain statutorily required waivers, consents, or nominations for his appointment from the other heirs and that he was therefore without priority. We treat this petition as a request to have Sutherlin's priority adjudicated in a formal proceeding under § 30-2438. The hearing, however, was not in compliance with the requisites of a formal proceeding.

[8] Neb. Rev. Stat. § 30-2209(16) (Cum. Supp. 2000) defines formal proceedings as "those conducted before a judge with notice to interested persons." Pelster served copies of her petition to Sutherlin and the other heirs with equal priority over a month in advance of the hearing. But when notice is required in an estate proceeding, Neb. Rev. Stat. § 30-2220 (Cum. Supp. 2000) requires the petitioner to give notice of the time and place

of the hearing to any interested person at least 14 days in advance by mail when the addresses of the parties are known and to file proof of that notice with the court. Interested person includes any heir or person having a priority for appointment. See § 30-2209(21). The record does not indicate when or if notice of the time and place of the hearing was given to the interested persons in this case, other than to Sutherlin.

[9] Moreover, Pelster's petition was deficient in that she did not nominate a personal representative to replace Sutherlin. Section 30-2438 specifies that in cases where the testacy of the decedent is not at issue, "the petition shall contain or adopt the statements required by section 30-2414(1) and describe the question relating to priority or qualification of the personal representative which is to be resolved." Section 30-2414(1) governs the contents of an application for personal representative. Thus, it is implicit in this sentence that the petitioner will also nominate a personal representative.

The comment to the Uniform Probate Code's counterpart to § 30-2438 states: "It is important to distinguish formal proceedings concerning appointment from 'supervised administration'. The former includes any proceeding after notice involving a request for an appointment." See Unif. Probate Code § 3-414, comment, 8 U.L.A. 103 (1998).

[10] In a hearing pursuant to § 30-2438, a judge should determine who has priority under § 30-2412 and make a proper appointment. See § 30-2438(b). Because Pelster failed to comply with the notice provision in § 30-2220 and failed to nominate another personal representative in her petition, the court was unable to make another appointment, had it determined that one was necessary under § 30-2412. Finally, we note that in a formal proceeding, a person with a substantial interest in the estate may object to the appointment of any person whose priority is not determined by will. See § 30-2412(b)(2).

[11] While the county court correctly determined that Sutherlin had not complied with the statutory mandates in obtaining his appointment, it should not have granted summary judgment removing or replacing him because the hearing did not comply with the procedural requirements of a formal proceeding under § 30-2438. Thus, we conclude in this case that summary

judgment was an incorrect procedure for making a priority determination that removes or replaces the personal representative.

Upon remand, the county court should comply with § 30-2438 by determining who is entitled to appointment as personal representative under § 30-2412 and by making a proper appointment at a formal proceeding held for that purpose.

CONCLUSION

We reverse the county court's removal of Sutherlin in a summary judgment hearing and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DALE E. HAGELSTEIN, APPELLANT, V.
SWIFT-ECKRICH DIVISION OF CONAGRA, APPELLEE.

622 N.W.2d 663

Filed February 23, 2001. No. S-00-625.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. ___: ___. 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.
3. **Workers' Compensation: Proof.** 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.
4. **Workers' Compensation.** An employer's unilateral cessation of workers' compensation benefits is not to be the basis for the modification of an award of benefits.
5. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
6. ___: ___: ___. If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court.

7. **Evidence: Videotapes: Appeal and Error.** The weight to be given videotaped evidence, admitted into evidence, is to be determined by the trier of fact, not the appellate court.
8. **Workers' Compensation.** Vocational rehabilitation benefits are properly awarded when an injured employee is unable to return to the work for which he or she has previous training or experience.
9. ___. A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.
10. ___. A modification to a workers' compensation award cannot be applied retroactively beyond the date of application for modification.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

James F. Fenlon, P.C., for appellant.

Theodore J. Stouffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Dale E. Hagelstein appeals from an order entered by a review panel of the Workers' Compensation Court. The review panel's order affirmed in part and reversed in part the trial judge's order, which modified a running award of total disability benefits to permanent partial disability benefits. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

SCOPE OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

[2] 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. *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

FACTS

Hagelstein filed a petition in the Workers' Compensation Court against his employer, Swift-Eckrich Division of ConAgra (Swift-Eckrich), for a lower back injury sustained while working as a maintenance mechanic on January 28, 1991. After a hearing on December 17, the trial judge found that Hagelstein was totally disabled and was entitled to benefits in the amount of $255 per week for an indefinite period.

In a second petition filed March 6, 1996, Hagelstein alleged that Swift-Eckrich had ceased paying total disability benefits and had begun paying permanent partial disability benefits on June 19, 1995. Swift-Eckrich answered on March 26, 1996. After a hearing, the trial judge modified the award, finding that Hagelstein had reached maximum medical improvement on April 24, 1995, and was thereafter partially disabled. The trial judge further found that Hagelstein had suffered a 35-percent permanent loss of earning power but did not need vocational rehabilitation training. The trial judge ordered Swift-Eckrich to pay reduced benefits effective April 24, 1995.

A review panel affirmed the trial judge's modification of the award. However, the order was signed by only two of the three judges who heard arguments, as the third judge had died in the interim. We dismissed Hagelstein's subsequent appeal after determining that the order was void due to the absence of the statutorily required quorum. See *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). On remand, the review panel affirmed in part and reversed in part. It reversed the portion of the order requiring payment of permanent partial disability benefits beginning on April 24, 1995, and ordered that payment commence on March 6, 1996, the day on which Hagelstein's second petition was filed, relying upon *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998) (holding that modification of workers' compensation award cannot be applied retroactively beyond date of application). Hagelstein timely appealed.

ASSIGNMENTS OF ERROR

Hagelstein assigns as error that the trial judge erred in finding (1) that he reached maximum medical improvement on April 24, 1995; (2) that he ceased being totally disabled on or about April 24, 1995; (3) that he suffered a 35-percent permanent loss of earning power after April 24, 1995; and (4) that he is not entitled to vocational rehabilitation benefits. Hagelstein also assigns as error that the review panel erred in failing to award him attorney fees.

ANALYSIS

[3] 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. *Id.* 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.*

[4] Here, we treat Swift-Eckrich as the applicant for a modification, with the date of the "application" being the date its answer was filed. Swift-Eckrich unilaterally stopped payment of Hagelstein's total disability benefits without filing an application with the compensation court. Hagelstein then petitioned the compensation court for a determination of total disability, and Swift-Eckrich's answer set out its claim requesting modification of the award of temporary total disability. We have previously stated that the employer's unilateral cessation of benefits is not to be the basis for the modification of an award of benefits. Employers are prohibited from unilaterally modifying workers' compensation awards. *Id.*

In determining whether Swift-Eckrich has proved a material and substantial change in Hagelstein's condition, we may modify, reverse, or set aside the compensation court's decision only if (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 sup-

port the order or award. See *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

[5] Hagelstein argues that there was not sufficient competent evidence in the record to warrant the making of the award because there was no objective medical evidence of a physical improvement. In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party, and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

[6] 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.* If the record contains evidence to substantiate the factual conclusions reached by the trial judge of the compensation court, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000).

The record contains reports from a number of doctors concerning Hagelstein's incapacity. In an opinion letter dated May 18, 1995, Dr. Michael O'Neil, after a second examination of Hagelstein, concluded with reasonable medical certainty that he had reached maximum medical improvement by April 24, 1995. He opined that Hagelstein could function at a light to medium work level and was entitled to a 35-percent permanent physical impairment rating. Dr. Gernon Longo stated that Hagelstein suffered from a 30-percent permanent impairment of the body. Dr. D.M. Gammel examined Hagelstein on July 10, 1995, and concluded that he suffered from a 35-percent impairment of the body. On August 16, 1996, Hagelstein's own physician, Dr. Eric Phillips, gave him a 25-percent permanent partial impairment rating.

There is no merit to Hagelstein's argument that there is not objective medical evidence of a material and substantial decrease in incapacity. There was no medical dispute that Hagelstein was partially disabled rather than totally disabled. The physicians' opinions varied only as to the extent of his partial disability.

Their ratings ranged from a 25- to 35-percent permanent partial impairment, and the trial judge found Hagelstein to be 35 percent partially impaired. There was sufficient competent evidence in the record to support the trial judge's findings that Hagelstein had reached maximum medical improvement and ceased being totally disabled on April 24, 1995. We cannot say that any of the trial judge's factual findings were clearly wrong.

[7] Hagelstein contends that the trial judge placed too much reliance on surveillance videotapes made of him. Hagelstein was under surveillance for approximately 80 hours between July 1994 and March 1995. The portion of the videotapes admitted into evidence showed Hagelstein performing a variety of activities outside his home. The weight to be given videotaped evidence, admitted into evidence, is to be determined by the trier of fact, not the appellate court. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). This argument is without merit.

Hagelstein also argues that the trial judge erred in finding that he is not entitled to vocational rehabilitation services. Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999) provided in part:

> When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she is entitled to such vocational rehabilitation services, including job placement and retraining, as may be reasonably necessary to restore him or her to suitable employment.

[8,9] Vocational rehabilitation benefits are properly awarded when an injured employee is unable to return to the work for which he or she has previous training or experience. *Collins v. General Casualty*, 258 Neb. 852, 606 N.W.2d 93 (2000). A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court. See *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

Craig Ferguson was selected as an independent vocational rehabilitation specialist to evaluate Hagelstein. Ferguson interviewed Hagelstein, reviewed the functional capacity assessments and medical reports, and conducted a labor market survey and a labor market access study. He concluded that Hagelstein

would be able to engage in substantial employment on the basis of a 40-hour workweek and that he would not need vocational rehabilitation in the form of retraining or reeducation to do that. We cannot say that the trial judge's finding that Hagelstein did not need vocational rehabilitation was clearly wrong. This assignment of error is without merit.

[10] Hagelstein next argues that if the modification is to be upheld, it cannot be applied retroactively. There is no question that a modification cannot be applied retroactively beyond the date of application for modification. See, *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). However, because we treat Swift-Eckrich as the applicant for modification, the application date is the date Swift-Eckrich filed its answer—March 26, 1996. Thus, Swift-Eckrich's obligation to pay Hagelstein the total disability benefits originally awarded extended until that date.

Hagelstein's final argument is that he received an "increase" in his award by the review panel and, therefore, is entitled to attorney fees under Neb. Rev. Stat. § 48-125 (Reissue 1998). The review panel modified the trial judge's order and determined that the obligation to pay total disability benefits extended to March 6, 1996, the day Hagelstein filed his petition. We have concluded that such obligation should continue to the date Swift-Eckrich filed its answer, March 26, which alleged a change in Hagelstein's condition.

Section 48-125(1) provides in part:

> [I]f the employee files an application for a review before the compensation court from an award of a judge of the compensation court when the amount of compensation due is disputed and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such review, and the Court of Appeals or Supreme Court may in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in the Court of Appeals or Supreme Court.

A similar situation was addressed in *Starks*. The employer had unilaterally terminated Starks' benefits without obtaining a

modification. Starks filed a motion in the compensation court requesting an order to resume the total disability payments. The employer then filed an application for modification on November 30, 1995. The trial judge subsequently modified the award retroactive to August 27, the date of the change in Starks' condition, and the review panel affirmed. On appeal, we held that the award was in full force and effect, as originally entered, until the award was modified pursuant to Neb. Rev. Stat. § 48-141 (Reissue 1998). We held that the compensation court erred in making the modification retroactive to August 27 instead of November 30. Because Starks obtained an increase in the award, however trivial, he was entitled to attorney fees. Hagelstein is likewise entitled to attorney fees.

CONCLUSION

There was sufficient competent evidence to support the trial judge's findings regarding Hagelstein's 35-percent partial impairment, maximum medical improvement, and vocational rehabilitation. However, the review panel erred in not awarding attorney fees, and we award Hagelstein $1,500 as attorney fees in the compensation court. Also, we modify the award of permanent partial disability benefits to become effective as of March 26, 1996, the date Swift-Eckrich filed its answer seeking the modification. We award Hagelstein $500 in attorney fees for this appeal.

AFFIRMED AS MODIFIED.

STEPHAN, J., not participating.

RONALD HAGAN ET AL., APPELLANTS, V. UPPER REPUBLICAN NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

622 N.W. 2d 627

Filed March 2, 2001. No. S-99-374.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.

2. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
4. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
5. **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.
6. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
7. **Public Officers and Employees: Actions.** A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
8. **Waters.** Ground water is owned by the public, but the overlying landowner has a right to use of the ground water.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Chase County, JOHN J. BATTERSHELL, Judge. Judgment of Court of Appeals affirmed.

Amy Svoboda, of Gregory J. Beal & Associates, P.C., for appellants.

G. Peter Burger, of Burger & Bennett, P.C., for appellees Champion Valley Enterprises, L.L.C., Steve Leibbrandt, and Tim Leibbrandt.

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

GERRARD, J.

NATURE OF CASE

The plaintiffs, Ronald Hagan, Troy Brandt, and Todd Hatcher, filed a petition in the district court seeking declaratory

relief against the Upper Republican Natural Resources District (NRD); Champion Valley Enterprises, L.L.C. (Champion Valley); and Steven Leibbrandt and Tim Leibbrandt, individually. The district court sustained the defendants' demurrers to the plaintiffs' amended petition on the basis of standing and dismissed the plaintiffs' petition. The plaintiffs appealed, and the Nebraska Court of Appeals reversed the judgment of the district court and remanded the cause with directions to reinstate the petition. See *Hagan v. Upper Republican NRD*, 9 Neb. App. 289, 610 N.W.2d 751 (2000). We granted the defendants' petition for further review. For the reasons stated herein, we affirm the judgment of the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are alleged in the plaintiffs' operative amended petition: The plaintiffs are residents of the NRD and are irrigators and landowners. Champion Valley and the Leibbrandts are also residents of the NRD.

During the period relevant to this action, the NRD had adopted a moratorium on new well construction. The plaintiffs, Champion Valley, and the Leibbrandts were all similarly situated in the moratorium area. During the summer of 1998, the plaintiffs applied to the NRD for an allocation of underground water for crop irrigation purposes. Champion Valley and the Leibbrandts applied to the NRD for a variance to allow use of underground water sufficient to operate hog confinement facilities. The plaintiffs were denied the variances for which they had applied. On or about July 7, 1998, Champion Valley and the Leibbrandts entered into separate settlement agreements with the NRD, which allowed Champion Valley and the Leibbrandts the use of underground water that was originally the subject matter of their application for a variance.

The plaintiffs filed a petition in the district court seeking declaratory relief against the defendants. Specifically, the plaintiffs sought a declaration that the agreements Champion Valley and the Leibbrandts entered into with the NRD were illegal and void. The critical allegation contained in the plaintiffs' operative amended petition, with respect to the question of standing, is as follows:

> That, in addition, Defendants have drawn water from the same aquifer as the aquifer that underlies Plaintiffs' land, and therefore the Plaintiffs are injured in that there is less water available for them for future requests in that the now declining water table of the aquifer will decline further by virtue of the withdrawal of the water by the Defendants.

The defendants demurred in part on the basis of standing. The district court sustained the demurrers, stating that "[t]he Plaintiffs attempt to claim special status or injury as irrigators and neighbors, but, that status is no different than all the members of the general public residing within the jurisdiction of the natural resource district." The district court further found that there was no possibility that the plaintiffs could further amend their petition to allege facts which would show standing to bring the action. The district court dismissed the petition, and the plaintiffs appealed.

The Court of Appeals reversed the judgment of the district court. See *Hagan v. Upper Republican NRD, supra.* The Court of Appeals determined that the plaintiffs, as landowners and irrigators, had an interest in protecting the limited water supply underlying their lands. *Id.* We granted the defendants' petition for further review.

ASSIGNMENT OF ERROR

The defendants assign that the Court of Appeals erred in finding that the plaintiffs' amended petition alleged facts sufficient to confer standing upon the plaintiffs to invoke the jurisdiction of the district court.

STANDARD OF REVIEW

[1] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Noffsinger v. Nebraska State Bar Assn., ante* p. 184, 622 N.W.2d 620 (2001).

[2] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable

inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

ANALYSIS

[3,4] The defendants argue that the district court correctly found the plaintiffs to be without standing to challenge the settlement agreements. Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000). As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

[5,6] 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. *Mutual Group U.S., supra*; *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000); *Ritchhart, supra.*

[7] In support of their argument, the defendants rely upon our recent decisions in *Ritchhart, supra*, and *Neb. Against Exp. Gmblg., supra*. Those cases, like the instant case, dealt with the alleged ultra vires acts of public officials. In *Ritchhart*, a citizen of Omaha sued several Omaha public officials, claiming that an alleged agreement among those officials was illegal and void. In *Neb. Against Exp. Gmblg.*, a taxpayer and a nonprofit corporation opposed to the proliferation of gambling sued the commissioners of the Nebraska State Racing Commission, alleging the illegality of licenses granted by the commission to simulcast

horseraces. In both cases, we determined that the plaintiffs lacked standing to sue. We stated:

> A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.

Id. at 693, 605 N.W.2d at 807, citing *Ritchhart, supra.*

Because the plaintiffs in *Neb. Against Exp. Gmblg., supra,* alleged neither a special injury peculiar to themselves nor an illegal expenditure of public funds or increase in the burden of taxation, we affirmed the district court's judgment sustaining the defendant's demurrer and dismissing the plaintiffs' petition on the basis of standing. Similarly, in *Ritchhart, supra,* because the plaintiff did not show a special injury or any basis for an exception to the special injury requirement after a trial on the merits, we reversed the judgment of the district court in favor of the plaintiff and remanded the cause with directions to dismiss the petition.

In the instant case, the plaintiffs have not alleged an illegal expenditure of public funds or an increase in the burden of taxation. The issue then is whether the plaintiffs have alleged facts sufficient to show a special injury peculiar to themselves. In this regard, we find that the facts alleged in the plaintiffs' amended petition distinguish this case from *Ritchhart, supra,* and *Neb. Against Exp. Gmblg., supra.*

[8] The plaintiffs have alleged that they are landowners and irrigators who were denied variances and that they will be injured by the depletion of the aquifer underlying their lands resulting from the allegedly illegal agreements. Ground water is owned by the public, but the overlying landowner has a right to use of the ground water. See, *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994); *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987).

In *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996), several landowners objected to an application for a permit to transfer ground water to Wyoming from a well in Nebraska. The director of the Department of Water Resources determined that the expected impact of the well on future demand for ground water was unclear and denied the

application. The applicant appealed. This court considered the standing of the objectors to challenge the application. We determined that two of the objectors had water use interests to protect, but that the remaining objectors did not. *Id.* Consequently, we concluded that the objectors who had water use interests had standing to object to the well permit application. *Id.*

Similarly, in *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960), the Ainsworth Irrigation District sought an appropriation of water from the Snake River for irrigation purposes. A number of landowners objected, but the appropriation was approved by the Department of Water Resources, and the objectors appealed. The irrigation district challenged the standing of the objectors, but we determined that the landowners within the irrigation district would be legally affected by the appropriation and had a legal interest in the proceeding. *Id.*

We recognize that unlike *Ponderosa Ridge LLC, supra*, and *Ainsworth Irr. Dist., supra*, this is not an appeal from an application for an appropriation of water, but is, instead, like *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999), and *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000), an action alleging an ultra vires act on the part of public officials. However, the question presented in this appeal does not relate to the underlying nature of the action, but is simply whether the plaintiffs have alleged a special injury which distinguishes their interests from those of the general public.

The plaintiffs have alleged, as landowners and irrigators whose requests for variances were denied, that the agreements entered into by the defendants will adversely affect the plaintiffs' water use interests because the water use of Champion Valley and the Leibbrandts will deplete the aquifer underlying the plaintiffs' properties. As in *Ponderosa Ridge LLC, supra*, and *Ainsworth Irr. Dist., supra*, these allegations are sufficient to distinguish the plaintiffs' injury from that shared by the general public and demonstrate the plaintiffs' standing to maintain the action.

Whether the plaintiffs will be able to present evidence to substantiate these allegations, either at trial or on hearing for sum-

mary judgment, is a matter that was not before the district court and is not before us. In other words, the defendants are not precluded from preserving and/or asserting a standing challenge at a later time if the plaintiffs are unable to prove that the defendants' use of the underground water would so deplete the aquifer as to injure the plaintiffs' water use interests. The plaintiffs, however, have adequately pled that the depletion of the aquifer will injure their water use interests, and in reviewing a demurrer, we are required to accept this fact as true and not to consider the evidence that might be adduced at trial. See, *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001); *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000).

CONCLUSION

Therefore, we conclude that the Court of Appeals correctly determined that the district court erred in sustaining the defendants' demurrer to the plaintiffs' amended petition on the basis of standing and in dismissing the amended petition. Accordingly, the Court of Appeals was correct in reversing the judgment of the district court and remanding the cause with direction to reinstate the plaintiffs' amended petition. We affirm the judgment of the Court of Appeals.

AFFIRMED.

IN RE ESTATE OF BUDDIE STULL, ALSO KNOWN AS BUDDIE WILLIAM STULL, DECEASED.
ROBERT ANDERSON ET AL., APPELLANTS, V. E. MICHAEL SLATTERY ET AL., APPELLEES.

622 N.W.2d 886

Filed March 2, 2001. Nos. S-99-1253, S-00-055.

1. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.

Appeals from the County Court for Cass County: JOHN F. STEINHEIDER, Judge. Affirmed.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellants.

William R. Reinsch, of Reinsch & Slattery, P.C., for appellee E. Michael Slattery.

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

MCCORMACK, J.

NATURE OF CASE

This case is a remand from the Nebraska Court of Appeals to the county court for Cass County, Nebraska, to determine the reasonable fee to be paid to Attorney E. Michael Slattery for his legal services. Slattery performed services in securing a settlement under the common fund doctrine for the residuary beneficiaries of the estate of Buddie Stull, also known as Buddie William Stull, in the sum of $98,500.96. On remand, the county court awarded Slattery an amount equal to one-third, or the sum of $32,758.87, two-thirds of which, $21,839.24, would be paid from several of the residuary beneficiaries' share of the residuary estate, plus the sum of $57 court costs. The beneficiaries will be referred to herein as the "objectors."

BACKGROUND

Slattery filed a will contest on behalf of one of the residuary beneficiaries, Rosie Wolski, challenging two charitable bequests of the estate of Stull. Slattery, on behalf of Wolski, initially challenged the Stull will on the bases of incapacity and undue influence. After some discovery was completed, Slattery changed the nature of the claim to a claim that the real property bequeathed to the two charities was in violation of the rule against perpetuities. The charitable bequests of the real property in the will provided that "at no time [could the charitable beneficiary] sell, mortgage, dredge, remove aggregate from, or otherwise alienate the real property." About the same time the legal theory was changed, Wolski became concerned that she did not have suffi-

cient funds to proceed, and Wolski and Slattery, therefore, entered into a one-third contingent fee agreement providing that Slattery would be paid one-third of any amounts that he recovered on her behalf and, if his efforts were not successful, would be paid nothing.

Slattery negotiated a settlement with the two charities which resulted in a substantial increase in the residuary estate in the sum of $98,500.96. This settlement was agreed to by all of the residuary beneficiaries and was approved by the county court. Slattery claimed that the settlement he negotiated was on behalf of the entire residuary estate. Slattery had a one-third contingent fee agreement with Wolski, but did not have any agreement as to representation or fees with the other residuary beneficiaries.

Slattery filed a petition for distribution of the funds of the settlement to the residuary beneficiaries and an application for the payment of attorney fees from the residuary estate. It was Slattery's theory that his efforts had resulted in a benefit to the residuary estate of $98,500.96 and that under the common fund doctrine, he is entitled to recover attorney fees from settlement proceeds. Slattery prayed for a fee of $32,833.65, or one-third of the amount recovered, plus costs of $57.

The objectors filed an objection to the application for attorney fees, claiming that the common fund doctrine was inapplicable and further that the fees requested were not fair and reasonable. The county court awarded Slattery one-third of the estimated settlement funds from the residuary estate. The objectors appealed this decision. The Court of Appeals in *In re Estate of Stull*, 8 Neb. App. 301, 593 N.W.2d 18 (1999), ruled that the common fund doctrine did apply to the facts of this case and that what is a reasonable fee to be paid from the common fund under the totality of the circumstances is a question not answered by simply applying the fee agreement between Slattery and Wolski. The Court of Appeals remanded the cause for the determination of whether the attorney fee of nearly $33,000 was reasonable by addressing the factors laid out in *Hauptman, O'Brien v. Milwaukee Guardian*, 7 Neb. App. 60, 578 N.W.2d 83 (1998).

In its remand to the county court, the Court of Appeals stated that the county court did not address any of the factors deemed

salient in *Hauptman, O'Brien v. Milwaukee Guardian, supra.* These factors as stated in *Hauptman, O'Brien* are "the services actually performed, the amount in controversy, the nature of the case, the results obtained, the extent of preparation of the case, the difficulty of the questions involved, the skill required, the customary charges of the bar for similar work, and the character and standing of the attorney." 7 Neb. App. at 67, 578 N.W.2d at 88.

In the remanded hearing, one of Slattery's expert witnesses was Attorney Keith Frederick. Frederick based his testimony on reviewing (1) the entire court file, together with exhibits and the bill of exceptions from the first trial; (2) Slattery's fee application, knowing that the Court of Appeals had determined there was a common fund; and (3) Slattery's own file on this case. Frederick said he based his opinion solely on Slattery's work in construing the will and the settlement agreements.

It is to be noted that the only testimony at the hearing was from Slattery's expert witnesses, Frederick and Attorney David Chebatoris. The objectors did not present any witnesses. Frederick described Slattery's legal theory and testified that there were 28 or 29 separate pleadings along with the settlement agreements and that it required a high degree of skill to prepare the legal theory and deal with the numerous individuals involved in this litigation. Frederick stated the difficulty with the questions involved was that if the will was set aside, there were prior wills that were still in existence and that therefore to obtain a settlement that "gets something for the residuary beneficiaries was quite a feat." The amount in controversy was testified by Frederick to be approximately $250,000 and that customary charges for this type of case could be either a straight hourly rate or a contingent fee based on the results. Frederick stated there were several services performed as shown on the court's docket sheet, such as different court hearings or appearances, that did not appear to be listed on Slattery's time charges. Slattery's listed time charges were 104.8 hours.

On cross-examination, Frederick said that based on reading the briefs, had the case gone to trial, Slattery's chances were better than 50-50. Frederick did not find any substantial discovery "as far as written documents in the court file." Frederick testified that he agreed with the objectors that the case involved basi-

cally a legal question, but that the one-third contingent fee was reasonable.

Chebatoris testified that he had known Slattery for over 20 years and described Slattery's character as being excellent, that Slattery was well respected in the community and legal profession, and that Slattery had an excellent reputation.

Slattery argued that Frederick's testimony supplied all of the elements of *Hauptman, O'Brien v. Milwaukee Guardian*, 7 Neb. App. 60, 578 N.W.2d 83 (1998), with the exception of Slattery's standing in the legal community, which testimony was provided by Chebatoris.

Frederick testified, and the record reflects, the following with regard to Slattery's fee: (1) that a contingent fee would be appropriate when the client felt that he or she could not afford the hourly time charges but wanted to proceed in some fashion with the matter; (2) that the customary charges of the bar for similar work provided by Slattery would be one of two forms, either an hourly rate, if the client was able to pay it, or a contingent fee based on the results; (3) that Frederick is familiar with the customary charges for services similar to those rendered by Slattery; (4) that assuming Slattery had a good reputation and standing in the community, it was his opinion that a one-third contingent fee, in this case, nearly $33,000, is fair and reasonable; and (5) that Slattery's rate of $125 per hour was reasonable based on Frederick's familiarity with what attorneys in Cass County with 20 to 25 years of experience were charging during the relevant time period.

The objectors argued that although the services performed by Slattery totaled 104.8 hours, one-half of that time was spent obtaining signatures from all the residuary beneficiaries for the settlement agreements. It should be noted that the requirement that all the residuary beneficiaries sign the settlement agreements was a requirement made by the county court prior to approving the settlement which produced the common fund. The objectors further claim the issues involved did not require a great deal of legal experience; that Slattery did not tell the objectors that the chances of success were greater than 50-50; and further that although the total value of the real property was $250,000, the residuary estate received only 40 per-

cent of that amount, and that therefore, Slattery does not deserve the maximum fee.

Slattery stated that his standard fee was $125 per hour. The objectors urged that Slattery's fee be 104.8 hours times $125 per hour for a total fee of $13,100.

ASSIGNMENTS OF ERROR

The objectors assign that the county court erred in (1) determining the amount of the attorney fees awarded to Slattery, (2) applying a percentage of one-third to the entire common fund, and (3) failing to consider all of the factors in the award of a "reasonable fee."

STANDARD OF REVIEW

[1] When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997).

ANALYSIS

[2] The objectors did not seek further review of the original decision of the Court of Appeals, and therefore, the issue of whether the common fund doctrine applied becomes the law of the case. The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998); *Talle v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 823, 572 N.W.2d 790 (1998). This same decision by the Court of Appeals required the county court, on remand, to apply the factors for attorney fees under *Hauptman, O'Brien v. Milwaukee Guardian*, 7 Neb. App. 60, 578 N.W.2d 83 (1998), in determining a reasonable fee to be awarded to Slattery under the common fund doctrine.

With regard to services actually performed, we note that in exhibit 6, Slattery's exhibit setting out his time and expenses, no charges were made for mailings, copy costs, postage, et cetera. The total hours expended by Slattery, according to exhibit 6, are 104.8 hours. Frederick testified that from a review of the court's docket sheet, there were several hearings held in May and

October 1996 and January and December 1997 and that these hearings were not listed on exhibit 6.

From this review, Frederick concluded that Slattery had actually devoted more time to the case than that reflected in his itemized statement. A significant portion of Slattery's time was expended in obtaining the residuary beneficiaries' approvals of the settlement agreements with the charitable beneficiaries. This action was required by the county court prior to its approving the settlement and is, therefore, a benefit to all of the residuary beneficiaries, including the objectors.

The second factor according to *Hauptman, O'Brien* is the amount in controversy. Frederick testified that this amount was $250,000, while the objectors claim that the amount was $98,000, which is 40 percent of the total value of the real property. It is true that the gross value of the real property was $250,000 and that the residuary estate received only $98,000, but the attorney fee was based on $98,000, and not $250,000.

The third factor under *Hauptman, O'Brien* is the nature of the case. This case initially started as a will contest alleging incapacity and undue influence and evolved into whether the devise of the real property to the charities with the limitation that the land could not be dredged or sold in any way violated the rule against perpetuities. The settlement negotiations with the charitable beneficiaries that produced the $98,000 for the residuary estate presumably were brought about by Slattery, acting for his client, Wolski, pursuing the rule against perpetuities theory. This theory was pursued by Slattery after he found in discovery that the initial theory of undue influence would in all likelihood not be successful.

The fourth factor under *Hauptman, O'Brien* is the results obtained. The settlement agreements with the two charities resulted in an amount to the residuary beneficiaries of approximately $98,276.60. Had Slattery, on behalf of Wolski, never presented this claim, the result to the residuary estate would have been zero.

The fifth factor under *Hauptman, O'Brien*, the extent of preparation of the case, can be judged from exhibit 6, showing an expenditure of 104.8 hours by Slattery, and, in addition, Frederick's testimony that from his review of Slattery's file and

the court file, Slattery devoted time to the case in addition to that reflected on exhibit 6.

As to the sixth and seventh factors of *Hauptman, O'Brien*, the difficulty of the questions involved and the skill required, Frederick praised Slattery's legal theory as being one that other attorneys may not have recognized. Frederick also testified that Slattery employed a complex legal standard and that it took skill to prepare the legal theory and to deal with the various individuals in the case. Frederick said the difficulty with the questions involved was that if the will was set aside, there were prior wills that were still in existence.

The eighth factor in *Hauptman, O'Brien v. Milwaukee Guardian*, 7 Neb. App. 60, 578 N.W.2d 83 (1998), is the customary charges of the bar for similar work.

Frederick testified that either an hourly rate or a contingent fee would be appropriate for legal representation in a case of this nature. While a contingent fee agreement between Slattery and Wolski does not control what is a reasonable fee in this case, the contingency that Slattery would be paid nothing for his services, if unsuccessful, is to be taken into consideration in determining a reasonable fee.

The last factor of *Hauptman, O'Brien* is the character and standing of the attorney. Chebatoris was the only witness on this subject and testified that he had known Slattery for 20 years, that Slattery's character was excellent, that Slattery was well respected in the community and legal profession, and that Slattery had an excellent reputation.

We conclude that upon remand from the Court of Appeals with directions to consider only the amount of a reasonable fee to be awarded to Slattery for his services in obtaining the common fund of $98,276.60, the county court did not abuse its discretion in awarding Slattery a fee from the common fund of one-third and, further, that $21,839.24 of that sum should be paid from the objectors' share. We note that Wolski was obligated by the contingent fee agreement with Slattery to pay one-third of the residuary estate attributable to her and that the objectors in this case are simply paying the same amount to Slattery for his services in producing the common fund for the benefit of the objectors.

CONCLUSION

For the reasons set out above, we conclude that the county court did not abuse its discretion in determining that a fair and reasonable fee to be paid to Slattery is one-third of the sums recovered on behalf of the residuary estate from the common fund.

AFFIRMED.

SHAWN LEE JONES, APPELLEE, V. STACIE J. PAULSON, APPELLANT.

622 N.W.2d 857

Filed March 2, 2001. No. S-99-1359.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **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.
3. **Courts: Jurisdiction: Paternity: Names.** Under Neb. Rev. Stat. § 71-640.03(1) (Reissue 1996), a district court, exercising jurisdiction in a paternity action, has discretionary power to decide whether a child's surname should be changed to the surname of the father.
4. **Paternity: Names.** In a paternity action, a court, in deciding whether a child's surname should be changed to the father's surname under Neb. Rev. Stat. § 71-640.03(1) (Reissue 1996), must consider the best interests of the child regarding a change of name.
5. ___: ___. Under the plain language of Neb. Rev. Stat. § 71-640.03(1) (Reissue 1996), after paternity is established by a district court, the district court has the discretion to decide only paternity-related issues, i.e., whether to change the child's previous surname to the father's surname.

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

Michael B. Lustgarten, of Lustgarten & Roberts, P.C., for appellant.

Karen A. Bates-Crouch for appellee.

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

GERRARD, J.

PROCEDURAL AND FACTUAL BACKGROUND

The minor child, Jordan Michael-Ray Jones, was born on February 28, 1996, to Stacie J. Paulson, the mother, and Shawn Lee Jones, the father. At the time of Jordan's birth, the parties were intending to be married, so they agreed to give Jordan the surname Jones. The certificate of live birth filed with the then Nebraska Department of Health so reflects the minor child's name, Jordan Michael-Ray Jones. Subsequently, the parties' relationship ended, and on March 9, 1999, the father, a resident of Nebraska, filed a paternity action in the Douglas County District Court. In the paternity action, the father was seeking, inter alia, a determination of paternity, joint custody of Jordan, and child support from Jordan's mother. The mother, a resident of Texas, filed a responsive pleading and cross-petition, admitting that Jones was Jordan's father, and seeking, inter alia, sole custody of Jordan, child support from Jordan's father, and a determination from the court that Jordan's surname be changed to Paulson-Jones.

Prior to trial, the parties stipulated, subject to court approval, inter alia, that (1) the mother would be awarded sole custody of Jordan subject to the father's reasonable visitation rights as set forth in the stipulation and (2) the father would pay child support and his share of day-care expenses pursuant to the terms of the stipulation. The sole issue contested at trial was the mother's request in her cross-petition to have Jordan's surname changed from Jones to Paulson-Jones. The trial testimony regarding the requested change of surname was brief and centered around the best interests of the child.

The mother testified that she thought it would be good to give Jordan the surname Paulson-Jones so that he would have an identity with both of his parents. She also testified that changing Jordan's surname would not result in an identity crisis because, at 3½ years old, Jordan does not know his full name. The father, who objected to the name change, testified that Jordan does know his name is Jordan Jones, but that he recently heard Jordan call himself Jordan Paulson. Additionally, the mother testified that she did not know whether she would keep the surname Paulson for the rest of her life.

At the close of trial, the district court concluded that it was without power to change Jordan's surname, unless, pursuant to Neb. Rev. Stat. § 71-640.01 (Reissue 1996), both of the parents agreed to the name change. Therefore, the district court determined that Jordan's surname would remain Jones. It is from this order that the mother appeals.

ASSIGNMENT OF ERROR

The mother assigns as error the district court's refusal to change Jordan's surname to Paulson-Jones.

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Jacob v. Schlichtman, ante* p. 169, 622 N.W.2d 852 (2001).

ANALYSIS

This appeal presents the question whether a district court, in a paternity action, has the statutory power to change a child's surname in a situation where a child was given his natural father's surname at birth and the mother seeks to change the child's surname to include the surname of the mother. Based on a plain reading of the relevant statutes, we answer the question in the negative and affirm the judgment of the district court.

[2] We adhere to the principle that 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. *In re Referral of Lower Platte South NRD, ante* p. 90, 621 N.W.2d 299 (2001). In *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988), we were presented with a situation where the father, in a paternity action, wanted the child's surname to be changed from the *mother's* surname to the *father's* surname. We held that a district court, "exercising jurisdiction in a filiation proceeding, has the discretionary power to decide whether a child's surname shall be changed from the legal surname of the

child's mother to the surname of the child's father." *Id.* at 375, 417 N.W.2d at 770.

Our decision in *Lancaster v. Brenneis, supra*, was based on § 71-640.01, which at that time stated, in part, the following:

> (3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father shall be entered on the certificate in accordance with the finding of the court and the surname of the child may be entered on the certificate the same as the surname of the father;
>
> (4) In all other cases, the surname of the child shall be the legal surname of the mother.

We held that the statute contained no mandate for designation of a child's surname for whom paternity has been established by a judicial proceeding. "Rather, subsection (3) . . . states that the surname of a child for whom paternity has been established in a judicial proceeding 'may' be entered the same as the surname of the child's father." *Lancaster v. Brenneis*, 227 Neb. at 375, 417 N.W.2d at 770.

In the instant case, the district court determined that it would have the power to change a child's surname only if both parents agreed to the new name because of a statutory amendment after our decision in *Lancaster v. Brenneis, supra.* In 1994, the Legislature amended and moved the language of § 71-640.01(3), quoted above, to Neb. Rev. Stat. § 71-640.03 (Reissue 1996). See 1994 Neb. Laws, L.B. 886, and 1996 Neb. Laws, L.B. 1044. The current version of § 71-640.03 contains language quite similar to the language upon which our reasoning was based in *Lancaster v. Brenneis*:

> (1) In any case in which paternity of a child is determined by a court of competent jurisdiction, the surname of the child may be entered on the record the same as the surname of the father.
>
> (2) The surname of the child shall be the parents' prerogative, except that the Department of Health and Human Services Finance and Support shall not accept a birth certificate with a child's surname that implies any obscene or objectionable words or abbreviations.

Under the previous statutory scheme, the parents were required to give their child, at birth, either the father's surname or the mother's surname. The major change in the statute, and the effect of subsection (2), was to allow parents to give their child a different surname at birth than either the mother's surname or the father's surname, so long as the chosen surname did not imply any obscene or objectionable words or abbreviations. Compare § 71-640.01 (Reissue 1990).

Focusing on the new statutory language that the child's surname "shall be the parents' prerogative," the district court in the case at bar refused to change the surname of the parties' minor child, reasoning that the enactment of § 71-640.03 revoked its power to change the child's surname unless both parents agreed that the name should be changed. The district court's reasoning is not entirely correct.

[3,4] The pivotal language of § 71-640.01 which we relied upon in *Lancaster v. Brenneis*, 227 Neb. 371, 417 N.W.2d 767 (1988), now found in § 71-640.03, has not changed. Section 71-640.03(1) maintains that the surname of a child for whom paternity has been established in a judicial proceeding "may" be entered the same as the surname of the child's father. See *Lancaster v. Brenneis, supra*. Under § 71-640.03(1), a district court, exercising jurisdiction in a paternity action, continues to have discretionary power to decide whether a child's surname should be changed *to the surname of the father*. See *Lancaster v. Brenneis, supra*. In a paternity action, a court, in deciding whether a child's surname should be changed to the father's surname under § 71-640.03(1), must consider the best interests of the child regarding a change of name. See *Lancaster v. Brenneis, supra*. Therefore, the district court was incorrect in determining that it completely lacked power to change a child's surname in a paternity action, absent both parents' consent.

[5] However, § 71-640.03 does not grant the district court the power, in a paternity action, to change the child's surname to something other than the father's surname. Under the plain language of § 71-640.03(1), after paternity is established by a district court, the district court has the discretion to decide only *paternity*-related issues, i.e., whether to change the child's previous surname to the father's surname. Therefore, any other

request for a change of surname cannot be considered in the context of a paternity action.

In the case at bar, Jordan was given his father's surname, Jones, at birth. A paternity action was subsequently filed by the father, and the mother requested that the surname of the child be changed to reflect both parents' surnames. While we disagree with the district court's reasoning that absent both parents' consent, it completely lacked power to change a child's surname in a paternity action, we nonetheless conclude that the district court lacked the statutory power to change Jordan's surname to something other than the father's surname in the instant paternity action.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court denying the mother's request to change Jordan's surname from Jones to Paulson-Jones.

AFFIRMED.

PATTI BATES, APPELLANT, V. DESIGN OF THE TIMES, INC., A NEBRASKA CORPORATION, APPELLEE.

622 N.W.2d 684

Filed March 9, 2001. No. S-99-673.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Trial: Juries: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.
3. **Negligence: Proof.** In order to prevail on a negligence action, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
4. **Negligence.** The duty in a negligence case is to conform to the legal standard of reasonable conduct in light of the apparent risk.
5. ___. A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff.

6. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Douglas County, JOSEPH S. TROIA, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

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

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Patti Bates, brought this negligence action, claiming that she suffered a brain stem stroke as a result of the manner in which her hair was rinsed at the beauty salon of appellee, Design of the Times, Inc. (DOTT). DOTT filed a motion for summary judgment, which was granted by the trial court on the ground that Bates' medical evidence was insufficient to create an issue of fact regarding causation and, further, on the basis that there was insufficient evidence of a breach of duty on the part of DOTT. The Nebraska Court of Appeals, with one judge dissenting on the breach of duty issue, concluded that the trial court erred in finding that the medical evidence was insufficient. See *Bates v. Design of the Times, Inc.*, 9 Neb. App. 260, 610 N.W.2d 41 (2000). However, the Court of Appeals affirmed the trial court's granting of summary judgment on the ground that there was no evidence of a breach of duty which had a causal connection with Bates' stroke. Bates filed a petition for further review to this court on the sole issue that the Court of Appeals erroneously concluded that "there is no evidence whatsoever of a breach of duty which had a causal connection with Bates'

stroke." *Id.* at 268, 610 N.W.2d at 47. We accepted further review on this issue.

BACKGROUND

On March 11, 1995, Bates went to DOTT to get a permanent wave. Bates' stylist, Michelle Havorka, delegated the task of rinsing Bates' hair to a "technician," M'Lissa Golden, who directed Bates to lean back in a chair with her head extended over a rinsing bowl. Bates stated in her deposition that she experienced some discomfort while her head was extended over the sink and that after approximately 1 to 2 minutes, she lifted her head to relieve the discomfort. Bates did not say anything to Golden at that time. Golden placed her hand on Bates' forehead and said, "You're okay, you're fine," or something to that effect, and pushed Bates' head back down. Bates said she again felt discomfort and, after about another 1 or 2 minutes, she lifted her head again from over the sink. This time Golden asked, "What are you doing?" Bates replied that she was lifting her head so that Golden could rinse the rollers at the base of her neck. Golden replied that she had already done so. Bates did not verbalize any discomfort to Golden at that time. Bates put her head back down without Golden's assistance, and the rinsing continued. Bates stated that at some point, Havorka walked by, and Golden asked her how long she should rinse Bates' hair. Havorka told Golden to rinse it about 5 minutes. Bates stated that Golden then set a timer, but that she did not see the time Golden entered on the timer. Bates estimated that the rinsing lasted a total of 8 minutes.

Bates filed this negligence action, claiming that Golden failed to notice her discomfort and then relieve her discomfort while she was in a reclining position with her head over a sink and that as a result, she suffered an occluded vertebral artery which later developed into a stroke. On the motion for summary judgment, the trial court first found that Bates' medical evidence was insufficient to create an issue of fact regarding causation. The trial court also determined that the evidence did not show a breach of duty and noted that "[t]here is no evidence that the manner in which Golden hyperextended — placing [Bates'] head into the sink to begin the rinsing procedure — was done contrary to the standards of the industry."

The Court of Appeals concluded that the medical evidence was sufficient to create a factual issue regarding causation, but affirmed the trial court's judgment on the ground that there was no evidence of a breach of duty that had a causal connection with Bates' stroke. We granted Bates' petition for further review on the latter issue.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000).

[2] Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination. *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

ANALYSIS

The only issue before us is whether the record contains sufficient evidence to create a genuine issue of material fact for the jury's determination of breach of duty. The Court of Appeals determined that because Bates failed to verbalize her complaints to Golden, no reasonable person in Golden's position "could be expected to know that Bates was in such discomfort that she was being injured." *Bates v. Design of the Times, Inc.*, 9 Neb. App. 260, 266, 610 N.W.2d 41, 46 (2000). The Court of Appeals found that there was no evidence whatsoever of a breach of duty. The dissent disagreed with the majority's conclusion that a reasonably prudent cosmetologist, as a matter of law, should not be expected to conclude that Bates' actions indicated discomfort. The dissent pointed out that it was DOTT, not Bates, who had the superior knowledge that positioning a person's head in a laid-back posture over the sink could lead to a stroke. The dissent concluded that there existed a genuine issue of material fact as to whether Bates' actions would put a reasonable cosmetologist on notice that a customer was experiencing pain or that an appropriate and reasonable inquiry was called for given the facts of this case.

[3,4] In order to prevail on a negligence action, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). The duty in a negligence case is to conform to the legal standard of reasonable conduct in light of the apparent risk. *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000). In this case, the parties concede that DOTT owed Bates such a duty.

[5] To survive summary judgment, Bates must also put forth evidence of a breach of the duty owed. A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff. *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980).

In opposition to DOTT's motion for summary judgment, Bates introduced exhibit 10, which is the affidavit of Martin Lyal McCaig, the president of the Capitol School of Hairstyling and Esthetics. McCaig was retained as an expert witness on Bates' behalf. The McCaig affidavit states in part as follows:

> 3. One of my opinions is that M'Lissa Golden failed to respond as would be expected of a reasonably prudent cosmetologist to Ms. Bates' indications of discomfort during the rinsing procedure on March 11, 1995, by stopping the procedure or taking other appropriate steps to assure the comfort and safety of Ms. Bates.
>
> 4. Some of the "other appropriate steps" which a reasonably prudent cosmetologist would taken [sic] in such circumstances include the following: asking a supervisor for assistance; placing a towel or pad underneath the customer's neck; rinsing the customer in a face-down position, or; supporting the customer's head with the stylist's hand.
>
> 5. Each of these possibilities would have, in my opinion, resulted in a change in the position of Ms. Bates' head in the rinsing sink to a position which would have been more comfortable for Ms. Bates, and which would not have required the hyperextension of her head and neck in a face-up position in the rinsing sink.

[6] In reviewing an order granting a motion for summary judgment, the question is not how a factual issue is to be

decided, but, instead, whether any real issue of material fact exists. *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999); *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999). We hold that McCaig's affidavit creates a genuine issue of material fact. McCaig's affidavit states that Golden failed to respond as would a reasonably prudent cosmetologist to Bates' indications of discomfort during the rinsing procedure and that a reasonably prudent cosmetologist would have stopped the procedure or taken other appropriate steps to ensure Bates' safety. If McCaig's testimony is to be believed, then the trier of fact could find for Bates. Whether McCaig is to be believed or not is a question for the trier of fact and cannot be decided on summary judgment.

For this reason, we reverse the decision of the Court of Appeals which affirmed the trial court's granting of DOTT's motion for summary judgment and remand the cause to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

VICKI L. KOVAR, APPELLEE AND CROSS-APPELLANT, V. DALE G. HABROCK, APPELLANT AND CROSS-APPELLEE.

622 N.W.2d 688

Filed March 9, 2001. No. S-99-1163.

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. **Statutes: Pleadings: Dismissal and Nonsuit: Words and Phrases.** The language of Neb. Rev. Stat. § 25-217 (Reissue 1995) providing for dismissal of unserved petitions is self-executing and mandatory.
3. **Limitations of Actions: Dismissal and Nonsuit: Jurisdiction.** After dismissal of an action by operation of law pursuant to Neb. Rev. Stat. § 25-217 (Reissue 1995), there is no longer an action pending and the district court has no jurisdiction to make further orders except to formalize the dismissal.
4. **Dismissal and Nonsuit.** If orders are made following a dismissal by operation of law under Neb. Rev. Stat. § 25-217 (Reissue 1995), they are a nullity, as are subsequent pleadings.

5. **Jurisdiction: Appeal and Error.** 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.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded with directions to vacate and dismiss.

Eugene L. Hillman and Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, for appellant.

David S. Houghton and J.P. Sam King, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., and Daniel G. Dolan for appellee.

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

CONNOLLY, J.

The appellant, Dale G. Habrock, argues that the district court did not have jurisdiction to render a default judgment against him. At issue is whether, under Neb. Rev. Stat. § 25-217 (Reissue 1995), the action of the appellee, Vicki L. Kovar, was dismissed by operation of law because Habrock was not served with process within 6 months.

After experiencing difficulties serving Habrock personally, Kovar was granted leave under Neb. Rev. Stat. § 25-517.02 (Reissue 1995) for alternate service. The order provided for service by publication and service on Habrock's probation officer, but Kovar failed to serve the probation officer. After the 6-month period for service of process under § 25-217 had passed, the district court found that the initial service was effective and entered a default judgment against Habrock. We conclude that service was not made within 6 months from the filing of the petition and that the action was dismissed by operation of law. Accordingly, the district court lacked jurisdiction to enter the default judgment. We reverse, and remand with directions to the district court to vacate the order granting the default judgment in favor of Kovar and to enter an order that Kovar's petition stands dismissed under § 25-217.

BACKGROUND

Kovar filed an action seeking damages for emotional distress after her son was killed in an automobile accident on May 4, 1995. A separate wrongful death action was also filed and is not part of this appeal. On October 2, 1998, Kovar filed her petition in the district court. Kovar served process on American Family Insurance Company, Habrock's insurance carrier. A summons was issued to the Douglas County sheriff for personal service upon Habrock, but Habrock had moved, and the sheriff could not locate him. On October 30, 1998, an attorney, on behalf of Habrock, filed a special appearance for the sole purpose of objecting to personal jurisdiction because a proper service of summons had not been made. In an affidavit accompanying the motion, Habrock's attorney stated that Habrock continued to reside in the Omaha, Nebraska, area and that he continued to meet with his probation officer. The district court sustained the special appearance on November 18.

On December 3, 1998, Kovar filed a motion for alternative service, requesting leave to serve by publication and by sending the petition by certified mail to Habrock's probation officer. The court sustained the motion on the same day. On January 15, 1999, an attorney for Kovar filed an affidavit stating that notice of the action was published in The Daily Record of Omaha on January 12 and that a copy of the notice was mailed to Habrock's last known address. But the affidavit did not state that a certified mailing had been made to Habrock's probation officer. The record contains a publisher's affidavit, stating that notice was published on January 12, 19, and 26. The notice stated that a petition had been filed in the district court for Douglas County, but it provided the wrong docket and page numbers. The notice stated that the object and prayer of the petition was for judgment against Habrock in the amount of $100,000 and such general damages that may be proved at the time of trial. The notice required an answer on or before February 25.

On March 22, 1999, Kovar's attorney again made a motion for alternative service. In support of the motion, the attorney submitted an affidavit stating that Habrock continued to reside in the Omaha area and continued to meet with his probation offi-

cer. The motion, however, requested to serve only by publication. The district court sustained the motion the same day, granting leave to serve by publication.

The 6-month time limit for obtaining service under § 25-217 expired on April 2, 1999. On April 30, an attorney for Kovar filed an affidavit stating that notice of the action was first published in The Daily Record of Omaha on April 26, 1999. A publisher's affidavit showed that notice was also published on May 3 and 10, 1999, and that a copy of the notice was mailed to Habrock's last known address. The notice required an answer before June 9.

On May 4, 1999, 4 years had expired since the events alleged in Kovar's petition. On June 9, Habrock filed a motion for summary judgment, contending that the district court lacked subject matter jurisdiction because the action stood dismissed by operation of law. In response, Kovar filed a motion on July 2, requesting that the court (1) reconsider the order sustaining Habrock's special appearance of October 30, 1998, or, in the alternative, allow Kovar to subpoena records of American Family Insurance Company; (2) order that service was properly perfected; and (3) enter a default judgment against Habrock. On September 8, 1999, the district court overruled the motion to reconsider the special appearance but determined that service was properly perfected. In reaching this conclusion, the district court stated that Kovar had the wrong docket and page numbers, along with the wrong filing date in the notice published in January, but that there was sufficient information in the notice to satisfy the requirements of Neb. Rev. Stat. § 25-519 (Cum. Supp. 2000). The district court then found that Habrock had not responded in a timely fashion to Kovar's petition. Thus, the district court overruled Habrock's motion for summary judgment. The district court entered a default judgment against Habrock on the issue of liability and determined that the matter should be set for trial on only the issue of damages.

Habrock filed his appeal from the September 8, 1999, order. Kovar filed a motion for summary dismissal for lack of jurisdiction, arguing there was not a final, appealable order. The Nebraska Court of Appeals denied the motion. Kovar filed a cross-appeal. We moved this case to our docket pursuant to our

power to regulate the docket of this court and the Court of Appeals.

ASSIGNMENTS OF ERROR

Habrock assigns, rephrased, that the district court erred in (1) determining that service of summons was proper and that it had subject matter jurisdiction over the case, (2) overruling his motion for summary judgment, and (3) entering a default judgment in Kovar's favor.

On cross-appeal, Kovar assigns that the district court erred in failing to vacate its order sustaining Habrock's special appearance or, alternatively, failing to grant Kovar leave to subpoena the records of Habrock's insurance carrier.

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. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

ANALYSIS

Habrock contends that because his probation officer was not served as required by the district court's order of December 3, 1998, Kovar's action was dismissed by operation of law on April 2, 1999, 6 months from the date the petition was filed. Thus, Habrock contends that the district court was without jurisdiction to enter a default judgment against him.

Under Neb. Rev. Stat. § 25-505.01 (Reissue 1995), service may be accomplished through personal service, residence service, or by certified mail. When service cannot be accomplished as provided for in § 25-505.01, § 25-517.02 provides:

> Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last-known address, (2) by publication, or (3) by any manner reasonably calculated under the

circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.

[2-4] Under § 25-217, "[a]n action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed." The language of § 25-217 providing for dismissal of unserved petitions is self-executing and mandatory. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000). After dismissal of an action by operation of law pursuant to § 25-217, there is no longer an action pending and the district court has no jurisdiction to make further orders except to formalize the dismissal. *Id.* If orders are made following the dismissal, they are a nullity, as are subsequent pleadings. See *id.*

Kovar failed to follow the district court's order of December 3, 1998, which required service by publication and service on Habrock's probation officer. We note that Kovar specifically requested alternate service in the form of both service by publication and service on the probation officer, a service that would be more likely to accomplish its goal than service by only publication. We further note that the district court's order did not allow for either service by publication or service on the probation officer, but, instead, the order required both. Had Kovar desired a court order for service by publication only, she was free to request only that service, but she did not do so, and the district court did not order service by publication only. Because Kovar failed to follow the district court's order, we determine that the service by publication in January 1999 was untimely, and that thus, Habrock was never served within 6 months from the date the petition was filed.

Kovar argues that the initial service on Habrock's insurance company was sufficient to effect service on Habrock. Thus, Kovar contends that any further attempts at service were unnecessary and that any failures in those attempts were inconsequential. Section 25-505.01, however, does not provide for service on a party's insurance company. Under § 25-517.02, upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the district court may permit service by any manner reasonably cal-

culated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard. Kovar, however, did not make a motion for, nor did the district court permit, service on the insurance company. Accordingly, we conclude that Kovar's argument is without merit.

Kovar also argues that the district court's order of March 22, 1999, allowing service by publication, relates back to the order of December 3, 1998, which allowed service by publication and service on the probation officer. Thus, Kovar contends that the first service by publication became sufficient when the district court entered an order allowing for an additional service by publication only. We find this argument unpersuasive.

Kovar's second motion for alternative service did not seek an order from the court to amend the first motion for service by publication in order to accomplish service under the publication in January 1999. See, generally, *Goldie v. Stewart*, 76 Neb. 168, 107 N.W. 245 (1906). Kovar also did not file a new petition after the 6-month timeframe for effecting service of process had passed. See, generally, *Vopalka v. Abraham, supra*; *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999). Instead, Kovar sought to perform only a second service by publication, something she requested within the 6-month timeframe under § 25-217, but failed to undertake until after that period had passed.

We conclude that as of April 2, 1999, service was not effected and that the action stood dismissed by operation of law. At that time, the district court lacked jurisdiction over the action and any further orders were null and void, including the order entering a default judgment against Habrock. Although the district court found in September 1999 that there was sufficient information in the notice of publication in January 1999 to satisfy the requirements of § 25-519, this finding occurred in an order after the date on which the action stood dismissed by operation of law and when the court lacked jurisdiction. Thus, the entirety of that order is a nullity. See *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000).

[5] 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. *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001); *Ferguson v. Union Pacific RR. Co.*, 258 Neb. 78, 601 N.W.2d 907 (1999). Accordingly, we do not have jurisdiction to address Kovar's assignments on cross-appeal that the district court erred in failing to vacate its order sustaining Habrock's special appearance or, alternatively, failing to grant Kovar leave to subpoena the records of Habrock's insurance carrier. The district court's order entering a default judgment against Habrock is null and void. We therefore reverse, and remand with directions to the district court to vacate the order granting a default judgment in favor of Kovar and to enter an order that Kovar's petition stands dismissed under § 25-217.

REVERSED AND REMANDED WITH DIRECTIONS TO VACATE AND DISMISS.

McCORMACK, J., not participating.

PAMELA JEAN RIGGS, APPELLANT, V.
GARY EUGENE RIGGS, APPELLEE.

622 N.W.2d 861

Filed March 9, 2001. No. S-99-1374.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent 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 refrain from acting, but 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. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Child Support: Rules of the Supreme Court: Taxes: Words and Phrases.** For purposes of paragraph D of the Nebraska Child Support Guidelines, a "means-tested public assistance benefit" is a benefit that includes a payment in money, or by assistance in kind, to, or for the benefit of, a person where (1) the eligibility for the benefit or (2) the amount of the benefit is determined on the basis of the income or resources of the recipient, such that the benefit decreases as the recipient's income increases.

5. ___: ___: ___: ___. The earned income credit under the federal Internal Revenue Code is a means-tested public assistance benefit under paragraph D of the Nebraska Child Support Guidelines.
6. **Child Support: Rules of the Supreme Court: Taxes.** Because paragraph N of the Nebraska Child Support Guidelines provides treatment for the value of the federal income tax credit for child care, the child-care credit should not again be considered in the calculation of income under paragraph D of the guidelines.
7. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
8. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child.
9. **Modification of Decree: Child Support.** In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.
10. **Modification of Decree: Child Support: Time.** The rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
11. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed as modified.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Tracy A. Follmer, of Keating, O'Gara, Davis & Nedved, P.C., for appellee.

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

GERRARD, J.

The primary issue in this appeal is whether the earned income credit (EIC) under the federal Internal Revenue Code is a "means-tested public assistance benefit" for purposes of the Nebraska Child Support Guidelines (Guidelines), paragraph D, and therefore to be excluded as income in the calculation of child support. For the reasons stated below, we conclude that

the EIC is a "means-tested public assistance benefit" and should not be considered as income for purposes of calculating child support.

FACTS

Pamela Jean Riggs (mother) and Gary Eugene Riggs (father) were divorced pursuant to a decree entered on August 15, 1997. In the original decree, the father was ordered to pay $959.61 per month in child support for the couple's two minor children. On March 26, 1999, the mother filed a petition for modification seeking an increase in child support based upon an increase in the father's income.

The modification action came on for trial on July 28, 1999. Evidence adduced at the modification hearing revealed that the father's income had increased from $56,000 annually at the time the parties were divorced in 1997 to $72,500 annually at the time of the modification hearing.

At the hearing, the mother and the father offered conflicting child support calculations. The main conflict relevant to this appeal was that the calculations differed with respect to the treatment of state and federal tax deductions as calculated under paragraph E of the Guidelines. The mother's proffered child support calculation worksheet deducted amounts for federal and state taxes from her gross income. The father submitted a child support calculation worksheet which deducted no federal or state taxes from the mother's gross income.

The father, who is a certified public accountant, testified that the mother is not required to have federal taxes withheld from her paycheck each month due to the mother's qualification for an EIC. The father testified that the mother could arrange it so that she would receive a small cash credit from the Internal Revenue Service (IRS) along with each paycheck due to her qualification for an EIC. The father claimed that allowing the mother to deduct any state or federal income tax from the mother's gross income in calculating child support would falsely represent her federal and state tax liability as she is refunded the full amounts she pays in such taxes each year. Further, the father asserted, not only is the mother refunded the amount of federal income tax she has withheld from her pay-

check, the mother receives a credit in the form of cash from the IRS due to her low income level and qualification for the EIC on her federal income tax return.

In its order dated September 13, 1999, the district court found that there was a material change in circumstances thereby warranting a modification in child support. The district court apparently agreed with the father's calculation of child support as it included the father's proffered child support calculation worksheet as an attachment to the court's order of modification. The court did not deduct state or federal taxes from the mother's income in calculating her net income, and the court's order does not state why there was no deduction for state and federal taxes. The district court determined that the father's child support obligation was to increase to $1,045.32 per month for the parties' two minor children and $716 per month when one minor child remained. The increase was to be effective as of August 1, 1999. The mother appealed.

ASSIGNMENTS OF ERROR

The mother assigns that the district court erred in (1) failing to include her federal withholding tax liability as a deduction from income when calculating child support, (2) failing to make the increase in child support retroactive to the date of the mother's petition for modification, and (3) failing to award the mother reasonable attorney fees.

STANDARD OF REVIEW

[1,2] Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000).

[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Jones v. Paulson, ante* p. 327, 622 N.W.2d 857 (2001).

ANALYSIS

EARNED INCOME CREDIT

The primary question that the mother's first assignment of error presents is whether the EIC under the Internal Revenue Code is a "means-tested public assistance benefit" for purposes of paragraph D of the Guidelines and therefore should be excluded from the calculation of income for child support purposes.

Paragraph D of the Guidelines defines the total monthly income that each party shall list on the guideline worksheet, in relevant part, as follows: "D. Total Monthly Income. This is income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages. All income should be annualized and divided by 12."

The mother's income portion of child support guideline worksheet 1 was thus set forth:

		Mother	Father
1. Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)		2,340.00	6,042.00
2. Deductions			
a. Taxes	Federal	202.88	1,184.77
	State	45.26	306.13
b. FICA		179.01	462.21
c. Health insurance			236.00
d. Mandatory retirement			
e. Child support previously ordered for other children			
f. Total deductions		427.15	2,189.11
3. Monthly net income		1,912.85	3,852.89

The father's income portion of child support guideline worksheet 1, on the other hand, stated:

		Mother	Father
1. Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)		2,390.00	6,042.00
2. Deductions			
a. Taxes	Federal		1,333.70
	State		319.30
b. FICA		182.83	462.21
c. Health insurance			236.17
d. Mandatory retirement			
e. Child support previously ordered for other children			
f. Total deductions			
3. Monthly net income		2,207.17	3,690.62

The mother asserts that the EIC is a means-tested public assistance benefit that should be excluded from the calculation of her income for purposes of child support under paragraph D of the Guidelines. Absent the EIC, the mother claims that she would have paid state and federal taxes in the amount deducted from her income as calculated on the mother's worksheet 1. Therefore, she argues that the amount of her tax liability, before the EIC is applied, should be deducted from her income because the amount of tax liability which is satisfied by the EIC is not to be excluded from her income if the credit is, in fact, a means-tested public assistance benefit.

The father argues, as he did in the district court, that the mother should not be allowed to deduct state and federal income tax from her gross income on worksheet 1. The father claims that such a deduction would falsely represent the mother's federal and state tax liability as she is refunded the full amount she pays in such taxes, plus some credit in the form of cash from the IRS due to her low income level and qualification for the EIC on her federal income tax return.

We must, therefore, first address whether the EIC is a "means-tested public assistance benefit" for purposes of paragraph D of the Guidelines. The Guidelines do not define the term "means-tested public assistance benefit." However, there is

a plethora of statutory and regulatory law that provides guidance to us in determining first the meaning of "public assistance benefit" and then the descriptive term "means-tested."

In federal law, the legislative history of the Welfare Reform Act of 1997 reveals that "public benefit" was originally defined as one that includes " 'cash, medical, housing, and food assistance and social services.' " *Aleman v. Glickman*, 217 F.3d 1191, 1194 n.2 (9th Cir. 2000) (quoting H.R. Rep. No. 104-725 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649). Also, Congress has enacted legislation which restricts aliens' access to welfare and public benefits. In so doing, Congress has defined "federal public benefit" to mean the following:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

8 U.S.C. § 1611(c)(1) (Supp. V 1999).

One jurisdiction, the District of Columbia, defines "public assistance" as " 'payment in or by money, medical care, remedial care, goods or services to, or for the benefit of, needy persons.' " *Committee of Blind Vendors v. District of Columbia*, 28 F.3d 130, 132 n.2 (D.C. Cir. 1994) (quoting D.C. Code Ann. § 3-201.1(6) (2000)). Another state, Kentucky, defines public assistance as "money grants, assistance in kind, or services to or for the benefit of needy aged, needy blind, needy permanently and totally disabled persons, needy children, or persons with whom a needy child lives or a family containing a combination of these categories." Ky. Rev. Stat. Ann. § 205.010(3) (Lexis 1998). These sensible definitions guide us to our determination that for purposes of paragraph D of the Guidelines, a "public assistance benefit" is one that includes a payment in money, or by assistance in kind, to, or for the benefit of, a needy person.

Similarly, in determining whether such a benefit is "means-tested," we find the U.S. Department of Health and Human

Services interpretation of the phrase "federal means-tested public benefit" to be instructive on this point: "a program is considered 'means-tested' if eligibility for the program's benefits, or the amount of such benefits, or both, are determined on the basis of income or resources of the eligibility unit seeking the benefit." Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45,256, 45,257 (August 26, 1997). Put more succinctly, "[g]reater earnings yield less assistance. This is what it means to say that a program is means-tested . . . ." *Vaughn v. Sullivan*, 83 F.3d 907, 908 (7th Cir. 1996). With this in mind, we conclude that a benefit is "means-tested" if (1) eligibility for the benefit or (2) the amount of the benefit is determined on the basis of the income or resources of the parent, such that the benefit decreases as the parent's income increases.

[4,5] Therefore, for purposes of paragraph D of the Guidelines, we hold that a "means-tested public assistance benefit" is a benefit that includes a payment in money, or by assistance in kind, to, or for the benefit of, a person where (1) the eligibility for the benefit or (2) the amount of the benefit is determined on the basis of the income or resources of the recipient, such that the benefit decreases as the recipient's income increases. Applying this holding to the instant case, we determine that the EIC is a means-tested public assistance benefit under paragraph D of the Guidelines.

As noted above, the mother qualifies for the EIC on her federal tax return. "The earned-income credit was enacted to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income (welfare payments are not similarly taxed) . . . and to provide relief for low-income families hurt by rising food and energy prices." *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 864, 106 S. Ct. 1600, 89 L. Ed. 2d 855 (1986). Thus, though it is given effect through the tax laws, the earned income credit is in substance an item of social welfare legislation, intended to provide low income families with " 'the very means by which to live.' " *In re Searles*, 445 F. Supp. 749, 753 (D. Conn. 1978) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)).

In discussing the nature of the EIC, it is constructive to note that the EIC is clearly distinguishable from a tax refund. While a tax refund returns to the taxpayer any overpayment of taxes withheld from wages, the earned income credit is a grant unrelated to the amount of taxes owed. *In re Brown*, 186 B.R. 224 (Bankr. W.D. Ky. 1995). "The earned income credit is given effect through a refund, but it is not a refund of taxes previously paid." *In re Searles*, 445 F. Supp. at 752. If the EIC exceeds a person's tax liability, he or she receives the excess in the form of cash from the IRS as if it were an overpayment of taxes in that amount. This is known as a refundable credit. See, *Sorenson v. Secretary of Treasury, supra*; *Peterson v. H & R Block Tax Services, Inc.*, 22 F. Supp. 2d 795 (N.D. Ill. 1998).

It is clear from its nature that the EIC fits the definition of a public assistance benefit. The credit is given regardless of the amount of tax owed and is a grant of money which is applied to a taxpayer's tax liability, and any excess will be given directly to the taxpayer due to the refundable nature of the credit. See *Sorenson v. Secretary of Treasury, supra.*

It is equally clear that the EIC is means-tested. The amount of the credit decreases as the amount of the taxpayer's earnings increase. See I.R.C. § 32 (1994 & Supp. III 1998). See, also, *Sorenson v. Secretary of Treasury, supra.* Further, we find it significant that the EIC is given to the taxpayer as a refundable credit. If it were a nonrefundable credit, then a taxpayer who owes little or no taxes would be eligible for only that portion of the credit which would reduce the taxpayer's tax liability to zero. Because of the EIC's nature, if the taxpayer's tax liability is zero, he or she would nonetheless receive the credit in the form of cash from the IRS.

Therefore, we conclude that the district court abused its discretion when it did not treat the mother's EIC as a "means-tested public assistance benefit" for purposes of paragraph D of the Guidelines. Before we proceed to calculate the child support in the instant case, however, we must address one other matter raised by the mother in this appeal.

Separate and apart from the EIC, the mother makes a cursory claim that her federal income tax credit for child care is a means-tested public assistance benefit that also should be

excluded from the calculation of her income for purposes of child support under paragraph D of the Guidelines. Tax credit for child care, however, is treated differently than the EIC and is specifically considered in paragraph N of the Guidelines, to wit:

> Child-care expenses are not specifically computed into the guidelines amount and are to be considered independently of any amount computed by use of these guidelines. Child-care expenses for the child for whom the support is being set, which are due to employment of either parent or to allow the parent to obtain training or education necessary to obtain a job or enhance earning potential, shall be divided between the parents in proportion to their parental contribution (worksheet 1, line 6) and shall be added to the basic support obligation computed under these guidelines. *The value of the federal income tax credit for child care may be subtracted from actual costs to arrive at a figure for net child-care expenses.*

(Emphasis supplied.)

[6] We determine that, because paragraph N provides treatment for the value of the federal income tax credit for child care, the child-care credit should not again be considered in the calculation of income under paragraph D of the Guidelines. In the case at bar, there is evidence that the father pays a portion of the child-care expenses pursuant to the couple's property settlement agreement, which is not in the record. Under paragraph N, the child-care credit should have been taken into account when calculating the net amount the father owes for child-care expenses. The record, however, does not show whether the child-care credit was considered in determining the parties' child-care obligations. Without a complete record, we are unable on de novo review to determine whether the child-care credit was properly considered when figuring the net child-care liabilities of each party under paragraph N. Nonetheless, because of paragraph N, determining whether the child-care credit is a means-tested public assistance benefit for purposes of paragraph D of the Guidelines is not necessary as the credit's benefit to the parties is already taken into account by the Guidelines.

Having concluded that the district court erred when it did not treat the mother's EIC as a "means-tested public assistance ben-

efit" for purposes of paragraph D of the Guidelines, we must now calculate the parties' child support obligations in our de novo review of the record. In the instant case, the mother's tax liability is satisfied, independent of any taxes she has withheld from her paycheck, by operation of the EIC for which she qualifies. Although, on her tax return, the mother's tax liability is reduced or eliminated by virtue of the EIC, such reduction of her tax liability is not to be included in the calculation of child support because such reduction is attributable only to the EIC, which is a means-tested public assistance benefit. Thus, in using worksheet 1 from the Guidelines, we include the mother's federal tax liability, prior to the deduction of the EIC, on the line designated for the federal tax deduction (see worksheet below). The mother's "[s]tandard deductions applicable to the number of exemptions provided by law will be used to establish the amount of federal and state income taxes." See Guidelines, paragraph E1. Thus, in utilizing the standard deductions provided under the state and federal tax codes in effect on the date of the trial, we find, in our de novo review, that worksheet 1 is properly computed as follows:

		Mother	Father
		Combined	
1. Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)		2,340.00	6,042.00
2. Deductions			
a. Taxes	Federal	264.13	1,062.30
	State	68.41	296.82
b. FICA		179.01	462.21
c. Health insurance			236.00
d. Mandatory retirement			
e. Child support previously ordered for other children			
f. Total deductions		511.55	2,057.33
3. Monthly net income		1,828.45	3,984.67
4. Combined monthly net income		5,813.12	
5. Combined annual net income		69,757.44	

6. Percent contribution of each parent	31.3%	68.7%
7. Monthly support from table 1	1,673.84	
1,672.00 1,679.00		
8. Each parent's share	526.49	1,147.35

We, therefore, conclude that the father's child support obligation is to increase to $1,147.35 per month for the parties' two minor children and, utilizing worksheet 4, to $785.75 per month when one child remains in the household.

Retroactive Modification

The mother also claims that the father's increased child support obligation should be instituted as of the date that she filed for the modification, rather than on August 1, 1999, the first day of the month after the modification trial. The sometimes stated, and less often applied, rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself. See *Reinsch v. Reinsch*, 8 Neb. App. 852, 602 N.W.2d 261 (1999), *aff'd* 259 Neb. 564, 611 N.W.2d 86 (2000) (citing *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991)). Depending on the equities of the situation, the modification of a child support order has been applied retroactively to the filing date of the application for modification. See, *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998); *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

The Nebraska Court of Appeals has long followed the above line of cases in determining whether the granting or failure to grant retroactive modification was proper depending on the equities of each case. See, *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000) (finding no abuse of discretion when district court granted retroactive modification to date 6 months after petition was filed and 7 months before entry of order); *Reinsch v. Reinsch, supra* (holding that increase should be retroactive to date of filing when order of modification was almost 1 year after filing for modification so that penalization of child and custodial parent can be avoided); *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999) (finding abuse of discretion in awarding retroactive modification in absence of bad faith when parent does not have ability to pay retroactive sup-

port and has met current obligations); *Dean v. Dean*, 4 Neb. App. 914, 552 N.W.2d 310 (1996) (holding that modification should have been made retroactive to first month after date of filing for modification); *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995) (holding that increase in support should have been made retroactive to date of filing for modification); *State ex rel. Crook v. Mendoza*, 1 Neb. App. 180, 491 N.W.2d 62 (1992) (holding that modification should be made retroactive to date that original ruling on modification was made by district court to avoid penalizing children and custodial parent for delay present in appeal process). But see *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995) (upholding district court's refusal to make *reduction* in child support retroactive to date of filing for modification).

[7-10] The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. See Guidelines, paragraph A. See, also, *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000). We also recognize that the paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). The child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. See *Reinsch v. Reinsch, supra*. Therefore, the rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.

We emphasize that the initial determination regarding the retroactive application of the modification order is entrusted to the discretion of the trial court, and the decision of the trial court will be affirmed absent an abuse of discretion. See *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000). There are circumstances, for example, when a noncustodial parent may not have the ability to pay retroactive support and meet current obligations. However, the general rule of applying modification of child support orders retroactively to the first day of the month following the filing date of the application for modification is

intended to clarify the law and to more accurately reflect the practice regarding the effective date of child support modification orders.

In the instant case, the mother filed her petition seeking a modification of the decree and an increase of child support on March 26, 1999. On April 22, the mother sent a request for production of documents to the father's first attorney. The father's first attorney did not forward the mother's request for documents to the father until May 28. Due to the lengthy delay in the father's response, on June 21, the mother filed a motion to compel the production of the requested documents, and the motion was withdrawn on July 9 at the request of the mother's attorney. The trial in this matter occurred on July 28, and the district court entered its order of modification on September 13.

We determine that the equities involved in this case require that the modified support obligation become effective as of April 1, 1999, the first day of the month following the date of the filing of the mother's petition for modification. The children in this case should not be penalized by the delay inherent in the legal process, nor should the noncustodial parent gratuitously benefit from the delay. The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. See Guidelines, paragraph A. See, also, *State v. Porter, supra*. Given that the father has been steadily employed as a certified public accountant since at least the time of the parties' divorce in 1997 and is earning a substantial salary, we find that the increase in his child support obligation should be retroactive to April 1, 1999.

Attorney Fees

[11] The mother's final assignment of error is that the district court abused its discretion in not awarding attorney fees in the instant action. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. See, *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999); *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998).

Even though the mother prevailed in obtaining an increase in child support, we note in our de novo review of the record that the road to the modification hearing was not entirely smooth on the part of either party. In 1997, the district court ordered the mother to execute and deliver appropriate forms to the father each year so that he could claim the child dependency exemptions for their two children. On June 1, 1999, the father filed a motion for order to show cause due to the mother's failure to sign and deliver the appropriate forms for the tax year 1998. A hearing was held on July 15, and on July 16, the district court found that the mother had willfully and continuously violated the order of the court by not signing the appropriate forms. The district court determined that the mother could purge herself of the contempt by signing the forms by the date of the modification trial on July 28. The mother signed the forms prior to July 28.

The district court heard and observed both parties during the course of the modification proceedings, and we cannot say, based on this record, that the district court abused its discretion in not awarding attorney fees to the mother in the instant case.

CONCLUSION

For the reasons stated above, we conclude that the district court abused its discretion (1) in failing to include the mother's tax liability as a deduction from income when calculating child support and (2) in not making the child support modification retroactive to April 1, 1999. We find no abuse of discretion in not awarding attorney fees to the mother. Therefore, we modify the father's child support obligation, effective April 1, 1999, to $1,147.35 per month for the parties' two minor children and $785.75 per month when one child remains in the household. The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

HENDRY, C.J., not participating.

ELLEN TERESA HARTMAN, APPELLANT, v. RODNEY R. HARTMAN, APPELLEE.

622 N.W.2d 871

Filed March 9, 2001. No. S-99-1405.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Modification of Decree: Attorney Fees: Appeal and Error.** A district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.
5. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998).
6. ___: ___. The Nebraska Child Support Guidelines permit deviations under specified circumstances, including circumstances in which application of the guidelines in an individual case would be unjust or inappropriate.
7. **Child Support: Social Security.** Social Security dependency benefits received on behalf of a child as a result of a custodial parent's disability should be included in the monthly net income of the parent whose disability resulted in the payment of dependency benefits.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with directions.

George G. Vinton for appellant.

R. Bradley Dawson, of Clough, Dawson, Piccolo & Jones, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this modification of a divorce decree case, Ellen Teresa Hartman (Terri) appeals the order of the district court for Lincoln County requiring her former husband, Rodney R. Hartman, to pay $282 per month in child support for their daughter, Jacqueline. Terri contends that the amount of child support should be increased because Rodney should not have received credit for Social Security dependency benefits paid to Terri on behalf of Jacqueline as a result of Terri's disability. In other words, Terri asserts that the benefits should have been treated as Terri's income. Terri also contends that the district court erred in failing to require Rodney to pay medical bills incurred by Jacqueline while she was temporarily in Rodney's custody and in failing to award Terri attorney fees. We affirm in part and reverse in part the order and remand the cause to the district court with directions to enter an order requiring Rodney to pay $467 per month in child support.

STATEMENT OF FACTS

During their marriage, Terri and Rodney had two children, Robert and Jacqueline. Pursuant to a May 29, 1997, decree of dissolution, Terri was awarded custody of Jacqueline and Rodney was awarded custody of Robert. A split custody child support calculation was prepared, and Rodney was ordered to pay child support to Terri in the amount of $309 per month.

On August 4, 1998, Rodney filed an application for change of custody requesting that he be awarded custody of Jacqueline. Rodney asserted the existence of a material and substantial change of circumstances, including the onset of Terri's disability. The district court entered an order that same day granting Rodney temporary custody of Jacqueline and suspending his child support obligation.

On May 24, 1999, Terri filed a motion to reinstate the original custody order and to reinstate and modify child support consistent with the Nebraska Child Support Guidelines (Guidelines). Terri asserted that child support would need to be recalculated because Robert would be turning 19 in July.

On July 1, 1999, Rodney filed a motion to dismiss his application for change of custody. The motion was granted July 2, and Jacqueline returned to live with Terri.

On August 9, 1999, Terri filed an amended motion to reinstate the original child custody and support order and requested that the court order Rodney to pay for medical expenses incurred by Jacqueline for the period she was in Rodney's custody prior to July 2. In her motion, Terri also sought an order directing Rodney to pay child support to Terri of $309 pursuant to the original order for July 1999 and to modify the amount of child support upward starting on August 1.

A hearing was held on Terri's motion October 4, 1999, at which hearing Terri established that she was receiving $655 per month in Social Security benefits as a result of her disability. In addition, Terri was receiving $327 per month in Social Security dependency benefits on behalf of Jacqueline due to Terri's disability.

On October 19, 1999, the district court ordered Rodney to pay child support in the amount of $220 per month as of July 1, 1999. Throughout its calculation of child support, the district court declined to treat the dependency benefits received on behalf of Jacqueline as income attributable solely to Terri. The particular treatment of the benefits in the district court's calculation is discussed in more detail in the "Analysis" section below.

Terri filed a motion for new trial on October 26, 1999, asserting (1) that Rodney's net monthly income had not been properly annualized and (2) that the Social Security dependency benefits received on behalf of Jacqueline should have been treated as Terri's income. The district court granted the motion only to the extent that child support should be recalculated using the properly annualized net monthly income of $2,002 per month for Rodney. The district court entered an order on November 30 increasing the amount of Rodney's child support obligation from $220 to $282; however, the district court did not change its method of accounting for the Social Security dependency benefits. Terri appeals the district court's order.

ASSIGNMENTS OF ERROR

Terri asserts that the district court erred in (1) failing to treat Social Security dependency benefits paid to Terri on behalf of Jacqueline as a result of Terri's disability as part of Terri's income, (2) failing to require Rodney to pay medical bills incurred by Jacqueline while she was in his custody pursuant to a temporary custody order, and (3) failing to award Terri attorney fees.

STANDARD OF REVIEW

[1] Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000).

[2] Whether Social Security dependency benefits received on behalf of a child are considered income of the parent whose disability resulted in the payment of benefits is a question of law. To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999).

[3] A district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999).

ANALYSIS

Social Security Dependency Benefits.

[4] A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000). Neither party disputes on appeal that a modification was appropriate.

Terri first asserts that the district court erred in failing to treat the Social Security dependency benefits Terri received on behalf of Jacqueline because of Terri's disability as part of Terri's income. In calculating Rodney's child support obligation pur-

suant to the Guidelines, the district court treated the benefits in the following manner:

(1) *Percentage of Contribution.* The court did not include the benefits in either Terri's or Rodney's net monthly income when calculating the percentage of contribution for each parent.

(2) *Combined Monthly Net Income.* The court added the benefits to Terri's and Rodney's monthly net incomes in order to arrive at the combined monthly net income.

(3) *Monthly Support.* The court used the combined monthly net income, which included the benefits, to determine monthly support from table 1 of the Guidelines.

(4) *"Reduced" Monthly Support.* The court subtracted the benefits from the monthly support figure found in table 1.

(5) *Each Parent's Monthly Share.* The court multiplied the "reduced" monthly support by each parent's percentage of contribution to arrive at each parent's monthly share, with Rodney's child support obligation's being his monthly share.

The district court patterned its calculation after the approach used by the Nebraska Court of Appeals in *Ward v. Ward*, 7 Neb. App. 821, 585 N.W.2d 551 (1998), which involved, inter alia, Social Security benefits received on behalf of a child by the custodial father based on the earnings of a deceased parent.

Terri urges that instead of the approach detailed above that was used by the district court, the dependency benefits received on behalf of Jacqueline should have been treated as part of Terri's net monthly income and that the monthly support figure should not have been reduced by the amount of the benefits. The result of such treatment, Terri asserts, would be to increase Rodney's child support obligation from $282 to $471 per month. Under the treatment urged by Terri, Rodney's monthly net income is $2,002 and Terri's monthly net income, including the $327 of Social Security dependency benefits received on behalf of Jacqueline, is $982. Using the combined monthly net income of $2,984, Terri found total monthly support to be $703. Multiplying the total monthly support of $703 by Rodney's contribution of 67 percent, Terri asserts that Rodney's monthly child support obligation should be $471 per month. We agree that the appropriate treatment of the Social Security dependency benefits is that urged by Terri.

The district court based its calculation on the approach used by the Court of Appeals in *Ward v. Ward, supra*. However, *Ward* and the instant case are distinguishable. The parties in *Ward* were the child's adoptive parents, and the benefits received on behalf of the child were based on the earnings of a deceased parent who obviously was not a party to the case. In the present case, the benefits received on behalf of Jacqueline are based on Terri's disability and her prior earnings. The present case and *Ward* further differ. In *Ward*, the benefits could not be directly attributed as income to one or the other of the parties because the benefits were based on a deceased parent's earnings, whereas, in the instant case, the dependency benefits are in lieu of a party's income.

[5,6] The approach taken by the Court of Appeals in *Ward* was a deviation from the Guidelines. In general, child support payments should be set according to the Guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 1998). *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000). The Guidelines permit deviations under specified circumstances, including circumstances in which application of the Guidelines in an individual case would be unjust or inappropriate. *Id.* The Court of Appeals found in *Ward* that a deviation from the Guidelines was justified because while the benefits received on behalf of the child were part of the total family income, they were not directly attributable to one of the parents who were parties to the proceedings and that strict application of the Guidelines would not result in a fair and equitable child support order.

By contrast to *Ward*, the Social Security dependency benefits in the present case are directly attributable to Terri as they reflect her prior earnings and are the result of her current disability. It would not be unfair or inequitable to consider the benefits as part of Terri's income in calculating support obligations, and a deviation from the Guidelines is therefore not indicated.

Terri asserts that the dependency benefits received on behalf of Jacqueline should be included as part of Terri's monthly income pursuant to the Guidelines. Paragraph D of the Guidelines requires that total monthly income should include, with certain exceptions, income derived from all sources. The Guidelines contemplate that income for purposes of child sup-

port may differ from taxable income and do not prevent consideration of tax-exempt benefits in determining the amount of a parent's income derived from all sources. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998).

[7] The approach Terri proposes is consistent with cases in which we have held that when a noncustodial parent becomes disabled after a child support order has been issued, Social Security dependency benefits paid on behalf of the child based on the noncustodial parent's disability can be applied to satisfy the noncustodial parent's child support obligation. See *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999) (Social Security payments made to child on account of parent's disability should be considered as credits toward noncustodial parent's court-ordered support obligation in absence of circumstances making allowance of such credit inequitable); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990); *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974). See, also, *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993) (Social Security benefits on behalf of child based on earnings of deceased father applied to deceased father's child support liability). In those cases, the reasoning was that such benefit payments were the result of the parent's disability and were a substitute for the parent's loss of earning power and his or her obligation to pay for the support of his or her dependents. See *Gress v. Gress, supra*. This same reasoning leads to the conclusion that Social Security dependency benefits received on behalf of a child as a result of a custodial parent's disability should be included in the monthly net income of the parent whose disability resulted in the payment of dependency benefits rather than as a credit to the nondisabled parent, as was done in this case.

We note that paragraph D of the Guidelines requires the inclusion of income from all sources except, inter alia, "all means-tested public assistance benefits." We have recently defined a "means-tested public assistance benefit" to mean

> a benefit that includes a payment in money, or by assistance in kind, to, or for the benefit of, a person where (1) the eligibility for the benefit or (2) the amount of the benefit is determined on the basis of the income or resources of the recipient, such that the benefit decreases as the recipient's income increases.

Riggs v. Riggs, ante p. 344, 351, 622 N.W.2d 861, 867 (2001). The Social Security dependency benefits in this case are not "means-tested public assistance benefits" within the meaning of the Guidelines and are, therefore, subject to inclusion as "income . . . from all sources" under paragraph D.

The Social Security Administration has stated that as to the programs it administers, for purposes of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, only "supplemental security income benefits" are " 'Federal means-tested public benefits.' " 62 Fed. Reg. 45,284 (August 26, 1997). At trial in the instant case, Terri offered documentary evidence from the Social Security Administration describing her disability benefits. The text of such evidence makes a distinction between the Social Security disability insurance program, which is based on prior earnings of the recipient, and the supplemental security income program, which is based on financial need of the recipient. Terri's evidence establishes that the benefits received on behalf of Jacqueline are part of the disability insurance program rather than the supplemental security income program. The benefits in the present case are not "means-tested public assistance benefits" that would be excluded from income pursuant to the Guidelines.

We conclude that the circumstances of the instant case do not justify the sort of deviation from the Guidelines that was taken in *Ward v. Ward*, 7 Neb. App. 821, 585 N.W.2d 551 (1998), and that the district court therefore erred in the manner in which it calculated Rodney's child support obligation. We further conclude that the Social Security dependency benefits received on behalf of Jacqueline because of Terri's disability should have been included in Terri's income in calculating Rodney's child support obligation. Treating the benefits as Terri's income, we find the combined monthly income to be $2,984. Under table 1 of the Guidelines, when combined monthly income is $2,984, the monthly support for one child is $697. Multiplying $697 by Rodney's contribution of 67 percent results in a monthly child support obligation for Rodney of $467. We therefore reverse the portion of the district court's order modifying the amount of child support to be paid by Rodney and, consistent with the calculation recited above, remand the cause to the district court

with directions to enter an order requiring Rodney to pay $467 per month in child support retroactive to August 1, 1999, the first day of the month after Robert turned 19.

Payment of Medical Bills.

Terri next asserts that the district court erred in failing to require Rodney to pay for medical bills incurred by Jacqueline while she was in his custody pursuant to the temporary custody order. In the original decree of dissolution entered May 29, 1997, with respect to medical expenses, the district court ordered that Rodney maintain health insurance for the benefit of both children and that he pay 79 percent of all unreimbursed medical, dental, optometric, and ophthalmic expenses incurred on behalf of Jacqueline. In its October 19, 1999, order in the current proceeding, the district court ordered that "no action shall be taken at this time regarding any delinquent medical bills for the minor child" and provided that "[a]ll other previous orders of the court not specifically modified herein shall remain in full force and effect." Terri did not address the issue of the district court's treatment of medical bills in her motion for new trial.

The effect of the district court's October 19, 1999, order was to maintain the provision of the original dissolution decree that Rodney was responsible for 79 percent of all medical expenses incurred on behalf of Jacqueline, including those she incurred while in his temporary custody. We find no abuse of discretion in the district court's disposition of this issue and therefore conclude that Terri's second assignment of error is without merit.

Attorney Fees.

Terri further assigns error to the district court's failure to award her attorney fees. In a proceeding to modify a dissolution decree, the decision to award attorney fees rests within the trial court's discretion. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). A district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999). We do not find that the trial court abused its discretion in failing to award attorney fees to Terri and therefore conclude that Terri's final assignment of error is without merit.

CONCLUSION

We conclude that the district court abused its discretion in deviating from the Guidelines and that the Social Security dependency benefits received on behalf of Jacqueline because of Terri's disability should have been treated as part of Terri's income in calculating Rodney's child support obligation. We therefore reverse the district court's order modifying child support and remand the cause to the district court to enter an order requiring Rodney to pay $467 per month in child support retroactive to August 1, 1999. We further conclude that Terri's assignments of error regarding the payment of medical bills and the awarding of attorney fees at the trial level are without merit and therefore affirm those portions of the district court's order.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
TROY ANTHONY HESS, APPELLANT.

622 N.W.2d 891

Filed March 9, 2001. No. S-00-252.

1. **Actions: Judicial Notice: Records.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
2. **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.
3. ___: ___: ___. The appellant in a postconviction proceeding has the burden of alleging and proving the claimed error is prejudicial.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Postconviction.** For relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the claimed infringement must be constitutional in dimension.
6. **Due Process.** Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due?

7. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
8. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
9. **Constitutional Law: Criminal Law: Convictions: Appeal and Error.** The U.S. Constitution does not guarantee the right to appeal a criminal conviction.
10. **Due Process: Appeal and Error.** Where an appeal is provided as a matter of right, the procedures used in deciding appeals must comport with the requirements of the Due Process Clause.
11. **Constitutional Law: Criminal Law: Appeal and Error.** Neb. Const. art. I, § 23, guarantees the right to appeal in all felony cases.
12. **Constitutional Law: Statutes: Jurisdiction: Time: Appeal and Error.** The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal.
13. **Criminal Law: Judgments: Appeal and Error.** For purposes of appeal in a criminal case, the judgment occurs when the verdict and sentence are rendered by the court.
14. **Criminal Law: Judgments: Final Orders: Appeal and Error.** A finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed.
15. **Judgments: Jurisdiction: Notice: Appeal and Error.** A notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered, is effective to confer jurisdiction on the appellate court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered in accordance with the decision which was announced and to which the notice of appeal relates.
16. **Notice: Time: Appeal and Error.** The date of receipt by the clerk's office, and not the date of mailing, is the relevant date for determining the timeliness of a notice of appeal.
17. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed.
18. **Records: Time: Evidence: Presumptions.** The entry of filing by the clerk is the best evidence of the date of filing and is presumed to be correct until the contrary is shown.
19. **Records: Time: Presumptions: Appeal and Error.** An appellate court must presume, in the absence of affirmative evidence to the contrary, that the clerk performed his or her duty and endorsed the notice of appeal with the date it was in fact presented to him or her for filing.
20. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

21. **Effectiveness of Counsel: Proof.** The two prongs of the test for ineffective assistance of counsel claims, deficient performance and prejudice, may be addressed in either order; if it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
22. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant is denied his or her right to an appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act.
23. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.
24. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own.
25. **Effectiveness of Counsel.** A pro se party is held to the same standards as one who is represented by counsel.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Sean J. Brennan for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Troy Anthony Hess, the appellant, was convicted in November 1994, and sentenced in January 1995, on charges of kidnapping, escape, two counts of use of a weapon to commit a felony, and being a felon in possession of a firearm. Hess' direct appeal was dismissed by this court as being filed out of time. See *State v. Hess*, 247 Neb. xxii (case No. S-95-146, Apr. 12, 1995). Hess now appeals from a denial of postconviction relief. The primary questions presented in this appeal are whether Hess was denied due process of law relating to the filing of the notice of appeal from his conviction and whether Hess was denied

effective assistance of counsel because Hess' appellate counsel failed to respond to, or inform Hess of, this court's order to show cause why Hess' appeal should not be dismissed as untimely.

II. FACTUAL AND PROCEDURAL BACKGROUND

[1] The following facts are taken from the record produced by the evidentiary hearing in this case, as well as this court's records of Hess' direct appeal. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000).

Hess was convicted pursuant to a jury verdict on November 7, 1994. Hess represented himself at trial. Hess testified that after the conviction was entered, on November 20, he mailed his first notice of appeal to the clerk of the district court (clerk's office). Subsequently, Hess was sentenced on January 9, 1995. Hess testified that on January 30, he mailed his motion for appointment of appellate counsel, affidavit in forma pauperis, and 6-month financial statement to the clerk's office.

Hess testified that on February 2, 1995, he received a written response from the clerk's office indicating that no notice of appeal had been included in the paperwork that Hess had sent to the clerk's office. Hess testified that attached to this letter from the clerk's office was a photocopy of Hess' original notice of appeal, which he had mailed on November 20, 1994. At the evidentiary hearing in the instant case, Hess produced the letter and photocopy of the notice of appeal that he claimed to have received from the clerk's office, and this was admitted into evidence as exhibit 40.

Hess testified that after receiving exhibit 40 from the clerk's office, he immediately mailed another copy of his notice of appeal to the clerk's office. Hess testified that the second notice of appeal was mailed on February 6, 1995. This notice of appeal was file stamped by the clerk's office on February 10. On the same day, the district court appointed Miles Johnston, Jr., to represent Hess on appeal.

On March 22, 1995, this court issued an order to show cause why Hess' appeal should not be dismissed, as the February 10 notice of appeal was not timely filed. A copy of the order was sent to Johnston's office by certified mail and was received on March 23. The order stated that Hess was ordered to show cause by April 4 why his appeal should not be dismissed. On April 25, this court issued its mandate indicating that the appeal had been dismissed.

Hess testified that Johnston visited Hess in late May 1995 and that Johnston told Hess that Johnston was working on the appeal and did not tell Hess that the appeal had already been dismissed. Hess testified that he finally found out about the dismissal in June, after he "made a phone call to the court." Hess testified that he was told that the appeal had been dismissed for failure to show cause why the appeal should not be dismissed. It should be noted that Johnston was suspended from the practice of law on August 31, and disbarred by this court on January 10, 1997, for a longstanding pattern of neglecting matters entrusted to him. See *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997).

Hess' amended motion for postconviction relief alleges, in sum, that Hess' constitutional right to a direct appeal was violated by the clerical errors of the clerk's office in failing to timely file Hess' appeal documents and by the ineffective assistance of his appellate counsel in failing to respond to this court's order to show cause. The district court held an evidentiary hearing, at which Hess was the only witness. The State did not substantively contradict Hess' testimony regarding the events leading to the dismissal of his direct appeal.

The district court denied Hess' motion for postconviction relief. The district court determined that there was no evidence to rebut the presumption that Hess' second notice of appeal was timely file stamped when it was received by the clerk's office. The district court determined that Hess did not prove that Hess' first notice of appeal was received and/or lost by the district court and that it was "inconceivable" that the clerk's office would mail a copy of that notice of appeal back to Hess. The district court generally discredited Hess' version of events and concluded that any ineffective assistance of counsel was without

prejudice, because Hess would have been unable in any event to show that his appeal was timely filed. Hess appeals from the denial of postconviction relief.

III. ASSIGNMENTS OF ERROR

Hess assigns, consolidated and restated, that the district court erred in concluding that (1) Hess had not proved that his notice of appeal was received by the court clerk prior to the appeal deadline and (2) Hess was not denied his right to effective assistance of counsel when his attorney did not respond to the show cause order and explain why the notice of appeal was filed by the clerk 1 day after the appeal deadline had expired.

IV. STANDARD OF REVIEW

[2,3] 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. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). The appellant in a postconviction proceeding has the burden of alleging and proving the claimed error is prejudicial. See *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998).

V. ANALYSIS

[4] Initially, we note that a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000). The issues presented by Hess, however, relate to the dismissal of his direct appeal and, obviously, could not have been raised on direct appeal. Therefore, the issues presented by Hess in his postconviction motion are not procedurally barred.

[5] For relief to be granted under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), the claimed infringement must be constitutional in dimension. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). Hess argues that he was deprived of his direct appeal because two of his constitutional rights, as guaranteed by the U.S. and Nebraska Constitutions, were violated: (1) his right to due process of law and (2) his right to effective assistance of counsel. We address each claim in turn.

1. Due Process

Hess does not clearly distinguish whether the due process claim he is presenting is procedural or substantive in nature. We determine, based upon our analysis of his argument, that Hess is asserting a procedural due process violation.

[6-8] Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due? *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991). Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). See, also, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

[9-11] The U.S. Constitution does not guarantee the right to appeal a criminal conviction. See, *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984). Where an appeal is provided as a matter of right, however, the procedures used in deciding appeals must comport with the requirements of the Due Process Clause. See, *Evitts v. Lucey, supra*; *State v. Kelley*, 198 Neb. 805, 255 N.W.2d 840 (1977). Neb. Const. art. I, § 23, guarantees the right to appeal in all felony cases. *State v. Schroder, supra.*

Hess argues that his right to due process was violated when he was deprived of his right to appeal due to the clerk's office's failure to appropriately date and file the notices of appeal he claims to have mailed on November 20, 1994, and February 6, 1995. For purposes of deciding this appeal, we assume that Hess has properly alleged a violation of procedural due process that deprived him of his right to direct appeal. Therefore, the issue is whether Hess met his burden of proving such a violation at the evidentiary hearing. In conducting this analysis, we separately consider Hess' arguments with reference to each notice of appeal.

(a) Notice of Appeal Mailed November 20, 1994

Hess testified that he mailed a notice of appeal to the district court on November 20, 1994. Although Hess' testimony was not contradicted by the State, the record from Hess' direct appeal does not contain such a notice of appeal. Even assuming Hess' testimony to be true, however, Hess cannot show that any failure to file this notice of appeal prejudiced him, because the notice of appeal would have been premature and therefore ineffective to preserve Hess' appellate claims.

[12] The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998). Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994), in effect at the relevant time, provided:

> [T]he proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days *after* the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal . . . .

(Emphasis supplied.)

[13,14] Hess claims to have mailed his notice of appeal on November 20, 1994, after he was convicted on November 7, but well before he was sentenced on January 9, 1995. For purposes of appeal in a criminal case, however, the judgment occurs when the verdict and sentence are rendered by the court. *State v. Nash*, 246 Neb. 1030, 524 N.W.2d 351 (1994). A finding of guilty is a conviction, but it is not a judgment or final order, and there can be no appeal until a sentence has been imposed. *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980); *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

[15] This court addressed the circumstances under which a premature notice of appeal may nonetheless be effective to confer jurisdiction upon an appellate court in *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). We stated that

> a notice of appeal filed after the trial court announced its decision, but before a judgment has been rendered, is effective to confer jurisdiction on the appellate court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered in accordance with the decision which was announced and to which the notice of appeal relates.

Id. at 698, 522 N.W.2d at 743.

The rule stated in *McDowell* is based upon the fact that "it is an admittedly odd situation in which the judgment has been announced, but in which an appeal therefrom cannot be had." 246 Neb. at 697-98, 522 N.W.2d at 743. This situation, however, clearly did not exist at Hess' trial. In the instant case, a conviction had been entered, but prior to sentencing, no judgment of the trial court had been announced or rendered.

As the district court had not announced a final decision as of November 20, 1994, any notice of appeal filed by Hess on that date would not satisfy the criteria set forth in *State v. McDowell, supra*, for determining if a premature notice of appeal can nonetheless confer jurisdiction, and we decline to extend *McDowell* to situations in which a judgment has been neither announced nor rendered. Instead, we continue to adhere to the rule stated in *State v. Long, supra*, and the line of cases cited above, that there can be no appeal until a sentence has been imposed. As a result, we conclude that even had Hess filed a notice of appeal on November 20, as he testified, that notice of appeal would not have conferred appellate jurisdiction upon this court. We note, for the sake of completeness, that Hess' appeal took place prior to the 1997 amendment to § 25-1912, which now provides specifically for the effect of a premature notice of appeal. See § 25-1912(2) (Cum. Supp. 2000).

A notice of appeal filed by Hess on November 20, 1994, would have been premature and insufficient to confer appellate jurisdiction. Therefore, even if the clerk's office did fail to properly file such a notice of appeal, Hess has not proved a violation of any due process right to a direct appeal, because the missing notice of appeal could not have perfected Hess' direct appeal in any event.

(b) Notice of Appeal Mailed February 6, 1995

[16] Hess also testified that he mailed another notice of appeal on February 6, 1995, after he had been sentenced. This notice of appeal was file stamped by the clerk's office on February 10, more than 30 days after Hess was sentenced. See § 25-1912(1) (notice of appeal must be filed within 30 days). Hess claims that this notice of appeal was not timely filed by the clerk's office. We note that the date of receipt by the clerk's office, and not the date of mailing, is the relevant date for determining the timeliness of a notice of appeal, as Nebraska does not have a " 'prison delivery rule.' " See *State v. Parmar*, 255 Neb. 356, 363, 586 N.W.2d 279, 284 (1998).

Neb. Rev. Stat. § 25-2205 (Reissue 1995) states that "[i]t is the duty of the clerk of each of the courts to file together and carefully preserve in his [or her] office all papers delivered to him [or her] for that purpose in every action or special proceeding." Neb. Rev. Stat. § 25-2206 (Reissue 1995) requires, in relevant part, that "[t]he clerk of the court shall endorse upon every paper filed with him [or her], the day of filing it . . . ."

[17] It has long been held that in the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is presumed. See *Ludwig v. Board of County Commissioners*, 170 Neb. 600, 103 N.W.2d 838 (1960). See, also, e.g., *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993). Such presumptions are applied to the official acts of the clerks of the district courts. See, e.g., *Knaak v. Brown*, 115 Neb. 260, 212 N.W. 431 (1927); *Brunke v. Gruben*, 84 Neb. 806, 122 N.W. 37 (1909); *Gate City Abstract Co. v. Post*, 55 Neb. 742, 76 N.W. 471 (1898); *Crowell v. Johnson*, 2 Neb. 146 (1873). See, also, e.g., *In re Estate of Crabtree*, 4 Cal. App. 4th 1119, 6 Cal. Rptr. 2d 224 (1992); *H. R. Lee Invest. Corp. v. Groover*, 138 Ga. App. 231, 225 S.E.2d 742 (1976).

[18,19] Because the clerk of the district court is required by law to file and endorse the date of filing of all documents filed in the court, the timely filing of such documents is an official act to which the presumption of regularity attaches. The entry of filing by the clerk is the best evidence of the date of filing and is

presumed to be correct until the contrary is shown. *H. R. Lee Invest. Corp. v. Groover, supra.* Thus, we must presume, in the absence of affirmative evidence to the contrary, that the clerk performed his or her duty and endorsed the notice of appeal with the date it was in fact presented to him or her for filing. See *In re Estate of Crabtree, supra.*

Hess claims that this presumption was overcome by the evidence presented at the evidentiary hearing. Hess argues that the clerk's office must have been in possession of his notice of appeal prior to February 10, 1995, because he testified that he received a copy of his own notice of appeal from the clerk's office on February 2. This argument is not persuasive, however, as Hess testified that the copy he received from the clerk's office was a copy of the notice of appeal he originally mailed on November 20, 1994. As discussed above, the clerk's office's possession of the notice of appeal mailed on November 20 is immaterial, because that notice of appeal was inadequate to confer jurisdiction upon an appellate court.

A careful examination of Hess' testimony shows that the only notice of appeal he claimed to have mailed after his sentencing was the notice of appeal filed by the clerk's office on February 10, 1995. Hess argues that the filing of this notice of appeal was delayed because the clerk's office lost it. In support of this argument, Hess refers to exhibit 41, a copy of Hess' motion for appointment of appellate counsel. Present on the photocopied document is a copy of a note evidently placed there by the clerk's office. It is initialed and reads, in its entirety, "Keep Copies in File until Originals are Found 2-14-95." Hess claims that this is proof that Hess' original notice of appeal was lost and thus not timely filed.

Hess' claim is without merit. The note copied in exhibit 41 might support the inference that the clerk's office received Hess' filings and made copies of them and that by February 14, 1995, the originals had at least temporarily been lost. Even if this is an accurate depiction of events, however, it does nothing to rebut the presumption that the original documents received by the clerk's office were timely filed and file stamped when they were received, even if they were subsequently misplaced. The evi-

dence does not prove that the documents were lost prior to their filing and endorsement of the date of filing.

Based on the record presented, we cannot say that the district court was clearly wrong in finding that Hess had not overcome the presumption of regularity attached to official acts and that Hess did not prove that his notice of appeal was received by the clerk's office prior to February 10. Compare *Huebner v. State*, 107 Nev. 328, 810 P.2d 1209 (1991) (direct appeal reinstated where it was proved that clerk's office's practice was not to file notice of appeal on incoming day as required by law).

In conclusion, we determine that Hess' first assignment of error is without merit. Hess' first notice of appeal, even if received by the clerk's office, was premature and insufficient to preserve Hess' right to appeal. Hess failed to prove that his second notice of appeal was received by the clerk's office prior to the 30-day deadline for appeal. Consequently, Hess has not proved that any acts of the clerk's office were responsible for the loss of his right to a direct appeal, and he did not prove a violation of his right to due process of law.

2. Ineffective Assistance of Counsel

Hess also claims that he was deprived of his right to direct appeal due to the ineffective assistance of his counsel on direct appeal, in violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. Hess claims that his appeal was dismissed because his counsel on direct appeal, Johnston, failed to answer this court's order to show cause why the appeal should not be dismissed, and this failure to respond constituted ineffective assistance of counsel.

[20,21] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). The two prongs of this test, deficient performance and prejudice, may be addressed in either order; if

it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. See, *State v. Soukharith, supra*; *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

[22,23] Where a defendant is denied his or her right to an appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act. *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *Id.*

[24,25] Prior to this presumption of prejudice, however, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own. *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000); *State v. Trotter, supra.* In the present case, Hess chose to represent himself pro se at trial, and a pro se party is held to the same standards as one who is represented by counsel. See *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994). Hess was not represented by Johnston until February 10, 1995, after the deadline for filing his notice of appeal had elapsed. Hess therefore cannot complain that his untimely notices of appeal were due to the ineffective assistance of counsel. This court's inquiry is limited to the sole facet of Hess' direct appeal in which Johnston represented Hess—this court's order to show cause why the appeal should not be dismissed.

Assuming, for the purposes of deciding this appeal, that Johnston was ineffective in failing to reply to, or inform Hess of, this court's order to show cause, the question is then whether this failure actually caused Hess' appeal to be dismissed. In other words, in order to prove that he was denied his right to appeal due to the negligence or incompetence of Johnston, see *State v. McCroy, supra*, Hess must prove that had Johnston replied to the order to show cause or informed Hess of the order to show cause, such action would have prevented Hess' direct appeal from being dismissed.

Our analysis of Hess' notices of appeal, set forth above with reference to Hess' due process claim, is also dispositive of Hess' ineffective assistance of counsel claim. For the reasons stated above, we have determined that the notice of appeal Hess claims to have mailed on November 20, 1994, was premature and without effect and that Hess did not prove that the notice of appeal he claims to have mailed on February 6, 1995, arrived at the clerk's office prior to the 30-day deadline for filing his appeal. In order to prevent this court from dismissing his direct appeal, however, Hess would have had to show that his direct appeal was timely filed.

In short, Hess has presented neither evidence nor argument showing what kind of answer could have been given to this court's order to show cause that would have been sufficient to prevent the appeal from being dismissed. The district court found that Hess did not file a timely notice of appeal, and we determine that this finding was not clearly wrong. Absent a timely notice of appeal, Hess' direct appeal would have been dismissed regardless of the reply to our order to show cause. Consequently, any failure of Johnston to reply to, or inform Hess of, the order to show cause did not result in the dismissal of Hess' direct appeal. The district court was not clearly wrong in finding that the dismissal of Hess' direct appeal resulted, not from ineffective assistance of counsel, but from Hess' own failure to file a timely notice of appeal.

The district court was not clearly wrong in finding that Hess did not prove by a preponderance of the evidence that Hess was denied his direct appeal due to the negligence or incompetence of counsel. Therefore, the district court did not err in determining that Hess did not establish a right to postconviction relief on that basis. Hess' second assignment of error is without merit.

VI. CONCLUSION

The notice of appeal Hess claims to have mailed on November 20, 1994, was premature and ineffective, and Hess did not overcome the presumption that the notice of appeal he claims to have mailed on February 6, 1995, arrived after his 30-day time to appeal had elapsed. Therefore, Hess did not prove that any actions by the clerk's office violated due process and

deprived him of his direct appeal, nor did Hess prove that his direct appeal was denied due to the ineffectiveness of counsel. The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER SCOTT DECKER, APPELLANT.

622 N.W.2d 903

Filed March 9, 2001. No. S-00-488.

1. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Proof.** Neb. Rev. Stat. § 27-1002 (Reissue 1995) applies only if the party offering the evidence is seeking to prove the contents of a writing, recording, or photograph.
3. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
6. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
7. **Double Jeopardy: Statutes: Legislature: Intent: Convictions.** A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on both offenses.
8. **Criminal Law: Weapons.** Where the record reflects the use of multiple weapons in the commission of a single felony, the use of each weapon may constitute a separate violation of Neb. Rev. Stat. § 28-1205 (Reissue 1995).
9. **Trial: Rules of Evidence.** Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), permits the trial court to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice. However, the fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is

only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403.

10. **Trial: Rules of Evidence: Appeal and Error.** The trial court must balance the probative value of the evidence against the prejudicial factors listed in Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and an appellate court will uphold the trial court's decision in this regard in the absence of an abuse of discretion.
11. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
12. **Homicide: Photographs.** If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome.
13. ___: ___. In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
14. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
15. **Homicide: Intent: Proof: Circumstantial Evidence: Directed Verdict: Juries.** A criminal defendant's mental process of forming the intent to kill is not always susceptible to proof by direct evidence, and it may be proved by circumstantial evidence. The interpretation of such evidence is generally a matter of fact which precludes a directed verdict and is properly left to the jury to determine.
16. **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.
17. **Sentences: Case Disapproved.** To the extent that the majority opinion in *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000), suggests that a sentence within statutory limits can never be the product of an abuse of discretion, it is disapproved.
18. **Judges: Sentences: Appeal and Error.** 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. Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.
19. **Sentences: Appeal and Error.** 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.
20. **Sentences.** Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, Neb. Rev. Stat. § 28-1205 (Reissue 1995) does not permit such discretion in sentencing because it mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed.

21. ___. A sentencing judge is required to separately determine, state, and grant the amount of credit on the sentence to which the defendant is entitled under Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999).
22. ___. When a defendant receives a sentence consecutive to a life sentence which carries a maximum and minimum term, the defendant is entitled to receive credit for the time served against the consecutive sentence.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed, and sentence on count III vacated and remanded with directions.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

STEPHAN, J.

Following a jury trial in the district court for Adams County, Christopher Scott Decker was convicted of first degree murder, third degree assault, and two counts of using a deadly weapon to commit a felony. One of the weapons counts involved the use of a firearm and is a Class II felony, while the other involved the use of a sword and is a Class III felony. The assault charge is a Class II misdemeanor. On April 18, 2000, the district court sentenced Decker to life in prison for the murder conviction; incarceration for a term of 18 to 20 years on the weapons count involving the use of a sword, consecutive to the life sentence; incarceration for 40 to 50 years on the weapons count involving the use of a firearm, consecutive to the sentence for use of the sword in the commission of a felony; and incarceration for 1 year on the assault charge, concurrent to all other sentences. Decker perfected this direct appeal.

BACKGROUND

All four of Decker's convictions arose from an incident which occurred at the home of Kenneth Skidmore in Hastings, Nebraska, during the early morning hours of July 10, 1999. The

facts and circumstances with respect to what transpired are largely undisputed.

For at least 2 years prior to the incident, Decker had had a romantic relationship with Sonya Ballard. The two moved to Clay Center, Nebraska, in the summer of 1997 and lived together in an apartment there. They were engaged to be married on August 2, 1999. However, during the month preceding the July 10 incident, Ballard had been spending significant amounts of time with Skidmore at his mobile home in Hastings. After finding a note on her vehicle stating that Decker wished to see her, Ballard traveled from Hastings to Clay Center where she met Decker at their apartment on the afternoon of July 9. They talked briefly before Decker left for work at approximately 2:30 p.m. Decker told Ballard that he wished to continue the discussion about their relationship when he returned from his work shift at approximately 11:30 that evening. Ballard remained at the apartment for a short time after Decker left, but then decided to return to Skidmore's home and left a note for Decker informing him of this.

After completing his shift at a meatpacking plant in Hastings, Decker returned to the apartment at approximately 11:30 p.m. and found the note left by Ballard. He became upset because he thought that Ballard was not "putting much stock in [their] relationship," and he believed that "there might be something going on" between Ballard and Skidmore.

In an attempt to calm himself, Decker took one of the two Valium tablets Ballard had left at the apartment and went to a bar in Clay Center to "drown [his] sorrows." At the bar, Decker consumed two glasses of a mixed alcoholic beverage known as Long Island iced tea while he played pool. A witness who observed him during this time said that he seemed depressed. Decker left the bar at approximately 1 a.m. and returned to his apartment. Upon his arrival there, he took the other Valium tablet because "all the feelings of hurt and everything came back."

After staying at the apartment for a short time and becoming more upset, Decker set out for Skidmore's home in Hastings, carrying with him his 4-foot-long broadsword. Testifying in his own defense, Decker stated that his purpose in going to Skidmore's home was to talk to Ballard and not to harm anyone,

but he carried the sword because he knew Skidmore had a firearm in his home. Decker drove his pickup truck from his apartment in Clay Center to Skidmore's mobile home in Hastings, arriving at approximately 3 a.m. on July 10.

When Decker arrived at Skidmore's mobile home, he first knocked on the front door and then tapped on some windows while calling for Ballard. He then entered the home through an unlocked back door. After first looking into a bedroom where he observed a male figure asleep on the bed, Decker eventually made his way through the home and opened the door to the second bedroom where he saw two figures lying on the bed. Decker propped the sword up against a wall just outside the second bedroom and then turned on the bedroom light, observing Skidmore and Ballard in the bed together, both unclothed. Upon observing Decker, Skidmore took a pistol from the nightstand and placed it on the bed, pointing it in the general direction of Decker with his hand resting on top of it. Skidmore did not raise the pistol from the bed. A heated conversation ensued, and Skidmore eventually stated to Decker, "Don't yell at me in my own God damn house." Ballard then pleaded with Decker to leave.

Decker turned as if to leave, but instead grabbed the sword and spun around, swinging the sword at Skidmore. Decker, who is more than 6 feet 8 inches tall and weighs approximately 320 pounds, attacked Skidmore repeatedly with the sword, causing 23 separate cutting and stabbing wounds to various parts of Skidmore's body, including his scalp, neck, trunk, and upper extremities. During the initial moments of the attack, Decker also struck Ballard with the sword, causing a 10-inch scalp wound. Bleeding from this wound, Ballard ran from the room to seek help from the other occupant of the mobile home, Skidmore's friend Curtis Renfro, who occupied the other bedroom. After putting on some clothing, Ballard went to the bedroom and told Renfro, "Skid is down. He needs your help." Before Renfro could react, a blood-soaked Decker approached Ballard and Renfro, informed Renfro that "[i]t's none of your business," and then dragged Ballard back to the bedroom where Skidmore lay on the floor, bleeding from his wounds. En route to the bedroom, Decker told Ballard that he was going to prison and that he wanted her to see what he was going to do. Upon

arriving in the room, Decker realized that Skidmore was still alive and became further enraged. Using Skidmore's pistol, he fired several rounds into Skidmore's head at close range.

Ballard escaped from the home and ran to a neighbor to summon assistance. After shooting Skidmore, Decker left the home and proceeded to the Hastings Police Department to turn himself in. Hearing Decker leave the mobile home, Renfro entered Skidmore's bedroom and observed him lying dead on the floor. Because there was no telephone in the home, Renfro went to seek help.

Within a short time after these events, Sgt. Mathew Workman and Det. Gary Reed of the Hastings Police Department encountered Decker in a telephone booth outside the Hastings police station, where he surrendered to them. Both before and after being advised of his *Miranda* rights, Decker made several unsolicited statements to Workman and Reed while still outside the police station, including, "I know, I know I did a serious crime" and "I'm sorry. I'm sorry. I know I really screwed up. I'm not armed. I left the gun and sword there." When the officers advised Decker of his *Miranda* rights and took him inside the station, Decker informed them that he wished to make a statement. Reed obtained a tape recorder and a *Miranda* form. Reed again read Decker the *Miranda* rights, this time directly from the form, and both Reed and Workman signed the form. Decker then gave a statement regarding the events which had transpired. Both Reed and Workman indicated that Decker was calm throughout the time they dealt with him, even during his statement.

Decker was originally charged with four counts, including murder in the first degree, assault in the second degree, and two counts of use of a deadly weapon in the commission of a felony. He entered pleas of not guilty to all charges. The jury found Decker guilty of the murder and weapons charges. With respect to the assault charge, it found Decker guilty of the lesser-included offense of assault in the third degree. After overruling Decker's motion for a new trial, the district court imposed the sentences set forth above, allowing Decker no credit for time served. Additional facts will be set forth where pertinent to our analysis of Decker's assignments of error.

ASSIGNMENTS OF ERROR

Decker asserts, restated and renumbered, that the district court erred in (1) receiving Reed's testimony regarding the substance of Decker's tape-recorded statement in lieu of the recording itself, (2) convicting Decker on two counts of using a weapon to commit a felony when he was convicted of only one felony, (3) receiving photographs of Skidmore into evidence and allowing a pathologist to testify regarding Skidmore's injuries and cause of death, (4) determining that the evidence was sufficient to support the convictions, and (5) imposing a sentence which was "excessive and disproportionate to the severity of the offense when considered with [Decker's] background and prior record."

ANALYSIS

ADMISSION OF TESTIMONY REGARDING SUBSTANCE OF TAPE-RECORDED STATEMENT

[1] During trial, Decker objected to questions propounded to Reed regarding statements made by Decker during the tape-recorded custodial interrogation, which occurred at the Hastings Police Department, on the ground that the recording itself constituted the "best evidence." In his first assignment of error, Decker contends that the district court erred in overruling this objection. In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Sanchez-Lahora, ante* p. 192, 622 N.W.2d 612 (2001); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000).

[2] Decker argues that Reed's testimony regarding the content of his recorded statement should have been excluded under Neb. Evid. R. 1002, which provides:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or of the Legislature of the State of Nebraska or by other rules adopted by the Supreme Court of Nebraska.

Neb. Rev. Stat. § 27-1002 (Reissue 1995). This "original writings" rule, which is sometimes inaccurately referred to as the "best evidence" rule, applies only if the party offering the evidence is seeking to prove the contents of a writing, recording, or photograph. See *State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992). See, also, *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000); *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988). Therefore, Decker's argument has merit only if the State was using Reed's testimony to prove the contents of Decker's recorded statement.

Decker relies on *State v. Harding*, 184 Neb. 159, 165 N.W.2d 723 (1969), in which we held that a transcribed but unsigned statement of the defendant taken by a court reporter who died prior to trial was inadmissible at trial because the rights of confrontation and cross-examination were not present to ensure its accuracy. In *Harding*, the State was attempting to prove the content of the transcribed statement through the statement itself. While we rejected this attempt for the reasons stated above, we further stated that "nothing we have said herein negates the admissibility of independent evidence verifying the authenticity of oral statements or admissions the defendant made at the time the testimony was transcribed by the reporter." *State v. Harding*, 184 Neb. at 169, 165 N.W.2d 729. Thus, *Harding* refutes rather than supports Decker's argument that the district court erred in permitting Reed to testify as to the content of his recorded statement.

Likewise, Decker's argument finds no support in *State v. Martin*, 198 Neb. 811, 255 N.W.2d 844 (1977), another case on which he relies. There, we held that it was not error to admit the transcription of a taped statement where the tape itself was also received in evidence. *Martin* is inapposite here. Even if we accepted Decker's contention that the inflection and tone of his voice on the tape recording would have assisted the jury in determining his intent at the time of the events in question, this would not obligate the State to prove the content of the tape recording as a material element of its case, and the original writing rule codified at § 27-1002 is therefore inapplicable. As succinctly noted by one commentator:

> Unless the substantive law makes the proof of the contents of the writing, recording or photograph essential, then a witness who has first-hand knowledge of an event memorialized by a writing or a scene depicted in a photograph may testify regarding the event or scene without satisfying the original writing rule. The fact that a writing, recording or photograph offers the "best evidence" available of the transaction or scene does not limit the form of the admissible evidence.

R. Collin Mangrum, Mangrum on Nebraska Evidence 727 (2000).

Conviction on Two Counts of Use of Weapon to Commit Felony

Decker contends that since he was convicted of only one felony, his two convictions for use of a weapon to commit a felony violate the double jeopardy provisions of both the state and the federal Constitutions. Decker maintains that Neb. Rev. Stat. § 28-1205 (Reissue 1995) does not provide that each weapon used or possessed during the commission of a single felony is a separate crime.

[3-5] We begin our analysis of this issue by examining the language of § 28-1205, the statute which defines the offense:

> (1) Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony.
>
> (2)(a) Use of a deadly weapon other than a firearm to commit a felony is a Class III felony.
>
> (b) Use of a deadly weapon which is a firearm to commit a felony is a Class II felony.
>
> (3) The crimes defined in this section shall be treated as separate and distinct offenses from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed.

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000); *State v. Hernandez*, 259 Neb. 948, 613 N.W.2d 455 (2000). In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000). Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Bottolfson, supra*; *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997).

[6,7] The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000). A determination of whether two convictions in a single trial lead to multiple punishment depends upon whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on both offenses. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

The Legislature's purpose in enacting § 28-1205 was to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage persons from carrying deadly weapons while they commit felonies. See *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989). Thus, the statute is designed to regulate the manner in which felonies are committed. *Id.* This means the statute acts to prevent the threat of violence and accompanying danger to human life present whenever one has a deadly weapon within one's immediate control during the commission of a felony. *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999).

This purpose, together with the plain language of the statute, leads us to conclude that Decker's convictions on both counts of use of a deadly weapon to commit a felony must stand. By enacting § 28-1205, the Legislature proscribed individuals from employing any deadly weapon in an effort to facilitate *any* felony that *could* be prosecuted in a court of this state. Thus, the "individual act" of using any deadly weapon to commit a felony is prohibited. It follows that when a person uses more than one such weapon to commit a single felony, each use is a separate, identifiable act that can be punished under the statute. As such, the Legislature constructed a statutory scheme that does not violate the double jeopardy provisions of either the state or the federal Constitution.

[8] Furthermore, the record clearly reflects that Decker first used the sword and then the firearm to kill Skidmore. The pathologist who performed the post mortem examination testified that wounds inflicted by both weapons caused Skidmore's death. Section 28-1205 separately proscribes the use of such weapons in the commission of a felony, in that use of a firearm constitutes a Class II felony under § 28-1205(2)(b), whereas the use of a weapon other than a firearm in the commission of a felony is a Class III felony under § 28-1205(2)(a). Each of these "use" offenses are "separate and distinct offenses from the felony being committed," under § 28-1205(3). Thus, we hold that where the record reflects the use of multiple weapons in the commission of a single felony, the use of each weapon may constitute a separate violation of § 28-1205. We therefore find no error by the district court in convicting and sentencing Decker on the two separate counts of use of a deadly weapon to commit a felony.

ADMISSION OF PHOTOGRAPHS AND PATHOLOGIST'S TESTIMONY

Decker assigns as error the trial court's admission, over his objection, of various photographs showing wounds inflicted upon Skidmore. He also alleges the district court erred in admitting the testimony of Dr. Jerry Jones, the pathologist who conducted the autopsy. Decker's objections to these items of evidence were based upon an assertion that it was cumulative, in that other "testimony offered indicates that Mr. Decker caused

the death of Mr. Skidmore" which was "really not contested," and that whatever probative value such evidence may have would be outweighed by the danger of unfair prejudice. The objections were overruled; 3 photographs of Skidmore's body taken at the crime scene and 14 photographs taken during the post mortem examination were received. Jones testified regarding his autopsy findings. Using photographs, he described each of the 23 cutting and stabbing wounds as well as the 4 gunshot wounds to the head. Jones noted that while all of the gunshot wounds were inflicted with the gun in close proximity to Skidmore's head, one of the shots was inflicted while the muzzle of the gun was in contact with the skin. He opined that the cause of death was "multiple penetrating gunshot wounds of the head and multiple cutting and stabbing wounds of the body involving the scalp, neck, trunk and upper extremities." He further noted that no single wound caused death, but all were important. In this regard, Jones explained:

> The gunshot wounds to the head in and of themselves would cause death, and the totality of the cutting and stabbing wounds would certainly cause enough bleeding externally, as well as some internally, to cause death. So, there are several of the cutting wounds and stab wounds which were quite deep, as you see, but even the ones that are less deep but go through the skin, into the underlying soft tissue also bleed.

[9,10] Neb. Evid. R. 403 permits the trial court to exclude relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice." Neb. Rev. Stat. § 27-403 (Reissue 1995). See *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). However, the fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Carter, supra*. Thus, the trial court must balance the probative value of the evidence against the prejudicial factors listed in § 27-403, and an appellate court will uphold the trial court's decision in this regard in the absence of an abuse of discretion. See *State v. Fahlk*, 246 Neb. 834, 524

N.W.2d 39 (1994). See, also, *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

[11-13] The admission of photographs of a gruesome nature rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome. *State v. Bjorklund, supra*. Likewise, in a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999).

In overruling Decker's objections to both the photographs and the pathologist's testimony, the district court explained that such evidence would help the jury determine whether Decker was guilty of murder in the first degree, murder in the second degree, or manslaughter. Additionally, the photographs as interpreted by Jones' testimony show the condition of Skidmore's body, establish the nature and extent of the injuries, and in conjunction with Jones' testimony, indicate the cause of Skidmore's death. Multiple photographs were reasonably necessary to depict each of the 27 separate wounds inflicted upon Skidmore, and the photographs are therefore not cumulative. We conclude that the district court did not abuse its discretion in receiving the photographs and Jones' testimony over Decker's objection.

Sufficiency of Evidence

[14] Decker next contends that the district court erred in overruling his motions for directed verdict and new trial on grounds that the evidence was insufficient to support his conviction for murder in the first degree. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the

State, is sufficient to support the conviction. *State v. Quintana, ante* p. 38, 621 N.W.2d 121 (2001); *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

Testifying in his own defense at trial, Decker denied that he intended to harm Skidmore and maintained that he "snapped" and "freaked out" upon encountering Ballard in bed with Skidmore and being told by her to leave. Sunday Ohia, Ph.D., a pharmacologist who testified as an expert witness on behalf of Decker, stated that while alcohol and the chemical components of Valium are central nervous system depressants, each can have a "paradoxical effect" and cause rage and hostility instead of calmness. Responding to a hypothetical question, Ohia stated his opinion that there was a "possibility" that a person who consumed two Long Island iced teas and two Valium tablets could experience such a paradoxical effect. On the strength of this, Decker argues that there was insufficient evidence upon which the jury could conclude that he formed the requisite intent to commit murder in the first degree.

[15] However, Decker's testimony that he intended no harm and the evidence with respect to his ingestion of alcohol and Valium were not the sole sources of evidence in the record going to the issue of intent. A criminal defendant's mental process of forming the intent to kill is not always susceptible to proof by direct evidence, and it may be proved by circumstantial evidence. *State v. Clark, supra*; *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994). The interpretation of such evidence is generally a matter of fact which precludes a directed verdict and is properly left to the jury to determine. *State v. Clark, supra.*

There is both direct and circumstantial evidence in this record to support a finding that Decker killed Skidmore purposely and with deliberate and premeditated malice. It is undisputed that Decker left his apartment in Clay Center and traveled some 30 miles to Skidmore's home in Hastings at approximately 2 a.m., armed with his sword. When law enforcement officers searched Decker's apartment following his arrest, they found sharpening stones and honing oil on a coffee table. Ballard testified that the sword was usually dull and that the sharpening stones and honing oil were not normally kept on the coffee table in Decker's apartment. Jones testified that Skidmore's injuries included

multiple "cutting wounds" produced by a "slicing or slashing motion," some of which cut "through the skin, fat and muscle, actually into bone." One of Skidmore's fingers was amputated by a "slice across the outside of the right hand." From this evidence, a jury could reasonably infer that Decker sharpened the sword in preparation for an anticipated encounter with Skidmore.

There is undisputed evidence that Decker entered Skidmore's home without permission at approximately 3 a.m. and initiated the attack which led to Skidmore's death. He admitted telling police immediately following the incident that Skidmore had made no threatening gesture with his pistol. Some of Skidmore's injuries were described by Jones as "consistent with defensive wounds" likely sustained by Skidmore in attempting to ward off the attack. Decker agreed with this assessment during his cross-examination.

Decker also testified that when he returned to the bedroom where Skidmore lay following the sword attack, he became angry because Skidmore was not dead and "unloaded" the pistol into his head. Reed testified that Decker described this incident during his statement as follows:

> A He [Decker] said he picked up the gun. And as [Skidmore] was laying on the floor, in his words, he said "Mother fucker, do you want me to kill you quick? Tell me how to get this safety off." And he was able to get the safety off, and he shot Mr. Skidmore once in the head then left the room.
>
> Q Did he say what he did then?
>
> A He took the gun and went out into the living room, where Sonya Ballard was located, and he told me it was his intent to kill her, put the gun to her head, but she was able to move the gun away. And he never did get the gun fired to kill her.
>
> Q Then what happened?
>
> A At that time Mr. Decker said that he — he believed he took Sonya back to the bedroom. And his phrasing was to show her what you've been doing to me or show you the person you've been doing this with. Got back to the bedroom, saw Mr. Skidmore — yeah, correct. Mr. Skidmore

> laying on the floor. And in Mr. Decker's words, it pissed him off because he was still alive. So, he took the gun, point blank, fired two more rounds or three more rounds into his head, then stepped back and emptied the gun into his head.

We conclude that this and other evidence in the record, when viewed in a light most favorable to the State, is sufficient evidence to support Decker's conviction for murder in the first degree.

SENTENCING

In his final assignment of error, Decker contends that the sentences he received on the two convictions for use of a deadly weapon in the commission of a felony were excessive. The statutory penalty range for a Class II felony is 1 to 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Decker was sentenced to 40 to 50 years' imprisonment on the charge of using a firearm in the commission of a felony. The statutory penalty range for a Class III felony is a maximum of 25 years' imprisonment, a fine of $25,000, or both. *Id.* Decker was sentenced to a term of 18 to 20 years' imprisonment on the charge stemming from his use of the sword in the commission of a felony.

[16] It is well established that 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. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000). Recently, in *State v. Ruisi*, 9 Neb. App. 435, 444, 616 N.W.2d 19, 26 (2000), a majority of a Nebraska Court of Appeals panel articulated this standard of review somewhat differently, stating:

> So long as a trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, an appellate court cannot say that the trial court has abused its discretion, because such a sentence is not untenable, does not unfairly deprive a litigant of a substantial right, and does not deny a just result.

The majority in *Ruisi* wrote further that the imposition of a sentence within the statutory limits "nearly universally means there has been no abuse of discretion." 9 Neb. App. at 444, 616

N.W.2d at 27. In his dissent, Judge Buckley disagreed with these statements for three reasons. First, he noted that the majority's position was inconsistent with the obligation of the appellate courts to review sentences pursuant to Neb. Rev. Stat. § 29-2308 (Reissue 1995), and to reduce those sentences found to be excessive. Second, he stated that the majority's interpretation of the scope of appellate review of sentences "defeats the very concept of discretion, because a sentence that exceeds its statutory authority is not an abuse of discretion, but is unlawful, null, and void." 9 Neb. App. at 452, 616 N.W.2d at 31. (Buckley, District Judge, Retired, dissenting). Finally, Judge Buckley noted that the majority's interpretation of the law "does not recognize that sentencing courts are human and fallible, and thus can impose imperfect judgments, however intended and well meaning they may be." *Id.* He concluded, "I cannot accept the majority's position. The Nebraska Supreme Court has left the door ajar—however slightly. It has not foreclosed any sentence within statutory limits from being excessive, but it strongly suggests it is a rare exception." *Id.*

[17-19] The dissent in *State v. Ruisi, supra*, sets forth an accurate characterization of the law by which appellate courts must review sentences claimed to be excessive, and to the extent that the majority opinion suggests that a sentence within statutory limits can never be the product of an abuse of discretion, it is disapproved. 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. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). Where a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed. 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.

State v. Gutierrez, 260 Neb. 1008, 620 N.W.2d 738 (2001); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

Decker was 24 years old at the time of trial and had the equivalent of a 10th or 11th grade education. According to the presentence report, he had no prior criminal convictions other than three traffic infractions in Oklahoma in 1997 and 1998. He has a history of substance abuse. Probation screening test results reflected in the presentence report include the following:

> Violent tendencies are indicated and a pattern of violence appears to be well established. This person could be dangerous to self or others. Violent behavior is characterized by ruthlessness, savageness, destructiveness and explosiveness. Substance abuse, jealousy and perceived stress could escalate into violent behavior. This client would likely be intimidating, threatening, dangerous and potentially brutal or even savage. This is a violent person. Prior violence is likely.

In pronouncing sentence, the district judge noted that Decker was not a candidate for probation or a "light sentence" because "the risk is substantial that you will engage in additional criminal conduct because of information in the presentence. You are in need of treatment that can be provided most effectively by commitment to a correctional facility. And a lesser sentence than incarceration would promote disrespect for the law."

[20] During the sentencing hearing, the court also noted that "this was an especially cruel and brutal murder." That finding is amply supported by the record. As noted, Decker used his sword 23 times to inflict massive and mutilating cutting and stabbing wounds upon Skidmore. The heavy sword was actually bent during the attack. As Skidmore lay bleeding on the floor of his bedroom, Decker then used a pistol to fire four shots at point blank range at his head. Given the extremely violent and brutal manner in which Decker used these weapons to kill Skidmore, we certainly cannot say that imposing a sentence near the maximum statutory ranges on the two weapons charges constituted an abuse of discretion. Although it is generally within the trial court's discretion to direct that sentences imposed for separate crimes be served concurrently or consecutively, § 28-1205 does not permit such discretion in sentencing because it mandates that a sentence

for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed. *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995).

[21,22] In reviewing the sentences, however, we note that the district court allowed no credit for time served. Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), which was in effect at the time of Decker's sentencing, provides in part that "[c]redit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based." We have interpreted this statutory provision to require the sentencing judge to separately determine, state, and grant the amount of credit on the sentence to which the defendant is entitled under § 83-1,106(1). *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). See, also, *State v. Torres*, 256 Neb. 380, 383, 590 N.W.2d 184, 185 (1999) (holding that language of Neb. Rev. Stat. § 47-503 (Reissue 1998) was "functionally identical" to that of § 83-1,106(1) and required county court to separately determine, state, and grant credit for time served at time of sentencing). We have also held that when a defendant receives a sentence consecutive to a life sentence which carries a maximum and minimum term, the defendant is entitled to receive credit for the time served against the consecutive sentence. *State v. Mantich, supra.*

Here, the sentence of 18 to 20 years' imprisonment on count III, the weapons charge involving use of the sword, was pronounced as consecutive to the life sentence imposed for count I, murder in the first degree. The district court abused its discretion in failing, at the time of sentencing, to allow credit for time served against the sentence imposed on count III. Therefore, we vacate that sentence and remand the cause to the district court for resentencing in order to credit Decker with time served prior to sentencing.

CONCLUSION

For the reasons discussed herein, Decker's convictions for murder in the first degree, assault in the third degree, use of a

deadly weapon (sword) in the commission of a felony, and use of a deadly weapon (firearm) in the commission of a felony are affirmed. The sentence on count III, involving the use of the sword in the commission of the felony, is vacated, and the cause is remanded to the district court with directions to resentence Decker on that count, giving him credit for time served.

AFFIRMED, AND SENTENCE ON COUNT III VACATED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. RICHARD J. BRUCKNER, RESPONDENT.

622 N.W. 2d 693

Filed March 9, 2001. No. S-00-851.

1. **Disciplinary Proceedings.** Once a grievance, a complaint, or formal charge has been filed, suggested, or indicated against a member of the bar, voluntary surrender of the member's license shall not terminate such grievance, complaint, or formal charge unless (1) the member knowingly admits in writing the truth of such grievance, complaint, or formal charge, or suggested or indicated charges, and waives all proceedings against him or her in connection therewith and (2) an appropriate order is entered by the Nebraska Supreme Court.

Original action. Judgment of disbarment.

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

PER CURIAM.

Richard J. Bruckner, respondent, was admitted to the practice of law in the State of Nebraska on June 23, 1956. On March 24, 1997, a complaint was filed with the Office of the Counsel for Discipline against respondent. Formal charges were filed in this court on August 17, 2000, alleging that respondent had engaged in conduct that violated respondent's oath of office as well as Canon 1, DR 1-102(A)(1), and Canon 9, DR 9-102(A), of the Code of Professional Responsibility. Respondent's alleged misconduct involved mishandling of client funds.

On February 23, 2001, respondent filed with this court a voluntary surrender of his license to practice law in the State of

Nebraska. In his voluntary surrender of license, respondent admitted the truth of the allegations of the formal charges and stated that he no longer wished to contest the formal charges. Respondent "freely, knowingly and voluntarily" surrendered his license to practice law and "freely, knowingly and voluntarily" waived his right to notice, appearance, or hearing prior to the entry of an order.

[1] Neb. Ct. R. of Discipline 15 (rev. 2001) provides:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, voluntary surrender of the member's license shall not terminate such Grievance, Complaint, or Formal Charge:
>
> (1) Unless the member knowingly admits in writing the truth of such Grievance, Complaint, Formal Charge, suggested or indicated Charges, and waives all proceedings against him or her in connection therewith, and
>
> (2) An appropriate order shall be entered by the Court.

Pursuant to rule 15, this court finds that respondent has voluntarily surrendered his license to practice law, admitted in writing that he has engaged in the conduct that violated his oath of office as well as DR 1-102(A)(1) and DR 9-102(A) of the Code of Professional Responsibility, consented to the entry of an order of disbarment, and waived all proceedings against him.

Upon due consideration of the pleadings in this matter, the court finds that respondent's admission and waiver are knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. JOHN M.C. ROBERTS, APPELLANT.

623 N.W. 2d 298

Filed March 16, 2001. No. S-00-325.

1. **Motions to Suppress: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **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.
3. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Sentences: Probation and Parole.** Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.
6. **Sentences: Appeal and Error.** A jail term within the statutory limits will be upheld on appeal, absent an abuse of discretion.
7. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, prohibit only unreasonable searches and seizures. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
8. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation.
9. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
10. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
11. **Arrests: Search and Seizure.** The validity of a search incident to a lawful arrest depends on the legality of the arrest itself.

12. ___: ___. Once a person is lawfully arrested, if the search is within the scope of a search which may be conducted incident to a lawful arrest, then the evidence obtained from the search is properly admitted.
13. **Arrests: Search and Seizure: Weapons: Evidence.** An arresting officer may search an arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction and may also search the area within the arrestee's immediate control.
14. **Arrests: Search and Seizure.** The justification for a search incident to a lawful arrest is absent if a search is remote in time or place from the arrest.
15. **Arrests: Search and Seizure: Words and Phrases.** The meaning of the phrase "immediate control" extends beyond the area that is easily accessible to an arrestee at the time of the search.
16. **Arrests: Search and Seizure.** The area of immediate control is not extinguished the moment an arrestee is handcuffed and removed.
17. ___: ___. A search incident to arrest of the area within an arrestee's immediate control must be contemporaneous with the arrest.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Adams County: TERRI HARDER, Judge. Judgment of Court of Appeals affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

HENDRY, C.J.

INTRODUCTION

John M.C. Roberts was found guilty of possession of a controlled substance, a Class IV felony, and sentenced to 1 year's imprisonment in the county jail. Roberts appealed to the Nebraska Court of Appeals, which summarily affirmed the decision without opinion on August 31, 2000. Roberts then petitioned for further review, which this court granted.

FACTUAL BACKGROUND

At approximately 4 a.m. on April 9, 1998, Randy Overton called the Adams County Sheriff's Department and requested that an officer come to the apartment where Overton was stay-

ing to remove Roberts. An argument had occurred between Overton and Roberts regarding which of them should be staying at the apartment. The apartment was located at 413 West Fourth Street, about one-half block from the Adams County sheriff's office in Hastings, Nebraska.

According to Roberts, his girl friend was the lessee of the apartment and she had given him a set of keys to the apartment. Apparently without informing Roberts, the lessee had in the meantime asked Overton to house-sit for 3 or 4 days while she was in the hospital and had also given Overton a set of keys. Overton had occupied the apartment for a day or two when Roberts came to the apartment on April 9, 1998, and discovered Overton was staying there.

In response to Overton's call, Officer James Konen, an Adams County deputy sheriff, walked to the residence. Having previously requested backup assistance, Officers Chad Wagner and Ed Garcia from the Hastings Police Department met Konen outside the apartment. The officers knocked on the apartment door, and Overton let them in. When the officers entered the apartment, Roberts and Overton were arguing over the apartment keys and Roberts' belongings.

Roberts asked Konen to accompany him to the bedroom where Roberts' property was located. Konen and Wagner went to the bedroom with Roberts, while Garcia remained with Overton. While in the bedroom, Konen and Wagner saw a pile of books and clothes lying on the bed. Roberts said he would leave if he could take the items on the bed with him and began gathering up the clothes and books and placing them in a bedsheet.

At this point, Wagner radioed the Hastings communications center to determine whether there were any outstanding warrants on either Overton or Roberts. Upon requesting such information, Wagner was advised there was an outstanding Adams County warrant for Roberts' arrest. Konen then informed Roberts that he was under arrest. Roberts asked Konen if he could put the items on the bed into a bedroom closet. Konen agreed, and Roberts tied the items in the sheet and placed them in the closet.

Konen then began to handcuff Roberts, whereupon Roberts asked if he could first remove his outer layer of clothing.

Roberts was wearing a pair of running pants and a nylon jacket over his blue jeans and shirt. Konen gave Roberts permission to remove the jacket and running pants. Roberts removed the pants and jacket and dropped them on top of the tied-up sheet. When Roberts dropped the items, Konen heard a "thud-type sound." As he was handcuffing Roberts, Konen asked Roberts what was in the clothes. Roberts said it was a cassette tape.

After handcuffing Roberts, Konen briefly patted him down. Roberts asked repeatedly if he could smoke a cigarette and if he could take his cigarettes with him. Konen said no. Almost immediately after Roberts was handcuffed, Overton began threatening Roberts. Both men began yelling at each other. Because the hostility was escalating, Konen removed Roberts from the apartment.

While Konen was escorting Roberts out, Wagner, who had been in the bedroom the entire time, searched the jacket Roberts had just removed because he thought it was suspicious that Roberts had asked to remove some of his clothing. In searching the jacket, Wagner found 30 to 40 tiny plastic baggies inside a larger plastic bag in the jacket pocket. After calling Garcia into the room, Wagner searched Roberts' running pants. In the pocket of the pants, Wagner found a marijuana pipe, a syringe, and what appeared to be an "eightball" of methamphetamine. The "eightball" was inside a package of cigarettes, inserted between the cellophane wrapper and the paper of the cigarette package. Wagner later testified that his search began "almost immediately" after Roberts was escorted from the bedroom, after "probably less than a minute" had elapsed.

The "eightball" later tested positive for amphetamine and methamphetamine, and Roberts was charged with possession of a controlled substance. Prior to trial, Roberts filed a motion to suppress the evidence found in his running pants and jacket. After a hearing, the court determined that the search of Roberts' pants and jacket was a valid search incident to a lawful arrest.

At trial, Overton testified that Roberts came to the apartment to remove his belongings. Overton testified that Roberts "was talking and all this and that." Overton

> wasn't in no mood to [sic] it, and that was it. I wanted him to get done and over with, and he was in the house so I said

> I'll call the police officer if I have to. And he said go ahead and call the police officer, so I did.

Roberts testified that he came to the apartment simply to clean the apartment for his girl friend. Roberts testified that he left the jacket and running pants at the apartment prior to that evening and that before the officers arrived, he put on the jacket and running pants. He further asserted that the cigarette package, syringe, and methamphetamine were not his and that they must have been planted by Overton. Roberts testified on cross-examination that the marijuana pipe found in his running pants did belong to him. He also asserted that as far as he could remember, his cigarettes were with him when he was later booked into the Adams County jail.

Debra Campbell, a drug chemist employed by the State of Nebraska, testified at trial that the suspected "eightball" found in Roberts' running pants contained amphetamine and methamphetamine. Gary Hueske, another Adams County deputy sheriff, testified as a rebuttal witness for the State. Hueske testified that Roberts did not have any cigarettes with him when Hueske booked Roberts on April 9, 1998.

The jury found Roberts guilty of possession of a controlled substance. He was sentenced to 1 year's incarceration in the county jail. At sentencing, the court noted that Roberts was not an appropriate candidate for probation. Roberts had several prior offenses including theft, assault, and three drug infractions. Roberts appealed, and the Court of Appeals summarily affirmed his conviction and sentence. Roberts then petitioned for further review, which this court granted.

ASSIGNMENTS OF ERROR

In his petition for further review, Roberts asserts the trial court erred in (1) denying his motion to suppress, (2) failing to grant a directed verdict, (3) denying his motion for new trial, (4) failing to place Roberts on probation, and (5) imposing an excessive and disproportionate sentence.

STANDARD OF REVIEW

[1] In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable sus-

picion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Ray*, 260 Neb. 868, 620 N.W.2d 83 (2000); *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000).

[2] 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. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000); *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

[3] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000); *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999).

[5] Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

[6] A jail term within the statutory limits will be upheld on appeal, absent an abuse of discretion. *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000).

ANALYSIS

Motion to Suppress

[7] Roberts asserts the trial court erred in overruling his motion to suppress because the methamphetamine found in the pocket of his running pants was seized in violation of his constitutional right to be free from unreasonable searches and seizures, guaranteed under the Fourth Amendment to the U.S.

Constitution and Neb. Const. art. I, § 7. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

Specifically, Roberts asserts that the search of his jacket and running pants was constitutionally unreasonable because Wagner, the officer who found the methamphetamine, was not the officer who actually arrested Roberts. Alternatively, Roberts contends that the search was unreasonable because Wagner did not have a search warrant or permission to search the clothing and was essentially conducting a "fishing expedition."

Roberts' first assertion is without merit. The three officers who responded to Overton's call for assistance jointly possessed the authority to conduct whatever search was constitutionally permitted under the circumstances. See, generally, *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990); *State v. Staten*, 233 Neb. 800, 448 N.W.2d 152 (1989). When Konen requested assistance, Wagner and Garcia responded to the request and met Konen outside the apartment. The three officers entered the apartment together. Wagner told Konen there was an outstanding warrant for Roberts' arrest. Wagner and Konen were both present in the room when Roberts was placed under arrest. Although Konen was the officer who placed the handcuffs on Roberts, Wagner and Konen were both arresting officers at the scene. Compare *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 713-14, 618 N.W.2d 715, 720 (2000) ("'[a]n officer, who is present at the scene of the arrest for purposes of assisting in it, if necessary, is an "arresting officer" . . . even though a different officer actually places his hand upon the defendant and informs him that he is under arrest'"), quoting *State v. Stauffer*, 266 N.C. 358, 145 S.E.2d 917 (1966). Roberts' assertion that only Konen could perform the search incident to Roberts' arrest is without merit.

[8,9] Roberts' second assertion rests on the fact that Wagner's search was made without a warrant. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few "'"'specifically established and well-delineated exceptions,'"'" *State v. Craven*, 253 Neb. 601, 606, 571 N.W.2d 612, 617 (1997), which "must be strictly confined

by the exigencies which justify [their] initiation," *State v. Ortiz*, 257 Neb. at 815, 600 N.W.2d at 828. "In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement." *State v. Craven*, 253 Neb. at 606, 571 N.W.2d at 617.

[10] The warrantless search exceptions recognized by this court include: (1) searches undertaken with consent or with probable cause, see *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000), and *In re Interest of Andre W.*, 256 Neb. 362, 590 N.W.2d 827 (1999); (2) searches under exigent circumstances, see *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); (3) inventory searches, see *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); (4) searches of evidence in plain view, see *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); and (5) searches incident to a valid arrest, see *State v. Ray*, 260 Neb. 868, 620 N.W.2d 83 (2000), and *State v. Roach, supra*. The State argues the trial court correctly found that Wagner's search of Roberts' jacket and running pants was a constitutionally permissible search under the fifth category, a search incident to a lawful arrest.

[11,12] The validity of a search incident to a lawful arrest depends on the legality of the arrest itself. *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994). There is no factual dispute in this case that Roberts was lawfully arrested, based on the outstanding Adams County arrest warrant. This arrest provides the justification for the search. See, *State v. Ranson, supra*; *State v. Ray, supra*. Wagner's subjective reason for searching the clothing has no bearing on the legality of this search because the justification for the search rests on the fact that Roberts was arrested. Once a person is lawfully arrested, "if the search was within the scope of a search which may be conducted incident to a lawful arrest, then the evidence obtained from the search was properly admitted." *State v. Kimminau*, 240 Neb. 176, 181-82, 481 N.W.2d 183, 187 (1992).

[13] Thus, the issue is whether the trial court erred in finding that a search of Roberts' jacket and pants fell within the permissible scope of a search incident to a lawful arrest. In *State v. Weible*, 211 Neb. 174, 179, 317 N.W.2d 920, 923 (1982), we

defined the permissible scope of a search incident to a lawful arrest, stating that "an arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may also search the area *within the arrestee's immediate control*." Accord *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). See, also, *State v. Sassen*, 240 Neb. 773, 484 N.W.2d 469 (1992); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991).

Roberts argues that the clothing was not within the area of his immediate control because the jacket and pants were searched after he was removed from the bedroom. Essentially, Roberts' argument is that his clothing was within the area of his immediate control only so long as Roberts remained in a position where he reasonably might gain access to the clothing.

In *Chimel v. California, supra*, the U.S. Supreme Court enunciated the scope of a search incident to an arrest. In *Chimel*, the officers lawfully arrested a suspect in his home on a charge of burglary, then conducted a warrantless search of the suspect's entire home. The Court concluded that the search of the entire home exceeded the reasonable scope of a search incident to a lawful arrest under the Fourth Amendment, and set out the following rule:

> There is ample justification . . . for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas of the room itself.

395 U.S. at 763.

[14] The *Chimel* Court went on to note that " '[t]he recurring questions of reasonableness of searches' depend upon 'the facts and circumstances—the total atmosphere of the case . . . viewed in the light of established Fourth Amendment principles.' " 395 U.S. at 765. However, the Court further noted that the justifica-

tion for a search incident to a lawful arrest is absent if " 'a search is remote in time or place from the arrest.' " 395 U.S. at 764, quoting *Preston v. United States*, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964).

[15] In applying *Chimel*, the Eighth Circuit noted in *U.S. v. Morales*, 923 F.2d 621, 626 (8th Cir. 1991), that the meaning of the phrase " 'immediate control' " extends beyond the area that is easily accessible to an arrestee at the time of the search. In *Morales*, the arrestee was holding two bags when the officers approached and arrested him. After the arrest, the officers removed the bags about 3 feet away from the arrestee and searched them. The court concluded that "[r]egardless of whether the bags were easily accessible to Morales, they were within the area of 'immediate control' as defined by *Chimel*, [*New York v.*] *Belton*[, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)], and the cases of this court." 923 F.2d at 627.

In *New York v. Belton, supra*, the officers searched the arrestee's jacket, which was located in the passenger compartment of an automobile. The Court found that the jacket was within the area of the arrestee's immediate control, although at the time of the search, the arrestee had already been removed from the automobile and placed under arrest.

We recognize that unlike *Belton*, Roberts' arrest took place in a home. However, in *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990), we rejected the argument that the underlying rationale of *Belton* could be applied only during an automobile stop, noting that numerous decisions from various federal courts have applied *Belton* outside that context. See, e.g., *United States v. Fleming*, 677 F.2d 602 (7th Cir. 1982) (search of paper bag taken from arrestee during arrest valid under *Belton*, although search was conducted after arrestee was handcuffed and escorted outside home).

As explained by the Eighth Circuit:

> [A]ccessibility, as a practical matter, is not the benchmark. The question is whether the [evidence] was in the area within the immediate control of the arrestee within the meaning of *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969). This rule defines the area which may be searched, and is not constrained

> because the arrestee is unlikely at the time of the arrest to actually reach into that area.

United States v. Palumbo, 735 F.2d 1095, 1097 (8th Cir. 1984) (search of area behind dresser drawer after arrestee was handcuffed valid). See, also, *U.S. v. Lucas*, 898 F.2d 606 (8th Cir. 1990) (search of kitchen cabinet after arrestee subdued and removed from area valid). Compare *Curd v. City Court of Judsonia, Ark.*, 141 F.3d 839 (8th Cir. 1998) (search of arrestee's purse after officers took possession of purse valid).

[16] Roberts asserts that once he left the bedroom, the area of his immediate control in effect vanished. The arrestee in *U.S. v. Nelson*, 102 F.3d 1344 (4th Cir. 1996), made a similar argument. In *Nelson*, the arrestee was placed under arrest in his home, and during the arrest, officers removed a bag from his shoulder. After the arrestee was handcuffed and escorted to another room in the house for questioning, the officers searched the shoulder bag. The Fourth Circuit held that the area of immediate control was not extinguished the moment the arrestee was handcuffed and removed, reasoning:

> While the need for the incident-to-arrest exception is indeed grounded on the need to protect law enforcement officers and evidence, the validity of such a search does not end at the instant the risks justifying the search come to an end. Even though the warrant exception is well grounded on the existence of exigent risks attending arrest, the pragmatic necessity of not invalidating such a search the instant the risks pass is well accepted.

Id. at 1347. Accord, *U.S. v. McLaughlin*, 170 F.3d 889 (9th Cir. 1999) (search of vehicle that commenced 5 minutes after defendant was arrested and removed from scene valid). See, also, *United States v. Silva*, 745 F.2d 840 (4th Cir. 1984) (search of arrestee's room valid although arrestee was handcuffed and guarded by agents); *Davis v. Robbs*, 794 F.2d 1129 (6th Cir. 1986) (search and seizure of rifle in house valid although arrestee was handcuffed and placed in squad car prior to search); *U.S. v. Queen*, 847 F.2d 346 (7th Cir. 1988) (search of closet after arrestee was handcuffed and guarded by two officers valid); *U.S. v. Lucas, supra*; *United States v. Roper*, 681 F.2d 1354 (11th Cir. 1982) (search of arrestee's shoulder bag lying on table valid

although arrestee was handcuffed); *United States v. Mason*, 523 F.2d 1122 (D.C. Cir. 1975) (search of closet while arrestee was handcuffed and standing 3 to 4 feet away from closet valid).

In the instant case, Roberts was wearing the clothing in question at the time of the arrest. The clothing was under his control when he intentionally removed it after being placed under arrest. The search itself took place in the same room where the arrest occurred. Considering the " 'total atmosphere' " of the facts and circumstances of this case, we determine that Roberts' jacket and running pants were within the area of Roberts' immediate control under *Chimel v. California*, 395 U.S. 752, 765, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). To conclude otherwise would permit an arrestee to conceal evidence simply by discarding his or her clothing and leaving the area. See, e.g., *State v. Sassen*, 240 Neb. 773, 484 N.W.2d 469 (1992); *DeLong v. State*, 670 N.E.2d 56 (Ind. App. 1996); *State v. Vitale*, 795 S.W.2d 484 (Mo. App. 1990).

[17] Having concluded that the search was properly within the area of Roberts' immediate control, we must also consider whether the search was timely. A search incident to arrest of the area within an arrestee's immediate control must be contemporaneous with the arrest. See, *Curd v. City Court of Judsonia*, Ark., 141 F.3d 839 (8th Cir. 1998); *State v. Twohig*, 238 Neb. 92, 107, 469 N.W.2d 344, 354 (1991) (" 'search incident to a lawful arrest need not be made immediately on arrest' "); *State v. Roach*, 234 Neb. 620, 452 N.W.2d 262 (1990).

In *Curd*, police officers took the arrestee's purse from her when they arrested her at her home. About 15 minutes later, when the arrestee arrived at the police station, she requested that her purse be placed where she could see it. In response, an officer placed the purse in view and searched it. The Eighth Circuit held that this search incident to arrest was sufficiently contemporaneous to satisfy the Fourth Amendment. *Curd v. City Court of Judsonia, Ark., supra*. See, also, *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (search of arrestee's jacket after placing him under arrest and searching his person contemporaneous); *United States v. Fleming*, 677 F.2d 602 (7th Cir. 1982) (search of paper bag 5 minutes after arrest contemporaneous).

The record in the instant case shows that Roberts removed his clothing, Konen handcuffed Roberts, then Konen escorted Roberts out of the bedroom because of escalating hostility between Roberts and Overton. Wagner initiated his search of the clothing "almost immediately" after Roberts was escorted from the bedroom, after "probably less than a minute" had elapsed. We find that the search of Roberts' removed clothing within minutes of his arrest was sufficiently contemporaneous to comport with the Fourth Amendment.

We determine that Wagner's search of Roberts' jacket and running pants satisfies the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7. The search was within the area of Roberts' immediate control under *Chimel v. California, supra*, and was conducted contemporaneously with Roberts' arrest.

Remaining Assignments of Error

In his second assignment of error, Roberts asserts the trial court erred in failing to grant a directed verdict in Roberts' favor made at the close of the State's case in chief and again at the conclusion of all the evidence. In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

Roberts contends the evidence adduced against him was doubtful and lacked any probative value because, according to Roberts' testimony, the cigarette package containing the "eight-ball" found by Wagner in Roberts' running pants was not his, but, instead, was planted by Overton. Roberts asserted that as far as he remembered, his package of cigarettes was in his possession when he arrived at the Adams County jail. However, Deputy Hueske testified that Roberts did not have any cigarettes with him when Roberts was booked into the jail. Roberts' testimony merely established a conflict in the evidence, which was resolved by the trier of fact against Roberts. The evidence in this case is not so doubtful in character or lacking in probative value

that a finding of guilt upon such evidence cannot be sustained. This assignment of error is without merit.

In his third assignment of error, Roberts asserts the trial court erred in denying his motion for new trial. However, Roberts does not argue this error in his brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

We have examined Roberts' remaining assignments of error under the appropriate standard of review and conclude they are without merit.

CONCLUSION

We affirm the Court of Appeals' summary affirmance of the decision of the district court finding Roberts guilty of possession of a controlled substance and sentencing him to 1 year's imprisonment in the county jail.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GLEN M. PETERS, APPELLANT.

622 N.W.2d 918

Filed March 16, 2001. No. S-00-404.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below.
3. **Criminal Law: Statutes: Sentences.** Under the prohibition against ex post facto laws, a legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed.
4. **Statutes: Constitutional Law: Prior Convictions: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages

a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law.

5. **Statutes: Prior Convictions: Weapons.** Neb. Rev. Stat. § 28-1206 (Reissue 1995) punishes the specific conduct of possession of a firearm by a person previously convicted of a felony, not the underlying felony.
6. **Search Warrants: Affidavits.** If an affidavit, read in a commonsense manner and as a whole, reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service of a search warrant, provision for such service in the warrant is proper.
7. **Constitutional Law: Search Warrants: Probable Cause: Time.** Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of the execution of the warrant—that is, whether it is still likely that the items sought will be found in the place to be searched.
8. **Search Warrants: Affidavits.** Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. ___: ___. The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred.

Appeal from the District Court for Merrick County: MICHAEL OWENS, Judge. Affirmed.

David T. Schroeder, of Kelly & Schroeder, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

Following a bench trial in district court, Glen M. Peters appeals his conviction of being a felon in possession of a firearm under Neb. Rev. Stat. § 28-1206 (Reissue 1995). Before 1995, § 28-1206 did not apply to firearms with barrels in excess of 18 inches in length. But in 1995, § 28-1206 was amended to apply to all firearms. Peters argues that at the time of his previous convictions under § 28-1206, he was allowed to possess a firearm with a barrel longer than 18 inches and that his conviction under

the amended § 28-1206, which now forbids possession of any firearm, violates the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions. Peters also argues that the district court should have sustained his motion to suppress evidence because the affidavit in support of the warrant and evidence at trial did not support a nighttime search or show the credibility of a citizen informant.

We determine that although Peters' previous felonies occurred before § 28-1206 was amended, there was no violation of the Ex Post Facto Clauses because § 28-1206 was not applied retroactively and was not further punishment for the earlier convictions. We further determine that the affidavit in support of the search warrant supported the issuance of a warrant to be served without notice and at any time. Accordingly, we affirm.

BACKGROUND

On March 13, 1999, Sgt. Richard N. Miller prepared an affidavit in support of a search warrant to be executed on Peters' residence. The affidavit stated that on March 8, 1999, Merrick County Deputy Sheriff Brian M. Stobbe was in Palmer, Nebraska, investigating a dogbite. The affidavit stated that while conducting the investigation, a citizen informant informed Stobbe that based on the informant's personal knowledge, Peters had various items of stolen property, which the informant described in detail. These stolen items included tools. The affidavit stated that the informant also told Stobbe that Peters had marijuana, that he was selling various controlled substances, and that he had various weapons. The informant told Stobbe that one of Peters' "hobbies" was to go out on the front porch and shoot a high-powered rifle at a stop sign located on the northwest corner of Highway 92 and Worms Road. The affidavit stated that Miller had further been advised that Peters would not hesitate to shoot at law enforcement officers.

In the affidavit, Miller stated that he verified that tools had been stolen from a construction site on Worms Road and that during the course of his duties, he had observed where the stop sign described by the informant had been shot. Miller stated that a background check showed that Peters was a convicted felon and had been previously charged with being a felon in posses-

sion of a firearm and with giving false information on an application for a handgun permit. In addition, Peters had a criminal history of discharging firearms within city limits, kidnapping, and false imprisonment. Miller stated in the affidavit that he has known the informant for approximately 8 years and that the informant had given reliable information in the past, including one time when Miller was able to obtain a search warrant based on information that later proved to be reliable. Miller then stated that based on his training and experience, he was aware that persons involved in drug- and weapons-related crimes often arm themselves with weapons and sometimes use those weapons against police and others. Miller stated that such people would also conceal or destroy evidence if given time and that very important factors in raids involving weapons and drugs are surprise and speed. Miller stated that identification eliminates surprise and provides persons within a residence time to take actions that would require reaction by officers. Miller then requested a no-knock search warrant to be served at any time.

The county court issued a warrant that could be served at any time and without notice. Five days later, on March 18, 1999, at 5:39 a.m., the warrant was executed. During the search, law enforcement officers seized four firearms with barrel lengths over 18 inches. As a result, Peters was charged by information with being a felon in possession of a firearm. Peters was also charged with two counts of possession of stolen property, which were later dismissed.

Peters filed a demurrer, plea in abatement, and motion to quash, all of which contended that the charge of being a felon in possession of a firearm violated his rights under the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions. Peters also filed a motion to suppress.

Stobbe, Miller, and Peters testified at the hearing on the motion to suppress. Stobbe testified that he had not had any prior contact with the informant. Stobbe did not try to independently verify what the informant told him, but instead gave all the information to Miller. Miller testified that he had known the informant for 8 years and that he spoke personally with the informant before executing the search warrant. When asked about the informant's reputation in the community for truthful-

ness and veracity, Miller responded that the informant had a mixed reputation for truthfulness, with some people finding him very likeable and truthful, while others disliked him and would call him a liar. Miller testified that he asked for a no-knock warrant that could be served at any time due to the high probability that Peters had weapons in his house and the possibility that he could use those weapons against police officers. Miller stated that he was also concerned that evidence could be disposed of or hidden.

Miller admitted that he waited 5 days after getting the information on Peters to ask for a warrant. Miller stated that the delay was due to other responsibilities within his office. Miller also admitted that while he received the warrant on March 13, 1999, he did not execute it until March 18. Miller testified that the reason for the delay was because his office was getting the State Patrol involved in the case. Miller testified that he saw no urgency that the evidence would be removed or hidden during this timeframe. Rather, Miller stated that his concern was that the warrant should be executed before Peters became aware of it. Miller stated that he was concerned that if Peters was not surprised, a weapon could be used against the officers.

Peters testified that he had previously been convicted of a felony in 1976 for burglary and another in 1989 for being a felon in possession of a firearm. (The record shows that although Peters was charged in 1976, he was convicted in 1977.) Peters admitted that he had previously been charged with other crimes.

The district court overruled the motion to suppress, having earlier overruled the demurrer, motion to quash, and plea in abatement. At the arraignment, Peters elected to stand mute, and the court entered a plea of not guilty on his behalf. A bench trial was held, during which Peters renewed the objections made in his previous motions. At the end of the State's evidence, Peters made a motion to dismiss because the firearms had barrels over 18 inches in length and his prior convictions took place during a time when a person convicted of a felony could possess firearms with barrels over that length. Peters did not present any evidence, and the district court found him guilty and sentenced him to incarceration for 12 months to 3 years. Peters appealed, and we granted his motion to bypass.

ASSIGNMENTS OF ERROR

Peters assigns, rephrased, that the district court erred in overruling his demurrer, plea in abatement, motion to quash, and motion to suppress.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[2] To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the courts below. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000); *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

ANALYSIS

Ex Post Facto Clauses

Peters contends that at the time of his previous felony convictions, § 28-1206 allowed him to possess a firearm with a barrel longer than 18 inches and that thus, his conviction under § 28-1206 as amended, which now forbids possession of any firearm, violates the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions. Before 1995, § 28-1206 (Reissue 1989) stated: "(1) Any person who possesses any firearm with a barrel less than eighteen inches in length . . . and who has previously been convicted of a felony or who is a fugitive from justice commits the offense of possession of firearms by a felon or a fugitive from justice." Operative September 9, 1995, § 28-1206 was amended to read: "(1) Any person who possesses any firearm . . . and who has previously been convicted of a felony or who is a fugitive from justice commits the offense of possession of a deadly weapon by a felon or a fugitive from justice."

[3,4] The U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law shall be passed. Under this pro-

hibition, a legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). Furthermore, a law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law. *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000).

The overwhelming majority of courts, however, hold that a conviction under a statute forbidding possession of a firearm by a person convicted of a felony does not violate the Ex Post Facto Clause even when the felony or felonies for which the defendant was convicted took place before the statute was enacted. See, *U.S. v. Mitchell*, 209 F.3d 319 (4th Cir. 2000) (citing cases); *U.S. v. Brady*, 26 F.3d 282 (2d Cir. 1994); *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984); *Landers v. State*, 250 Ga. 501, 299 S.E.2d 707 (1983); *State v. Swartz*, 601 N.W.2d 348 (Iowa 1999); *State v. Williams*, 358 So. 2d 943 (La. 1978); *People v Tice*, 220 Mich. App. 47, 558 N.W.2d 245 (1996); *Dodson v. Com.*, 23 Va. App. 286, 476 S.E.2d 512 (1996).

Likewise, it has been held that the Ex Post Facto Clause is not violated when, at the time of the defendant's underlying felony conviction, the statute prohibited possession of particular kinds of firearms but the defendant is convicted under an amendment to the statute that prohibits the possession of any firearm. *People v. Mills*, 6 Cal. App. 4th 1278, 8 Cal. Rptr. 2d 310 (1992); *State v. Vainio*, 466 A.2d 471 (Me. 1983); *Hand v. State*, 107 Nev. 577, 816 P.2d 468 (1991); *State v. Lamb*, 110 Or. App. 146, 822 P.2d 143 (1991); *State v. Schmidt*, 100 Wash. App. 297, 996 P.2d 1119 (2000). See, also, *State v. Olvera*, 191 Ariz. 75, 952 P.2d 313 (Ariz. App. 1997) (not ex post facto violation when amended statute increased number of crimes constituting felonies). Generally, such amendments are viewed not as further punishment for the underlying felony or felonies, but as a future prohibition on a felon's conduct. See *id.*

Peters bases his argument primarily on *U.S. v. Davis*, 936 F.2d 352 (8th Cir. 1991), and the dissenting opinion in *People v. Mills, supra*, contending that the amendment to § 28-1206 acted to retroactively punish him for his 1977 and 1989 felony con-

victions. In *Davis*, the Eighth Circuit Court of Appeals discussed the application of a Minnesota statute that lengthened the time prohibiting felons from possessing firearms and its effect on a restoration of civil rights law. The court concluded that an application of the amendment to a conviction that took place before the amendment increased the defendant's punishment by delaying restoration of his or her civil rights. *Davis*, however, did not involve a conviction for possession of a firearm by a felon. Thus, the Iowa Supreme Court determined that *Davis* was inapplicable in cases involving statutes forbidding possession of a firearm by a felon. *State v. Swartz, supra*. See, also, *U.S. v. O'Neal*, 180 F.3d 115 (4th Cir. 1999) (disagreeing with *Davis*); *Forster v. Pierce County*, 99 Wash. App. 168, 991 P.2d 687 (2000) (concluding that *Davis* court's discussion of Minnesota law was dictum and disagreeing with case to extent that it found Minnesota law applied to past conduct).

We conclude that *Davis* is neither persuasive nor applicable to Peters' case. Instead, we agree with the overwhelming majority of jurisdictions that hold the Ex Post Facto Clauses are not violated under circumstances such as those in Peters' case. Although § 28-1206 as amended applies to Peters only because he has the status of a convicted felon and he acquired that status before the amendment, § 28-1206 applies to events that occur after its effective date. See *People v. Mills, supra*. In this case, the event, possession of a firearm by a person convicted of a felony, took place after the effective date of the amendment, and the amendment was not retroactive. See *id*.

Neither was the amendment to § 28-1206 an increase in punishment for Peters' prior felonies. Nothing in § 28-1206 indicates that it was enacted as a form of retroactive punishment. Rather, § 28-1206 is located in the statutory sections defining offenses against public health and safety. As one court has noted, a statutory amendment prohibiting felons from possessing any firearm may be enacted " 'to lessen "a high potential of danger to the public" and to reduce the "probability that the convicted individual would continue his criminal activity." . . .' " *State v. Vainio*, 466 A.2d at 475. The court further stated " '[t]he Legislature could justifiably conclude there was a need for [more] gun control legislation in the case of convicted crimi-

nals.' " *Id.* See, also, *State v. Olvera, supra* (overview of legislative scheme showed intent to restrict firearm possession to protect public instead of to punish for past offense).

[5] We hold that § 28-1206 punishes Peters for the specific conduct of possession of a firearm by a person previously convicted of a felony. It does not punish Peters for the underlying felony. Peters' status as a felon makes the law applicable to him, but the legal consequences of his past conduct were not changed. Thus, the crime for which Peters was punished was not for the earlier felonies, but for the new and separate crime of which the prior felony convictions are an element. See, *People v. Mills*, 6 Cal. App. 4th 1278, 8 Cal. Rptr. 2d 310 (1992); *Hand v. State*, 107 Nev. 577, 816 P.2d 468 (1991); *People v Tice*, 220 Mich. App. 47, 558 N.W.2d 245 (1996); *Dodson v. Com.*, 23 Va. App. 286, 476 S.E.2d 512 (1996). Accordingly, we determine that no violation of the Ex Post Facto Clause occurred in this case.

MOTION TO SUPPRESS

[6] Peters next contends that the trial court erred in overruling his motion to suppress because the affidavit in support of the search warrant did not show a factual basis for a nighttime search. In particular, Peters argues that the affidavit did not support any urgency permitting a nighttime search and points to the fact that the warrant was not executed until 5 days after it was issued. Neb. Rev. Stat. § 29-814.04 (Reissue 1995) provides in part:

> The warrant shall direct that it be served in the daytime unless the magistrate or judge is satisfied that the public interest requires that it should not be so restricted, in which case the warrant may direct that it may be served at any time. The warrant shall designate the magistrate or judge to whom it shall be returned. For purposes of this section, daytime shall mean the hours from 7 a.m. to 8 p.m. according to local time.

We have said that " ' "[i]f the affidavit, read in a common sense manner and as a whole reasonably supports the inference that the interests of justice are best served by the authorization of nighttime service, provision for such service in the warrant is proper." ' " *State v. Fitch*, 255 Neb. 108, 114, 582 N.W.2d 342, 347 (1998), quoting *State v. Paul*, 225 Neb. 432, 405 N.W.2d 608 (1987).

[7] In executing a warrant, Neb. Rev. Stat. § 29-815 (Reissue 1995) requires that it be executed and returned within 10 days after its date. *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996). We have also stated, however, that "it does not follow that compliance with the legislatively imposed time limit will in every instance result in a valid search." *Id.* at 211, 556 N.W.2d at 249. Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of the execution of the warrant—that is, whether it is still likely that the items sought will be found in the place to be searched. *Id.*

Miller's affidavit stated that based on his training and experience, persons involved in drug- and weapons-related crimes often arm themselves with weapons and sometimes use those weapons against police and others. The affidavit stated that such people would also conceal or destroy evidence if given time and that very important factors in raids involving weapons and drugs are surprise and speed. The affidavit also stated that identification eliminates surprise and provides persons within a residence time to take actions that would require reaction by officers. The affidavit further stated that Miller had been advised that Peters would not hesitate to shoot at law enforcement officers. Thus, the affidavit provided information showing that the execution of the warrant at a time when surprise and speed could be accomplished, such as at night and without knocking, could serve to protect the safety of the officers involved.

Although the warrant was not executed until 5 days after it had been issued, the record shows that the probable cause recited in the affidavit still existed at the time of the execution of the warrant. The concern in this case was not of destruction of contraband. Rather, it was for the safety of law enforcement officers involved. Thus, although Miller testified that there was no urgency in executing the warrant immediately upon receiving it, there was some concern for the officers' safety. Further, the record indicates that the time taken between receiving and executing the warrant was necessary in order for the local law enforcement officers to arrange for the involvement of the State Patrol in the matter. We determine that the delay of 5 days in executing the warrant did not act to make the search unconstitu-

tional. Accordingly, we conclude that the interests of justice are best served by the authorization of nighttime service.

Peters' final contention is that the trial court erred in overruling his motion to suppress because the affidavit in support of the search warrant did not establish the informant's credibility. Peters further contends that evidence at the suppression hearing showed that the informant was reputed to be dishonest.

[8] Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Edmonson*, 257 Neb. 468, 598 N.W.2d 450 (1999).

[9] Although the affidavit labels the informant as a citizen informant, it does not set out facts to show why that label was used. The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth circumstances from which the informant's status as a citizen informant can reasonably be inferred. *Id.* Neither does the affidavit set forth any specific statements the informant made against his or her penal interest.

The affidavit did, however, provide information regarding the credibility of the informant. Although testimony at the suppression hearing indicated that the informant's reputation for honesty was mixed, the affidavit stated that Miller had known the informant for 8 years and that the informant had provided law enforcement with reliable information in the past. Further, the affidavit showed the manner in which an independent investigation verified information provided by the informant. Under these circumstances, we conclude that the affidavit sufficiently established the informant's credibility to support the issuance of a search warrant.

CONCLUSION

We hold that although Peters' previous felonies occurred before § 28-1206 was amended, there was no violation of the Ex

Post Facto Clauses because § 28-1206 was not applied retroactively and was not further punishment for the earlier convictions. We further hold that the affidavit in support of the search warrant supported the issuance of a warrant to be served without notice and at any time. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JESSE SPURGIN, APPELLANT.

623 N.W.2d 644

Filed March 16, 2001. No. S-00-411.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **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 discretion.
4. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Double Jeopardy.** The Double Jeopardy Clauses of both the U.S. Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
6. ___. The Double Jeopardy Clause precludes multiple punishments for the same offense imposed in a single proceeding.
7. **Criminal Law: Convictions: Statutes: Legislature: Intent.** A determination of whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses.
8. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
9. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

10. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
11. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
12. **Sentences: Appeal and Error.** 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.
13. **Sentences: Probation and Parole: Appeal and Error.** Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for Adams County: TERRI HARDER, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

WRIGHT, J.

NATURE OF CASE

Jesse Spurgin was charged with three counts of possession of a destructive device. A jury found him guilty on each of the three counts, and he was sentenced to consecutive sentences of 20 months' to 2 years' imprisonment on each count. Spurgin timely appeals.

SCOPE OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000).

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the

absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of discretion. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001).

FACTS

On July 5, 1999, Edna Jones was driving home from work when she noticed two men yelling at each other, one of whom she later identified as Spurgin. She also observed what she thought to be bottles lined up in the middle of the street. As she slowed down, Spurgin approached her with a bottle raised in the air. Jones testified that at the time, she thought Spurgin was going to hit her with the bottle. Spurgin then told Jones to " '[g]et the fuck out of here, Bitch.' " Jones immediately left the area and reported the incident to the Hastings Police Department.

When Officer Robert Bednar arrived at the scene, he noticed three black canisters lined up across the street. Bednar was soon approached by Spurgin, who was carrying what appeared to be a Jack Daniels whiskey bottle. Spurgin told Bednar that he was "pissed off at the world."

Bednar noticed that the bottle Spurgin was holding contained a substance which appeared milky and "chocolatey" and that the substance was oozing out of the bottle. As he escorted Spurgin to the sidewalk, Bednar asked Spurgin to set the bottle on the ground. After Spurgin eventually complied, Bednar was able to do a weapons search. At that time, Bednar discovered a bottle of "sudsy like soap type" material in Spurgin's pants pocket.

By this time, another police officer had arrived and was assisting in the search. As Bednar pulled the bottle from Spurgin's pants pocket, the other officer stated that it looked like a bomb. Spurgin responded, " 'That's right, it's a bomb. It's a bottle bomb. And [so are] those over there.' " Spurgin then pointed to three devices in the street.

Spurgin was arrested and placed in the back of a police car. While in the car, he stated that the items in the street were

"'potato bombs.'" He told the officers, "'Don't move those containers because they've got an ignition device on them and if you throw them they'll explode.'"

Spurgin made additional statements to the police to the effect that he had been kicked out of the military and wanted to get back in and that he thought he would get the military's attention by demonstrating that he was capable of making such devices. Bednar testified that Spurgin stated that he had placed a shotgun shell inside each of the devices and taped a screw to the bottom of the shotgun shell so that when he threw the device and it hit the ground, the shotgun shell would explode the device. He told another officer that he would cooperate by drawing pictures and explaining the design of the devices in detail, along with the contents of the devices.

The police notified various other agencies, including the Nebraska State Patrol. Jud McKinstry, an explosives expert from the State Patrol, supervised the removal of the three devices from the street and three other bottles that were found in a nearby yard. McKinstry transported all six devices to the local landfill. He placed explosive countercharges on the devices and detonated them. McKinstry was unable to determine the contents of the three bottles found in the yard.

With regard to the three glass bottles found in the yard, Spurgin told the police that he was attempting to make mustard gas. Spurgin stated that the devices in the street were designed after "the old potato masher style grenades" from World War II. He told the police to be careful with the devices because if they exploded, anyone in a 10- to 15-meter area would be "hamburger, blind, or possibly dead." Spurgin said he had been designing these devices for about 4 months. He also indicated that previously, in April 1999, he had blown up a device at the old K Mart store outside of Hastings. Two weeks later, he detonated a liquid-style device at a park. Upon further questioning by Det. Paul Weber, Spurgin stated that after he placed the devices in the street, he was yelling and screaming that he had a bomb or hand grenade and that he was "tired of people talking shit about him in Hastings."

Spurgin was charged with three separate counts of possession of a destructive device, and following a jury trial, he was found

guilty on each of the three counts. A motion for new trial was overruled, and Spurgin was sentenced to consecutive sentences of 20 months' to 2 years' imprisonment. Spurgin timely appealed his convictions and sentences.

ASSIGNMENTS OF ERROR

Spurgin assigns as error that the district court erred (1) in determining that one simultaneous act involving possession of multiple items at the same place constitutes more than one offense, (2) in imposing consecutive sentences for one simultaneous act, (3) in failing to grant his motion for a directed verdict at the close of all the evidence, (4) in failing to grant his motion for a new trial, (5) in refusing to place him on probation, and (6) in imposing sentences which are excessive and disproportionate to the severity of the offense.

ANALYSIS

Spurgin first argues that charging him with multiple counts violates the Double Jeopardy Clause against multiple punishments for the same offense imposed in a single proceeding. Spurgin claims that possession of the three devices constituted only one single criminal act and that the Nebraska Criminal Code does not define whether possession of each individual device constituted a separate offense.

Neb. Rev. Stat. § 28-1220 (Reissue 1995) states: "(1) Any person who has in his possession a destructive device, as defined in subdivision (7) of section 28-1213, commits the offense of possession of a destructive device. . . . (3) Possession of a destructive device is a Class IV felony."

Neb. Rev. Stat. § 28-1213 (Reissue 1995) provides in relevant part:

> (7) Destructive devices shall mean:
>
> (a) Any explosive, incendiary, or poison gas (i) bomb, (ii) grenade . . . the primary or common purpose of which is to explode and to be used as a weapon against any person or property; or
>
> (b) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (7)(a) of this section from which a destructive device may be readily assembled.

Spurgin argues that charging him with three separate counts is similar to charging a shoplifter with three counts of shoplifting where three items have been taken from the same store at the same time, as was the case in *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992). In *Garza*, we held that the act of theft involving multiple items of property stolen simultaneously from the same place constituted but one offense. Spurgin claims that under this rationale, possessing three devices in violation of § 28-1220 constitutes only one offense.

[4] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000). In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

We conclude that under a plain reading of § 28-1220, possession of each destructive device constitutes a separate offense. Section 28-1220 also states that possession of a single destructive device is a Class IV felony. Therefore, possession of three destructive devices would constitute three separate offenses.

Our conclusion is further supported by the fact that Spurgin constructed each device in an individual and unique manner. Each of the devices contained different elements: one contained flour, another salt and chlorine, and another wheat and salt. The devices also varied in size. Furthermore, the fact that the devices were discovered at the same time and location does not equate with the commission of only one offense.

Spurgin next argues that the district court erred in imposing consecutive sentences for one simultaneous act, including possession of multiple similar items at the same place. Spurgin claims that the imposition of three separate punishments violates the Double Jeopardy Clause with regard to multiple punishments for the same offense in a single proceeding.

[5-7] The Double Jeopardy Clauses of both the U.S. Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense

after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000). The Double Jeopardy Clause precludes multiple punishments for the same offense imposed in a single proceeding. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997). A determination of whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses. See *id.* Since each individual device constituted a new and separate offense, punishment for each separate offense does not offend the Double Jeopardy Clause. Therefore, we conclude that Spurgin's argument regarding double jeopardy is without merit.

[8] Next, Spurgin argues that the evidence was so lacking in probative force that his motion for a directed verdict should have been granted at the close of all the evidence. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[9,10] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

Spurgin admitted to the police that the items in his possession were bombs or grenades. Although Spurgin argues that he did

not want to hurt anyone, the issue is for what purpose or intent were the devices constructed. This was an issue of fact for the jury. At the time of the incident, Spurgin was yelling and screaming that he was "tired of people talking shit about him in Hastings." He also explained to one of the police officers that he was "pissed off at the world."

The elements of § 28-1220 require that a person be in possession of a destructive device as defined in § 28-1213(7), which states that the primary or common purpose of the device is "to explode and to be used as a weapon against any person or property." There was sufficient evidence to sustain Spurgin's convictions on these three counts. The evidence, viewed and construed most favorably to the State, was sufficient to support Spurgin's convictions.

[11] Spurgin's fourth assignment of error is that the district court erred in failing to grant his motion for new trial. However, Spurgin's brief devotes no argument to this issue. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000). Accordingly, we do not address this assignment of error.

[12] Finally, Spurgin argues that the district court abused its discretion in imposing consecutive sentences of 20 months' to 2 years' imprisonment and in refusing to place him on probation. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of discretion. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). 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.* Spurgin's sentences of 20 months' to 2 years' imprisonment are well within the statutory limits of Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000), which provides for a maximum of 5 years' imprisonment on each count for a Class IV felony.

[13] Whether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Crowdell*, 241 Neb. 216, 487 N.W.2d 273 (1992). Here, Spurgin's presentence investigation report indicated that he was not a suitable candidate for proba-

tion. The recommendation was based on Spurgin's prior record, which showed a substantial risk that Spurgin would engage in additional criminal conduct during a period of probation. The presentence investigation report also indicated that a lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law.

The district court also concluded that Spurgin was not a suitable candidate for probation and that to place him on probation would promote disrespect for the law. The court was particularly disturbed by a letter in the presentence report in which Spurgin stated that he could not promise that he would never construct another such device. We conclude that the sentence imposed was not an abuse of discretion, and Spurgin's argument has no merit.

CONCLUSION

For the reasons set forth herein, we affirm the convictions and sentences of the district court.

AFFIRMED.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE, V. MICHAEL STRUSS, APPELLANT.

623 N.W.2d 308

Filed March 23, 2001. No. S-99-1088.

1. **Jurisdiction.** The question of jurisdiction is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own independent conclusions.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **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. **Constitutional Law: Jurisdiction: Legislature: Appeal and Error.** Jurisdiction is vested in an appellate court through the state Constitution and the Legislature, Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 1995).
6. **Constitutional Law: Supreme Court: Jurisdiction: Appeal and Error.** Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute.

7. **Statutes: Jurisdiction.** Jurisdictional statutes are to be strictly construed.
8. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
10. **Arbitration and Award: Appeal and Error.** Under Neb. Rev. Stat. § 25-2620(a)(5) (Reissue 1995), an order which vacates an arbitrator's award without directing a rehearing is appealable, whereas an order which vacates an award and directs a rehearing is not appealable.

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

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

Don Stenberg, Attorney General, Donald J.B. Miller, Douglas D. Dexter, and Terri M. Weeks for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Michael Struss was employed by the Nebraska Department of Health and Human Services (the Department) at the Hastings Regional Center. His employment was governed by a collective bargaining agreement which provided a grievance procedure for employment disputes. Struss was put on probation, and later, his employment was terminated. He filed two grievances, a probation grievance and a termination grievance, both of which proceeded through arbitration and eventually were considered by the district court for Lancaster County.

The district court made separate rulings regarding the probation grievance and the termination grievance. Struss appeals that portion of the order of the district court with respect to the termination grievance, which order vacated the award of the arbitrator and directed a rehearing of the termination grievance before a new arbitrator. Neither party appeals the portion of the district court's order which confirmed the award with respect to

the probation grievance. In response to Struss' appeal, the Department argues, inter alia, that this court does not have jurisdiction over this appeal under Neb. Rev. Stat. § 25-2620 (Reissue 1995). For the reasons recited below, we dismiss Struss' appeal for lack of appellate jurisdiction.

STATEMENT OF FACTS

Struss was employed by the Department at the Hastings Regional Center. The terms and conditions of Struss' employment were governed by a collective bargaining agreement (the Contract) which had been negotiated between the Department and the Nebraska Association of Public Employees, American Federation of State, County, and Municipal Employees Local 61, which was the exclusive bargaining agent for the bargaining unit of which Struss was a member. The Contract governed, inter alia, the procedure to be utilized in grievance matters. The arbitrator in this case determined that the 1997-99 collective bargaining agreement governed procedural grievance matters. The 1997-99 collective bargaining agreement became effective July 1, 1997, and covered the period from July 1, 1997, through June 30, 1999, which was subsequent to the June 11, 1997, effective date of Neb. Rev. Stat. § 25-2602.01 (Cum. Supp. 2000). Compare *Millennium Solutions v. Davis*, 258 Neb. 293, 603 N.W.2d 406 (1999).

On June 2, 1997, the Department placed Struss on disciplinary probation for a period of 6 months. On June 4, Struss filed a grievance with respect to the probation. On October 8, while the grievance process with respect to the probation grievance was underway, the Department terminated Struss' employment. Struss filed a separate grievance with respect to the termination of employment.

The grievance procedure under the Contract consisted of a multistep process, the third step of which allowed the parties to mutually agree to submit the dispute to voluntary binding arbitration as an alternative to submitting the dispute to the State Personnel Board. The Contract provided that "[w]ithin fifteen workdays of receipt of the decision in Step 2 the grievant [in this case, Struss] may appeal said decision through the Chief Negotiator, DAS - Employee Relations Division."

Struss' probation grievance was denied at step two. The step two denial of the probation grievance was appealed to the step three level, and the dispute was submitted to arbitration on November 2, 1997. Struss' termination grievance was also denied at step two. The step two decision in the termination grievance, dated November 25, 1997, was received by Struss on December 3 and was appealed on February 19, 1998.

On February 6, 1998, in connection with the probation grievance appeal, the Department filed a motion to dismiss the probation grievance on the basis that Struss had failed to appeal the step two decision in his termination grievance, thereby rendering moot the remedies Struss sought in the probation grievance. The parties subsequently selected an arbitrator, and the motion was submitted to him. As noted, on February 19, Struss filed an appeal of the step two denial of the termination grievance. The Department filed a motion to dismiss the appeal of the termination grievance on the basis that it had been filed late. Following a telephone hearing, the arbitrator overruled both of the Department's motions to dismiss.

The arbitrator granted a motion for a consolidated hearing of both the probation grievance and the termination grievance. The Department renewed both motions to dismiss and continued to renew the motions throughout the arbitration proceedings, which included four hearings conducted between October 17 and December 3, 1998. The arbitrator decided that he had jurisdiction over both grievances, agreed with Struss on the merits, and ultimately upheld both of Struss' grievances in a decision issued on April 13, 1999, and supplemented on April 17. As an award, the arbitrator ordered that the Department reinstate Struss to his former position with backpay, but because of misconduct on Struss' part in connection with the disciplinary action, the arbitrator ordered that Struss be placed on probation for a period of 6 months from the date of reinstatement.

On May 24, 1999, the Department filed a motion pursuant to Neb. Rev. Stat. § 25-2613 (Cum. Supp. 2000) in the district court for Lancaster County to vacate the arbitrator's award. The Department alleged that pursuant to § 25-2613(a)(3), the arbitrator exceeded his power when he exercised jurisdiction over

the appeal of the termination grievance which had been untimely filed. The Department requested that the arbitrator's award be vacated and that the district court order a rehearing before a new arbitrator pursuant to § 25-2613(c). On June 16, Struss objected to the Department's motion to vacate and filed a cross-motion requesting that the district court confirm the consolidated award of the arbitrator. Struss claimed that the Contract's language with respect to appealing a step two decision within 15 workdays was not mandatory.

On July 22, 1999, the district court entered an order specifically vacating the award with respect to the termination grievance and directing that the matter be remanded for a rehearing before a new arbitrator. The district court found that the step three appeal in the termination grievance was not timely filed, but nevertheless ordered the rehearing "to allow [Struss] to present evidence which may justify the failure to file the step 3 grievance in a timely manner" and thereby establish just cause to excuse the delay. The district court further taxed the costs of the proceedings to Struss.

On August 3, 1999, Struss moved the district court to clarify the July 22 order by (1) confirming the portion of the arbitrator's award which upheld his probation grievance and (2) clarifying whether, if the new arbitrator found evidence to justify the failure to timely appeal the termination grievance, the first arbitrator's award on the merits would then be confirmed or whether a new trial on the merits of the termination grievance would be conducted. In response to the motion to clarify, the district court entered an order on August 13 amending the July 22 order to include language confirming the award of the arbitrator with respect to the probation grievance.

On August 17, 1999, Struss filed notice of his intent to appeal the order dated July 22, 1999, and the supplemental order thereto dated August 13, 1999. On appeal, Struss assigns error only to that portion of the order pertaining to the termination grievance which vacated the arbitrator's award and directed a rehearing before a new arbitrator. Struss does not assign error to the order with respect to the probation grievance, and the Department did not cross-appeal such order.

ASSIGNMENTS OF ERROR

Struss asserts, restated, that the district court erred in vacating rather than confirming the award of the arbitrator in the termination grievance and further erred in directing a rehearing before a new arbitrator. The Department has raised an issue regarding the jurisdiction of this court to hear the appeal.

STANDARDS OF REVIEW

[1,2] The question of jurisdiction is a question of law. *In re Appeal of Stoller, ante* p. 150, 622 N.W.2d 878 (2001). On questions of law, an appellate court has an obligation to reach its own independent conclusions. *Id.*

[3] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

ANALYSIS

[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. *In re Appeal of Stoller, supra*; *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001).

[5] Jurisdiction is vested in an appellate court through the state Constitution and the Legislature. See, Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 1995); *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001).

[6] Neb. Const. art. V, § 2, provides that this court shall have "such appellate jurisdiction as may be provided by law." We have held that, except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, this court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). Section 24-204 provides that this court

> shall have appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees of other courts in all matters of

law, fact, or equity when the rules of law or the principles of equity appear from the files, exhibits, or records of the court to have been erroneously determined.

[7] In connection with the instant case involving the appeal of an arbitration case from a lower court limited to intrastate matters, § 25-2620, which is a section of the Uniform Arbitration Act enacted in Nebraska, defines the "matters of appeal and proceedings in error which may be taken from the judgments or decrees of other courts," see § 24-204, with respect to arbitration proceedings, and § 25-2620 limits appeals to those orders specifically listed. Jurisdictional statutes are to be strictly construed, *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000), and this court therefore lacks appellate jurisdiction over orders relating to arbitration matters such as the instant case other than those listed in § 25-2620. For the reasons stated below, we conclude that this court lacks jurisdiction to hear this appeal under § 25-2620.

Before the instant appeal was moved to this court's docket, the Department filed a motion for summary dismissal, which Struss opposed. The Nebraska Court of Appeals overruled the Department's motion for summary dismissal. The basis of the Department's motion for summary dismissal was that the district court's order was not appealable under § 25-2620. Section 25-2620 provides in relevant part that in arbitration cases, an appeal from the lower court may be taken from "[a]n order confirming or denying confirmation of an award," § 25-2620(a)(3), or "[a]n order vacating an award *without directing a rehearing*," § 25-2620(a)(5). (Emphasis supplied.)

In the instant case, the district court entered two orders: one relating to the probation grievance which confirmed the arbitrator's award and one relating to the termination grievance which vacated the arbitrator's award and directed a rehearing before a new arbitrator. Neither party appeals the district court's order confirming the arbitrator's award pertaining to the probation grievance. Struss appeals only the order which vacated the award in the termination grievance and directed a rehearing.

In connection with its jurisdictional challenge, the Department argues that § 25-2620(a)(5) does not allow an appeal where an award has been vacated and a rehearing

ordered. Struss argues in response that the vacation of the termination grievance award and remand for rehearing by the district court were effectively a denial of his motion to confirm the award pertaining to the termination grievance and, therefore, appealable as an order denying confirmation under § 25-2620(a)(3). We reject Struss' argument.

[8] 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. *In re Referral of Lower Platte South NRD, ante* p. 90, 621 N.W.2d 299 (2001).

The language of § 25-2620(a)(5) states that "[a]n order vacating an award *without directing a rehearing*" may be appealed. This language explicitly indicates that an order which vacates an award but does not direct a rehearing is appealable and implies that an order which vacates an award but does direct a rehearing is not appealable. The obvious purpose of § 25-2620 is to identify orders relating to arbitration which are final and appealable. The reasonable construction of § 25-2620(a)(3) and (5) is that a lower court's order which confirms or denies an arbitration award or vacates an arbitration award without directing a rehearing finally terminates the arbitration process and thus renders such order suitable for review, whereas an order which directs a rehearing is premature for appellate review because the arbitration process has not been completed.

[9,10] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001). The language "without directing a rehearing" in § 25-2620(a)(5) which qualifies an order which vacates an award is meaningful and not superfluous. Clearly, an order which vacates an award "without directing a rehearing" concludes the matter and is therefore appealable, whereas an order which vacates an award and directs a rehearing requires that further arbitration proceedings be conducted to finally determine the rights of the parties and is not final or appealable. Thus, we

read § 25-2620(a)(5) to mean that an order which vacates an award without directing a rehearing is appealable, whereas an order which vacates an award and directs a rehearing is not appealable. Because Struss' challenge is to a lower court order of the latter type, the order in the instant case is not appealable.

Our construction of § 25-2620(a)(5) is comparable to the construction placed on statutes in other states with arbitration statutes similar to those in Nebraska and derived from the Uniform Arbitration Act. See, e.g., *Stolhandske v. Stern*, 14 S.W.3d 810 (Tex. App. 2000); *Prudential Securities, Inc. v. Vondergoltz*, 14 S.W.3d 329 (Tex. App. 2000); *Kowler Associates v. Ross*, 544 N.W.2d 800 (Minn. App. 1996); *Dept. of Transp. v. State Employ. Ass'n*, 581 A.2d 813 (Me. 1990); *Carner v. Freeman*, 175 So. 2d 70 (Fla. App. 1965). See, similarly, *Airports Com'n v. Airports Police Fed.*, 443 N.W.2d 519, 523 (Minn. 1989) (holding that even though appellant was not entitled to appellate review of order vacating award and directing rehearing " 'as of right,' " the Minnesota Constitution gave the Minnesota Supreme Court "independent power to review any case").

Notwithstanding the district court's order vacating the termination grievance award and directing a rehearing, Struss nevertheless argues that the district court's order in this case is appealable because the order implicitly denied confirmation of the termination grievance award, and orders denying confirmation are appealable under § 25-2620(a)(3). In this regard, we note that the district court's order states that the award is vacated and orders a rehearing before a new arbitrator; the district court's order does not explicitly deny Struss' motion to confirm the award.

In *Kowler Associates v. Ross, supra*, the Minnesota Court of Appeals rejected an argument similar to that advanced by Struss. The order in *Kowler Associates* differed from the order in the instant case, however, in that in addition to vacating the award and directing a rehearing, the trial court's order in *Kowler Associates* explicitly denied confirmation of the award, whereas the district court's order in the instant case did not deny confirmation. The Minnesota Court of Appeals cited *Airports Com'n v. Airports Police Fed., supra*, for the proposition that an order vacating an award but directing a rehearing is not appealable

under the Minnesota statute. The Minnesota Court of Appeals rejected the appellant's argument and reasoned that if an order vacating and remanding for rehearing were construed as an order denying confirmation, the subsection of the statute providing for the appealability of "an order vacating an award *without directing a rehearing*," *Kowler Associates v. Ross*, 544 N.W.2d at 801, would be of no effect, and an order vacating an award, with or without a rehearing, would always be appealable. The Minnesota Court of Appeals stated that "when a rehearing is directed, appellate review is premature because the arbitration process has not been completed." *Id.* at 802.

In recent cases addressing the issue, the Texas Court of Appeals agreed with the Minnesota Court of Appeals' holding in *Kowler Associates v. Ross, supra. Prudential Securities, Inc. v. Vondergoltz, supra*; *Stolhandske v. Stern, supra.* In *Prudential Securities, Inc.*, the lower court denied an application to confirm, granted an application to vacate, and ordered rehearing. The Texas Court of Appeals agreed with the reasoning of the Minnesota Court of Appeals in *Kowler Associates* that to allow appeal of a denial of confirmation when a rehearing has also been ordered would render the statutory language "without directing a rehearing," *Stolhandske v. Stern*, 14 S.W.3d at 331 n.2, without effect. In *Stolhandske*, as in the case before us, the lower court vacated the arbitration award and ordered a new arbitration but did not rule on a motion to confirm the award. The Texas Court of Appeals noted that "[t]he vacating of an arbitration award does not automatically deny a motion to confirm, but renders the consideration of an application to confirm moot." *Stolhandske v. Stern*, 14 S.W.2d 810, 815 (Tex. App. 2000). Compare, *National Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 341 (Mo. App. 1995) (holding appealable order which explicitly denied confirmation, vacated award, and directed rehearing but stating that "[w]e do not imply the order would have been appealable absent the provision denying confirmation"); *Air Shield Remodelers, Inc. v. Biggs*, 969 S.W.2d 315 (Mo. App. 1998).

We agree with the reasoning of the Minnesota Court of Appeals and the Texas Court of Appeals that to construe an

order vacating an award and directing rehearing as an appealable denial of confirmation would render the effect of the statutory language "without directing a rehearing" meaningless. In the instant case, the district court vacated the award relating to the termination grievance, ordered a rehearing, and did not explicitly deny confirmation of the award. We reject Struss' argument that the district court's vacation of the award with a direction for a rehearing was an appealable denial of his motion to confirm the award.

CONCLUSION

In this case, § 25-2620 does not allow an appeal from a lower court's order vacating an award of an arbitrator and directing a rehearing. Accordingly, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

PATRICIA BLIZZARD, ALSO KNOWN AS PATRICIA EISENACH, WIDOW OF DENNY E. BLIZZARD, ET AL., APPELLANTS, V. CHRISMAN'S CASH REGISTER CO., DOING BUSINESS AS DATA SYSTEMS, INC., APPELLEE.

623 N.W.2d 655

Filed March 23, 2001. No. S-99-1118.

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. **Workers' Compensation: Attorney Fees: Interest.** In order to receive interest under Neb. Rev. Stat. § 48-125(2) (Reissue 1998), compensation and attorney fees must be assessed against the same employer under § 48-125(1).
3. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Workers' Compensation: Attorney Fees: Interest.** An award of attorney fees is a prerequisite before interest on the compensation amount due to a claimant may be awarded under Neb. Rev. Stat. § 48-125(2) (Reissue 1998).

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Steven J. Riekes, of Marks, Clare & Richards, P.C., for appellants.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This is a workers' compensation case tried on stipulated facts. Appellants include Patricia Blizzard, also known as Patricia Eisenach, widow of Denny E. Blizzard; Andrea Kay Blizzard; and Harold M. Zabin, assignee of the law firm of Richards, Riekes, Brown & Zabin, P.C. Appellants claim that appellee, Chrisman's Cash Register Co., through its workers' compensation insurer, Travelers Insurance Company (Travelers), which voluntarily paid to Patricia's daughter, Andrea, the sum of $44,304 as a 50-percent penalty, should have paid one-third of that amount to Patricia's attorney, Zabin. Appellants also claim that the trial court should have awarded Zabin a statutory attorney fee award under Neb. Rev. Stat. § 48-125 (Reissue 1998) because of late payments by Travelers and, further, that the trial court should have awarded appellants interest on the late payments. The trial court awarded Zabin a share of the penalties that Travelers voluntarily paid to the beneficiary, but denied Zabin's application for a statutory award of attorney fees and interest. The Nebraska Workers' Compensation Court review panel reversed the trial court's award and ruled that Zabin was not entitled to a one-third share of the penalties voluntarily paid by Travelers in the form of attorney fees. The review panel also ruled that Zabin was not entitled to a statutory award of attorney fees and that Patricia was not entitled to interest on the amount paid as a penalty. Appellants filed an appeal to the Nebraska

Court of Appeals, which affirmed the review panel's decision. See *Blizzard v. Chrisman's Cash Register Co.*, No. A-99-1118, 2000 WL 1207130 (Neb. App. Aug. 22, 2000) (not designated for permanent publication). Appellants now petition for further review, which this court granted.

BACKGROUND

Patricia is the surviving widow of Denny, who was killed in an automobile accident while in the course of his employment with Chrisman's Cash Register Co. In 1986, Patricia remarried, and Travelers paid to Patricia the appropriate remarriage benefits; those benefits are not at issue here. Upon Patricia's remarriage, Travelers should have begun paying Andrea increased benefits of $120 per week and should have continued to pay Zabin $60 per week. However, due to an unintentional mistake made by Travelers, Travelers continued to pay Andrea only $24 per week rather than the $120 to which she was entitled, and it did not make any further weekly payments to Zabin. This mistake continued for 568 weeks from November 29, 1986, to November 13, 1997, without any complaint by Andrea or Zabin.

In November 1997, a representative of Travelers discovered the underpayment of benefits and informed Andrea and Zabin of the mistake. The record reflects that neither Andrea nor Zabin had made any complaints, nor did they take any action regarding the underpayment of the benefits before they were notified by Travelers. On November 14, Travelers, of its own volition, began paying Andrea benefits of $120 per week and Zabin $60 per week, the correct amounts of the benefits.

On December 8, 1997, Travelers paid Andrea $54,528 and paid Zabin $34,080, which were the amounts of the underpayment of benefits for the 568 weeks. In addition, Travelers also voluntarily paid Andrea a 50-percent waiting-time penalty in the amount of $44,304 for the unintentional delay in the payment of the benefits. The stipulated facts further reflect that no legal services were provided by Zabin to Andrea and that no proceedings were held before the compensation court in order to recover these amounts from Travelers.

On June 4, 1998, Zabin, naming himself as a plaintiff along with Patricia and Andrea, his client beneficiaries, filed a petition

in the compensation court alleging that he was entitled to be paid a 50-percent waiting-time penalty on the $34,080 voluntarily paid to him and further alleging that there were unpaid interest and penalties due and owing to Patricia, Andrea, and Zabin.

On December 3, 1998, the trial court entered an order awarding Zabin an attorney fee in the amount of $14,768, an amount equal to a one-third share of the waiting-time penalty voluntarily paid to Andrea and enforcing a lien in this amount to be offset by the future payment of weekly indemnity benefits to Andrea. The trial court, however, refused to award any other attorney fees or interest, finding that "[t]here is no attorney fee due and owing as there were no 'proce[e]dings held' nor award or judgment" and because no legal services had been provided to Andrea to recover the penalty voluntarily paid to her.

An application for review was filed, and the review panel reversed those portions of the trial court's order awarding Zabin an attorney fee, finding as follows:

> [T]he trial court found that [Zabin] provided no legal services to [Andrea] as none were required in recovering the 50 percent penalty amount paid voluntarily to [Andrea]. It is also uncontradicted that the same was true with respect to Travelers' payment of the delinquent indemnity amount, a significant portion of which Travelers paid directly to [Zabin], representing the full payment of the one-third (1/3) fee amount on all benefits payable to [Andrea] for the relevant time period.

The Court of Appeals noted that the only issue appealed is the review panel's determination that Zabin is not entitled to a statutory award of attorney fees and interest for bringing this matter before the compensation court. The Court of Appeals held that in considering the award of attorney fees for bringing this action, the review panel held that "'[a]n award of such a fee would constitute nothing more than a windfall to [Zabin],'" *Blizzard v. Chrisman's Cash Register Co.*, No. A-99-1118, 2000 WL 1207130 at *3 (Neb. App. Aug. 22, 2000) (not designated for permanent publication), and stated that Zabin may not create work for himself by filing a petition for attorney fees in the compensation court and then argue that the work done to prepare for trial of the case constitutes the sole basis for an award of a fee

because such work adds nothing to any benefits Andrea had already received. The Court of Appeals agreed with the review panel that an award of attorney fees for bringing this action would be contrary to the statutory authority of § 48-125(1) when no attorney services were provided and no court proceedings were held to recover the delayed benefits or the waiting-time penalty. The Court of Appeals further determined that an award of attorney fees for bringing this action would be contrary to § 48-125(1) when this proceeding stemmed from the same delinquent payments and waiting-time penalty.

ASSIGNMENTS OF ERROR

Appellants assign, restated, that the Court of Appeals erred in not awarding (1) attorney fees for the $44,304 penalty amount and (2) interest payments for the total underpayment ($88,608) during the 568 weeks.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000); *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000).

ANALYSIS

The central issue in this case is whether a party may recover interest on late payments pursuant to § 48-125(2) where there has been no award of attorney fees pursuant to that section. The review panel and the Court of Appeals did not award an attorney fee from the $44,304 penalty amount, holding that Zabin provided no legal services in recovering the 50-percent penalty amount because it was voluntarily paid. Therefore, because there was no award of an attorney fee, the wording of § 48-125(2) prevents appellants from receiving interest for the amount of the late payments.

The pertinent part of § 48-125 states:

> [W]hen the employer neglects to pay compensation for thirty days after injury . . . 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 . . . .

Attorney Fees

We agree with the reasoning of the Court of Appeals that § 48-125(1) does not provide for an award of attorney fees where no court proceedings were held.

Other jurisdictions have defined "award" as it pertains to compensation cases. The Superior Court of Delaware has defined the word "award" to mean "compensation received as a result of a formal hearing and presentation before the Industrial Accident Board, and does not include compensation paid under a voluntary agreement between employer and employee." *Anderson v. Wheeler Construction*, 267 A.2d 616, 617 (Del. Super. 1970). See, also, *Kelly v. J & J Corp.*, 447 A.2d 427 (Del. Super. 1982). The Supreme Court of Arkansas has defined "award" under its compensation statutes to mean "any deicision [sic] by a referee or the Commission, whether favorable to the claimant or not." *Clemons v. Bearden Lumber Company*, 240 Ark. 571, 575, 401 S.W.2d 16, 19 (1966).

We conclude that the voluntary payment by Travelers and acceptance by appellants is not an award of compensation to appellants under § 48-125(1). No proceeding took place before the compensation court where an employee received an award under § 48-125(1). Because the employee did not receive an award in a proceeding before the compensation court, attorney fees cannot be awarded under § 48-125(1).

Interest

The Court of Appeals determined that under § 48-125(2), interest can be awarded only wherein an award of an attorney fee has been made.

[2] In *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 164, 542 N.W.2d 696, 701 (1996), dealing solely with the interest issue, this court held that "[i]n order to receive interest under § 48-125(2), compensation and attorney fees must be assessed against the same employer under § 48-125(1)."

[3] We agree with the Court of Appeals that § 48-125(2) will not allow the award of interest to appellants in this case. We note, however, there is no logical connection between attorney fees and interest to the claimant other than that § 48-125(2) requires this nexus. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999); *Neb. Account. & Disc. v. Citizens for Resp. Judges*, 256 Neb. 95, 588 N.W.2d 807 (1999).

[4] Whether interest payments for the late payment situation mentioned in § 48-125 should be a separate issue from whether an attorney fee is awarded is a question for the Legislature, not for this court. The unequivocal language of § 48-125 clearly reads that an award of attorney fees is a prerequisite before interest on the compensation amount due to a claimant may be awarded under § 48-125(2). See, *Koterzina v. Copple Chevrolet, supra*; *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993).

We conclude that appellants are precluded from receiving an interest award on the late payments made by Travelers.

CONCLUSION

For the reasons stated in this opinion, we affirm the decision of the Court of Appeals which, in turn, affirmed the judgment of the review panel.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. MCLEMORE, APPELLANT.

623 N.W.2d 315

Filed March 23, 2001. No. S-99-1323.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.
3. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.
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. **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.
6. **Homicide: Intent.** The elements of first degree murder in Nebraska are intent to kill, premeditated malice, and deliberate malice.
7. **Convictions: Weapons: Proof.** To convict a defendant of use of a weapon to commit a felony, the State must prove the defendant used a deadly weapon to commit any felony.
8. **Homicide: Intent: Weapons.** The intent to kill sufficient to support a conviction may be inferred from the defendant's deliberate use of a deadly weapon in a manner likely to cause death.
9. **Homicide: Intent: Words and Phrases.** The term "premeditated" means to have formed a design to commit an act before it is done.
10. ___: ___: ___. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
11. **Intent: Words and Phrases.** "Deliberate" means not suddenly, not rashly.
12. ___: ___. Deliberation requires that the defendant considered the probable consequences of his or her act before doing the act.
13. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.

14. **Motions to Strike: Appeal and Error.** Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice.
15. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
16. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
17. **Trial: Rebuttal Evidence.** Rebuttal evidence is confined to that evidence which explains, disproves, or counteracts evidence introduced by the adverse party.
18. **Trial: Rules of Evidence: Witnesses.** Courts limit cross-examination of witnesses to the subject matter of the direct examination and matters affecting the credibility of the witness.
19. **Trial: Testimony.** It is within the discretion of the trial court to control and limit cross-examination as necessary to prevent undue prejudice and thus produce a fair trial.
20. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
21. **Effectiveness of Counsel: Appeal and Error.** When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Karen A. Bates-Crouch for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

HENDRY, C.J.

INTRODUCTION

A jury convicted Michael E. McLemore of first degree murder and use of a deadly weapon to commit a felony in connection with the September 2, 1997, death of Marcella Lynn Estes-Torres (Torres). McLemore was sentenced to life in prison on the murder conviction and not less than nor more than 20 years' imprisonment for use of a weapon. McLemore appeals.

FACTUAL BACKGROUND

Torres was a real estate agent who lived in Omaha with two of her children and her brother, Edward Mentzer. Torres was married, but the marriage was troubled. Torres' husband was incarcerated at the time of Torres' murder.

On July 25, 1997, Torres met McLemore, and the two began a dating relationship. Soon after the two met, McLemore developed strong feelings for Torres. However, by the end of August 1997, Torres had expressed a desire to end her relationship with McLemore.

On the afternoon of September 1, 1997, McLemore accompanied Torres to a real estate appointment. After the appointment had concluded, Torres dropped McLemore off at his apartment and told him she would return to his apartment around 7 p.m.

Corine Alvarado, one of Torres' older daughters, was babysitting Torres' two younger children at Torres' residence that afternoon and evening. Between 5 and 6 p.m., Torres returned to her home to get ready to go out for the evening. She told Alvarado that she was going to the Anchor Inn. When she left the house that evening, Torres was wearing blue jeans, a black belt, a white tank top, and white pumps.

Thereafter, Torres went to the residence of Frank Szeliga and his girl friend, Kerri Cullinane. Torres had previously dated Szeliga. Torres asked Szeliga and Cullinane if they would like to go with her to the Anchor Inn. Szeliga and Cullinane declined. Torres then picked up her friend Epifanio Barrientos, and he accompanied her to the Anchor Inn. Torres dropped Barrientos off at his residence at approximately 11 p.m.

McLemore waited until approximately 8 p.m. for Torres to arrive at his residence. Between 8 and 9 p.m., Alvarado received a telephone call from McLemore, asking where Torres was. Alvarado received two more calls from McLemore that evening, asking where Torres was and sounding angrier with each call.

Between 8 and 10 p.m., Mentzer, Torres' brother, returned to Torres' residence, and Alvarado informed him she would be leaving once the children were asleep. Mentzer then went to his downstairs bedroom and went to sleep at approximately 10:30 p.m.

McLemore's attempts to reach Torres having proved unsuccessful, McLemore decided to walk to her house, a distance of

5 miles. McLemore took a knife with him. Alvarado left Torres' residence at 12:04 a.m. on September 2, 1997. As she was leaving, she saw McLemore walking toward the residence with a bottle of beer in his hand. McLemore, wanting to make sure Alvarado was not coming back, waited outside Torres' residence for 20 minutes. He then entered Torres' residence and was inside the residence for approximately 20 minutes. During that time, McLemore was angry and began slicing up Torres' living room furniture with his knife and strewing the stuffing over the living room floor.

At 12:45 a.m. Torres' neighbors, Rodney and Joanne Givens, were awakened by a woman's screaming for help. Looking out their bedroom window, the Givenses saw a woman they recognized as Torres struggling with a man whom they did not recognize. Joanne Givens went to the kitchen and called the police. The Givenses then saw the man putting Torres into the passenger side of Torres' car and driving away. The Givenses' son Drew, who also witnessed the incident, heard a woman screaming for help and a man saying, "[H]ow could you do this to me, bitch?" When Drew looked out the window, he witnessed the man and woman struggling. All three of the Givenses noticed that the man was holding a shiny object which he eventually put behind his back, into his belt or pants. It was dark and raining at the time the Givenses witnessed this incident, and the Givenses gave varying physical descriptions of the male they saw struggling with Torres.

Louisa Smith, another of Torres' neighbors, was also awakened at 12:45 a.m. by a woman screaming for help. Upon looking out her window, Smith witnessed a man chasing a woman in the street, both falling to the ground, and the man putting the woman into a car and driving away. Smith could not identify either of the people involved in the struggle because they were too far away and it was dark outside.

At approximately 2 a.m., Mentzer awoke and went upstairs. At that time, he noticed the living room furniture had been cut up and the stuffing strewn around the room. He also noticed a pair of black tennis shoes in the living room, which he recognized as belonging to McLemore. Mentzer later called the police and several family members.

Police discovered Torres' purse in the front yard of Torres' residence. The purse had a small amount of blood on it. Small amounts of blood were also found in the entryway to Torres' house.

At approximately 5 a.m. on September 2, 1997, several of Torres' family members went to McLemore's apartment complex looking for Torres. At that time, they encountered McLemore outside and asked him if he knew where Torres was. McLemore responded that he would "check [his] Caller I.D." and then ran behind the apartment complex and did not return while Torres' family members were outside.

On the morning of September 3, 1997, McLemore was arrested in connection with Torres' disappearance. At noon on September 3, Det. Michael Hoch was called to the Omaha police station to interview McLemore. During the interview, McLemore stated that Torres was supposed to come to his residence on the evening of September 1 but that she did not arrive. He admitted that he called Torres' residence three times looking for her. He stated that he became angry and decided to walk to Torres' house, taking a knife with him and stopping along the way to purchase a bottle of beer. A bottle of beer was found on a picnic table in Torres' backyard. McLemore admitted that he had been at Torres' residence from 12:04 to 12:45 a.m. on September 2 and that he had sliced up Torres' furniture, cutting his finger in the process. He stated that he left the residence at 12:45 a.m. and began walking home, discarding the knife along the way.

McLemore also told Hoch that later in the day on September 2, 1997, while at a schoolyard drinking alcohol and looking at a photograph of Torres, McLemore became despondent and attempted suicide by cutting his wrists. However, the wounds stopped bleeding, and McLemore then walked back to his apartment complex, where he was later arrested.

After the interview with Hoch, McLemore was booked by detention technician Brenda Rocha. During the process of booking McLemore, Rocha asked McLemore what brought him to town. McLemore responded, "This girl." McLemore then stated, referring to "this girl," that he drove her car, that his fingerprints would be in her car, and that his hair would be on her. Upon

noticing the cuts on McLemore's wrists, Rocha asked McLemore why he did that. McLemore responded, "I loved that girl. I loved her." McLemore did not identify by name the "girl" he was referring to.

After McLemore was arrested on September 3, 1997, police searched McLemore's apartment, taking certain items into evidence, including a black belt and several items of McLemore's clothing retrieved from a closet area. The black belt was later identified by Alvarado as the belt Torres was wearing when she went out on the evening of September 1.

At approximately 10:30 p.m. on September 3, 1997, Torres' car was found in the parking lot of a dentist's office located a few blocks from McLemore's apartment complex. The car had been in the parking lot since the morning of September 2. The car was towed to police headquarters where the trunk was opened. Torres' body was found inside the trunk.

Torres' death resulted from internal and external bleeding due to 54 to 56 cutting and stabbing wounds to the left side of the face, neck, chest, abdomen, and upper extremities. These wounds included a stab wound to the chest which penetrated Torres' heart, several stab wounds to the abdomen which penetrated her intestines, and a significant cutting wound to the neck which cut into the larynx. The wounds to the arms and hands were "defensive wounds," which Torres sustained while trying to defend herself from the assault.

On January 9, 1998, McLemore was charged with first degree murder and use of a weapon to commit a felony in connection with Torres' murder. On January 14, 1999, McLemore filed a motion to preclude the State from making any reference at trial to his previous conviction and incarceration which had occurred in another state. The trial court sustained the motion on January 19.

On June 21, 1999, the day trial was scheduled to begin, McLemore made a motion for continuance to allow McLemore to secure testimony from Roxanne Berres, a former girl friend of Szeliga, in order to establish a "pattern of violence against women" by Szeliga. The trial court overruled the motion and determined that Berres' testimony was not relevant and was inadmissible under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404

(Reissue 1995). The State then made a motion in limine with respect to Berres' anticipated testimony, claiming the testimony was irrelevant. The trial court sustained the motion.

The case proceeded to trial, beginning on June 21, 1999. Evidence admitted at trial showed that blood found in Torres' house, in Torres' car, and on Torres' purse and clothing matched only Torres' blood. Blood found on McLemore's clothing recovered from the closet area of McLemore's apartment matched only McLemore's blood. Torres' car was examined for fingerprints by Donald Veys, a criminalist for the Omaha Police Department. Veys testified that environmental factors, such as the passage of time and moisture, can destroy fingerprints, and that the only print recoverable from Torres' car was a palm print, which could not be matched to Torres, McLemore, or any other suspects.

The State elicited testimony from several witnesses regarding statements Torres made to them about her fear of McLemore and statements McLemore had made regarding his feelings toward Torres. Such testimony included testimony from Mentzer that Torres told him that "she was concerned with her safety" because "of a statement [McLemore] made." This testimony was admitted without objection.

Carolyn Ludwig and Terri Holcomb, friends of Torres, also testified that Torres had told them she was afraid of McLemore. Holcomb testified that on August 31, 1997, Torres told her that McLemore "was very controlling, that she was afraid of him, and that she wanted to break it off with him." Holcomb further testified that on that same day, she and Torres were discussing Torres' husband's wanting to get back together with Torres. Holcomb then testified that McLemore interjected at that point, stating, "if he couldn't have her, nobody could have her." This testimony was admitted without objection. Ludwig testified, without objection, that toward the end of August, McLemore told her he was in love with Torres and "[w]ould never let her go." Ludwig also testified that on August 31, Torres told her in reference to McLemore, "She was scared of him. She did not want to go with him." Finally, Ludwig testified, again without objection, that McLemore stated in reference to Torres that "if he couldn't have her, nobody was going to have her."

Evidence was also adduced regarding McLemore's behavior on the morning and early afternoon of September 2, 1997. Donald Grimm, a former roommate of McLemore, testified that around 8:30 a.m. on September 2, McLemore came to Grimm's residence and told Grimm that Torres was missing. During Grimm's testimony, the following exchange took place:

> [Prosecution:] . . . What did he say about his standpoint after he told you that?
>
> [Grimm:] He told me that they would probably try to blame him —
>
> Q. Okay.
>
> A. — because he —
>
> Q. I'm sorry, go ahead.
>
> A. Because the shit he was in before, you know, for down in North Carolina.

Defense counsel objected on the basis that the testimony was in violation of the pretrial order because it alluded to McLemore's prior conviction and incarceration. The trial court overruled the objection. After Grimm's testimony, McLemore made a motion for mistrial based on this testimony. In ruling on the motion for mistrial, the court stated "[T]he statement, itself, doesn't violate any of our pretrial orders in this case, as I indicated, nothing about prior convictions, nothing about prior incarcerations. The motion will be overruled."

Theresa Spivey, controller of the company where McLemore was employed, testified that on the morning of September 2, 1997, McLemore came to his workplace and gave his resignation. Spivey testified that McLemore indicated the reason he quit his job was "he would be going away for a long time and would not be able to work any longer." Evan McPhillips, the leasing agent at McLemore's apartment complex, testified that between noon and 1 p.m. on September 2, he received a telephone call from McLemore. McLemore told McPhillips that he would not be able to continue his lease because "he and his girlfriend had gotten into a fight and that he thought he might be going to jail."

Willie Martin, an inmate housed in the same area as McLemore at the Douglas County correctional facility from

September 16 to October 10, 1997, testified about conversations Martin had had with McLemore regarding Torres' murder. Martin had been previously convicted of four felonies and had three previous convictions for giving false information.

Martin testified that 2 to 3 days after McLemore's arrival at the facility, McLemore told him that he had been charged with criminal mischief for entering the home of a woman he had been dating and cutting up her furniture. McLemore told Martin that the woman was a real estate agent who had several children. Martin further testified that McLemore stated that one day when it was "pouring down rain," McLemore had placed several telephone calls to the woman's house but was unable to reach her. McLemore told Martin that he became angry when he could not reach the woman because he believed that she was with another man.

Martin testified that McLemore stated that he then started walking to the woman's house in the rain and entered the house through an unlocked patio door. Martin testified that McLemore stated that he became angry while waiting for the woman and cut up her furniture with a knife he had brought with him, cutting his finger in the process. McLemore then stated that the woman came home and that a struggle ensued. McLemore told Martin that he forced the woman outside and into her car. Martin testified that McLemore stated that "the bitch kept talking shit so I had to do something to her" and that he and the woman then "drove somewhere" in her car. McLemore told Martin that he "wasn't going to let her walk out of his life" and that he pulled out a knife and cut the woman's throat. McLemore told Martin that he put the woman's body in the trunk of the car and that McLemore knew that his fingerprints were in the car. McLemore stated that he left the car parked in the rain and started walking home, throwing the knife away as he walked. At the time Martin had these conversations with McLemore, the police had not released any information about how Torres had died.

Martin testified that a few days after McLemore told him these things, he saw news reports dealing with Torres' death. At that time, he realized that this was the woman McLemore had been telling him about and contacted the police to give them the information.

At the beginning of McLemore's case in chief, when it appeared that he was going to call Szeliga as a defense witness, the State made a motion in limine regarding a sexual encounter between Torres and Szeliga which allegedly occurred some time during the week of Torres' murder. The court overruled the State's motion. However, McLemore then decided not to call Szeliga as a defense witness. McLemore also made an offer of proof regarding Berres' testimony. The trial court again found the testimony irrelevant and sustained the State's objection to such testimony.

The defense introduced testimony from one of its witnesses stating that when Torres stopped by Szeliga and Cullinane's residence on the evening of September 1, 1997, Torres spoke with only Szeliga. The State later called Szeliga as a rebuttal witness for the purpose of rebutting this testimony. Prior to presenting Szeliga's testimony, the State made a motion that McLemore's cross-examination of Szeliga be limited to the scope of direct examination and that McLemore not ask Szeliga any questions regarding the alleged sexual encounter with Torres the week of the murder. The court sustained the motion. Szeliga then testified that both he and Cullinane spoke with Torres when Torres stopped by.

After Szeliga's rebuttal testimony, McLemore made an offer of proof regarding questions he would have asked Szeliga on cross-examination. McLemore claimed he would have asked whether Szeliga had lied to a police detective, initially telling the detective that he did not have a sexual encounter with Torres the week of the murder, but later admitting to the detective that such an encounter had occurred. McLemore claimed that the purpose of such questioning was to impeach Szeliga's credibility. The State objected to the offer of proof, claiming that such testimony would be beyond the scope of direct examination and that McLemore could have adduced this testimony had he chosen to call Szeliga during his case in chief. The court agreed with the State's analysis and sustained the State's objection to the offer of proof.

The jury found McLemore guilty on both counts, and he was sentenced to life in prison on the murder conviction and not less than nor more than 20 years' imprisonment for use of a weapon. McLemore filed a notice of appeal and a poverty affidavit, and was granted leave to proceed in forma pauperis on appeal.

ASSIGNMENTS OF ERROR

McLemore claims the trial court erred in (1) failing to grant his motion to dismiss and in accepting the guilty verdicts when the evidence was insufficient to sustain the convictions, (2) not excluding altered testimony of eyewitnesses, (3) failing to grant his motion for mistrial due to Grimm's mention of the "North Carolina" incident, (4) admitting certain hearsay testimony, and (5) not allowing him to present evidence regarding the past domestic abuse incident between Szeliga and Berres and not allowing him to cross-examine Szeliga regarding the alleged sexual encounter with Torres. McLemore also asserts that his constitutional rights were violated due to ineffective assistance of trial counsel.

STANDARD OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

[2] The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

[3] In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

ANALYSIS

JURISDICTION

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has juris-

diction over the matter before it. *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001). The State claims this court lacks jurisdiction over McLemore's appeal because McLemore failed to comply with Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000), which sets forth the procedure for commencing an appeal in forma pauperis. The State claims McLemore failed to file a proper "application" to proceed in forma pauperis as required by § 25-2301.01. The State claims § 25-2301.01 requires the filing of an application separate from the poverty affidavit and that this court lacks jurisdiction over McLemore's appeal because he did not file an "application" separate from his poverty affidavit. However, McLemore's failure to file an "application" separate from his poverty affidavit does not divest this court of jurisdiction. See *State v. Campbell, supra*. We determine that we have jurisdiction over McLemore's appeal.

Sufficiency of Evidence

[5] McLemore first claims there was insufficient evidence to support his convictions. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Rieger, supra*.

[6,7] McLemore was charged with first degree murder and use of a weapon to commit a felony. The elements of first degree murder in Nebraska are intent to kill, premeditated malice, and deliberate malice. *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999). The State bears the burden of proving all of these elements beyond a reasonable doubt. *Id.* To convict a defendant of use of a weapon to commit a felony, the State must prove the defendant used a deadly weapon to commit any felony. Neb. Rev. Stat. § 28-1205 (Reissue 1995).

McLemore claims the evidence was insufficient to convict him because there was no blood or DNA evidence connecting him to Torres' murder, the eyewitnesses' descriptions of the male involved in the altercation with Torres outside Torres' residence did not match McLemore, and Torres' family members did not initially mention Torres' fear of McLemore to police.

McLemore further claims the evidence was insufficient to convict him because the tennis shoes found in Torres' living room were not "tested" to prove they belonged to McLemore, Martin's testimony regarding McLemore's confession was not credible, and the time of Torres' death was not proved.

McLemore's assertions do not show the evidence was insufficient to convict McLemore. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). Such matters are for the finder of fact. *Id.* We determine, as discussed below, that the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the convictions.

[8] The facts taken in the light most favorable to the State are such that the jury could conclude beyond a reasonable doubt that McLemore committed murder and used a knife to commit this felony. In regard to the first degree murder charge, the intent to kill sufficient to support a conviction may be inferred from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999). The evidence supports the finding that McLemore intentionally killed Torres by using a deadly weapon in a manner likely to cause death. McLemore admitted to taking a knife with him to Torres' residence and to using the knife to cut Torres' throat. The evidence shows Torres suffered 54 to 56 cutting and stabbing wounds, sustaining significant injuries which caused her death, as well as defensive wounds sustained in attempting to fend off her attacker. From this evidence, a jury could reasonably find that McLemore intended to kill Torres by cutting and stabbing her with the knife.

[9-12] A jury could also reasonably find that McLemore killed Torres with premeditated and deliberate malice. The term "premeditated" means to have formed a design to commit an act before it is done. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *State v. Sims, supra*. "Deliberate" means not suddenly, not rashly. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). Deliberation

requires that the defendant considered the probable consequences of his or her act before doing the act. *Id.*

The jury could reasonably find that McLemore formed a design to kill Torres prior to committing the act and that the act was not done suddenly or rashly. McLemore admitted to becoming angry with Torres after waiting for her to arrive at his apartment and placing several telephone calls to determine her whereabouts. McLemore then decided to walk 5 miles in the rain to Torres' residence, taking a knife with him, and waiting outside the house to make sure Alvarado was not coming back. He admitted to entering the house and destroying the furniture. When Torres came home, an altercation ensued, culminating in McLemore's putting Torres into her car and driving to another location, where he stabbed Torres to death. McLemore admitted to cutting Torres' throat and putting her body in the trunk of her car.

This evidence supports the jury's finding that the essential elements of first degree murder and use of a weapon to commit a felony existed beyond a reasonable doubt. The evidence was sufficient to find McLemore guilty of first degree murder and use of a weapon to commit a felony.

EYEWITNESS TESTIMONY

[13] McLemore next claims the trial court erred in not excluding testimony of eyewitnesses Rodney, Joanne, and Drew Givens. McLemore claims the prosecution made certain suggestions to these witnesses regarding their descriptions of the man they saw involved in the altercation with Torres, resulting in these witnesses' giving "altered" testimony. However, the record shows that McLemore did not object to the eyewitnesses' descriptions of the assailant. A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999). Thus, this assignment of error is without merit.

MOTION FOR MISTRIAL DUE TO GRIMM'S TESTIMONY

McLemore claims the trial court erred in not granting his motion for mistrial which was made after Grimm's testimony.

Defense counsel objected to Grimm's mention of "the shit [McLemore] was in before, you know, for down in North Carolina." The trial court overruled the objection and later overruled McLemore's motion for mistrial based on this testimony, determining that the testimony was not in violation of the pretrial order regarding McLemore's prior conviction and incarceration because Grimm's statement did not mention that McLemore had been previously convicted or incarcerated.

The decision to grant a motion for mistrial is within the discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999). Grimm's statement in the present case did not violate the pretrial order. Grimm's vague statement did not inform the jury of the nature of the incident in "North Carolina," nor did it mention McLemore's previous conviction and incarceration. The trial court did not abuse its discretion in not granting McLemore's motion for mistrial.

Hearsay Testimony

McLemore further claims the trial court erred in allowing certain witnesses to testify about statements Torres made regarding her fear of McLemore and certain statements McLemore made regarding his state of mind. McLemore claims that testimony from Torres' daughter Brandy Lucero, Torres' mother, Mentzer, Alvarado, Ludwig, and Holcomb regarding these issues was hearsay and erroneously admitted into evidence.

[14] Our review of the record shows that much of the testimony in question was admitted without objection. As stated previously, a party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Lotter, supra.* Some of the testimony in question was not hearsay. Other portions of the testimony in question were stricken from the record upon sustained objections, and the jury was instructed to disregard that testimony. Ordinarily, when an objection to or motion to strike improper evidence is sustained and the jury is instructed to disregard it, such instruction is deemed sufficient to prevent prejudice. *Id.* Based on our review of the record, we

determine that McLemore waived his right on appeal to assert prejudicial error concerning the testimony which was received without objection and was not prejudiced by the testimony that was stricken from the record.

Assuming without deciding that the remaining testimony regarding Torres' statements of fear and McLemore's state of mind was erroneously admitted, such testimony was cumulative of other testimony regarding the same subject matter that was admitted without objection. Ludwig and Holcomb testified without objection that Torres "was afraid of" McLemore, was "scared of" McLemore, and that Torres "did not want to go with" McLemore. Ludwig and Holcomb also testified that McLemore had stated in regard to Torres that "if he couldn't have her, nobody could have her," and that he "[w]ould never let her go." Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). The testimony which McLemore claims was erroneously admitted was cumulative of other testimony admitted without objection, and as discussed previously, there was other competent evidence to support McLemore's conviction.

Evidence Regarding Szeliga

McLemore claims the trial court erred in not allowing him to present evidence regarding Szeliga's history of domestic violence and in not allowing him to present evidence regarding an ongoing sexual relationship between Szeliga and Torres. McLemore claims that he should have been allowed to present testimony from Berres, Szeliga's former girl friend, regarding a domestic abuse incident between Berres and Szeliga which occurred in 1995. The trial court determined that Berres' testimony was not relevant and was inadmissible under § 27-404(2). Section 27-404(2) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. In making its ruling, the court determined that because there was no evidence of a violent relationship between Szeliga and Torres, there was an insufficient nexus between the present case and

Szeliga's alleged abusive conduct toward other women. Thus, the court determined that Berres' testimony regarding the violent relationship between herself and Szeliga was not relevant.

[15,16] The trial court did not abuse its discretion in determining that Berres' testimony was not relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995). The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Kinser*, 259 Neb. 251, 609 N.W.2d 322 (2000). The incident between Berres and Szeliga occurred in 1995, 2 years prior to Torres' murder. Furthermore, no evidence was presented at trial of a violent relationship between Torres and Szeliga which could arguably make Berres' testimony regarding the violent relationship between her and Szeliga relevant to determining the issues in the present case. The trial court did not abuse its discretion in determining that Berres' testimony was not admissible.

[17] McLemore further contends the trial court erred in not allowing him to cross-examine Szeliga about a sexual encounter with Torres that allegedly occurred the week of the murder. Szeliga was called as a rebuttal witness for the State. Rebuttal evidence is confined to that evidence which explains, disproves, or counteracts evidence introduced by the adverse party. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). The State called Szeliga for the limited purpose of rebutting testimony from a defense witness that Torres spoke only with Szeliga when she stopped by Szeliga and Cullinane's residence on the evening of September 1, 1997. Szeliga testified that both he and Cullinane spoke with Torres when Torres stopped by their residence. Szeliga testified on direct examination as to this issue only, and the trial court limited cross-examination to the issues raised on direct examination.

[18,19] Pursuant to Neb. Evid. R. 611(2), Neb. Rev. Stat. § 27-611(2) (Reissue 1995), courts limit cross-examination of witnesses to the subject matter of the direct examination and matters affecting the credibility of the witness. *State v.*

Bjorklund, supra. McLemore claims that the questions he intended to ask Szeliga regarding the sexual encounter with Torres the week of the murder were for the purpose of impeaching Szeliga's credibility. However, the trial court recognized that McLemore could have introduced testimony regarding the sexual encounter by calling Szeliga during his case in chief, but chose not to do so. The trial court recognized that McLemore's purpose in this line of questioning was not simply for the purpose of impeaching Szeliga's credibility, but was for the purpose of introducing evidence of the alleged sexual encounter between Torres and Szeliga the week of the murder. It is within the discretion of the trial court to control and limit cross-examination as necessary to prevent undue prejudice and thus produce a fair trial. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). The trial court correctly determined that the testimony McLemore sought to introduce on cross-examination exceeded the scope of direct examination and was not offered for the purpose of impeaching Szeliga's credibility. Under the circumstances of this case, the trial court did not abuse its discretion in limiting cross-examination of Szeliga to matters raised on direct examination.

INEFFECTIVE ASSISTANCE OF COUNSEL

[20,21] Finally, McLemore claims his constitutional rights were violated by ineffective assistance of counsel. A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995). When the issue of ineffective assistance of counsel 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. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000).

The ineffective assistance of counsel issue in the present case was not raised or ruled upon at the trial court level. We determine that the record is not sufficient to adequately review McLemore's ineffective assistance of counsel claim. Thus, we do not address this issue on direct appeal.

CONCLUSION

For the reasons stated above, McLemore's convictions are affirmed.

AFFIRMED.

LUCILLE M. GIBBONS, APPELLEE, V.
DON WILLIAMS ROOFING, INC., APPELLANT.

623 N.W.2d 662

Filed March 23, 2001. No. S-99-1373

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. ___: ___. 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.
3. **Small Claims Court: Attorneys at Law: Appeal and Error.** A party appealing a judgment entered in a small claims court may be assisted by an attorney in perfecting an appeal of the judgment from the small claims court to the district court.

Appeal from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge, on appeal thereto from the County Court for Lancaster County, JEAN A. LOVELL, Judge. Judgment of District Court reversed, and cause remanded for further proceedings.

Thomas R. Lamb, of Anderson, Creager & Wittstruck, P.C., for appellant.

Richard J. Butler, on brief, Patrick T. O'Brien, and Matthew F. Wright, of Butler, Galter, O'Brien, Boehm & Fritz Law Firm, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Lucille M. Gibbons obtained a default judgment against Don Williams Roofing, Inc. (Williams), in the small claims court for

Lancaster County. An attorney filed a notice of appeal in the small claims court indicating Williams' intent to appeal the judgment. The Lancaster County District Court dismissed the appeal for lack of jurisdiction, and Williams appeals.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

[2] 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. *In re Referral of Lower Platte South NRD, ante* p. 90, 621 N.W.2d 299 (2001).

FACTS

Gibbons brought this action against Williams, seeking damages allegedly caused by Williams while roofing Gibbons' house. After Williams failed to appear on the trial date, a default judgment was entered in favor of Gibbons in the amount of $1,375 plus costs. Williams retained an attorney who thereafter signed and filed a notice of appeal to the district court and an appeal bond on behalf of Williams. Gibbons filed a motion to dismiss the appeal, and the district court sustained the motion, finding that the appeal had not been taken in accordance with applicable statutes. The district court held that an attorney could not perfect an appeal from the small claims court, and therefore, the district court was without jurisdiction to hear the appeal. Williams timely appealed, and we removed this case to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Williams assigns as error that the district court erred in concluding that its attorney could not file a notice of appeal on its behalf and in determining that the court lacked jurisdiction to hear the appeal.

ANALYSIS

The following statutes are applicable to our analysis: Neb. Rev. Stat. § 25-2803(2) (Reissue 1995) provides: "No party shall be represented by an attorney in the Small Claims Court except as provided in section 25-2805." Neb. Rev. Stat. § 25-2805 (Cum. Supp. 2000) provides:

> [A]ny defendant in an action or such defendant's attorney may transfer the case to the regular docket of the county court by giving notice to the court at least two days prior to the time set for the hearing. Upon such notice the case shall be transferred to the regular docket of the county court. At the same time as such notice is given to transfer the case, any defendant or such defendant's attorney may demand trial by jury, and the Small Claims Court shall forward the demand to the county court.

Additionally, Neb. Rev. Stat. § 25-2807 (Cum. Supp. 2000) provides: "[A]ny party may appeal to the district court as provided in sections 25-2728 to 25-2738. Parties may be represented by attorneys on appeal."

We are presented with an issue of first impression regarding whether an attorney may file a notice of appeal and other documents necessary to perfect an appeal from the small claims court on behalf of his or her client. This issue is a matter of statutory interpretation. Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001). 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. *In re Referral of Lower Platte South NRD, ante* p. 90, 621 N.W.2d 299 (2001).

Williams argues that § 25-2807 makes it clear that the Legislature intended for attorneys to represent parties on an appeal from the small claims court. Although § 25-2807 does not explicitly address the question of when an attorney may begin such representation, Williams claims that it can reasonably be inferred that representation begins immediately after a

judgment has been rendered in the small claims court. Williams asserts that if an attorney is permitted to aid a party on appeal, that attorney should also be permitted to aid the party in perfecting the appeal. Its rationale is that once the small claims court has rendered its decision, there is no reason to preclude a party from being represented by an attorney in order to appeal from the decision.

Williams further argues that it is inconsistent to permit an attorney to assist in the transfer of a claim to the regular docket of the county court, pursuant to § 25-2805, but not to permit an attorney to assist in perfecting an appeal to the district court. Such a rule, it claims, would violate due process. Williams also points out that the general public is not familiar with the requirements of perfecting an appeal and that without the aid of an attorney, an appeal might not be properly perfected.

Gibbons, on the other hand, urges us to adopt a stricter interpretation of the statutory language relating to attorney representation in small claims court. She argues that the Legislature has clearly expressed its intent that no attorney shall be involved in the small claims litigation process, except where a defendant has the case transferred to the county court as provided by § 25-2805. Gibbons argues that this interpretation is consistent with the public policy justification for the existence of small claims courts, which is to provide a forum in which small claims may be prosecuted without the delay, expense, or procedural difficulties incident to normal litigation. See *Simon v. Lieberman*, 193 Neb. 321, 226 N.W.2d 781 (1975).

Gibbons further argues that since the Legislature specifically carved out an exception allowing attorney representation in small claims court when a case is transferred to the regular docket of the county court, the Legislature could also have provided for attorney representation in the appeal process from the small claims court. Gibbons asserts that until an appeal is perfected, the case remains in the small claims court and that the appellate court does not have jurisdiction of a matter until the appeal has been perfected.

In *Simon*, the plaintiff argued that since a party could transfer the action from the small claims court to the county court, such party could elect to obtain legal representation and thus obtain a

right to appear by counsel. Inferentially, the argument was that such provisions were a sufficient guarantee of the right to appear by counsel to satisfy constitutional due process and that the failure to exercise that right in the small claims court constituted a waiver of the right. We concluded that on appeal, the party has a right to be represented by an attorney in the district court. We pointed out that other courts have recognized that the right to representation by counsel must be provided somewhere during the course of the proceedings in order to meet the requirements of constitutional due process. See, *Mendoza v. Small Claims Court*, 49 Cal. 2d 668, 321 P.2d 9 (1958); *Prudential Ins. Co. v. Small Claims Court*, 76 Cal. App. 2d 379, 173 P.2d 38 (1946); *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959).

The question is whether an attorney may perfect an appeal from a judgment of the small claims court on behalf of his or her client or whether such right does not accrue until the appeal has been perfected and jurisdiction is lodged in the district court. We conclude that the district court erred in its determination that Williams was not entitled to have an attorney to represent it in perfecting its appeal to the district court. Once a judgment has been rendered by the small claims court, allowing an attorney to assist a client in filing an appeal to the district court does not interfere with the purpose of the small claims court.

In the small claims court, cases are handled on a very informal basis with a minimum of procedural requirements. See *Scottsbluff Typewriter Leasing v. Beverly Ent.*, 230 Neb. 699, 432 N.W.2d 844 (1988). However, perfecting an appeal is a different matter. To perfect an appeal from the small claims court to the district court, a party must within 30 days after the rendition of the judgment file with the clerk of the county court a notice of appeal and deposit with the clerk of the county court a docket fee in the amount of the filing fee in the district court. See Neb. Rev. Stat. § 25-2729(1) (Cum. Supp. 2000). The party appealing from the small claims court must also deposit with the clerk of the county court a cash bond or undertaking, with at least one good and sufficient surety approved by the court, in the amount of $50, conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her. See § 25-2729(4). The party appealing is also required to serve a

copy of the notice of appeal upon all parties who have appeared in the action, and proof of service is required to be filed with the notice of appeal. § 25-2729(7). If the appellant fails to comply with any provision of § 25-2729(4) or (7), the district court on motion and notice may take such action, including dismissal of the appeal, as is just. § 25-2729(8). Therefore, it is a classic understatement to say that even lawyers at various times have had difficulty perfecting an appeal.

[3] Based on the above, we hold that a party appealing a judgment entered in a small claims court may be assisted by an attorney in perfecting an appeal of the judgment from the small claims court to the district court. This assistance may include the filing of the notice of appeal, docket fee, and cash bond on behalf of such party, as well as any other documents necessary for the purpose of perfecting such an appeal.

CONCLUSION

For the reasons set forth herein, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
PORFIRIO JIMENEZ RUBIO, APPELLANT.

623 N.W.2d 659

Filed March 23, 2001. No. S-00-138.

1. **Pleadings: Final Orders.** A plea in bar is a final, appealable order provided it is a true plea in bar that meets the requirements of Neb. Rev. Stat. § 29-1817 (Reissue 1995).
2. **Pleadings: Indictments and Informations.** Pursuant to Neb. Rev. Stat. § 29-1817 (Reissue 1995), an accused may offer a plea in bar to the indictment that he or she has before had judgment of acquittal or conviction or been pardoned for the same offense; and to this plea, the county attorney may reply that there is no record of such acquittal or conviction or that there has been no pardon.
3. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed and a court is without authority to change such language.
4. ___. It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Cheyenne County, KRISTINE R. CECAVA, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions to dismiss.

Alan G. Stoler and Jerry M. Hug for appellant.

Don Stenberg, Attorney General, and Ronald D. Moravec for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case comes before the court on a petition for further review. Appellant, Porfirio Jimenez Rubio, was charged in state court with drug-related offenses. Rubio filed a plea in bar, based on a federal court's prior determination that the state troopers who seized drugs from Rubio violated his Fourth Amendment rights by conducting an illegal search. The trial court denied the plea in bar, and the Nebraska Court of Appeals affirmed. We granted Rubio's petition for further review.

BACKGROUND

In November 1998, Rubio was stopped on Interstate 80 by two state troopers because he had a visual obstruction hanging from his rearview mirror. The troopers issued him a ticket for the obstruction offense. The troopers suspected that Rubio possessed contraband and eventually searched his car and seized cocaine and methamphetamine contained in a hidden compartment.

Rubio was originally charged in state court in Cheyenne County, but the charges were dismissed when Rubio was indicted based on the same conduct in the U.S. District Court. Rubio filed a motion to suppress with the U.S. District Court, alleging that his Fourth Amendment rights protecting against unreasonable search and seizure had been violated. The court granted the motion, and the U.S. Attorney subsequently dismissed the charges. Rubio was then charged in Cheyenne

County under state law based on the same conduct. He filed what he labeled a "Plea in Bar," alleging that the State was precluded from proceeding against him because there had been a full and fair adjudication in federal court of his rights as guaranteed by the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution and that the State, therefore, had no admissible evidence against him.

The trial court denied Rubio's plea in bar. On appeal to the Court of Appeals, the State filed a motion for summary affirmance. The Court of Appeals did not grant the State's motion, but instead affirmed the trial court's decision without arguments in a memorandum opinion filed October 18, 2000.

ISSUE ON FURTHER REVIEW

The issue in this case is whether a plea in bar is the proper procedural device with which to raise a challenge based on the Supremacy Clause of the U.S. Constitution.

ANALYSIS

[1,2] We have previously held that a plea in bar is a final, appealable order. See *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990). For this proposition to apply to a particular case, however, the pleading filed must be a true plea in bar. In Nebraska, a plea in bar is a statutory procedure. See Neb. Rev. Stat. § 29-1817 (Reissue 1995). In order for a particular pleading to be a true plea in bar, it must meet the requirements of § 29-1817, which provides in relevant part:

> The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense; and to this plea the county attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon.

In this case, Rubio did not assert in his pleading that he had previously been acquitted, convicted, or pardoned. In fact, Rubio has not been tried at all, but has merely been subjected to a suppression hearing in federal court.

[3,4] Rubio is essentially asking this court to read another basis for a plea in bar into the statute. However, where the lan-

guage of a statute is plain and unambiguous, no interpretation is needed and a court is without authority to change such language. *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Cuny*, 257 Neb. 168, 595 N.W.2d 899 (1999).

Because Rubio has not been acquitted, convicted, or pardoned, his pleading cannot be properly labeled as a plea in bar under § 29-1817. See *Melcher v. State*, 109 Neb. 865, 192 N.W. 502 (1923) (holding that plea in bar may be based only on grounds set forth in statute). Because his pleading is not a plea in bar, it is not a final, appealable order, and the Court of Appeals did not, therefore, have appellate jurisdiction.

CONCLUSION

We conclude, therefore, that because the Court of Appeals did not have jurisdiction, it should have dismissed the appeal. We reverse the decision and remand the cause to the Court of Appeals with directions to dismiss the appeal.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

MICHAEL JAMES PURSLEY, APPELLANT, V. DEBRA RENEE PURSLEY, APPELLEE.

623 N.W.2d 651

Filed March 23, 2001. No. S-00-275.

1. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. ___. Where the mandate of an appellate court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.
3. **Child Support: Rules of the Supreme Court.** The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.

4. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the children. The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.

Appeal from the District Court for Dundy County: JOHN J. BATTERSHELL, Judge. Vacated and remanded with directions.

G. Peter Burger, of Burger & Bennett, P.C., for appellant.

Philip E. Pierce, of Pierce Law Office, for appellee.

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

STEPHAN, J.

Michael James Pursley appeals from an order of the district court for Dundy County, Nebraska, determining that an increase in the child support obligation of Debra Renee Pursley awarded on appeal became effective on the first day of the month following receipt of the mandate from the Nebraska Court of Appeals. See *Pursley v. Pursley*, No. A-98-1147, 1999 WL 759967 (Neb. App. Sept. 28, 1999) (not designated for permanent publication). We removed this case to our docket pursuant to our authority to regulate the caseloads of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We conclude that the judgment of the Court of Appeals modified the judgment of the district court and therefore related back to the date of that judgment. Accordingly, we vacate the order of the district court from which this appeal was taken and remand the cause with directions.

FACTS

Michael and Debra were divorced on March 16, 1995. At the time of dissolution, Michael lived in Benkelman, Nebraska, and Debra lived in Fort Collins, Colorado. The district court awarded custody of the parties' three minor children to Michael and visitation rights to Debra. The court ordered Debra to pay child support in the amount of $672 per month.

On or about August 6, 1998, Michael filed an application for leave to remove the children from Nebraska to Wisconsin. Debra

responded with a petition to modify custody. After an evidentiary hearing, the district court granted Michael's application and modified Debra's visitation schedule, specifically providing that each party was responsible for one-half of the costs of visitation. In addition, the district court found that due to a change in Debra's financial circumstances, application of the child support guidelines would result in an increase of her child support obligation to $1,314 per month. Due, however, to the expense of visitation required by Michael's relocation, the district court chose to deviate from the guidelines and ordered Debra to pay a reduced amount of $1,014 per month in child support.

Debra appealed, and Michael cross-appealed. The Court of Appeals affirmed the order allowing removal of the children from the jurisdiction. However, the Court of Appeals determined that the district court abused its discretion in deviating from the child support guidelines and therefore "modifi[ed] the trial court's order to provide that Debra pay the full amount of child support mandated by the child support guidelines, that figure being $1,314 per month." *Pursley v. Pursley*, 1999 WL 759967 at *6. Neither party petitioned for further review. The mandate issued by the Court of Appeals was filed in the district court on December 8, 1999, and ordered the court to "without delay, proceed to enter judgment in conformity with the judgment and opinion of this court."

A motion was filed in the district court for a determination of when the child support increase ordered by the Court of Appeals became effective. After receiving letter briefs from the parties, the district court entered a "Judgment on Mandate" providing:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered on the mandate as of December 9, 1999, and that the Respondent [Debra] shall pay increased child support from one thousand fourteen dollars ($1014.00) per month to one thousand three hundred fourteen dollars ($1314.00) per month and this increased amount should be and hereby is ordered to commence the first day of January, 2000, and continue with [sic] in accordance with the orders of the court. In all other

respects the order of the Court issued on August 20, 1998 is affirmed.

Michael timely appealed.

ASSIGNMENT OF ERROR

Michael assigns, restated, that the district court erred in delaying the effective date of the increase in child support ordered by the Court of Appeals until after the issuance of the mandate.

STANDARD OF REVIEW

[1] The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999).

ANALYSIS

The sole issue presented for our review is the effective date of the increase in Debra's child support obligation ordered by the Court of Appeals. Michael argues that according to the plain language of the mandate, the increase became effective on August 31, 1998, the date of the district court's original order increasing Debra's child support obligation which was modified on appeal. Debra, while also relying upon the plain language of the mandate, argues that the increase became effective only after the district court received the mandate from the Court of Appeals.

[2] The mandate directed the district court to "proceed to enter judgment in conformity with the judgment and opinion of this court." Where the mandate of an appellate court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon. See *Plischke v. Jameson*, 181 Neb. 887, 152 N.W.2d 119 (1967). Debra argues that the district court strictly followed the mandate because neither the mandate nor the opinion set a date upon which the modification ordered was to become effective and because the district court was without authority to act beyond the mandate. Although we agree that the district court was powerless to act beyond the mandate, see

Custom Fabricators v. Lenarduzzi, 259 Neb. 453, 610 N.W.2d 391 (2000), upon examining the reasoning of the Court of Appeals and the language utilized in its opinion, we disagree with Debra's interpretation of the mandate.

The Court of Appeals held that the district court abused its discretion in deviating from the guidelines in order to consider Debra's visitation expenses. In doing so, the court reasoned that the deviation was unfair because the district court had already addressed the issue of visitation expenses by ordering that the parties share such costs equally. The Court of Appeals then expressly stated, "Having found an abuse of discretion, we therefore *modify the decree* to make Debra's obligations consistent with those suggested by the guidelines." (Emphasis supplied.) *Pursley v. Pursley*, No. A-98-1147, 1999 WL 759967 at *6 (Neb. App. Sept. 28, 1999) (not designated for permanent publication). In its concluding paragraph on this issue, the court again stated "we modify *the trial court's order* to provide that Debra pay the full amount of child support mandated by the child support guidelines, that figure being $1,314 per month." (Emphasis supplied.) *Id.* at *6.

It is thus clear that the Court of Appeals determined that the district court had ordered an incorrect amount of child support. Had the district court properly calculated the amount of support pursuant to the guidelines, Debra's support obligation would have been $1,314 per month from the time set forth in the August 31, 1998, order of the district court. Moreover, it is clear from the language used by the Court of Appeals that it modified "the trial court's order" and "the decree."

[3,4] The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. See Nebraska Child Support Guidelines, paragraph A. See, also, *Riggs v. Riggs, ante* p. 344, 622 N.W.2d 861 (2001); *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000). The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the children. *Riggs v. Riggs, supra*; *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). The children and the custodial parent

should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay. *Riggs v. Riggs, supra*; *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995). We conclude as a matter of law that the mandate provided that the increase in the amount of Debra's child support obligation was to take effect as of the date specified in the district court's August 31, 1998, order. That order declares that Debra's increased child support obligation would commence October 1, 1998. Therefore, Debra must pay child support of $1,314 per month from and after October 1, 1998, and the district court erred as a matter of law in its interpretation of the mandate. Because the district court was without power to affect rights and duties outside the scope of the mandate, its order determining that the $1,314 was to commence only after the issuance of the mandate is void. See *State ex rel. Hilt Truck Line v. Jensen*, 218 Neb. 591, 357 N.W.2d 455 (1984).

In *Riggs*, decided during the pendency of this appeal, we stated the general rule that "absent equities to the contrary . . . modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification." *Ante* at 356, 622 N.W.2d at 870. In this case, the issue of retroactivity was not presented in either the district court or on appeal, and the mandate at issue was received prior to our decision in *Riggs*. We therefore do not address the issue of retroactivity.

CONCLUSION

The mandate issued by the Court of Appeals incorporated the opinion of that court by reference. The language and rationale of the opinion clearly reflect that the appellate court modified the order of the trial court. Therefore, we hold that the increase in Debra's child support obligation became effective as of October 1, 1998, the date set forth in the August 31 order of the district court. The district court's order stating otherwise is vacated, and the cause is remanded to the district court for execution of the mandate of the Court of Appeals in a manner consistent with this opinion.

VACATED AND REMANDED WITH DIRECTIONS.

PORCHA BUSCH, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, GWEN KNAVE, APPELLANT, V. OMAHA PUBLIC SCHOOL DISTRICT ET AL., APPELLEES.

623 N.W.2d 672

Filed March 30, 2001. No. S-98-1374.

1. **Administrative Law: Schools and School Districts: Appeal and Error.** Appeals from the district court under the Student Discipline Act, Neb. Rev. Stat. § 79-254 et seq. (Reissue 1996 & Cum. Supp. 2000), are governed by the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Schools and School Districts: Statutes.** School boards are creatures of statute, and their powers are limited.
6. **Schools and School Districts: Legislature.** Any action taken by a school board must be through either an express or an implied power conferred by legislative grant.
7. ___: ___. The Legislature sets the broad policy for maintenance of discipline in the schools in this state. The local school boards in turn are charged with the responsibility for promulgating rules that maintain order and foster a safe and appropriate learning environment for students and staff within the parameters of the policies set forth by the Legislature.
8. **Schools and School Districts: Courts.** Absent any suggestion that a particular school rule violates some statutory or substantive constitutional guarantee, the courts generally defer to legislative and local judgment, and refrain from attempting to distinguish between the rules that are important to the preservation of order in the schools and rules that are not.
9. **Schools and School Districts: Constitutional Law.** The stated purpose of the Student Discipline Act is to ensure the protection of all elementary and secondary school students' constitutional right to due process and fundamental fairness within the context of an orderly and effective educational process.
10. **Schools and School Districts: Presumptions: Proof.** Courts will generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.
11. **Schools and School Districts.** The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, but also that students conform themselves to reasonable standards of conduct prescribed by school authorities.

12. ___. The use of violence or force which causes personal injury to a school employee who is attempting to break up or prevent a physical confrontation constitutes a substantial interference with school purposes within the meaning of Neb. Rev. Stat. § 79-267(1) (Reissue 1996).
13. **Schools and School Districts: Statutes.** The subsections of Neb. Rev. Stat. § 79-267 (Reissue 1996) are coextensive, and a particular instance of student conduct may constitute grounds for discipline under more than one subsection of the statute.
14. ___: ___. A particular instance of student conduct may be punishable under a subsection of Neb. Rev. Stat. § 79-267 (Reissue 1996) despite being excepted from the scope of another subsection, so long as the conduct meets the specific requirements of the subsection under which the school district seeks to discipline the student.
15. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Daniel J. Welch, of Welch Law Firm, P.C., for appellant.

David M. Pedersen and Maya C. Samms, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees.

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

GERRARD, J.

NATURE OF CASE

Porcha Busch was expelled from school by the Omaha Public School District (OPS) after a fight with another student during which Busch accidentally struck and injured an assistant principal who was attempting to restrain Busch and break up the fight. Busch argues that OPS exceeded its statutory authority by adopting the rule pursuant to which Busch was expelled. The district court disagreed and upheld the expulsion. Because we determine that OPS acted within its statutory authority, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of this case are essentially undisputed. At the time of the incident in question, Busch was in the seventh grade at the McMillan Magnet Center in Omaha, Nebraska. On September 30, 1998, Busch became involved in a physical alter-

cation with another student with whom Busch had a history of disagreements. Four staff members, including the assistant principal, intervened to stop the fight. Despite being restrained, Busch continued to fling her arms in an attempt to break away and reach the other student.

During her struggling, Busch's hand struck and injured the assistant principal on the left side of her nose and upper lip. Both Busch and the assistant principal testified that although Busch was very angry at the other student, Busch did not specifically intend to strike the assistant principal.

Busch was immediately suspended, and she and her mother were notified that the McMillan Magnet Center administration was recommending that she be expelled from classes for the remainder of the first semester of the 1998-99 school year. Upon receiving notification of the recommendation of expulsion, Busch and her mother requested a due process hearing before a hearing officer. After holding the hearing requested by Busch, the hearing officer upheld the recommendation of expulsion for the remainder of the semester. Busch and her mother appealed the hearing officer's decision to a committee of school board members, and an ad hoc committee of the OPS board of education, on October 23, 1998, upheld the expulsion for the remainder of the first semester of the 1998-99 school year.

Busch, by and through her mother, filed a petition in error in the district court, arguing, inter alia, that OPS exceeded its statutory authority in adopting the rule pursuant to which Busch was expelled. That rule, OPS Student Code of Conduct rule 1(b), provides:

> **Injuring a school employee who is attempting to break up or prevent a physical confrontation**
>
> Students are forbidden by the use of violence or force to cause personal injury to a school employee who is attempting to break up or prevent a physical confrontation. Such use of violence or force constitutes a substantial interference with school purposes.
>
> **First Offense:** Expulsion. Remainder of the semester. Law Enforcement will be contacted.

Busch argued that this rule exceeded the authority granted to OPS by Neb. Rev. Stat. § 79-267(3) (Reissue 1996), as inter-

preted by this court's decision in *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997). Busch also argued that the rule was not "clear and definite" as required by Neb. Rev. Stat. § 79-262(1) (Reissue 1996).

The district court rejected Busch's arguments, determining that rule 1(b) was sufficiently clear and definite and was based on the authority of § 79-267(1), not § 79-267(3). Consequently, the district court entered a judgment affirming Busch's expulsion. Busch, by and through her mother, appealed. We granted the parties' petitions to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Busch assigns, consolidated and restated, that the district court erred in failing to reverse the decision of OPS because (1) rule 1(b) was outside the statutory authority of § 79-267 and (2) rule 1(b) is not clear and definite as required by § 79-262(1).

STANDARD OF REVIEW

[1-3] Appeals from the district court under the Student Discipline Act, Neb. Rev. Stat. § 79-254 et seq. (Reissue 1996 & Cum. Supp. 2000), are governed by the Administrative Procedure Act. § 79-292. See, also, *Spencer v. Omaha Pub. Sch. Dist., supra*; *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997). A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Gottsch Feeding Corp. v. State, ante* p. 19, 621 N.W.2d 109 (2001); *Affiliated Foods Co-op v. State*, 259 Neb. 549, 611 N.W.2d 105 (2000). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

ANALYSIS

STATUTORY AUTHORITY

[5,6] We have long acknowledged that school boards are creatures of statute, and their powers are limited. *Spencer v. Omaha Pub. Sch. Dist., supra.* Any action taken by a school board must be through either an express or an implied power conferred by legislative grant. *Id.*

[7,8] Thus, it is important to recognize from the outset that the Legislature sets the broad policy for maintenance of discipline in the schools in this state. The local school boards in turn are charged with the responsibility for promulgating rules that maintain order and foster a safe and appropriate learning environment for students and staff within the parameters of the policies set forth by the Legislature. Absent any suggestion that a particular school rule violates some statutory or substantive constitutional guarantee, the courts generally defer to that legislative and local judgment, and refrain from attempting to distinguish between the rules that are important to the preservation of order in the schools and rules that are not. See *New Jersey v. T. L. O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). See, also, *Kolesnick v. Omaha Pub. Sch. Dist., supra.*

[9] The Legislature, within this framework, passed the Student Discipline Act, § 79-254 et seq. The stated purpose of the Student Discipline Act is "to [en]sure the protection of all elementary and secondary school students' constitutional right to due process and fundamental fairness *within the context of an orderly and effective educational process.*" (Emphasis supplied.) § 79-255. As part of the Student Discipline Act, the Legislature set forth the types of student conduct that may be, in the judgment of the local school boards, grounds for long-term suspension, expulsion, or mandatory reassignment of offending students. Section 79-267 provides, in relevant part:

> The following student conduct shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment, subject to the procedural provisions of the Student Discipline Act . . . :
>
> (1) Use of violence, force, coercion, threat, intimidation, or similar conduct in a manner that constitutes a substantial interference with school purposes;

. . . .

(3) Causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student. Personal injury caused by accident, self-defense, or other action undertaken on the reasonable belief that it was necessary to protect some other person shall not constitute a violation of this subdivision.

OPS subsequently passed rule 1(b), which was modeled after the language contained in § 79-267(1).

Busch first argues that OPS acted outside the scope of authority granted to school districts by § 79-267(3) when it passed rule 1(b) and applied the rule in the instant case. Busch's argument is based on this court's application of § 79-267(3) in *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997). In *Spencer*, OPS had adopted a rule that provided for the expulsion of a student for causing injury to another student and provided that it would not be a defense to the charge of assault that the student did not intend to hurt anyone. This court held that an injury caused "by accident," within the meaning of § 79-267(3), is "one which is caused accidentally, unintentionally, or unexpectedly." *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. at 755, 566 N.W.2d at 760. This court, limiting its analysis to § 79-267(3), noted that the rule adopted by OPS did not permit the defense that the act caused a result that was accidental and, thus, concluded that the school board exceeded its statutory authority in adopting the rule. See *id.*

Busch maintains that the rule at issue in the instant case is like that in *Spencer* in that the rule does not permit a defense that the injury was caused accidentally and thus exceeds the statutory authority of § 79-267(3). OPS argues that rule 1(b) is authorized by § 79-267(1) and that the school district is not relying on § 79-267(3) as the enabling section of the statute. OPS asserts that the use of violence or force upon a school employee who is attempting to break up or prevent a physical confrontation, in and of itself, constitutes a substantial interference with school purposes, and when personal injury to the school employee occurs (whether intentional or not), expulsion is warranted under § 79-267(1).

[10] The initial question presented, then, is whether rule 1(b) is indeed authorized by § 79-267(1). In considering the validity of rule 1(b), we note that generally, courts will presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority and that the burden rests on those who challenge their validity. See, e.g., *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

Section 79-267(1) provides that the use of violence, force, coercion, threat, intimidation, or similar conduct in a manner that constitutes a substantial interference with school purposes may constitute grounds for long-term suspension, expulsion, or mandatory reassignment of an offending student. This court has not previously considered the meaning of "substantial interference with school purposes" as that phrase is used in § 79-267(1). The Supreme Court of Connecticut, however, considered a similar issue in *Packer v. Board of Education*, 246 Conn. 89, 717 A.2d 117 (1998). In that case, the school sought to discipline a student for conduct that was " 'seriously disruptive of the educational process,' " within the meaning of a Connecticut statute. *Id.* at 104, 717 A.2d at 131. The court considered the context and common meaning of the statutory terms and concluded that conduct that was "seriously disruptive of the educational process" was that conduct which markedly interrupts or severely impedes the day-to-day operation of a school. *Id.*

Furthermore, the term "school purposes" includes the maintenance of an orderly and effective educational system. *Board of School Trustees v. Barnell*, 678 N.E.2d 799 (Ind. App. 1997). See, also, § 79-255. For many adolescents, learning is a discipline rather than a pleasure and it must be carried on in dignified and orderly surroundings if it is to be practiced satisfactorily. *In re C.M.J.*, 259 Kan. 854, 915 P.2d 62 (1996). We agree with these courts and find their reasoning instructive as we consider the commonsense meaning of what "constitutes a substantial interference with school purposes" within the context of § 79-267(1).

[11] The day-to-day operation of a school requires that a safe learning environment be provided for students and school employees, and "school purposes" certainly include the mainte-

nance of such an environment. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, but also that students conform themselves to reasonable standards of conduct prescribed by school authorities. See *New Jersey v. T. L. O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). The promulgation of a rule that forbids the use of violence or force which causes injury to a school employee who is attempting to break up or prevent a physical confrontation clearly advances an appropriate school purpose. It is difficult to imagine a more substantial interference with a school employee's performance of that function than the use of violence or force which causes personal injury to an employee while he or she is attempting to break up or prevent a physical confrontation.

[12] The promulgation of such a rule also presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. See *id.* Because there has been no suggestion that rule 1(b) violates some substantive constitutional guarantee in the instant case, we appropriately defer to the judgment of local school officials in determining the appropriate sanction, within the guidelines of § 79-267, for violating rule 1(b). Consequently, we hold that the use of violence or force which causes personal injury to a school employee who is attempting to break up or prevent a physical confrontation constitutes a substantial interference with school purposes within the meaning of § 79-267(1).

Busch argues that this interpretation of § 79-267 has the effect of making § 79-267(1) an exception to the "accident" defense set forth in § 79-267(3) and that "[t]he message from the Legislature is that students should not be expelled for unintentional acts without exception." Substituted brief for appellant at 10. Busch's argument fails for several reasons.

First, § 79-267(3) specifically states that personal injury caused by accident, self-defense, or an action undertaken to protect another person "shall not constitute a violation *of this subdivision*." (Emphasis supplied.) The language of the statute makes clear that while accidental injuries are excepted from the discipline authorized by § 79-267(3), that exception does not apply to other subsections of § 79-267.

Second, it is quite apparent from the plain language of the statute that the Legislature, in enacting § 79-267(1) and (3), allows school districts to impose discipline upon students for two distinct types of violations. Section 79-267(1) is intended to allow school districts to discipline students for using violence, force, intimidation, or similar conduct in a manner that substantially interferes with school purposes. That violence, force, or intimidation can take many forms (including but not limited to assaultive behavior), but if the specified conduct substantially interferes with school purposes, the student may appropriately be disciplined. Intent is not a necessary element of § 79-267(1), and accidental injury is not a defense under this subsection. Under § 79-267(1), it frankly does not make any difference whether a student *intends* to cause personal injury to a school employee while a fight is being broken up; the substantial interference with school purposes begins with the initiation of a physical confrontation and continues with the student's use of violence or force while the combatants are being separated.

Section 79-267(3), on the other hand, enables school districts to discipline students for intentionally or knowingly causing personal injury to a school employee, school volunteer, or fellow student. It is specifically provided that personal injury caused by accident shall not constitute a violation of *this particular subsection*. Section 79-267(3) deals narrowly with intentional assaults and batteries in the school setting. However, both § 79-267(1) and (3) were enacted by the Legislature at the same time in 1976 Neb. Laws, L.B. 503. In addition, six other subsections of § 79-267 were enacted at the same time in L.B. 503, each of which provided independent sources of authority for school districts to discipline students for behaviors such as theft, robbery, destruction of property, selling or possessing drugs or alcohol, and possessing or transmitting a weapon. See § 79-267(1) through (10) (separate subsections for public indecency and sexual assault were added later by amendment). Obviously, certain types of behavior such as an intentional battery, robbery, sexual assault, and other such conduct may simultaneously constitute a violation of several subsections of § 79-267 and several sections of a school's code of conduct. Conversely, under a plain reading of the statute, a particular

instance of student conduct may be punishable under one subsection of § 79-267, despite being excepted from the scope of another subsection.

[13,14] Therefore, we reject the underlying premise of Busch's argument, that the subsections of § 79-267 were intended by the Legislature to be exclusive of one another. While § 79-267 sets forth several types of student conduct that constitute grounds for discipline, the statute does not provide that conduct punishable under one subsection precludes the consideration of that conduct in light of other subsections of the statute. In the absence of any indication that the Legislature intended otherwise, the underlying purpose of the statute leads us to conclude that the subsections of § 79-267 are coextensive and that a particular instance of student conduct may constitute grounds for discipline under more than one subsection of the statute. As a corollary, we determine that a particular instance of student conduct may be punishable under a subsection of § 79-267 despite being excepted from the scope of another subsection, so long as the conduct meets the requirements of the subsection under which the school district seeks to discipline the student.

We conclude that OPS did not exceed its authority in adopting rule 1(b), as the use of violence or force to cause personal injury to a school employee who is attempting to prevent or break up a fight is a substantial interference with school purposes within the meaning of § 79-267(1). We further conclude that the "accidental" injury exception set forth in § 79-267(3) and interpreted in *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997), is limited to that subsection and does not preclude the punishment of student conduct that constitutes grounds for discipline under another subsection. The district court properly concluded that Busch's conduct constituted a substantial interference with school purposes and violated rule 1(b) of the OPS Student Code of Conduct. Busch's first assignment of error is without merit.

Clear and Definite

Busch also argues that rule 1(b) is not "clear and definite" as required by § 79-262(1), which provides, in relevant part:

> The school board or board of education shall establish and promulgate rules and standards concerning student conduct which are reasonably necessary to carry out or to prevent interference with carrying out any educational function, if such rules and standards are clear and definite so as to provide clear notice to the student and his or her parent or guardian as to the conduct prescribed, prohibited, or required under the rules and standards.

Busch concedes that she and her mother had been provided a copy of the student code of conduct at the beginning of the 1998-99 semester and that rule 1(b) was clear in providing that students may not use violence or force to cause personal injury to a school employee. Busch's argument is that it is unclear and indefinite as to whether or not that force must be intentional to warrant expulsion under the rule. We disagree.

[15] Rule 1(b) does not address whether an injury to a school employee attempting to prevent or break up a physical altercation must be intentional in order to warrant expulsion. The plain language of the rule simply provides that causing injury to a school employee who is attempting to prevent or break up a fight will be punished by expulsion for the remainder of the semester. In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997). The determinative factor set forth by the plain language of the rule is not whether injury was intended, but is simply whether injury was caused by force or violence while the school employee was breaking up or preventing a physical confrontation.

In the context of constitutional due process, the U.S. Supreme Court has stated that "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986). This reasoning applies equally to our analysis of rule 1(b). Rule 1(b) plainly states that a student who causes injury (by violence or force) to a school employee attempting to pre-

vent or break up a physical altercation will be punished by expulsion—period, end of discussion. The language of rule 1(b) could not be more clear or definite and provided sufficient notice to Busch and her mother of the conduct prohibited under the rule. Busch's second assignment of error is without merit.

CONCLUSION

We conclude that § 79-267(1) enables school districts to discipline students for the use of violence or force which causes injury to a school employee who is attempting to break up or prevent a physical confrontation, as such conduct constitutes a substantial interference with school purposes. Therefore, OPS did not exceed the statutory authority of § 79-267(1) in adopting rule 1(b), and rule 1(b) is sufficiently clear and definite to satisfy the requirements of § 79-262(1). For the reasons stated herein, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., not participating.

LESTER L. GLANTZ, APPELLANT, V. FRANK X. HOPKINS, WARDEN OF THE NEBRASKA STATE PENITENTIARY, AND HAROLD CLARKE, DIRECTOR OF THE NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEES.

624 N.W.2d 9

Filed March 30, 2001. No. S-99-1202.

1. **Actions: Habeas Corpus: Collateral Attack: Appeal and Error.** As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void?
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below.
3. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
4. ___. A writ of habeas corpus is a statutory remedy in Nebraska. It is available to those persons falling within the criteria established by Neb. Rev. Stat. § 29-2801 (Reissue 1995), namely, those who are detained without having been convicted of a crime and committed for the same, those who are unlawfully deprived of their liberty, or those who are detained without any legal authority.

5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

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

Peter K. Blakeslee for appellant.

Don Stenberg, Attorney General, and Linda L. Willard for appellees.

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

WRIGHT, J.

NATURE OF CASE

Lester L. Glantz appeals from the Lancaster County District Court's denial of his petition for writ of habeas corpus.

SCOPE OF REVIEW

[1] As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void? *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[2] To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

FACTS

Glantz was convicted of attempted burglary and possession of burglary tools. On March 26, 1996, he was sentenced as a habitual criminal to two concurrent terms of 10 to 12 years' imprisonment with credit for 179 days served while awaiting trial. At the time of sentencing, the district court stated that Glantz "must serve five years, minus any credit for time previously served toward parole eligibility and must serve six years, minus any . . . credit for time previously served toward mandatory discharge." The State of Nebraska did not appeal Glantz' sentence.

Glantz was notified by the Department of Correctional Services (Department) on July 2, 1996, that his earliest possible

parole date was September 26, 2005, and that his tentative release date was September 26, 2001. The Department later notified Glantz through a superseding "Inmate Time/Sentence Sheet" dated September 27, 1996, that his tentative release date had been extended to September 26, 2005, in accordance with an Attorney General opinion concerning mandatory minimum sentences.

Glantz then filed a petition for declaratory judgment in the district court, requesting that the court "void the standard issued by the respondent, Harold Clarke, Director of the Nebraska Department of Correctional Services." The "standard" was Harold Clarke's alleged application of Neb. Rev. Stat. § 83-1,110(1) (Reissue 1999) to his sentence. Section 83-1,110(1) provides in part: "[E]very committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term."

Clarke demurred on the basis that the district court did not have jurisdiction due to sovereign immunity and that Glantz' petition failed to allege facts sufficient to state a cause of action. The district court sustained the demurrer, and on appeal to the Nebraska Court of Appeals, the decision was affirmed in a memorandum opinion filed April 13, 1998.

Glantz subsequently petitioned the district court for a writ of habeas corpus against Clarke and Frank X. Hopkins, warden of the Nebraska State Penitentiary (respondents). Glantz alleged that the action of the respondents in extending his release date to September 26, 2005, unlawfully changed and increased his sentence by removing parole eligibility and adding 5 to 6 years to the sentence. Glantz alleged that such actions violated his right to due process; violated his right to be free from ex post facto application of the law as guaranteed by article I, § 16, of the Nebraska Constitution; and violated the separation of powers doctrine of article II, § 1, of the Nebraska Constitution. Glantz claimed that the respondents' action would unlawfully deprive him of liberty at a future date, that the concept of habeas corpus should permit him to litigate his right to liberty at a future date, and that he should not be required to suffer deprivation of that liberty before he may seek relief.

Glantz prayed that the district court enter a writ of habeas corpus directing the respondents to grant him parole eligibility 5 years from the beginning of his sentence minus credit for 179 days served while awaiting trial and to grant him mandatory discharge 6 years from the beginning of his sentence minus credit for time served of 179 days.

The district court denied Glantz' petition for writ of habeas corpus. It found that Nebraska law made it clear that for a writ of habeas corpus to be appropriate, Glantz must first be illegally detained, and that Glantz had not alleged that he was currently being illegally detained or that his sentence was void. The district court found that Glantz' current confinement appropriately reflected his crime and that his sentence was issued and adjusted pursuant to the law in effect at the time he committed his crime. The district court concluded that based on the current facts, a writ of habeas corpus could not lie now or in the future. It denied Glantz' petition for writ of habeas corpus and entered judgment for the respondents. Glantz appeals.

ASSIGNMENTS OF ERROR

Glantz assigns as error that the district court erred (1) in ruling that a writ of habeas corpus will not lie for a person who will be illegally confined at some point in the future, (2) in ruling that his sentence was issued and adjusted pursuant to the law in effect at the time he committed his crime and that a writ of habeas corpus will not lie for a person whose sentence as imposed by the court has been increased by the Department through ex post facto application of the law, and (3) in failing to find that his sentence was increased by the Department in violation of the separation of powers doctrine.

ANALYSIS

[3] In *Rehbein v. Clarke*, 257 Neb. 406, 409-10, 598 N.W.2d 39, 43 (1999), we stated:

> Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained. . . . A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality

> of a person's detention, imprisonment, or custodial deprivation of liberty. . . .
>
> A writ of habeas corpus in this state is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he is in custody in violation of the federal Constitution, law, or treaties of the United States. . . . It is established that where a judgment is attacked in a way other than a proceeding in the original action to have the judgment vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is considered a "collateral attack." . . . An action for habeas corpus is an example of such a collateral attack.

(Citations omitted.) As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void? *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[4] A writ of habeas corpus is a statutory remedy in Nebraska. It is available to those persons falling within the criteria established by Neb. Rev. Stat. § 29-2801 (Reissue 1995), namely, those who are detained without having been convicted of a crime and committed for the same, those who are unlawfully deprived of their liberty, or those who are detained without any legal authority. Glantz concedes that he does not fall within any of these criteria. He contends however that it is unfair to force him to wait to petition for a writ of habeas corpus until after the date upon which the sentencing court stated he would be discharged when the Department has already informed him that he will not be discharged on that date. He argues that we should avoid the possible danger of allowing a prisoner to be illegally detained and that the Department will benefit by being on early notice as to whether its action, which increases Glantz' sentence, is permissible.

[5] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001). Section 29-2801 speaks in terms of present detention. We do not read into this section the possibil-

ity of future illegal detention as the basis for a writ of habeas corpus. Such a reading would be inconsistent with the nature of a writ of habeas corpus. "The writ is generally available only when the release of the prisoner from the detention he attacks will follow as a result of a decision in his favor." 39 Am. Jur. 2d *Habeas Corpus* § 13 at 221-22 (1999). It is not within the province of this court to expand the availability of this statutory remedy, and we leave that to the Legislature. Since the relief sought by Glantz would not result in his release, a writ of habeas corpus may not lie.

Glantz also argues that the State, and therefore the Department, has lost the right to challenge the sentence pronounced because the State did not appeal from the pronouncement of the sentence. Although this is an interesting argument, it is without merit. Glantz mistakenly cites to Neb. Rev. Stat. § 29-2306 (Reissue 1995) to support his position. Neb. Rev. Stat. § 29-2320 (Reissue 1995) provides for appeal of a sentence by a prosecutor and limits such appeals to cases where the prosecutor reasonably believes that the sentence is excessively lenient. Section 29-2320 does not extend to the appeal of a sentence that is not in conformity with the law. Therefore, we conclude that this argument is without merit.

CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court that denied Glantz' petition for writ of habeas corpus.

AFFIRMED.

NORTH BEND SENIOR CITIZENS HOME, INC., ASSIGNEE, APPELLANT, V. CHERYLL COOK, ALSO KNOWN AS CHERYLL WEBER, APPELLEE.

623 N.W.2d 681

Filed March 30, 2001. No. S-99-1375.

1. **Summary Judgment: Appeal and Error.** In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
3. **Malpractice: Attorney and Client: Contracts: Public Policy: Claims: Assignments.** Attorney malpractice claims are not assignable based on public policy considerations concerning the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises.
4. **Malpractice: Attorney and Client: Claims: Assignments.** Legal malpractice claims involve matters of personal trust and confidence and do not lend themselves to assignability because permitting the transfer of such claims would undermine the attorney-client relationship.
5. ___: ___: ___: ___. A claim for breach of fiduciary duties arising out of an attorney-client relationship is similarly within the rule of nonassignability.
6. **Principal and Agent.** A power of attorney is an instrument in writing authorizing another to act as one's agent. The agent holding the power of attorney is termed an attorney in fact as distinguished from an attorney at law.
7. **Agency: Principal and Agent.** The authority and duties of an attorney in fact are governed by the principles of the law of agency.
8. **Agency: Words and Phrases.** An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and further resulting from another's consent to so act.
9. **Malpractice: Words and Phrases.** Malpractice is defined as an instance of negligence or incompetence on the part of a professional.
10. **Principal and Agent: Conversion: Public Policy: Claims: Assignments.** The nonassignability rule set forth in *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), is not applicable to a claim arising out of the conversion of a principal's funds by an attorney in fact. The public policy considerations underlying nonassignability of attorney malpractice claims are not present in the relationship between a principal and attorney in fact.
11. **Courts: Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
12. **Summary Judgment: Final Orders: Jurisdiction: Appeal and Error.** Although the denial of a motion for summary judgment is normally not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Reversed and remanded for further proceedings.

James L. Haszard and Stephanie R. Hupp, of McHenry, Haszard, Hansen & Roth, for appellant.

L.J. Karel, of Karel & Seckman, for appellee.

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

HENDRY, C.J.

INTRODUCTION

North Bend Senior Citizens Home, doing business as Birchwood Manor (Manor), as assignee, brought an action against Cheryll Weber, also known as Cheryll Cook (Cook), to recover over $83,000 Cook allegedly converted while acting as power of attorney for Laura Duda, a resident of the Manor. Duda assigned her claim against Cook to the Manor.

The district court granted summary judgment in favor of Cook, determining that the assignment from Duda to the Manor was void as against public policy. The Manor appeals, claiming the district court erred in determining that the assignment was void. We moved this case to our docket pursuant to our power to regulate the Nebraska Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

On December 7, 1990, Duda, age 90, executed a power of attorney in favor of her grandniece, Cook. In 1991, Duda became a resident of the Manor. Beginning in 1991 and during 1992, Cook wrote checks on Duda's bank accounts totaling $83,255.04, expending the money for Cook's personal use.

Despite Cook's frequent use of Duda's bank accounts for Cook's own personal benefit, Cook failed to pay Duda's nursing home bills. Duda's account with the Manor first became delinquent in August 1992. Donald Hruza, administrator of the Manor, contacted Cook on several occasions regarding the delinquent account. The Manor last received payment from Cook on Duda's account in May 1993. By February 24, 1994, Duda's unpaid account at the Manor amounted to $19,420.62. In April 1994, Cook applied for public assistance on Duda's behalf, and the Manor began receiving medicaid funds for Duda's care.

Shortly after Cook applied for public assistance for Duda in 1994, the Manor became suspicious of Cook's actions regarding Duda's funds due to statements Cook made to a social worker while applying for public assistance on Duda's behalf. The

Manor began investigating banking transactions involving Duda's accounts and discovered that Cook had been utilizing funds from Duda's bank accounts for Cook's own personal use.

On January 30, 1998, Hruza and Rodney Johnson, the Manor's attorney, presented to Duda a document entitled "Assignment," which assigned to the Manor Duda's "entire interest . . . in any debt due to her from Cheryll Cook and in any claim she may have for recovery of funds taken from her by Cheryll Cook." Duda signed the document.

On March 30, 1998, the Manor, as assignee, filed an action against Cook, seeking to recover the $83,255.04 of Duda's funds that Cook had used for her own personal use. By June 1999, Duda's unpaid nursing home bill amounted to $23,344.69.

On September 29, 1999, the Manor filed a motion for partial summary judgment. In its motion, the Manor sought judgment as a matter of law, asserting that Cook, acting as Duda's attorney in fact, used Duda's funds for her own personal benefit and that those funds had not been repaid by Cook. On September 30, Cook filed a motion for summary judgment.

At the October 13, 1999, hearing on these motions several exhibits were admitted into evidence, including the depositions of Cook, Duda, and Hruza. Included as exhibits in these depositions were the assignment signed by Duda, documentation of Duda's nursing home bills, the application for public assistance Cook filled out on Duda's behalf, and a list of various checks written on Duda's bank accounts documenting the $83,255.04 of Duda's funds that Cook had used for her own personal benefit.

In her deposition, Cook stated that from 1990 to 1994, acting as Duda's power of attorney, she met with Duda approximately once a month to discuss Duda's finances. Cook admitted to using nearly all of the $83,255.04 for her own personal use and could not account for the amounts that she had not specifically admitted to using for personal use. However, Cook claimed the amounts withdrawn from Duda's bank accounts and used for Cook's personal benefit were gifts made with Duda's permission. The power of attorney instrument did not specifically provide that Cook could make gifts to herself from Duda's property. Cook admitted that she had not repaid any of this money to Duda. Cook also admitted that when she applied for public

assistance for Duda in 1994, Duda "was out of money, zero, at that point." When Cook was deposed on June 9, 1999, she had not seen Duda for approximately 1 year.

An affidavit from Johnson, the Manor's attorney, was also admitted into evidence. In the affidavit, Johnson stated that he prepared the assignment dated January 30, 1998. He stated that he had previously discussed the assignment with Duda on two occasions, September 19 and October 20, 1997. Johnson stated that on September 19, Duda "appeared to understand the meaning of the Assignment and the actions she was taking." However, Johnson stated that when he discussed the assignment with Duda on October 20, he informed Duda that he believed that Cook had used Duda's funds for purposes other than for Duda's benefit. Duda responded that "she didn't know anything about that." Johnson stated that when he explained the assignment to Duda on January 30, 1998, and Duda signed the assignment, Duda "appeared to understand the document and what she was doing."

In his deposition, Hruza stated that he has known Duda since she became a resident at the Manor and that he sees Duda on a regular basis. Hruza discussed Duda's nursing home bills and also testified that he was present when Duda signed the assignment on January 30, 1998. He testified that when Duda signed the assignment, she was " 'upset' because of what the niece [Cook] had done to her in reference to her property." However, Hruza also stated, "I do not remember her [Duda] ever mentioning dollars, because I do not believe that she knew that she had dollars, one way or the other, whether it was ten dollars or whatever it was, it didn't make her any [sic] difference."

Evidence regarding Duda's mental condition was also admitted at the hearing. The Manor's psychological records on Duda, dating from 1994 to 1998, indicated that Duda's concentration, memory, place and time orientation, and self-care functioning were impaired to some degree, ranging from mild to severe impairment. Also admitted into evidence was a request the Manor submitted to the Social Security Administration on June 21, 1994, requesting that the Supplemental Security Income benefits that Duda was receiving be paid to the Manor as representative payee. This request stated that Duda "needs a payee because she cannot understand the value of money."

Duda's deposition was taken on June 16, 1999. During the deposition, Duda, who was 99 years old at the time, stated that she was 93 years old. She stated that she knew "Cheryll Weber" was her relative, but did not know how she and Weber (Cook) were related. Duda believed that "Cheryll Weber" and "Cheryll Cook" were two different people. When asked if she had appointed Cook as her power of attorney, Duda stated, "I don't know anything about that." When shown a copy of the power of attorney, Duda did not know what it was. Duda stated that Cook did not pay any bills for Duda or write any checks for Duda and that Duda did not have any bills. When shown a copy of the assignment, Duda did not know what it was. When asked if her signature appeared on the assignment, Duda responded, "I don't remember. I don't know. Don't bother me any more."

On November 8, 1999, the district court denied the Manor's motion for partial summary judgment and granted Cook's motion for summary judgment. The district court determined that as a matter of law, Duda's claim against Cook was not assignable, extending our holding in *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), in which we determined that attorney malpractice claims are not assignable due to the highly personal and confidential relationship between attorney and client.

The district court relied on a combination of three cases, *Earth Science Labs., supra*; *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998); and *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989), in determining that the assignment was void. The district court first determined that under *Earth Science Labs.*, the "critical element" in determining whether a claim is assignable is whether the claim involves a "highly personal and confidential relationship." The district court then determined that there was no genuine issue of material fact that the relationship between Cook and Duda was highly personal and confidential. The court next determined that, essentially, this action was an action for breach of fiduciary duties. The district court, citing *Community First State Bank, supra*, and *Olsen, supra*, then stated, "The Nebraska Supreme Court has ruled that where an action is one for breach of fiduciary duty, the cause of action is not assignable." Based on these

cases, the district court sustained Cook's motion for summary judgment, determining that Duda's claim against Cook was not assignable as a matter of law and that the assignment was void as against public policy. The Manor appeals.

ASSIGNMENTS OF ERROR

The Manor claims, summarized and rephrased, that the district court erred in (1) finding the assignment void as a matter of law and granting summary judgment to Cook on that basis, (2) finding that the relationship between Cook and Duda was "highly personal and confidential," and (3) denying the Manor's motion for partial summary judgment.

STANDARD OF REVIEW

[1] In reviewing an order of summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Olsen v. Farm Bureau Ins. Co.*, 259 Neb. 329, 609 N.W.2d 664 (2000).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000).

ANALYSIS

The Manor first claims the district court erred in determining that the assignment was void as against public policy and granting summary judgment to Cook on that basis. The district court determined that the claim was not assignable as a matter of law, extending our holding in *Earth Science Labs., supra*, to fiduciary relationships other than the attorney-client relationship. The issue in this case is whether the "nonassignability rule" set forth in *Earth Science Labs.* should be extended to preclude assignment of a cause of action against an attorney in fact for conversion of the principal's funds.

This court first determined in *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), that attorney malpractice claims are not assignable due to public policy considerations. In *Earth Science Labs.*, a bankrupt corporation

assigned its claim for attorney malpractice to its successor corporation. The successor corporation, as assignee, brought a malpractice action against the attorney. We determined that attorney malpractice claims are not assignable due to the highly personal and confidential relationship between attorney and client.

In *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998), we applied the nonassignability rule set forth in *Earth Science Labs.* to determine that claims for malpractice and breach of fiduciary duties arising out of an attorney-client relationship are not assignable. In *Community First State Bank*, Abbott Bank assigned a claim for malpractice against its attorney to Community First State Bank. Community First State Bank, as assignee, then filed an action against the attorney for attorney malpractice and breach of fiduciary duty. We determined that based on our ruling in *Earth Science Labs.*, the malpractice claim was not assignable "because of public policy considerations concerning the personal nature and confidentiality of the attorney-client relationship." *Community First State Bank*, 255 Neb. at 622, 587 N.W.2d at 368. As to the breach of fiduciary duty claim which arose out of the attorney-client relationship, we stated:

> This court has held that any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice. *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989). Although *Olsen v. Richards, supra*, interpreted Neb. Rev. Stat. § 25-222 (Reissue 1995), which sets the statute of limitations for professional negligence claims, we see no reason why claims for breach of fiduciary duties should not be similarly classified for purposes of the rule against assigning malpractice claims.

Community First State Bank, 255 Neb. at 623-24, 587 N.W.2d at 368. The district court in the present case relied upon this language in determining that Duda's cause of action against Cook was not assignable.

Olsen v. Richards, 232 Neb. 298, 440 N.W.2d 463 (1989), the case cited in *Community First State Bank*, was a statute of limitations case and did not involve the application of the nonassignability rule. In *Olsen*, the defendant doctor forcefully

slammed the headrest of an examination chair down on the plaintiff's neck during the course of performing an examination on the plaintiff, and the plaintiff was injured. The plaintiff asserted that the 4-year ordinary negligence statute of limitations applied to the claim, while the doctor asserted that the 2-year professional negligence statute of limitations applied. In determining that the 2-year statute of limitations applied, we stated, " '[A]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is "malpractice" and comes within the professional or malpractice statute of limitations.' " *Id.* at 301, 440 N.W.2d at 465. The first portion of this sentence was then used in *Community First State Bank* in determining that a claim for breach of fiduciary duties which arose out of an attorney-client relationship is not assignable.

[3-5] Contrary to the district court's interpretation, this court did not hold in *Community First State Bank* that *any* claim for breach of fiduciary duties is not assignable. The nonassignability rule set forth in *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), and applied in *Community First State Bank* does not extend to all personal and confidential relationships or to all fiduciary relationships. In *Earth Science Labs.*, we stated that attorney malpractice claims are not assignable "based on public policy considerations concerning 'the uniquely personal nature of legal services and the contract out of which a highly personal and confidential *attorney-client relationship* arises.' " (Emphasis supplied.) 246 Neb. at 800, 523 N.W.2d at 256, quoting *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976). Legal malpractice claims involve matters of personal trust and confidence and do not lend themselves to assignability because permitting the transfer of such claims would undermine the attorney-client relationship. *Earth Science Labs., supra. Earth Science Labs.* does not provide that claims arising from any personal and confidential relationship are not assignable. In *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998), this court determined that a claim for breach of fiduciary duties arising out of an attorney-client relationship is similarly within the rule of nonassignability. We

have never held that *all* claims for breach of fiduciary duty are not assignable.

Cook, however, claims that the nonassignability rule was properly extended by the district court in determining that a cause of action arising out of the relationship between Duda and Cook was not assignable. Cook argues that the relationship between Duda and Cook is sufficiently similar to an attorney-client relationship to justify extending the nonassignability rule to such relationships. The Manor claims the district court erred in extending the nonassignability rule to the situation in the present case. The Manor argues that the relationship between Cook and Duda was simply an agency relationship which does not possess the unique characteristics of the personal and confidential attorney-client relationship.

[6-8] Cook acquired the authority to handle Duda's accounts through Duda's execution of a power of attorney. A power of attorney is an instrument in writing authorizing another to act as one's agent. *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986). The agent holding the power of attorney is termed an "attorney in fact" as distinguished from an attorney at law. *Id.* Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency. *Id.* An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent, and further resulting from another's consent to so act. *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997).

[9] Cook classifies the Manor's claim against her as a claim for "malpractice," and relying on the language of *Community First State Bank*, asserts that such a claim is not assignable. Malpractice is defined as "[a]n instance of negligence or incompetence on the part of a professional." Black's Law Dictionary 971 (7th ed. 1999).

The claim against Cook that Duda assigned to the Manor is not a malpractice claim. Cook was not in a professional capacity when acting as Duda's attorney in fact. Cook is simply Duda's grandniece, whom Duda appointed as her power of attorney. Cook was not rendering any professional services to Duda due to

her position as Duda's attorney in fact. The claim against Cook for her conversion of Duda's funds did not arise out of any professional negligence or incompetence. The claim arose due to Cook's utilization of Duda's funds in a fashion the Manor contends was not authorized by the power of attorney instrument.

The agency relationship between Duda and Cook is not sufficiently similar to that of attorney and client to justify extending the nonassignability rule to a claim against an attorney in fact who wrongfully converts the principal's funds. The public policy reasons behind the nonassignability rule stem from the unique qualities of the attorney-client relationship, which are not present in the relationship between a principal and his or her attorney in fact.

The "confidential relationship" involved in *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), and *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998), was the "unique" and "highly personal and confidential *attorney-client relationship*." Among the unique characteristics of the attorney-client relationship is that attorney-client communications are confidential and privileged from disclosure. In determining that a "confidential relationship" existed between Cook and Duda, the district court relied upon *Schaneman v. Schaneman*, 206 Neb. 113, 125-26, 291 N.W.2d 412, 420 (1980), which defined a confidential relationship in the following manner: "'[A confidential] relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind,'" quoting *Boettcher v. Goethe*, 165 Neb. 363, 85 N.W.2d 884 (1957). However, the court in *Schaneman* was defining the term "confidential relationship" for the purpose of determining whether a prima facie case of undue influence had been established. The attorney-client relationship is "confidential" not only in the sense that the attorney may "act or advise" with the client's interests in mind, but also in the sense that communications between attorney and client are privileged from disclosure to outside parties. Communications between a principal and his or her attorney in fact are not so privileged.

A claim for legal malpractice cannot be assigned because of public policy considerations concerning the personal nature and

confidentiality of the attorney-client relationship. *Community First State Bank, supra*; *Earth Science Labs., supra*. The public policy reasoning behind the nonassignability rule for legal malpractice claims is that " 'permitting the transfer of such claims would undermine the important relationship between an attorney and client.' " *Earth Science Labs.*, 246 Neb. at 802, 523 N.W.2d at 257. Cook argues that allowing causes of action for conversion arising out of the relationship between a principal and his or her attorney in fact to be assigned is contrary to public policy because it "would undermine the confidentiality and the exchange of information necessary between those two parties to the end that the attorney in fact could not best carry out the required duties." Brief for appellee at 15. This argument is unpersuasive due to the differing nature of the attorney-client relationship and the principal-agent relationship created by a power of attorney.

Confidential disclosure of information is essential in the attorney-client relationship so that the client will reveal information to the attorney, enabling the attorney to properly represent his or her client in legal matters. In contrast, the power of attorney Duda executed simply gives Cook the authority to conduct Duda's personal and business affairs during any period in which Duda is "disabled, incompetent or incapacitated." As attorney in fact, Cook was acting in Duda's place because Duda was not able to conduct her affairs. There is no indication that any exchange of confidential information was necessary between Cook and Duda to enable Cook to properly carry out her duties as attorney in fact. The proper functioning of the relationship between principal and attorney in fact is not dependent upon the open "exchange of information" as is the attorney-client relationship.

[10] We determine that the nonassignability rule set forth in *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), is not applicable to a claim arising out of the conversion of a principal's funds by an attorney in fact. The public policy considerations underlying nonassignability of attorney malpractice claims are not present in the relationship between a principal and attorney in fact. Therefore, the trial court erred in granting Cook's motion for summary judgment.

The Manor also assigns as error the trial court's finding that the relationship between Cook and Duda was highly personal and confidential. However, we have determined that the nonassignability rule does not apply outside the highly personal and confidential *attorney-client relationship* and that there was no attorney-client relationship between Cook and Duda. Therefore, we need not address the question of whether the relationship between Cook and Duda was highly personal and confidential.

[11] However, our determination that the nonassignability rule does not apply to the assignment in this case does not determine the question of whether the assignment is valid. In its order, the trial court recognized that an issue existed as to "whether Ms. Duda was competent at the time the assignment to [the Manor] was executed." The district court also noted that the Manor was seeking "judgment in an amount greatly in excess of the underlying debt." The district court did not make a determination regarding the impact of either of these issues on the validity of the assignment. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000). Therefore, this case must be remanded for further proceedings on the issue of the validity of the assignment.

The Manor claims the district court erred in denying its motion for partial summary judgment. The Manor asserts that because the power of attorney Duda executed does not authorize Cook to make gifts to herself, Cook's use of Duda's funds for her own personal use constitutes conversion as a matter of law. The Manor further asserts that it is entitled to summary judgment on the issue of Cook's liability to the Manor due to such improper conversion of Duda's funds.

[12] Although the denial of a motion for summary judgment is normally not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions. *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000). Thus, under the circumstances of this case, the Manor may appeal the denial of its motion for summary judgment. However, the Manor's legal capacity to bring this suit is dependent upon

its status as Duda's assignee. Cook is not liable to the Manor for the allegedly converted funds unless the assignment is valid. Because the validity of the assignment has yet to be determined, summary judgment in favor of the Manor cannot be granted on the issue of Cook's liability to the Manor for the allegedly converted funds.

CONCLUSION

For the above-stated reasons, the decision of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BARBARA A. BABBITT, APPELLANT, V. BLANCHE M. HRONIK ET AL., APPELLEES.

623 N.W.2d 700

Filed March 30, 2001. No. S-99-1391.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Decedents' Estates: Statutes.** The right to proceed for or against the estate of a decedent exists only to the extent that statutory enactments so provide.
4. ___: ___. The Nebraska Probate Code provides the procedure for bringing a claim against a decedent's estate.
5. **Decedents' Estates: Claims.** A claim under Neb. Rev. Stat. § 30-2209(4) (Reissue 1995) includes liabilities of the decedent whether arising in contract, in tort, or otherwise.
6. ___: ___. Under Neb. Rev. Stat. § 30-2404 (Reissue 1995), a claim against a decedent's estate cannot be commenced before the county court has appointed a personal representative.
7. **Decedents' Estates: Actions.** Under Neb. Rev. Stat. § 30-2486(2) (Reissue 1995), an action against a decedent's estate is not commenced unless a claimant files a lawsuit against the personal representative of the estate.
8. **Decedents' Estates: Limitations of Actions.** A claim against a decedent's estate which is excepted from the time limitations of Neb. Rev. Stat. § 30-2485(a) (Reissue 1995) remains subject to the statute of limitations governing the underlying claim.

9. ___: ___. Under Neb. Rev. Stat. § 30-2484 (Reissue 1995), the running of any statute of limitations, measured from some event other than the death of and subsequent advertisement for claims against a decedent, is suspended during the 2 months following the decedent's death but resumes thereafter as to claims not barred pursuant to any applicable statute of limitations.
10. **Decedents' Estates.** The relation-back doctrine is inapplicable when no cause of action has been commenced.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Michael N. Schirber and Jeffrey A. Wagner, of Schirber Law Offices, P.C., for appellant.

Thomas B. Wood, of Wolfe, Snowden, Hurd, Luers & Ahl, for appellee Doris J. Kohout.

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

CONNOLLY, J.

On September 15, 1994, the appellant, Barbara A. Babbitt, was involved in an automobile collision with Blanche M. Hronik. Hronik died shortly after the collision of unrelated causes. Hronik's estate was closed, and the personal representative of the estate was discharged. On September 9, 1998, after the personal representative's discharge, Babbitt sued Hronik individually without seeking reappointment of the personal representative. Babbitt appeals the district court's order which granted the personal representative's motion for summary judgment. The district court concluded that an action had never been commenced within the statute of limitations under Neb. Rev. Stat. § 25-207 (Reissue 1995) (4-year limitation on personal injury claims) and Neb. Rev. Stat. § 30-2484 (Reissue 1995) (suspending statute of limitations under § 25-207 for 2 months following decedent's death).

Although the personal representative was reappointed, we conclude that an action against Hronik's estate was never commenced because the only petition filed by Babbitt was against Hronik individually and not against the personal representative. The action brought against Hronik individually was a nullity. We affirm.

BACKGROUND

On September 15, 1994, Babbitt and Hronik were involved in an automobile collision. Two months later, on November 21, Hronik died of an unrelated illness. The personal representative was appointed on December 7. The personal representative caused notice to be given to creditors of Hronik in accordance with Neb. Rev. Stat. § 30-2483 (Reissue 1995) (notice by publication). No individual notice was provided to Babbitt. On July 19, 1995, the personal representative filed her report of distribution and was discharged from her duties.

On September 9, 1998, after Hronik's death, Babbitt filed a petition against Hronik individually in district court. The Saline County Sheriff returned the summons to the clerk of the county court on September 28, stating that Hronik was deceased.

On February 4, 1999, the county court reappointed the personal representative at Babbitt's request for the sole purpose of being served with civil process in Babbitt's case. Babbitt also filed two motions for revivor in district court, but an objection to both orders was subsequently sustained. On February 25, the personal representative was served a copy of the September 9 petition, naming Hronik individually as defendant.

The personal representative and heirs filed a motion for summary judgment, which was granted. The court determined that Babbitt's cause of action had never been commenced because she failed to file a petition against the personal representative. The court also determined that Babbitt's action was barred by the statute of limitations under both §§ 25-207 and 30-2484.

ASSIGNMENT OF ERROR

Babbitt assigns that the district court erred in granting summary judgment in favor of the personal representative and Hronik's heirs.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Allstate Ins. Co. v. LaRandeau, ante* p. 242, 622 N.W.2d 646 (2001); *Casey v. Levine, ante* p. 1, 621 N.W.2d 482 (2001).

[2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Allstate Ins. Co. v. LaRandeau, supra*; *Casey v. Levine, supra.*

ANALYSIS

Babbitt argues that her action was commenced pursuant to Neb. Rev. Stat. § 25-217 (Reissue 1995) and that service was perfected upon the personal representative within the requisite 6 months from the date the petition was filed. Section 25-217 provides that "[a]n action is commenced on the date the petition is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the petition was filed."

The personal representative argues that Neb. Rev. Stat. § 30-2404 (Reissue 1995) controls the commencement of an action against a deceased individual. That statute requires a personal representative to be appointed before commencing an action against an estate. Because a personal representative was not appointed or reappointed after being discharged, she argues that Babbitt's lawsuit was never commenced and that the applicable statute of limitations barred her claim after November 15, 1998, pursuant to §§ 25-207 and 30-2484.

[3] Babbitt was apparently unaware that Hronik was deceased until after she had filed her petition and the summons was returned unserved. Once she received this information, however, she was obliged to comply with the correct statutory procedures for bringing a claim against a decedent. While § 25-217 provides the guidelines for the commencement of actions generally, the district court correctly noted that the death of a party terminates a lawsuit at common law.

> Both at common law and in this jurisdiction prior to 1867, a cause of action for injuries to the person did not survive on the death of either the person injured or the wrongdoer, and a pending action for such an injury abated on the death of either the plaintiff or the defendant.

Rhein v. Caterpillar Tractor Co., 210 Neb. 321, 324, 314 N.W.2d 19, 21 (1982). Thus, the right to proceed for or against the estate of a decedent exists only to the extent that statutory enactments so provide. See *id.*

[4] The Nebraska Probate Code provides the procedure for bringing a claim against a decedent's estate. Section 30-2404 provides in part:

> No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article.

[5] A claim under Neb. Rev. Stat. § 30-2209(4) (Reissue 1995) "includes liabilities of the decedent . . . whether arising in contract, in tort or otherwise."

[6] There was no acting personal representative at the time Babbitt learned of Hronik's death on September 28, 1998, because the personal representative had been discharged from her duties on July 19, 1995. We conclude that under § 30-2404, Babbitt's claim against Hronik's estate could not have commenced before the county court reappointed the personal representative on February 4, 1999. See *Tank v. Peterson*, 214 Neb. 34, 38, 332 N.W.2d 669, 672 (1983) (citing with approval Arizona case holding that plaintiff was "entitled to have the estate reopened for the limited purpose of service of process"); *In re Estate of Wilson*, 8 Neb. App. 467, 594 N.W.2d 695 (1999) (affirming county court's emergency appointment of special administrator in order that claimants would be able to file claim); *Mach v. Schmer*, 4 Neb. App. 819, 550 N.W.2d 385 (1996) (concluding that summary judgment in favor of discharged personal representative was proper so long as estate remained closed).

[7] But Babbitt's claim was never commenced. Neb. Rev. Stat. § 30-2486 (Reissue 1995) provides, in relevant part:

> Claims against a decedent's estate may be presented as follows:
>
> (1) The claimant may file a written statement of the claim . . . with the clerk of the court. . . .

> (2) The claimant may commence a proceeding *against the personal representative* . . . but the commencement of the proceeding must occur within the time limited for presenting the claim.

(Emphasis supplied.) Subsection (2) is controlling under these facts and demonstrates that Babbitt failed to comply with the statutory procedure for commencing an action against an estate. Even after the personal representative was reappointed on February 4, 1999, Babbitt never filed a lawsuit against the personal representative acting in her personal representative capacity. Her only petition was directed against Hronik individually. We conclude that Babbitt's action was a nullity.

Furthermore, if Babbitt had filed a lawsuit against the personal representative after she was reappointed, the action would have been barred by any applicable statute of limitations. Neb. Rev. Stat. § 30-2485(a) (Reissue 1995) provides the time limitations "against a decedent's estate which arose before the death of the decedent." Subsection (a)(1) gives creditors 2 months to present their claims after the first publication of notice. Subsection (a)(2) bars creditors' claims after 3 years if they have a direct legal interest in the estate and the personal representative fails to send them a copy of the published notice.

Although Babbitt did not receive a copy of the notice, we have held that a claim for unliquidated damages does not constitute a "direct legal interest" for the purpose of receiving a copy of the published notice. See *Farmers Co-op. Mercantile Co. v. Sidner*, 175 Neb. 94, 120 N.W.2d 537 (1963). See, also, *Mach v. Schmer, supra*. For the sake of argument, however, we accept without deciding Babbitt's argument that her claim fell within the exception to the probate code's time limitations. See § 30-2485(c)(2) (providing that limitations under § 30-2485(a) will not bar claim to extent decedent's liability is protected by liability insurance).

[8,9] But Babbitt's claim, nonetheless, remained subject to the statute of limitations for personal injuries under § 25-207. See § 30-2485(a) (providing time limitations on actions against decedent's estate which are not barred by other statute of limitations). Section 25-207 bars all actions for personal injury not commenced within 4 years. The accident occurred on September

15, 1994. Section 25-207 would have barred Babbitt's claim after September 15, 1998, if Hronik had survived to that date. However, because Hronik died after the cause of action accrued but before the 4-year limitations period had expired, the following provision of § 30-2484 is applicable: "The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the two months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow." Even with a 2-month extension of the 4-year limitations period by operation of § 30-2484, Babbitt's cause of action would have been time barred after November 15, 1998. Thus, by the time Babbitt requested the reappointment of the personal representative on December 31, 1998, her claim was time barred by more than a month.

Babbitt, nonetheless, argues that she is entitled to proceed against the estate of Hronik under the relation-back doctrine because she had the personal representative reappointed and served within 6 months of filing her petition as provided for under § 25-217.

[10] This argument fails because we have determined that no cause of action was ever commenced. Although Babbitt served a copy of the September 9, 1998, petition on the personal representative, the service did not change the fact that the petition failed to commence an action against the estate, thus the relation-back doctrine is inapplicable. The claim was asserted against Hronik in her individual capacity, not against the personal representative of her estate. Further, none of the allegations in the petition are directed against the personal representative or the estate.

CONCLUSION

We conclude that the district court correctly determined that Babbitt failed to commence a cause of action against Hronik's estate before her claim was barred by the statute of limitations under § 25-207 as extended by § 30-2484.

AFFIRMED.